Demonstrations
Mass Protests-Occupy Movement

The Interplay of First Amendment Rights with Fourth Amendment Protections

One Violent Day May 30, 2020

Cities across the county erupted in protest following the death of George Floyd.

On that day eight citizens were seriously injured by police officers who fired projectiles. All eight have either filed lawsuits or have hired attorneys to investigate their case.

In several cases the video appears to undermine the official police reports.

Less Lethal Weaponry

Every Community Must be Prepared

- This is a community/regional issue-get ready
  - Police, Fire, EMS, Communications, EMA, State partners, Federal Partners
- Must have a Civil Event Response that covers all types of Civil Events
- Even the most peaceful of events can turn into unrest or a riot

You Must be Prepared:

- Consider in any event:
  - Time: Is this pre-planned or spontaneous
  - Resources: What resources are available in spontaneous? What resources are available in pre-planned?
  - How can resources be expediently deployed in spontaneous?
  - Have Mutual Aid Agreements in place so that these resources can be expediently deployed

Some Major Components

- Planning
  - Safety and Security Planning-Get groups together
    - SWAT-SERT
    - Intelligence/Investigations
    - Explosive Ordinance/Chemical
    - Location Disruption
    - EMS
    - Coordination of Mass Casualty Resources
    - Form Multi-Jurisdictional Planning Group

For Planned Events

- Meet with event planners
  - Try and develop working relationship
  - Determine Intentions
  - Develop compromise agreements on locations and movements (That does not mean that all participants will abide by agreements)

Implementation

- Resource Issues
  - Barricades controlling flow or as part of safety plan for vehicles
  - Emergency Management-develop mutual agreements, operational strategies, securing logistical resources

Training

- NIMS-National Incident Management/Incident Command-Boston uses (ICS) 400
- Crisis Leadership and Decision Making
- Bomb Threat Management Planning Course
- Site Protection and Document Screening where applicable
- Police and Fire Field Force Extraction-Managing protestors and Civil Disobedience
- Behavioral Observation Suspicious Activity Reporting (BOSAR-Developed by NYPD)
- Mock Exercise by various groups where event is pre-planned

Threat Assessment

- Some items to consider:
  - Counter Protest
  - Group's History-find out where they've been and pick up the phone-speak to the incident commander
  - Any critical facilities in area of protest that should be protected
  - What is likelihood of violence. This is a particular consideration where protest is unlicensed or spontaneous

What can we do? 1st Amendment Protected Conduct!

- The Supreme Court has declared that the First Amendment protects political demonstrations and protests - activities at the heart of what the Bill of Rights was designed to safeguard. Indeed, the Court has repeatedly held that police may not interfere with orderly, nonviolent protests merely because they disagree with the content of the speech or because they simply fear possible disorder. First Amendment protections, furthermore, are especially strong where an individual engages in speech activity from his or her own private property.
- That said, First Amendment protections, while broad, are not absolute. . It is axiomatic, for instance, that government officials may stop or disperse public demonstrations or protests where "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears." Indeed, where a public gathering threatened to escalate into racial violence and members of a hostile crowd began voicing physical threats, the Supreme Court expressly sanctioned police action that ended the demonstration and arrested the speaker, who defied police orders to cease and desist. The police, the Court reasoned, were not "powerless to prevent a breach of the peace" in light of the "imminence of greater disorder" that the situation created. *(Cites Omitted)*

Papineau v. Parmley, 465 F.3d 46, 56-57 (2nd Cir. 2006).

Law Enforcement

- 1st Amendment Rights to speech and assembly
- 4th Amendment protection from unreasonable seizure
- Rights of other stakeholders to carry on without the interference of the protests
- Rights of private property owners who are impacted

- The one common theme that applies to all assemblies is the fact that law enforcement personnel must balance the constitutional rights of the crowd to assemble and demonstrate peacefully against the rights of non-participants to carry out their activities in a peaceful and unobstructed manner.
- Additionally rights of demonstrators and counter demonstrators

Big cases…

- May be brought as class action
  - Commonality: In the civil rights context, commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members. A policy, practice, or custom may be inferred from widespread practices or evidence of repeated constitutional violations for which the errant officials are not reprimanded. Although class certification should not be a "dress rehearsal for the trial on the merits," plaintiffs must provide "significant proof" that the injuries inflicted were pursuant to a policy or practice.

    Aichele v. City of L.A., 314 F.R.D. 478, 481 (Cal. Fed.Dist. 2013).

Class Action Commonality in Protests

- All persons arrested for failing to disperse
- All persons alleging impact by non-individualized force
- Etc.

Some Issues…

- Contempt of Cop…
- Officer and Agency Attitude
- Knowledge of the law for declaring an unlawful assembly
- Arrest Procedures during demonstrations
- Mass Arrests

A Number of First Amendment Issues

Do you have a “robust” permitting process

- Threshold for requiring a permit
- Capacity limits for public spaces
- Tiered permit applications
- Time restrictions
- Timeline for submitting and reviewing permit applications
- Fees
- Off-duty public safety officers
- Weapons restrictions
- Coordination
- Communication
- Evaluation and feedback

Reasonable Time, Place, Manner Restrictions

- Even the most stringent protection of free speech would not protect a man in falsely shouting **fire** in a **theatre** and causing a panic.

  Schenck v. United States, 249 U.S. 47, 52 (1919)

Permitting

- Government entities may constitutionally regulate the time, place and manner of speech in a public forum as long as:
- Content Neutral
- Cannot have overbroad government discretion
- Narrowly tailored to serve a significant government interest (need not be least restrictive but cannot be broader than necessary to achieve the interest)
- And, leave open ample alternative means of communication.
- All 4 must be met

Government Interest in Safety Plan-Permitting

- Vehicle Access for police and EMS/Fire
- Evacuation in event of worst case scenario: fire, bombing, chemical attack
- (See Boston-no parading on Causeway Street except for Sunday when businesses closed and limited traffic-thus street won't be overburdened)

DZ or Demonstration Zones

- Court may reject if too large : Service Employees Int'l Union, Local 660 v. City of Los Angeles, 114 F. Supp. 2d 966 (C.D. Cal. 2000)
- Court may Uphold if parade/protest does not give law enforcement enough time to prepare. United for Peace & Justice v. City of New York, 243 F. Supp. 2d 19 (S.D. NY 2003) No permit for 100K person march by UN- when permit sought 3 weeks before
- Moving Pens as DZ not allowed: Stauber v. City of New York, 2004 U.S. Dist. LEXIS 13350 (S.D. NY 2004).

Good Example of Safety Demonstration Plan Upheld

Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8

- Hard Zone Security
- Soft Zone Security
  - Limits on numbers of persons on particular streets
  - Closures of streets including Route 93
- Balance safety of DNC delegates

- The double fence is reasonable in light of past experience in which demonstrators have pushed over a single fence. A second fence may prevent this altogether, or at least give police officers more time to respond and protect the delegates. The liquid dispersion fabric is reasonable in light of past experience in which demonstrators have squirted liquids such as bleach or urine at delegates or police. The overhead netting is reasonable in light of past experience in which demonstrators have thrown objects over fences. The razor wire atop the Green Line tracks -- which was not a subject of plaintiffs' written prayer for relief, but only because it was not erected until after they filed their complaint -- is reasonable in light of the possibility of demonstrators climbing upon the tracks and using them as an access point to breach the hard zone perimeter, and/or rain objects on delegates, media, or law enforcement personnel from above

Understanding Content Neutral

- North Providence Code of Ordinances Chapter 35 605 D:
- Signs on Utility Poles - Utility poles owned by any governmental agency or utility company shall not be used for any type of sign or message other than those specifically erected by such governmental agency or utility company.
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Protest Example…

- "[T]he right of the people peaceably to assemble, and to petition the government for a redress of grievances" is expressly protected in the First Amendment. It is, however, subject to reasonable restrictions on time, place and manner. Zuccotti Park is private property that is open for certain public uses. The Court assumes without deciding that the public, including each of the nine plaintiffs, had the right to assemble and protest in Zuccotti Park. Their presence was subject to reasonable restrictions on time, place and manner. Among the content neutral rules in place in Zuccotti Park was a prohibition on tents and tarpaulins. At a minimum, temporary structures for habitation, such as tents and tarpaulins, present sanitation issues and, because of the amount of space they occupy, their presence restricts the use of the Park by others. The incontrovertible facts of record show that the police gave a dispersal order to all present in the Park so that it could be cleaned of debris, tents and tarpaulins. Plaintiffs, as noted, did not comply and were arrested. So far as this record shows, individuals were permitted to engage in protest activities in Zuccotti Park before and after the cleaning and clearing. For this and other reasons, the Court concludes that the March 17, 2012 order to disperse from Zuccotti Park for a limited period of time was lawful.

  Caravalho v. City of New York, 2016 U.S. Dist. LEXIS 44280, *2-3

Content Neutral

- No one can have tents in park, irrespective of whether are vacationers passing through or Occupy Wall Street protestors
- Rule is not directed at speech or to chill a certain group
- Just remember-what is history of agency in enforcing the particular rule…i.e. curfew in park-no citations ever written-why did department write just to protestors

Announcement

Typical Claims

- On the morning of November 17, 2011, Plaintiffs were arrested while "peacefully assembling and demonstrating with others in the Wall Street area in connection with an OWS-related demonstration." They assert that, prior to their arrests, neither they "nor other non-NYPD persons present were causing or creating the risk of any substantial blockage of vehicular or pedestrian traffic, or any other serious public ramifications," such as "real public inconvenience, annoyance, and/or alarm," They allege that, "[w]ithout first having given a clearly communicated dispersal order or clearly communicated orders . . . and a meaningful opportunity. . . to comply, police began to make arrests." Facts specific to each plaintiff are set forth below.

  Case v. City of New York, 233 F. Supp. 3d 372, 379

Ordinance Example

- § Sec. 10-1-3.10 **Unlawful assemblies**.
- (a) It shall be **unlawful** for any two (2) or more persons to assemble together for any **unlawful** purpose or, being assembled, to act in concert to do an **unlawful** act against the property of the city or the person or property of another or against the public peace, or to make any movement or preparation therefor.
- (b) It shall be **unlawful** for any person to knowingly suffer or permit any assemblage for the purpose of committing any **unlawful** act or breach of the peace or any riotous, offensive or disorderly conduct in or upon premises owned or occupied by him, or under his control within the city.

State Law Reference

- Power of the city to prevent or suppress disorderly **assemblies**, etc., 65 ILCS 5/11-5-2
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East Peoria, Illinois Code of Ordinances Sec. 10-1-3.10

From Law Enforcement Perspective Make sure…

- Must first have enforcement authority
- Dispersal order is loud and clear
- Document that it can be heard by positioning officers at farthest reaches of the crowd
- Officers that were in positions to hear must document.

The concept of retaliation for Exercise of 1st Amendment Rights

Retaliatory Arrests

Citizen 1st Amendment Right

- Filming Officer in Public Place
  - Glik v. Cunniffe, 2011 U.S. App. LEXIS 17841 (1st Cir. 2011).
  - Sharp v. Baltimore-DOJ Involvement in §1983
  - East Haven Connecticut-DOJ Consent Decree

Glik:

> “In our society, police officers are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights. See City of Houston v. Hill, 482 U.S. 451, 461, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."). Indeed, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." Id. at 462-63. The same restraint demanded of law enforcement officers in the face of "provocative and challenging" speech, id. at 461 (quoting Terminiello v. Chicago, 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131 (1949)), must be expected when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces.”

Houston v. Hill, 482 U.S. 451 (1987)

- Challenge to Houston, Texas Ordinance
- Today's decision reflects the constitutional requirement that, in the face of verbal challenges to police action, officers and municipalities must respond with restraint. We are mindful that the preservation of liberty depends in part upon the maintenance of social order. But the *First Amendment* recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.

Crowd Control includes:

- Show of force
- Crowd containment
- Dispersal tactics
- Encirclement & Arrest
- Remember the 4th Amendment-Graham v. Connor still applies

What is the Reasonable Response…

It depends

Social Media

- Social Media is used to mobilize participants for such events
- Social Media can serve as a law enforcement intelligence tool
  - Determine type of protest
  - Determine types of action being suggested
  - Determine violent v. non-violent
  - May assist with historical information on prior events with same group

What type of crowd?

- Large but compliant-Direct Movement
- Passively non-compliant
- Hostile and non-compliant
- Hostile and assaultive

Distinguish inconvenience caused by gathering from actual law violations that jeopardize public or personal safety

Never Consider Subject Matter of Speech or Protest

Is action necessary…

- Time and Mother Nature sometimes solves the problem…
- Think outside the box…the Providence Experience with Occupy Providence
- If no one is affected…what's the hurry?

Levels of Action by Group

- Is this any different than use of force/Response to Resistance
- How Important based on:
  - Offenses-How Serious
  - Physical Threat- How Serious
  - Active Resistance/ Evade Arrest by Flight

Protests sometimes Evolve Thus Impacting Law Enforcement Response

Does Your Plan Contemplate the Evolving Protest

Levels of Protest- Riot

- Soft Uniform
- Medium
- SWAT

Basic Tenet

- Unity of action and command and control are key to the effective handling of demonstrations and civil disturbances. Therefore, unless exigent circumstances require immediate action, officers should not independently make arrests or employ force without command authorization.

Agency policy and training should detail prohibited tactics to the extent that such tactics are within the resources of the agency. Some common prohibitions in policy include:

- Prohibition on use of horses to move passive demonstrators who are lying or seated on the ground.
- Offensive baton strikes by moving mounted officers.
- Motorcycle (B.U.M.P. technique) driven into crowd
- K-9
- Bicycles
- Fire Hoses
- Weapon fire into crowd

IACP

- Canines should not normally be deployed for the purposes of crowd control. When their use as backup is deemed necessary and appropriate, canines should remain in patrol vehicles or other secure locations and, whenever reasonably possible, out of the view of demonstrators.
- The inappropriate use of canines for crowd control during the civil rights demonstrations of the 1960s created a great deal of adverse publicity and negative public opinion that lingers to this day.

IACP

- Horses can be a significant asset in controlling and managing crowds and can normally be used to surround, contain, or move groups in nonviolent demonstrations as appropriate. However, they should not be used against passively resistant demonstrators who are sitting or lying down as there is increased risk of injury. In addition, horses should not be deployed when the use of chemical agents is anticipated or have been deployed or in ice or snow or other conditions where footing is problematic.

IACP

- Fire hoses have been used in other countries for crowd management purposes. However, much like the deployment of canines, due to the negative connotations following their use during civil rights demonstrations in the past, it is not recommend that they be used for crowd containment or dispersal.

IACP

- Motor vehicles under the control of law enforcement officers may be used to surround and move persons if required. Vehicles can be used to establish containment areas and barriers and to move persons if caution and coordination are employed. In particular, vehicles should not be brought into contact with persons for purposes of containment or dispersion.

IACP

- Impact projectiles are projectiles designed and intended to deliver non-penetrating impact energy from safer than contact range. These may include direct fire or non-direct skip-fired rounds. The latter are projectiles that are discharged toward the ground in front of a target, theoretically delivering the energy to the subject following contact with the ground. Impact projectiles can be used in crowd control situations where officers have had sufficient training and when they are used appropriately based on the totality of circumstances presented (Remember Graham still applies).

IACP

- Electronic control weapons (ECWs) may be used during civil disturbances for purposes of restraint or arrest of noncompliant and resistant individuals where proper target acquisition is possible and when alternative lesser means of control are not available. However, these types of weapons should not be fired randomly into crowds.

IACP

- Officer-issued aerosol restraint spray (OC) is best used in crowd control situations against specific individuals who are engaged in unlawful acts or actively resisting arrest. OC may also be appropriate for use in a defensive capacity when other alternatives are inadequate, unreasonable, or unavailable. OC should not be used indiscriminately against groups of people; in demonstrations or crowds where bystanders or other officers would be unreasonably affected; or against passively resistant individuals.
- High-volume OC delivery systems (such as MK-9 and MK-46) are designed for and can be used in civil disturbances against groups of people engaged in unlawful acts or endangering public safety and security, with approval of the IC; a warning should be issued prior to the use of these systems, whenever reasonably possible.

Compare

- *Crowell v.Kirkpatrick,* 400 Fed Appx. 592 (2nd Cir. 2010).
- Headwaters v. Humboldt County, 276 F.3d 1125 (9th Cir. 2002).

IACP

- The riot baton can be used primarily as a defensive weapon or as a means of overcoming resistance, for example, when it is used in the two-hand horizontal thrust on a police line, as a show of force, or as a means to contain or disperse a crowd.

Don’t just train the skill-Train the Decision Making

Some Resources

- Utilization of designated arrest teams;
- On-scene legal advisors; on-scene internal affairs investigators;
- Arrest documentation procedures to include photographing the arresting officer with the prisoner due to the potential for confusion when mass arrests occur in a demonstration.

Example of Lack of Documentation

- Plaintiffs' "Declination of Prosecution" forms explain that the district attorney decided not to file charges against each plaintiff because each one's arresting officers were unable "to personally attest to" their criminal conduct. (P's 56.1 ¶ 1498; Oliver Decl. Ex. U). According to Officer Galgano's deposition testimony, some arresting officers became separated from their arrestees while the arrestees were being moved into transport buses; as a result, other officers were designated as arresting officers and completed processing paperwork for their newly acquired arrestees on the basis of information provided to them by other officials. (P's 56.1 ¶¶ 626, 642-46).

  Caravalho v. City of New York, 2016 U.S. Dist. LEXIS 44280, *11

First Amendment Issues…

- Freedom of Assembly
- Free Speech
- Free Expression…

Activities not protected

- Obstructing movement of other persons, particularly entries, exits and passageways.
- Physically assaulting persons
- Throwing objects
- Disturbing the peace (be careful here)
- Using offensive language constituting fighting words (be careful here)
- Committing other criminal acts.

Charlottesville

Before Heather Heyer was Murdered

Barham v. Ramsey, 338 F. Supp. 2d 48 (Dist. D.C. 2004)

- Large scale protest
- Mass Arrest Ordered
- Chief and Deputy Chief Not Entitled to QI
- No Dispersal Order Given…

Pre-Protest Enforcement Actions

Appel v. City of St. Louis, 2007 U.S. Dist. LEXIS 104187 (2007)

Houses

- Police had houses under surveillance
- Had building inspectors check status-one condemned/one nuisance
- Police forced entry searched and seized-alleged strip search of female-No QI
- Alford pleas on being in condemned property
- Bicyclists-searched/charged no license
- Pedestrian Stop without cause
- Lawsuit-house no QI,

Chilling Effect

- A disproportionate exercise of police power that included warrantless entry, property damage, and a strip search is sufficient to deter a person of ordinary firmness from exercising their rights. Accordingly, Plaintiffs have stated a claim under the **First Amendment**.

  Appel v. City of St. Louis, 2007 U.S. Dist. LEXIS 104187, *27-28

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Law

- The Supreme Court "has repeatedly held that **police** may not interfere with orderly, nonviolent **protests** merely because they disagree with the content of the speech or because they simply fear possible disorder." *Jones v. Parmley*, 465 F.3d 46, 57 (2d Cir. 2006) (citing *Cox*, 379 U.S. at 550; *Edwards v. South Carolina*, 372 U.S. 229, 237, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963)).

Law

- However, once a protest evidences a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order," the **police**may take action to disperse those **protests**. *Cantwell v. Connecticut*, 310 U.S. 296, 308, 60 S. Ct. 900, 84 L. Ed. 1213 (1940).

2 Major Exceptions to Free Speech

- Fighting Words
- Incitement to Riot

Bible Believers v. Wayne County, 805 F.3d 228, 250 (6th Cir.2015).

- The civil-rights era cases tell us that police cannot punish a peaceful speaker as an easy alternative to dealing with a lawless crowd that is offended by what the speaker has to say.

- In the decade following this string of Supreme Court precedents, a heckler's veto case came before the Sixth Circuit. *See Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975). *Glasson* recognized, consistent with the aforementioned precedents, that "[a] police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas."

- Maintenance of the peace should not be achieved at the expense of the free speech.

- When a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals. Nor can an officer sit idly on the sidelines—watching as the crowd imposes, through violence, a tyrannical majoritarian rule—only later to claim that the speaker's removal was necessary for his or her own protection.

  Bible Believers v. Wayne County, 805 F.3d 228, 252-253

Glasson v. Louisville

- The dispute in *Glasson* originated when a speaker intent on voicing her displeasure with the Vietnam War, as well as the issues of racism and poverty in America, displayed a placard reflecting her grievances while waiting on a motorcade route for then-President Richard M. Nixon. . One of the police officers responsible for crowd control noticed that a group of Nixon supporters on the opposite side of the street became agitated, started hollering, and were likely to riot, after perceiving the poster. . Instead of reprimanding the rabble-rousing crowd, the officer destroyed the speaker's poster after she refused to hide it from view.
- The police officer's actions in *Glasson* were a patent violation of the speaker's **First Amendment** rights, because the speaker did not "somehow forfeit[] the protection afforded her message by the Constitution because it unintentionally evoked a hostile reaction from others.

Constitution Does Not allow a Heckler's Veto

- The Supreme Court, in *Cantwell, Terminiello*, *Edwards, Cox*, and *Gregory*, has repeatedly affirmed the principle that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Watson v. City of Memphis*, 373 U.S. 526, 535, 83 S. Ct. 1314, 10 L. Ed. 2d 529 (1963) If the speaker's message does not fall into one of the recognized categories of unprotected speech, the message does not lose its protection under the **First Amendment** due to the lawless reaction of those who hear it.
- Simply stated, the **First Amendment** does not permit a heckler's veto.

Retaliatory Arrest for Exercise of Rights

- Plaintiffs allege that immediately prior to the Mt. Adams protest, Ltc. Janke got into a "heated discussion" with one of the plaintiffs in the presence of his subordinates. Ltc. Janke allegedly told Plaintiff Mitchell that he would "whack" Mitchell. Plaintiffs referred to CPD officers as criminals and murderers in the presence of Ltc. Janke and other officers. Plaintiffs also allege that they obeyed police orders to move onto the sidewalk, but questioned the lawfulness of their actions as they did so. They allege that Plaintiff Marx was arrested as he was leaving the protest after asking why another protester had been arrested. Finally, they allege that Officer Henderson intentionally made false statements in the criminal complaints filed against the Plaintiffs with Ltc. Janke's consent and authority. The Court finds that these allegations are sufficient to meet Plaintiffs' burden of putting forward specific, nonconclusory allegations that establish improper motive for purposes of the **First Amendment** retaliation claims.

  Marx v. Janke, 2004 U.S. Dist. LEXIS 30104, *13-14

- "Over sixty years ago, the Supreme Court declared that use of the streets for assembly and communication is a right held by U.S. citizens pursuant to the **First Amendment**." Dean v. Byerley, 354 F.3d 540, 549 (6th Cir. 2004) (citing Hague v. Committee for Indust. Org.,307 U.S. 496, 515-16, 59 S. Ct. 954, 83 L. Ed. 1423 (1939)). Likewise, the right to criticize public officials has been "central to the meaning of the **First Amendment**" since "the day the ink dried on the Bill of Rights." McCurdy v. Montgomery Cty., Ohio, 240 F.3d 512, 520 (6th Cir. 2001). Few actions could so deter a person of reasonable firmness from continuing to exercise his or her free speech rights as being arrested. ("[A]rresting or detaining an individual in retaliation for criticizing the police, even through the use of crude language, violates the **First Amendment**.")

  Marx v. Janke, 2004 U.S. Dist. LEXIS 30104, *11-12

Know your local law…

- The Court rejects Defendants' implied argument that the Mt. Adams protesters, including Plaintiffs, engaged in illegal activity because they gathered in Mt. Adams without **first** obtaining a parade permit from the City. Defendants do not cite to a specific provision in the Cincinnati Municipal Code or other statutory code that Plaintiffs violated. In fact, the Municipal Code requires participants in a march or parade to obtain a permit only when they will not strictly comply with laws and regulations relating to vehicular and pedestrian traffic. See Cincinnati Muni. Code §§ 510-2, 510-3. Otherwise, protesters are required not to obstruct or unreasonably interfere with the rights of the public to use the streets and sidewalks and to obey lawful police orders concerning the flow of traffic. See id. §§ 502-9, 510-2, 510-7 through 510-10. Plaintiffs' activities as described in the Fourth **Amendment** Complaint were not unlawful under these standards and did not furnish probable cause for their arrest.

  Marx v. Janke, 2004 U.S. Dist. LEXIS 30104, *16-1

Ordinances may not work…

- The district court correctly found that the union had a very high likelihood of success on the merits of the claim based on a **First Amendment** right to use portable, non-obstructive props to disseminate information in a public right-of-way on a temporary or limited basis. The court held that the ordinance, as applied to the use of the rat balloon, unconstitutionally infringed on this right. The city argued that there was no constitutional right to maintain a structure in a public right-of-way. While it was true that courts generally refused to protect on **First Amendment** grounds the placement of objects on public property where the objects were permanent or otherwise not easily moved, the balloon was temporary and easily movable, the union only used the balloon during its protests, which lasted just one to two hours, and there was no showing that the balloon caused any danger. The ordinance was not narrowly tailored as applied to the union's use of the balloon--by applying the ordinance to prohibit the temporary use of the balloon, the city applied its ordinance in a manner that was substantially broader than necessary to achieve its interests.

  Tucker v. City of Fairfield, 398 F.3d 457, 460 (6th Cir. 2005)

A Recent Case-Protest v. Law Enforcement

St. Louis

September 2017

(CNN) Protesters in St. Louis blocked highways and threw rocks at the mayor's house Friday after white former police officer Jason Stockley was acquitted in the 2011 shooting death of black driver Anthony Lamar Smith.

Protests in Aftermath of Stockley Verdict St. Louis

- On September 15, 2017, the Circuit Court for the Twenty-Second Judicial Circuit of Missouri issued its findings and verdict in *State of Missouri v. Stockley*, Cause No. 1622-CR02213-01. The decision prompted some members of the public to engage in protest activity around the St. Louis metropolitan area, including within the City of St. Louis. The protests, which began on the morning of September 15, 2017 and have continued to occur regularly since the verdict, concern not only the verdict itself but broader issues, including racism and the use of force by police officers. The participants often express views critical of police. This case concerns the response to some of these protests by the St. Louis Metropolitan Police Department during the weekend of September 15-17, 2017.

- Rose attends many protests as a legal observer, and testified that in his experience, going back to 2014, St. Louis City police officers declare unlawful assemblies, issue dispersal orders, use force, and deploy chemical agents against those **protesting police** conduct, but not against other types of protesters. Rose attended a women's march in January of 2017, an LGBTQ [*7] march in February of 2017, and an immigrants' rights march in 2017. Police blocked traffic, sometime for hours, at each of these events to allow the protesters to march in the streets, and no unlawful assembly or dispersal orders were given at any of these protests. These protests were peaceful. Rose testified that he has never engaged in any violent activity at any protest he has attended but has nevertheless been subjected to chemical agents without warning only at **protests** critical of **police**.

  Ahmad v. City of St. Louis, 2017 U.S. Dist. LEXIS 188478, *6-

- Eventually protesters blocked one or more city buses containing police officers so the buses could not exit the area. Some protesters, including plaintiff Maleeha Ahmad, were [*4] intentionally blocking a bus to prevent it from leaving as an admitted act of civil disobedience. Lieutenant Timothy Sachs, commander in charge of the Civil Disobedience Team, was in charge of deploying defendant's tactical units and ordered the police officers to get off the bus and form a line to move the protesters away from the bus so it could leave. Police officers had shields for their bodies and on their helmets. Officers from the bicycle unit came to assist, placing their bikes in front of and beside their bodies as they moved forward and ordered the protesters to "Get Back!" The police moved the crowd north of Clark. Some officers sprayed hand held mace at and on the protesters, including plaintiff Ahmad. The evidence is disputed as to whether any warnings were given before the deployment of mace at this time.

  Ahmad v. City of St. Louis, 2017 U.S. Dist. LEXIS 188478, *3-4

- Defendant's tactical unit was deployed to the Central West End on the evening of Friday, September 15, 2017, when protesters converged upon the home of the mayor of the City of St. Louis and began throwing objects at the house and at **police** officers. This **protest** was declared an unlawful assembly, **police** used a loudspeaker to order protesters to disperse, and protesters were warned that chemical munitions could be used if they did not comply. Plaintiffs do not challenge the **police** response to the **protest** at the mayor's house.
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  Ahmad v. City of St. Louis, 2017 U.S. Dist. LEXIS 188478, *7
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Who in your agency decides-Unlawful Assembly

- Plaintiffs have presented sufficient evidence demonstrating that they are likely to prevail on their claim that defendant's custom or policy is to permit any officer to declare an unlawful assembly in the absence of the force or violence requirement of St. Louis City Ordinance 17.16.275 and Mo. Rev. Stat. § 574.060, in violation of plaintiffs' **First** and Fourth **Amendment** rights. Although defendant argues that it is usually someone such as the Incident Commander who makes such a determination, Sachs admitted that defendant has issued no guidelines with respect to when, how, or who should declare an unlawful assembly with respect to protest activity.

- All officers testified that it was within their sole discretion to declare an unlawful assembly whenever they observed a group violating any law, whether peaceably or not, including but not limited to merely congregating on sidewalks or on streets closed by **police** for **protest** activity.

  Ahmad v. City of St. Louis, 2017 U.S. Dist. LEXIS 188478, *43

- Plaintiffs have presented sufficient evidence for purposes of awarding preliminary injunctive relief that defendant's custom or policy of committing discretionary authority to police officers to declare unlawful assemblies in the absence of any threat of force or violent activity provides no notice to citizens of what conduct is unlawful, and it permits officers to arbitrarily declare "there's no more assembling." This custom or policy permits officers to exercise their discretion in such a manner as to impermissibly curtail citizens' **first amendment** rights of assembly and free speech based upon nothing more than a subjective determination by an officer that "we're done for the evening," or when the content of the speech is deemed objectionable, or because an earlier assembly in a different location was declared unlawful. Plaintiffs have presented sufficient evidence [*46] at this stage of the proceedings that this discretion was in fact exercised in such a manner in violation of plaintiffs' constitutional rights. Defendant's custom or policy with respect to unlawful assemblies accords to police "the full discretion . . . to determine" whether a violation has occurred, "entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat, . . . furnishes a convenient tool for harsh and discriminatory enforcement by prosecuting officials against particular groups deemed to merit their displeasure, . . . and confers on police a virtually unrestrained power to arrest and charge persons with a violation."

Importance of Detailed/Documented Dispersal Order

- Similarly, plaintiffs have presented sufficient evidence demonstrating that they are likely to prevail on their claim that defendant's custom or policy is to permit officers to issue vague dispersal orders to protesters exercising their **first amendment** rights in an arbitrary and retaliatory way and then to enforce those dispersal orders without sufficient notice and opportunity to comply before being subjected to uses of force or arrest, in violation of plaintiffs' **First** and Fourth **Amendment** rights. Defendant's witnesses all testified that dispersal orders simply direct people to leave "the area" and do not define "the area." Sachs testified that he could not testify "exactly how far would be enough" to comply with this, or any, dispersal order. Sachs could not define "the area" people were ordered to disperse from on September 15, 2017, September 17, 2017, or at any other time.

- Plaintiffs presented sufficient, credible evidence for purposes of awarding preliminary injunctive relief that defendant has a custom or policy, in the absence of exigent circumstances, of issuing dispersal orders to citizens engaged in expressive activity critical of police which are either too remote in time and/or too vaguely worded to provide citizens with sufficient notice and a reasonable opportunity to comply, inaudible and/or not repeated with sufficient frequency and/or by a sufficient number of officers to provide citizens with sufficient notice and a reasonable opportunity to comply, contradictory and inconsistent, not uniformly enforced, and retaliatory.

Ahmad v. City of St. Louis, 2017 U.S. Dist. LEXIS 188478, *47-48

- Plaintiffs have also presented sufficient evidence demonstrating that they are likely to prevail on their claim that defendant has a custom or policy of using chemical agents without warning on citizens engaged in expressive activity that is critical of police or who are recording police in retaliation for the exercise of their **first amendment** rights, in violation of the **First**, Fourth, and Fourteenth **Amendments**.
- Plaintiffs have presented sufficient, credible testimony and video evidence from numerous witnesses that they were maced without warning in the absence of exigent circumstances while they were not engaging in violent activity and either were not in defiance of police commands (because none were given) or were complying with those commands.

Ahmad v. City of St. Louis, 2017 U.S. Dist. LEXIS 188478, *49