IMLA

Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

JULY AUG 2019

VOL. 60 NO. 04

Ransomware and Local Governments: Do Not be Held Hostage!

THE INTERSECTION OF SAFETY AND EXPRESSION: INJUNCTIONS IN CROWD CONTROL MEASURES

THE PROFESSIONAL AND ETHICAL OBLIGATIONS OF MUNICIPAL ATTORNEYS

The Intersection of Safety and Expression: Injunctive Relief in Crowd Control Measures

BY: DANIEL E. PETERSON AND DEWITT F. MCCARLEY
Parker Poe, Charlotte, North Carolina

Introduction:

All mass demonstrations can present unique issues for law enforcement agencies, but the demonstrations that turn to rioting are peculiarly dangerous. Public participation rights—particularly practiced in the public streets and sidewalks by picketing and parading—are enshrined in the American ethos as part of what makes us… well… 'us.' What happens when a peaceful demonstration devolves into a violent riot? When tensions spill over into violent rioting, law enforcement agencies must be able to respond, and have confidence that they are responding in accordance with the First, Fourth, and Fourteenth Amendments.

All municipal attorneys should be prepared to defend their law enforcement agency's crowd control tactics in court. In this article, we will focus on what happens when a plaintiff files a complaint and motion for preliminary injunction against a municipality over common crowd control tactics. (We will stick to federal court proceedings, as the allegations are almost always of a constitutional nature.)

In many ways, the municipality's response is a conflation of trial techniques and motion practice, and it occurs over a dramatically reduced time period and without the benefit of discovery. It is critical to avoid an overly broad injunction, which can have deleterious effects on law enforcement's ability to use professional judgment in responding to riotous conditions during the pendency of the judicial order. As such, being prepared to thoroughly, accurately, and quickly tell your client's story serves an important public safety purpose.

Social media has become an unavoidable part of that story. With the proliferation of smart phones and social media, conclusions are drawn by the crowd, based, in many cases, on incomplete facts and raw emotions. Social media can be used to gather both peaceful demonstrators and chaos-seeking rioters from miles around with little notice. As lawyers, we are used to drawn-out processes and deliberative discovery. As the municipal litigator responding to a motion for preliminary injunction, time is not your friend. Therefore, the very same sources—*i.e.*, live social media posts—can be used by you to paint a picture in your briefing and argument to the court that emphasizes the intense circumstances encountered by your police officers on the ground.

We will make suggestions on how to craft such a response efficiently and effectively. We will explain the standard of review for both temporary restraining orders (TROs) and preliminary injunctions. There will be a section on using live video feed from social media as a real-time fact-checker for both the plaintiff(s) and the law enforcement agency. Finally, we will discuss what the case law says about the merits of common claims made against law enforcement in these situations – and provide practical tips for municipal lawyers based on that case law.

I. Standard of Review

a.Temporary Restraining Order

Rule 65(b) of the Federal Rules of Civil Procedure allows for a temporary restraining order to be issued to a party

"only if… specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss or damage will result to the movant *before the adverse party can be heard in opposition*…" (Emphasis added.) Therefore, under the plain language of the rule, the purpose of temporary restraining orders is to provide immediate relief from irreparable harm when formal notice to the adverse party is not possible.

That said, local governments are frequent defendants in TRO filings, so the chief judge in the jurisdiction will not be surprised if the city attorney periodically renews a request for notice and an opportunity to be heard any time a plaintiff seeks a TRO against the city.

If a complaint requests an 'emergency hearing' in the form of a TRO, but then does not obtain that immediate hearing, the plaintiff is really seeking a preliminary injunction. In practice, if you have time to brief a TRO, then the TRO should not issue, given the terms of the federal rule.

b. Preliminary Injunction

"Preliminary injunctions are extraordinary remedies," whose "traditional office… is to *protect the status quo* and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits," according to the U.S. Supreme Court's ruling in *eBay Inc. v. MercExchange*.[1]

The Supreme Court has also explained that "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[2] All of these factors must be established for an injunction to issue.

Moreover, the Supreme Court is reticent to permit the imposition of injunctive relief against law enforcement agencies tasked with enforcing state laws:

> We decline the invitation… [in] recognition of the need for a proper balance between the state and federal authority counsels restraint in the issuance of injunctions against sate officers engaged in the administration of the states' criminal laws in the absence of irreparable injury which is both great and immediate.[3]

Municipal attorneys should come to court armed with evidence to support their own contentions—i.e., in an intermediate scrutiny of a time, place, manner restriction that the regulation… is 'narrowly tailored' to satisfy the government's legitimate interests.

As the language used in the foregoing case law demonstrates, a complaint seeking injunctive relief against a police department should face a rigorous review from any court.

The public policy reason for this steep climb makes sense. An inflexible judicial order interposed in place over the professional judgment of law enforcement official would have deleterious effects on law enforcement's ability to fulfill its mission of providing for the public safety and welfare. Such an order could invite individuals seeking to perpetuate mayhem by taking advantage of the perceived anonymity of the crowd.

It would also require the police to second-guess an otherwise lawful use of force in the midst of tense and evolving circumstances, with the risks of being held in contempt of court for a use of force later to be determined in violation of the order. Law enforcement agencies cannot be stripped of their authority to use such force as is reasonably necessary to quell a gathering riot.

c. Weight of Affidavit Testimony in Preliminary Injunctions

Though the approach we suggest in this article is similar to a rushed motion for summary judgment, the comparison should neither be taken literally nor too far. Crucially, the difference in weight given to affidavit testimony is distinct and favorable to the defense.

Plaintiffs seeking injunctive relief are not entitled to have their complaint, or any affidavits submitted in support of it, viewed in a light most favorable to their position. Rather, "the weight to be accorded affidavit testimony is within the discretion of the court, and statements based on belief rather than personal knowledge may be discounted."[10]

However, the ultimate burden of proof often lies with the government in cases challenging First Amendment restrictions. Municipal attorneys should come to court armed with evidence to support their own contentions—*i.e.*, in an intermediate scrutiny of a time, place, manner restriction (discussed further below), that the regulation is 'narrowly tailored' to satisfy the government's legitimate interests.[5]

II. How Municipal Lawyers Can Address Substance

Turning to the factual and legal substance of preliminary injunction requests in relation to mass demonstrations, the defense is put in the position

Continued on page 12

Daniel Peterson, counsel in Parker Poe's Charlotte office, focuses his practice on defending local governments, professionals, and businesses in civil disputes, including claims involving police liability and constitutional issues. Prior to joining Parker Poe, Daniel served as an assistant city attorney for the City of Charlotte.

Mac McCarley, partner in Parker Poe's Charlotte office, concentrates his practice on advising local governments and private sector clients in regulatory and public policy matters. He is a previous city attorney for the City of Charlotte and the City of Greenville, North Carolina.

Crowd Control cont'd from page 11

of rapidly responding to a narrative without the luxury of 21-60 days to respond to an answer, nor likely will depositions and other discovery tools be employed.

Thus, harmonizing old school 'eyes on the ground' with new school 'eyes on social media' is imperative in preparing a quick response to the facts. On the legal response, nothing replaces old fashioned case law research, brief writing, and coffee—though electronic research services certainly make a more complete response much more feasible in a shorter turnaround.

a. 'Insta-Storytelling'

Plaintiff will obviously have the first opportunity to put their perspective of the events out into the public. Unlike a motion to dismiss, the defense practitioner is not confined by the pleadings in responding to a motion for preliminary injunction. Moreover, as many times mass demonstrations are covered by at least local media, placing forth the client's version of the facts quickly and coherently is essential, while also dispelling any mistruths in the plaintiff's retelling.

Reviewing real-time video feed from social media accounts is becoming an imperative in responding to many claims, but particularly claims involving mass demonstrations.[6] Many social media sites now allow for live video feeds to be broadcast from users' accounts and often remain posted after the event.[7] Many social media users—more than one might expect—leave their content completely open to the public. Relying too heavily on unauthenticated video in a prepared response for the court—even at a more relaxed (for evidentiary purposes) posture—can be a pitfall. However, video is a compelling medium for storytelling. This is particularly so if the plaintiff has posted live video on social media – and that video does not match the lawsuit's version of the facts.

Even if unused in briefing or before the court at a preliminary injunction hearing, social media video provides underlying context and can inform the defense's response to the motion for preliminary injunction.

If time can at all permit, obtaining an accurate and documented timeline in the form of an affidavit from a commanding officer provides a competing perspective—*i.e.*, a perspective of a dedicated law enforcement professional versus the perspective of the layman plaintiff. Rushed affidavits, however, can obviously hurt the case down the line if what is recalled by the witness is able to be impeached on cross-examination. It is critical that the affiant have a broad view of what happened on the night in question, how and when orders were given, as well as documentation and collective officer knowledge to corroborate the information provided.

b. Case Law on Responding to Riotous Conditions in Mass Demonstrations

As referenced above, the first and most substantive element of a motion for preliminary injunction is whether the plaintiff has a likelihood of success on the merits. What follows is sample case law from demonstration lawsuits that may serve useful in responding to common claims made by the plaintiff in these cases.

The First Amendment protects mass demonstrations but does not protect riots. Tear gas and other crowd control tactics are entirely constitutional uses of force, and the law does not require that police single each individual rioter out from a crowd that has become, on the whole, unruly and violent.[8] In addition, otherwise peaceful demonstrators have broken the law if they fail to obey a lawful dispersal order in the face of riotous conditions.

Generally, law enforcement officers are permitted to issue dispersal commands when they have reasonable belief that a riot or disorderly conduct of multiple individuals is occurring. Establishing the timeline of dispersal orders via affidavit—including whether and how they were amplified—provides a rebuttal to allegations that the plaintiff(s) could not hear the order(s).

When has a demonstration crossed the line from peaceful protest to a violent riot? In the oft-cited *Brandenburg v. Ohio,* the Supreme Court set the guideposts for when speech may be sanctioned as incitement to riot.[9] The so-called *Brandenburg* test is premised upon the principle that the guarantees of the First Amendment "do not permit a State to forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[10] Broken down by the Sixth Circuit into a convenient summary, "[t]he *Brandenburg* test precludes speech from being sanctioned as incitement to riot unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech."[11]

The last of those elements is crucial because without it a widevariety of protected speech activities could be precluded based solely on the first two elements. Case law from just before and during the Civil Rights Era, juxtaposed against case law emerging thereafter, helps provide context and set specific parameters. Before and during the Civil Rights Era, some of the cases where so-called 'riots' or 'disturbances of the peace' were broken up with police force were farcical. In those cases, the police—typically in the Jim Crow South—were clearly and unambiguously the aggressor.

As introduced briefly above, decisions of the U.S. Supreme Court from the 1960's relating to the unconstitutional breaking up of peaceful demonstrations provide vivid contrast to cases where demonstrations have become infested with violence and mayhem.

In *Edwards v. South Carolina*, the Supreme Court held that law enforcement violated the First Amendment rights of African American students engaged in a peaceful demonstration who were arrested for breach of the peace.[12] The demonstration numbered about 187 protestors marching on the state capitol grounds "in an orderly way."[13] There were approximately 200-300 onlookers that gathered over the course of over about a half hour. "There was no evidence to suggest that these onlookers were anything but

curious… There was no obstruction of pedestrian or vehicular traffic…"[14] Police presence was sufficient. After about 45 minutes, the demonstrators were advised "they would be arrested if they did not disperse in 15 minutes."[15] The demonstrators did not disperse and they were arrested. The justices noted that, "There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them. Police protection was ample."[16]

In *Cox v. Louisiana*, the Supreme Court was presented with the question of whether a group of supposedly threatening bystanders warranted the discharge of tear gas by law enforcement to break up a peaceful demonstration and to arrest the demonstrators.[17] In a resounding 'no,' the Court noted that "[i]t is virtually undisputed… that the students [*i.e.*, demonstrators] were not violent and threatened no violence. The fear of violence appears to have been based upon the reaction of white citizens looking on from across the street…" and said citizens were separated by dozens of police officers.[18]

Indeed, at the close of the decade, the Supreme Court issued its opinion in *Brandenburg,* officially ushering in a new era in free speech jurisprudence. This new era cast aside a pure 'clear and present danger' test of the bygone era. Ironically, in doing so, the Court in *Brandenburg* encountered the opposite factual circumstances that it encountered in *Edwards* and *Cox*.

In *Brandenburg*, the appellant was the leader of a local Ku Klux Klan that had been convicted under a statute criminalizing speech that "advocate[es] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform and for voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[19] The Court held that the Ohio statute was overly-broad in that it criminalized "the mere abstract teaching of the moral necessity for a resort to force and violence," because said conduct, the Court reasoned, "is not the same as preparing a group for violent action and steeling it to such action."[20]

However, in the post-*Brandenburg* era, courts have seemingly clarified the contours of *Brandenburg* with some significance in the application of its principles in active practice. Take this quote from *Washington Mobilization Committee v. Cullinane*:

> …[I]t is axiomatic however that the police may, in conformance with the First Amendment, impose reasonable restrains upon demonstrations to assure that they be peaceful and not destructive… And by the same token the First Amendment permits the police to contain or disperse demonstrations that have become too violent or obstructive.[21]

Cullinane is instructive because the D.C. Circuit examined the constitutionality of applied police mass demonstration procedures in the nation's capital—specifically mass arrests resulting from demonstrations that turned violent. Plaintiffs were peaceful protestors that were arrested as a result and sought to enjoin the D.C. Police from being able to disperse crowds in this way. The Court rejected the "unrealistic" expectation that police prune each individual bad actor from a crowd.

> It is the tenor of the demonstration as a whole that determines whether the police may intervene; and if it is substantially infected with violence or obstruction the police may act to control it as a unit. 'Where demonstrations turn violent, they lose their protected quality as expression under the First Amendment…' Confronted with a mob the police cannot be expected to single out individuals; ***they may deal with the crowd as a unit*** (emphasis added).[22]

Similarly, in *Barney v. City of Eugene*, the Ninth Circuit concluded that, as a matter of law, the plaintiff was not entitled to relief under § 1983 for deprivations of her First Amendment rights.[23] Law enforcement deployed a tear gas canister at a peaceful protestor while participating in a growingly riotous protest.[24] At the conclusion of discovery, there was no material dispute of fact that the demonstration had turned violent and there was no forecasted evidence that "her exposure to tear gas and any effect on her First Amendment activities were anything other than the unintended consequence of an otherwise constitutional use of force under the circumstances."[25]

When possible, prior to the use of tear gas, providing notice is preferred, as the purpose is to gain compliance and not use force as an end in itself. That said, notice is not required. In *Dalrymple v. U.S.*, the use of a gas gun against demonstrators outside the home where INS agents were executing warrants to remove a child was found to be objectively reasonable when the demonstrators attempted to interfere and threw objects at the agents.[26]

Finally, a recent opinion from the U.S. District Court for the Western District of Virginia clarifies long-standing case law post-*Brandenburg,* which reasserts that "the First Amendment does not protect violence."[27] The opinion in *Sines v. Kessler* disposed of a motion to dismiss filed in a lawsuit brought in the wake of the Charlottesville, Virginia rioting by "the Ku Klux Klan, various neo-Nazi organizations, and associated white supremacists."[28] The plaintiffs—ten Charlottesville residents—brought the lawsuit alleging a conspiracy to violate their civil rights. Though the court's ruling did dispose of some of the plaintiffs' claims, much of the conspiracy claims remained.

In allowing the conspiracy claims to survive a Rule 12(b)(6) challenge, the court rejected the defendants' claim that the First Amendment immunized them from liability. Couching its holding in *Brandenburg*, the court concluded that the allegations in the complaint were "replete with specific allegations that extend beyond mere 'abstract' advocacy."[29] Illustrative allegations include "Defendants encourage[ing] the throwing of torches at counter-protestors,… ordered others to 'charge!'[,]… distributed shield fighting tactics, instructed members to wear 'good fighting uniforms,' and recom-

Continued on page 32

Crowd Control cont'd from page 13

mended attendees 'bring picket sign posts, shield, and other self-defense implements ***which can be turned from a free speech tool to a self-defense weapon should things turn ugly***."[30] While these examples share a bigoted ugliness with the remarks in question in *Brandenburg*, the *Brandenburg* speech lacked the imminent threat that the words of violence would be acted upon.[31]

This holding—assuming, obviously, that it withstands appellate scrutiny—has practical application for law enforcement as well. The sorts of activities listed in the opinion in *Sines* are outside the bounds of *Brandenburg*, and thus law enforcement officers should be able to intervene as they did in *Cullinane* and *Barney*, cited above.

c. Putting It Into Practice

Defending against a preliminary injunction ideally starts before the conflict arises at all, with a conversation between the municipal attorney and the police department about the intersection of modern policing practices and the contours of the historical case law, merely sampled above. In the event mass demonstrations in a city do turn riotous, the police department is then prepared to respond in a manner consistent with *Brandenburg*, *Cullinane*, and *Barney*, among others. Then, if an injunction is sought against the police department, the legal team is not scrambling to learn the basics of their client's response protocols.

This is important because there is already much to do to respond quickly and decisively. The plaintiffs will have the initial advantage in broadcasting their narrative. By leveraging the resources available to municipal lawyers—including law enforcement technology and public social media accounts—the legal team can quickly pull together the actual facts on the ground to demonstrate what the case law requires: that the police were not simply responding to some 'abstract' threat of violence, but rather a concrete threat to the community.

III. Conclusion

In conclusion, the defending municipality in a motion for preliminary injunction must draw the court's attention to the pragmatic limitations of an injunction. A judicial injunction is an extreme limitation to place on a police department tasked with responding to evolving circumstances on the ground. Law enforcement should not be tasked with hoping that cooler heads will prevail among the participants of the next demonstration, nor should they fear that, if they act to stop a riot in progress, they will be acting in contempt of a court order.

An undertone of this entire discussion is blackletter use of force case law: "The reasonableness… must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," as the Supreme Court put it in *Graham v. Connor*.[32] This notion of not relying on hindsight should be especially protected in the context of injunctive relief as a result of mass demonstrations. People's lives may depend on the intervention of law enforcement in that scenario.

Notes

1. In re Microsoft Corporation Antitrust Litigation v. Microsoft Corporation, 333 F.3d 517, 524-25 (4th Cir. 2003) (emphasis added), *abrogated on other grounds related to copyright law*, eBay Inc. v. MercExchange, LLC, 547 U.S. 388 (2006).
2. Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008).
3. City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983).
4. Imagine Medispa, LLC v. Transformations, Inc., 999 F.Supp.2d 862, 869 (S.D. W.Va. 2014), *citing* Federal Practice & Procedure § 2949.
5. *See, e.g.*, Reilly v. City of Harrisburg, 858 F.3d 173, 180 (3d Cir. 2017).
6. Please note that there are ethical issues associated with obtaining non-public posts without a formal discovery request. This portion of the discussion assumes that the posting individual has left the post open for public consumption on the social media platform.
7. Though the focus of this paper is responding to a preliminary injunction, one should note that the user can take down a video post after the fact. Practitioners should be sure to ask plaintiffs during discovery whether they took a video and/or posted a video—live on social media or not—of the event in question.
8. "[T]here is no federally protected right to engage in a riot." Frinks v. North Carolina, 468 F.2d 639, 641 (4th Cir. 1972).
9. 395 U.S. 444 (1969) (per curiam).
10. 395 U.S. at 448.
11. Bible Believers v. Wayne County, Mich., 805 F.3d 228, 246 (6th Cir. 2015) (emphasis added), *cert. denied*, 136 S.Ct. 2013 (2016).
12. 372 U.S. 229 (1963).
13. *Id*. at 231.
14. *Id*. at 231-32.
15. *Id*. at 232.
16. *Id*.
17. 379 U.S. 536, 550 (1965).
18. *Id*.
19. Brandenburg, 395 U.S. at 444–45 (internal quotations and citations omitted).
20. 395 U.S. at 448.
21. 566 F.2d 107, 119 (D.C. Cir. 1977).
22. 566 F.2d 107, 120, *quoting in part*, Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).
23. 20 Fed. Appx. 683 (9th Cir. 2001).
24. *Id*. at 684.
25. *Id*. at 685.
26. 460 F.3d 1318 (11th Cir. 2011).
27. Sines v. Kessler, 324 F.Supp.3d 765, 802 (W.D. Va. 2018), quoting, N.A.A.C.P. v. Clairborne Hardware Co., 458 U.S. 886, 916 (1982).
28. 324 F.Supp.3d at 773.
29. *Id*. at 803.
30. *Id*. (Emphasis added.)
31. *Cf*., 395 U.S. at 446 ("…[I]f our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.")
32. 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). ML