Lessons from Charlottesville: What Not To Do

"Police Criticized for Slow Response to Violent Demonstrators,"[i]; **"City Officials, Police, Face Harsh Criticism"**[ii]; **"Angry Protest Overwhelms City Council Meeting"**[iii]; **"Mayor Blames City Manager."**[iv] For municipal officials, this kind of press does not signify a job well done. Are there lessons from Charlottesville's deadly protests for South Carolina's cities and towns? Does your town have the tools you need in place?

City Councils statewide are taking notice. Myrtle Beach, Georgetown, and Greenville are among the cities that have considered or are poised to consider amendments to special events policies and related city ordinances in light of what happened. Cities have the duty to secure freedom of speech and protect public safety. Neither happened in Charlottesville.

The First Amendment to the U.S. Constitution and the South Carolina Constitution guarantee the freedom to speak and assemble in the public space. Local government can "make no law… abridging the freedom of speech…or the right of the people peaceably to assemble."[v] Courts interpreting constitutional law have given government a legal roadmap of sorts to navigate cities' dual roles: (1) protecting the public safety; and (2) protecting the public's freedoms. Municipal attorneys, elected officials, and police chiefs have to know how to serve both these goals.

Charlottesville—Good Intentions Gone Bad

Charlottesville failed to protect protesters and failed to protect the public. A pedestrian protester was killed and the man who mowed her down is charged with murder. Why weren't the protesters separated? The timeline is instructive[vi]:

May 30 Unite the Right applies for a permit to protest Charlottesville's plan to eliminate confederate honoraria. The event was set for August 12 in Robert E. Lee Park

June 5 Charlottesville ("the city") changed the name of Lee Park to Emancipation Park

June 13 The city grants Unite the Right's permit

July 17 Counter-protest groups were granted permits to assemble and protest near Emancipation Park on August 12.

August 7 The city revoked Unite the Right's permit and moved them to a different park. It took no action on the counter-protest permits.

August 10 The ACLU, representing Unite the Right, filed against the city for revoking the permit

August 11 The federal district court granted an injunction, blocking revocation of the permit. "The court concludes Kessler (right wing organizer) will likely prevail…supported by the fact that the city solely revoked his permit but left in place the permits issued to counter-protesters. This disparity in treatment suggests

the decision to revoke his permit was based on the content of his speech rather than neutral factors applicable to both him and those protesting against him. This is bolstered by other evidence, including communications on social media indicating member that members of city council oppose Kessler's political viewpoint."

August 12 Violence started early. Unite the Right protesters passed a permitted counter-protest site on the way to Emancipation Park and reportedly brawled with counter-protesters. "Standing nearby,…police watched silently behind barricades —and did nothing."[vii]Witnesses reported fistfights, improvised weapons, and pepper spray. The city, county, and Governor declared a local emergency.

Prior to the noon start time in the permit, city police indicated "an Unlawful Assembly has been declared." At 11:40 a.m. police ordered through a megaphone: "If you do not leave the area immediately you will be arrested."At that point, hundreds of protesters—many armed or quasi-armed—were ordered by the city to disperse, together. By 1:42 p.m., a young pedestrian counter-protester exiting as ordered was dead, run down by a white supremacist blocks from the park.

In effect, the only place in the city the police made 'safe' with the command to disperse was Emancipation Park—by emptying it. The passionate, hate-filled protesters and counter-protesters were no longer separated by barricades, but left to spill out into the city together, unprotected. Rather than dig in and do the unpopular and tedious work of making evidence-based arrests based on crimes committed by individuals, the police shut down a distasteful message by prior restraint under threat of arrest and relinquished their duty as officers of public safety.

First, the city failed in the protection of free speech. The neo-nazi crowd had obtained a permit for their event. The backstory shows much municipal hand-wringing in an effort to keep them from coming. The city did not want to aid these out of town hate groups, but it had the duty to evaluate a permit application irrespective of content, and protect free speech. Second, the city failed to protect public safety. When the city shut down the event and demanded they disperse, the distance between their group and the counter-protesters, which could have been maintained by police, was no longer maintainable. It became—predictably—a powder keg. If not lit by the city's fumbles, it was certainly fed by them.

Executive Summary of Lessons Learned

Put every tool your town has in place for collision avoidance. Implement a careful permit application and special events ordinance. Disarm protesters to the extent possible and legal. Have a skinny of municipal ordinances and state code sections potentially applicable in riot or near-riot situations at the ready. Some are listed in the sidebar. Mobilize law enforcement in sufficient numbers and erect safety barriers with police attendance. And then…do the thankless but critical job of protecting the First Amendment and the safety of the public.

The Right to Protest is Fundamental, but not Absolute

People have the right peaceably to assemble. The use of the 'public forum' for the exercise of free speech is protected, and public spaces have "time out of mind been used for the purpose of protest."[viii] But, First Amendment rights are not absolute,[ix] and government can act when there is a clear and present danger of riot, interference with traffic, or other immediate threat to public peace.[x]

State and local criminal codes still apply. Criminal laws on battery, larceny, concealed weapons, indecent exposure, public intoxication, vandalism, and the like are not related to free speech and are not suspended simply because the crime occurs during a protest. Some protesters may actually intend to provoke arrest. Police are trained to recognize this "civil disobedience" and give a warning followed by an opportunity to cease, but they are not required to turn a blind eye to crimes committed. Police are cautioned, however, in the use of more subjective offenses such as disorderly conduct, arguably overbroad in a protest scenario.

The City's Two Duties

So, how does a city navigate between its duty to protect speakers and protesters and its duty to protect the public from clear and present danger? Might these two not inevitably collide? The goal is collision-avoidance. This is where the work beforehand comes in. Municipal officials need to have a well-crafted ordinance in place, backed up by the training to support it.

1. The Duty to Protect Free Speech

Cities should keep the focus on public property. One cannot claim a first amendment right to protest on private property belonging to someone else, even if generally open to the public, like a shopping center.[xi] Conversely, a private property owner may "speak" on his own property, not subject to picketing policies.[xii] Disorder on private property would be regulated under the criminal code or in civil court, not by a special events policy.

The traditional public forum includes places historically associated with free expression like streets, sidewalks, and parks.[xiii] Protests can be peaceful and popular, or hateful and loathsome. [xiv] Parades and pickets of all stripes are legally the same to Lady Justice in her blindfold: from non-violent sit-ins across the state in the sixties, to picketers blocking women's clinic patients in Laurens ("babies murdered here"), to the hand-holding Bridge to Peace walkers on the Ravenel Bridge in 2015, to the KKK marching at the statehouse. In the context of the 'traditional public forum,' "...citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."[xv] Cities have a duty to protect citizens exercising those freedoms and may not impose a ban on expression or assembly in the public forum except where "essential to serve a compelling government interest."[xvi] The city's duty here includes the use of police power, if necessary, to protect speakers or groups.

A speaker may utilize a traditional public forum in a traditional way, obeying traffic and pedestrian laws, in connection with sharing a message. This is constitutionally protected and would not be restricted by ordinance. When a group would impede the roadway, sidewalk, or park, the city's permit considerations arise. The best practice is foresight, having a defensible permit ordinance in place.

2. The Duty to Protect Public Safety

What might be a reasonable restriction on free speech, in the interest of public safety? After all, "municipal authorities are charged with the duty of maintaining safety and order." [xvii]

A restrictive ordinance must be narrowly tailored to time, place, and manner and will be subject to strict judicial scrutiny to ensure it is no broader than necessary to serve the city's compelling interest and does not end up restricting speech based on content.[xviii] What might be ok? Court-approved restrictions include volume restrictions[xix] and traffic control.[xx] Requiring a permit for a scheduled special event is permissible, provided the permit ordinance is narrowly drafted, unrelated to content.

Collision-Avoidance: A Permit Ordinance that Works

All South Carolina towns canvassed by these authors have permit requirements for parades, assemblies, or other special events. The state Supreme Court has found parades and pickets may be subject to reasonable nondiscriminatory permit requirements related to traffic control and public convenience.[xxi] Traffic control can include pedestrian traffic too. For example, leafletting on sidewalks is protected speech. However, blocking pedestrians or harassing people is not, and may be regulated under the city's duty to protect the public.

Take a look at your town's permit ordinance. Some city officials may have been napping prior to Charlottesville, lulled into complacency by a fee-based permit ordinance that includes an administrative review and nominally involves the police department. Does it go far enough toward collision-avoidance, without going too far?

1. Type of event

Cities cannot base ordinances on speech content, but municipal ordinances have historically been reasonably tied to the type of event. Charlottesville was a protest rally in a public park. Permits more frequently issue for festivals, concerts, races, fundraisers, and parades. Is it wise to distinguish political events from other more common special events? Some cities with special events ordinances have a separate picketing ordinance (e.g. Charleston.) In Georgetown, picketing is addressed in the special events ordinance, but exempt from the permit requirement. That seems entirely reasonable, but is a picket a protest? Is a march a parade? Specificity is usually helpful, but cities must be careful not to differentiate on content. One answer could be to define a picket as a group, or by movement or location (sidewalk) but not based on message.

2. Crowd Size

Under the city's duty to protect free speech, when one person or a small group protests in a park or on a sidewalk in a way that does not burden anyone else, the First Amendment probably bars enforcement of a permit requirement. These might include speeches, press conferences, signs, or small sidewalk marches. The absence of a permit simply does not burden any legitimate government interest.

On the other hand, cities can require a permit for a pre-planned assembly on public property that will have an impact. For example, parade permits are defensible given the impact on the traveling public, the inherent danger of interaction between people and cars, and the planning necessary to protect participants. Cities can require a permit for large protests in parks or other similar places in order to ensure fairness in scheduling among groups and to determine law enforcement needs and the adequacy of sanitary facilities to accommodate the event.

Obviously helpful is some idea of the size of the anticipated group. This is a struggle for both organizers and cities. The concept of a 'crowd size' ordinance has been treated favorably by the courts, where, for example, a permit is not required for gatherings of fewer than fifty (50). [xxii] Charleston classifies events as "major" "medium" or "small" based on size. If your town is considering a crowd size element, each park in a town would presumably need to be analyzed for occupancy limitations. A word of caution: unless the organizer is a group and evidence of pre-registration is available and appears intentionally withheld to avoid a permit, a city would have an uphill challenge charging protesters with a permit violation for the assembly of a larger group.

3. Time for Application

A due date on an application for a protest or assembly is a governmental time restraint on free speech that must be narrowly tailored to a compelling governmental need, such as lining up police protection. Months-in-advance permit application deadlines may be too long. Also, cities might consider a spontaneity exclusion, for protesters gathering in response to breaking news, when the First Amendment would trump ordinary deadlines. By way of example, a city could not likely successfully defend permit violation arrests of hastily organized protesters gathering outside city hall in response to a recent vote, although other laws might apply. Most South Carolina towns have deadlines on permit applications. Look at yours and think about how your town will defend it as being narrowly tailored to a compelling interest if it's required more than a couple of months out.

4. Fees

The cities canvassed all charge application fees for special event permits. There are limits on financial burdens a town can impose on the exercise of First Amendment rights. First, the charges cannot exceed the actual cost of the public safety needs to accommodate the speech.[xxiii] Second, the city cannot increase the charge to include services anticipated to control opponents – that would operate as a "heckler's veto."[xxiv] In Charlottesville terms, the city could not charge Unite the Right for barricades necessary to separate counter-protesters. And last, the city cannot impose an insurance requirement on a group that cannot get it.[xxv] Some cities have deposits in addition to or rather than fees, and others, like Charleston, have separate fees ("park user fees.") Public safety estimates are based on event size, so crowd estimates are commonly linked to fee schedules. Some ordinances separate event types for fee

schedules, which can be a minefield. For example, films, festivals, concerts, sports events, and demonstrations may be subject to fees while pickets are not. The best practice here may be simply to exempt certain events from the permit requirement, rather than charge different fees based on type of event.

5. Counter-protests

When one group assembles to protest the message of another, the First Amendment protects both. Police must not silence either, but function in the dual role of protecting the freedoms and safety of both groups, as well as the public. Police must be prepared to protect all from physical attack. The Heckler's Veto has to remain a consideration. Police cannot arrest a protester for provoking a hostile audience reaction, without some other crime. The Supreme Court has found the "heckler's veto" undermines the First Amendment. Two examples from Chicago: (1) A racist speaker was arrested when his speech in an auditorium led to an angry 1,000 person mob on the streets outside. The Court found his arrest improper.[xxvi] (2) On the opposite side but similarly, a civil rights protester was arrested protesting segregation outside the mayor's home and an unruly mob gathered. The Court found his arrest was also improper, that the police should protect the speaker.[xxvii]

6. Distance

Strategies should include separating opposing groups, but opponents must be allowed to protest in the same general vicinity. Cities can pre-plan for hostile-party separation via ordinance and training. Boston, for example, has a great deal of experience in the American experiment and, by ordinance, separates groups by not less than 40 yards. Myrtle Beach has similarly added a 40 yard separation requirement. Cities considering amendments will need to consider resource availability and street layout, so the distance is reasonably related to identifiable safety interests.

7. Noise

The First Amendment allows reasonable regulations on sound amplification and loud noise. For example, Chicago's noise ordinance disallowing amplification louder than conversational level at 100 feet, with an exception for parades and assemblies with permits, was constitutional.[xxviii] One challenge with noise ordinances is objective enforceability. One hearer's unacceptable cacophony may be another's Mozart. Time, place, and manner are the keys to enforceability and police need to be consulted if your city considers a decibel limit, to make sure they have metering instruments in place for patrol officers. One example of a specific place and manner restriction is found in Myrtle Beach's updated ordinance: "No [event] may include a dynodrag, or similar machine known to produce excessive noise or a burnout pit."[xxix]

8. Traffic Flow

The public has a right to freedom of movement police must protect, and this includes pedestrian and vehicle traffic. A city is well within its rights to tailor a special events policy to minimize disruption for a road race or festival. Protesters have the same freedom as anyone else to use a sidewalk, such as pickets at a factory, business, or politician's office. Or they may seek a roadway, as for a political march,

protected by the First Amendment.[xxx] However, there is no "right" to target a private home from the sidewalk,[xxxi] or block business entrances or exits, other pedestrians, or traffic. For special events needing public space, it is entirely normal—and the practice of most South Carolina towns—to have a permit process in place so that the traffic impact can be planned for.

9. Weapons

The Charlottesville melee erupted with pepper spray, as in the kind you spray on attacking grizzly bears or muggers. Some white supremacists had torches. Arguing protesters reportedly beat each other with picket signs and selfie sticks. The cities looking at amendments are debating what can be weaponized. Myrtle Beach has declared the following contraband at permitted group events: flames not used for cooking, torches, combustible gasses, aerosols, sticks, bats, poles or selfie sticks, opaque backpacks, firearms, blades, bats, martial arts weapons, masks, shields, non-service animals, drones, wagons, and glass. Well, how does one hold up a permitted-size sign saying "we love Myrtle Beach" you might ask? They thought of that too. There is an exemption for using commercial corrugated tubing to hold up signs or flags.

10. Caution Light: Illegal Speech

In light of the First Amendment, is there such a thing? The answer is yes; the Supreme Court has carved out three classes of speech which may be criminalized. "Hate speech" is not one of those.[xxxii] Unprotected speech falls into three categories: Incitement, true threats, and fighting words. Cities can—and should—regulate these.

Incitement is more than rabble-rousing. It is intended to cause imminent lawbreaking. A speaker who rhetorically says in ten years from people will be hanging all the judges lacks intent, imminence, and likelihood. It is free speech. Incitement is preparing a group for violent action. Or, "C'mon let's bust the windows in the mayor's office" as opposed to the anti-war protester overheard yelling, "We'll take the *bleeping* streets later," whose conviction was overturned by the Supreme Court.[xxxiii]

True threats are similar. Is the message a threat? One example is cross-burning, found to be "intimidation in the constitutionally proscribable sense of the word… [A] true threat is where a speaker directs a threat to a person or group with the intent of placing the victim in fear of bodily harm or death."[xxxiv1]

Fighting words are Assault in South Carolina. These are directed face-to-face to provoke violence. The rather quaint example is calling someone an ugly name and then "clucking like a chicken."[xxxv] A more modern example might be two opposing protesters shouting personal threats of physical violence to one another. This does not include loud arguing, or political or hate messages such as flag burning,[xxxvi] or displaying a swastika near the JCC.[xxxvii]

Disorderly Conduct merits its own warning. There is no disorderly conduct exception to the First Amendment, but it is the most commonly brought criminal charge in the free speech context. Cities and

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towns need to tread lightly here. The charge may be appropriate in a public hearing, [xxxviii] and cities can plan for that by ordinance. And, courts have upheld the conviction of a man arrested for shouting obscenities and slurs within hearing of private citizens. [xxxix] These are exceptions. A public obscenity charge might have worked just as well, although even that is suspect in today's coarse society. Disorderly conduct is a crime in South Carolina[xl] when one conducts himself in a "disorderly or boisterous manner" or uses "obscene or profane language on any highway or public place or gathering, or in hearing distance of any schoolhouse." City officials reading this article who have attended a high school football game on any Friday night in the last twenty years have heard arguably half the attendees violate the state disorderly conduct law. Police are urged to exercise restraint when no other criminal offense is apparent in considering whether there is probable cause to arrest an American for something he said.

Conclusion

If local government prepares, plans, and trains, perhaps we can avoid another Charlottesville.

Elise F. Crosby
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[SIDEBAR]

South Carolina Criminal Statutes potentially applicable in a riot or protest:

Assault and Battery by Mob (two or more persons). S. C. Code 16-3-210

Sending or accepting a challenge to fight, with a deadly weapon. S. C. Code 16-3-410

Assault and Battery 16-3-300

Resisting arrest with a deadly weapon. 16-3-625

Conspiracy against civil rights. 16-5-10

Instigating, aiding or participating in a riot (three or more) (common law) 16-5-120 & 16-5-130

Wearing a mask prohibited (16 and older) 16-7-110

Resisting arrest 16-9-320

Aiding escape from custody of officers 16-9-420

Malicious injury to personal property 16-11-510

Trespass upon real property 16-11-520

Entry upon lands after notice 16-11-600

Entering premises after warning or refusing to leave 16-11-620

Littering 16-11-700

Illegal graffiti vandalism 16-11-770

Public disorderly conduct 16-17-530

Assault or intimidation on account of political opinion or exercise of civil rights 16-17-560

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[i] *The Washington Post* August 12, 2017

[ii] *The Daily Progress* August 23, 2017

[iii] *Las Vegas Review-Journal* August 22, 2017

[iv] *Breitbart.com* August 26, 2017

[v] S.C. Const. Art. I, Section 2

[vi] Leahy, Michael Patrick. "*The Charlottesville Brawls Escalated When Police Forcibly Ended the Court-Approved Unite the Right Rally*", Breitbart.com (August 16, 2017)

[vii] *Id*. citing ProPublica

[viii] *Boos v. Barry*, 485 U.S. 312, 318 (1988)

[ix] *Elrod v. Burns*, 427 U.S. 347 (1976); *City of Darlington v. Stanley*, 239 S.C. 139 (1961)

[x] *State v. Brown*, 240 S.C. 357 (1962)

[xi] *Charleston Joint Venture v. McPherson* 308 S. C. 145 (1992)

[xii] *City of Ladue v. Gilleo*, 512 U. S. 43 (1994)

[xiii] *Hague v. CIO*, 307 U. S. 496 (1939)

[xiv] *Reed v. Town of Gilbert*, 576 U.S.__ (2015)

[xv] *Boos* at 322

[xvi] *Frisby v. Schultz*, 487 U.S. 474 (1988)

[xvii] *Cox v. State of New Hampshire*, 312 U.S. 569 (1941)

[xviii] *U. S. v. Grace*, 461 U.S. 171 (1983).

[xix] *Ward v. Rock Against Racism*, 491 U. S. 781 (1989)

[xx] *Schenck v. Pro Choice Network*, 519 U. S. 357 (1989)

[xxi] *City of Darlington v. Stanley*, 239 S.C. 139 (1961)

[xxii] *Thomas v. Chicago Park District*, 534 U. S. 316 (2002)

[xxiii] *Murdock v. Commonwealth of Pa.*, 319 U.S. 105 (1943); *ACLU v. White*, 692 F. Supp. 2d 986 (N.D. Ill. 2010).

[xxiv] *Forsyth Co. v. Nationalist Movement*, 505 U.S. 123 (1992)

[xxv] *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) Cf. *Thomas v. Chicago Park Dist.*, 227 F.3d 921 (7th Cir. 2000)

[xxvi] *Terminiello v. City of Chicago*, 337 U.S. 1 (1949)

[xxvii] *Gregory v. City of Chicago*, 394 U.S. 111 (1969)

[xxviii] *Rock Against Racism*, supra.

[xxix] Sec. 19-27(c)(8), Code of Ordinances, City of Myrtle Beach

[xxx] *United States v. Grace*, 461 U.S. 171 (1983)

[xxxi] *Frisby,* supra.
[xxxii] *Matal v. Tam*, October 2017, No. 15–1293. Decided June 19, 2017. ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate.")
[xxxiii] *Hess v. Indiana*, 414 U.S. 105 (1973)
[xxxiv] *Virginia v. Black***,** 538 U.S. 343 (2003)
[xxxv] *Cohen v. California*, 403 U.S. 15, 20 (1971)
[xxxvi] *Texas v. Johnson*, 491 U.S. 397, 409 (1989)
[xxxvii] *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978)
[xxxviii] *United States v.Woddard*, 376 F.2d 136 (7th Cir. 1967)
[xxxix] *City of Columbia v. Brown*, 450 S.E.2d 117 (Ct. App. 1994)
[xl] S. C. Code §16-17-530