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United States District Court, N.D. Illinois.

ALLIANCE TO END REPRESSION, et al.,
Plaintiffs,
v.
CITY OF CHICAGO, et al., Defendants.

No. 74 C 3268. | May 8, 2000.

Opinion

MEMORANDUM OPINION AND ORDER

GOTTSCHALL, District J.

BACKGROUND

***1** Before the court are plaintiffs' objections to a Report and Recommendation (R & R) issued by Magistrate Judge Bobrick on October 27, 1999. Plaintiffs—CounterMedia, Active Resistance Organizing Committee, Autonomous Zone, and the *Alliance* named plaintiffs—filed an enforcement petition under a consent decree entered into nearly twenty years ago by the City of Chicago, the ACLU, and the *Alliance* plaintiffs. The consent decree stems from two prior class action suits in which a number of organizations claimed that the City and its agents violated their First Amendment rights through various investigative practices. The consent decree provides extensive regulations intended to govern the City's investigation of First Amendment conduct by organizations and individuals in Chicago. It also prohibits harassment of, disruption of, or interference with persons because of their First Amendment conduct.

In the enforcement petition, plaintiffs claim that the City, through the Chicago Police Department, committed various violations of the consent decree during and around the time of the Democratic National Convention (DNC) in Chicago in August 1996. Plaintiffs were involved in various political demonstrations, workshops, and rallies around the time of the DNC. The Autonomous Zone is a collective, community activist center located in Chicago. CounterMedia is a coalition of media groups, political organizations and individuals which provided coverage of the DNC. Active Resistance Organizing Committee is a coalition of activists and organizations which organized the Active Resistance CounterConvention. The CounterConvention took place in Chicago in August 1996, partially overlapping with the DNC. Approximately 700 participants attended. The CounterConvention's two principal locations—the "Ballroom" and the "Spice Factory"—were both located within one mile of the United Center, where the DNC took place.

Plaintiffs' allegations defy easy summarization, but they broadly outline a campaign of harassment by the police against plaintiffs and other protestors during the Democratic National Convention. They allege that police spied on the CounterConvention, monitored CounterMedia radio communications, and followed, questioned, and generally harassed CounterConvention participants and CounterMedia journalists. Plaintiffs also allege that police unlawfully arrested and physically assaulted protestors and journalists during the convention, interrogated them about their First Amendment activities, unlawfully searched and ransacked their vehicles, and unjustifiably seized, damaged and destroyed their cameras, film, and communication radios. The CounterConvention sites were allegedly subject to unlawful police raids.

The Magistrate Judge recommends that the court grant summary judgment on behalf of the City. Plaintiffs have filed objections to the Magistrate Judge's R & R. The court's review of the R & R is *de novo. See* FED. R. CIV. P. 72(b). The court accepts and rejects the R & R to the extent and for the reasons stated below.

ANALYSIS

***2** Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in that party's favor. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

Standard of Proof

In granting summary judgment to defendants, the Magistrate Judge applied the "clear and convincing" standard of proof to plaintiffs' claims, ruling that "[t]o

gain any of the relief they seek, plaintiffs must prove the City violated the decree; this they must do by clear and convincing evidence." (R & R at 17) Plaintiffs contend that this was the wrong standard of proof because "[t]he standard of proof in enforcement proceedings for relief other than contempt is 'a preponderance of all the evidence'... while the standard of proof in contempt proceedings is the higher standard of 'clear and convincing evidence." ' (Pets.' Objections at 5)

The Seventh Circuit appears to have resolved this issue. "[I]t is settled that a party asserting a violation of a consent decree has the burden of proving the violation by clear and convincing evidence." *Bartsh v. Northwest Airlines, Inc.,* 831 F.2d 1297, 1303 n. 3 (7th Cir.1987) (citing *Shakman v. Democratic Organization of Cook County,* 533 F.2d 344, 351 (7th Cir.), *cert. denied,* 429 U.S. 858 (1976)); *see also South Suburban Housing Ctr. v. Berry,* 186 F.3d 851, 853 (7th Cir.1999) (recognizing "clear and convincing" standard in determining violation of consent decree). Nevertheless, the court will address plaintiffs' arguments in support of their proposition to the contrary.

Under the terms of the consent decree, the court retains jurisdiction to allow the parties to apply for "further orders and directions as may be necessary or appropriate for the construction or carrying out of this Order, for the enforcement of compliance with the provisions contained herein, and for the punishment of the violation of any such provisions." (Consent Decree § II(A)(1)) Unfortunately—or perhaps by design—the decree does not set forth what standard of proof should be applicable to such subsequent actions.

Plaintiffs insist that "the type of relief sought for a violation of a consent decree does dictate the evidentiary standard." (Pets.' Objections at 5) Presumably, plaintiffs would have the court apply the "clear and convincing" standard only to their request for a finding of contempt, and apply the "preponderance of the evidence" standard to their requests for damages and injunctive relief. If the court finds that plaintiffs have failed to meet the "clear and convincing" standard as to any alleged violation, plaintiffs ask that the court dismiss the contempt charge as to that violation and allow "a trial seeking relief other than contempt." (*Id.* at 6)

***3** Plaintiffs' distinction between a finding of contempt and all other remedies sought misconstrues the nature of civil contempt, which is not merely a remedy, but an action by which other remedies are possible. The remedies available in a civil contempt proceeding go beyond the finding of civil contempt itself. A finding of contempt may entail injunctive relief to bring about compliance with the previous order, as well as compensatory damages:

> Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes; to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained.... Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.

United States v. United Mine Workers, 330 U.S. 258, 303–04 (1947) (citations omitted); *see also Jones v. Lincoln Elec. Co.,* 188 F.3d 709, 738 (7th Cir.1999) ("Civil contempt proceedings are coercive and remedial, but not punitive, in nature and sanctions for civil contempt are designed to compel the contemnor into compliance with an existing court order or to compensate the complainant for losses sustained as a result of the contumacy."), *cert. denied,* No. 99–1336, 2000 WL 381492 (U.S. Apr. 17, 2000); *Commodity Futures Trading Comm'n v. Premex, Inc.,* 655 F.2d 779, 785 (7th Cir.1981) ("The purpose of a civil contempt proceeding ... is remedial, with its purpose being either enforcement of a prior court order or compensation for losses or damages sustained as a result of noncompliance with the provisions of the order at issue.").

Plaintiffs urge their view of the standard of proof based primarily on three cases. First, they rely on *United States v. Board of Educ. of Chicago,* 567 F.Supp. 272 (N.D.Ill.), *aff'd in part and rev'd in part on other grounds,* 717 F.2d 378 (7th Cir.1983), in which the court applied a "preponderance of the evidence" standard in making findings of fact regarding the federal government's compliance with a desegregation plan agreed to by the Chicago school board. *Id.* at 273. The court found that, while the school board had "made every good faith effort to find and provide every available form of financial resources adequate to pay the cost of full implementation of the Plan," *id.* at 274, the federal government "failed to use its best efforts to find and provide all available financial resources adequate for full implementation of the Plan." *Id.* at 280.

The *Board of Education* court's inquiry was fundamentally different from the one presented by plaintiffs' enforcement petition. The *Board of Education* court described the action as a "proceeding to enforce compliance" with the consent decree: "[s]pecifically it is to determine the nature and extent of the United States'

obligations undertaken by the inclusion" of a particular provision in the consent decree. *Id.* at 274. The court interpreted the provision at issue, found that the federal government's conduct had not comported with that provision as interpreted, and ordered certain remedies to ensure future compliance with the provision as interpreted. Indeed, the Seventh Circuit held that the remedies ordered by the district court were premature because the federal government was given no opportunity to comply with its newly interpreted obligations under the consent decree. *Board of Education,* 717 F.2d at 385.

***4** Here, the focus of plaintiffs' enforcement petition is primarily backward-looking: awarding compensatory damages, declaring that past conduct violated the decree, enjoining certain behavior based on past violations, and requiring that certain actions be taken because of the past violations. (*See* Petition at 9) The majority of remedies sought do not require the interpretation of any particular provision of the consent decree, but rather the determination as to whether the evidence submitted by plaintiffs constitutes a violation of the decree, as already understood and interpreted.

More fundamentally, the *Board of Education* court never substantively addressed the standard of proof issue. The court merely mentioned in passing that its factual findings were made by a preponderance of the evidence. 567 F.Supp. at 273. There is no indication that the parties even raised the "clear and convincing" standard as potentially applicable. Under these circumstances, the *Board of Education* court's passing reference is an insufficient basis for disregarding the Seventh Circuit's express language to the contrary.

Plaintiffs also seek support in the federal government's antitrust case against Microsoft. According to plaintiffs, the *Microsoft* court "is applying the 'preponderance of the evidence' standard to all of the United State[s'] requested remedies other than contempt." (Pets.' Reply at 5) Specifically, plaintiffs look to *United States v. Microsoft Corp.,* 147 F.3d 935 (D.C.Cir.1998), in which the federal government brought a civil contempt proceeding against Microsoft alleging that the company had violated the parties' previous consent decree. The district court found no contempt, but nevertheless granted a preliminary injunction forbidding the disputed practice. *See id.* at 940. On appeal, Microsoft argued that, after finding no contempt, the district court should have dismissed the government's petition. The appellate court disagreed, observing that the government's "prayer for relief sought not only pure contempt remedies (such as the attention-grabbing request for $1,000,000 a day in damages), but also an order directing Microsoft to cease and desist" from the disputed practice. *Id.* at 941. "This was plainly a request for clarification of the consent decree," which "may properly take the form of an injunction." *Id.*

To the extent plaintiffs rely on the *Microsoft* court's reasoning to urge that a request for clarification of a consent decree not be subject to the "clear and convincing" standard, this court readily agrees. However, plaintiffs' broader proposition—that clear and convincing evidence is required to support a finding of civil contempt, but other forms of relief require only a preponderance of the evidence—stretches the *Microsoft* language beyond the bounds of reasonableness.[1]

Finally, plaintiffs cite language from *Cook v. City of Chicago,* 192 F.3d 693 (7th Cir.1999), for the notion that "a consent decree enforcement proceeding more commonly seeks relief other than contempt," including compensatory relief. (Pets.' Reply at 2) In *Cook,* the Seventh Circuit addressed the availability of a laches defense to a consent decree enforcement proceeding. The court noted that to remedy a consent decree violation, the injured party may seek a contempt judgment or a supplementary order "designed to make the party whole for his or her loss," *id.* at 695, implying that a party could seek compensatory relief for the violation of a court order without bringing a contempt action. Even if the resulting order is compensatory in purpose, the court recognized that the order is still equitable in nature, and therefore subject to the usual equitable defenses, including laches. *Id.*

***5** Significantly, the *Cook* court limited its discussion to the availability of the laches defense, and did not address the proper standard of proof applicable to violations of a consent decree. Further, given that the language cited by plaintiffs is dicta, this court will not construe it as a departure from the "settled" principle "that a party asserting a violation of a consent decree has the burden of proving the violation by clear and convincing evidence." *Bartsh,* 831 F.2d at 1303 n. 3.

Besides departing from Seventh Circuit case law, plaintiffs' suggested approach would render the "clear and convincing" standard largely inapplicable to consent decree litigation. According to plaintiffs, the only remedy for which clear and convincing evidence is required is the contempt judgment itself. Any other remedies may be obtained by a preponderance of the evidence. Of course, if a court can award a plaintiff damages, as well as injunctive and declaratory relief, without finding contempt, then the contempt finding itself is of little discernible value. A plaintiff could circumvent the "clear and convincing" standard—yet be entitled to largely the same spectrum of remedies—merely by unhitching her requested remedies from a contempt finding.

The court declines plaintiffs' invitation to establish a two-tier standard of proof for establishing violations of the City's consent decree. Plaintiffs must prove violations by clear and convincing evidence. For evidence to be

considered clear and convincing, it must "place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are 'highly probable.' " *Colorado v. New Mexico,* 467 U.S. 310, 316 (1984). This is true only if the material "offered instantly tilted the evidentiary scales in the affirmative when weighed against the evidence ... offered in opposition." *Id.* This standard of proof applies to the summary judgment inquiry, as well as to the ultimate trial on the merits. *See Anderson,* 477 U.S. at 254. Of course, if plaintiffs have requested court action that does not require the finding of a violation—*e.g.,* requests for clarification, interpretation, or modification—the "clear and convincing" standard is inapplicable, and likely irrelevant.

Interpretation of Consent Decree

Several provisions of the consent decree are especially relevant to this enforcement action. The decree "prohibits any investigation of First Amendment conduct in the absence of one of the valid governmental purposes specified" in the decree—namely, criminal investigations, dignitary protection investigations, public gathering investigations, and regulatory investigations. (Consent Decree § 1.1.2) The decree "permits, but regulates, investigative activity that is directed toward First Amendment conduct in the course of performing" one of the specified types of investigation. (*Id.* § 1.1.3) Investigative activity is "directed toward First Amendment conduct" when it: includes the collection or handling of information about First Amendment conduct; has as a subject or target a person who is actively and substantially engaged in First Amendment conduct, where the investigative activity relates to that conduct; or interferes with First Amendment conduct. (*Id.* § 1.3)

***6** Investigative activity that meets these criteria only by "incidental reference" is not considered to be directed toward First Amendment activity. "An incidental reference is an occasional or isolated reference to First Amendment conduct where: the conduct is not itself a significant issue in or focus of an investigation; and the reference is relevant to the law enforcement purpose of the investigative activity." (*Id.* § 1.4)

Along with regulating investigations directed toward First Amendment conduct, the consent decree also provides that no agent or agency of the City may "disrupt, interfere with or harass any person because of the person's First Amendment conduct." (*Id.* § 2.2)

Plaintiffs argue that the Magistrate Judge misinterpreted the consent decree by finding that alleged instances of name-calling by police officers are not covered by the decree's provisions. According to the Magistrate Judge, "While the consent decree prohibits police from disrupting, interfering with or harassing any person due to First Amendment activity, we find it a stretch that it would cover epithets, or asking someone why they were wasting their life." (R & R at 20) Plaintiffs insist that "the decree expressly bars any harassment if it is motivated by the target's First Amendment conduct." (Pets.' Objections at 14)

By its terms, section 2.2 of the decree contains no qualifying language excluding verbal harassment from its coverage, or establishing a more stringent standard for claims based on verbal harassment as opposed to other forms of harassment, disruption, or interference. Still, the prohibition is subject to two important qualifiers. First, the disruption, interference, or harassment must be based on the person's First Amendment conduct. Second, for practical reasons, there must be a *de minimis* exception to the provision. Otherwise, an enforcement action could result every time a stray comment by a police officer gave offense to someone engaged in an activity protected by the First Amendment—*e.g.,* parade participants, churchgoers, or protestors. The court will evaluate plaintiffs' evidence with these standards in mind.

Plaintiffs also fault the Magistrate Judge for not clarifying a contested section of the consent decree. The parties disagree as to whether the decree applies to information that is gathered but not recorded, filed, or used by police. The consent decree provides that "Police Department employees and agents may engage in investigative activity directed toward First Amendment conduct ONLY in a criminal, dignitary protection, public gathering or regulatory investigation that is conducted in compliance with Part 3 of this Judgment." (Consent Decree § 3) "Investigative activity," in turn, is defined as "the collection of information by any means, including its acquisition from another agency or from another unit within the same agency, or the recording, filing, retention, indexing or dissemination of information." (*Id.* § 1.2)

***7** The City's apparent interpretation—that information must be recorded, filed, or used to qualify as "investigative activity"—finds no support in the language of the provision. The definition includes the collection of information "by any means," and does not require any subsequent use of the information gathered. This expansive definition is tempered by two criteria, however. To be subject to the requirements set forth in part 3 of the consent decree, the "investigative activity" must be "directed toward First Amendment conduct." Second, the court will read into the provision a *de minimis* exception, so as to prevent the absurd results predicted by the City. (*See* City's Resp. at 11)

The Alleged Violations

Rather than repeat the voluminous factual allegations underlying plaintiffs' enforcement petition, both parties have referred the court to the allegations set forth in the summary judgment briefs submitted to the Magistrate Judge. The court's analysis is based to a large extent on the allegations and arguments presented in those briefs.

The court notes that an enormous number of factual allegations are at issue in this dispute, and that a given allegation can implicate several separate provisions of the consent decree—in their Fourth Amended Petition, plaintiffs have alleged that no less than eleven provisions of the consent decree were violated. The court does not purport to have weighed each and every allegation against each and every provision of the consent decree. The court has attempted to determine only whether summary judgment in favor of the City is warranted—*i.e.,* for each allegation, the court will determine whether there is clear and convincing evidence that at least one provision of the consent decree was violated; the court makes no findings as to whether other provisions may also have been violated.

The court agrees with the Magistrate Judge that plaintiffs' allegations are somewhat of a hodgepodge, with little discernible organizational framework. The most helpful structure for analyzing the various claims was provided by the City in its summary judgment brief. The court's analysis incorporates the City's method of categorization.

Surveillance / Police Presence

Plaintiffs allege that, by keeping the CounterConvention and CounterMedia under surveillance, the Chicago police conducted an investigation "directed toward First Amendment conduct" without complying with the consent decree's requirements. Plaintiffs allege that police officers parked near the CounterConvention's sites, questioned each passing conference participant about the CounterConvention, demanded identification from participants, and threatened to arrest those without identification. A police officer was stationed across from CounterMedia's office, allegedly "watching" CounterMedia's staff members.

This conduct by the police clearly was directed toward First Amendment conduct, and thus is governed by the consent decree. The subject of the investigation was the convention participants' First Amendment conduct—*i.e.,* their public assembly "concerning ideas or beliefs about public or social policy, or political, educational, cultural, economic, philosophical or religious matters." (Consent Decree § 1.5.3) The First Amendment conduct was not merely an "incidental reference" of the investigation; rather, it was at the center of the investigation. The fact that the police may have had legitimate reasons for their investigation—*e.g.,* monitoring potential threats to the dignitaries and delegates attending the nearby DNC—does not render the consent decree inapplicable.

***8** However, plaintiffs have not submitted clear and convincing evidence that the surveillance violated the consent decree. Under the decree's terms, the police are excused from several of the decree's provisions if they are investigating a "public gathering." The decree defines "public gathering," in part, as "any march, demonstration, or rally in a public place, or in a place to which the public has reasonable access, that is reasonably likely to significantly affect traffic or public health or safety." (Consent Decree § 3.4.1.2) A political convention with 700 participants taking place in a warehouse several blocks north of the Democratic National Convention satisfies this definition. CounterConvention participants camped and cooked food outside the building, further justifying police attention. Several vehicles, including a bus and a 28–foot trailer, were parked behind the Ballroom, near adjoining railroad tracks. Around the corner from the Ballroom, participants parked a van and an 18–foot trailer carrying a "mock nuclear waste cask." There is no indication that the building was inaccessible to the public; indeed, at the time of the police "raid" on the Ballroom, the building's back door was standing open. (Exh. 31 to City's Rule 12(m) Statement at 42) The CounterConvention's "security" team appears to have been focused primarily on monitoring police activity, not on keeping members of the public away from the Ballroom.

A public gathering investigation is, to a limited extent, exempted from § 3.1.4's authorization requirement. The police may "communicate overtly with the organizers of the public gathering concerning the number of persons expected to participate and similar information about the time, place, and manner of the gathering that is necessary" to ensure adequate public services to protect public health and safety, and to protect the exercise of constitutional rights. (Consent Decree § 3.4.4.2) To the extent that officers questioned participants about the basic parameters of their gathering, such questions were permissible.

The decree requires that public gathering investigations be "supervised by one police unit designated by the Superintendent," and that "[i]nformation gathered shall be kept in public gathering files separate from all other police investigative files." (Consent Decree § 3.4.3) The City contends that the only information report regarding the CounterConvention was purged—*i.e.,* placed in a sealed envelope and segregated from other police files—pursuant to the consent decree. Plaintiffs dispute this, noting that there is no indication on the face of the document that it was purged. In response, the City has submitted correspondence showing that the bates-number

stamped on the investigative report was included in the range of bates-numbers corresponding with a set of purged documents. Because the court is aware of no requirement in the consent decree that a document's "purged" status be indicated on its face, the court finds that plaintiffs have failed to provide clear and convincing evidence that the City failed to keep the CounterConvention information report separate from all other investigative files.

***9** As for the requirement that public gathering investigations be supervised by one police unit designated by the Superintendent, plaintiffs contend that "[t]he public gathering unit did not supervise this investigation." (Pets.' Opposition to Summ. J. at 20) The court notes that the consent decree does not require that only members of the designated unit gather information on public gatherings, but only that a designated unit supervise such investigations. Plaintiffs have provided no evidence that such supervision was lacking here. On the contrary, the fact that the information report was purged indicates that some supervision was exercised over the investigation. In any event, plaintiffs have failed to come forward with clear and convincing evidence that the City violated the consent decree by questioning CounterConvention participants regarding the nature of their activities.

Plaintiffs also allege that the police demanded identification and threatened to arrest participants without identification. This conduct would go beyond the scope of what is permissible without authorization under the consent decree. Plaintiffs cite to one deposition as support for this allegation. (*See* Pets.' Rule 12(n) Statement ¶ 173) The witness was told by others that police "threatened to take them in and hold them until their identity was ascertained." (Exh. 27 to Pets.' Opposition to Summ. J. at 57) This testimony is inadmissible hearsay. Further, the witness personally was never asked for identification by police. The witness recalls that several "young folks" appeared to be asked for identification by police while walking from one convention site to the other. The witness could not hear what was said, and doesn't "recall seeing exactly what was taking place other than 'Oh, there's some more young folks being hassled by the police officers." ' (*Id.* at 60) This does not constitute clear and convincing evidence that the police violated the consent decree.

Plaintiffs also allege that "[p]olice officers with a chair were stationed on a continuing basis across the street from where the CounterMedia staff parked their cars, watching the staff." (*See* Pets.' Rule 12(n) Statement ¶ 174) The witness's testimony on which this allegation is based does not indicate that the officer was there because of CounterMedia, much less because of CounterMedia's First Amendment conduct. He testified that a uniformed officer was "hanging out" on a street corner across from the office, was there "pretty much" whenever the witness was at the office, and seemed to be "watching us." (Exh. 28 to City's Rule 12(m) Statement at 56–57) The fact that a uniformed police officer was stationed on a street corner near the DNC does not constitute clear and convincing evidence of a consent decree violation.

Festival of Life

The Festival of Life was a multi-day event at Grant Park during the week of the DNC. The Festival included a number of marches and rallies. Plaintiffs allege that police quashed a Festival of Life peace march on August 29, 1996 by seizing all of the signs, banners, and flyers, and arresting the chief organizer, the assistant organizer and the sound technicians shortly before the march was to begin. The arrests stemmed from mob action that allegedly occurred at an August 27 march. Plaintiffs do not contend that the arrests themselves violated the consent decree, but rather that the timing of the arrests violated the decree. They insist that the suspects could have been arrested after the march or during the two days prior to the march.

***10** Plaintiffs allege that the Magistrate Judge committed legal error in rejecting their claim regarding the Festival of Life arrests. The Magistrate Judge found that the timing of the arrests did not violate the consent decree, and noted that there is no constitutional right to be arrested as soon as probable cause exists. Plaintiffs contend that the absence of a constitutional right is immaterial because they have a right under the consent decree "not to be arrested at a time calculated to stop First Amendment activity ." (Pets.' Objections at 14) Under plaintiffs' approach, if the police have probable cause to arrest someone, they must time the arrest so as not to interfere with First Amendment conduct. This approach would lead to outlandish results here, where police would have been required to allow suspects wanted for mob action to lead a mass protest march. The consent decree provision cited by plaintiffs as support for this proposition forbids the City from disrupting, interfering with, or harassing any person because of the person's First Amendment conduct. (*See* Consent Decree § 2.2) It does not forbid the City from disrupting a person's First Amendment conduct when the City has probable cause to arrest the person for a crime. The court overrules plaintiffs' objection as to the timing of the Festival of Life arrests.

At the time of the arrests, the police impounded a vehicle belonging to one of the arrestees, along with materials—banners, signs, and flyers—that were in or near the vehicle. Plaintiffs argue that police seized these materials in order to stop the march. The City has submitted testimony from the commanding officer who ordered the arrests indicating that "[s]tandard police procedure when persons with a vehicle are arrested is to

secure the vehicle and the items with the vehicle." (Exh. 3 to City's Rule 12(m) Statement ¶ 10)

The testimony on which plaintiffs rely—a declaration from one of the arrestees—alleges only that police "removed all of the peace march materials which we had unloaded, placed them in the vehicle and removed the vehicle, making the materials unavailable for the peace march." (Exh. 19 to Pets.' Opposition to Summ. J.) Plaintiffs do not allege that the police took materials from the possession of march participants, or took materials that were not next to the impounded vehicle. As the City points out, it is not reasonable to expect the police, when arresting a suspect and impounding his vehicle, to leave materials from that vehicle behind and unattended. Because the impoundment of these materials was incident to the legitimate arrests, plaintiffs cannot show that the impoundment was directed at First Amendment conduct. The City is entitled to summary judgment on plaintiffs' claims associated with the Festival of Life.

Festival of the Oppressed

On the afternoon of Thursday, August 29, 1996, Active Resistance organized a march called the Festival of the Oppressed, which ran from Wicker Park, down Milwaukee Avenue, Ashland Avenue, Damen Avenue, and North Avenue on the north side of Chicago. The march involved several hundred people and various vehicles. The Festival of the Oppressed's organizers did not obtain, or even apply for, a parade permit from the City. The police were not informed of the route that the march would take. Nevertheless, the police closed some or all of the traffic lanes on Milwaukee, Ashland, and North Avenues to allow the march to pass. Toward the end of the march, participants blocked the six-way intersection at North, Milwaukee, and Damen Avenues for several minutes, bringing traffic on those streets to a halt.

***11** During the Festival of the Oppressed, police officers forced a van operated by the Shundahai Network to pull over. The van was towing an 18–foot long "mock nuclear waste cask" trailer behind it. Because the van had been rerouted, it was late getting to the parade. As a result, the van drove behind the parade, approximately thirty feet behind a line of police on horseback that was at the end of the parade. (Exh. 16 to City's Rule 12(m) Statement at 66–67) Matteo Ferreira testified that eventually, the van's occupants asked a police officer if they could drive around the line of police and join the parade itself. (*Id.* at 68–69) The police officer said they could drive around the horses, which they did. After several blocks, another police officer told them that they needed to drive behind the police horses and a police van, so they moved back to their previous position. Ferreira recalled the officer telling the van's occupants that because the parade did not have a permit, they could not be in the parade. (*Id.* at 71) Ferreira testified that a police van then pulled up, and an officer told the Shundahai van to pull over. Ferreira pulled the van over to the curb and the police ordered them out of the van. Ferreira remembers seeing someone inside the van lock the door. All of the van's occupants were arrested.

Plaintiffs allege that these actions were taken "without legal justification" (Petition ¶ 24), and rely on the conflicting police orders at the time and confusion in officers' deposition testimony as support. The fact that an officer may have initially allowed the van to join the parade is irrelevant, as is the conflicting testimony regarding who gave the order to pull over the van. Two facts are relevant: first, the Festival of the Oppressed march took place without a permit, as required by municipal law; second, the Shundahai Network van was pulling an 18–foot long trailer with a mock nuclear waste container on it. The fact that police allowed the majority of demonstrators to continue the march without a permit does not mean that they were required to allow this obvious traffic hazard to continue down the unknown and unauthorized route.

Plaintiffs argue that "[w]hat is at issue is the police's actual motivation in stopping the van." (Pets.' Opposition to Summ. J. at 43) Even so, plaintiffs have not provided any clear and convincing evidence that police were motivated to stop the van because of its occupants' First Amendment conduct. Their decision to pull the van and trailer out of the march—regardless of an individual officer's earlier statements to the contrary—is not clear and convincing evidence of a consent decree violation. Further, police were entitled to order the van's occupants to step out and—especially when one of the occupants locked the door in response to the police order—arrest them. Even if the arrests were somehow improper, there is no clear and convincing evidence that they were made because of First Amendment conduct. The rough treatment of the van's occupants and ransacking of the van's interior will be addressed below.

***12** Plaintiffs also allege that Chicago police violated the consent decree at the Festival of the Oppressed march by ordering that anyone with a radio and anyone on a bicycle with a radio be arrested. While police were arresting CounterMedia journalist Lee Wells and seizing his radio, Commander Thomas Folliard ordered that "anybody you see with a radio, he's interfering with the police, uh, take them into custody." (Pets.' Opposition to Summ. J. at 45) The order was subsequently clarified, as Folliard instructed a particular lieutenant that "you see people your way on bicycles with radios, take them into custody." (*Id.*) Plaintiffs rely on a police radio transmission which indicates that "one of those people with the radios" subsequently was arrested. (*Id.* at 46) Robert Boyle testified that he and at least seven other "CounterMedia

people" were at the march with radios, and that no one else at the march had a radio. (Exh. 23 to Pets.' Opposition to Summ. J. at 80–81) Those with radios were being fed information from a police scanner in the CounterMedia van. (*Id.*)

The police were allowing an unauthorized demonstration march to proceed down busy city streets on a weekday afternoon; they were trying to control traffic and provide for the public safety despite not knowing the march's route. Under these circumstances, arresting demonstrators on bicycles who indirectly were monitoring police transmissions with their radios may have been a reasonable measure. In any event, there is no clear and convincing evidence that Commander Folliard ordered the bicyclists' arrest because of their First Amendment conduct. Interfering with police efforts to regulate and monitor an unlawful protest march is not First Amendment conduct. While the bicyclists may in fact simply have been monitoring police radio transmissions for their own curiosity and using the radios to talk to each other about the march, plaintiffs have failed to provide clear and convincing evidence that such conduct was the motivating factor behind Commander Folliard's arrest order.

Police Raids on the Ballroom and Spice Factory

Plaintiffs allege that on August 29, 1996, Chicago police raided the Ballroom—one of two principal locations for the CounterConvention. According to plaintiffs, a group of Chicago police officers, without their name tags, badges or hats, approached the rear of the building on foot. One of the convention participants stood up and yelled, "The police are coming!" One of the officers approached and kicked her, saying "What the hell are you doing?" She replied, "What are you doing?," and he pepper-sprayed her in the face. (Exh. 29 to Pets.' Opposition to Summ. J. at 37–40)

While several officers detained convention participants behind the building, other officers entered the building, where they searched several participants. They allegedly seized one participant's documents, along with a communication radio and cell phone. As they left, officers pepper-sprayed another conference participant for attempting to identify the officers. Both participants who were pepper-sprayed were taken to a hospital for treatment.

***13** The court cannot consider the alleged police raid to be "an incidental reference" to First Amendment conduct. Nor does the court find it a stretch—on this record—to conclude that the raid constitutes harassment because of First Amendment conduct. One witness reported that an officer referred to the documents seized in the raid as "subversive." The focus of the City's defense and the Magistrate Judge's summary judgment order is not whether the raid violated the consent decree, but whether the raid was, in fact, conducted by the Chicago police. To the extent that the City argues that such a raid, even if conducted by the Chicago police, satisfied the requirements of the consent decree, that argument is rejected.

The City admits that Chicago police had a staging area in the vicinity of the Ballroom on the night of August 29, 1996. The purpose was "to deploy individuals not needed for active operations but who were available to respond to any department operation that may arise." (City's Rule 12(n)(3) Statement ¶ 101) The City further admits that "a group of persons wearing what some witnesses called Chicago police uniforms, but with no badges or name tags, approached the rear of the [Ballroom] building" at 8:30 PM on that night. (*Id.* ¶ 104) Rather than dispute that the alleged events took place, the City contends that the perpetrators were not Chicago police. They rely on apparent inconsistencies in the witnesses' description of the perpetrators' physical appearance. The Magistrate Judge relied on these same inconsistencies in granting the City summary judgment on this claim. The City characterized the conflicting testimony as follows:

> Michelle Xenos testified that approximately eight persons holding 'billy clubs,' flashlights, and mace and wearing dark, solid colored uniforms, came to the Ballroom. She did not remember seeing any insignia on them, or any patches.
>
> Miles Mendenhall testified that about five or six persons came to the ballroom. They were wearing police uniforms: dark blue pants, light blue short sleeve shirts, black patent leather shoes, and police equipment belts. He did not see any insignia at all, but did see the holes where insignia could be attached. He did not remember any arm patches, but was not sure they did not have them. They were not wearing hats.
>
> Daniel Whitmore testified that there were about five persons who came. They were wearing what appeared to him to be Chicago police department uniforms of light blue shirts and dark pants. None was wearing a badge or name tag. He did not recall if they were wearing patches. Two of them were wearing bulletproof vests.
>
> Alexander Sakulich testified that he saw eight to twelve persons come to the Ballroom. They wore dark pants, blue shirts with an emblem on both shoulders, and work shoes, like work boots. One or both of the shoulder emblems said "Chicago Police." None were wearing badges or name tags. Two or three were wearing hats without identifying numbers. Two or three were carrying normal "nightsticks," and two or three were carrying what Sakulich described as "Tonfas":

> swing-around sticks with a short, swivelling handle about a quarter of the way up the stick. At one point, one or more of the persons allegedly stated that they did not need a search warrant, they were Chicago police.
>
> ***14** Lynda White testified that six or eight men came into the Ballroom. They were wearing dark blue pants with stripes, blue shirts, and bulletproof vests inside their shirts. None were wearing hats, and none had stars or name tags. One had a cigar, and he may have been wearing a white rather than a blue shirt.

(*Id.*) Another witness to the raid, Lynn Harrington, testified that she looked at the raiders' uniforms "closely at the time, and they looked just like Chicago police uniforms." (Exh. 29 to Pets.' Opposition to Summ. J. at 35)

To the extent that this testimony is inconsistent, it reflects only on the witnesses' credibility. The inconsistencies do not suggest that the event never happened, nor do they preclude the trier of fact from concluding that Chicago police officers were responsible for the raid. Given that some witnesses were inside the Ballroom and some were outside, and that some officers remained outside while others went inside, it is understandable that witnesses do not agree on the number of officers involved. More fundamentally, the court does not find it surprising that, months after the event, witnesses have conflicting recollections about uniforms worn during an event as shocking and traumatic as an unprovoked police raid. The City is not entitled to summary judgment on this claim.

Plaintiffs allege that, immediately after the raid on the Ballroom, Chicago police massed near the other CounterConvention site—the Spice Factory. According to plaintiffs, this caused the site to be evacuated. Elisabeth Alexander testified that, after the raid on the Ballroom, "[t]here was a heavy police presence, several squad cars and vans, a large number of police officers waiting on the corner there outside of the spice factory." (Exh. 21 to Pets.' Opposition to Summ. J. at 31) Stephane Luchini testified that he remembered "seeing large groups of Chicago Police Department within a block—assembled within a block of the Spice Factory as we drove by." (Exh. 30 to Pets.' Opposition to Summ. J. at 53) James Bell testified that by the time he got to the Spice Factory, "everybody had left that scene," but "there was squads like in the dozens of officers all right in that area." (Exh. 22 to Pets.' Opposition to Summ. J. at 69) This testimony does not establish that Chicago police officers raided the Spice Factory, caused it to be evacuated, or violated the consent decree in any way. To the extent that plaintiffs purport to bring a claim based on a "raid" of the Spice Factory, the City is entitled to summary judgment.

Moving Surveillance of Persons by Police

Plaintiffs allege that police followed CounterMedia journalists and CounterConvention participants. Robert Boyle testified that, while driving between two abortion clinics, he was followed by an unmarked police car. Boyle was taking photographs for CounterMedia and engaging in "clinic defense," where Boyle would "physically" prevent anti-abortion protestors from blocking access to abortion clinics. (Exh. 14 to City's Rule 12(m) Statement at 56) Boyle testified that he went to a clinic where an anti-abortion protest was supposed to take place. Police officers subsequently arrived. The anti-abortion protestors did not show up, and Boyle found out that the protestors were at a different abortion clinic. Boyle testified that he got back into his car, started driving toward the other clinic, and "as soon as I pulled away, there was an unmarked police car following us." (*Id.* at 90) Boyle listened on his police scanner and heard the police run the license plate of his car. Boyle managed to get ahead of the unmarked police car in traffic, then pulled over, and the car drove past him. Elisabeth Alexander, who apparently was monitoring police radio transmissions, testified that she heard police run the license plate of the vehicle in which Boyle was traveling. (Exh. 12 to City's Rule 12(m) Statement at 27)

***15** This testimony does not constitute clear and convincing evidence that the consent decree was violated. Based on the evidence, the conclusion could readily be drawn that police arrived at one abortion clinic, found out that the protest would occur at a second clinic, and drove to that second clinic. Boyle, also attempting to get to the second clinic, drove ahead of the police; when Boyle pulled over, the police continued on to the second clinic. The fact that police ran his license plate may have been a sensible precautionary step to determine the likelihood of violence if Boyle and his pro-choice "clinic defense" team physically attempted to prevent the anti-abortion protestors from blocking access to the clinic. Boyle admits that he engaged in "clinic defense" before, and his description of its "physical" aspects goes beyond mere First Amendment conduct. Thus, even assuming that the police followed Boyle, there is no clear and convincing evidence that the "investigation" of him was directed toward First Amendment conduct.

Lee Wells testified that an unmarked car with municipal license plates followed him as he drove people home from the area of Grant Park to the 600 block of West Lake Street. Wells and his companions "assumed we were being followed," so they "just made a few turns, realized we were [being followed], and then proceeded to drop everybody off." (Exh. 28 to City's Rule 12(m) Statement at 50) Wells "believed" the car "to be an undercover City of Chicago vehicle, a Caprice Classic." (*Id.* at 52) The car began following Wells "like three blocks from Michigan Avenue" (*id.* at 53), but stopped following Wells when he dropped off someone who lived in the 600 block of West

Lake. (*Id.* at 54) Wells continued on to the CounterMedia office, but he no longer saw the car following him. This does not constitute clear and convincing evidence that Wells was being followed or investigated, much less that the investigation was directed toward First Amendment conduct.

Lynda White testified that one evening she left the Ballroom to drive to the grocery store. She testified that "[t]here was a marked Chicago police car that was driving behind me at some point after I left the Ballroom." (Exh. 31 to City's Rule 12(m) Statement at 36) When White stopped at the grocery store, the police car parked across the street from where she parked. Two officers entered and stood at the front of the store. On the way back to the Ballroom, White noticed another police car behind her, but she could not tell if it was the same car as before.

Later that night, after the police "raid" at the Ballroom, White drove home. On the way, she was followed by a car that had "the characteristics" of an unmarked police car—"It was a large, late model American car. It had the big search light thing on the side, had that really loud transmission. There were two men in it, Caucasian." (*Id.* at 69) White pulled up in front of a restaurant at the corner of Ogden and Grand, and a marked police car pulled up behind her. White then drove down Ogden, where she saw "a huge police presence." (*Id.* at 71) Near her building—which apparently was on Ogden—a police car was parked in the street. When she pulled into her driveway, two police officers got out of the car and "looked at" her. (*Id.* at 72)

***16** As the City points out—and plaintiffs do not contest—Ogden was one of the major arteries to and from the DNC, and was a prime route for shuttling delegates from downtown hotels to the United Center. Police officers were stationed there on an ongoing basis during the convention. White's testimony is not clear and convincing evidence that White was being followed or investigated, nor that any such investigation was directed toward First Amendment conduct.

Police stopped James Bell after he left a CounterMedia fundraiser at the Ballroom. Bell recounted the event at his deposition:

> They [the police] seemed—the officer seemed really concerned about what was going on I assume because they were in that area or had, you know, seen them earlier in that area, so they were the only car there, and they saw all these people—or probably saw all these people around, and that was their line of questioning was, Why are all these people here? What's going on? And I proceeded to tell them about Active Resistance. And at no time did they ask me for my license or any other documentation. And they—they then asked people—there were some people in the back of the pickup truck, it was a cab-cover pickup truck—had them get out, and then they searched the back of the truck.

(Exh. 13 to City's Rule 12(m) Statement at 27–28)

As discussed above, the consent decree does not preclude the police from making basic and overt inquiries into the nature of a public gathering. Even assuming that the police knew that First Amendment conduct was occurring at the Ballroom—rather than simply a large party—the alleged interrogation of Bell is well within the permissible scope of inquiry.

Based on a CounterConvention security log entry and testimony from Elisabeth Alexander, plaintiffs allege that police followed protestors leaving the Immigrants' Rights March to "see where they were going." (Exh. 12 to City's Rule 12(m) Statement at 46) The City contends that this conduct relates to crowd control, and points to Alexander's subsequent testimony that, at another time, police were "talking about large groups of people they saw walking down the sidewalk from that spice factory area saying, 'Let's see if they're planning on meeting up with that demonstration." ' (*Id.*) The reasonable interpretation of the police communications is that they relate to crowd control. The court does not believe that the consent decree precludes police from monitoring the dispersion of a crowd following a march, including determining whether the crowd is headed to another site. Plaintiffs' insistence that police may not follow "individuals" is beside the point. The evidence refers only to "protestors," not "individual protestors," or even "small groups of protestors." The evidence regarding the overheard police communications is not clear and convincing evidence of a consent decree violation.

Police Monitoring and Jamming of CounterMedia Radio Communications

***17** Plaintiffs allege that the police monitored CounterMedia's internal radio communications. This allegation is based on the testimony of Elisabeth Alexander. (*See* Pets.' Rule 12(n) Statement ¶ 176) As discussed above, while Robert Boyle was driving from one abortion clinic to another, Alexander was monitoring police radio transmissions and communicating with Boyle via CounterMedia radios. She testified that "a couple of times shortly after I radioed to him to go to a certain

location, I would hear police officers dispatched specifically to that location," or "after he would radio to me that he was going to a specific location, I would hear police officers dispatched to that location." (Exh. 12 to City's Rule 12(m) Statement at 27–28) Alexander does not recall what the locations were. This is not clear and convincing evidence that the police were monitoring CounterMedia's radio communications, nor that the investigation was directed toward First Amendment conduct.

Plaintiffs also allege that the police disrupted CounterMedia's internal radio communications. While arresting Lee Wells, one of the CounterMedia journalists, during the Festival of the Oppressed, police seized his radio. One witness recalls that after Wells was arrested and his radio was confiscated, CounterMedia was "getting interference from the radio that was confiscated or that we assumed could only be coming from the radio that was confiscated." (Exh. 22 to Pets.' Opposition to Summ. J. at 56) He further testified that "we were hearing on the radio transmissions like 'Storm Troopers are coming' and 'Beam me up' andstuff like that which we knew couldn't be coming from anybody who was associated with CounterMedia because we had all had nicknames that were Star Wars and they were using Star Trek." (*Id.*)

Elisabeth Alexander testified that after the radio was seized, she picked up "communications from people who were not our crew who were giving false information over the airwaves, people who were holding open the mics over the radios in order to block any transmissions from coming through." (Exh. 12 to City's Rule 12(m) Statement at 40) Howie Samuelsohn, President of "the Earth Network," submitted a declaration in which he indicated that he was at the Chicago Police Department Fourteenth District Police Station on August 29, 1996. While at the station, he "heard male voices yelling 'He's beating me!' and other remarks." (Exh. 16 to Pets.' Opposition to Summ. J.) Later that day, Samuelsohn "heard the same voices yelling the same remarks emitting from the CounterMedia radio channel." (*Id.*)

By interfering with plaintiffs' radio communications, the police were not gathering information or investigating plaintiffs' activities. In order to constitute disruption, interference, or harassment that is barred by the consent decree, the police must have interfered with the radio communications "because of the person's First Amendment conduct." (Consent Decree § 2.2) Even assuming that plaintiffs' allegations are true, there is no evidence—much less clear and convincing evidence—that the disruptions occurred because of plaintiffs' First Amendment conduct. Plaintiffs' contention that the conduct must be "viewed in the context of a pattern and practice of retaliation" by police against plaintiffs does not lead to a different conclusion. (Pets.' Opposition to Summ. J. at 37) There is no indication that the officers allegedly involved in the radio shenanigans had any previous contact with plaintiffs—it could just as well be concluded that they were simply clowning arround, not engaged in retaliation against First Amendment conduct. In any event, there is no clear and convincing evidence to the contrary.

Improper Questioning of Persons Under Arrest

***18** Plaintiffs allege that the police interrogated various CounterMedia journalists and CounterConvention participants while in custody regarding their beliefs and activities. Kristian Williams, a participant in the Festival of the Oppressed march, injured his foot when it was stepped on by a police horse. Members of the Shundahai Network gave him a ride in their van. All of the van's occupants, including Williams, were subsequently arrested and questioned by the police. Williams testified that Chicago police officers asked him:

> How I knew the people in the [Shundahai Network] van, if there were any drugs in the van, if I did drugs, my friends did drugs, if I had been at the criminal justice system demonstration earlier in the week, if I had thrown a bottle at them, why I was demonstrating, if—they asked a lot of very vague sort of general questions like, So why are you doing all of this, and so who organized all this? And they asked if I had only come to Chicago to be in protests, things like that. They asked me if my family knew what I was doing.

(Exh. 33 to City's Rule 12(m) Statement at 78) Williams refused to answer the officers' questions regarding politics or his personal relationships. (*Id.*)

It was proper for the police to ask Williams about his relationship with the van's other occupants. Deciding whether to charge Williams, and deciding which particular charges to bring against him, could depend on his relationship with the other occupants—as a full participant in any unlawful plans or activities, or, as was the case, someone who just happened to be "along for the ride." The drug-related inquiries appear to have been proper, as do the inquiries regarding the earlier incident in which a police officer was struck with a bottle during a demonstration. Because the questions focused on the bottle-throwing incident itself, rather than the underlying demonstration, this was not an investigation directed at First Amendment conduct, and therefore did not require written authorization or the preservation of notes. Further, because Williams' testimony suggests that he provided

only basic information such as his name, address, and occupation, there may have been no information to preserve. The police were also entitled to ask Williams who the organizers of the Festival of the Oppressed were.

Asking Williams why he was demonstrating is more problematic. Such a question targets the heart of First Amendment conduct. The fact that Williams apparently did not respond to this line of questioning is not dispositive—the decree governs the process of information-gathering by the police, not just the substantive information gathered. Under § 3.1.4, the police were required to obtain written authorization before investigating Williams' First Amendment conduct—even if the unauthorized staging of the Festival of the Oppressed gave them a valid factual basis for such investigation. If the trier of fact finds Williams' testimony credible, it could provide clear and convincing evidence that the consent decree was violated.

***19** Julia Moon–Sparrow and Melissa Rohs were in the van with Williams during the Festival of the Oppressed march, and were also arrested. Moon–Sparrow testified that an officer told Rohs (who was in the same room as Moon–Sparrow) that "she was wasting her life, something like that, you know. I mean, like I said, it's not verbatim, something like that. That theme that she was stupid for being involved with people like us, things like that." (Exh. 34 to Pets.' Opposition to Summ. J. at 35) Especially where the seemingly open-ended § 2.2 (barring harassment because of a person's First Amendment conduct) is the decree provision at issue, the court is hesitant to allow claims to proceed on vague and abstract recollections of what might have been said by an unidentified officer. Moon–Sparrow's testimony of what one officer said to Rohs is not clear and convincing evidence that Rohs was harassed because of her First Amendment conduct.

As for Moon–Sparrow, she "was spoken to in a demeaning way about my involvement. And questioned about why I was doing what I was doing and did I know I was wasting my life and things like that." (*Id.* at 36) For the same reasons set forth above, the court does not find this to be clear and convincing evidence that Moon–Sparrow was harassed because of her First Amendment conduct. However, Moon–Sparrow's testimony that she was asked about the reasons for her First Amendment conduct gives rise to a real possibility that the consent decree was violated. At a minimum, the City was required to obtain written authorization before pursuing such lines of inquiry.

CounterMedia journalist Neil Corcoran testified that, after his arrest, officers asked him "a variety of questions concerning who is CounterMedia, what did the name mean, what were we doing." (Exh. 15 to City's Rule 12(m) Statement at 25) However, the only specific question Corcoran recalled is that officers "asked us what CounterMedia means." (*Id.* at 26) He could not even remember the "gist" of the other questions. (*Id.*) This is not clear and convincing evidence that the police harassed Corcoran because of his First Amendment conduct, nor that their questions were directed toward First Amendment conduct. To the extent that an officer's question regarding the meaning of "CounterMedia" can be construed as a violation of the consent decree, the court dismisses it as *de minimis*.

CounterMedia journalist Carla West testified that, after her arrest, officers asked her what she was doing in Chicago, along with other questions "along the same lines, where I was from, what I did there, why I was, you know, covering the event, questions like that." (Exh. 29 to City's Rule 12(m) Statement at 20) After transporting her to another jail, they asked her similar questions—"why I was there and why I was covering the event and what I thought about the event and the police." (*Id.* at 21) This testimony is not clear and convincing evidence that West was harassed because of her First Amendment conduct—indeed, it is not evidence of harassment at all, but could be construed as mere banter by the officers.

***20** As to whether the questions amount to an investigation directed toward First Amendment conduct, the court acknowledges that asking a protestor to explain her protest is qualitatively different than asking a journalist why she is covering a certain event. The former is readily perceived as investigatory; the latter is more sensibly viewed as conversational. However, when that journalist is under arrest, the conversational quality is swallowed up by the custodial circumstances. To engage in such inquiry—even if motivated by officers' mere curiosity—the authorization and preservation requirements of the consent decree must be followed. West's testimony, if found credible, could amount to clear and convincing evidence of a consent decree violation.

Mateo Ferreira was detained after stopping his van and 18–foot "mock nuclear waste cask" trailer along the Vice–President's motorcade route near Grant Park. Plaintiffs suggest that the City improperly interrogated him, but the cited testimony does not support their characterization. Ferreira testified that police detectives "indicated that they were aware that there was people assembling over in that warehouse district that were there to protest the convention." (Exh. 16 to City's Rule 12(m) Statement at 50) Moon–Sparrow testified that FBI agents asked Ferreira various questions about his activities. (Exh. 34 to Pets.' Opposition to Summ. J. at 55) This is not clear and convincing evidence that the City violated the consent decree.

Berating and Threats of Persons Under Arrest

Plaintiffs cite four episodes in which Chicago police "assaulted, threatened and berated CounterMedia and CounterConvention participants." (Petition ¶ 20) First, during the arrests of the occupants of the Shundahai Network van during the Festival of the Oppressed, a police officer taunted Kristian Williams because he had been injured previously. Williams testified that the officer "started kicking my injured foot saying, you know, Be careful of your foot. Watch out for your foot, ha-ha-ha." (Exh. 45 to Pets.' Opposition to Summ. J. at 57) Plaintiffs have not provided clear and convincing evidence that this harassment stemmed from Williams' First Amendment conduct. Moon–Sparrow testified that, when officers ordered everyone out of the van, Williams locked the van's door. (Exh. 23 to City's Rule 12(m) Statement at 21–22) It reasonably could be concluded that the police harassment was in retaliation for Williams locking the door, not for the occupants' participation in the parade. Plaintiffs' characterization of this as a factual dispute does not preclude summary judgment—they must submit clear and convincing evidence of a consent decree violation, which they have not done as to the taunting of Williams.

Moon–Sparrow testified that, during the same episode, she was thrown out of the van onto the ground, then lifted up by her wrists handcuffed behind her, thereby injuring her back. She testified that the officer "who reached into the open window and unlocked the sliding door [that Williams had locked] then picked me up forcefully and threw me to the ground forcefully." (Exh. 34 to Pets.' Opposition to Summ. J. at 22) She was then "straddled and handcuffed, and then lifted up by my wrists, by my wrists only; and then once standing, was pushed forward against the wall, pushed forward across the sidewalk against a wall, and then guarded." (*Id.* at 27) Whether or not the alleged conduct constitutes police brutality, there is no indication that it constitutes a violation of the consent decree. Moon–Sparrow's testimony is not clear and convincing evidence that she was treated roughly because of her First Amendment conduct. Indeed, given that the same officer unlocked the door and threw her onto the pavement, her mistreatment may have resulted from Williams locking the door in violation of the police order to exit the van.

***21** Plaintiffs also allege that Rohs was improperly harassed at the police station. The only testimony offered in support of this allegation comes from Moon–Sparrow. As explained above, the testimony is too vague and abstract to constitute clear and convincing evidence that Rohs was harassed because of First Amendment conduct.

Finally, plaintiffs allege that, while Lee Wells was at the police station, "a police officer threatened to kill the arrested protestors as he had killed other radicals while in the U.S. military in Guatemala and called the arrestees 'pussy-ass faggots." ' (Petition ¶ 20(d)) The cited testimony does not support this allegation. Wells testified that:

> [T]his one police officer was bragging about killing people in Guatemala, that he was in the military in the '70s, and if he thought we were radical and that—you know, what special forces was doing in Guatemala and Honduras in the '70s was radical—I mean, he was bragging about it and basically calling us all pussy-ass faggots and stuff like that.

(Exh. 28 to City's Rule 12(m) Statement at 39) The import of this testimony is that the officer told the protestors that his military experience was more radical than their purportedly radical protests were. While the officer's vulgar behavior ought not be condoned, to the extent such behavior can be construed as harassment based on the protestors' First Amendment conduct, the resulting consent decree violation is *de minimis.*

Breaking of Cameras and Other Equipment

Plaintiffs allege that Chicago police "repeatedly seized, destroyed, damaged and jammed film, cameras, radios and radio-scanners of CounterMedia, CounterConvention and their participants." (Petition ¶ 18) They provide eight supporting examples.

First, while searching a CounterMedia van, police grabbed Stephane Luchini's camera, opened the camera and pulled out film of the police entering and searching the van, thereby destroying the film. James Bell testified that an officer "had opened up the back and was inspecting the camera, and when he had opened the back, obviously he exposed the film that was in that camera." (Exh. 13 to City's Rule 12(m) Statement at 40) Lee Wells testified that he saw an officer "open up a camera and pull the film out of the camera." (Exh. 41 to Pets.' Opposition to Summ. J. at 30) Alexander Sakulich testified that he saw an officer carrying something that looked "like developed film they pulled out of the camera and stretched out so that it was ruined." (Exh. 37 to Pets.' Opposition to Summ. J. at 41)

If this testimony is found credible by the trier of fact, it may constitute clear and convincing evidence that the police destroyed Luchini's film because of his First Amendment conduct—namely, taking photographs of the police entering the van in which he was a passenger. While opening up a camera may be necessary to search for contraband under certain circumstances, it strains credulity that, in order to determine whether the van posed a safety threat, police needed to open up its occupants' cameras and pull out any undeveloped film, thereby destroying it. Because a trier of fact could sensibly conclude that this constituted harassment of a person because of First Amendment conduct, summary judgment is not warranted.[2]

***22** Second, during the same search, police broke Lee Wells' video camera during an initial stop and destroyed it during a second stop by dropping it to the floor. Wells testified that, during the initial stop, "My camera was—I believe it was damaged at that incident. My camera was grabbed and then given back to me after they left the vehicle." (Exh. 28 to City's Rule 12(m) Statement at 14) When police pulled the van over again, the camera was completely broken by officers dropping it on the floor of the van. (*Id.* at 15) There is no indication that the officers dropped the camera intentionally. Unlike the intent inherent in pulling film completely out of a camera, dropping a camera could very well be accidental. Accordingly, Wells' testimony is not clear and convincing evidence that his camera was broken because of his First Amendment conduct.

Third, during the Festival of the Oppressed march, officers seized Wells' 35–millimeter camera. Wells testified that at the police station, an officer, while laughing, opened the camera, thereby exposing and destroying the film inside. (*Id.* at 39) James McGuinness remembers twice seeing an officer "looking through cameras and just opening the back and saying, whoops and laughing and said, film got exposed." (Exh. 32 to Pets.' Opposition to Summ. J. at 49–50) This testimony suggests that the officers' exposure of Wells' film was not accidental or pursuant to a good-faith search for contraband. The officer intentionally destroyed, for no apparent reason, film belonging to a journalist covering a demonstration. If found credible, this testimony qualifies as clear and convincing evidence that Wells was harassed or interfered with because of his First Amendment conduct.

Fourth, during the Festival of the Oppressed march, officers arrested Jeffrey Perlstein and seized his video camera and backpack as he videotaped the police arresting an Active Resistance demonstrator. When he was released from police custody, the police returned his video camera and backpack, but the backpack had been damaged. Further, the videotape that was in the camera at the time of the arrest was not returned, but had been replaced by another videotape that was in Perlstein's backpack. Further, twenty dollars and a videotape about events at the 1996 Republican National Convention were missing from Perlstein's backpack. There is no indication that any of these items were stolen in retaliation for Perlstein's videotaping of the demonstrator's arrest. This is not clear and convincing evidence that the loss of these items constitutes harassment because of Perlstein's First Amendment conduct.

Fifth, police broke a video camera, a still camera, and a CB radio that were in the Shundahai Network van when its occupants were arrested during the Festival of the Oppressed march. Julia Moon–Sparrow testified that she "briefly" watched officers inside the van before she was taken into the police wagon. (Exh. 34 to Pets .' Opposition to Summ. J. at 30) She saw a "[v]ideo camera, papers, T-shirts, things like that" being "tossed out from the sliding door" of the van. (*Id.*) Matteo Ferreira testified that, when he picked up the van from the impounding yard, the interior was ransacked. Their boxes of literature and clothes had been soaked with their drinking water. According to Ferreira, "[i]t appeared that they wanted the film out of the video camera and didn't realize that they had to turn on the power in order to open the door, so they jammed the door open," breaking the camera. (Exh. 27 to Pets.' Opposition to Summ. J. at 108) The police also destroyed the CB radio: "They busted the hands, so the receiver and that was gone and other parts were strewn about the van." (*Id.* at 109)

***23** The scope of this alleged destruction gives the court pause. Unlike a few missing items or a dropped camera, it is impossible to explain away the damage to the van's interior as mere accident or oversight. Further, the seemingly methodical destruction cannot reasonably be viewed as retaliation for Williams' locking of the van door, nor can it be justified as a search incident to the arrests. Under the circumstances of the arrests, the trier of fact could conclude that Moon–Sparrow and Ferreira's testimony is clear and convincing evidence that the police destroyed the cameras and CB radio because of the First Amendment conduct of the van's occupants.

Sixth, police seized a video camera and still camera from CounterMedia journalists Neil Corcoran and Karla West. The cameras contained film of interviews with "suspected government agents spying on a demonstration." (Petition ¶ 18(f)) When police returned the cameras, the film from the still camera and the video cassette from the video camera were missing, and both cameras were broken. While this may indicate that police were negligent, it is not clear and convincing evidence that the film was stolen, or the cameras broken, because of the journalists' First Amendment conduct.

Seventh, during the police raid on the Ballroom, officers seized a communication radio and cell phone. Daniel Whitmore testified that, during the raid, when he picked up the radio to contact other CounterConvention participants about the raid, officers took the radio from him. Robert Mendenhall testified that the police took a walkie-talkie, a cell phone, a boom box, and some papers. The propriety of this conduct turns on the propriety of the raid itself. Given that the court has denied the City's motion for summary judgment as to the raid, plaintiffs can introduce evidence relating to the items seized. The seizure of these items may constitute additional police harassment and interference because of the CounterConvention participants' First Amendment conduct.

Eighth, plaintiffs claim that, while arresting CounterMedia journalist Edmund Nix during a demonstration at an abortion clinic, officers allegedly damaged his video camera, rendering it inoperative. (Petition ¶ 18(h)) Nix testified that:

> [A]fter I said, "I'm with the press," twice I was grabbed by a number of police officers at which time they made sure that the camera got out of my hands one way or another. I was trying to hold onto it, but it eventually I believe was smashed down to the ground or someone grabbed it. I'm not sure. It was quite an interaction, and at that point I didn't resist at all. I just let them grab me and carry me off to the truck.

(Exh. 35 to Pets.' Opposition to Summ. J. at 42) Nix did not get his camera back for "a number of weeks," and when he did, "[i]t was damaged to the point where I had to buy a new battery for it because that was broken, but the camera still functioned although to this day it doesn't really function too well." (*Id.* at 45–46)

***24** There are two flaws in plaintiffs' characterization of this testimony. First, contrary to plaintiffs' allegation, Nix's testimony suggests that his camera was not rendered inoperative. Second, and more importantly, Nix's testimony suggests that his camera was damaged because he resisted handing it over to police, not because police intended to damage it based on Nix's First Amendment conduct. Deputy Chief Ronald Jablon submitted a declaration in which he indicated that Nix was arrested because he refused a police order to move several feet back from anti-abortion protestors at whom he was yelling obscenities. (Exh. 3 to City's Rule 12(m) Statement ¶¶ 5–7) The police were attempting to separate the anti-abortion protestors from the pro-choice protestors in order to avoid a violent confrontation. (*Id.*) Given the circumstances, the damage to Nix's camera is not clear and convincing evidence of a consent decree violation.

Municipal Liability Based on Policy or Custom

The court is puzzled by plaintiffs' reliance on *Monell v. Department of Social Services,* 436 U.S. 658 (1978), for the proposition that the City is liable because its policy or custom caused plaintiffs' injury. The *Monell* Court addressed the circumstances under which a municipality could be held liable under § 1983. *See id.* at 694. Plaintiffs' cause of action arises under the consent decree's jurisdictional provision, not under § 1983. If *Monell* and § 1983's "policy or custom" analysis has any relevance to this enforcement proceeding, the court is unable to discern it. The ultimate resolution of plaintiffs' claims turns on whether the City has violated the consent decree, not on whether plaintiffs may have a separate cause of action under § 1983 case law.

Statute of Limitations

The court finds persuasive the reasoning underlying the Magistrate Judge's rejection of the City's statute of limitations argument. The City has offered no reasonable justification for applying the 180–day statute of limitations governing violations of the *Shakman* decree to this litigation. To the extent that the City objects to the Magistrate Judge's analysis, the objection is overruled.

CONCLUSION

Plaintiffs have submitted clear and convincing evidence that, if found credible by the trier of fact, would establish that the following conduct by the City and its agents violated the consent decree: the police raid on the Ballroom; certain aspects of the police interrogations of Kristian Williams, Julia Moon–Sparrow, and Carla West; the destruction of Stephane Luchini's film during the search of the CounterMedia van; the destruction of Lee Wells' film at the police station; and the ransacking of the Shundahai Network van. The City is entitled to summary judgment on all other allegations set forth in the Fourth Amended *Alliance* Plaintiffs, CounterMedia, Active Resistance Organizing Collective and Autonomous Zone's Petition to Enforce the City of Chicago Consent Decree.

Footnotes

1 Plaintiffs' reliance on the more recent opinions issued regarding Microsoft, *see United States v. Microsoft Corp.,* 87 F.Supp.2d 30 (D.D.C.2000); *United States v. Microsoft Corp.,* 84 F.Supp.2d 9 (D.D.C.1999), is wholly misguided. Judge Jackson's findings of fact and conclusions of law arise from lawsuits filed in 1998 by the Department of Justice and twenty states' Attorneys General. *See United States v. Microsoft Corp.,* Nos. 98–1232, 98–1233, 1998 WL 614485, at *1 (D.D.C. Sep. 14, 1998). These lawsuits alleged violations of federal and state antitrust statutes, not the earlier Microsoft consent decree, which was entered pursuant to a 1994 suit filed by the Department of Justice. *See id.* at *3.

[2] The court rejects plaintiffs' assertion that the underlying searches of the CounterMedia van violated the consent decree. The van had stopped at an intersection during a march, and the driver had removed the keys, preventing the van from moving when police ordered it to do so. The police saw an open gas can in the van, and a rag sticking from the mouth of the van's gas tank. (*See* City's Rule 12(n)(3) Statement ¶¶ 33–34, 118–123) Under these circumstances, there is no clear and convincing evidence that the searches were directed toward First Amendment conduct, rather than toward the potential hazard posed by the van.