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FOCUS ON RELIGION

Religious Speakers' Access to Public Spaces

Damned if You Do, Damned if You Don't: Complying With the Establishment Clause

STATE DOCKET:
The Riding Lawnmower as "Motor Vehicle"

IMLA 2017 AMICUS SERVICE AWARDS:
Recognizing Excellence

INSIDE CANADA:
Recent Cases of Interest

LISTSERV:
Can Disorderly Conduct Ordinances Survive?

CASES:
Evidence, Probable Cause and Qualified Immunity

AMICUS CORNER:
Local Airports and Sanctuary Cities



Religious Speakers' Access to Public Spaces

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The continual tension between order and liberty can be most vividly manifest at the level of local government. The tension is exposed when police officers who are enforcing local ordinances collide with citizens who are engaging in what they understand to be constitutionally protected rights.

How can cities pass ordinances to preserve public order and safety—restricting speech and access to public spaces in the process—without violating constitutionally protected liberties? When officers enforce ordinances, at what point might they go too far and violate a citizen's rights? Courts have provided guidance on the contours of these competing interests. In light of that guidance, this article addresses some of the issues that arise when citizens seek to use public spaces to convey a religious message.

Constitutionally protected rights

In the collision between religious speakers and local police, the rights most often triggered are those protected by the First and Fourth Amendments to the U.S. Constitution. The First Amendment protects several rights that are particularly germane to religious speakers, including free exercise of religion, freedom of speech, and the right of assembly. The amendment's prohibition against establishing religion also plays an important role in circumscribing rights.[1]

The Fourth Amendment protects against unreasonable search and seizure.[2] If read in a vacuum, the relationship between these two amendments might not be obvious, but the connection becomes clear when religious speakers—typically Street preachers[3]—are arrested.

There are a number of situations in which speakers seeking to convey a religious message in a public space have encountered some form of restriction. Sometimes the restriction is as mild as a directive to move along; other times the speaker is detained, arrested, fined, or jailed. Several cases involving Street preachers (some arrested, some not) will be examined below.

Protected freedoms as limited negative rights

The freedoms of speech, assembly, and exercise of religion are fundamental to our republic and have long been held as sacred.[4] The Constitution's guarantee is that these freedoms will be protected against the government.[5] Because the Constitution protects rights to engage in some conduct free from government action, those rights are often referred to as "negative rights" as distinguished from "positive rights" that lay claim to government action.[6]

"[F]reedom of speech is a negative liberty."[7] That is true whether the speech is religious in nature or not.[8] This negative liberty guarantees that citizens can engage in speech, including religious speech, free from governmental prohibitions. But that liberty is not absolute.[9] Consistent with constitutional protections, the government can impose some limits on some categories of speech. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[10] Our freedom of speech does not extend to personal abuse, "threat[s] to public safety, peace, or order[,]" or incitement to violence.[11]

But what about exercising one's religion? That freedom is not absolute, either. The Exercise Clause "embraces two concepts—freedom to believe and freedom to act. The first is absolute but . . . the second cannot be. Conduct remains subject to regulation for the protection of society."[12] Some religions—Christianity is one prominent example—have as a part of their teaching that adherents are to engage in some conduct well beyond the confines of the worship gathering.[13] Thus, the exercise of religion calls not just for worship, but for action—and in some instances that action might be subject to government regulation "for the protection of society."[14] This has the potential for being a "flashpoint."[15]

Constitutionally permissible restrictions on protected freedoms

Free speech and free exercise of religion are not absolute;[16] they are subject to time, place, and manner restrictions for the purpose of protecting the public.[17] "Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."[18] Constitutionally permissible limitations on protected speech are based on the "character of the property at issue[,]"[19] to which we now turn.

Categories of public space

Not all property is a forum, and not all public property is a public forum. For purposes of restricting First Amendment freedoms, public spaces fall into several different categories, and courts have recognized that the distinctions among them are sometimes unclear.[20] Despite possible challenges of identifying the category of the public space in a given case, it is critical to do so because it determines the level of scrutiny that applies to government restrictions on protected liberties.

Traditional Public Forum

The public spaces most likely to survive time, place and manner restrictions are those known as "traditional public fora" such as "streets and parks which have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[21] Sidewalks and easements sometimes substitute for streets as public spaces.[22]

Under governmental police power and the obligation to maintain peace and order, municipalities can restrict the time, place, and manner of speech with ordinances that (a) regulate noise and sound levels,[23] (b) require permits for events such as parades, demonstrations, rallies, or protests,[24] and (c) regulate the paraphernalia that participants can carry.[25]

Restrictions on speech in a traditional public forum are subject to strict scrutiny: "speakers can be excluded . . . only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[26]

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Street preacher in Portland at privately-sponsored, City-permitted events in public square, open to the public: *Gathright v. City of Portland*

In *Gathright v. City of Portland*,[27] Street preacher Edward Gathright had been preaching outdoors to the general public for several years in a variety of public locations, including the Courthouse Square.[28] At times, he would engage in preaching "at privately sponsored, City-permitted events open to the public in those venues."[29] "On at least six occasions, police forced Gathright to leave the open events by threatening him with arrest for trespass."[30] The officers' basis for evicting Gathright from the public square was a Portland ordinance protecting permit holders from having contrary messages expressed at their events.[31]

The Ninth Circuit considered the competing interests of Gathright's right to free speech and the permit holder's right not to be "compelled to communicate messages not of their choosing."[32] In resolving that tension, the Court applied strict scrutiny because the space in question—Pioneer Courthouse Square—was a traditional public forum. The Court held the City's ordinance "allowing permittees unfettered discretion to exclude private citizens on any (or no) basis is not narrowly tailored to the City's legitimate interest in protecting its permittees' right" to be free from compelled communication of a message the permittees find objectionable.[33]

Designated Public Forum

When the government intentionally opens up a nontraditional forum for public discourse, such as opening a city hall gallery for an art exhibit,[34] the space becomes a designated public forum.[35] "Restrictions on expressive activity in designated public fora are subject to the same limitations that govern a traditional public forum, *i.e.*, strict scrutiny."[36]

Excluding Art From the City Hall: *Hopper v. City of Pasco*

In *Hopper v. City of Pasco*,[37] the City opened Pasco City Hall Gallery to an exhibit of art from local artists.[38] Two artists submitted artwork for the exhibit but the city excluded their work on grounds that it was controversial.[39] The district court ruled for the city, "holding that the city hall is a nonpublic forum and that Pasco's decision to exclude their works was reasonable."[40] The lower court applied the more lenient standard of scrutiny based upon its characterization of the space as a nonpublic forum. The Ninth Circuit reversed, holding "that the city opened its halls to expressive activity and thereby created a designated public forum in the art gallery."[41] Strict scrutiny applied, and the city's decision to exclude art based on controversy alone was not justified by any compelling state interest.

Christian film in public senior center: *Church on the Rock v. City of Albuquerque*

In *Church on the Rock v. City of Albuquerque*, the church requested permission to show a Christian film entitled *Jesus* at city-owned Bear Canyon Senior Center, and the city refused on grounds that the film would violate the funding restrictions of the Older Americans Act.[42] The district court held for the city, "assum[ing] without deciding that the Senior Center is a designated limited public forum[,] . . . [and] conclud[ing] that the film constitutes sectarian instruction[,]" which

Continued on page 8



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Religious Speakers' Access Cont'd from page 7

the City can exclude "on the ground that its subject matter is not within the purpose of the Senior Centers. The court also held that the City's restriction is not viewpoint-based because the City does not permit sectarian instruction from *any* religious perspective."[43]

The Tenth Circuit held that Bear Canyon Senior Center is a designated public forum that the city limits in only two ways: first, with an age requirement for participation; and second, that the subject matter of presentations be "topics 'of interest to senior citizens.' The subject matter limitation has been extremely flexible in practice, evidenced by the long list of diverse topics presented in the past."[44] The city argued that its restriction was based on content rather than viewpoint because it excluded *all* religious worship from the centers, but the Supreme Court had previously rejected similar arguments, and the court held that the center was restricting religious viewpoints in favor of non-religious viewpoints.[45]

Because the senior center was a designated public forum and the restriction was viewpoint based, strict scrutiny applied.[46] The court of appeals overruled the city's arguments that permitting religious presentations would constitute an establishment of religion, would violate the Older Americans Act, and would subject "vulnerable" senior citizens to "coercion."[47] The city had not shown a compelling interest to justify "its policy of prohibiting sectarian instruction and religious worship at its Senior Centers[,]" and the court reversed and awarded attorney's fees to the appellants.[48]

Limited Public Forum

Within the designated public forum is a sub-category of limited public forum, which exists when the government intentionally (not by inaction or by permitting limited discourse) opens a nonpublic forum to certain groups or certain topics,[49] such as opening a public school's baseball field fence for paid advertising.[50] "In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible."[51] Although the City of Albuquerque incorrectly argued in *Church on the Rock* that its senior center was a limited public forum, that category is correctly illustrated by the next case, *DiLoreto v. Downey United School District Board of Education*.[52]

Religious message at a high school baseball field:
DiLoreto v. Downey United School District Board of Education

In *DiLoreto*, the school district refused to accept Edward DiLoreto's paid religious message—the text of the Ten Commandments—for posting on the high school's baseball field fence; the refusal was based on concern about violating the Establishment Clause, and "disruption, controversy and expensive litigation that might arise . . . ."[53] After DiLoreto sought an opinion from the California Attorney General, the district closed its fundraising program and removed some 40 signs that had been posted on the baseball field fence.[54]

The undisputed evidence showed the school district had only accepted commercial advertising and had refused ads for "alcohol or taverns" as well as for Planned Parenthood.[55] On DiLoreto's appeal from summary judgment for the district, the Ninth Circuit noted, "The validity of the District's conduct turns on the nature of the baseball field fence as a forum for expression."[56] The record showed that the school district "did not intend to designate the baseball field fence as a public forum for expressive activity[,]"[57] but was using the fence in a proprietary manner as a tool for generating revenue. As a "nonpublic forum opened for a limited purpose," the fence is subject to subject matter restrictions that are reasonable in light of the purpose served by the forum.[58] The court affirmed, holding that the district's rationale for excluding DiLoreto's message was reasonable and did not constitute viewpoint discrimination.[59]

Religious group access to public school facilities:
Lamb's Chapel v. Center Moriches Union Free School District
and *Good News Club v. Milford Central School*

In *Lamb's Chapel v. Center Moriches Union Free School District*, a church had sought to use school facilities for a Christian film series on family values and child-rearing, and the district denied the application on grounds that the films "appear to be church related[.]"[60] The lower courts had characterized the school facilities as a limited public forum, which would require only that the district show that its restrictions were viewpoint neutral and reasonable for the forum's purposes.[61] The district argued that it treated "all religions and all uses for religious purposes" alike by denying their requests to use school property, and both lower courts agreed, upholding the district's exclusion.[62] The Supreme Court, however, reversed and held that the district's exclusion policy discriminated against religious viewpoints in favor of nonreligious viewpoints.[63]

In *Good News Club v. Milford Central School*, the school had a policy of permitting the public use of its facilities for specified purposes.[64] The Good News Club, a Christian organization, sought permission to hold "weekly afterschool meetings in the school cafeteria[,]" which the school denied "on the ground that the proposed use . . . was 'the equivalent of religious worship[,]'" in violation of the school's community use policy.[65] The parties agreed that the school had created and was operating a limited public forum by opening its facilities for public use, so the Supreme Court proceeded on that assumption without having to decide the characterization of the public space.[66] Any exclusion, then, would only have to be reasonable in light of the purpose of the forum and not involve viewpoint discrimination.[67]

Observing a split in the circuits "on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech[,]"[68] the Court applied its earlier opinion in *Lamb's Chapel* and reasoned that "the Club seeks to address a subject otherwise permitted under the [district's policy], the teaching of morals and character, from a religious standpoint."[69] It resolved the circuit split, holding that "the exclusion of the Good News Club's activities, like the exclusion of Lamb's Chapel's films, constitutes unconstitutional viewpoint discrimination."[70]

In contrast to *Lamb's Chapel* and *Good News Club*, some courts have held that schools may, in some circumstances, exclude religious groups from using their facilities.[71] Each case turns upon characterization of the public space (likely as a limited public forum) and the challenged restriction's viewpoint neutrality and its reasonableness in light of the forum's purpose.

Nonpublic Forum

The final category is the nonpublic forum, which includes all other public property. Low level scrutiny applies to restrictions on speech in this category: "All remaining public property is classified as nonpublic fora. The government may limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speaker's viewpoint."[72]

Disturbances and the heckler's veto

The government's police power enables municipalities to pass ordinances that prohibit (and punish) disorderliness and breaches of the peace,[73] because "[t]he right of free speech does not encompass the right to cause disruption[.]"[74] Some ordinances prohibit "[a]ddressing any offensive, derisive, or annoying words to any other person who is lawfully in any street, or other public place[.]"[75] Other prohibitions are against "such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them[.]"[76]

The concern with offending others might suggest that a speaker could be silenced by complaining citizens—the heckler's veto. As a factual matter, this occurs with some frequency.[77] But the law does not permit this; the probable reaction that listeners would have to offensive speech will not supply a content-neutral basis for restricting speech.[78] Police are not constitutionally empowered to silence a "rabble-rousing speaker." "The police must permit the speech and control the crowd; there is no heckler's veto."[79] Even though not permitted by law, the heckler's veto is a very real and ongoing challenge-in-fact for municipalities.[80]

Government restrictions on offensive language can be enforced if the words are directed at an individual, but not if directed at a group.[81] Incitement to violence is not protected;[82] nor are "fighting words" directed at an individual.[83]

The legal distinction between directing inflammatory words at a group rather than at an individual is illustrated in *Bible Believers v. Wayne County*,[84] where Sheriff's deputies had to weigh the free speech rights of Street preachers against public peace and safety.

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Street preacher addressing Muslims at festival in Dearborn:
Bible Believers v. Wayne County,

The City of Dearborn, Michigan, is home to the country's second largest population of Arab Americans, both Christian and Muslim.[85] The Arab International Festival has been held there since 1996, sometimes drawing as many as 300,000 people over three days.[86] "[A] diverse array of religious groups requested permission to set up information booths on the Festival grounds. The Festival also had a history of attracting certain Christian evangelists who preferred to roam free among the crowd and proselytize to the large number of Muslims who were typically in attendance each year."[87] The evangelists' practice of distributing leaflets on the sidewalks at the Festival was interrupted in 2009, when "Dearborn police enforced an anti-leafletting policy promoted by the American Arab Chamber of Commerce . . . and ratified by the City."[88] The Sixth Circuit later held that this anti-leafletting policy was a violation of free speech "because it failed to serve a substantial government interest and it was not narrowly tailored, as is required with respect to any time, place, or manner restriction on protected speech."[89] Wayne County Sheriff's Office (WCSO) then took over primary responsibility for security at the Festival.[90]

At the Festival in 2011, Bible Believers "walk[ed] the public streets and sidewalks, spreading their message to those who passed by."[91] Their message was essentially "that Mohammed was a false prophet . . . and that Muslims would be damned to hell if they failed to repent by rejecting Islam. This message was not well received . . . . The Bible Believers allege that they were assaulted by various members of the crowd and that the WCSO . . . eventually silenced the Bible Believers by kicking them out and requiring them to leave the Festival grounds."[92]

At the Festival in 2012, Bible Believers conveyed their message verbally and in writing on T-shirts, banners, and signs, including the statement, "Islam Is A Religion of Blood and Murder."[93] One of them also "carried a severed pig's head on a spike . . . [to] keep the Muslims at bay . . . ."[94] After one of the Bible Believers told a group of about 30 teenagers that Mohammad was "a pedophile" and "your religion will send you to hell[,]" some in the crowd began "throwing plastic bottles and other debris at the Bible Believers."[95]

Bible Believers continued preaching in this manner, and the crowd continued throwing debris. Bible Believers asked the WCSO to assign two officers to prevent violence from the crowd, but a deputy chief explained that it was the Bible Believers who were creating the problem, and he suggested that they leave. Ultimately, "the Bible Believers were escorted out of the Festival by more than a dozen officers."[96]

The Sixth Circuit Court of Appeals, sitting en banc, distinguished this case from the "fighting words" cases following *Chaplinsky v. New Hampshire*, in which the Supreme Court held that some speech is unprotected because it "inflict[s] injury or tend[s] to incite an immediate breach of the peace."[97] As much as Bible Believers' speech might have provoked a violent crowd response, it did not qualify as "fighting words" because of the Supreme Court's later holding that such words, to be unprotected, have to be directed at an individual, rather than at a crowd.[98] Despite the crowd's reaction, Bible Believers' speech was protected. The Sixth Circuit held that Wayne County, its sheriff's office, its sheriff, and two deputy sheriffs, "violated the Bible Believers' First Amendment rights because there can be no legitimate dispute based on this record that the WCSO effectuated a heckler's veto by cutting off the Bible Believers' protected speech in response to a hostile crowd's reaction[,]" and it ordered that summary judgment be entered for Bible Believers.[99]

Continued on page 10

Religious Speakers' Access Cont'd from page 9

Denying parade permits for fear of violence or disturbance:
Beckerman v. City of Tupelo,
and *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Stuart*

The heckler's veto can even come into play before the hecklers voice their opposition. In *Beckerman v. City of Tupelo*, a city ordinance authorized the chief of police to deny a parade permit "if he finds that 'the conduct of the parade will probably cause injury to persons or property or provoke disorderly conduct or create a disturbance.'" [100] The Fifth Circuit noted that the ordinance lacked a definition of "disorderly conduct," and the definition that was in the criminal statute prohibiting disorderly conduct had "been declared overbroad as applied to certain situations."[101] Without a narrowing construction offered by the city, the court concluded that the ordinance had a "substantial potential for overbroad application" in this instance, and it held that part of the ordinance unconstitutional.[102]

The court further held that, by giving the chief of police the discretion to deny a parade permit, the ordinance constituted "an impermissible prior restraint upon free speech because it is not narrowly drawn to relate to health, safety, and welfare interests, but instead it sanctions the denial of a permit on the basis of the so-called 'hecklers' veto.' In authorizing the denial of a permit because the licensor has determined the activity will provoke disorderly conduct in others, the state treads on thin ice."[103]

Notice the difference between the *Beckerman* case and *Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. Stuart*, in which the Town of Pelion, South Carolina, passed an emergency ordinance prohibiting the Ku Klux Klan from participating in the Christmas parade because of fear of violence. [104] The Fourth Circuit upheld the ordinance, noting that it was not an instance of the heckler's veto: "Under the facts presented in this case, a 'heckler's veto' is not involved, because the real threat was believed to be presented by Klan members rather than by spectators."[105]

In *Beckerman*, denial of a parade permit was unconstitutional as a prior restraint that effectively embraced the heckler's veto. In *CKKKK*, denial of parade participation was constitutional as proper police power because the facts showed that violence was reasonably expected not from hecklers but from the Klan members themselves.

Search and seizure

Fourth Amendment protections against unreasonable search and seizure may also come into play when a citizen seeking access to public spaces violates a city ordinance or state law. Depending on the severity of that violation, this can lead to detention, arrest, fine, or jail. Courts have addressed this conflict on a number of occasions involving Street preachers who are charged with violating an ordinance or state law.[106]

Street preachers have claimed false arrest, arguing that they were silenced because of their message. Where the evidence shows that the speakers had violated an ordinance or a state or federal law—irrespective of the content of the message—then the seizure (and accompanying search) would be constitutional.[107]

Street preachers demonstrating on sidewalks in Houston:
Allen v. Cisneros

In *Allen v. Cisneros*,[108] the court addressed the claims of Street preacher David Allen that his First and Fourth Amendment rights had been violated when he was detained and arrested. Since 2010, Allen had participated in a number of demonstrations in the City of Houston, preaching the gospel and speaking against homosexuality and abortion.[109] He would preach outside Planned Parenthood centers, in front of City Hall, and at other locations around Houston. He regularly would sound a shofar as part of his preaching.[110] This case arose from two of his encounters with Houston police.

On October 31, 2011, Allen was preaching at a bus stop in front of a Planned Parenthood center, accompanied by David Stokes—another Street preacher—and two other individuals. Officer Montelongo and another officer responded to calls about a disturbance. When the police arrived, Stokes began video recording the interactions. Montelongo told Stokes that the signs he was carrying violated the ordinance governing the size of things that could be carried in a demonstration.[111] Stokes argued with Officer Montelongo that his signs complied with the ordinance. The video shows that Stokes threatened to sue Officer Montelongo personally and take all his assets.

Officer Montelongo told Allen and Stokes that they could continue with their demonstration and preaching but could not have the signs unless they made the signs comply with the dimensional requirements of the ordinance. Montelongo also told Allen that he could not possess his shofar at the demonstration because it did not comply with that ordinance. [112] Allen did not surrender the shofar and struggled when Montelongo reached to take it. Montelongo handcuffed Allen and put him in the back of his patrol car, he issued citations to Stokes and Allen for violating the ordinance, and he confiscated the signs and Allen's shofar (and later returned them).[113]

On January 14, 2012, Allen and Stokes were again engaging in street preaching and protesting, this time along the route of the Houston Marathon in downtown Houston, again carrying signs and Allen's shofar. Stokes "exchanged words" with a race official and a police officer on the scene, who "called for assistance because of 'two extremely uncooperative males' that were causing a disruption along the race route."[114]

Sergeant Cisneros arrived at the scene and spoke with the other officer and the race official, and then with Allen and Stokes "and directed them to move back from the edge of the race route."[115] Stokes, however, verbally refused to move, and Sergeant Cisneros escorted him to his patrol car, while Allen video recorded the interaction.[116] Allen followed Cisneros and Stokes toward the patrol car, Cisneros turned and directed him away from the car, and Allen verbally protested.[117] Sergeant Cisneros then placed Allen in the back of the patrol car. Shortly thereafter, Cisneros released both men and returned their belongings.[118] At that point, Allen began walking toward Cisneros's patrol car and video recording Cisneros. When Allen stepped into the street, Cisneros arrested him and issued him "a citation for failure to obey a lawful order of a police officer directing traffic and for violating Houston Ordinance § 28–33 by possessing a staff while participating in a demonstration."[119]

Allen sued the City of Houston,

HPD Chief Charles McClelland, Sergeant A.H. Cisneros, Officer F. Gallegos, and Officer J. Montelongo, claiming that his rights to free speech and free exercise of religion, and his right to be free from unreasonable search and seizure, were violated when officers detained and arrested him on multiple occasions.[120] Allen alleged that he was unconstitutionally seized in retaliation for preaching the Gospel and for video recording his interactions with police. The district court dismissed all of Allen's claims against the City and Chief McClelland, and dismissed some of Allen's claims against Cisneros and Montelongo. But the court denied qualified immunity for Cisneros and Montelongo for detaining Allen during the 2011 sidewalk demonstration and for arresting him during the 2012 protest at the marathon.[121]

After a short overview of the doctrine of qualified immunity and the rights protected by the First and Fourth Amendments, the Fifth Circuit concluded "the genuine disputes identified by the district court are not material and Allen has failed to show that either officer violated his constitutional rights," and Officer Montelongo and Sergeant Cisneros were entitled to qualified immunity.[122]

Liability for civil rights violations

Congress has provided a mechanism in 42 U.S.C. § 1983 for citizens to sue for violations of constitutionally protected rights.[123] The Supreme Court held in *Monell v. Department of Social Services* that Section 1983 lawsuits can be against individuals—typically law enforcement officers—as well as municipalities.[124] A plaintiff suing police officers under Section 1983 can establish a prima facie case by alleging: 1) a violation of a federal constitutional or statutory right; and 2) that the violation was committed by an individual acting under color of state law.[125]

A municipality may be held liable only for constitutional violations resulting from official policy or custom.[126] A municipality cannot be vicariously liable for torts of its employees; unconstitutional conduct must be directly attributable to the municipality through official action.[127] Isolated unconstitutional actions by municipal employees will almost never trigger liability.[128]

The plaintiff's search for a city's or individual officer's pattern of fairly similar violations thus becomes a focus of both discovery and argument. Determining what prior violations are fairly similar and what are not for purposes of identifying a pattern rests with the court.

To establish municipal liability, a plaintiff must show: (1) a policy maker; (2) an official policy; and (3) a violation of constitutional rights whose "moving force" is the policy or custom.[129] To show official policy, there must be a written policy or policy statement announced by the policy maker, or a "persistent widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy."[130] If the suit is based on custom rather than written policy, the plaintiff will also have to plead and show that the policymakers were aware of the custom and were deliberately indifferent to it.[131]

Municipal liability requires deliberate action attributable to the municipality that is the direct cause of the alleged constitutional violation.[132] A municipality cannot be liabile merely for employing a tortfeasor.[133] The standard is a stringent one, and all *Monell* elements must be established or the inquiry collapses into respondeat superior.[134]

A plaintiff claiming failure to train or failure to supervise must establish that the city's training or supervision policy was inadequate, that the city was deliberately indifferent in adopting such policies, and that the inadequate policy caused the constitutional violation.[135] Only where a municipality's failure shows "deliberate indifference" to the rights of its citizens can the shortcoming be considered a policy or custom. "[T]o establish deliberate indifference, a plaintiff must show at least a pattern of violations (fairly similar to what ultimately transpired) so that the failure of the city to respond with different training, better supervision, or punishment reflects a deliberate or conscious choice to endanger constitutional rights."[136]

The plaintiff's search for a city's or individual officer's pattern of fairly similar violations thus becomes a focus of both discovery and argument. Determining which prior violations are fairly similar and which are not for purposes of identifying a pattern rests with the court. Because the contours are imprecise, courts will differ, and some cases will proceed to trial while others, which might bear a superficial resemblance, will be dismissed.

Defenses

Qualified immunity

An officer defending against a Section 1983 claim for violations of constitutionally protected rights can assert qualified immunity, the purpose of which is to protect public servants from "undue interference with their duties and from potentially disabling threats of liability."[137] "Qualified immunity promotes the necessary, effective, and efficient performance of governmental duties by shielding from suit all but the plainly incompetent or those who knowingly violate the law."[138] It protects them not only from eventual liability, but even from having to defend themselves in litigation.[139] Once a defendant invokes qualified immunity, the burden shifts to the plaintiff to rebut it.[140]

Each individual officer's entitlement to qualified immunity turns on the objective reasonableness of his actions in light of legal rules clearly established at the time.[141] Proper application of the reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[142] The reasonableness of an officer's use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight.[143] The reasonableness analysis must consider allowances for the fact that police officers are often forced to make split second decisions about the amount of force that is necessary in situations that are tense, uncertain, and rapidly evolving.[144]

Continued on page 26

Religious Speakers' Access Cont'd from page 11

A two-prong test is used to determine whether an official is entitled to a qualified immunity defense.[145] First, the court must determine if the facts, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right.[146] Second, if a constitutional right has been violated, the court must ask whether the right was clearly established.[147] If the conduct did not violate a constitutional right, there is no need to address the second prong of the qualified immunity analysis.[148]

Missing elements

Municipalities may move for summary judgment on the lack of evidence of one or more of the elements required under *Monell*: (1) a policy maker; (2) an official policy; and (3) a violation of constitutional rights whose "moving force" is the policy or custom.[149] In many instances, municipalities might be able to assert all of the following: the allegations and proffered evidence do not show a constitutional violation; there is no "moving force" nexus between the alleged constitutional violation and the municipal policy; plaintiff has not identified a policy maker; plaintiff has not identified a policy; if alleging custom, the plaintiff has not shown deliberate indifference toward that custom on the part of the policymaker.

Conclusion

As municipalities pass ordinances that restrict speech and police officers enforce those ordinances, officers and officials must maintain a balance between liberty and order that sometimes can be delicate. Municipal attorneys can play an important role in advising the city's policymakers and department heads about the developing contours of those competing interests.

Notes

1. U.S. Const. amend. I.
2. U.S. Const. amend. IV.
3. The term "Street preacher" is used broadly here to refer to Christian evangelists who—using the spoken word, signs, written or graphic materials, or musical performances—convey a religious message outdoors in a variety of public spaces.
4. A number of cases—federal, and from a variety of states, over a long period of time—acknowledge that these rights are sacred. *See, e.g.*, McCollum v. Bd. of Ed, 333 U.S. 203, 246 n. 11 (1948) (Reed, J., dissenting) (quoting Thomas Jefferson: " '. . . the constitutional freedom of religion, the most inalienable and sacred of all human rights, over which the people and authorities of this state, individually and publicly, have ever manifested the most watchful jealousy . . .' 12 Ford, The Works of Thomas Jefferson (Fed. Ed. 1905) 272.").
5. *See*, e.g., McDaniel v. Paty, 435 U.S. 618, 620, 629 (1978) (addressing "the right to the free exercise of religion guaranteed by the First Amendment and made applicable to the States by the Fourteenth Amendment.").
6. Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307, 319 (6th Cir. 1998).
7. Pahls v. Thomas, 718 F.3d 1210, 1240 (10th Cir. 2013).
8. Capitol Square Review & Adv. Bd. v. Pinette, 515 U.S. 753, 753 (1995).
9. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).
10. *Id.*
11. Cantwell v. Connecticut, 310 U.S. 296, 308-10 (1940).
12. *Id.* at 303-04.
13. The reference here to Christianity is because of its prominence in this country, although some other religions have similar expectations for their members.
14. *Cantwell*, 310 U.S. at 303-04.
15. Use of the word "flashpoint" here is a reference to the title of the panel presentation, of which this paper is a part: "Prayer, Prisons, and Public Fora: Flashpoints at the Intersection of Religion and Municipal Practice" at the 2017 IMLA Mid-Year Seminar. This title was suggested by co-panelist Ayesha Khan, who is a partner with Potomac Law Group, PLLC.
16. *Chaplinsky*, 315 U.S. at 571; *Cantwell*, 310 U.S. at 309-10.
17. Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 369 (1997); *Cantwell*, 310 U.S. at 308.
18. Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 799-800 (1985).
19. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).
20. DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 965 n.4 (9th Cir. 1999).
21. *Perry Educ.* Ass'n, 460 U.S. at 45 (internal quotations marks omitted).
22. *See, e.g.*, Netherland v. Eubanks, 302 Fed. Appx. 244, 246 (5th Cir. 2008) (involving Street preacher on grassy public easement between street and restaurant's parking lot).
23. *See, e.g.*, Houston, Tex. Code of Ordinances, Ch. 30 ("Noise and Sound Level Regulation"), Sec. 30-2 (restricting time, volume, and nature of sound); Sec. 30-8 (requiring permit for amplification equipment); Sec. 30-16 (providing defense if part of religious service and of short duration).
24. *See, e.g.*, Houston, Tex. Code of Ordinances, Ch. 25 - SPECIAL EVENTS; Sec. 25-1 (declaring policy of public use of parks, streets, and other city property); Sec. 25-4 (requiring permits for special events).
25. *See, e.g.*, Houston, Tex. Code of Ordinances, Sec. 28-33 ("Carrying clubs, poles, etc., in demonstrations, picket lines, etc."). *See also* Florida's breach of the peace and disorderly conduct statute, West's Fla. Stat. § 877.03, in *Gold v. City of Miami,* 121 F.3d 1442, 1445 (11th Cir. 1997).
26. Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001) (citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 800 (1985)).
27. 439 F.3d 573 (9th Cir. 2006).
28. *Id.* at 575.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 577.
34. *Hopper*, 241 F.3d at 1074.
35. *Id.*
36. *Id.*
37. 241 F.3d 1067 (9th Cir. 2001).
38. *Id.* at 1069-70.
39. *Id.* at 1070 ("The parties agree that the art is not obscene or pornographic. Instead, the case boils down to a matter of taste and perception.")
40. *Id.*
41. *Id.* at 1078.
42. 84 F.3d 1273, 1276-77 (10th Cir. 1996) (citing 42 U.S.C.A. § 3027(a)(14)(A)(iv)").
43. *Id.* at 1277.
44. *Id.* at 1278.
45. *Id.* at 1279 (citing Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 830-31 (1995).
46. *Id.* at 1279-80.
47. *Id.* at 1280 (regarding the vulnerability argument: "This claim is at best tenuous, and at worst insulting to senior citizens.").
48. *Id.* at 1281.

Continued on page 30

Religious Speakers' Access Cont'd from page 28

49. *Hopper*, 241 F.3d at 1078.
50. *DiLoreto*, 196 F.3d at 965.
51. *Hopper*, 241 F.3d at 1074-75.
52. 196 F.3d 958 (9th Cir. 1999).
53. *Id.* at 963.
54. *Id.*
55. *Id.*
56. *Id.* at 964.
57. *Id.* at 966.
58. *Id.* at 967.
59. *Id.* at 970.
60. 508 U.S. 384, 387-89 (1993).
61. *Id.* at 390.
62. *Id.* at 393-94.
63. *Id.*
64. 533 U.S. 98, 102, 104-05 (2001).
65. *Id.* at 103.
66. *Id.* at 102, 106.
67. *Id.* at 106-07.
68. *Id.* at 105-06.
69. *Id.* at 109.
70. *Id.* at 110.
71. *See, e.g.*, Bronx Household of Faith v. Community Sch. Dist. No. 10, 127 F.3d 207, 215 (2d Cir. 1997) (upholding district's refusal to make public middle school gymnasium-auditorium available for church's weekly worship services as reasonable and viewpoint neutral); Bronx Household of Faith v. Bd. of Educ. of City of New York, 650 F.3d 30, 33, 40, 51 (2d Cir. 2011) (same).
72. *DiLoreto*, 196 F.3d at 965.
73. *See, e.g.*, *Netherland,* 302 Fed. Appx. at 245 (involving disturbing the peace ordinance of City of Zachary, Louisiana, Code Ordinance § 58-93.2).
74. Startzell v. City of Philadelphia, Penn., 533 F.3d 183, 198 (3d Cir. 2008).
75. *Id.*
76. WEST'S FLA. STAT. § 877.03, quoted in *Gold,* 121 F.3d at 1445.
77. The heckler's veto is being used in a variety of public spaces. *See, e.g,* Anne Neal, *Colleges Are Paralyzed by the 'Heckler's Veto,'* N.Y. TIMES, May 19, 2014, available at http://www.nytimes.com/roomfordebate/2014/05/19/restraint-of-expression-on-college-campuses/colleges-are-paralyzed-by-the-hecklers-veto (last accessed Mar. 29, 2017).
78. Forsyth County, Georgia v. Nationalist Mvmt., 505 U.S. 123, 134 (1992).
79. Ovadal v. City of Madison, Wisconsin, 416 F.3d 531, 537 (7th Cir. 2005).
80. In addition to the Supreme Court, every circuit court (except the Federal Circuit) and at least a dozen state courts have in some way addressed the issue of the heckler's veto in varying contexts.
81. Bible Believers v. Wayne County, Mich., 805 F.3d 228, 246 (6th Cir. 2015).
82. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
83. *Chaplinsky*, 315 U.S. at 572.
84. 805 F.3d 228 (6th Cir. 2015) (en banc).
85. *Id.* at 234-35 (citing census data).
86. *Id.* at 235.
87. *Id.*
88. *Id.*
89. *Id.* at 235-36.
90. *Id.* at 236.
91. *Id.*
92. *Id.*
93. *Id.* at 238.
94. *Id.* (internal brackets omitted).
95. *Id.* at 238-39.
96. *Id.* at 240-41.
97. *Id.* at 246.
98. *Id.*
99. *Id.* at 242-43, 261-62.
100. 664 F.2d 502, 507 (5th Cir. 1981).
101. *Id.* at 507-08.
102. *Id.* at 509.
103. *Id.*
104. 934 F.2d 318 (Table) at *1-2 (4th Cir. 1991).
105. *Id.*
106. *See, e.g.*, Allen v. Cisneros, 815 F.3d 239, 246 (5th Cir. 2016) (reversing denial of qualified immunity for officers who arrested Street preacher for carrying a shofar in violation of Houston city ordinance restricting items that participants in a demonstration can carry); Redd v. City of Enterprise, 140 F.3d 1378 (11th Cir. 1998) (reversing denial of qualified immunity for officers who arrested traveling ministers for disorderly conduct); Costello v. City of Burlington, 632 F.3d 41, 43 (2d Cir.2011) (affirming dismissal of suit by Street preacher who was issued a written warning for violating city noise control ordinance).
107. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the fourth Amendment, arrest the offender.").
108. 815 F.3d 239 (5th Cir. 2016).
109. 815 F.3d at 241-42. Although the court of appeals' opinion does not specify that Allen was speaking against homosexuality and abortion, those facts are in the record in this case, which was handled on appeal by the author of this article.
110. *Id.* & n. 1 ("A shofar is a trumpet-like instrument made from a ram's horn.").
111. *Id.* at 242 n. 2.
112. *Id.* at 242.
113. *Id.*
114. *Id.* at 242-43.
115. *Id.*
116. *Id.* at 243.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.* at 243-44.
122. *Id.* at 244-47.
123. 42 U.S.C. § 1983.
124. 436 U.S. 658, 690 n. 55 (1978).
125. Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402, 1406 (5th Cir. 1995).
126. Board of County Comm'rs v. Brown, 520 U.S. 397, 403 (1997).
127. *Monell*, 436 U.S. at 690 n. 55.
128. Piotrowski v. City of Houston, 237 F.3d 567, 578 (5th Cir. 2001).
129. *Monell*, 436 U.S. at 693.
130. Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir.), rev'd en banc on other grounds, 739 F.2d 993, 993-94 (1984).
131. Sander-Burns v. City of Plano, 594 F.3d 366, 381 (5th Cir. 2010).
132. *Monell*, 436 U.S. at 391-92.
133. City of Canton, Ohio v. Harris, 489 U.S. 378, 392 (1989).
134. Board of Cnty. Comm'rs of Bryan Cnty., Okla. v. Brown, 520 U.S. 397, 415 (1997).
135. *Sander-Burns*, 594 F.3d at 381.
136. Anderson v. City of Minden, Civil Action No. 07-0905, 2009 WL 1374122 (W.D. La. May 15, 2009).
137. Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982).
138. Tolan v. Cotton, 713 F.3d 299, 304 (5th Cir. 2013), rev'd on other grounds, 134 S. Ct. 1861 (2014); Malley v. Briggs, 475 U.S. 335, 341 (1986).
139. DePree v. Saunders, 588 F.3d 282, 287 (5th Cir. 2009).
140. *Tolan*, 713 F.3d at 304.
141. Pearson v. Callahan, 555 U.S. 223, 243 (2009).
142. Graham v. Connor, 490 U.S. 386, 396 (1989).
143.*Id.*
144. *Id.* at 396-97.
145. Thompson v. Johnson, 348 Fed. Appx. 919, 922 (5th Cir. 2009) (citing Saucier v. Katz, 533 U.S. 194, 201 (2001)).
146. *Id.*
147. *Id.*
148. *Thompson*, 348 Fed. Appx. at 922.
149. *Monell*, 436 U.S. at 693. ML