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Municipal Interpretation of State Law as "Conscious Choice": Municipal Liability in State Law Enforcement

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INTRODUCTION

Carlos Vives sometimes sent press clippings and letters to "people of the Jewish faith with the intent to alarm them about current world events that have been prophesied in the Bible."[1] After sending one such packet in early 2002, Vives was arrested by New York City police officers for violating a state law prohibiting communication with another person by mail "in a manner likely to cause annoyance or alarm."[2] Vives sued the City for damages under 42 U.S.C. § 1983, claiming that the City's enforcement of the statute violated his First and Fourteenth Amendment rights.[3]

The City claimed that it merely was enforcing a state statute,[4] rather than promulgating a policy that would trigger liability under *Monell v. Department of Social Services*.[5] Joining three other circuits, the Second Circuit found in Vives's case that the City's liability depended upon whether state law mandated or merely authorized the City to enforce the particular provision of state law.[6] The

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1. Vives v. City of New York, 524 F.3d 346, 348 (2d Cir. 2008) (quoting Vives v. City of New York, 305 F. Supp. 2d 289, 294 (S.D.N.Y. 2003)).

2. N.Y. PENAL LAW § 240.30 (McKinney 2008); *see Vives*, 524 F.3d at 348-49.

3. *See Vives*, 524 F.3d at 349.

4. *Id.* at 349.

5. 436 U.S. 658 (1978).

6. *Vives*, 524 F.3d at 351, 353; *see* Cooper v. Dillon, 403 F.3d 1208, 1222-23 (11th Cir. 2005); Garner v. Memphis Police Dep't, 8 F.3d 358, 364 (6th Cir. 1993); Evers v. County of Custer, 745 F.2d 1196, 1203 (9th Cir. 1984); *see also* Bethesda Lutheran Homes & Servs., Inc. v. Leean, 154 F.3d 716, 718 (7th Cir. 1998) ("When the municipality is acting under compulsion of state or federal law, it is the policy contained in that state or federal law, rather than anything devised or adopted by the

City could be held liable if it made a "conscious choice" to enforce that particular provision.[7] But if state law required the City to enforce the provision, or if the City had a general policy of enforcing all of the state's statutes,[8] it could not be held liable.[9] In so deciding, the Second Circuit parted ways with three other circuits, which have found municipalities not liable for merely enforcing unconstitutional state law.[10]

This Comment argues that the Second Circuit's approach should extend to cases in which municipalities *interpret* ambiguous state laws when enforcing them. Where a reasonable and constitutional interpretation of a state statute exists, a municipality should be held liable for its "conscious choice" to enforce an unconstitutional interpretation. This approach best comports with the Supreme Court's municipal liability doctrine, the tort principles that underlie § 1983, and states' sovereign authority to direct municipal actions.

I. Supreme Court Municipal Liability Doctrine

When a municipal official enforcing a state law violates a citizen's constitutional rights, the citizen generally can seek monetary relief from one of three sources: the state, the municipality, or the individual official.[11] The Eleventh Amendment, however, precludes citizens from suing a state for damages unless Congress has abrogated the state's sovereign immunity,[12] which Congress has not done for § 1983 claims.[13] And qualified immunity often protects municipal officials from personal liability.[14] As a result, the municipality is often the only entity that may be held liable under § 1983.[15]

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municipality, that is responsible for the injury."). At least one federal court has found a municipality liable even though the municipality's actions were mandated by state law. *See* Davis v. City of Camden, 657 F. Supp. 396, 402 (D.N.J. 1987).

7. *See Vives*, 524 F.3d at 350-51 (citing City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985)).

8. *See, e.g.*, Wong v. City & County of Honolulu, 333 F. Supp. 2d 942, 951 (D. Haw. 2004) (stating that Honolulu could not be held liable because its ordinance "merely reflects a declaration of [general] policy by the City and County to enforce state law").

9. *Vives*, 524 F.3d at 353.

10. *See* Whitesel v. Sengenberger, 222 F.3d 861, 872 (10th Cir. 2000); Bockes v. Fields, 999 F.2d 788, 791 (4th Cir. 1993); Surplus Store & Exch., Inc. v. City of Delphi, 928 F.2d 788, 791 (7th Cir. 1991).

11. *See Vives*, 524 F.3d at 349-50.

12. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); *Ex parte* Young, 209 U.S. 123 (1908).

13. *See* Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989).

14. *See* Owen v. City of Independence, 445 U.S. 622 (1980).

15. *See Vives*, 524 F.3d at 350.

Obtaining recovery against municipalities poses its own challenges. Municipalities are not vicariously liable for their employees' actions. Instead, they are only liable for promulgating "polic[ies] or custom[s]" that cause constitutional violations.[16] As a result, two inquiries govern municipal liability: (1) Did the municipality promulgate a policy? (2) Did that policy cause a constitutional violation?

For the first inquiry, the Court has clarified that a municipal "policy" must be "a course of action consciously chosen from among various alternatives."[17] Additionally, the policy must be made "by the official or officials responsible [under state law] for establishing a final policy with respect to the subject matter in question."[18]

Municipal interpretation of ambiguous state law when enforcing that law often constitutes a "policy" under these two criteria. Regarding the "conscious choice" criterion, when a state law is ambiguous, possible interpretations of that law constitute "various alternatives" between which a municipal official must "consciously choose." The *Vives* court emphasized that "[f]reedom to act is inherent in the concept of 'choice.'"[19] Where a state statute clearly mandates specific municipal action, the "municipality's decision to honor this obligation" should not be characterized as a free choice.[20] But where the state statute's meaning is ambiguous even after state-mandated rules of statutory construction are applied, the municipality may choose freely among possible meanings.

Regarding the "final policymaking authority" criterion, the Court has suggested that local officials may exercise final local policymaking authority over state law enforcement in some states.[21] Several federal courts have found particular local law enforcement officials to have such policymaking authority.[22]

16. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

17. City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985); *see also* Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) (declaring that municipal liability attaches only where "a deliberate choice to follow a course of action is made from among various alternatives").

18. *Pembaur*, 475 U.S. at 483-84.

19. *Vives*, 524 F.3d at 353.

20. *Id.*

21. *See* McMillian v. Monroe, 520 U.S. 781, 795 (1997). *McMillian* determined, however, that Alabama county sheriffs lack local policymaking authority over state law enforcement. *Id.* at 789.

22. *See, e.g.*, Cooper v. Dillon, 403 F.3d 1208, 1223 (11th Cir. 2005); Cortez v. County of Los Angeles, 294 F.3d 1186, 1191-92 (9th Cir. 2002); Turner v. Upton County, 915 F.2d 133, 137 (5th Cir. 1990). Courts sometimes use the "arm of the state" inquiry to establish that a particular official acts on behalf of the state and therefore lacks final policymaking authority on behalf of the municipality. *See, e.g.*, Manders v. Lee, 338 F.3d 1304, 1308 (11th Cir. 2003).

Municipalities are often forced to interpret state laws in order to enforce them.[23] As a result, their authority to interpret state law should be considered final policymaking authority pursuant to their authority to enforce state law.

For the second inquiry, which concerns whether the municipal policy caused a constitutional violation, the Court has emphasized that there must be "a direct causal link" between the municipal policy and the alleged violation in order to establish liability.[24] More specifically, the municipality must "*itself* cause[] the constitutional violation."[25] When a municipality enforces its unconstitutional interpretation of a state statute, its own actions are directly and causally linked to the constitutional violation. In this situation, the municipality's actions meet both the "but-for cause" and "proximate cause" standards for traditional torts: the violation would not have occurred but for the municipality's interpretation and enforcement, and a clear and direct connection exists between the municipality's interpretation and the resulting violation.[26]

II. Tort Principles Underlying § 1983

Many scholars and courts have emphasized the importance of fault in determining municipal liability.[27] While some aspects of municipal liability resemble strict liability[28]—for example, the fact that municipalities cannot claim good faith immunity[29]—a number of fault-based elements still play a role. For example, as discussed above, municipalities are responsible only for "deliberate conduct"[30] that constitutes an official policy because it is "consciously chosen"

23. *See, e.g.*, FM Props. Operating Co. v. City of Austin, 93 F.3d 167 (5th Cir. 1996) (discussing a city's policy interpreting a state land development law); Frazier v. Boomsma, No. CV 07-08040-PHX-NVW, 2007 U.S. Dist. LEXIS 72427, at *25 (D. Ariz. Sept. 27, 2007) (acknowledging that the city attorney might interpret and enforce unconstitutionally a state statute precluding the use of a soldier's likeness for commercial purposes); Boelter v. City of Coon Rapids, 67 F. Supp. 2d 1040 (D. Minn. 1999) (discussing a city's interpretation of a state law requiring that municipal employees continue to receive pay while on military duty).

24. City of Canton v. Harris, 489 U.S. 378, 385 (1989).

25. *Id.*

26. *Cf.* Barbara Rook Snyder, *The Final Authority Analysis: A Unified Approach to Municipal Liability Under Section 1983*, 1986 Wis. L. Rev. 633 (proposing that courts should impose cause-in-fact and proximate causation requirements for § 1983 claims).

27. *See, e.g.*, Mark R. Brown, *The Failure of Fault Under § 1983: Municipal Liability for State Law Enforcement*, 84 Cornell L. Rev. 1503 (1999).

28. *See* Owen v. City of Independence, 445 U.S. 622, 665 (1980) (Powell, J., dissenting); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 58-59 (1998).

29. *See Owen*, 445 U.S. 622, 625.

30. Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

by officials with final policymaking authority.[31] They are not vicariously liable under § 1983 for all actions taken by municipal officials within the scope of their employment, in contrast to the strict liability that most private employers face under state tort law.[32] These features of municipal liability, many of which stem from principles in *Monell*, led the Court to declare, "*Monell* is a case about responsibility."[33]

The fault principles underlying the Court's municipal liability jurisprudence reveal a particular concern about deterrence, which is evidenced also by statements made in the Court's opinions.[34] Upon application, these fault principles track the municipality's degree of control over its unconstitutional actions: Municipalities exercise far greater institutional control over deliberate and consciously chosen conduct by policymaking officials than, for example, over the entire scope of conduct committed by all municipal officials. The focus on control stems from the goal of deterrence: Liability cannot deter an entity from actions that it cannot control.[35]

Where states mandate municipal enforcement of clear laws, municipalities have little to no control over their "decision" to enforce those laws. Individual municipal officials may physically control their actions. The municipality *as an entity* lacks institutional control, however, because the state is the source of the municipality's institutional authority, and the municipality has no control over its actions other than that permitted to it by the state.[36] By mandating that a municipality enforce a clear law, the state denies the municipality the power to decline enforcement.

In contrast, where the state requires municipal enforcement but the law is unclear, the state implicitly has permitted the municipality to exercise some control in interpreting the law for enforcement purposes. Because a municipality in such circumstances has the authority and ability to interpret the law, the municipality retains the capacity to avoid an interpretation that would produce unconstitutional results. Because it retains control, the municipality may be

31. *See* City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985).

32. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

33. Pembaur v. City of Cincinnati, 475 U.S. 469, 478 (1986).

34. *See, e.g., id.* at 495 ("The primary reason for imposing § 1983 liability on local government units is deterrence . . . ."); *Owen*, 445 U.S. at 651-52.

35. *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 109 (1970).

36. *See* City of Trenton v. New Jersey, 262 U.S. 182, 186-87 (1923) ("In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self government which is beyond the legislative control of the State. A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit."); Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907); Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 653 (1964).

deterred from selecting unconstitutional interpretations by the threat of tort liability.

This control rationale implies that municipalities should be exempt from liability not only when a state law enforced by municipalities is clear on its face, but also when an unconstitutional interpretation of the state law is dictated by state-mandated rules of statutory construction. Where a state has explicitly codified certain interpretive rules,[37] municipalities lack the institutional authority to interpret the statute in a manner contrary to those rules. Under such circumstances, the state effectively mandates municipal enforcement of a clear law, so municipal liability should not apply for the reasons discussed above.[38] But where the meaning of a state statute is ambiguous, even after applying state-mandated rules of statutory construction, the municipality has institutional control to determine when the statute applies, because its decision will not conflict with a clear decision of the state. It is therefore appropriate to hold it accountable under § 1983 for choosing an interpretation that proves contrary to a court's understanding of the Constitution.

III. Respect for Sovereign States

At least one commentator has argued that Eleventh Amendment immunity should extend to municipalities when they enforce state law.[39] According to that view, a municipality enforcing state law acts as an arm of the state and therefore

37. *See, e.g.*, Ky. Rev. Stat. Ann. §§ 446.010-.400 (LexisNexis 2005); Mass. Gen. Laws Ann. ch. 4, § 6 (West 2006).

38. Some scholars argue that the Supremacy Clause provides municipalities with institutional control even to resist mandatory enforcement of clear state statutes. *See, e.g.*, Brown, *supra* note 27, at 1517. But this argument is far from self-evident. The Supremacy Clause does not definitively state *whose interpretation* of the Constitution reigns supreme, particularly when courts have not yet ruled on the constitutionality of a particular statute. By the very act of passing a statute, a state legislature indicates that it considers a statute constitutional. Where the constitutionality of a state statute is unclear, as it often is, the Supremacy Clause does not clearly authorize a municipality to disobey its state's orders based on its own interpretation of the Constitution or predictions about the Supreme Court's view.

The same may not be true, however, when the Supreme Court has already declared the state statute unconstitutional. In such cases, the principle of *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is," 5 U.S. (1 Cranch) 137, 177 (1803), provides municipalities with institutional control to decline to enforce the unconstitutional state statute, since a higher institutional authority has unambiguously overridden the state's institutional control over the municipality's choices.

39. *See* Jessica R. Manley, Comment, *A Common Field of Vision: Municipal Liability for State Law Enforcement and Principles of Federalism in Section 1983 Actions*, 100 Nw. U. L. Rev. 967 (2006).

should be viewed *as the state* for the purposes of sovereign immunity.[40] This logic may be appropriate when the state mandates municipal enforcement of a clear state law,[41] but it does not apply when municipalities exercise their separate policy judgment by interpreting the state law and deciding how to enforce it. Where municipalities have the authority to exercise independent judgment, they should be considered institutionally distinct from the state.

Even when sovereign immunity does not apply, principles of federalism merit limiting municipal liability when the state more closely directs the municipality's actions. First, to hold municipalities liable in such instances would directly flout the state's authority to command municipalities within their jurisdiction. Second, it would undermine the important and productive relationship between states and their municipalities by pressuring municipalities to respond more to predictions about how the Supreme Court would evaluate their actions than to the real and immediate orders they receive from their states.[42] Courts are and should be "extreme[ly] reluctan[t] . . . to intrude in the political relationships between . . . the State and its governmental subdivisions."[43]

However, when the state requires municipal enforcement, but the state law to be enforced is unclear, holding the municipality liable for enforcing its unconstitutional interpretation does not affront the state. Because the state has not taken a clear stance on the law's meaning in such cases, requiring municipalities to select a constitutional interpretation does not undermine state authority. Similarly, the relationship between the municipality and the state is not compromised, because no incentive arises for the municipality to disobey the state. Instead, the municipality is encouraged to comply with both the state's and the Constitution's mandates where the two are not incompatible.

IV. Municipal Interpretation of State Law in Practice

Thus far, this Comment has discussed the theoretical grounding of its proposal. But, in practice, how often do municipalities confront unclear state laws and select unconstitutional interpretations to enforce?

Such municipal decisions often appear in First Amendment cases. For example, *Nobby Lobby, Inc. v. City of Dallas*[44] involved a Texas statute that criminalized possession of items "specially designed, made, or adapted for use in the

40. *See id.*

41. *See* Echols v. Parker, 909 F.2d 795, 801 (5th Cir. 1990) ("[W]hen a state statute directs the actions of an official, as here, the officer, be he state or local, is acting as a state official.").

42. *See* Bethesda Lutheran Homes & Servs., Inc. v. Leean, 154 F.3d 716, 718 (7th Cir. 1998) (implying that holding municipalities liable for complying with state mandates to enforce state law "puts local government at war with state government").

43. City of New York v. State, 655 N.E.2d 649, 654 (N.Y. 1995).

44. 767 F. Supp. 801 (N.D. Tex. 1991).

commission of an offense."[45] The City of Dallas interpreted the statute to require the seizure of video equipment and peep show booths from adult establishments because such equipment, in the City's view, was "specially designed" for, among other things, the commission of obscenity, public lewdness, and indecent exposure offenses.[46] The Northern District of Texas ultimately rejected the City's interpretation (and its enforcement thereof) as both unreasonable and unconstitutional.[47] While *Monell* did not apply because the plaintiff adult establishments sought injunctive relief rather than damages, the Northern District of Texas found that the *Monell* standard nonetheless was satisfied—the City's seizures constituted a policy or custom in violation of the plaintiffs' First Amendment rights to exhibit sexually explicit (but nonobscene) material.[48]

The facts of *Vives* suggest another possible example of municipal enforcement of an unconstitutional interpretation. *Vives* itself did not involve an unconstitutional interpretation of a state statute because the district court had found that the statute was unconstitutionally overbroad.[49] Yet one could imagine a similar statute that would delete the overbroad language of "annoy" and "alarm," leaving only the narrower language of "harass" and "threaten." While such a statute might not be unconstitutional itself,[50] a city might still reasonably interpret it to extend to conduct like that of Carlos Vives, and this interpretation might be found unconstitutional because Vives's mailing constitutes protected speech.

Beyond the First Amendment context, one can conceive of other instances in which a municipality might enforce its unconstitutional interpretation of a state law. For example, a city public housing authority might decide that a state statute requiring the city to protect against "dangerous conditions" on public property[51] necessitates a handgun ban on such property.[52] If the city enforced its interpretation by confiscating firearms owned by public housing residents for self-defense,[53] a court might find that enforcement unconstitutional.[54] As

45. TEX. PENAL CODE ANN. § 16.01 (Vernon 2003).

46. *See* 767 F. Supp. at 814, 818.

47. *See id.* at 818, 821.

48. *See id.* at 810-14, 821.

49. Vives v. City of New York, 305 F. Supp. 2d 289, 301-02 (S.D.N.Y. 2003). *But see Vives*, 405 F.3d 115, 118-19 (2d Cir. 2004) (declaring that the state statute was not clearly unconstitutional).

50. *See Vives*, 305 F. Supp. 2d at 302 n.9 (declining to address whether the statute's prohibition of communications intended to "harass" or "threaten" is unconstitutional).

51. *See, e.g.*, CAL. GOV'T CODE §§ 830-835 (West 1995).

52. *See, e.g.*, S.F., CAL., POLICE CODE art. 9, § 617 (2007).

53. *See* Jesse McKinley, *Challenges to Bans on Handguns Begin*, N.Y. TIMES, June 28, 2008, at A9.

54. *See* District of Columbia v. Heller, 128 S. Ct. 2783 (2008).

another example, a city police chief might instruct officers to apply a state statute prohibiting "unnatural and lascivious"[55] conduct to private sexual acts between unmarried heterosexual partners. A court might find that such enforcement violates the individuals' due process rights.[56] As a third example, a local school board might establish procedures that it deems necessary to maintain an appropriate racial balance in district schools, as required by state law.[57] But the set of procedures it establishes could violate the students' equal protection rights.[58] Under this Comment's proposal, the municipality in each of these examples might be held liable for its unconstitutional interpretation of state law.

Conclusion

There are several important implications of this Comment's proposal to treat municipal interpretation of state law as a form of "conscious choice" giving rise to *Monell* liability.

First, imposing liability when municipalities choose to interpret and enforce a state law in an unconstitutional manner would essentially pressure municipalities to apply the canon of constitutional avoidance in interpreting state law. However, many state constitutions already bind municipalities to enforce the Constitution when executing state laws.[59] Additionally, because my proposal would not impose liability on a municipality when mandatory state statutory interpretation rules dictate the municipality's interpretation,[60] states can avoid pressuring municipalities to apply the canon of constitutional avoidance by codifying that intention explicitly through a state statute.

Second, my proposed structure of liability would leave some victims of constitutional torts uncompensated. But *Monell* accepted this outcome when it decided that municipalities are liable only for their unconstitutional policies or customs.[61] This Comment seeks only to extend the principles of *Monell* and related cases to their logical conclusion: municipalities should not be held liable for merely enforcing clear and mandatory state laws, because doing so involves no "conscious choice" and therefore does not constitute a policy.

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55. *See, e.g.*, Fla. Stat. Ann. § 800.02 (West 2008).

56. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

57. *See, e.g.*, Ohio Rev. Code Ann. § 3313.97(B)(4) (West 2008).

58. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738 (2007).

59. *See, e.g.*, Cal. Const. art. 20, § 3 (requiring every "public officer and employee," including those of "every county, city, . . . [and] district," to take an oath to support the U.S. and California Constitutions).

60. *See supra* text accompanying notes 37-38.

61. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

Finally, this structure of liability would require federal courts to interpret state statutes more frequently. Federal courts would need to determine, first, whether a state statute's meaning is clear and, second, whether state law mandates the municipality's enforcement of that statute. But the expanded role of federal courts in interpretation of state law would support state sovereignty rather than undermine it, because the federal courts' inquiries would avoid holding municipalities liable for obeying states' commands. Additionally, state rules of statutory interpretation and state court precedent constrain federal courts in their reading of state law.

In summary, municipalities should be held liable for selecting and enforcing unconstitutional interpretations of state laws when reasonable constitutional interpretations are available. Municipal liability for unconstitutional interpretation of state law is consistent with Supreme Court municipal liability doctrine, because municipal interpretation is a "conscious choice" that constitutes a policy under *Monell*. Municipal liability for unconstitutional interpretation is consistent with the tort principles underlying § 1983, because municipalities can control their interpretations of state law and thus may be deterred from unconstitutional interpretation by the threat of tort liability. Finally, municipal liability for unconstitutional interpretation is consistent with respect for state sovereignty, because it leaves undisturbed the state's control over its municipalities. Ultimately, imposing municipal § 1983 liability for enforcing unconstitutional interpretations of state laws would best protect individual constitutional rights while preserving the important relationship between states and their municipalities.