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Municipalities Held Strictly Liable Under Section 1983, Owen v. City of Independence, 445 U.S. 622 (1980)

CASE COMMENTS

MUNICIPALITIES HELD STRICTLY LIABLE UNDER SECTION 1983

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

The United States Supreme Court in *Owen v. City of Independence*[1] settled the issue of good faith immunity for municipalities under section 1983 of the Civil Rights Act by ruling that a municipality is strictly liable for prohibitory acts that reflect official policy.

The former police chief of Independence, Missouri, alleged that the city manager discharged him without notice of the reasons and without a hearing in violation of his substantive and procedural due process rights under the fourteenth amendment.[2] The police chief instituted an action under section 1983 of the Civil Rights Act[3] against the city, city manager, and members of the city council in their official capacities. The district court entered judgment for defendants.[4] On remand from the Supreme Court, the Eighth Circuit Court of Appeals held that all defendants, including the city, were entitled to qualified immunity from liability based on the good faith of the city officials involved.[5] On final review, the Supreme Court reversed and *held*: A municipality may not assert the good faith of its officials as a defense to liability

1. Judgment entered for defendants, 421 F. Supp. 1110 (W.D. Mo. 1976), *aff'd in part and rev'd in part*, 560 F.2d 925 (8th Cir. 1977), *vacated and remanded for consideration in light of* Monell v. Department of Social Servs., 438 U.S. 902, *aff'd on rehearing*, 589 F.2d 335 (8th Cir. 1978), *rev'd*, 445 U.S. 622 (1980).

2. "Due process requires a hearing on the discharge of a government employee 'if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination . . . .'" Owen v. City of Independence, 445 U.S. 622, 661 (1980) (Powell, J., dissenting) (quoting Codd v. Velger, 429 U.S. 624, 628 (1977) (per curiam)). The Court first announced this principle in Board of Regents v. Roth, 408 U.S. 564 (1972), decided ten weeks after Owen's discharge. 445 U.S. at 661.

The day prior to petitioner's discharge, the City Council of Independence released a statement to the news media directing the City Manager to "take all direct and appropriate action" against those persons "involved in illegal, wrongful, or gross inefficient activities" brought out in an investigation of the police department. 445 U.S. at 628-29.

3. Enacted as Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

4. 421 F. Supp. at 1126-27.

5. 589 F.2d at 337-38.

under section 1983.[6]

Congress enacted section 1983 of the Civil Rights Act to provide a federal statutory remedy for persons deprived of any "rights, privileges, or immunities secured by the Constitution and laws . . . ."[7] Potential defendants under section 1983 include "every person" responsible for depriving any person of a protected right while acting under color of any "statute, ordinance, regulation, custom, or usage, of any State or Territory . . . ."[8] In short, Congress designed section 1983 as a vehicle to enforce, and to remedy violations of the fourteenth amendment.

The issue of municipal[9] liability under section 1983 has generated considerable controversy since it first arose in *Monroe v. Pape*.[10] The *Monroe* Court completely immunized municipalities from section 1983 liability by holding that the term "person" as incorporated within the statute did not include municipalities.[11] The Court reasoned that Congress in 1871 intended to exclude municipal bodies from the class of persons subject to section 1983.[12] The Civil Rights Commission and

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6. 445 U.S. at 638.

7. *See* note 3 *supra*.

8. *Id.*

9. The term "municipality" refers to any local governmental unit that, under Monroe v. Pape, 365 U.S. 167 (1961), was absolutely immune from section 1983 liability and that, after *Monell*, retains that immunity with respect to section 1983 claims based on respondeat superior.

10. 365 U.S. 167 (1961). The complaint in *Monroe* alleged that thirteen Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. Police then took Mr. Monroe to the police station and detained him on "open" charges for ten hours, without access to an available magistrate and without permission to call his family or attorney. He was eventually released without being charged. *Id.* at 169.

11. *Id.* at 187.

12. In its analysis the Court stressed the congressional debates surrounding the Sherman amendment. This amendment, as originally proposed, would have held a municipal corporation liable for damages to the person or property of its inhabitants by private persons "riotously and tumultuously assembled." Although the proposed Sherman amendment did not amend section 1 of the 1871 Act, it was the only place where municipal liability was expressly raised. Thus Justice Douglas concluded in his opinion for the Court that "[t]he response of the Congress to the proposal to make municipalities liable for certain actions . . . was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."

Comment, Monell v. Department of Social Services: *One Step Forward and a Half Step Back for Municipal Liability Under Section 1983*, 7 HOFSTRA L. REV. 893, 896-97 (1979) (footnotes omitted).

For an analysis of the *Monroe* Court's interpretation of the legislative history see Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 132-36 (1972); Note, *A Municipality Is A "Person" Under 42 U.S.C. § 1983 Where Local Law Has Abolished Sovereign Immunity*, 9 HOUS. L. REV. 587, 592-94 (1972).

scholars criticized *Monroe* for leaving the remedy of section 1983 emasculated.[13] In addition, several courts attempted to limit *Monroe*.[14] The different approaches taken by courts led to the development of a doctrinal muddle.[15]

In *Monell v. Department of Social Services*[16] the Supreme Court

13. Recognizing *Monroe*'s failure to protect constitutional rights, the United States Commission on Civil Rights recommended that Congress reverse *Monroe* by amending section 1983 to explicitly incorporate local governments. UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT: A REPORT ON EQUAL PROTECTION IN THE SOUTH 179 (1965); UNITED STATES COMMISSION ON CIVIL RIGHTS, 1961 COMM. ON CIVIL RIGHTS REPORT: BOOK V 25 (1961). *See generally* Kates & Kouba, *supra* note 12; Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1531 (1977); Comment, *Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection*, 57 CALIF. L. REV. 1142, 1164-69 (1969); Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1506 (1969); Note, *Developing Governmental Liability Under 42 U.S.C. § 1983*, 55 MINN. L. REV. 1201, 1203-22 (1971); 90 HARV. L. REV. 1133, 1191-97 (1977).

14. Some federal courts limited *Monroe* by abrogating immunity under state law. *See, e.g.,* Carter v. Carlson, 447 F.2d 358, 368-69 (D.C. Cir. 1971) (intent of Congress was not to create absolute immunity, but to defer to local rules of immunity), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973). *See generally* Kates & Kouba, *supra* note 12, at 155-61.

Other federal courts construed *Monroe* as barring only damage claims and permitting equitable relief. *See, e.g.,* Garren v. City of Winston-Salem, 439 F.2d 140, 141 (4th Cir. 1971), *vacated*, 405 U.S. 1052 (1972); Harkless v. Sweeny Independent School Dist., 427 F.2d 319, 321-23 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); Dailey v. City of Lawton, 425 F.2d 1037, 1038-39 (10th Cir. 1970); Adams v. City of Park Ridge, 293 F.2d 585, 587 (7th Cir. 1961). *See generally* Note, *Developing Governmental Liability Under 42 U.S.C. § 1983, supra* note 13, at 1210-14. The Supreme Court subsequently rejected these theories. *See* City of Kenosha v. Bruno, 412 U.S. 507, 512-13 (1973) (municipality not a "person" under § 1983 in suit for injunctive relief); Moor v. County of Alameda, 411 U.S. 693, 710 (1973) (county not subject to suit for damages under § 1983 even when state law abrogates immunity). *See also* Aldinger v. Howard, 427 U.S. 1, 17-18 (1976) (reaffirming *Monroe* exclusion of municipalities from scope of § 1983 liability).

15. *See generally* Comment, *supra* note 12, at 895-900. Although *Monroe* held only that municipal corporations and counties are not "persons" under § 1983, some lower federal courts subsequently extended the *Monroe* rationale to bar § 1983 actions against a wide variety of local government bodies. *See, e.g.,* Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977) (school board); Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1159-60 (9th Cir. 1976) (water district); Skehan v. Board of Trustees, 501 F.2d 31, 44 (3d Cir. 1974) (state college), *vacated on other grounds*, 421 U.S. 983 (1975); Dawes v. Philadelphia Gas Comm'n, 421 F. Supp. 806, 818 (E.D. Pa. 1976) (gas commission).

16. 436 U.S. 658 (1978). The *Monell* plaintiffs, female employees of the Department of Social Services and the Board of Education of New York City, instituted a § 1983 action against the department and its commissioner, the board and its chancellor, and the city and its mayor, challenging an official policy of the city as unconstitutional. The policy permitted both the department and the board to compel pregnant employees to take unpaid maternity leaves before such leaves were medically necessary. The district court dismissed the complaint, holding, *inter alia*, that *Monroe v. Pape* precluded recovery against any of the defendants on the basis that *Monroe* held that municipalities were not "persons" under § 1983. The Court of Appeals for the Second

overruled *Monroe* and subsequent decisions,[17] insofar as those cases held that municipalities and other local governmental units were wholly immune from suit under section 1983. Concluding that *Monroe* rested upon an erroneous interpretation of the legislative history of section 1983,[18] the Court held that municipalities are indeed "persons" under section 1983.[19] *Monell* emphasized that municipalities, as "persons," are susceptible to suit only if the unconstitutional action is pursuant to official municipal "policy or custom."[20] In addition, the Court reaffirmed that municipalities cannot be held liable under section 1983 on a *respondeat superior* theory.[21] The *Monell* Court reserved decision on whether local governments, although not entitled to absolute immunity, could invoke some form of qualified immunity.[22] Lower federal courts in post-*Monell* decisions split on the question of extending qualified immunity to local governments under section 1983.[23]

Circuit affirmed. The Supreme Court granted certiorari to address the issue of whether local governmental units are "persons" within the meaning of § 1983. *Id.* at 660-62. For further discussion of *Monell* see Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213 (1979); Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304 (1979); Comment, *Municipal Liability under Section 1983 for Civil Rights Violations after* Monell, 64 IOWA L. REV. 1032 (1979).

17. *See generally* cases cited in notes 14 and 15 *supra*.

18. 436 U.S. at 664-90. The Court concluded that *Monroe* incorrectly equated the part of the debates that expressed fear that "Congress had no constitutional power to impose any *obligation* upon county and town organizations" with a limitation on the "constitutional power . . . to impose civil liability on municipalities." Carlisle, Owen v. City of Independence: *Toward Constructing a Model for Municipal Liability After* Monell, 12 URB. LAW. 292, 295 (1980) (quoting *Monell*, 436 U.S. at 664-65). For an exhaustive discussion of *Monell's* analysis of the legislative history see Comment, *supra* note 16, at 902-906.

19. 436 U.S. at 690.

20. *Id.* at 690-91. The Court states that official "policy or custom" is made either by the body's lawmakers or by those "whose edicts or acts may fairly be said to represent official policy." *Id.* at 694. For definitional elaboration see Note, *supra* note 16. Cases subsequent to *Monell* illustrate "custom." *See, e.g.,* Mayes v. Elrod, 470 F. Supp. 1188 (N.D. Ill. 1979).

21. 436 U.S. at 694 & n.58. Under *Monell*, a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, only when municipal "policy or custom" inflicts the injury is the government as an entity responsible under § 1983. *See generally* note 20 *supra*. For a criticism of *Monell's* rejection of *respondeat superior* see Comment, *supra* note 12, at 906-21.

22. 436 U.S. at 701.

23. *Compare* Bertot v. School Dist. No. 1, 613 F.2d 245 (10th Cir. 1979) *and* Eckerd v. Indian River School Dist., 475 F. Supp. 1350 (D. Del. 1979), both refusing to extend a qualified immunity to the governmental entity, *with* Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980) (en banc); Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979); Owen v. City of Independence, 589 F.2d 335 (8th Cir. 1978) *and* Shuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979), each extending a qualified immunity based on "good faith" to the governmental entity.

In *Owen v. City of Independence*[24] the Supreme Court ruled on the issue of qualified immunity for municipalities left unresolved by *Monell*. The *Owen* Court firmly rejected a construction of section 1983 that would accord municipalities a qualified immunity based on the good faith of their officials.[25] Consequently, despite a claim of good faith, the Court found the city liable for the unconstitutional conduct of its city council, whose acts were said to "represent official policy."[26]

The majority opinion by Justice Brennan summarily dismissed the reasoning and holding of the appellate court. The lower court had reasoned that no section 1983 violation had occurred because at the time of petitioner's discharge, the Supreme Court had not as yet established the right to a hearing and notice upon such discharge.[27]

Justice Brennan commenced the opinion with an analysis of the statutory language. He reasoned that the language of section 1983 is "absolute,"[28] "unqualified,"[29] and "admits of no immunities."[30] The Court cited *Monell* as authority for extending this absolute liability to municipalities.[31] Moreover, the Court suggested that the legislative history of the Civil Rights Act evinces congressional intent to liberally construe the statutory provisions.[32]

Notwithstanding the Court's expansive reading of section 1983 and its consequent rejection of qualified municipal immunity, Justice Brennan ratified the good faith defense for officials in their individual capacities.[33] Thus, if an official acts in good faith, no danger of personal liability exists. The Court justified this good faith immunity accorded officials,[34] in contrast to any form of municipal immunity,[35] as compat-

24. 445 U.S. 622 (1980).

25. *Id.* at 635-38, 650, 655-56.

26. *Id.* at 633, 657 (quoting Monell v. Department of Social Services, 436 U.S. 658, 694 (1978)).

27. *Id.* at 633 n.13, 634. *See* note 2 *supra*.

28. *Id.* at 635.

29. *Id.*

30. *Id.*

31. *Id.* (quoting Imbler v. Pachtman, 424 U.S. 409 (1976)). *See* Monell v. Department of Social Services, 436 U.S. 658, 683-87 (1978).

32. 445 U.S. at 635.

33. The Court distinguishes the case in which an official is sued in his individual capacity from the case in which the official is sued in his official capacity as a representative of the governmental unit. In the former case, good faith immunity becomes necessary "to insulate them from personal liability for damages." In the latter instance, no protection is needed because "any recovery would come from public funds." *Id.* at 638 n.18.

34. *Id.* at 637-38.

ible with the purposes of section 1983.[36] Moreover, Justice Brennan reasoned that the rationale underlying the immunity of officials in their individual capacities[37] fails to apply when municipal liability is at stake.[38] The Court also indicated that the good faith immunity of officials "was well established at common law at the time section 1983 was enacted."[39]

Further addressing the distinction between municipal and individual immunity, Justice Brennan noted that at the time section 1983 was enacted, common law did not extend "good faith" qualified immunity to municipalities.[40] Furthermore, the Court indicated that when Congress adopted section 1983, courts did not recognize qualified municipal immunity based on the good faith of municipal officers.[41] Finally, Justice Brennan observed that the legislative debates neither recognized qualified municipal immunity as existing at common law nor expressed an intention to incorporate it into section 1983.[42] In short, the Court concluded that nothing in the legislative history or common-law interpretation of section 1983 supported qualified municipal immunity.

The Court further reasoned that qualified municipal immunity contravenes the fundamental legislative purpose of section 1983.[43] *Owen*

35. *Id.* at 638-50. The Court concluded that neither history nor policy support a construction of § 1983 that would justify qualified immunity for municipalities. *Id.* at 638.

36. *Id.*

37. *Id.* at 654 & n.38, 655. The Court concluded that two basic considerations favor immunity from suit for officials:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; and
> (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.

Id. at 654 (footnotes omitted). The Court "mentioned a third justification for extending a qualified immunity to public officials: the fear that the threat of personal liability might deter citizens from holding public office." *Id.* at 654 n.38 (quoting Wood v. Strickland, 420 U.S. 308, 320 (1975)).

38. *Id.* at 653 & n.37, 654-56 & n.41.

39. *Id.* at 638.

40. *Id.* at 640. Justice Brennan emphasized that courts treated municipalities as natural persons "for virtually all purposes of constitutional and statutory analysis." *Id.* at 639. *See* Monell v. Department of Social Services, 436 U.S. 658, 687-88 (1978). Municipalities, routinely sued in both federal and state courts, were commonly held liable for personal losses emanating from a wide variety of official operations, policies, and functions. *See* 445 U.S. at 639 & n.19, 640 & n.21. Municipal liability could also result from acts of authorized agents or officers. *See id.* at 640. *See generally* 18 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 53.02 (3d rev. ed. 1977).

41. 445 U.S. at 641.

42. *Id.* at 643.

43. *Id.* at 650-51.

holds that section 1983 represents a congressional attempt to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[44] Justice Brennan concluded that the Court would be "uniquely amiss" if it allowed the very entity against which section 1983 affords protection to escape punishment for transgressing the rights that entity was meant to uphold.

In addition, the Court surveyed the policies underlying section 1983. Justice Brennan urged that the dual purpose of section 1983 to compensate victims and to deter future abuses "compelled" the outcome.[45] Justice Brennan observed that Congress enacted section 1983 to compensate victims of abuses of official power;[46] from that presupposition he reasoned that a municipality that violates a citizen's rights should provide compensation.[47] In strongly endorsing a compensation policy, the Court advocated the concept of "loss spreading."[48] The Court reasoned that because the public-at-large enjoys the benefits of governmental activities, it should also bear the costs and risks of governmental administration.[49]

The *Owen* decision places a limit on the parameters of municipal liability by applying the *Monell* test of "official policy or custom."[50] The Court assumed that knowledge of potential municipal liability for injurious conduct, "whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights."[51]

Justice Powell, in dissent,[52] initially observed that the Court established the due process right of a discharged government employee to a "name clearing" hearing *after* Owen's discharge.[53] Thus, the dissent

44. *Id.*
45. *Id. See* note 73 *infra*.
46. 445 U.S. at 654.
47. *Id.*
48. *Id.* at 655, 657.
49. *Id.* at 655.
50. *Id.* at 657.
51. *Id.* at 651-52.
52. Chief Justice Burger, Justice Stewart, and Justice Rehnquist joined Justice Powell in dissent.
53. 445 U.S. at 658, 683 (Powell, J., dissenting). *See* note 2 *supra*.

broadly criticized the majority's formulation of section 1983, reasoning that it has the effect of sanctioning municipalities for failing to predict the development of constitutional law.[54] Furthermore, Justice Powell contended that Owens had failed to establish the requisite elements of the claimed due process violation.[55] The dissent urged that the majority's interpretation contravenes prior decisions under section 1983,[56] the legislative history,[57] the common law of municipal tort liability,[58] and the current state law governing municipal immunity.[59] Justice Powell warned that strict liability under section 1983 for municipalities poses a significant threat to the operation of local governments.[60]

In two short years, municipalities have traversed from "absolute immunity under section 1983 to strict liability."[61] This becomes increasingly significant in view of statistics showing that from 1961 to 1977, the number of suits annually filed in federal courts under civil rights statutes increased from 296 to 13,113.[62] Not only will *Owen* probably

54. 445 U.S. at 658, 683 (Powell, J., dissenting).

55. Justice Powell argued that Owen failed to display requisite impairment of his reputation that would require a "name clearing" hearing under the due process clause. *Id.* at 661-64 (Powell, J., dissenting).

56. *Id.* at 665-67 (Powell, J., dissenting).

57. *Id.* at 670-76 (Powell, J., dissenting).

58. The dissent discussed the two common-law doctrines limiting municipal tort liability—the governmental-proprietary doctrine and the discretionary/legislative-ministerial principle—as supporting limited municipal immunity under section 1983. *Id.* at 676-79 (Powell, J., dissenting). *But see* note 40 *supra*. *See also* 445 U.S. at 665-67 (Powell, J., dissenting). The dissent also observed that the majority misplaced its reliance on the *Thayer* principle as supporting strict liability, noting subsequent judicial limitations of *Thayer*. *Id.* at 679-80 n.19 (Powell, J., dissenting). *See* note 40 *supra*.

59. Justice Powell, analogizing to a "good faith" defense against liability for constitutional torts, noted that 44 states and the District of Columbia provide qualified municipal immunity for state law torts. 445 U.S. at 680-83 (Powell, J., dissenting).

60. First, Justice Powell expressed concern that excessive judicial intrusion into municipal decisionmaking processes will unreasonably restrict the ability of municipalities to govern and to respond to local needs, resulting in "governmental paralysis." *Id.* at 668-69 (Powell, J., dissenting). Second, the dissent postulated that because many municipalities lack the financial resources to withstand substantial unanticipated liability under section 1983, the impossibility of strict liability could result in financial ruin and inability to serve the public. *Id.* at 670 (Powell, J., dissenting).

61. *Id.* at 665 (Powell, J., dissenting).

62. Butz v. Economou, 438 U.S. 478, 526 (1978) (Rehnquist, J., concurring in part and dissenting in part) (citing DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANN. REP. 189, Table 11 (1977); DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANN. REP. 173, Table 17 (1976)). Estimates reveal that in 1976 approximately one-third of all private federal cases filed were civil rights suits against state and local

perpetuate or accelerate this trend, but the number of *successful* suits brought against local governments appears likely to increase.

The Court's rejection of qualified immunity for municipalities rested in part on the public policy of "loss spreading."[63] The *Owen* resolution of municipal liability recognized and appropriately balanced the equities involved.[64] In fairness, when a local government is responsible for a constitutional deprivation, courts should distribute the loss among the public rather than impose it on the innocent victim.[65] The dissent warned that a "loss spreading" policy will result in fiscal catastrophe.[66] The majority, however, diminished this concern by requiring compensation only for injuries directly related to the administration of official policy or custom.[67] Furthermore, "evidence from jurisdictions in which immunity has been abolished shows the fears of expense to be unwarranted."[68]

The Court correctly reasoned that the policies of compensation and deterrence support a rejection of qualified municipal immunity.[69] As Justice Douglas emphasized in *Monroe*, the availability of a remedy is vital to the efficacy of section 1983.[70] Prior to *Owen*, many section 1983 violations remained without remedy because the official was either judgment proof or accorded good faith immunity.[71] The imposition of liability on municipalities by *Owen*, however, assures compensation for injury inflicted by official policy.[72] Most authorities view municipal liability as prerequisite to effective deterrence;[73] *Owen* should therefore

officials. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 149 (2d ed. Supp. 1977).

63. 445 U.S. at 650-58.

64. *Id.* at 657.

65. *Id.* at 652-53, 657; Kates & Kouba, *supra* note 12, at 138-39. *Contra*, 445 U.S. at 667-68 (Powell, J., dissenting).

66. 445 U.S. at 670.

67. *Id.* at 657.

68. Kates & Kouba, *supra* note 12, at 143. *See* Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. ILL. L.F. 919, 968-78.

69. 445 U.S. at 650-52.

70. 365 U.S. at 174.

71. *See* Kates & Kouba, *supra* note 12, at 136 n.28.

72. 445 U.S. at 657. "[M]any victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good faith defense." *Id.* at 651.

73. *See* Kates & Kouba, *supra* note 12, at 140-41; Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 927 (1976). The Court postulated three situations that likely will result in deterrence:

(1) officials who may harbor doubts about the lawfulness of their intended actions will err on the side of protecting citizens' constitutional rights;

significantly enhance the promotion of deterrence. *Owen* maximizes the effectuation of both policies by providing a remedy that does not relieve municipal officials acting in bad faith of liability, but merely provides an additional remedy against the local government.

Owen enhances the spirit, purpose, and policies of section 1983. Nevertheless, the case seems wrongly decided upon the facts. Careful analysis of the record supports the lower court view that Owen suffered no constitutional deprivation. Petitioner premised his section 1983 claim on the right to a hearing and notice upon the discharge of a government employee.[74] This right was nonexistent, however, at the time of Owen's discharge. The Court first articulated this right in *Board of Regents v. Roth*,[75] a case decided ten weeks *after* his discharge.[76] Clearly, as the appellate court reasoned, this right existed only in theory when the city discharged petitioner.[77] As the appellate court concluded, therefore, petitioner had no basis for a section 1983 claim notwithstanding the *Owen* doctrine of strict liability.

As Justice Powell observed in the *Owen* dissent, this aspect of the decision "unreasonably subjects local governments to damages judgments for actions that were reasonable when performed. It converts municipal governance into a hazardous slalom through constitutional obstacles that are often unknown and unknowable."[78] Section 1983 should not be applied so as to charge municipalities with "predicting the future course of constitutional law."[79] By its very terms, section 1983 should apply to protect a right only after such right has been established.[80] Nonetheless, the Court's willingness to extend section 1983

(2) policymakers will institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights; and

(3) officials at higher levels will more closely supervise the conduct of subordinates.

445 U.S. at 652.

74. 445 U.S. at 630-31 & n.10.

75. 408 U.S. 564 (1972). *See* note 2 *supra*.

76. *See* note 2 *supra*. The Court handed down *Roth* ten weeks after Owen was discharged and eight weeks after the city denied his request for a hearing. 445 U.S. at 683 (Powell, J., dissenting).

77. *Id.* at 634.

78. *Id.* at 665 (Powell, J., dissenting).

79. *Id.* at 683. "[L]ocal governments and their officials will face the unnerving prospect of crushing damage judgments whenever a policy valid under current law is later found to be unconstitutional." *Id.*

80. Section 1983 extends protection to "rights, privileges, or immunities *secured* by the Constitution and laws . . . ." (emphasis added). *See* note 3 *supra*.

to protect undefined constitutional rights should stand as a caveat to local governments.

Owen v. City of Independence reinforces the obligation of local governments to recognize and to protect constitutional rights by providing a meaningful recourse under section 1983 for victims of municipal wrongdoings.