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Strict Liability Under Section 1983 for Municipal Deprivations of Federal Rights: Owen v. City of Independence

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COMMENT

STRICT LIABILITY UNDER SECTION 1983 FOR MUNICIPAL DEPRIVATIONS OF FEDERAL RIGHTS?: *OWEN V. CITY OF INDEPENDENCE*

Section one of the Civil Rights Act of 1871 (the Act)[1] was enacted to guard against violations of federal rights by "persons" acting "under color of" state law.[2] In *Monell v. New York City*

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[1] Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1976)).

[2] As presently codified, section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976), *as amended by* Act of Dec. 29, 1979, Pub. L. No. 96-170, § 1, 93 Stat. 1284.

Sometimes called the "Ku Klux Klan Act," the Civil Rights Act of 1871 was enacted to quell civil unrest in the south in the post-Civil War period. *See* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 665-68 (1978). *See generally* Note, *Developments in the Law: Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1137-90 (1977); Note, *Governmental Liability Under Section 1983 and the Fourteenth Amendment After* Monell, 53 ST. JOHN'S L. REV. 66, 68-79 (1978) [hereinafter cited as *Governmental Liability*]. Urging Congress to adopt legislation to correct these evils, President Ulysses S. Grant stated:

> A condition of affairs now exists in some States . . . rendering life and property insecure . . . . That the power to correct these evils is beyond the control of state authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of all law in all parts of the United States.

CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871); *see* Monroe v. Pape, 365 U.S. 167, 172-73 (1961).

The express purpose of the Act was to enforce the provisions of the fourteenth amendment. *See* District of Columbia v. Carter, 409 U.S. 418, 423 (1973); Mitchum v. Foster, 407 U.S. 225, 240 (1972); Monroe v. Pape, 365 U.S. at 171. The debates surrounding the passage of the Act also demonstrate three nonexpress purposes for the legislation. *See* CONG. GLOBE, 42d Cong., 1st Sess. 522 (1871). First, by providing a means of redress in the federal courts, Congress intended it to "override certain kinds of state laws." Monroe v. Pape, 365 U.S. at

Department of Social Services,[3] the Supreme Court held that municipal corporations were "persons" within the coverage of section 1983[4] and that local governments, therefore, were liable under the statute for official acts, resulting in constitutional injury, if performed in furtherance of governmental "policy or custom."[5] The *Monell* Court declined to rule, however, on whether municipalities were entitled to a qualified immunity from suit under section 1983.[6] Recently, in *Owen v. City of Independence*,[7] the Supreme Court refined the scope of municipal liability under *Monell*, holding that a municipal defendant in a section 1983 suit will not be accorded a qualified immunity based on the good faith of its officials.[8]

George D. Owen was employed by the city of Independence,

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173. Secondly, the Act was meant to provide "a remedy where state law was inadequate." *Id.* Finally, in enacting the Civil Rights Act of 1871, Congress aimed "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 174; *accord*, District of Columbia v. Carter, 409 U.S. at 426-29. Additionally, the Supreme Court has remarked that the Act was meant to ensure enforcement of constitutional rights in any state that refused or was unable to enforce its own laws. Monroe v. Pape, 365 U.S. at 175-76. *See generally* Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"* 79 COLUM. L. REV. 304, 307-15 (1979).

[3] 436 U.S. 658 (1978).

[4] *Id.* at 688-89.

[5] *Id.* at 690, 694-95. In *Monell*, the plaintiffs brought a section 1983 suit challenging an official New York City policy that required pregnant employees to take unpaid leaves of absence from their jobs when they reached the fifth month of pregnancy—a practice which had previously been declared unconstitutional by the Supreme Court. *Id.* at 660-61 (citing Board of Educ. v. LaFleur, 414 U.S. 632 (1974)). The district court held for the defendants and the court of appeals affirmed, relying on Monroe v. Pape, 365 U.S. 167, 191 (1961), wherein the Supreme Court held that municipalities were not "persons" within the meaning of section 1983. Monell v. New York City Dep't of Social Servs., 436 U.S. at 661-62. The Supreme Court, however, reversed the lower court and held for the plaintiffs, expressly overruling *Monroe* insofar as it excluded municipal corporations from the meaning of the word "persons" in section 1983. *Id.* at 664-89. Under *Monell*, local governments can be party defendants in section 1983 suits "for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. *See generally* Note, *Civil Rights—Local Government—Local Governments Can Be Sued Directly Under 42 U.S.C. § 1983 Where Unconstitutional Action is Pursuant to Governmental Custom or Implements Official Policy*, 10 TEX. TECH. L. REV. 145, 151 (1978).

[6] 436 U.S. at 695. *Monell* "express[ed] no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity . . . ." *Id.* at 701. The Court noted, however, that a municipality would not be liable under the statute on a respondeat superior theory. *Id.* at 691.

[7] 445 U.S. 622 (1980), *rev'g*, 589 F.2d 335 (8th Cir. 1978), *rev'g in part*, 421 F. Supp. 1110 (W.D. Mo. 1976).

[8] 445 U.S. at 638.

Missouri for an indefinite term as its chief of police.[9] When certain irregularities were discovered in the records of the police department's property room,[10] the city manager initiated an internal investigation into the administration and control of the room.[11] The investigative report found "no evidence of any criminal acts or of any violation of state or municipal law in the administration of the property room,"[12] but facts suggesting mismanagement were revealed.[13] When he refused to resign,[14] Owen was fired without a hearing and without being informed of the reasons for his dismissal[15] pursuant to a city ordinance authorizing the discharge of municipal employees "for the good of the service."[16]

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[9] *Id.* at 625. Owen did not have a written contract of employment with the city and was not subject to a tenure system. 421 F. Supp. at 1114.

[10] 445 U.S. at 625. The management of the property room was questioned when a gun, shown as destroyed in property room records, was found in the possession of a felon. *Id.*

[11] *Id.* Owen initially headed the probe, but the city manager, Lyle Alberg, soon shifted the responsibility to the city's department of law. *Id.*

[12] *Id.* at 625-26.

[13] *Id.* In a statement to the city council, one councilman remarked:

> "The reports show that numerous firearms properly in the police department custody found their way into the hands of others including undesirables and were later found by other law enforcement agencies.
>
> "Reports whow [sic] that narcotics held by the Independence Missouri Chief of Police have mysteriously disappeared. Reports also indicate money has mysteriously disappeared. Reports show that traffic tickets have been manipulated. The reports show inappropriate requests affecting the police court have come from high ranking police officials. Reports indicate that things have occurred causing the unusual release of felons. The reports show gross inefficiencies on the part of a few of the high ranking officers of the police department."

Id. at 627 n.5.

[14] *Id.* at 625. Alberg asked Owen to step down as police chief and accept another position within the department. *Id.* It was clear, however, that a refusal to comply with this request would result in Owen's discharge. *Id.*

[15] *Id.* at 629. Prior to his discharge, Owen, on the advice of counsel, requested written notice of any charges against him. *Id.* at 626-27 & n.4. The notice of termination, however, stated merely that he was being dismissed pursuant to section 3.3(1) of the city charter. *Id.* at 629; *see* note 16 *infra.*

[16] *Id.* at 625. Paul Roberts, a city council member who had obtained a copy of the investigative report, *id.* at 627, read a statement at the regularly scheduled meeting of the city council charging Owen with misappropriating police department property and with gross inefficiency in his management of the property room. *Id.* at 627-28; *see* note 13 *supra.* Subsequently, a motion urging the city manager to take action against those involved in the alleged misconduct was proposed by Roberts and passed easily by the council. *Id.* at 628-29. Section 3.3(1) of the city's charter vested the city manager with the power to "[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads of administrative departments and all other administrative officers and employees of the city . . . ." *Id.* at 625 n.2. The action by the city manager pursuant to the charter provision came just one day after the city council's resolution. *Id.* at 629. While

Owen brought suit under section 1983 against the city manager, the city council and the city of Independence, alleging that the defendants' failure to afford him notice of the reasons for his discharge and a name-clearing hearing deprived him of due process.[17] The district court held for the defendants, reasoning that section 1983 did not create a claim against the city.[18] The Court of Appeals for the Eighth Circuit, applying "a post-*Monell* interpretation of section 1983,"[19] reversed the lower court decision,[20] insofar as it denied a section 1983 claim against the municipality.[21] It affirmed the district court judgment for the defendants, however, finding that the city of Independence was entitled to a qualified good-faith immunity from liability under section 1983.[22]

On appeal, the Supreme Court reversed, holding that local governments do not enjoy a qualified immunity from section 1983 liability based on the good faith of municipal officials.[23] Justice

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the contents of the investigative report were not made public, *id.* at 630, the events culminating in Owen's termination received prominent coverage in the local press, *id.* at 629.

[17] *Id.* at 630. The complaint also alleged violation of the plaintiff's constitutional rights under the fourteenth amendment. 421 F. Supp. at 1112. Money damages in the form of backpay and attorneys' fees were sought, as well as declaratory and injunctive relief. 445 U.S. at 630.

[18] *Id.* at 630 n.10. The trial court ruled that the complaint did state a claim for relief under the fourteenth amendment. *Id.*; *see* note 17 *supra*. Reaching the merits of the constitutional claim, however, the court determined that "the [plaintiff's] discharge did not deprive him of any constitutionally protected property interest," since, as a nontenured employee, he had no property interest in his continued employment. Moreover, the court added that the circumstances of his discharge did not impugn his professional reputation so as to implicate any liberty interests. 445 U.S. at 630 n.10; *see* Board of Regents v. Roth, 408 U.S. 564, 569-79 (1972); Perry v. Sindermann, 408 U.S. 593, 599-603 (1972).

[19] Owen v. City of Independence, 589 F.2d 335, 337 (8th Cir. 1978), *rev'd*, 445 U.S. 622 (1980). The Eighth Circuit's decision was made on remand from the Supreme Court, 438 U.S. 902 (1978), with instructions to give the *Owen* case "further consideration in light of [the] supervening decision in *Monell* . . . ." 100 S. Ct. at 1406; *see* notes 3-6 and accompanying text *supra*.

[20] 421 F. Supp. 1110 (W.D. Mo. 1976).

[21] Owen v. City of Independence, 589 F.2d at 337. Both parties initially had appealed the district court decision in *Owen*. *See* 445 U.S. at 631 n.11. Before the Eighth Circuit for the first time, the appellate court affirmed the district court's holding that the city was not a person within the meaning of section 1983. Owen v. City of Independence, 560 F.2d 925, 933 (8th Cir. 1977). It reversed the district court's decision on the plaintiff's fourteenth amendment claim, however, *see* note 18 *supra*, finding that the plaintiff had been deprived of a liberty interest—his reputation was stigmatized—without due process of law. 560 F.2d at 937. Subsequently on remand from the Supreme Court, the Eighth Circuit found it unnecessary to rely on this liberty interest analysis since *Monell* "permit[ted] Owen to sue the City of Independence directly . . . ." 589 F.2d at 337.

[22] *Id.* at 338.

[23] 445 U.S. at 624-25. Prior to the *Monell* decision, resolution of the municipal immu-

Brennan, writing for the majority,[24] examined the language of section 1983, the congressional debates surrounding the passage of the 1871 Act, and subsequent judicial interpretations of the statute. The Court noted that the text of the statute does not provide for immunity from suit.[25] Furthermore, Justice Brennan concluded that the legislative history of the Act indicated a congressional intention that it be read expansively.[26] Thus, the Court reasoned, only where an immunity was deeply rooted in the common law and was "compatible with purposes of the Civil Rights Act" would congressional intent to extend immunity under section 1983 be found.[27] The majority determined that municipalities, traditionally treated as natural persons by the courts and generally subject to full liability for tortious acts,[28] were not entitled to a good-faith

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nity issue would not have been proper since municipalities were accorded absolute immunity from suit under section 1983. *See* Monroe v. Pape, 365 U.S. 167, 191-92 (1961).

[24] The majority consisted of Justices Brennan, White, Marshall, Blackmun and Stevens. Justice Powell filed a dissent in which Chief Justice Burger and Justices Stewart and Rehnquist joined.

[25] 445 U.S. at 635. The Court stated:

> By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." . . . Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the act imposes liability upon *"every person"* who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

Id. (citation omitted) (emphasis in original).

[26] *Id.* at 635-36. The Court quoted Representative Shellabarger, sponsor of the Civil Rights Act of 1871 in the House of Representatives. *Id.* at 636. Introducing the proposed Act in the House, the Congressman remarked that the statute should be "liberally and beneficently construed," and that "[i]t would be most strange and, in civilized law, monstrous were this not the rule of interpretation." *Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess., App. 68 (1871) (remarks of Rep. Shellabarger)).

[27] 445 U.S. at 638. The Court previously had found some form of immunity from suit under section 1983 to exist for individuals who were sued in their capacity as governmental officials. *See, e.g.,* Procunier v. Navarette, 434 U.S. 555 (1978)(prison officials); Imbler v. Pachtman, 424 U.S. 409 (1976)(state prosecutors); Wood v. Strickland, 420 U.S. 308 (1975)(school board members); Tenney v. Brandhove, 341 U.S. 367 (1951)(legislators).

[28] 445 U.S. at 641 (citing Thayer v. Boston, 36 Mass. (19 Pick.) 511 (1837)). In *Thayer,* the Supreme Judicial Court of Massachusetts found that if a municipality performed an unlawful act

> either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done.

36 Mass. (19 Pick.) at 515-16; *see, e.g.,* Horton v. Ipswich, 66 Mass. (12 Cush.) 488, 489, 492

immunity under section 1983.[29]

Several policy arguments also were advanced by the majority in support of its refusal to recognize a section 1983 immunity based on the good faith of municipal officials.[30] First, since the Civil Rights Act was enacted to protect individuals from injury caused by official abuse of state law, the Court reasoned that the government, as public representative and role model, should not be permitted to avoid the consequences of its wrongdoing by asserting immunity.[31] Secondly, Justice Brennan asserted that municipal liability under section 1983 would create an incentive for government officials who doubt the legality of a proposed action to choose an alternative course of action that would ensure the federal rights of their constituency.[32] Finally, with little comment or support the majority contended that its decision was consistent with contemporary tort theories which no longer impose liability solely on the basis of fault.[33]

In a dissenting opinion, Justice Powell, like the majority, analyzed the legislative history and policy underlying section 1983.[34]

(1853); Elliot v. Concord, 27 N.H. 204, 208-09 (1853); Lee v. Village of Sandy Hill, 40 N.Y. 442, 448-51 (1869); Town Council of Akron v. McComb, 18 Ohio 229, 230-31 (1849); Hurley v. Town of Texas, 20 Wis. 634, 637-38 (1866).

[29] 445 U.S. at 650. The Court rejected the common-law distinction between a municipality's "proprietary" and "ministerial" acts, which had been used to create municipal immunity in certain instances. *Id.* at 644-50. First, the Court argued that when the municipality was found to be a "person" under section 1983, "whatever vestige of the State's sovereign immunity the municipality possessed" was abolished. *Id.* at 647-48. Secondly, the Court asserted that since "a municipality has no 'discretion' to violate the Federal Constitution," *id.* at 649, the discretionary immunity doctrine, "which had insulated sovereigns from liability for discretionary acts," no longer applied. *Id.*

[30] *Id.* at 650-56.

[31] *Id.* at 651. The Court concluded that "owing to the qualified immunity enjoyed by most governmental officials, . . . many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense." *Id.* (citation omitted).

[32] *Id.* at 651-52. The Court noted that the policies supporting section 1983 immunity for governmental officials were not applicable to municipal liability. *Id.* at 652-56. First, the policy of insulating a public officer from liability for acts he is required to perform is not applicable when an award of damages "comes not from the official's pocket, but from the public treasury." *Id.* at 654. Moreover, municipal liability would not unduly restrict governmental decisionmaking processes since "[t]he inhibiting effect is significantly reduced, if not eliminated, . . . when the threat of personal liability is removed." *Id.* at 655-56.

[33] *Id.* at 657.

[34] *Id.* at 658-83 (Powell, J., dissenting). Justice Powell also argued that the majority had reached the wrong conclusion on the merits of the plaintiff's claim. *Id.* at 658-64 (Powell, J., dissenting). Noting that an employee-at-will is entitled to a hearing upon discharge only if the circumstances surrounding his firing had impugned the employee's professional reputation, *id.* at 662 (Powell, J., dissenting); *see* Board of Regents v. Roth, 408 U.S. 564,

Justice Powell reasoned, however, that since municipal corporations had absolute immunity from suit at common law, the failure to extend a qualified immunity to municipalities under the statute "abandon[ed] any attempt to harmonize § 1983 with traditional tort law."[35] Moreover, the dissent found the policy arguments of the majority unpersuasive, stating that "[i]mportant public policies support the extension of a qualified immunity to local governments."[36] Finally, Justice Powell expressed the apprehension that, under the majority's rule, municipalities might be subjected to "strict liability" for violation of an individual's federal rights.[37]

The Supreme Court's decision in *Owen* disallowing a qualified good-faith immunity to local governments appears to be consistent with the history of governmental immunity and the Court's prior decisions under section 1983. At common law, local governments generally were not accorded qualified immunity from suit.[38] Rather, municipalities either were immune from liability abso-

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572-75 (1972), the dissent found that the actions of the city in dismissing Owen did not impose a "stigma on [the] petitioner that would require a 'name clearing' hearing under the Due Process Clause." 445 U.S. at 658 (Powell, J., dissenting). Justice Powell concluded that the city manager's conduct was within his statutory authority to discharge city employees, and thus, did not infringe on Owen's liberty. *Id.* at 664 (Powell, J., dissenting).

[35] *Id.* at 667 (Powell, J., dissenting). The dissent acknowledged that section 1983 does not on its face provide for immunity from suit. *Id.* at 666 (Powell, J., dissenting); *see* note 25 and accompanying text *supra*. The absence of an express legislative grant, however, was not deemed to be dispositive. Instead, Justice Powell observed that section 1983 " 'is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.' " 445 U.S. at 666 (Powell, J., dissenting) (quoting Imbler v. Pachtman, 424 U.S. 409, 418 (1976)). Justice Powell also concluded that "the legislative record suggest[ed] that the Members of the 42d Congress would have been dismayed by this ruling." *Id.* at 670-71 (Powell, J., dissenting). Relying on the debates in the Senate in 1871, the dissent cited two concerns of the legislators which would favor a grant of a qualified immunity to municipalities: First, their fear that strict liability "could bankrupt local governments" by holding municipalities vicariously liable for the riotous acts of their constituents and, secondly, the possibility that liability might be imposed upon a municipality when it did not know that a certain constitutional right existed. *Id.* at 672-73 (Powell, J., dissenting) (citing CONG. GLOBE, 42d Cong., 1st Sess., 763 (1871) (Sen. Casserly), *Id.* at 762 (Sen. Stevenson)).

[36] *Id.* at 667 (Powell, J., dissenting). The dissent noted that under the separation of powers doctrine "some municipal decisions should be at least presumptively insulated from judicial review." *Id.* at 667-68 (Powell, J., dissenting). Furthermore, Justice Powell argued, the Court's decision would restrict independent local governing by exposing municipalities to liability without affording them the knowledge of which acts may be deemed unconstitutional. *Id.* at 1425 (Powell, J., dissenting).

[37] *Id.* at 669-70 (Powell, J., dissenting); *see* text accompanying notes 45-51 *infra*.

[38] 445 U.S. at 638-40; *see* Horton v. Ipswich, 66 Mass. (12 Cush.) 488, 489, 492 (1853); Elliot v. Concord, 27 N.H. 204, 208-09 (1853); Lee v. Village of Sandy Hill, 40 N.Y. 442, 448-51 (1869); Town Council of Akron v. McComb, 18 Ohio 299, 320-21 (1849); Hurley v. Town of Texas, 20 Wis. 634, 637-38 (1866).

lutely or were held fully accountable without any immunity for their malfeasance.[39] Thus, the *Owen* Court was not presented with a well-established common-law principle from which to imply a good-faith immunity for municipalities from liability under section 1983.[40] Moreover, *Owen* comports with the modern trend in section 1983 jurisprudence to expand the coverage of the statute.[41] In *Monell*, the Supreme Court evinced a policy in favor of recompensing plaintiffs injured by the actions of municipalities, as well as by the acts of other individuals.[42] Since the affirmative defense of good faith on the part of municipal governments[43] may be especially difficult to disprove, a good-faith immunity for municipalities could effectively frustrate this policy.[44]

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[39] *See* note 29 and accompanying text *supra.*

[40] *See* 445 U.S. at 638; note 27 and accompanying text *supra.*

[41] *See, e.g.,* Maine v. Thiboutot, 100 S. Ct. 2502 (1980) (section 1983 protects rights established by federal statutory law as well as constitutional rights); Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978)(municipal corporations are "persons" within meaning of section 1983). The modern trend to liberally interpret section 1983 contrasts with the narrow interpretations characterizing early decisions under the statute. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1873). *Cf.* Monroe v. Pape, 365 U.S. 167 (1961)(municipal corporations are not persons within meaning of section 1983). *See generally* Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363-66 (1951).

[42] *See* 436 U.S. at 690-91; notes 3-5 and accompanying text *supra. See generally* Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213 (1979); *Governmental Liability, supra* note 1, at 66; Comment, *Civil Rights: Discarding Section 1983 Municipal Immunity—Is That Enough?* 30 U. FLA. L. REV. 979 (1978).

[43] Gomez v. Toledo, 100 S. Ct. 1920, 1924 (1980).

[44] *See, e.g.,* Williams v. Kelley, 624 F.2d 695, 698 (5th Cir. 1980); Bailey v. Lally, 481 F. Supp. 203, 223-24 (D. Md. 1979); *see* notes 56-58 and accompanying text *infra.* At least one commentator has suggested that if a municipality was given good faith immunity from section 1983 suit, it could convert its qualified immunity into an absolute freedom from section 1983 liability. *See* Note, *Municipal Immunity—Section 1983—Absolute Immunity Withdrawn—Qualified Immunity Left as a Possibility,* 1979 WIS. L. REV. 943, 953.

The difficulty of proving bad faith on the part of a local government is illustrated by the Second Circuit decision in Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979), *vacated,* 446 U.S. 903 (1980). The plaintiff was charged with a minor offense. Her summons, however, was mailed to the wrong address, and when she did not timely respond to it, a warrant was issued for her arrest. 604 F.2d at 208-09. Learning of this, the plaintiff voluntarily went to the police department, where she was handcuffed and subjected to a strip search, "which included visual inspection of the genital and anal areas." *Id.* at 209. The plaintiff then commenced suit against Suffolk County and several individuals. *Id.* Deciding the case prior to the Supreme Court's holding in *Owen,* the Second Circuit found that the county was entitled to a qualified good-faith immunity. *Id.* at 211. Cloaked with the immunity, the county was found not liable:

> The facts of this case present a situation wherein *although the practice was insensitive, demeaning and stupid, there was no evidence of bad faith on the part of anyone charged with formulating or implementing the municipal policy,* and

The *Owen* Court's apparent sanction of strict municipal liability for section 1983 violations, however, is more troublesome. The Court did not explore the possibility of municipal liability based on a lesser standard of care. It appears, however, that a strict liability standard for municipal violations of section 1983 not only is unwarranted in light of the historical purpose of liability without fault, but also is inconsistent with the realities and integrity of the municipal government system. Moreover, an alternative theory of municipal liability based on negligence has not been precluded by section 1983 precedent. The balance of this Comment will examine these issues.

Strict Liability: The Traditional Bases

The tort concept of strict liability is grounded on the notion that, in some circumstances, one who causes injury to another should be held accountable whether or not he is at fault.[45] Although liability without fault was imposed regularly at early common law,[46] the modern tendency has been to find strict tort liability on a more limited basis.[47] Today, strict liability generally is

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> the case law as of the time of the incident involved here did not suggest that the practice of strip searching which apparently had long been followed by many governmental bodies, was unconstitutional.

Id. (emphasis added).

[45] *See generally* W. PROSSER, LAW OF TORTS 492-549 (4th ed. 1971); Bohlen, *The Rule in* Rylands v. Fletcher, 59 U. PA. L. REV. 298 (1911); Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259 (1976); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Thayer, *Liability Without Fault*, 29 HARV. L. REV. 801 (1916). The modern concept of strict liability was introduced in the mid-19th century in the English case of Fletcher v. Rylands, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868), in which the court held that a landowner will be liable if injury occurs to another through the non-natural use of his land. *See* notes 48-49 and accompanying text *infra*.

[46] F. HARPER & F. JAMES, THE LAW OF TORTS § 14.1 (1956); *Epstein, supra* note 45, at 152; Peck, *Negligence and Liability Without Fault in Tort Law*, 36 WASH. L. REV. 225, 225-26 (1971).

[47] Most modern courts premise tort liability upon the fault of the defendant. *See, e.g.*, Stief v. J.A. Sexauer Mfg. Co., 380 F.2d 453, 462 (2d Cir. 1966), *cert. denied*, 389 U.S. 997 (1967); Borowicz v. Chicago Mastic Co., 367 F.2d 751, 760 (7th Cir. 1966); Harris v. Oro-Dam Constructors, 269 Cal. App. 2d 911, 915, 75 Cal. Rptr. 544, 547 (1969); *see* W. PROSSER, *supra* note 45, at 493; Peck, *supra* note 45, at 225. Where strict liability is imposed, it is generally done as a matter of social policy. Huebner v. Hunter Packing Co., 59 Ill. App. 3d 563, 568, 375 N.E.2d 873, 877 (1977); Realmuto v. Straub Motors, Inc., 65 N.J. 336, 344, 322 A.2d 440, 444 (1974); *see* United States v. Marathon Pipe Line Co., 589 F.2d 1305, 1309 (7th Cir. 1978); Doundoulakis v. Town of Hempstead, 42 N.Y.2d 440, 448, 368 N.E.2d 24, 27, 398 N.Y.S.2d 401, 404 (1977); Chandler v. Bunick, 279 Or. 353, 356, 569 P.2d 1037, 1039 (1977) (en banc); Langan v. Valicopters, Inc., 88 Wash. 2d 855, 865, 567 P.2d 218, 223 (1977) (en

imposed only if the defendant's activity is so abnormally dangerous or inappropriate as to pose a high risk of harm to others[48] or if, as a matter of social policy, the defendant is deemed to be most financially capable of bearing the cost of the plaintiff's injuries.[49]

Strict municipal liability is not justified under either of these views. Municipal liability under section 1983 attaches only where the plaintiff establishes that a "policy or custom" of the local governing unit deprives him of a federally protected right.[50] Since the legislative and policymaking processes usually entail careful deliberation and execution by municipal officials, it appears that local "policy or custom" will rarely pose the sort of urgent danger which traditionally has triggered strict liability. Rather, it is more likely that the decisions of local lawmaking bodies will promote effective municipal government, although, on occasion, injury may result to a relatively small number of citizens.[51] Finally, many local governments simply are not financially able to bear the expense of potentially open-ended liability under section 1983.[52]

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banc).

[48] *See, e.g.*, Singer v. Sterling Drug, Inc., 461 F.2d 288, 290 (7th Cir.), *cert. denied*, 409 U.S. 878 (1972); Hall v. E.I. duPont de Nemours & Co., 345 F. Supp. 353, 368 (E.D.N.Y. 1972); *In re* Alamo Chem. Transp. Co., 320 F. Supp. 631, 634-38 (S.D. Tex. 1970); Garelli v. Sterling-Alaska Fur & Game Farms, Inc., 25 Misc. 2d 1032, 1036, 206 N.Y.S.2d 130, 134 (Sup. Ct. Queens County 1960). The American Law Institute has formulated the following factors to be considered in determining whether a defendant's activity is abnormally dangerous so as to justify strict tort liability:

> (a) existence of a high degree of risk of harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

RESTATEMENT (SECOND) OF TORTS § 520 (1977).

[49] United States v. Marathon Pipe Line Co., 589 F.2d 1305, 1309 (7th Cir. 1978); *e.g.*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 62-63, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1963). *See, e.g.*, N.Y. WORK. COMP. LAW § 10 (McKinney 1965). *See generally* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

[50] *See* note 5 *supra*.

[51] *Cf.* Dalehite v. United States, 346 U.S. 15, 57 (1953) (Jackson, J., dissenting) ("[I]t is not a tort for government to govern.").

[52] *See* Blaydon & Gifford, *Financing the Cities: An Issue Agenda*, 1976 DUKE L.J. 1057, 1057; Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L.J. 1483, 1531-43 (1977).

A Negligence Standard: A Viable Alternative for Municipal Liability

Both the language of section 1983 and the legislative history of the Civil Rights Act of 1871 are silent as to the degree of culpability necessary to establish a prima facie violation of the statute.[53] Additionally, although it has been decided that the statute should be read in harmony with traditional tort theory,[54] pre-*Owen* courts had reached no general agreement as to the state of mind that would justify the imposition of section 1983 liability.[55] The immu-

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[53] *See* 42 U.S.C. § 1983 (1976); CONG. GLOBE, 42d Cong., 1st Sess. 365-66, 385, 390 (1871); Kirkpatrick, *Defining A Constitutional Tort Under Section 1983: The State-of-Mind Requirement*, 46 CINN. L. REV. 45, 46 (1977).

[54] Monroe v. Pape, 365 U.S. 167, 187 (1961); *see* Pierson v. Ray, 386 U.S. 547, 553-57 (1967); Daniels v. Van De Venter, 382 F.2d 29, 31 (10th Cir. 1967); McClellan & Northcross, *Remedies and Damages for Violation of Constitutional Rights*, 18 DUQUESNE L. REV. 409, 411 (1980); Nahmod, *Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 7 (1974); Note, *Civil Rights—Section 1983 Action Lies for Gross and Culpable Negligence*, 49 N.C.L. REV. 337, 339-40 (1971).

Section 1983 is not coextensive, however, with traditional tort theory. *See, e.g.*, Williams v. Kelley, 624 F.2d 695, 697 (5th Cir. 1980); Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); Santiago v. Yarde, 487 F. Supp. 52, 54 (S.D.N.Y. 1980). Although the Supreme Court has found similarities between state tort law and section 1983, it has stressed that the two are distinct. This notion was expressed in the leading case of Screws v. United States, 325 U.S. 91 (1945). In *Screws*, an action was brought against a police officer under 18 U.S.C. § 242 (1976)—the criminal counterpart to section 1983—alleging that the defendant beat and killed a handcuffed suspect for no apparent reason. 325 U.S. at 92-93. On these facts the Court commented that a "[v]iolation of local law does not necessarily mean that federal rights have been invaded." *Id.* at 108. In a more recent case, Paul v. Davis, 424 U.S. 693 (1976), the Court used the *Screws* reasoning to justify a holding that a state officer's behavior does not automatically violate section 1983 when it constitutes a tort under state law. *Id.* at 699-700. *See* Levin, *supra* note 52, at 1489-90; Nahmod, *supra*, at 13-32.

[55] The general rule in the wake of Monroe v. Pape, 365 U.S. 167 (1961), *see* note 5 *supra*, is that "wilfulness" is not a prerequisite to section 1983 liability. *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967); Howell v. Cataldi, 464 F.2d 272, 281 (3d Cir. 1972); Daniels v. Van De Venter, 382 F.2d 29, 31 (10th Cir. 1967); Loewen v. Turnipseed, 488 F. Supp. 1138, 1151 (N.D. Miss. 1980). *But cf.* Smith v. Dallas County Bd. of Educ., 480 F. Supp. 1324, 1337 (S.D. Ala. 1979) (motives and intent are crucial to a determination of whether section 1981 has been violated). Where a specific intent is required to establish a deprivation of constitutional rights within the coverage of section 1983, however, the courts have insisted that intentional or purposeful conduct be demonstrated. *E.g.*, Loewen v. Turnipseed, 488 F. Supp. at 1151 (section 1983 plaintiff alleging deprivation of equal protection must prove discriminatory intent on part of defendant); *see* Kirkpatrick, *supra* note 53, at 50-53. On the other hand, some courts have imposed section 1983 liability only upon a showing of gross negligence or deliberate indifference, *e.g.*, Johnson v. Shaw, 609 F.2d 124 (5th Cir. 1980); Arroyo v. Schaefer, 548 F.2d 47, 49 (2d Cir. 1977) (quoting Williams v. Vincent, 508 F.2d 541, 546 (2d Cir. 1974)); Hoit v. Vitek, 497 F.2d 598, 602 (1st Cir. 1974); Burns v. Sullivan, 473 F. Supp. 626, 629 (D. Mass. 1979); *see* Note, *Civil Rights—Section 1983 Action Lies for*

nity decisions under section 1983, however, may provide some guidance as to the standard of care to be applied to alleged violations of the statute.

The standard upon which a qualified section 1983 immunity has been premised contains both objective and subjective elements. As a general rule, a person otherwise entitled to a good-faith defense under section 1983 will not be immune from suit "if *he knew or reasonably should have known* that the action he took . . . would violate the constitutional rights of [another]," or if he acted "with malicious intent to cause a deprivation of constitutional rights or other injury . . . ."[56] The courts consistently have held that a defendant "reasonably should have known" that his acts would constitute an actionable section 1983 deprivation only where he has violated "clearly established" federal rights.[57] Thus, under these decisions, a defendant will not be charged with section 1983 liability unless there existed at the time he acted legal precedent indicating that his actions would deprive an individual of his

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Gross and Culpable Negligence, 49 N.C.L. REV. 337 (1971), or according to a mere negligence standard, *e.g.*, Carter v. Estelle, 519 F.2d 1136, 1136-37 (5th Cir. 1975); Stiltner v. Rhay, 371 F.2d 420, 421 n.3 (9th Cir.), *cert. denied*, 386 U.S. 997 (1967); Huey v. Barloga, 277 F. Supp. 864, 872 (N.D. Ill. 1967) (dicta); *see* Schnapper, *supra* note 42, at 247-50. *But see* Procunier v. Navarette, 434 U.S. 555, 567-68 (1978) (Burger, C.J., dissenting); Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980) (citing Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)); Ferguson v. Fleck, 480 F. Supp. 219, 221 (W.D. Mo. 1979). Moreover, even before *Owen*, a few courts had imposed strict liability for section 1983 violations. *See* Freed, *Executive Official Immunity for Constitutional Violations: an Analysis and a Critique*, 72 NW. U.L. REV. 526, 527 (1977); Kirkpatrick, *supra* note 53, at 67-70. It is suggested that these various approaches have evolved because, among other things, the courts will not articulate a standard if another issue is dispositive of the case. *E.g.*, Baker v. McCollan, 443 U.S. 137 (1979); *see* Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980); note 59 *infra*.

[56] Wood v. Strickland, 420 U.S. 308, 322 (1975); *see* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974); Maiorana v. MacDonald, 596 F.2d 1072, 1074 (1st Cir. 1979); Crowe v. Lucas, 595 F.2d 985, 990 (5th Cir. 1979); Perez v. Rodriguez Boy, 575 F.2d 21, 23 (1st Cir. 1978); McGhee v. Draper, 564 F.2d 902, 914 (10th Cir. 1977); Bailey v. Lally, 481 F. Supp. 203, 221-22 (D. Md. 1979); Rogers v. Okin, 478 F. Supp. 1342, 1381-83 (D. Mass. 1979). *See generally* Note, *The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects*, 20 ARIZ. L. REV. 915 (1978). Incorporating its subjective elements, good faith has been defined as "[h]onesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry." BLACK'S LAW DICTIONARY 623 (5th ed. 1979); *accord*, Efron v. Kalmanovitz, 249 Cal. App. 2d 187, 192, 57 Cal. Rptr. 248, 251 (1967); Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 296 Minn. 130, 136, 207 N.W.2d 282, 287 (1973); Hulse v. Sheriff, Clark County, 88 Nev. 393, 398, 498 P.2d 1317, 1320 (1972).

[57] *E.g.*, Procunier v. Navarette, 434 U.S. 555, 565 (1978) (citing Wood v. Strickland, 420 U.S. 308, 322 (1975)); Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 712 (3d Cir. 1978); Bailey v. Lally, 481 F. Supp. 203, 222-24 (D. Md. 1979).

rights under federal law.[58]

Similarly, the *Owen* Court's refusal to recognize a qualified good-faith immunity from suit under section 1983 does not mandate that localities be held strictly liable for deprivations of federal rights. It is suggested that a negligence standard for municipal liability would safeguard the federal rights of individuals without impinging on the autonomy of local governing units.[59] This negligence standard would entail an examination of whether a municipality, in the reasonable exercise of its governing powers, should have opted for an alternative course of action in its legislation or custom that would have more adequately protected the federal rights of those affected.[60] Under a negligence standard, therefore, a municipality would be liable only for civil deprivations that were within the reasonable contemplation of its legislators or policymakers; it

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[58] *See* Procunier v. Navarette, 434 U.S. 555, 565 (1978); Wood v. Strickland, 420 U.S. 308, 322 (1975); Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 712 (3d Cir. 1978); Bailey v. Lally, 481 F. Supp. 203, 222-24 (D. Md. 1979).

[59] *See generally* Schnapper, *supra* note 42, at 247-53. The courts have not squarely evaluated a negligence standard for section 1983 violations. *See* Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980). In Procunier v. Navarette, 434 U.S. 555 (1978), for example, the United States Supreme Court granted certiorari to determine whether negligent deprivation of constitutional rights was redressable under section 1983. *Id.* at 559. The Court, however, never reached the issue, reasoning instead that the defendants were entitled to a qualified good-faith immunity and that the plaintiff's allegations of negligence were insufficient to rebut the defense of good faith. *Id.* at 566. *But see id.* at 567-68 (Burger, C.J., dissenting). A year later, in Baker v. McCollan, 443 U.S. 137 (1979), the Supreme Court was again presented with an opportunity to determine whether a negligence standard would suffice in section 1983 actions. The *Baker* Court, noting that *Procunier* provided no guidance on this issue, also did not reach the negligence question; rather, it decided the case on the basis of a failure of the plaintiff to meet the "threshold" showing of a deprivation of constitutional rights. *Id.* at 145-46. In dicta, however, the Court suggested:

> Having been around this track once before in *Procunier* . . . we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action.

Id. at 139-40.

[60] *See* Schnapper, *supra* note 42, at 247. The judge of conduct under negligence law must weigh four separate factors: "(a) the likelihood that the conduct would cause injury, (b) the magnitude of the possible injury, (c) the importance of the goal at which the conduct is directed, and (d) the availability of alternative methods of achieving that goal." *Id.* at 248. To apply this standard to section 1983, the only modification required would be to change "injury" to constitutional injury. The most significant reason for using such a standard to evaluate municipal activities, however, is that "liability would not be imposed retroactively when an established constitutional precedent is overturned by the Supreme Court, since prior to the decision involved there would have been little foreseeable risk of constitutional injury." *Id.* at 248.

would be insulated from liability for remote and unforeseeable violations which could not have been averted through the exercise of reasonable care.[61] Such a standard would adequately protect the federal rights of the municipality's citizens without unnecessarily hindering its legislative and policymaking processes.

CONCLUSION

The *Owen* decision denying municipalities qualified immunity from section 1983 suits clearly is in line with prior authority and the intent of the framers of the Civil Rights Act of 1871. Thus, where a municipal policy or custom deprives an individual of his federal rights, the municipality will be liable for damages caused thereby despite any allegation of good faith. Elimination of the availability to local governments of qualified immunity, however, should not result in imposition of strict liability on municipalities. It is hoped that the judiciary will take note of this and will refuse to impose section 1983 liability on a municipality for violation of an individual's federal rights unless it is demonstrated that a reasonably prudent governing body would have avoided the result by utilizing an existing alternative course of action.

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[61] *See* note 60 *supra.*