

CASENOTES

Broadening the Impact of Section 1983 on Municipalities: *Owen v. City of Independence*¹ — In 1972 George Owen was fired from his position as Chief of Police of the City of Independence, Missouri.² Although no official reason was given for the dismissal, it came in the midst of a highly publicized investigation of possible criminal activity among members of the department.³ Owen claimed that he had been stigmatized by the dismissal due to the notoriety surrounding this act, and that, therefore, the City had infringed on his constitutionally protected liberty interest in reputation. At the time of the dismissal, however, the City had no reason to expect that it might be liable for violating Owen's liberty interest by stigmatizing him in the course of the termination. Not until ten weeks *after* Owen was discharged did the Supreme Court of the United States announce the existence of such an interest in *Board of Regents v. Roth*.⁴ Furthermore, even if the City had been aware of such a liberty interest, it reasonably could have expected to be immune from liability. In *Monroe v. Pape*,⁵ the Supreme Court had determined that cities were not "persons" who could be sued for causes of action arising under 42 U.S.C. § 1983.⁶ After the Court's pronouncement in *Monroe*, a municipality enjoyed absolute immunity from suits brought under section 1983 even if it did cause a deprivation of a federally protected right. Thus the City Manager who terminated Owen on

¹ 445 U.S. 622 (1980).

² *Id.* at 629.

³ See text at notes 30-44 *infra*.

⁴ 408 U.S. 564 (1972). In *Roth* an assistant professor at a state university was not rehired. No reasons were given for this action. Although finding for the university on the merits of the case, the Court suggested that there were circumstances in which a refusal to re-employ might violate a liberty interest — specifically where a plaintiff's "good name, reputation, honor, or integrity is at stake because of what the government is doing to him. . . ." *Id.* at 573 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). Such circumstances might be found where the government acts in such a way that the plaintiff would be seriously stigmatized or have other employment opportunities foreclosed. See text at note 70 *infra*.

⁵ 365 U.S. 167 (1961).

⁶ *Id.* at 191-92. 42 U.S.C. § 1983 (Supp. 1979) 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. . . .

The independent statutory basis granting jurisdiction for federal courts that is most commonly invoked is 28 U.S.C. § 1343(a)(3) (Supp. III 1979), which states:

The district courts shall have original jurisdiction of any action authorized by law to be commenced by any person . . . [t]o redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

behalf of the City had reason to think that the dismissal was lawful and that even if the action was unlawful, the municipality would be immune from suit.

Despite these dual hurdles, Owen initiated a suit in Federal District Court for the Western District of Missouri against the City of Independence, the City Manager, and the City Council⁷ alleging that the defendants had deprived him of a liberty interest because of the manner in which he was discharged. In particular, Owen asserted that he had been denied due process of law because he had not been afforded a name-clearing hearing prior to his dismissal.⁸

The district court concluded that it could not exercise subject matter jurisdiction over a cause of action based on section 1983 because municipalities were not covered by that statute.⁹ It held, however, that it could imply a cause of action directly from the fourteenth amendment.¹⁰ Thus, the court reached

⁷ Owen also brought a state action for defamation against the City Manager and against the City Councilman who prepared the allegedly stigmatizing statement. Owen later dropped the suit against the City Manager and reached a financial settlement with the Councilman. 445 U.S. at 630 n.9.

⁸ *Owen v. City of Independence*, 421 F. Supp. 1110, 1120 (W.D. Mo. 1976). The petitioner also alleged he had a property interest in his job which entitled him to a pre-termination hearing. The district court rejected this argument because Owen held his position "at the will of the City Manager and was subject to discharge without notice of reasons and a hearing at any time the City Manager determined that his discharge was 'for the good of the service.'" *Id.* The court of appeals affirmed. *Owen v. City of Independence*, 560 F.2d 925, 938 (8th Cir. 1977). This ruling was not challenged at the Supreme Court level. 445 U.S. 626 n.3.

Owen also claimed his dismissal was in retaliation for the exercise of his first amendment rights because he had publicly addressed the City's need for more police, pay raises, and better facilities. The district court found that Owen presented no evidence to support this allegation and the defendants rebutted the inference of any causal connection. 421 F. Supp. at 1122. In an amended complaint, Owen also alleged that the Charter provision that allowed his discharge when deemed necessary for the good of the service was vague and overbroad. In addition he claimed that such a provision, which permitted administrative department heads to be terminated without a hearing when other high-ranking officials were provided with hearings, constituted an equal protection violation. Brief for Petitioner at 4. These issues were not addressed in the opinions of any of the courts.

⁹ 421 F. Supp. at 1119. Because the City was not a person within the meaning of section 1983, see note 5 *supra*, that section could not be the basis for a remedy. Therefore, § 1343(a)(3), see note 6 *supra*, or § 1343(a)(4), providing for the recovery of damages, equitable relief, or "other" relief, could not be the basis for subject matter jurisdiction. 421 F. Supp. at 1119.

¹⁰ U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Implying rights of action directly from the Constitution was first recognized by the Supreme Court in *Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narcotics*, 403 U.S. 388 (1971). The *Bivens* Court held first that a valid cause of action arises under the fourth amendment when federal agents, acting under color of federal authority, allegedly violate the amendment and second, that money damages is an appropriate remedy for such an action. Jurisdiction in *Bivens* was based upon 28 U.S.C. § 1331, a provision that granted federal jurisdiction where the amount in controversy exceeded \$10,000 and the action "arises under the Constitution, laws or treaties of the United States." *Id.* at 394, 397. It should be noted that § 1331 was amended on

the merits of the case and held that Owen's liberty interest had not been violated.¹¹ Both parties appealed; Owen appealed the holding, while the City appealed on the issue of subject matter jurisdiction.¹² The Court of Appeals for the Eighth Circuit agreed that no action could lie against a municipality pursuant to section 1983.¹³ It also affirmed the district court's conclusion that the fourteenth amendment provided Owen with a direct cause of action for monetary damages.¹⁴ The court found, however, that Owen was stigmatized and thus deprived of a liberty interest without due process of law when the City refused to provide a name-clearing hearing.¹⁵

The City petitioned the Supreme Court for certiorari, which was granted.¹⁶ Before the Court granted certiorari, however, it had decided *Monell*

December 1, 1980, to eliminate the need for any amount in controversy. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486.

Recently the Supreme Court extended the rationale behind the *Bivens* holding to other constitutional amendments. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court held that the plaintiff who had been discharged from her job as a deputy assistant administrator to a United States Congressman because of her gender could base a claim directly upon the due process clause of the fifth amendment. *Id.* at 234. In *Carlson v. Green*, 446 U.S. 14 (1980), the administratrix for the estate of a deceased federal prisoner was allowed to bring an action based on the eighth amendment, alleging that prison officials failed to provide the medical care and equipment necessary to treat the deceased. *Id.* at 18. The Supreme Court has expressly reserved the question whether the *Bivens* rationale should be extended to the fourteenth amendment. *Mount Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 278-79 (1977). Several courts have employed *Bivens* in allowing plaintiffs to sue municipalities for fourteenth amendment violations. *See, e.g.*, *Adekula v. New York City*, 431 F. Supp. 812, 817-18 (S.D.N.Y. 1977); *Donoghue v. Behler*, 429 F. Supp. 403, 404-06 (D.N.J. 1977); *Aiello v. City of Wilmington*, 426 F. Supp. 1272, 1283 (D. Del. 1976). The Supreme Court in 1978, however, vacated and remanded a Second Circuit decision, *Turpin v. Maillet*, 579 F.2d 152 (2d Cir. 1978), which had implied a right under the fourteenth amendment and had granted relief against a municipality for the unconstitutional acts of its employees. The Court sought reconsideration by the Second Circuit in light of *Monell v. New York Dep't of Social Services*, 436 U.S. 658 (1978), which held that the same result could be obtained under § 1983. *City of West Haven v. Turpin*, 439 U.S. 974 (1978). Since the outcome would be the same, under an implied right theory or a § 1983 theory, vacating *Turpin* may indicate that the Court is still unprepared to extend *Bivens* to the fourteenth amendment. *But see Hundt, Suing Municipalities Directly Under The Fourteenth Amendment*, 70 N.W. U. L. REV. 770 (1976). Indeed, on remand the Second Circuit concluded that "there is no place for a cause of action against a municipality directly under the 14th Amendment, because the plaintiff may proceed against the City of West Haven under § 1983." *City of West Haven v. Turpin*, 591 F.2d 426, 427 (1979).

¹¹ 421 F. Supp. at 1122. The court found that Owen had no property interest in his job nor was he stigmatized and thus deprived of a liberty interest by the circumstances of his discharge. The court further concluded that the defendants disproved the imposition of a stigma by a preponderance of the evidence because (1) Owen was terminated pursuant to the City Charter and no statement imputing any illegal, immoral, or other "stigmatizing" conduct to him was put in his record; (2) the Councilman's statement was not causally connected to Owen's termination since the decision to replace Owen was made prior to the Council meeting; and (3) the supervisor of the investigation and the grand jury exonerated Owen of any criminal charges. *Id.* at 1120-22.

¹² The defendants challenged the ruling that they were subject to suit under 28 U.S.C. § 1331 and the fourteenth amendment. 560 F.2d at 931.

¹³ *Id.*

¹⁴ *Id.* at 933.

¹⁵ *Id.* at 937.

¹⁶ 438 U.S. 902 (1978).

v. New York Department of Social Services.¹⁷ In that case the Court held that a section 1983 suit can be brought against a municipality when the injury claimed resulted from a city's policy, custom, or usage.¹⁸ In light of *Monell*, the Court remanded *Owen v. City of Independence* to the court of appeals for reconsideration.¹⁹ On remand the court of appeals applied *Monell* and reaffirmed its previous finding that a fourteenth amendment violation had been proved.²⁰ The court concluded that Owen's complaint stated a cause of action under section 1983 but held that all the defendants enjoyed qualified immunity because the city officials had acted in good faith.²¹ This time Owen petitioned for certiorari. The Supreme Court granted the petition²² in order to resolve the issue whether cities enjoyed qualified immunity based on the good faith of the cities' officials. This issue had not been addressed in *Monell*.

In reviewing the court of appeals' decision, the United States Supreme Court, in a five-to-four decision, held that the good faith of a municipality's officials or agents is no defense to an action brought against the City pursuant to 42 U.S.C. § 1983.²³ The Court found nothing in the language or history of section 1983 nor anything in the common law at the time the section was drafted that would support a rule of qualified immunity.²⁴ To buttress this construction of section 1983, the Court added that holding municipalities liable for damages is necessary to accomplish the central aim of the Civil Rights Acts of the 1870's,²⁵ of which section 1983 is but one provision. This aim was "to provide protection to those persons wronged by the misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with

¹⁷ 436 U.S. 658 (1978).

¹⁸ *Id.* at 690-91. In *Monell*, several female employees of the Department of Social Services and the Board of Education of New York City challenged the official policy of those departments which required pregnant employees to take unpaid leaves of absence before such leaves were required medically. *Id.* at 661. The Court, holding that § 1983 applies to local governments, reversed the decision of the Court of Appeals for the Second Circuit. *Id.* at 702.

¹⁹ 438 U.S. 902 (1978).

²⁰ 589 F.2d 335, 337 (8th Cir. 1978).

²¹ *Id.* at 337-38.

²² 444 U.S. 822 (1979).

²³ 445 U.S. at 634.

²⁴ *Id.* at 635-37.

²⁵ *Id.* at 650. The statutes were originally passed in response to the southern states' unwillingness or inability to remedy the violations of civil rights caused primarily by the violence of the Ku Klux Klan. In 1871, speaking in support of the Act of April 20, 1871 (popularly known as the Ku Klux Klan Act), Rep. Beatty of Ohio emphasized these lawless conditions:

certain states have denied to persons within their jurisdiction the equal protection of the laws. The proof of the point is voluminous and unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law were shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.

Cong. Globe, 42d Cong., 1st Sess., App. at 428. See generally Gressman, *The Unhappy History Of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952); Nahmod, *Section 1983 and the 'Background' of Tort Liability*, 50 IND. L.J. 5 (1974); Note, *Developments in the Law; Section 1983 And Federalism*, 90 HARV. L. REV. 1133 (1977) [hereinafter cited as *Developments*].

the authority of state law.”²⁶ The Court explained that section 1983’s provision of a cause of action against wrongdoers acting under color of state law protected the injured person by compensating him for past deprivations of federal rights and by deterring future violations of such rights.²⁷ Such protection would be lost, the Court noted, if the government were allowed to disavow liability for its injurious conduct.²⁸

The significance of *Owen v. City of Independence* is twofold. It lies not only in its holding that cities are subject to “strict liability,”²⁹ but also in its ambiguous expansion of a liberty interest. This casenote will discuss both of these aspects of the *Owen* decision and their potential impact on municipalities. First, the facts surrounding Owen’s dismissal will be presented. This presentation will be followed by an examination of how the recognition of a liberty interest based on these facts has expanded the concept of due process of law. Next, the Court’s reasoning for imposing strict liability on the City will be set forth. In analyzing this reasoning particular attention will be focused on the policy considerations on which the Court relied as well as those that the majority ignored. This casenote will then examine the overall effect of this decision on municipalities. It will be submitted that because of the combination of the unexplained and undefined expansion of a liberty interest with the Court’s disregard of important policy considerations, the *Owen* holding needs to be reconsidered to present municipalities some defense in similar liberty interest cases.

I. THE SEARCH FOR A LIBERTY INTEREST

A. *Owen’s Case Against the City of Independence*

George Owen had been appointed Chief of Police of the City of Independence for an indefinite period.³⁰ During Owen’s administration certain discrepancies in the records of the police property room were found.³¹ An investigation ordered by the City Manager resulted in a finding that there was “no evidence of any criminal acts or of any violation of state or municipal law in the administration of the property room.”³² This finding notwithstanding, the City Manager asked Owen to resign and offered Owen an advisory position with the Department.³³ Owen, however, refused to resign.³⁴ Following another

²⁶ 445 U.S. at 650 (quotations omitted).

²⁷ *Id.* at 651-52.

²⁸ *Id.* at 651.

²⁹ *Id.* at 658 (Powell, J., dissenting).

³⁰ 445 U.S. at 625.

³¹ *Id.* The most serious of these discrepancies was discovered in March, 1972, when a handgun that supposedly had been destroyed by the police was found in the possession of a felon in Kansas City. Additionally, money and narcotics had disappeared without explanation and two television sets had been signed out by the petitioner for his personal use. *Id.* at 625, 627-28.

³² *Id.* at 625-26.

³³ 421 F. Supp. at 1114-15.

³⁴ 445 U.S. at 626.

meeting between the two men, the City Manager again warned Owen that if he did not resign or accept the alternative position he would be fired.³⁵ Subsequently, the City Manager issued a public statement concerning the property room investigation adding that "[s]teps have been initiated on an administrative level to correct these discrepancies" found in the administration, handling, and security of recorded property.³⁶ This statement was reported in a local paper.³⁷

A few days later at a City Council meeting, one of the members read his own secretly prepared statement about the investigation.³⁸ He then moved that the full investigative report be made public and "that the City Council recommend to the City Manager 'that he should take all direct and appropriate action permitted under the Charter against such persons as are shown by the investigation to have been involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports.'"³⁹ The motion was passed by a substantial majority of the Council.⁴⁰ The following day, exercising his power under the City Charter to remove heads of administrative departments, the City Manager discharged Owen without stating specific reasons for the dismissal.⁴¹ The local press reported that the discharge resulted from the investigation.⁴² Owen's request for specific grounds for his discharge and appellate review of his termination were denied by the City.⁴³ Because Owen could not obtain an administrative review of this decision, he initiated a suit in federal district court.⁴⁴

The district court, relying upon the standard enunciated in *Roth*, held that Owen had not suffered a constitutionally cognizable injury. The court concluded that Owen's discharge did not foreclose his ability to obtain other employment.⁴⁵ There were no statements in Owen's official employment rec-

³⁵ 421 F. Supp. at 1115.

³⁶ *Id.* The City Manager did not release the details of the investigation but intended to keep these confidential. *Id.* He did speak with a police lieutenant, however, about the latter's willingness to assume Owen's position. *Id.*

³⁷ *Id.*

³⁸ *Id.* No other city official knew of this statement. In fact the statement and motion did not even appear on the Council's agenda. *Id.*

³⁹ *Id.* at 1115-16.

⁴⁰ *Id.* at 1116. Section 2.11 of the City Charter, however, expressly prohibits the City Council from influencing the City Manager's appointment and discharge of city employees. *Id.* at 1113.

⁴¹ *Id.* at 1113. Section 3.3(1) gives the City Manager the sole power to "[a]ppoint, and when deemed necessary for the good of the service, to lay off, suspend, demote, or remove all directors, or heads of administrative departments, and all other administrative officers and employees of the city." *Id.*

⁴² 445 U.S. at 628. On Owen's official employment record maintained by the City, his discharge is recorded as occurring pursuant to § 3.3(1) of the Charter. No specific reasons or charges appear on the record. Brief for the Respondent at 5.

⁴³ 421 F. Supp. at 1113. The Charter did not provide that the Chief of Police was entitled to any notice of reasons, or a hearing, in connection with the termination of his employment. *Id.*

⁴⁴ See note 8 *supra*.

⁴⁵ 421 F. Supp. at 1121.

ord charging him with any illegal or immoral conduct.⁴⁶ Furthermore, the court found no connection between Owen's discharge and the Council's resolution because the City Manager had obtained Owen's replacement prior to the Council meeting.⁴⁷ Moreover, the Council was precluded, by the City Charter, from influencing the City Manager's decision; thus, the Council was acting *ultra vires*.⁴⁸ Finally, Owen had been publicly exonerated of any illegal or immoral conduct prior to his termination by the City Manager and after his discharge by the grand jury.⁴⁹ Thus, the district court concluded that Owen's discharge was not related to any charge which would prevent his future employment.

On appeal, the Eighth Circuit also relied upon *Roth* but reached the opposite result.⁵⁰ The appeals court reasoned that the City of Independence "as employer served to blacken Owen's name and reputation."⁵¹ The court emphasized the Councilman's statement and the connection that the press had drawn between the statement and the discharge.⁵² Since the charges against Owen were made by a City Councilman and were connected "in the eyes of the public" with Owen's termination, the court concluded that under *Roth* the City had deprived Owen of a liberty interest without due process of law.⁵³

Judge Van Oosterhout, the sole dissenter, disagreed with the majority's approach of using the public's perception, based on newspaper stories, to find a causal connection. He found the perception to be an incorrect one since the official discharge notice was devoid of any stigmatizing comments. Furthermore, he concluded, the public's impression was the result of newspaper accounts and not the result of any municipal action.⁵⁴ Thus, he would have affirmed the trial court's determination that Owen was not stigmatized in the course of his discharge because that court's conclusion was supported by substantial evidence and was not clearly erroneous.⁵⁵ Furthermore, the dissent expressed concern that the majority's holding would convert every defamation by a public official into a due process violation.⁵⁶ According to the dissent, such a result was not the intention of the Supreme Court.⁵⁷

The court of appeals, by finding a causal connection in the eyes of the public between the discharge and the defamation, was not merely applying *Roth*; rather, it was superimposing *Roth* onto a very different set of facts. In *Roth* the Court had found that the connection arose from the actual termination

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 1121-22. See note 11 *supra*.

⁵⁰ 560 F.2d at 937.

⁵¹ *Id.*

⁵² *Id.* at 936.

⁵³ *Id.* at 937.

⁵⁴ *Id.* at 942 (Oosterhout, J., dissenting).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 941-42.

of employment. It was the action of the employer, itself, in discharging its employee that created the employee's injury. The Court did not look to any impressions that the event might have made on outsiders.⁵⁸ Yet this is exactly what the court of appeals did in *Owen*. In essence the decision by the court of appeals was an expansion of the *Roth* standard. Instead of confining itself to the City Manager's decision to discharge Owen, the court looked to events that happened around the same time as the personnel decision. Indeed, the Councilman's statement and its subsequent adoption by the City Council did not take place until after the City Manager decided to terminate Owen, although the City Council meeting was held the night before the City Manager actually implemented his plan.⁵⁹ Thus, by looking to the Councilman's statement, the court of appeals looked beyond the circumstances particular to the termination to establish a causal connection between the dismissal and the stigma claim of the employee. Yet the court did not delineate how far a court may wander from the events that occurred in the course of the termination in order to find that link. The majority opinion stated only:

The fact of actual stigma to Owen *connected with his discharge* is undeniable, for the action of the City of Independence as employer served to blacken Owen's name and reputation. That the stigmatizing charges did not come from the city manager and were not included in the discharge notice is immaterial because the official actions of the city council released charges against Owen contemporaneous and, in the eyes of the public, connected with that discharge.⁶⁰

Thus, according to the court, the publicity given to the discharge and the defamatory statement of the Councilman was sufficient to establish a due process violation.

When the case was decided by the Supreme Court, although four justices reached the same conclusion as the dissent in the court of appeals,⁶¹ the majority accepted the finding of a constitutional injury.⁶² While the majority gave the liberty interest summary treatment, discussing it only in a footnote,⁶³ nevertheless, the Court's conclusion was a significant statement with respect to the liberty interest concept. It simply dismissed the challenge to the court's finding of a liberty interest as having "no merit."⁶⁴

⁵⁸ 408 U.S. at 570.

⁵⁹ 445 U.S. at 629.

⁶⁰ 560 F.2d at 937. The language of this expanded standard actually appeared the year before in *Codd v. Velger*, 429 U.S. 624, 628 (1977) (in connection with a job termination). Yet the *Velger* Court avoided applying the standard by finding that the plaintiff failed to state a claim. The decision rested solely on the plaintiff's failure to allege and prove that the charges which harmed his reputation, *id.* at 626, were substantially false. *Id.* at 628.

⁶¹ 445 U.S. at 658.

⁶² *Id.* at 633 n.13.

⁶³ *Id.* This issue was not raised by the City until it filed its brief. *Id.* See Brief for the Respondent at 45-47.

⁶⁴ 445 U.S. at 633 n.13.

The implementation of this new standard is inconsistent with previous Supreme Court cases that had considered the nature of a liberty interest in public employment. In *Owen* the Court implied that defamation alone, with only a loose causal relation to loss of employment, may be sufficient to rise to the level of a constitutional injury. Such an overinclusive standard is at odds with the narrow construction that the Court had attempted to give to the stigma theory of injury shortly before *Owen*.⁶⁵ Prior to *Owen* the Court had found constitutional violations only when reputational harm directly resulted in an economic injury.⁶⁶ Yet after *Owen* it appears that reputation alone is a constitutionally protected interest sufficient to trigger fourteenth amendment protections automatically. Thus, *Owen* represents a radical departure from the narrower trend in prior cases of defamation by a public official, as applied in *Paul v. Davis*⁶⁷ and *Cafeteria Workers v. McElroy*,⁶⁸ where injury to reputation, without more, was insufficient for fourteenth amendment purposes.

B. *The Evolution of a Liberty Interest in Reputation:
Defamation Alone Not a Constitutional Injury Until Owen*

The development of a stigma theory — namely that reputation is a constitutionally protected interest and thus, defamation by a public official was a constitutional violation — has been erratic. At the early stages of the theory's development, the Supreme Court intimated that reputational harm serious enough to jeopardize future employment possibilities triggered the protection of the fourteenth amendment.⁶⁹ The Court later seemingly broadened this definition of a liberty interest to include reputational harm standing alone,⁷⁰ but it later retreated to the earlier standard.⁷¹ In *Owen* the Court appears to have reversed this retreat and is moving again toward expanding the scope of a liberty interest.

The evolution of this stigma theory began against the political backdrop of the McCarthy era.⁷² The leading case, *Joint Anti-Fascist Refugee Committee v. McGrath*,⁷³ concerned the practice of placing certain organizations that had been designated by the Attorney General as Communist on a list to be submitted to the Loyalty Review Board whose function was to assess the loyalty of government employees.⁷⁴ Because of the nationwide publicity given to the

⁶⁵ See Note, *Reputation, Stigma and Section 1983: The Lessons of Paul v. Davis*, 30 STAN. L. REV. 191 (1977).

⁶⁶ See Section I.B. *infra*.

⁶⁷ 424 U.S. 693 (1976).

⁶⁸ 367 U.S. 886 (1961).

⁶⁹ See text at notes 73-92 *infra*.

⁷⁰ See text at notes 93-99 *infra*.

⁷¹ See text at notes 100-18 *infra*.

⁷² Note, *Reputation, Stigma and Section 1983: The Lessons of Paul v. Davis*, 30 STAN. L. REV. 191, 217-23 (1977).

⁷³ 341 U.S. 123 (1951).

⁷⁴ *Id.* at 125.

listing, the listed organizations suffered severe economic harm.⁷⁵ Although several of the organizations denied Communist affiliation, they were not given the opportunity to rebut the Attorney General's determination.⁷⁶ In a plurality opinion the *McGrath* Court held that the Attorney General could not place organizations on the list arbitrarily.⁷⁷ The basis for the holding was that the Executive Order under which the Attorney General acted did not grant him the authority to list organizations without making the "appropriate determinations."⁷⁸ The concurring opinions implied that some form of due process is required if an employee has been branded with a "badge of infamy" when discharged.⁷⁹ This case indicated what the developing standard might be but did not clarify in what circumstances, other than the extreme one in *McGrath*, a constitutional injury would be found.

The following year, in *Wieman v. Updegraff*,⁸⁰ the Court further defined and reinforced the stigma theory by holding that a charge of disloyalty may be a "badge of infamy."⁸¹ In *Wieman* the plaintiff brought an action to enjoin state officials from paying further salaries to state employees who refused to take the loyalty oath mandated by statute for all state officials and employees.⁸² The appellants, various state employees, intervened claiming the statute was invalid for several reasons including the reason that it deprived them of their due process rights.⁸³ The Court held the statute unconstitutional.⁸⁴ The *Wieman* holding, however, rested on the Court's finding that a statute that required state employees to swear that they were not currently nor at any time within the preceeding five years members of "subversive" groups listed by the United States Attorney General was patently arbitrary and discriminatory because it did not distinguish between members who knew the true nature of the groups and those who did not.⁸⁵ Furthermore, these listings had a potentially chilling effect upon the individual's first amendment associational rights. Yet, since the underlying harm in *Wieman* was a branding of disloyalty, its holding reaffirmed the holding in *McGrath*.

⁷⁵ *Id.* at 129.

⁷⁶ *Id.* at 126.

⁷⁷ *Id.* at 137-38.

⁷⁸ *Id.* at 136.

⁷⁹ Justice Black's concurring opinion suggested that due process is required when blacklists are used as a sanctioning tool. *Id.* at 144-45 (Black, J., concurring). Justice Frankfurter found that procedural requirements are mandated whenever the government imposes a "grievous loss." *Id.* at 168 (Frankfurter, J., concurring). Justice Douglas found that due process is required before any organization could be "branded as 'subversive.'" *Id.* at 175-76 (Douglas, J., concurring). Justice Jackson suggested that it was the disqualification from government employment that was the basis for the due process requirement. *Id.* at 184-85 (Jackson, J., concurring).

⁸⁰ 344 U.S. 183 (1952).

⁸¹ *Id.* at 190-91.

⁸² *Id.* at 184-85.

⁸³ *Id.* at 185.

⁸⁴ *Id.* at 192.

⁸⁵ *Id.* at 190.

Nine years later, the Court in *Cafeteria Workers v. McElroy*⁸⁶ clarified the standard announced in *Wieman* and suggested that in some instances government-imposed stigma could be so harmful as to entitle the victim to a hearing in order to rebut the stigmatizing allegations.⁸⁷ *Cafeteria Workers* involved a cook who lost her job at a government cafeteria because she failed to receive a security clearance. Although the plaintiff was not afforded a hearing, the Court did not find a constitutional injury.⁸⁸ The Court reasoned that the plaintiff was not entitled to notice and a hearing because her exclusion was reasonable and in accordance with the provisions of her contract.⁸⁹ The Court concluded that the denial of a security pass raised inferences only as to certain character deficiencies of the plaintiff.⁹⁰ Such an injury to the plaintiff's reputation, the Court held, was insufficient to mandate due process protections.⁹¹ The Court added that the government had not acted in such a way as "to bestow a badge of disloyalty or infamy, with the attendant foreclosure from other employment opportunity."⁹² *Cafeteria Workers* added to the uncertainty surrounding the development of the stigma theory. Arguably, its only distinction from the earlier cases was that the employee's injury occurred from the government's failure to grant a security clearance and that this refusal has a different impact upon future employment opportunities than an actual label as a Communist or a disloyal individual.

The holdings in *McGrath*, *Wieman*, and *Cafeteria Workers* were typical of the Court's early approach to reputational injury. In those cases the Court viewed the liberty interest as an interest in reputation free only from a "badge of disloyalty or infamy" so great as to foreclose other employment. Apparently only this type of injury mandated due process.

This narrow view arguably changed in *Wisconsin v. Constantineau*.⁹³ In *Constantineau* the plaintiff was forbidden to purchase or receive liquor for one year because of a determination by the chief of police that she had a "drinking problem."⁹⁴ Furthermore, the police chief posted notices to this effect without notifying the plaintiff or giving her an opportunity to rebut the allegation.⁹⁵ The plaintiff filed suit claiming that her due process rights had been violated. The Court held that the posting violated the plaintiff's liberty interest by imposing a

⁸⁶ 367 U.S. 886 (1961).

⁸⁷ *Id.* at 898-99.

⁸⁸ *Id.* at 898.

⁸⁹ *Id.*

⁹⁰ *Id.* at 899. Although the denial of a pass could raise an inference of disloyalty, the Court stated it also could have implied that plaintiff was "garrulous, or careless with her identification badge." *Id.*

⁹¹ *Id.*

⁹² *Id.* at 898.

⁹³ 400 U.S. 433 (1971).

⁹⁴ The Wisconsin statute allowed the determination to be made by designated people, including the Chief of Police. *Id.* at 434 n.2.

⁹⁵ *Id.* at 435.

stigma.⁹⁶ Therefore, the procedural safeguards of notice and hearing were deemed to be necessary.⁹⁷ The Court declared:

Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Posting" under the Wisconsin Act may to some be merely the mark of illness, to others it is a stigma, an official branding of a person. The label is a degrading one.⁹⁸

From the language of *Constantineau*, therefore, it appeared that the Court had adopted a more expansive standard of the liberty interest — one that was inclusive enough to protect reputational injury by the government without any additional harm.⁹⁹

In *Board of Regents v. Roth*¹⁰⁰ the Court applied the *Constantineau* standard restrictively. The *Roth* Court adopted the language from *Constantineau* that due process is required where "good name, reputation, honor, or integrity is at stake" and applied it to the termination of public employment.¹⁰¹ In *Roth* the plaintiff had been hired by the state university to teach for one academic year.¹⁰² At the end of that year he learned he would not be rehired, but the state university refused to provide reasons for this decision.¹⁰³ Roth alleged that his unexplained dismissal injured his reputation and that he deserved at least an opportunity to undo this harm at a name-clearing hearing.¹⁰⁴ The Court, however, declined to find a due process violation. The Court stated that in order for a constitutional violation to occur there must be an accusation "that might seriously damage . . . [or foreclose] freedom to take advantage of other employment opportunities."¹⁰⁵ Viewed against the earlier blacklisting cases, this was a strong suggestion that damage to reputation alone does not trigger the requirement of a name-clearing hearing. According to the Court, before a liberty interest in reputation can mandate procedural safeguards it must be present in conjunction either with accusations that would chill exercise of first amendment associational rights, with a property interest in the right that is

⁹⁶ *Id.*

⁹⁷ *Id.* at 437.

⁹⁸ *Id.*

⁹⁹ *But see* *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

¹⁰⁰ 408 U.S. 564 (1972).

¹⁰¹ *Id.* at 573.

¹⁰² *Id.* at 566.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 569.

¹⁰⁵ *Id.* at 573 (emphasis added).

denied, or with the foreclosure of future employment opportunities.¹⁰⁶ There must be "stigma plus."¹⁰⁷

The "stigma plus" notion was carried over to areas other than the termination of employment. In *Goss v. Lopez*,¹⁰⁸ some high school students were suspended for ten days, without a hearing prior to or within a reasonable time after the suspension. The Court held that the students' due process rights had been violated.¹⁰⁹ First, the Court concluded that the students had a property

¹⁰⁶ In *Perry v. Sindermann*, 408 U.S. 593 (1972), a companion case to *Roth*, the plaintiff claimed that a state college's failure to rehire him was in retaliation for his exercise of first amendment rights. *Id.* at 595. Although the Court declined to hold the college's action invalid, it reaffirmed its earlier pronouncements that "the renewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights." *Id.* at 598. The plaintiff also claimed that the college's failure to rehire him without first giving him a hearing deprived him of his property interest in his job. *Id.* at 599-600. Reviewing this claim, the Court concluded that an "informal" tenure system did give the plaintiff a property interest in his job. *Id.* at 603. Thus, it was the violation of both the first amendment rights and the property interest, not simply any reputational harm, which created the right to notice and opportunity to be heard.

In *Arnett v. Kennedy*, 416 U.S. 134 (1974), a civil service employee was discharged for making false and reckless charges that a superior had accepted a bribe. Justice Rehnquist, in a plurality decision, looked not at the nature of the right involved — the plaintiff's statutory expectation of continued employment — but rather at the fact that the legislation that conferred the expectancy also limited the procedural guarantees. *Id.* at 151-52. Therefore, he concluded that "a litigant in the position of the appellee must take the bitter with the sweet." *Id.* at 154. According to the plurality, a liberty interest violation would exist only if there were no name-clearing hearing when the "dismissal [was] based upon an unsupported charge which could wrongfully injure the reputation of an employee." *Id.* at 157.

In *Bishop v. Wood*, 426 U.S. 341 (1976), a police officer who was discharged without a hearing claimed a property interest in his job under a city ordinance. The Court rejected this contention, upholding the district court's conclusion that the petitioner "held his position at the will and pleasure of the city." *Id.* at 345. In addition, the police officer claimed that his liberty interest was violated because the reasons given for his discharge were false. In rejecting this claim, the Court explained that the reasons articulated for the discharge had not been made public. Therefore, no harm to reputation was involved. *Id.* at 348. Furthermore, the Court refused to review what it characterized as a "personnel decision." *Id.* at 349. Even if the charges precipitating the dismissal were false, the Court concluded, "[t]he Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." *Id.* at 350.

¹⁰⁷ Lower courts, although acknowledging the standard set forth in *Roth*, did not always reach consistent results. For example, in *Adams v. Walker*, 492 F.2d 1003 (7th Cir. 1974), the chairman of the State Liquor Control Commission was discharged by the governor for "incompetence, neglect of duty and malfeasance in office." *Id.* at 1004. In examining the liberty interest claim the court held that, when read in context, the statement did not deprive the plaintiff of due process. *Id.* at 1007. See also *Moore v. Otero*, 557 F.2d 435, 438 (5th Cir. 1977) (Where an employee retains his employment, even after a demotion, his reputational harm does not rise to the level of a liberty interest violation); *Mitchell v. King*, 537 F.2d 385, 390 (10th Cir. 1976) (discharged member of museum board suffered reputational harm at most, not a liberty interest violation when terminated); *Sullivan v. Brown*, 544 F.2d 279 (6th Cir. 1976) (transfers of teachers after each suffered reputational harm not a liberty deprivation); and *Danno v. Peterson*, 421 F. Supp. 950 (N.D. Ill. 1976) (same).

¹⁰⁸ 419 U.S. 565, 569-71 (1975).

¹⁰⁹ *Id.* at 572.

interest in their education that derived from a state statute.¹¹⁰ Thus the primary reason for finding a due process violation was the deprivation of a property interest. Only then did the Court go on to conclude that there was a liberty interest violation as well because "those charges [*i.e.*, the grounds for the suspension] could *seriously* damage the students' standing with their fellow pupils and teachers as well as interfere with later opportunities for higher education and employment."¹¹¹ Furthermore, the Court noted, the reputational injury that the students would suffer would appear on their transcripts and could prevent admission to advanced educational institutions, thus foreclosing future opportunities.¹¹² Therefore, the reputational harm incurred by the students and relied upon by the Court in *Goss* went beyond mere defamation because it served to narrow their future options. It appears, then, that the Court relied on a "stigma plus" standard, just as it had in *Roth*. Yet *Goss* and *Roth* are difficult to reconcile with the Court's pronouncement in *Constantineau*. When reputational harm would mandate due process protections remained unclear.

In *Paul v. Davis*¹¹³ the Court attempted to clarify what kind of reputational harm was necessary to mandate procedural guarantees. In *Paul* a plaintiff who had been arrested for shoplifting, but not yet tried, alleged that his reputation had been so stigmatized as to impair his future employment opportunities because he was identified to storeowners as a shoplifter.¹¹⁴ The Court squarely rejected a liberty interest resting on reputation alone and denied that any previous cases stood for such a proposition.¹¹⁵ The Court explained that "the Court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment."¹¹⁶ For example, the *Paul* Court asserted that the holding in *Constantineau* rested on a property right, granted by the state "to purchase or obtain liquor in common with the rest of the citizenry,"¹¹⁷ not on a liberty interest in reputation. The *Paul* decision, therefore, precluded a constitutional injury unless the defamation is causally connected with the termination of government employment.¹¹⁸ Furthermore, to trigger constitutional protection the defamation arguably would have to occur in conjunction with an employment loss where the employment itself was a property interest. Employees in non-tenured positions, such as *Roth* and *Owen*, could not claim such property interests in their jobs.

¹¹⁰ *Id.* at 573.

¹¹¹ *Id.* at 575 (emphasis added).

¹¹² *Id.* at 575 n.7.

¹¹³ 424 U.S. 693 (1976).

¹¹⁴ *Id.* at 696. The charges were subsequently dropped. *Id.*

¹¹⁵ *Id.* at 699.

¹¹⁶ 424 U.S. at 706.

¹¹⁷ *Id.* at 708.

¹¹⁸ *Id.* at 709.

Owen held his job subject to termination at will.¹¹⁹ Clearly there was no property interest. At most the *Owen* Court was presented with a defamatory statement¹²⁰ made by a high-ranking city official which, even according to the majority's finding, did not motivate the decision to terminate Owen's employment.¹²¹ According to the facts accepted by the Court, the City Manager had already decided to fire Owen when the statement was made. Indeed, the City Manager already had found a replacement for Owen before the Councilman made his statement.¹²² To allow a plaintiff to claim a constitutional violation because a defamatory statement was made around the time the personnel decision was implemented not only expands prior case law, but also allows that plaintiff to take advantage of a fortuitous occurrence to establish the constitutional injury.¹²³

Such a result seems at odds with the result reached by the Court in *Mount Healthy School District Board of Education v. Doyle*.¹²⁴ In *Mt. Healthy* the Court refused to allow such fortuitous circumstances to establish a constitutional violation. The plaintiff in that case, a teacher, had telephoned a radio station and described a proposed dress code for teachers at his school. When his contract was not renewed — an action that prevented the granting of tenure — his call to the radio station was cited as one of several reasons for the failure to rehire. Since the Court found that the other reasons provided sufficient independent grounds for Doyle's termination,¹²⁵ the Court held that the plaintiff could not use the first amendment infringement claim to get a remedy.¹²⁶ The Court reasoned that such an outcome would result in a windfall for the plaintiff and stated that "[a] rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."¹²⁷ Thus, even though the failure to reappoint the plaintiff amounted to a loss of employment in part for exercising first amendment rights, the Court did not order reinstatement. It correctly recognized that the employer had sufficient legitimate reasons to justify its action. The mere fact that the teacher

¹¹⁹ 421 F. Supp. at 1120.

¹²⁰ As the district court noted, the statement accused Owen of being a poor administrator, nothing more. 421 F. Supp. at 1122.

¹²¹ 445 U.S. at 671 n.13.

¹²² *Id.* at 660.

¹²³ In fact Owen chose termination rather than accepting an advisory position. *Id.*

¹²⁴ 429 U.S. 274 (1977).

¹²⁵ These included fighting with other teachers and cafeteria workers and making an obscene gesture to two female students. *Id.* at 281-82.

¹²⁶ *Id.* at 285. The Court stated: "[w]e are thus brought to the issue whether, even if . . . the protected conduct played a 'substantial part' in the actual decision not to renew, [the termination] would necessarily amount to a constitutional violation justifying remedial action. We think that it would not." *Id.*

¹²⁷ *Id.* See DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of Mt. Healthy Board of Education v. Doyle Upon the NLRA*, 66 GEO. L.J. 1109 (1978).

had chosen to speak out shortly before his termination was not enough to negate the valid reasons for his discharge.

From the underlying policy consideration in *Mt. Healthy*, it would follow that a plaintiff also should not be permitted to enjoy a windfall because of statements made by an individual not directly involved in the discharge process. In *Owen*, however, this is exactly the result that the majority allowed. Owen was put in a position he never would have enjoyed but for the Councilman's statement. Owen was awarded back pay he would have earned had he continued as police chief¹²⁸ when in fact he would have been discharged regardless of the Councilman's statement. To be consistent with *Mt. Healthy*, the *Owen* Court should have examined more closely the evidence produced by the City. The City met the burden of proving that the City Manager had already decided to replace Owen and that any defamation that Owen suffered was immaterial to the decision to replace him.¹²⁹ Inasmuch as the City Manager could have discharged Owen for any reason, permitting Owen to claim that he was stigmatized because of the defamatory remarks made independent of the decision to discharge him has opened the door to a broad range of claims. Now any discharged government employee can claim a constitutional injury if he can show that he has been defamed, regardless of whether the discharge and the defamation have a close causal connection. As a result of *Owen* it appears that a causal connection need not be demonstrated between the defamation and the dismissal so long as the events occur around the same time.¹³⁰ This tenuous connection, one that occurred "in the eyes of the public"¹³¹ despite the City Charter's explicit prohibition of interference by the City Council in some personnel decisions,¹³² raises questions about the scope of municipal liability. Under *Owen* it seems that a municipality may be held liable merely because it appears to have acted impermissibly in the public eye.

¹²⁸ Owen could not be reinstated since he had reached the mandatory retirement age during the course of the litigation. 445 U.S. at 632 n.12. The money that he received, however, was the back pay he would have earned minus the amount he received in his defamation action against the Councilman. *Id.*

¹²⁹ According to *Mt. Healthy*, once the plaintiff has proved that he engaged in constitutionally protected conduct and that such conduct was a substantial factor in the dismissal decision, the defendant must show by a preponderance of the evidence that it would have reached the same decision absent the conduct in question. 429 U.S. at 287. In *Owen* the district court and the dissents in the court of appeals and Supreme Court were satisfied that the defendants clearly met this burden. 421 F. Supp. at 1122; 560 F.2d at 941; 445 U.S. at 657.

¹³⁰ In *Owen* the fact that the statement occurred about twelve hours prior to Owen's actual termination was important to the Court because it made the two events appear connected. Yet the Court did not establish guidelines to determine how close in time the two events must occur to establish a sufficient nexus to prove a stigmatizing injury. See *Gentile v. Wallen*, 562 F.2d 193 (2d Cir. 1977) (post-discharge statement by officials that teacher was discharged for misconduct not sufficient).

¹³¹ 560 F.2d at 937.

¹³² See note 40 *supra*.

C. *The Nexus Necessary for Municipal Liability in Section 1983 Actions:*
Was the City Liable Because It Looked Liable?

The *Owen* majority relegated the entire causation issue to a footnote. By doing so, it implied that there was little need for any extended discussion of the issue. For the majority it was sufficient that the public perceived Owen's dismissal to be the result of the City Council's resolution "even if [the statement and the resolution] did not in point of fact 'cause' petitioner's discharge. . . ." ¹³³ Since the Council's actions did not "cause" the discharge but only the reputational harm, however, it was inconsistent with the holding in *Paul* for the Court to have imposed liability. In *Paul* mere defamation caused by a public official was not enough to warrant due process rights. Although *Owen* did not explicitly overrule the holding in *Paul*, it does appear to have expanded the *Paul* standard beyond recognition and without explanation. An understanding of the *Owen* Court's departure from *Paul* might be gained through an analysis of the nexus between the stigma and Owen's termination.

For the stigma and the dismissal to be causally related, it would seem both would have to have originated from a common source — the City. In some manner the City, to be liable, must be responsible for the reputational harm as well as the termination. Three possible theories might support a finding that the City was liable for the stigma: (1) the City, as employer of the Councilman, is liable under the principle of respondeat superior; (2) the City, as an entity, is the City Manager and the City Council and actions by one cannot be distinguished legally from actions by the other; and (3) the City, as a singular entity vis-a-vis the public, is liable because it appears to be liable to the public. Under the first rationale, the relationship of the municipality to the harm is merely that of the employer to harm caused by an employee-tortfeasor. In this context a city cannot be held liable. The Court has expressly rejected this theory as a basis for municipal liability ¹³⁴ although it has not expressly indicated its rationale. The use of respondeat superior, however, would open municipal liability to seemingly endless limits. Any tort committed by an employee during the course of his employment would result in liability for the city.

Under the second rationale, the municipality would be liable in those instances in which "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" ¹³⁵ causes the con-

¹³³ 445 U.S. at 633-34 n.13. In a concurring opinion in *Adams v. Walker*, see note 107 *supra*, Judge Stevens, now Justice Stevens who joined the majority in *Owen*, agreed that there was no deprivation of a liberty interest and added that in a political context there is a routine "use [of] uncomplimentary language about one another — a context in which First Amendment interests override a State's interest in enforcing its own law of defamation. . . ." 492 F.2d at 1010 (Stevens, J., concurring). Additionally, Judge Stevens explained that the discretionary nature of the personnel decision would render any hearing "meaningless — nothing more than an opportunity to test the firmness of the governor's prior decision — or else would involve an excessive invasion by the federal judiciary into the making of policy by the State." *Id.* (footnote omitted).

¹³⁴ *Monell v. New York City Dep't of Social Services*, 436 U.S. at 691.

¹³⁵ *Id.* at 690.

stitutional injury.¹³⁶ These theories do not appear to have been adopted by the *Owen* Court. Although the majority accepted the decision of the court of appeals that the stigma was caused by an official policy, neither the court of appeals nor the Supreme Court enunciated what the policy was or how it came into existence.¹³⁷ Owen did not show that the interference in his termination by the Council was caused by any municipal policy. Indeed the City's policy in terminating certain officials, as articulated in the City Charter, was to allow the City Manager to terminate those employees at will.¹³⁸ No reputational harm attached to Owen as a direct consequence of the City Manager's act. Rather, it was the public's perception of the discharge based upon newspaper articles that supplied the nexus. While this may be sufficient to show defamation, it does not establish an injury beyond that. Thus it cannot satisfy the "stigma plus" test set forth in *Paul*.

The *Owen* Court established a new test, under which it held the City liable because it looked liable. Under this test the causal connection can be established by determining how the City looked in the eyes of the public. In *Owen* the headlines in the local press constituted a critical factor. Among the headlines were: "Lid Off Probe, Council Seeks Action," "Independence Accusation. Police Probe Demanded," "Probe Culminates in Chief's Dismissal," and "Police Probe Continues; Chief Ousted."¹³⁹ To base the City's liability on the substantive content of newspapers, however, would not be sound law. This approach would infringe on the papers' first amendment rights. The *Owen* Court, in no way, advocated any such restraint on the press. The result, then, is municipal liability stemming from events outside the scope of municipal control.

This new standard allows a tenuous link between the city and the violation to provide a broadened basis for municipal liability. It also allows high-ranking officials to go beyond the bounds of their delineated authority and still implicate the municipality. Given the Court's explicit holding in *Owen* that cities cannot avail themselves of a good-faith defense,¹⁴⁰ the most likely result is an unwarranted proliferation of actions for constitutional violations against the increasingly vulnerable city.

¹³⁶ The connection between the municipality and the deprivation of a federally protected right may result from a policy or custom which, even though not approved by the lawmakers of the government, has the force of law. *Id.* at 691. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). See generally Schnapper, *Civil Rights Litigation After Monell*, 79 COLUM. L. REV. 213, 215-27 (1979); Note, *Municipal Liability Under Section 1983: The Meaning of "Policy or Custom"*, 79 COLUM. L. REV. 304 (1979).

¹³⁷ 445 U.S. at 624.

¹³⁸ See note 40 *supra*.

¹³⁹ 445 U.S. at 629 n.8.

¹⁴⁰ See section II.A. *infra*.

II. THE DENIAL OF QUALIFIED IMMUNITY

A. *The Owen Court's Opinion*

By finding a constitutional violation in *Owen* the Supreme Court has further confused the question whether a liberty interest exists in reputation. While the opinion stopped short of holding that reputation alone is protected by the due process clause, it expanded the circumstances in which a constitutional injury can be found by minimizing the standard of proof needed to show a causal connection between the defamation and the discharge. Thus, the opinion is a step back from the *Paul* "stigma plus" requirement to *Constantineau*, where the Court indicated that reputation alone is a protected interest. The majority may have taken this step inadvertently, however, in an effort to reach a question left unresolved in its prior decisions, namely, whether a city is entitled to qualified immunity under section 1983. Ultimately, the Court may have to reexamine its holding of reputational protection in *Owen* in light of its concomitant denial of a good-faith defense.

In *Owen* the Supreme Court set out to decide whether a city may avail itself of a good-faith defense in section 1983 actions. This section will address the Court's rationale for deciding that a city cannot assert such a defense. This aspect of the *Owen* decision will be analyzed first by discussing the Court's use of the legislative history and common law of the mid-1880's. Next, the policy considerations underlying the decision will be considered. Finally, the ramifications of *Owen* for municipalities will be examined and potential methods for cities to limit their liability will be suggested.

Prior to *Owen*, the Court in *Monell v. New York Department of Social Services*¹⁴¹ specifically left unanswered the issue of whether a municipality is entitled to a good-faith defense in section 1983 actions.¹⁴² Although when first deciding *Owen's* case against the City of Independence the court of appeals held that a good-faith defense was not available to the City,¹⁴³ on remand, after *Monell* was decided, it modified this holding.¹⁴⁴ The court of appeals reasoned that since the City's discharge of *Owen* occurred more than two months before the Court announced its decision in *Board of Regents v. Roth*,¹⁴⁵ the City could not have known that its actions had unreasonably deprived *Owen* of his constitutional liberty interest.¹⁴⁶ Therefore, the court of appeals concluded that the good-faith

¹⁴¹ 436 U.S. 658 (1978).

¹⁴² *Id.* at 701. See text at notes 17-18 *supra*.

¹⁴³ 560 F.2d at 941. The court held the defense "unavailable as a matter of law in cases involving claims for backpay and similar equitable remedies which will be borne by a unit of government and not individual office holders." *Id.*

¹⁴⁴ 589 F.2d at 338.

¹⁴⁵ 408 U.S. 564 (1972). See note 4 *supra*.

¹⁴⁶ 589 F.2d at 338.

defense should be extended to the City of Independence.¹⁴⁷ Other circuits, however, were not in agreement on this issue.¹⁴⁸ In order to resolve this conflict, the Supreme Court granted Owen's petition for certiorari.¹⁴⁹ In a five-to-four decision the Court held that a municipality is not entitled to qualified immunity based on the good-faith of its officials.¹⁵⁰

Justice Brennan, writing for the majority, initiated his analysis of whether a good-faith defense should be extended to municipalities by examining the plain language of section 1983, and found no reference to any immunities.¹⁵¹ A review of the legislative history of section 1983 lent additional support to this position and allowed Justice Brennan to conclude that the statute was intended to have an expansive sweep to achieve its purpose of remedying constitutional torts.¹⁵²

Prior to *Owen*, the Court had read certain immunities into section 1983. For example, in *Tenney v. Brandhove*¹⁵³ the plaintiff was summoned before a state legislature committee. He claimed that the committee was trying to frighten him into abandoning his efforts to cut off the committee's funding.¹⁵⁴ He brought an action under section 1983 against various members of the committee.¹⁵⁵ The Court held that the legislators were not liable.¹⁵⁶ The Court reasoned that immunity for legislators was so well grounded in our history through the speech and debate clause that Congress would not have abolished it without a specific mandate.¹⁵⁷ Since the Court had read certain immunities into section 1983,¹⁵⁸ in *Owen* Justice Brennan undertook an examination of the role of municipal immunity at common law. Relying primarily upon *Thayer v. Boston*,¹⁵⁹ which allowed a city to be sued for acts of its officials done in accord with their delegated authority, he concluded that there was no tradition of municipal immunity in the common law at the time section 1983 was

¹⁴⁷ *Id.*

¹⁴⁸ *Hander v. San Jacinto Junior College*, 519 F.2d 273, 277 n.1, *aff'd per curiam on rehearing*, 522 F.2d 204 (5th Cir. 1975) (good faith of officials not extended to the college); *Hostrop Bd. of Junior College Dist. No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976) (good faith of board members not extended to board as an entity); *Bursey v. Weatherford*, 528 F.2d 483, 488 n.8 (4th Cir. 1975), *rev'd on other grounds*, 429 U.S. 545 (1977) (good faith not applicable to defendants in their official capacities); *Thomas v. Ward*, 529 F.2d 916 (4th Cir. 1975) (same).

¹⁴⁹ 444 U.S. 822 (1979).

¹⁵⁰ *Owen v. City of Independence*, 445 U.S. 622, 625 (1980).

¹⁵¹ *Id.* at 635.

¹⁵² *Id.* at 635-36.

¹⁵³ 341 U.S. 367 (1951).

¹⁵⁴ *Id.* at 370.

¹⁵⁵ *Id.* at 369.

¹⁵⁶ *Id.* at 379.

¹⁵⁷ *Id.* at 376.

¹⁵⁸ *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976) (prosecutor acting within the scope of his employment absolutely immune); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (school officials enjoy qualified immunity); *Schuer v. Rhodes*, 416 U.S. 232, 247 (1974) (qualified immunity for governor and certain executive officers).

¹⁵⁹ 36 Mass. (9 Pick.) 511 (1837).

enacted.¹⁶⁰ Therefore, he concluded that municipal immunity could not be implied in section 1983.

In order to refute more thoroughly any claim of a common law doctrine of municipal immunity, Justice Brennan also addressed the doctrines of sovereign immunity¹⁶¹ and of immunity based on the distinction between discretionary and ministerial functions.¹⁶² Both doctrines were found inapplicable to a good-faith defense.¹⁶³ The doctrine of sovereign immunity, which the majority found to have only a "nominal existence" at the time the Civil Rights Act of 1871 was enacted,¹⁶⁴ was determined to be irrelevant to the issue of a qualified immunity defense.¹⁶⁵ The Court concluded that under the doctrine of sovereign immunity, a governmental body, in executing its governmental functions, was afforded absolute immunity from suits unless the governmental unit agreed to be sued. Thus, under sovereign immunity the issue is not whether agents were acting in good faith but whether they were performing governmental or proprietary functions.¹⁶⁶ Moreover, the Court noted, all traces of municipal sovereign immunity under section 1983 were abolished by *Monell* which expressly included cities within the scope of that statute.¹⁶⁷ As for the immunity granted to municipalities for discretionary decisions made by municipal employees, the Court noted that such immunity evolved from the separation of powers doctrine.¹⁶⁸ Thus, courts traditionally have been prevented from interfering in the policy-making decisions of the legislative and executive branches where such decisions were made in good faith. The Court concluded, however, that since a court presiding over a section 1983 action would not be reviewing the reasonableness of a city's policies but rather only judging the constitutionality of the implementation of those policies, the judiciary would not be substituting its judgment of what the governmental policies should be for the cities.¹⁶⁹ Thus, the majority concluded that any immunity based on sovereign immunity principles or a discretionary-ministerial distinction would not be appropriate.¹⁷⁰

In the final section of its analysis, the majority addressed what was ap-

¹⁶⁰ 445 U.S. at 642.

¹⁶¹ The doctrine of sovereign immunity is based on a governmental-proprietary distinction and derives from the immunity of the state. When the city acts in a governing capacity, it has been traditionally immune from liability for common law torts. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 979 (4th ed. 1971).

¹⁶² Like the governmental-proprietary distinction, the discretionary-ministerial distinction also focuses on the nature of the act performed by the municipality. If the local entity was employing a broad discretionary decisionmaking power, it was considered immune, but in the actual implementation of the decision the city was to be treated as any other corporation. See 445 U.S. at 649.

¹⁶³ 445 U.S. at 644.

¹⁶⁴ *Id.* at 646.

¹⁶⁵ *Id.* at 647.

¹⁶⁶ *Id.* at 646.

¹⁶⁷ *Id.* at 647-48.

¹⁶⁸ *Id.* at 648.

¹⁶⁹ *Id.* at 649.

¹⁷⁰ *Id.* at 650.

parently the major factor in its decision — public policy. Concluding that “the central aim” of section 1983 was the protection of those harmed by a “misuse of power,”¹⁷¹ the Court stated that a damage remedy becomes a “vital component” of such protection.¹⁷² Any allowance of a good-faith defense, the Court explained, would render that component useless since most government officials enjoy a good faith defense.¹⁷³ Furthermore, the Court reasoned that the threat of damage remedies levied against municipal treasuries would increase the diligence of cities and safeguarding of individual rights,¹⁷⁴ but would not inhibit individual officials in the performance of their duties.¹⁷⁵ Finally, the Court pointed out that strict municipal liability was supported by the principle of “equitable loss spreading” — so-called because the taxpayers who benefit from municipal action bear the responsibility for city-induced injuries.¹⁷⁶ Therefore, the majority concluded that, since neither the history of the statute, nor case law, nor principles of equity supported the use of a good-faith defense by municipalities, strict liability was indeed appropriate.

While agreeing that the language of section 1983 does not refer to immunities,¹⁷⁷ the dissent, written by Justice Powell, found that the Court’s decision to deny municipalities a good-faith defense imposed strict liability on the cities and conflicted with legislative intent, the common law, and the trend of recent Supreme Court decisions toward extending immunity to officials in section 1983 actions.¹⁷⁸ First, the dissent argued that the imposition of strict liability was in opposition to the intent of Congress in enacting the Civil Rights Act of 1871.¹⁷⁹ Congress in 1871 refused to pass an amendment, written by Senator Sherman, which would have imposed strict liability upon municipalities.¹⁸⁰ According to the dissent, when the 42nd Congress rejected the Sherman Amendment, it rejected the imposition of strict liability for municipalities.¹⁸¹

Second, in focusing upon the role of qualified municipal immunity at common law, Justice Powell challenged the majority’s use of case law.¹⁸² He found that *Thayer*,¹⁸³ the principal case used in Justice Brennan’s examination of the common law status of good-faith defenses for municipalities, had been limited severely by subsequent Massachusetts cases decided prior to the enact-

¹⁷¹ *Id.*

¹⁷² *Id.* at 651.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 656.

¹⁷⁶ *Id.* at 657.

¹⁷⁷ *Id.* at 666.

¹⁷⁸ *Id.* at 667.

¹⁷⁹ *Id.* at 670-71.

¹⁸⁰ See text at notes 209-13 *infra*.

¹⁸¹ 445 U.S. at 675.

¹⁸² *Id.* at 679 (Powell, J., dissenting).

¹⁸³ 36 Mass. (9 Pick.) 511 (1837).

ment of section 1983.¹⁸⁴ In *Hill v. Boston*,¹⁸⁵ which held that a municipality is liable only when the city acts in a proprietary capacity.¹⁸⁶ Justice Powell found that the court had applied the doctrine of sovereign immunity.¹⁸⁷ Furthermore, the dissent rejected the Court's conclusions that neither the governmental-propriety nor the discretionary-ministerial distinctions could be the basis for qualified immunity for cities. The dissent found the governmental-proprietary distinction so widely accepted when section 1983 was enacted that Congress would not have expected it to be abrogated through silence.¹⁸⁸ To abolish such a distinction, the dissent argued, would permit inappropriate judicial intrusion into municipal decisionmaking.¹⁸⁹ As for the discretionary-ministerial distinction, it had been recognized previously by the Court, according to Justice Powell, as inherent to the separation of powers doctrine.¹⁹⁰ The *Owen* Court, in Powell's view, undermined this concept.¹⁹¹ Powell foresaw judicial review of discretionary city acts resulting in distorted municipal decisionmaking and discredit to the courts.¹⁹²

In weighing the policy considerations, the dissent concluded that the majority's "decision will hamper local government unnecessarily."¹⁹³ In capsulizing the dramatic change in the status of cities from absolute immunity to absolute liability under section 1983, Justice Powell noted that the change occurred "in just two short years" and that the new status of being held strictly liable "converted municipal governance into a hazardous slalom through constitutional obstacles that are often unknown and unknowable."¹⁹⁴ Since "[c]onstitutional law is what the courts say it is," cities may not be able to "know or anticipate when their action or inaction will be deemed a constitutional violation."¹⁹⁵ For this reason Justice Powell found that the use of a good-faith defense would protect cities from these inevitable uncertainties.¹⁹⁶ For the dissenters denial of a good-faith defense conflicted with their interpretation of "basic fairness."¹⁹⁷

The dissent also was troubled by other aspects of the majority's determinations concerning public policy. In particular, the dissent addressed what it

¹⁸⁴ 445 U.S. at 679 (Powell, J., dissenting). See *Child v. City of Boston*, 86 Mass. (4 Allen) 41 (1862); *Buttrick v. City of Lowell*, 83 Mass. (1 Allen) 172, 173-74 (1861); *Bigelow v. Inhabitants of Randolph*, 80 Mass. (14 Gray) 541, 544-45 (1860).

¹⁸⁵ 122 Mass. 344 (1877).

¹⁸⁶ *Id.* at 359.

¹⁸⁷ 445 U.S. at 679 (Powell, J., dissenting).

¹⁸⁸ *Id.* at 677.

¹⁸⁹ *Id.* at 668.

¹⁹⁰ *Id.* at 678.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 658.

¹⁹⁴ *Id.* at 665.

¹⁹⁵ *Id.* at 669.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

considered to be the internal inconsistency in the majority's decision. While the majority assumed that the imposition of strict liability would increase municipal diligence in guarding constitutional rights, it also assumed that the actual decisionmaking of individual policymakers would not be inhibited because such policymakers would continue to be immune. According to Justice Powell the Court apparently believed that the threat of damages resulting from the City being held strictly liable would effectuate needed changes in city policies by the individual officials. Yet the majority ignored the likely result that officials will be hesitant to govern lest they cause injury resulting in liability and thus risk their job security or jeopardize reelection potentials.¹⁹⁸

In countering the majority's concept of equitable loss-spreading among the taxpayers, the dissent expressed concern that local governments will not be able to afford the financial consequences of the decision. In criticizing the majority's assumption that municipalities can best bear the burden, Justice Powell stated that the majority ignored the precarious financial status of many local governments.¹⁹⁹ The dissent argued that by "ignoring the reality of municipal finance",²⁰⁰ Justice Brennan did not consider that as a result of *Owen* some cities might have to limit programs and that the decision would have an adverse effect on the welfare of the public.²⁰¹ Because of their concern regarding *Owen's* financial impact on local governments, and because of their conviction that the language and history of section 1983 did not support the denial of a good-faith defense, the dissenters would have allowed limited municipal immunity. In their view, any change in this defense ought to come from Congress in the form of an explicit mandate.²⁰²

Both Justice Brennan, writing for the majority, and Justice Powell, writing for the dissent, initially treated the issue of the existence of a qualified municipal immunity as one of statutory construction. The two opinions, however, reflect different policy considerations. While the majority stressed the need to compensate a plaintiff, the dissent emphasized concern that the implementation of the Court's approach would result in dangerous financial consequences for municipalities. Both of these policies are legitimate concerns, and, therefore, must be balanced in devising an equitable solution to the municipal immunity question. In the ensuing section it will be submitted that the dissent struck the better balance and that the majority, in a zealous effort to safeguard individual rights, overlooked important factors crucial to a fair decision.

B. *Should There Be A Good-Faith Defense?*

In holding that municipalities may not assert the good faith of their officers or agents as a defense to liability under section 1983, the *Owen* Court has

¹⁹⁸ *Id.* at 669 n.9.

¹⁹⁹ *Id.* at 670.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 665.

taken municipal governments from a position of absolute protection from liability to a position of strict liability in those actions in only a two-year period. For ninety years after its passage, section 1983 languished until 1961 when the landmark decision of *Monroe v. Pape*²⁰³ initiated a period of civil rights litigation under section 1983.²⁰⁴ In *Monroe* the Court allowed municipal officials to be sued under section 1983 for violating the plaintiff's constitutional rights.²⁰⁵ The Court concluded, however, that cities could not be sued since municipalities were not persons within the language of the statute.²⁰⁶ Although lower courts attempted to devise means of circumventing the absolute municipal immunity rule of *Monroe*,²⁰⁷ it was not until 1978 that the Court in *Monell v. New York Department of Social Services* recognized cities were suable entities under section 1983.²⁰⁸ Now the Court has taken another major step, holding cities liable for unknowable prospective constitutional violations without allowing municipalities to avail themselves to a good-faith defense. In light of the history of section 1983, not only is this significant, it is also unwarranted.

In a comprehensive review of the legislative history of section 1983 undertaken in *Monell*, the Court found that there was one stage of the statute's development that was indicative of Congress's attitude toward municipal liability. This stage was the history of the Sherman Amendment which, although it did not amend section 1 of the Civil Rights Act of 1871, the precursor of section 1983,²⁰⁹ it did attempt to impose strict liability on municipalities for acts of violence committed within their boundaries.²¹⁰ The first conference

²⁰³ 365 U.S. 167 (1961). In *Monroe*, thirteen Chicago police officers broke into the home of the Monroes, a black family, and forced them to stand naked in the living room while the officers "ransacked every room." *Id.* at 169. Mr. Monroe was taken to the police station and held on "open" charges without being taken before an available magistrate or being allowed to communicate with his family. After ten hours he was released and no criminal charges were preferred against him. *Id.* The Monroes brought suit under § 1983 against the City of Chicago and the officers involved in the incident. The complaint charged, *inter alia*, that under color of state and municipal law, the defendants violated the plaintiffs' fourth amendment right to be free from unreasonable searches and seizures. *Id.* Both the district court and the court of appeals, 272 F.2d 365, 366 (7th Cir. 1959), found that the complaint failed to state a claim. The Supreme Court reversed in part, 365 U.S. at 192, finding that the complaint stated a valid cause of action against the individual officers when reading § 1983 against a "background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.* at 187. The Court held, however, that the city was not a "person" within the meaning of § 1983. *Id.* at 191. Therefore, the municipality was absolutely immune from suit under this statute. *Id.* at 191-92.

²⁰⁴ According to the Administrative Office of the United States Courts, 11% of all civil complaints filed for the year ending June 30, 1978, were listed as "Civil Rights-Other Civil Rights" or "Civil Rights-Prisoner Petitions." Annual Report of the Directors at A16-A17. See generally *Developments*, *supra* note 25, at 1167-75.

²⁰⁵ 365 U.S. at 187.

²⁰⁶ *Id.* at 191.

²⁰⁷ See note 10 *supra*.

²⁰⁸ *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978). The Court, recognizing that the *Monroe* rule was being eroded by some courts, see note 10 *supra*, granted certiorari to review its prior interpretation of § 1983. In reviewing the legislative history of § 1983 and relevant case law of that era, the majority concluded that a city could be sued for relief if the city caused a deprivation of constitutional rights. *Id.* at 690.

²⁰⁹ See text and note at note 25 *supra*.

²¹⁰ The original text of the amendment did not place liability for damage on the

draft of the amendment provided that the local governmental entity would be liable for the damage caused by "tumultuous" persons who were attempting to deprive another of his federal rights.²¹¹ Senator Sherman, speaking in defense of the strict liability amendment that he authored, construed the first conference draft as consistent with his original attempt to impose liability upon the landowners living within the geographical boundaries of the governmental entity.²¹² On the floor of the Senate he declared: [l]et the people of property in the southern States understand that if they will not make the hue and cry and take the necessary steps to put down lawless violence in those States their property will be holden responsible, and the effect will be most wholesome."²¹³

municipal entity but rather imposed the liability for damage caused by persons "riotously and tumultuously assembled" upon *any inhabitant of the municipality*, CONG. GLOBE, 42d Cong., 1st Sess. at 633 (1871). Thus, wealthy landowners were to be held accountable for the damage. Although the original version passed the Senate, it was altered subsequently by the Conference Committee of the House of Representatives. 436 U.S. at 668.

²¹¹ *Id.* at 666.

The complete text of the first conference substitute for the Sherman amendment is:

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part by any person riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any person riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiffs in such action, may, if not satisfied, by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all monies in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment.

CONG. GLOBE, 42d Cong., 1st Sess. at 749, 755 (1871).

²¹² See note 210 *supra*.

²¹³ CONG. GLOBE, 42d Cong., 1st Sess. at 164 (1871).

The *Monell* Court reasoned that the Senator must have assumed that the local entities made directly responsible for unconstitutional activity within their boundaries would recoup any monetary losses by levying a property tax against their inhabitants.²¹⁴ Although Senator Sherman claimed his proposal was modeled on old English statutes imposing governmental liability²¹⁵ the *Monell* Court concluded there were "critical differences" between the two. In the amendment, unlike its English counterparts, liability was imposed on the city whether or not it had notice of the impending riot, whether or not the city had the power to intervene, and whether or not the city made reasonable efforts to intervene.²¹⁶ The *Monell* Court found that these factors were significant distinctions to the Senators who criticized the amendment.²¹⁷ These Senators were concerned about both the constitutionality of such a statute²¹⁸ and the potential damaging effect such an act would have upon local governments.²¹⁹ After balancing the Sherman Amendment's potential effect of deterring violence, against the probable adverse impact upon cities, Congress rejected strict liability as the appropriate vehicle for preventing future constitutional abuses.²²⁰ Given Congress's rejection of the amendment and the *Monell* Court's interpretation of the amendment's history, the Court's repudiation of municipal immunity in *Owen* must be seen as inconsistent with legislative intent and judicial precedent.

While it can be argued that the *Owen* Court did not hold the City liable for acts of a private individual and the holding, thus, is distinguishable from the Sherman Amendment, this argument presumes that the City Councilman was acting under color of municipal law. Such an argument, however, ignores that the City explicitly prohibited the Councilman's behavior in its charter and that the Councilman, therefore, was acting *ultra vires*. In *Owen*, the City was held liable even though it had attempted to prevent such unauthorized actions through explicit legislation. The City was held liable because the acts of a highranking City official, even if *ultra vires*, merely appeared to be the acts of the City. Thus, the *Owen* decision forces the conclusion that a city cannot protect itself through explicit legislation.

Furthermore, the *Owen* Court erroneously concluded that there was no common law tradition of qualified municipal immunity. The *Owen* Court ig-

²¹⁴ 436 U.S. at 667 n.16.

²¹⁵ CONG. GLOBE, 42d Cong., 1st Sess. at 761 (1871).

²¹⁶ 436 U.S. at 668.

²¹⁷ *Id.*

²¹⁸ *Id.* at 664; CONG. GLOBE, 42d Cong., 1st Sess. at 804 (1871).

²¹⁹ The Court expressed some uncertainty over this precise point and in *Monell* "expressly declined to consider 'policy considerations' for or against municipal liability." 436 U.S. at 664-65 nn.8-9.

²²⁰ The House of Representatives rejected the first conference draft. The second conference draft which was ultimately passed imposed liability upon those persons who, although knowing of a conspiracy to violate another's civil rights and having the power to intervene, still allowed those rights to be violated. Municipal liability was abandoned. CONG. GLOBE, 42d Cong., 1st Sess. at 804 (1871).

nored the well-grounded nineteenth century judicial policy of allowing immunity to cities performing governmental functions.²²¹ This policy was based on the notion that a local government cannot execute its public functions if the revenues of the city are depleted in remedying the torts committed by municipal employees in the administration of those functions.²²² Given the financial conditions of some municipalities, of which the dissent took judicial notice,²²³ it is impractical and unrealistic for the Court to impose strict liability on cities. Such an imposition might well drive some cities to insolvency. Some cities would have inadequate fiscal resources to fulfill their governing function. The majority must have assumed that cities would pass the financial burden on to the taxpayers. Yet in so assuming the Court ignored the economic realities currently faced by municipalities. In recent years some cities have been forced to declare bankruptcy²²⁴ while others have had their resources severely curtailed by voter-mandated decreases in property taxes.²²⁵ City services may have to be restricted to come within the cities' limited budgets. A threat of a large money damages award may be so harmful to a city that it will enter into settlements rather than risk an adverse judgment. The *Owen* Court has put the cities in a position in which they have a great deal to lose and no defense to such a loss.

Moreover, the Court's conclusion that there was no tradition of qualified municipal liability is not supported in case law. The Court failed to carry its examination of case law through to its logical end. Principal support for the Court's conclusion came from *Thayer v. Boston*.²²⁶ Yet the *Owen* Court failed to deal with the critical stipulation underlying that decision. In *Thayer*, the defendant city had agreed that the acts of the officials were within the scope of their authority, and, therefore, the city had admitted that these acts were rightly its responsibility.²²⁷ This stipulation was crucial to the decision if the officials' acts had not been within the scope of authority delegated to them by the city, the officials would have been acting in a manner not authorized by the municipal corporation. Their actions would have been *ultra vires*, and, therefore, the officers would have been personally liable, not the city.²²⁸ Thus, *Thayer* is not analogous to *Owen*, where the City agreed to no such stipulations. Furthermore, by failing to distinguish *Thayer* on the basis of the stipulation, the *Owen* Court never reached the question of how to define or limit the scope of an official policy or custom that might result in the imposition of municipal liability.

²²¹ See *Coolidge v. Brookline*, 114 Mass. 592 (1874); *Board of Comm'rs of Hamilton County v. Mighels*, 7 Ohio St. 100 (1857); *Riddle v. Proprietors of the Locks and Canals on Merrimac River*, 7 Mass. 169 (1810).

²²² See cases cited at note 221 *supra*.

²²³ 445 U.S. at 670 (Powell, J., dissenting). See also *Business Week* 23:22 (Jan. 1980).

²²⁴ See note 223 *supra*.

²²⁵ *Id.*

²²⁶ 36 Mass. (9 Pick.) 511 (1837).

²²⁷ "[F]or the purposes of the trial it was ruled that the defendants were responsible for the acts of the officers of the city." *Id.* at 513.

²²⁸ 36 Mass. (9 Pick.) at 516.

ty.²²⁹ The Court's silence on this important issue seems to compel the conclusion that a city will always be deemed liable for the acts of its high-ranking officials.

In further support of its imposition of municipal liability the Court discussed a line of nineteenth century cases concerning the wrongful discharge of municipal employees.²³⁰ In those cases, cities were held liable for breaches of contract.²³¹ Such cases are distinguishable from cases involving constitutional violations. Since contracts set forth the duties of each party, often in explicit language, actions which could constitute breaches and result in liability are known to the parties. Constitutional law, however, because of its dynamic nature, affords no such predictability. In not recognizing this significant distinction, the *Owen* Court made cities potentially liable for violating the unknowable.

C. The Aftermath

There are significant problems that flow from the *Owen* holding with respect to municipal liability, resulting in a onerous burden upon a municipal entity. The enormity of this financial burden was underscored only two months after *Owen* in *Maine v. Thiboutot*.²³² In *Thiboutot* the Court held that section 1983 liability encompasses violations of federal *statutory* as well as *constitutional* law.²³³ Thus, municipalities can be strictly liable not only for violating constitutional principles as yet undeveloped by the Court, but also for committing "errors in the administration of complex federal statutes."²³⁴ Moreover, although *Thiboutot* expands the scope of section 1983 liability for all persons acting under color of state law, the *Owen* decision makes the city the most vulnerable "person." States, unlike municipalities have the protection of the eleventh amendment,²³⁵ and government officials may assert a good-faith defense.²³⁶ Thus all the potential section 1983 defendants, with the important exception of municipalities, are protected in some manner from unknowable federal violations. It is the local government — perhaps the entity which can least afford to

²²⁹ See note 136 *supra*.

²³⁰ 445 U.S. at 639 n.19.

²³¹ See, e.g., *Richardson v. School Dist. No. 10*, 38 Vt. 603, 606-07 (1866) (teacher allowed to recover when discharged during school term in violation of contract); *Paul v. School Dist. No. 2*, 28 Vt., 575, 577-78 (1856) (same).

²³² 448 U.S. 1 (1980). The plaintiffs in *Thiboutot*, a couple with eight children, three of whom were the husband's by a previous marriage, brought a § 1983 action asserting that the state of Maine's interpretation of the Social Security Act, 42 U.S.C. § 602(a)(7) (1976), deprived them of welfare benefits to which they were entitled. The state had notified the husband that his future AFDC benefits would not include any allowance for the five children who were not exclusively his. 448 U.S. at 3.

²³³ 448 U.S. at 4.

²³⁴ *Id.* at 22 n.10 (Powell, J., dissenting). "Municipalities . . . will be strictly liable for errors in the administration of complex federal statutes." *Id.*

²³⁵ See *Edelman v. Jordan*, 415 U.S. 651 (1974).

²³⁶ See *Wood v. Strickland*, 420 U.S. 308 (1975).

function as a deep pocket for any alleged violation — that is left alone on the firing line.

In imposing this overwhelming potential liability, the Court never explained how such liability will deter constitutional violations, one of the goals of the Civil Rights Act of 1871. Implicit in the Court's opinions in *Owen* and *Thiboutot* is the concept that cities will be deterred from violating federal law because of the fiscal ramifications. At the same time, however, the Court postulated that by passing the cost along to the taxpayers, municipalities will be able to absorb the awards made to plaintiffs under section 1983.²³⁷ Whether this is a valid assumption is unclear given the present financial status of some municipalities and the emerging trend toward limiting the major source of municipal revenue, the property tax. Thus the question remains: how will a city be able to function effectively if it must guard against any action that may cause a deprivation of a federal right? One means of possible protection which municipalities need to explore is the use of liability insurance to provide some measure of security to city treasuries.²³⁸ Otherwise, the unfortunate answer is that municipalities may try to relinquish control of many of their programs to the states in an effort to shelter themselves from section 1983 liability by arguing they are the mere instruments carrying out a state policy. Since the eleventh amendment grants absolute immunity to the states in federal court, cities, in many instances, would not have to be concerned with states seeking indemnity for money damages. Whether such a plan will afford cities protection, however, is uncertain. The cities may remain liable because, even though carrying out state policy, it could appear to the public that the cities still have control.

Another avenue which cities could explore is the use of indemnity suits against its employees when employee actions result in municipal liability. The problems with this approach, however, are obvious. Officials are entitled to qualified immunity if sued directly under section 1983;²³⁹ presumably the same immunity would be invoked if sued by the city. Furthermore, the threat that an individual will have to pay a judgment undermines the very policy behind qualified immunity for officials; without such a defense an individual's willingness to participate in government employment will diminish. Additionally, individuals, fearing liability, might be inhibited in their function as city employees. Therefore, *Owen* has created a serious threat to municipal stability, and cities may not have sufficient legal bases on which to fight for their economic survival.

²³⁷ 445 U.S. at 656.

²³⁸ See note 174 *supra*.

²³⁹ 445 U.S. at 666-67 (Powell, J., dissenting).

CONCLUSION

The *Owen* decision potentially affects the law in two significant ways. First, the *Owen* Court's failure to examine closely whether the finding of a due process violation has increased the uncertainty that surrounds the recognition of a liberty interest in public employment. Now, after the *Owen* decision, lower courts will face the dilemma whether the "stigma-plus" standard of *Paul* is still a viable test or whether, as a result of *Owen*, reputational harm alone mandates due process. Second, in holding that a municipality is strictly liable for deprivations of constitutional rights caused by the municipality's broadly defined policy or custom, the Court's decision may have disastrous consequences for some municipalities. To avoid having to bear the financial responsibility for the consequences of many of its programs, the cities may seek to become the instruments of the states. The result may be the relinquishment of control of many municipal programs to the states. Furthermore, the financial impact is particularly burdensome when *Owen* is viewed in light of the Court's holding in *Maine v. Thiboutot*, which expanded section 1983 to include violations of federal statutes. Presently cities are strictly liable for violating undeveloped principles of constitutional law as well as for incorrectly interpreting or administering complex federal statutory schemes. This liability may prove too severe for our cities to handle. Therefore, the Court should reconsider the trend toward expanding liability demonstrated in *Owen* to provide municipalities at least some degree of fiscal protection.

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