UIC Law Review

Volume 14 | Issue 2 Article 1

Spring 1981

The Attorney/Client Relationship and 42 U.S.C. 1983: The Impact of Owen v. City of Independence, 14 J. Marshall L. Rev. 285 (1981)

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THE ATTORNEY/CLIENT RELATIONSHIP AND 42 U.S.C. § 1983: THE IMPACT OF *OWEN v. CITY OF INDEPENDENCE*

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INTRODUCTION

In *Owen v. City of Independence*,[1] the United States Supreme Court decided that governmental entities and their officials acting in their official capacities are not entitled to a qualified "good faith" immunity from suits pursuant to 42 U.S.C. § 1983.[2] The five to four decision in effect made them, as the dissent accurately noted, strictly liable for violations of section 1983.

The *Owen* decision represents the culmination of nearly twenty years of Supreme Court decisions defining the meaning and contours of section 1983. When *Owen* is viewed in the context of previous Supreme Court decisions interpreting that statute, it is evident that governmental entities face a new reality which will affect all aspects of governmental operations. Moreover, attorneys who represent governmental entities must reconsider the traditional attorney/client relationship regarding the attorney's functions both in counseling and in defending section 1983 lawsuits. Of particular concern is conflict of interest in defense of section 1983 litigation.

The impact of the *Owen* decision on governmental entities and on their legal counsel may only properly be understood in the context of section 1983 jurisprudence. Accordingly, the first portion of this article will briefly examine the judicial history of that statute.

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1. 445 U.S. 622 (1980).
2. 42 U.S.C. § 1983 (1970).

HISTORICAL BACKGROUND

Monroe v. Pape[3]

The Civil Rights Act of 1871, section 1 of which is currently codified as 42 U.S.C. § 1983,[4] reads:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any 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 statute had been largely ignored, and as recently as 1951 was referred to by the Supreme Court as "loosely and blindly drafted."[5] However, it has become the source of much federal litigation.

The purpose of the statute was "to interpose the federal court between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' "[6] The statute was enacted in the context of widespread violence against newly-freed southern blacks by the Ku Klux Klan, and what was perceived as the willful refusal of state and local authorities to curb such violence and protect the newly-created civil rights[7] of the freedmen.

Obviously, the legislation contemplated a profound shift in the balance of power between the states and the federal government in favor of federal judicial authority to protect the civil rights of individuals.[8] Despite the potentially broad impact of section 1983, the federal courts quickly acted to restrict its application and usefulness.[9] The ability of the southern states to effectively disenfranchise both blacks and lower-class whites in the 1890s through various mechanisms included in state constitutions and statutes indicates the failure of the federal courts to

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3. 365 U.S. 167 (1961).

4. 42 U.S.C. § 1983 (1970).

5. Stefanelli v. Minard, 342 U.S. 117, 121 (1951).

6. Mitchum v. Foster, 407 U.S. 225, 242 (1972). *Accord*, Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("[i]t is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ").

7. Rights created by the thirteenth, fourteenth, and fifteenth amendments to the Constitution, *i.e.*, the reconstruction amendments.

8. For a thoughtful and complete discussion of this issue, as well as a thorough analysis of the contours of § 1983, *see generally Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977) [hereinafter cited as *Federalism*].

9. *See Federalism*, *supra* note 8, at 1156-60.

use section 1983 to protect even the most fundamental civil rights, in this case, voting. Indeed, prior to 1961, section 1983 was cited by the Supreme Court only thirty six times.[10]

Section 1983 jurisprudence was revolutionized by the Supreme Court decision in *Monroe v. Pape*.[11] The facts of *Monroe* illustrate the types of outrageous governmental conduct for which section 1983 was intended to provide a federal remedy. The plaintiffs alleged that "thirteen Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room . . . ."[12] One of the plaintiffs was taken to police headquarters and detained on "open" charges for ten hours while being interrogated. The plaintiffs claimed that these actions by governmental officers constituted a deprivation of their rights, privileges, and immunities secured by the Constitution.[13]

After a discussion of the statute's legislative history, Justice Douglas held that plaintiffs' complaint stated a cause of action[14] even though the official conduct at issue violated state law and constituted an abuse of the officials' authority. The police officers could therefore be held liable for engaging in what has come to be known as a "constitutional tort."[15] The Court further held, however, that the city of Chicago held an absolute immunity from suit under section 1983 because the city was not a "person" as that term was used in the statute.[16] The result was that while governmental officials might be monetarily liable for their constitutional torts in their "individual capacities," the

10. T. EMERSON, C. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1447 (3d ed. 1967). *See also* Gressman, *The Unhappy History of Civil Rights Litigation*, 50 MICH. L. REV. 1323 (1952).

11. 365 U.S. 167 (1961).

12. *Id.* at 169.

13. *Id.* at 169 n.1.

14. Plaintiffs' complaint had been dismissed by the trial court and affirmed by the Seventh Circuit. *See* Monroe v. Pape, 272 F.2d 365 (7th Cir. 1959).

15. The phrase "constitutional tort" apparently originated in Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 NW. L. REV. 277, 323-29 (1965) (noting at 323-24, "It thus appears that what is developing is a kind of 'constitutional tort.' It is not quite a private tort, yet contains tort elements; it is not 'constitutional law,' but employs a constitutional test.").

16. The Court reached this conclusion based on the failure of the 42nd Congress to enact the Sherman Amendment to the Civil Rights Act of 1871. That amendment would have made a governmental entity strictly liable for the acts of violence within its territorial jurisdiction. Justice Douglas, after reviewing the debates on the amendment, stated that "[t]he response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." 365 U.S. at 191.

governmental entity could not be so liable. Neither could the government's employees be held liable in their official capacities. Because any damages would have to be paid by the entity, this would be a subterfuge to hold the entity itself liable.[17]

While the *Monroe* decision effectively rescued section 1983 from ninety years of obscurity, it had not yet become a powerful weapon to protect individuals' civil rights. Because the Supreme Court refused to hold governmental entities liable for the acts of their employees, an aggrieved party could only seek redress from the governmental employees involved. Section 1983 litigation increasingly focused on the immunities available to various governmental employees. Furthermore, attempts were made to evade section 1983 entirely so that governmental entities themselves could be sued.

Section 1983 Immunities

As the Supreme Court repeatedly noted, section 1983 does not on its face create any immunities. Nonetheless, the Court has implied immunities in the statute where "a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons, that 'congress would have specifically so provided had it wished to abolish the doctrine'."[18] In 1951, the Supreme Court held in *Tenney v. Brandhove*[19] that legislators are entitled to an absolute immunity from suit under section 1983, based on the longstanding common law privilege of legislative immunity. The Court held that the policies favoring unfettered legislative deliberation were so important that legislators could not even be subject to suit. As Justice Frankfurter noted, "the privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."[20] Similarly, in *Pierson v. Ray*,[21] the Court granted absolute immunity from suit to judges for acts committed within their official discretion. That same decision, however, conferred only a qualified immunity upon local police officials. The qualified immunity was based upon good faith and probable cause, similar to that which existed in false arrest actions at common law.[22]

17. *See* Wood v. Strickland, 420 U.S. 308, *rehearing denied*, 421 U.S. 921 (1975).
18. Owen v. City of Independence, 445 U.S. 622, 637 (1980).
19. 341 U.S. 367 (1951).
20. *Id.* at 377.
21. 386 U.S. 547 (1967).
22. *Id.* at 555-57.

Somewhat later, the Supreme Court granted absolute immunity to prosecutors in initiating and presenting a state's case.[23]

For other governmental employees, a more limited qualified immunity was applied. The Supreme Court's decisions in *Scheuer v. Rhodes*[24] and *Wood v. Strickland*[25] effectively defined the qualified immunity available to a governmental employee. The *Scheuer* case concerned the order by the governor of Ohio and other high level executive officials to use military force to restore order at Kent State University. The Court found that the policy of allowing governmental officials freedom to act must be balanced against the civil rights of the citizen, and allowed only a limited qualified immunity from suit under section 1983 based on good faith of the actor.[26] The court concluded:

> These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all circumstances, coupled with a good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct.[27]

In *Wood v. Strickland*, the issue was the liability of school board members for a student suspension which violated procedural due process rights under the fourteenth amendment. The Court granted the school board member a qualified immunity. The import of the decision lies in its definition of that immunity. Apparently elaborating on the standards it applied in *Scheuer v. Rhodes*, the Court found that a qualified good faith immunity contains both subjective and objective elements. The individual must evidence subjective good faith, *i.e.*, a belief that he is doing right.[28] He must also prove objective good faith, *i.e.*, that the action, even if taken in subjective good faith, does not violate "settled, indisputable law on the part of one entrusted with

23. Imbler v. Pachtman, 424 U.S. 409 (1976). Two circuit courts of appeal have held that city council members have absolute immunity from suit under § 1983 for legislating an allegedly unconstitutional ordinance. The courts have applied the legislative immunity granted to state legislatures and extended it to cover legislators at the local level. Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980); Gorman Towers v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980).

24. 416 U.S. 232 (1974).

25. 420 U.S. 308 (1975).

26. 416 U.S. 232, 247-49 (1974).

27. *Id.* at 247-48.

28. 420 U.S. 308, 321 (1975).

supervision of students' daily lives. . . ."[29] The Court noted, however, that a school official is not charged with predicting the future course of constitutional law.

The dissent in *Wood* raised the critical question of exactly what settled constitutional law is.

> The Court states the standard of required knowledge in two cryptic phrases: "settled, indisputable law" and "unquestioned constitutional rights." Presumably these are intended to mean the same thing, although the meaning of neither phrase is likely to be self-evident to constitutional law scholars—much less the average school board member. One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and to our five-to-four splits—to recognize the hazard of even informed prophecy as to what are "unquestioned constitutional rights."[30]

Justice Powell's dissenting opinion in *Wood* also addressed the issues concerning the relationship between a governmental entity and its attorney. First, from the governmental official's standpoint, is consultation with legal counsel sufficient to establish good faith? Justice Powell noted that it apparently is not.[31] Moreover, local school districts would be required to consult far more closely than they had with counsel "on the countless decisions that necessarily must be made in the operation of our public schools."[32] Implicit in Justice Powell's analysis is an acknowledgment of the burden placed on counsel to school boards to be fully and correctly informed as to "settled constitutional law," assuming that such a thing can be recognized.[33]

Governmental Entity Liability after Monroe

The development of the law of immunities under section 1983 did not resolve two fundamental problems for plaintiffs seeking to use section 1983 for redress of allegedly unconstitutional governmental action. First, under *Monroe*, the governmental entity itself could not be held liable, thus the "deep pocket" defendant was unavailable to a plaintiff. Second, as a direct result of this consideration it became extremely difficult to get a judge or jury to hold an individual personally liable.

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29. *Id.*
30. *Id.* at 329.
31. *Id.* at 329 n.2.
32. *Id.* at 331.
33. As legal counsel for many school districts rarely deal with issues of constitutional law that burden cannot be taken lightly. Local counsel rarely can devote the time necessary to acquire the expertise required to counsel school districts or other governmental clients adequately on constitutional questions.

For a collection of cases discussing the issue of settled versus unsettled constitutional law see *Federalism*, *supra* note 8, at 1215-16. *See also* Picha v. Weiglos, 410 F. Supp. 1214 (N.D. Ill. 1976).

While there is abundant case law from before 1978 that discusses the standards of qualified good faith immunity as applied to governmental officials, there are very few decisions holding an individual governmental employee solely liable in his personal capacity. In *Bellnier v. Lund*,[34] for example, the plaintiffs were fifth grade pupils who were subjected to strip searches by a teacher looking for three dollars that had been reported missing. The court held the teacher immune under section 1983, stating that "[t]he plaintiffs have failed to allege in their Complaint that the actions were not taken in good faith."[35] The court further noted that the law governing student searches was unsettled at the time.[36] Moreover, even if public officials were regularly held liable, as a practical matter they would often be judgment proof.

To avoid the difficulties created by the *Monroe* decision, courts often held the governmental entity liable for an unconstitutional act without even discussing *Monroe*,[37] or found an alternate theory of entity liability. In *Hostrop v. Board of Junior College District 515*,[38] the Seventh Circuit Court of Appeals held the state junior college liable for improper dismissal of a

34. 438 F. Supp. 47 (N.D.N.Y. 1977).

35. *Id.* at 55.

36. *Id.* This decision may be contrasted with the post-*Owen* decision of Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), in which the court considered the legality of a strip search by school officials. The court stated:

> [i]t does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency . . . . Wood v. Strickland . . . accords immunity to school officials who act in good faith *and within the bounds of reason*. We suggest as strongly as possible that the conduct herein described exceeded the "bounds of reason" by two and a half country miles.

631 F.2d at 92-93.

See generally Kates and Kouba, *Liability of Public Entities under § 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 136-37, 157 (1972) for a discussion of the liability of officials in their individual capacities prior to *Monell*.

37. *See* Aulmiller v. University of Delaware, 434 F. Supp. 1273 (D. Del. 1977) (university held liable for dismissing homosexual teacher based on finding the university was not protected by eleventh amendment). *See also* Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975).

38. 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963 (1976). Plaintiffs also tried a variety of methods to circumvent § 1983, each of which was rejected by the Supreme Court. In City of Kenosha v. Bruno, 412 U.S. 507 (1973), the Court held that injunctive relief was unavailable against a municipality under § 1983. In Moor v. County of Alameda, 411 U.S. 693, *rehearing denied*, 412 U.S. 963 (1973), the plaintiffs attempted to use 42 U.S.C. § 1988 to circumvent the restrictions of § 1983. The Court held, however, that § 1983 does not create an independent jurisdictional base for suits for violations of federal civil rights. Finally, in Aldinger v. Howard, 427 U.S. 1 (1976), the Court held that the civil rights jurisdictional statute, 28 U.S.C. § 1343(3), does not provide a jurisdictional basis for suit against a govern-

teacher. Although *Monroe* barred suit against the entity under section 1983, the court allowed the suit to proceed under 28 U.S.C. § 1331, which requires existence of a federal question. In other cases it appears that the governmental entity simply failed to raise its defense of absolute immunity, subjecting itself to liability.

Litigants attempting to evade the restrictions of section 1983 immunity received new hope from the Supreme Court decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[39] which held that a direct cause of action exists under the fourth amendment to redress an unlawful search and seizure by federal agents. A logical extension of this decision would allow suits directly under the fourteenth amendment for denial of due process and equal protection. In *Turpin v. Mailet*,[40] the Second Circuit Court of Appeals *en banc*, in a five to four decision over a bitter dissent, created such a cause of action.[41]

Monell v. Department of Social Services

The anomalous situation created by *Monroe v. Pape* was finally recognized and resolved seventeen years later by the Supreme Court in *Monell v. Department of Social Services*.[42] After an extensive review of the legislative history of section

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mental entity, nor may such an entity be joined in a suit pursuant to that section.

39. 403 U.S. 388 (1971). Perhaps the first decision supporting such a cause of action was Williams v. Brown, 398 F. Supp. 155 (N.D. Ill. 1975). Not only did the court allow a suit directly under the fourteenth amendment, but it also held that the governmental entity would be held liable under a theory of respondeat superior for the actions of its employees. *See generally* Note, *Damage Remedies against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922 (1976) (advocating such a *Bivens* remedy under the fourteenth amendment).

40. 579 F.2d 152 (2d Cir. 1978) (*en banc*). *See* note 41 *infra*. *See also* Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977) allowing a *Bivens* type of cause of action. (Subsequently remanded by the Supreme Court.) *See* Owen v. City of Independence, 589 F.2d 335 (8th Cir. 1978), *rev'd*, 445 U.S. 622 (1980).

41. The majority in *Turpin*, although it created a *Bivens* cause of action, held that the doctrine of respondeat superior did not apply to hold the entity liable for the acts of its employees. The Supreme Court accepted certiorari of the *Turpin* case, but then vacated the Second Circuit's decision after it decided Monell v. Department of Social Serv., 436 U.S. 658 (1978). On remand the Second Circuit, again *en banc*, in Turpin v. Mailet, 591 F.2d 426 (2d Cir. 1979), reversed its prior decision, finding no *Bivens* cause of action directly under the fourteenth amendment. For a discussion after *Monell*, *see generally* Kramer, *Section 1983 and Municipal Liability: Selected Issues Two Years After Monell v. Department of Social Services*, 12 URB. LAW. 232, 232-40 (1980) [hereinafter cited as *Liability*].

42. 436 U.S. 658 (1978).

1983, the Court reversed *Monroe* and held that "Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies."[43]

Having created a new cause of action, the Court partially defined its contours. Relying on the language of the statute, the Court held that an entity may be held liable for a challenged governmental custom or usage even though it "has not received formal approval through the body's official decisionmaking channels."[44] The entity could, however, not be held liable "*solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."[45] Finally, the Court refused to decide the issue it ultimately decided in *Owen v. City of Independence*:[46] whether an immunity defense is available to the governmental entity.[47]

After *Monell*, lower courts began to struggle with the policy considerations for and against granting governmental entities qualified immunity from suits under section 1983. Absent such immunity, governmental entities would be held liable for any action ultimately held to be violative of section 1983, regardless of whether the action was proper and legal at the time it was taken. In effect, governmental bodies would become strictly liable for their unconstitutional actions. The policy considerations militating against such liability were examined in a series of cases which had differing results.[48]

These policy considerations go to the nature of an individual's civil rights in a federal system. Those courts which extended the qualified immunity noted several considerations. (1) Deep pocket loss sharing, *i.e.*, mutual insurance, is an insufficient basis for denying any immunity. (2) Denying immunity would not deter constitutional violations. As the court stated in *Ohland v. City of Montpelier*: "More realistically, retroactive liability would either not affect public decisionmaking at all, or would paralyze decisionmaking with continual reference to advisory prognostications, the imposition of unnecessary procedu-

43. *Id.* at 690.

44. *Id.* at 691.

45. *Id. See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 171-72 (1970) ("We disagree with the District Court's implicit assumption that a custom can have the force of law only if it is enforced by a state statute.").

46. 445 U.S. 622 (1980).

47. 436 U.S. 658, 695 (1978).

48. *Compare* Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980) (*en banc*) *and* Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979) *and* Gross v. Pomerleau, 465 F. Supp. 1167 (D. Md. 1979) all allowing governmental entities a limited immunity *with* Bertot v. School Dist. No. 1, 613 F.2d 245 (1980).

ral protections, and the avoidance of politically controversial issues that might result in § 1983 suits."[49] (3) Denial of any immunity would detract from the quality and efficiency of governmental decision making. (4) Unnecessary expense to the taxpayers and deprivation of funds for other governmental programs would result. (5) Harassment of local government by unfounded litigation would not occur. To these considerations one might add increased interference by legal counsel in the governmental process and the attendant cost of legal fees.

Courts that found a qualified immunity unavailable to governmental entities relied on the paramount needs to protect individual's constitutional rights and the benefits of apportioning loss to the party most able to afford it—invariably the governmental entity. Moreover, these courts noted that because the money at stake would be only that of the government,[50] not the individual, effective governmental decision making would not be seriously inhibited.

Owen v. City of Independence

Ultimately, of course, the Supreme Court faced the issue of governmental immunity in *Owen v. City of Independence*.[51] That case had been in the appellate process for over four years, and reached the Supreme Court twice. Perhaps the courts had difficulty with the decision because it is a "hard" case involving a series of complex legal policy and procedural concerns.[52]

The facts at issue in *Owen* were essentially undisputed. Owen was chief of police of the city of Independence. For some time before March, 1972, Owen and the city manager, Lyle Al-

49. 467 F. Supp. 324, 345 (D. Vt. 1979). The court also noted: "Taxpayers are not private investors willingly accepting the risks of doing business in return for anticipated profits. Moreover, governments, unlike private businesses, cannot choose to avoid acting in areas of greater risk." *See generally* Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L.Q. 409, 444-45 (1978).

50. "[I]t is a fact of human nature that the official will be less concerned with the expenditure of public funds than with the expenditure of his own personal resources." Paxman v. Campbell, 612 F.2d 848, 870 (4th Cir. 1980) (Winter, J., dissenting). *See generally* Note, *Liability of State and Local Governments under 42 U.S.C. § 1983*, 92 HARV. L. REV. 311, 323 (1978) (advocating the need to hold governmental entities monetarily liable for any deprivation of a constitutional right).

51. 445 U.S. 622 (1980).

52. Carlisle, *Owen v. City of Independence: Toward Constructing a Model of Municipal Liability after Monell*, 12 URB. LAW. 292, 296 (1980) (the author represented the city of Independence throughout the *Owen* litigation).

berg, had had various differences of opinion.[53] In early March, 1972, a handgun which according to police records had been destroyed was discovered in the possession of a felon by Kansas City police. Alberg ordered an investigation of the management of the police department's property room. The investigation originally was directed by Owen, but subsequently was transferred to the city's Department of Law. While the resulting report revealed inadequate record keeping for the property room, there was no evidence of criminal acts in its administration. On April 10, 1972, apparently as a result of the report, Alberg asked Owen to accept a transfer or be fired.

The controversy surrounding Owen was the subject of intense local press coverage. On April 15, after a conference with Owen, Alberg decided to terminate Owen's employment with the city. On the same date, a city councilman, Paul L. Roberts, obtained copies of the report on the property room investigation and decided without informing anyone to make the report public. At a city council meeting on April 17, Roberts read a prepared statement in public alleging that Owen had engaged in improper and criminal acts in the operation of the property room.[54] Roberts moved that the reports be made public and turned over to the county prosecutor for further action. The motion was approved by a vote of six to nothing, with one abstention.

On April 18, 1972, Alberg sent Owen written notice terminating his employment with the city. Owen's attorney subsequently requested a hearing on the reasons for Owen's discharge, which was denied on the advice of the city's legal counsel. Owen then filed suit in federal court under section 1983 and under the fourteenth amendment, alleging that termination without notice or a hearing violated his due process rights.

The trial court entered judgment for the city. The court first allowed a *Bivens* type cause of action directly under the fourteenth amendment for deprivation of protected liberty and property interests without due process of law.[55] Thus, the city could be sued for damages. Nonetheless, Owen was denied recovery because the court found that he had no property interest in his position as police chief.[56] More importantly, the court found no liberty interest implicated. First, the court held there was no

53. Owen v. City of Independence, 421 F. Supp. 1110, 1114 (W.D. Mo. 1976).

54. *Id.* at 1116 n.2.

55. *See* notes 39-41 and accompanying text *supra*.

56. Owen v. City of Independence, 421 F. Supp. 1110, 1120 (W.D. Mo. 1976).

stigma connected with Owen's discharge, *i.e.*, there was no causal link between Councilman Roberts's actions and Owen's discharge. Second, the court relied on the city's report exonerating Owen of any wrongdoing. Finally, the court held that even if Owen was deprived of his liberty without due process of law, the city was entitled to a good faith defense. The city council had relied on the advice of legal counsel that no hearing was required, and thus the city was entitled to good faith immunity from suit.[57]

The appellate court reversed.[58] It first accepted, as the trial court had, a *Bivens* cause of action directly under the fourteenth amendment.[59] However, the Eighth Circuit denied the city its good faith immunity[60] and held it liable for a deprivation of liberty without due process. The court found that Councilman Roberts's statement, as reported in the press,[61] was so connected with Owen's discharge as to create a defamation in the course of termination of employment which was actionable under the fourteenth amendment.

The Supreme Court accepted certiorari but remanded the case to the Eighth Circuit for further consideration in light of *Monell*.[62] On remand[63] the same three judge panel totally reversed its prior decision and held that the city was entitled to a good faith defense against suit under section 1983.[64]

The Supreme Court again granted certiorari, and in a five to four decision held that municipalities are not entitled to good faith immunity from suit under section 1983. Thus, the city was liable in damages for failure to afford Owen a hearing after his dismissal, even though no such legal obligation existed at the time.[65] The majority opinion written by Justice Brennan first agreed with the earlier *Owen* decision that Owen's dismissal from his job with the city was a deprivation of liberty. The Court

57. *Id.* at 1117-18.

58. Owen v. City of Independence, 560 F.2d 925 (8th Cir. 1977).

59. *Id.* at 931-32.

60. *Id.* at 940-41.

61. *Id.* at 936.

62. Monell v. Department of Social Servs., 436 U.S. 658 (1978).

63. 589 F.2d 335 (8th Cir. 1978). *See* note 41 *supra*.

64. *Id.* at 338. The reversal in the panel's thinking is simply unexplained, as is its conclusion that a qualified good faith immunity is available to a municipal defendant in a § 1983 action. Apparently the Supreme Court was mystified as well. At oral arguments on *Owen* before the Supreme Court, Justice Brennan asked Owen's counsel why he thought the court of appeals reversed itself. Counsel responded that he simply didn't know.

65. The right to a name-clearing hearing in the context of termination of employment was not established until Board of Regents v. Roth, 408 U.S. 564 (1972). The *Roth* decision was handed down approximately ten weeks after Owen's discharge.

then discussed whether a qualified good faith immunity should be extended to the city. Justice Brennan first analyzed the legislative history of section 1983, and then examined the state of municipal immunity at the time of its passage in 1871.[66] Finally, the Court examined the policy considerations underlying its decision. The fundamental need to protect individual civil rights, as well as the need to deter future constitutional deprivations, were paramount considerations.[67] The Court found neither of the rationales underlying qualified immunity in *Scheuer v. Rhodes*[68] to be applicable. First, no injustice results from holding the city liable because any money damages will come from the municipality's treasury, not from the officials who committed the acts. Second, entity liability would not deter conscientious governmental decision making.

The dissent, written by Justice Powell and joined by Chief Justice Burger and Justices Stewart and Rehnquist, essentially restated the view of the trial court that no deprivation of Owen's constitutional rights had occurred.[69] Justice Powell then discussed the policy considerations in favor of extending a qualified immunity to municipalities, primarily the need for free and unfettered governmental decision making, and the need to protect municipal finances.[70] Finally, Powell found no basis for denial of qualified immunity to local governmental entities in the legislative history of section 1983 and the state of municipal immunity at the time it was passed.

THE IMPACT OF *OWEN*

The Governmental Entity

Ultimately, the *Owen* decision resolves profound policy questions which the legislative history of section 1983 addresses

66. The Court relied extensively on the decision of Thayer v. Boston, 19 Pick 511, 515-16 (Mass. 1837), in which the Massachusetts Supreme Court held that a municipality must pay when it has injured someone, even if the governmental action causing the injury was legal and proper at the time it was taken. The Court's decision was apparently based on theories of loss spreading.

67. The Court noted that the absence of immunity would cause city officials to "err on the side of the protection of citizens' constitutional rights," as well as to establish internal procedures to minimize the possible infringement of constitutional rights. 445 U.S. at 651-52.

68. 416 U.S. 232 (1974).

69. "That events focused public attention upon Owen's dismissal is undeniable; such attention is a condition of employment—and of discharge—for high government officials. Nevertheless, nothing in the actions of the city manager or the city council triggered a constitutional right to a name-clearing hearing." 445 U.S. at 663 (Powell, J., dissenting).

70. "By simplistically applying the theorems of welfare economics and ignoring the reality of municipal finance, the Court imposed strict liability on the level of government least able to bear it." *Id.* at 670.

obliquely, if at all. As a matter of policy, the majority concluded that protection of civil rights by the federal courts is so important that the attendant cost and interference in municipal decision making is acceptable. Conversely, of course, the dissent reached the opposite conclusion.[71]

From the local governmental entities' standpoint, the *Owen* decision can be regarded as little less than disastrous. Whether the decision will effectively make it a tort to govern[72] will become clear only with the passage of time. The ultimate financial impact on municipal treasuries also is a matter of conjecture. There can be no doubt, however, that municipalities will be forced to divert increasingly larger portions of their budgets to legal expenses, whether they be fees for legal counsel or damages. Governmental officials at all levels will become increasingly hesitant to act, especially in the controversial and highly publicized areas which require the most courageous and independent conduct on the part of governmental officials. Perhaps the most important effect of the decision is that legal concerns will become paramount, or nearly so, in government administration.

While courts and commentators have considered the impact of federal court intervention on governmental conduct,[73] there has been virtually no discussion of the role of legal counsel in governmental affairs. It is possible that the single most important result of the *Owen* decision will be a type of institutionalized interference by lawyers into the governmental process. Lawyers representing governmental entities will be forced to review and alter government programs to minimize the risk of costly litigation under section 1983.[74] Local governments, in an

71. The majority opinion in *Owen* contains an internal contradiction which the advocates of strict municipal liability never have resolved. According to its proponents, strict municipal liability apparently both will and will not affect the conduct of governmental officials. It will affect conduct in leading officials to protect constitutional rights, but will not affect any other sphere of the official's conduct. A more likely result is stated by Judge Coffren in Ohland v. City of Montpelier, 467 F. Supp. 324 (D. Vt. 1979). *See* note 47 and accompanying text *supra*.

72. Dalehite v. United States, 346 U.S. 15 (1953).

73. *See, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976). *See generally Federalism, supra* note 8, at 1190-1247.

74. Normally, § 1983 claims arise under the Constitution. The scope of § 1983 was again expanded, however, by the Supreme Court decision in Maine v. Thiboutot, 100 S. Ct. 2502 (1980), to include violations of federal statutory law by local governmental entities. *Thiboutot* involved a claim by the plaintiff that the state violated the law in its application of the Federal Social Security Act. Relying on the "plain language" of § 1983, the Court held that statutory violations were clearly included under the terms of the statute. The dissent, again written by Justice Powell, argued that legislative

effort to avoid both courts and controversy, will increasingly turn to legal counsel for protection. As the price of that protection, governmental officials will simply have to become accustomed to a degree of legal interference in their decision making previously considered unthinkable. While such interference by legal counsel is less blatant than judicial takeover of a school district or a prison, the results are similar.

The extent of governmental liability under section 1983 is further broadened by the "custom and usage" language of the statute. A governmental entity, of course, can only act through its governing board and its high level administrators, whose actions may fairly be said to represent the entity.[75] While a governmental entity normally will not be liable for the unconstitutional action of its non-policy making employees on a respondeat superior basis, the entity can be held liable where it is shown that the employees' actions pursued a governmental custom or policy. The standards which courts have used in applying the custom and usage doctrine are nebulous at best. It is at least clear, however, that where a "policy making" administrator is aware or should be aware of constitutional violations by governmental employees and fails to take action to remedy them, then a cause of action against both the governmental body and the official will lie under section 1983. Also, where governmental supervision is so lax and inept as to evidence "deliberate and conscious indifference to a substantial probability that constitutional violations will result," the government will be held liable for the employees' actions.[76]

Most courts have held that while mere negligence in supervision is insufficient to impose liability on the governmental entity, gross negligence may lead to liability.[77] Courts have held that a single action by a governmental employee can lead to entity liability on a custom and usage theory.[78] Such potential lia-

history and prior Supreme Court opinions did not require the inclusion of purely statutory claims in § 1983. More importantly, Powell looked at the potential impact of the decision: "In practical effect, today's decision means state and local governments, officers, and employees now may face liability whenever a person believes he has been injured by the administration of *any* federal-state cooperative program, whether or not that program is related to civil rights." 100 S. Ct. at 2513 (emphasis in original).

75. Smith v. Ambroggio, 456 F. Supp. 1130, 1134 (D. Conn. 1978).

76. Mayes v. Elrod, 470 F. Supp. 1188, 1194 (N.D. Ill. 1979).

77. Estelle v. Gamble, 429 U.S. 97 (1976), *rehearing denied*, 429 U.S. 1066 (1977) (deliberate indifference standard); Popow v. City of Margate, 476 F. Supp. 1237 (D.N.J. 1979); Leite v. City of Providence, 463 F. Supp. 585 (D.R.I. 1978).

78. Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979), *cert. denied sub nom.* Nassau v. Owens, 444 U.S. 980 (1980); Oshiver v. Court of Common Pleas, 469 F. Supp. 645, 648 (E.D. Pa. 1979).

bility for the acts of its employees can only further limit governmental responsiveness and require tightened administrative control by policy making officials.[79] Government's freedom to respond to the needs of its citizens will inevitably be reduced.

Limitations on Section 1983 Liability

Ironically, while section 1983 has been radically expanded in scope and importance by the Supreme Court, and the impact of the statute on governmental entities consequently expanded,[80] the range of substantive causes of action most commonly asserted under section 1983 has been narrowed by the Supreme Court. The "typical" section 1983 action involves an alleged violation of constitutional rights secured by the first or fourteenth amendments. The fourteenth amendment claims have centered on deprivations of liberty or property without due process of law, as well as denial of equal protection of the law. The coverage of the due process and equal protection clauses was greatly expanded by a series of Supreme Court decisions in the early 1970s. The explosion of due process law at that time was typified by such cases as *Board of Regents v. Roth*,[81] its companion case *Perry v. Sindermann*,[82] and *Wisconsin v. Constantineau*,[83] which greatly expanded the concepts of liberty and property protected by the fourteenth amendment. These decisions also expanded the procedural protections which government must afford prior to deprivation of the newly-created liberty or property rights.[84]

Protected "property interests" were defined by the Court to include benefits (previously considered privileges) extended by the government which "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[85] Needless to say, decisions such as

79. For a discussion and analysis of the law of governmental custom and usage, see *Liability*, *supra* note 41, at 240-57.

80. As Justice Powell noted in his dissent in *Owen*: "After today's decision, municipalities will have gone in two short years from absolute immunity under Section 1983 to strict liability." 445 U.S. at 665.

81. 408 U.S. 564 (1972).

82. 408 U.S. 593 (1972).

83. 400 U.S. 433 (1971).

84. *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (a trial-type hearing must be held before termination of government welfare benefits). For the academic origins of the expansion of procedural due process protection to new types of "property interests" see Reich, *The New Property*, 73 YALE L.J. 733 (1964).

85. Board of Regents v. Roth, 408 U.S. 564, 577 (1965).

Roth led to extensive litigation attempting to expand further the protections of the fourteenth amendment. Ultimately, the Supreme Court retreated in a series of decisions in the mid-1970s.

In *Arnett v. Kennedy*,[86] the Supreme Court considered the claim of a nonprobationary federal employee that his discharge was effected without due process. Justice Rehnquist, speaking for three Justices, held that Kennedy had a property interest as a nonprobationary employee in continued employment. However, Rehnquist went on to find that although Kennedy had a property interest, he had no constitutional right to any termination procedures beyond those provided in his agency's regulations. In Rehnquist's words, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of appellee must take the bitter with the sweet."[87]

Two Justices agreed with the Rehnquist opinion that Kennedy had a property interest in continued employment with the government as he could only be terminated "for cause," and thus had an expectation of continuing employment. They disagreed, however, that where a governmental body creates a property interest it may terminate that interest in any manner it desires. Justices Powell and Blackmun stated that a balancing test, guided by the constitution, must be employed by the courts to determine "what process is due" in terminating a property interest.[88] While the Rehnquist approach was apparently rejected by six Justices,[89] the "bitter with the sweet" analysis has survived, and has been employed by some lower courts in analyzing procedural due process claims.[90]

In *Bishop v. Wood*,[91] the Court reaffirmed the partial holding in *Arnett* by stating that a property interest in continued governmental employment is created only where an employee may be terminated "for cause." If an employee may be terminated at the will of his public employer, no property interest is

86. 416 U.S. 134, *rehearing denied*, 417 U.S. 977 (1974).

87. *Id.* at 153-54.

88. For the elements to be employed in that balancing test see Mathews v. Eldridge, 424 U.S. 319 (1976). *See also* Ingraham v. Wright, 430 U.S. 651 (1977).

89. The six were Blackmun, Powell, and four dissenters.

90. *See, e.g.*, Barszcz v. Board of Trustees of Community College Dist. No. 504, 400 F. Supp. 675 (N.D. Ill.), *aff'd*, 539 F.2d 715 (7th Cir. 1975), *cert. denied*, 429 U.S. 1080 (1976).

91. 426 U.S. 341 (1976).

created as the employee has no interest in continuing governmental employment.

The Court has also narrowed the remedies available for violations of the due process clause. In *Carey v. Piphus*,[92] it held that denial of procedural due process, if proven, should result only in nominal damages to the claimant absent proof of actual injury, *i.e.*, mental or emotional distress caused by the deprivation.[93] The Supreme Court has likewise attempted to narrow the reach of "liberty interests" protected by the fourteenth amendment. *Paul v. Davis*,[94] another opinion by Justice Rehnquist, essentially repudiated the Court's broad holding in *Wisconsin v. Constantineau*[95] that "[w]here 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."[96] The Court formulated a "reputation plus" test, finding that more than an individual's interest in his reputation must be implicated before the fourteenth amendment will apply to limit governmental conduct. The procedural protections of the fourteenth amendment are only required where the state adversely affects the governmental employee's reputation in the context of terminating that employee's position.[97]

Paralleling the expansion of the due process clause in the early 1970s was the expansion of the equal protection clause as the Court established a two-tier approach to equal protection analysis. Where government economic regulations were challenged, the Court would approve the legislative classification so long as it had a rational relationship to a legitimate governmental interest. But where a suspect class[98] or a fundamental interest[99] was involved, the governmental classification would be subject to "strict scrutiny," which required a compelling state interest to justify the classification. However, the Court has re-

92. 435 U.S. 247 (1978) (suspension of student without prior notice of hearing).

93. *Id.* at 266-67. For a critique of *Carey v. Piphus* arguing that deprivation of constitutional rights must receive greater compensation than nominal damages, see Note, *Damage Awards for Constitutional Torts: A Reconsideration after Carey v. Piphus*, 93 HARV. L. REV. 966 (1978).

94. 424 U.S. 693, *rehearing denied*, 425 U.S. 985 (1976).

95. 400 U.S. 433 (1971).

96. *Id.* at 437.

97. Justice Brennan has termed the *Paul* decision "overtly hostile to the basic constitutional safeguards of the Due Process clauses. . . ." Bishop v. Wood, 426 U.S. 341, 351 (1976) (Brennan, J. dissenting).

98. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (race held to be a suspect class).

99. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (voting held to be a fundamental interest).

jected invitations to expand the categories of suspect classes and fundamental interests. For example, it has failed to make gender a suspect class,[100] and has refused to make education a fundamental interest.[101]

Public employee attempts to use the first amendment guarantees of freedom of speech and association to gain protection from loss of employment and to further employee unionization have met with limited success. The Supreme Court has held that public employees retain their first amendment rights on the job, although their interest in free speech must be balanced against the need of the government to protect the efficiency of its public services.[102] Nonetheless, the Court held in *Mt. Healthy City School District Board of Education v. Doyle*[103] that where an employee termination would have occurred even in the absence of constitutionally protected conduct by the employee, the termination must be upheld. In effect, the Court created a "but for" test in first amendment employee dismissal cases, *i.e.*, if the employee would not have been dismissed but for the protected conduct, he is protected against termination. Obviously, this is a very liberal standard for the governmental entity. Similarly, although the free speech clause allows employees to support unionization and to solicit membership for public employee unions, the first amendment does not compel a public body to recognize or bargain with any particular unit.[104]

The Supreme Court's decisions attempting to define and limit the substantive constitutional causes of action under section 1983, although beneficial to governmental entities, hardly solve the problems they face in light of the strict liability for any constitutional violation imposed by *Owen*. While the Court has specified when a property interest arises, it apparently has left the decision of what process is due to case by case analysis.[105] Accordingly, if a governmental entity "guesses wrong" and provides inadequate procedural protections for a property interest,

100. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

101. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

102. Givhan v. Western Line Consol. School Dist., 439 U.S. 410 (1979); Pickering v. Board of Educ., 391 U.S. 563 (1968) (it is irrelevant that the governmental employees' speech is not public in nature).

103. 429 U.S. 274 (1977).

104. Smith v. Arkansas State Highway Emp., 441 U.S. 463 (1979).

105. The benefit of the Rehnquist "bitter with the sweet" approach is that it removes the uncertainty in determining whether notice and hearing standards meet constitutional minimums on a case by case basis. Governmental bodies would no longer have to guess whether their policies are constitutional. Obviously, though, this freedom would come at the expense, in certain instances, of individual rights.

it will be strictly liable under section 1983 even if its actions were taken in good faith. Moreover, federal courts can and will apply due process protections in situations where they previously have not been applied.[106]

Furthermore, it is not correct to assume that a deprivation of due process is unimportant because only nominal damages can be awarded to the plaintiff. First, the Civil Rights Attorney's Fees Awards Act of 1976[107] awards attorney's fees to "prevailing" plaintiffs and attorney's fees are never nominal. Second, the plaintiff may recover damages for mental or emotional distress resulting from the deprivation of due process.[108] Similarly, first amendment claims by public employees have not been deterred by the Supreme Court's decision in *Mt. Healthy*. A terminated governmental employee often has little to lose and a great deal to gain by such a suit. Also, public employee unions can use such actions to make a governmental body think twice before terminating an employee. Of course, even if it is ultimately successful in defending against a first amendment claim, the governmental body must pay attorney's fees to defend such an action.

Even though the Supreme Court has attempted to narrow its decisions concerning liberty and property interests, it has not done so consistently. The *Owen* case itself is an excellent example. In *Owen*, the Supreme Court split five to four not only on the issue of good faith immunity for governmental bodies, but also on the issue of whether Owen had been deprived of any liberty interest to begin with. In effect, governmental entities remain at the mercy of the federal courts' definition of an individual's constitutional rights.

THE IMPACT OF *OWEN* ON THE ATTORNEY-CLIENT RELATIONSHIP

The Attorney's Counseling Function

The decision of *Owen v. City of Independence* will fundamentally alter the attorney/client relationship, both in counsel-

106. *See* Larry v. Lawler, 605 F.2d 954 (7th Cir. 1978) (the Seventh Circuit applied due process protection to an applicant seeking governmental employment). *Cf.* Arnett v. Kennedy, 416 U.S. 134 (1974) (the Lloyd-La Follette Act, governing discharge of federal employees does not require procedural protection under the Due Process Clause beyond that afforded by the statute and agency regulations).

107. 42 U.S.C. § 1988 (1976). Attorney's fees are to be calculated on a reasonable hourly fee for the attorney's work even where the attorney works for legal aid or a public interest group. Copeland v. Marshall, 594 F.2d 244 (D.C. Cir. 1978).

108. James v. Board of School Comm'rs, 484 F. Supp. 705, 714-15 (S.D. Ala. 1979).

ing and in litigating a section 1983 suit. Before *Monell* and *Owen*, the attorney who represented a governmental client was primarily concerned with the independent liability of governmental employees for civil rights claims under section 1983. Prior to *Monell*, of course, the governmental entity could not be sued under section 1983.

In the usual case, a governmental employee has a qualified immunity from suit as defined by *Wood v. Strickland*: subjective and objective good faith. The attorney representing a public client would normally be concerned with the objective good faith test concerning "settled indisputable constitutional law." The public official had to review the legality of his actions with legal counsel, and counsel's obligation was to inform his client if the proposed act violated the constitution as it was then interpreted. While the attorney's obligation was hardly an easy one to meet,[109] it was a traditional legal function—ascertaining the state of the law and advising his client whether he could legally proceed with his project or plan. Moreover, under the *Wood* standards, the attorney could practice preventative law with the cooperation of his client. By meeting regularly with the client the attorney could avoid most problems that might lead to litigation because he could rely on judicial precedent in advising his client.

Owen v. City of Independence, by making governmental entities strictly liable for their unconstitutional acts, makes it impossible as a practical matter to practice preventative law. Denying governmental bodies a qualified good faith immunity renders constitutional precedent irrelevant. The entity will be held liable for its actions regardless of whether it violates the law at the time the action is taken. The impact of *Owen* in this regard can only be truly appraised by first noting that virtually everything local government does has a constitutional dimension that is cognizable, at least arguably, in a suit under section 1983. Governmental policy, for example, may not be binding upon the governmental entity under state law, but may create a property interest under the fourteenth amendment.[110]

Any contract entered into by a governmental body, including a collective bargaining agreement with its employees, may create a property interest protected by the fourteenth amendment. Thus, a matter which would normally give rise to a grievance under the collective bargaining agreement may become the

109. Wood v. Strickland, 420 U.S. 308, 328-29 (1975) (Powell, J. dissenting).

110. Sargent v. Illinois Inst. of Technology, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1st Dist. 1979).

subject of federal court litigation under section 1983.[111] Indeed, the presence of attorney's fees in section 1983 litigation can only have the effect of encouraging such suits.

The pervasive intrusion of the constitution into governmental affairs lies at the heart of the problems raised by *Owen*.[112] While the federal courts often recognize the problems of judicial interference in governmental affairs,[113] the practical effect of decisions such as *Owen* is to guarantee a high degree of judicial involvement in the governmental process. The manner in which local governments and their legal counsel adapt to the situation will determine just how much judicial interference will result from the *Owen* decision. As noted above, the *Owen* decision requires the attorney to determine not only what the law is, but also what it will become. The difficulty of this task requires a fundamental modification in the traditional attorney/client relationship.

To come to grips with the strict liability imposed by the *Owen* decision, governmental officials must be willing regularly to discuss projects and problems with their attorneys. No longer does the client have the luxury, if he ever did, of waiting until the summons is served to call his attorney. Likewise, the attorney must go beyond the traditional approach of informing his client about the state of the law as applied to a particular set of facts. Rather, he must counsel his client on *avoiding* the types of legal problems that could give rise to section 1983 litigation.

Such counseling will take several forms. The attorney can establish regular "in-service" programs with governmental officials on a variety of civil rights concerns. For example, many

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111. For example, a teacher denied a salary increment under the collective bargaining agreement could file a federal court action for deprivation of property without due process of law. For that matter, any breach of contract could lead to litigation under the fourteenth amendment. In the school context, § 1983 litigation may arise in areas as diverse as grading policy, athletic discipline, and educational malpractice. *See, e.g.*, Knight v. Board of Educ., 38 Ill. App. 3d 603, 348 N.E.2d 299 (4th Dist. 1976).

112. One may question exactly why the government must be treated differently than a private employer. In its capacity as employer, the government normally does not exercise "governmental" power which would justify imposing the constitutional restrictions of the first and fourteenth amendments.

113. The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error.

Bishop v. Wood, 426 U.S. 341, 349-50 (1976). *See also* Sampson v. Murray, 415 U.S. 61, 83 (1974) (government is traditionally granted the widest latitude in the dispatch of its own affairs).

employment discrimination claims can be avoided simply by explaining the requirements of the employment discrimination laws to administrators, and telling them how to deal with their day-to-day personnel matters in a nondiscriminatory manner. While this seems to be a simple matter, most governmental clients are unlikely to request such services, and most attorneys who represent governmental entities, particularly smaller governmental entities, are probably not prepared to provide extensive in-service counseling.

Equally as important as an in-service program is close cooperation between the governmental client and the attorney in promulgation of new ordinances and policies, as well as in review of old governmental policies. It is incumbent on the governmental client to involve his legal counsel directly at the earliest stage of creation of governmental ordinances and policies. The attorney, in advising his client, must be prepared not only to consider the current legality or illegality of the program, but also to shape the proposed policies to minimize the possibility of litigation arising from the policy itself or its implementation.

The attorney must also aid in the establishment of internal administrative hearing procedures to deal with citizen or employee complaints. Such procedures will inevitably reduce litigation by encouraging the feeling that the individual, citizen or employee, is being treated fairly by his government.[114]

Because much governmental action involves some form of "property interest" as defined by the Supreme Court, treating the individual fairly will reduce the possibility that he will go to court to vindicate what he perceives to be his due process rights. Justice Brennan addressed this issue in the *Owen* case: "Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights."[115] While the procedural protections imposed may be unnecessary and burdensome, they will reduce the possibility of litigation. It can be argued that if sufficient procedural protections are afforded to employees or citizens, there will rarely be substantive inequities. Indeed, one way of limiting the impact of *Owen* is for

114. As one commentator stated, "[a]n individual who becomes the focus of lawless official action loses the assurance that the government affords all its citizens a degree of security for their basic interests. This loss of security in one's entitlements is inherent in the deprivation of due process. . . ." Note, *Damage Awards for Constitutional Torts: A Reconsideration after Carey v. Piphus*, 93 HARV. L. REV. 966, 979 (1980).

115. Owen v. City of Independence, 445 U.S. 622, 652 (1980).

federal judges to exercise great deference to substantive governmental actions so long as those actions were taken in a procedurally proper manner.

The practical effects of the altered attorney/client relationship created by *Owen* are clear. First, governmental bodies will be required to spend substantially increased portions of their budgets for legal counsel—private, in-house, or both. Such increased costs will inevitably be opposed both by governmental administrators and by the general public. Nonetheless, the cost will be unavoidable. Second, local government will be less able to try innovative programs for fear of adverse legal consequences. Third, lawyers will become increasingly involved in the day-to-day management of government, as well as in policy formulation. Fourth, as a consequence of the greater involvement of lawyers, the authority of governmental administrators will be reduced. These results, while not pleasant, are inevitable. Regardless of whether *Owen* was correctly decided by the Supreme Court, governments must learn to live with it and perform their governmental functions within its constraints.

Defending Section 1983 Litigation

No matter how conscientious governmental officials and governmental attorneys are, litigation under section 1983 will increase, at least partly as a result of *Owen*. Section 1983 litigation presents unique ethical problems for the attorney responsible for defending the suit, who must address and resolve them at the beginning of his involvement in any litigation brought under section 1983. Failure to do so can expose the attorney to liability for legal malpractice, as well as severely prejudice the rights of his client.

Lawsuits brought under section 1983 arguably can be divided into two broad classes. The first class includes cases dealing with governmental conduct, and the second cases in which governmental policy is challenged.[116] The conduct case is typified by *Owen*: the conduct of a governmental official, in that case a city councilman, gave rise to a section 1983 claim. The policy case is typified by *Monell v. Department of Social Services*. In *Monell*, the Court considered a challenge to the constitutionality of governmental policy duly adopted by the governmental entity's governing board. Obviously, there are hybrids of these two types of cases, *e.g.*, where both the governmental policy and the conduct either formulating or

116. *Liability, supra* note 41, at 240-41. *See also Federalism, supra* note 8, at 1227; Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO L.J. 1483 (1977).

implementing the policy is challenged. Unless the case is a pure "policy" case, there will be multiple defendants sued in a section 1983 action. These defendants can be divided into two groups: the governmental entity and its governing body, *e.g.*, a board of education or city council, and the governmental employees or officials who committed the act in question. It is the presence of multiple defendants in a section 1983 suit which raises ethical considerations for an attorney defending the suit.

Whenever an attorney represents multiple defendants, a potential conflict of interest exists. It is the duty of the attorney to search out any potential conflicts, and not the duty of the client to divulge them.[117] In a normal civil lawsuit, when an attorney represents multiple clients a conflict of interest will arise only as a result of a factual conflict between the two defendants, *i.e.*, each defendant "points the finger" at the other. Absent such a factual conflict, the defense attorney can often represent multiple defendants jointly so long as their interests coincide. Section 1983 litigation, however, presents several sources of conflict of interest beyond a simple factual conflict because of the differing defenses section 1983 makes available to the two types of defendants.[118]

Normally, a governmental attorney is hired to represent the governmental entity, just as private corporation counsel represents the corporate entity, "but that principle does not of itself solve the potential conflicts existing between the entity and its individual participants."[119] Current section 1983 law establishes the defenses of both the entity and its officers and employees. Under *Owen* and *Monell*, the governmental entity is strictly liable for a violation of section 1983. The entity may not be held liable for the acts of its employees under a theory of respondeat superior, however, unless the action of its employees was pursuant to the "custom and usage" of the entity. Governmental employees and officials are entitled to qualified good faith immunity from suit under section 1983 pursuant to the standards enunciated in the Supreme Court's decision of *Scheuer v. Rhodes* and *Wood v. Strickland*.

The attorney representing multiple defendants in a section 1983 suit must first carefully analyze the facts of the case and

117. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1979). *See also* Pennwalt Corp. v. Plough, Inc., 85 F.R.D. 264 (D. Del. 1980).

118. Section 1983 makes certain defenses available to all defendants. See *Federalism*, *supra* note 8, at 1250-80 for a discussion of the doctrines of abstention and exhaustion of remedies.

119. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1318 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1979).

ask himself three critical questions where the plaintiff has sued both the entity and governmental officials and employees: (1) Can the actions of the governmental employee be regarded as the actions of the entity, *i.e.*, are the entity and the individual the same for purposes of section 1983? (2) Where the action of the governmental employee or official is not an action of the entity, was the employee acting within the scope of his employment? (3) If the administrator was acting within the scope of his employment, was he acting pursuant to a custom or usage of the governmental entity? The answers to these three questions will guide the attorney in determining whether a conflict of interest exists between the governmental entity and its employees.

(1) A governmental entity may only act through its policy making employees or officers.[120] To determine whether the employee's actions can be imputed to the entity, the attorney must ask whether the governmental official or employee has the authority to make policy on behalf of the entity. If the employee or official named in the complaint is making policy, he is similarly situated with the entity, *i.e.*, his conduct is the conduct of the governmental body. Accordingly, neither he nor the entity will be immune from suit under section 1983. An example of such an employee would be the mayor of a city or the superintendent of a school district.

No conflict of interest will exist between the administrator and the entity unless there is a direct factual conflict between the codefendants. Of course, it is true that the governmental employee may still be sued in his individual capacity. The employee will have a qualified immunity from suit in his individual capacity. Such a situation will create no conflict of interest between the individual and the entity, because the interests of both parties remain synonymous so long as they both take the position that no violation of section 1983 occurred.

This is not to say, however, that it is easy for the attorney to determine whether a governmental administrator has policy making authority, or that the court will agree with him that the employee or official had such authority. Given the complex hierarchies of many governmental institutions and the diffuse decision making authority, a decision as to who makes policy and who does not can be singularly difficult. If in doubt, the attorney

120. Goss v. San Jacinto Junior College, 588 F.2d 96 (5th Cir.), *modified*, 595 F.2d 1119 (1979); Leite v. City of Providence, 463 F. Supp. 585, 589 (D.R.I. 1978) ("It is elementary that a municipality can only act through its high level, supervisory officials.").

should consider the governmental employee a non-policy maker in determining whether a conflict of interest exists.

(2) If the attorney determines that the governmental employee sued is not in a policy making position, then the entity possesses a section 1983 defense that is unavailable to the employee, *i.e.*, that the employee acted on his own and the entity is not responsible under a theory of respondent superior for his actions. Accordingly, the parties no longer have an identity of interest, and a potential conflict exists. The attorney must then make a second determination: Was the employee acting within the scope of his employment? Scope of employment involves the familiar standards of agency law.[121] If the attorney determines that the employee did not act within the scope of his employment, a conflict of interest immediately exists between the employee and the entity which prohibits the attorney from representing both sides. The attorney should immediately remove himself from representation of one of the parties[122] because if the employee has not acted within the scope of his employment, the governmental entity can move to dismiss itself from the section 1983 action either by a motion to dismiss or by summary judgment. The governmental entity, of course, is never responsible under agency law for the acts of its employee which are outside the scope of his employment. The entity could even argue in such a case that no state action had occurred which would implicate constitutional rights under the first and fourteenth amendments.

Once the defense attorney recognizes that a scope of employment defense exists, he cannot fairly continue to represent both the employee and the entity. An inherent conflict exists, as the employee will nearly always assert that his action was within the scope of his employment. In the typical section 1983 suit, though, scope of employment will rarely be a defense for the entity due to the broad definition of scope of employment that the courts usually apply. In fact, it is difficult to conceive of

121. *See generally* H. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP 100-55 (1979).

122. Many statutes only require that an employee's act be within the scope of employment in order to be defended and indemnified by his employer in a civil rights action. *See, e.g.*, ILL. REV. STAT. ch. 122, § 34-18.1 (1979), which requires school boards to indemnify and protect the school district, members of school boards, employees, volunteer personnel . . . and student teachers against civil rights damage claims and suits, constitutional rights, damage claims and suits and death and bodily injury and property damage claims and suits including defense thereof when damages are sought for negligence or wrongful acts alleged to have been committed in the scope of employment or under the directions of the board. *See also* ILL. REV. STAT. ch. 127, § 1302 (1979) (indemnification of state employees for acts committed within the scope of employment).

a section 1983 action where the conduct at issue was not done within the scope of the employee's position.

(3) If the non-policymaking governmental employee is acting within the scope of his employment, the attorney must make a far more difficult determination: Was the employee's conduct pursuant to the custom and usage of the governmental entity? If not, then the entity can again attempt to dismiss itself from the litigation as it is not liable for the acts of its employees under a theory of respondeat superior.

As discussed above,[123] the standards used by the federal courts to determine the presence or absence of governmental custom or usage are at best nebulous. For example, courts regularly differ on the question of whether a single incident can give rise to entity liability on a custom and usage theory.[124] The attorney must attempt to determine whether the employee acted pursuant to a "persistent practice of state officials which is so well settled that it has the same force of law as does a legislative pronouncement."[125] Obviously, this involves an intensive analysis of the facts and a careful look at the case law that defines the concept of custom and usage.

If the attorney determines there is a possible defense that the employee was in a non-policy making position and his actions were not taken pursuant to a governmental custom or usage, a potential conflict of interest again exists between the entity and the employee. The conflict is created not because of any factual conflict between the parties, but by the nature of the defenses available to the governmental entity in a section 1983 suit. In such a situation, the interest of the entity is obviously to dismiss itself from the litigation.[126] The interest of the governmental employee, however, is to keep the entity in the litigation as a codefendant.

Where the attorney recognizes a potential defense for the entity because the employee-defendant acted on his own, the attorney must determine whether the conflict of interest exists and how to respond to it. The attorney of course is guided by the American Bar Association's Code of Professional Responsibility. Canon 5 of the Code provides that "[a] lawyer should exercise independent professional judgment on behalf of a

123. *See* notes 73-78 and accompanying text *supra*.

124. *Compare* Owens v. Haas, 601 F.2d 1242 (2d Cir.), *cert. denied sub. nom.* County of Nassau v. Owens, 444 U.S. 980 (1979) *with* Popow v. City of Margate, 476 F. Supp. 1237 (D.N.J. 1979).

125. Mayes v. Elrod, 470 F. Supp. 1188, 1192 (N.D. Ill. 1979).

126. Such a motion would probably take the form of a summary judgment action, as the issue of "custom and usage" is intensely factual in nature.

client."[127] Like all Canons in the Code, Canon 5 contains both ethical considerations representing the highest aspirations of the Bar, and disciplinary rules, violation of which can result in disciplinary action. Ethical Consideration 5-15 provides in part:

> If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. *He should resolve all doubts against the propriety of the representation.* A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially.

Ethical Consideration 5-16 states in part: "In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation, free of any potential conflict and to obtain other counsel if he so desires." Disciplinary Rule 5-105 then provides:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment . . . except to the extent permitted under D.R. 5-105(C).
>
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client . . . except to the extent permitted under D.R. 5-105(C).
>
> (C) In the situations covered by D.R. 5—105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.[128]

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127. ABA CODE OF PROFESSIONAL RESPONSIBILITY No. 5.

128. *Id.* The Illinois Code of Professional Responsibility (adopted by the Supreme Court of Illinois effective July 1, 1980) adopts the langauge of D.R. 5-105 almost verbatim, but does not include any ethical considerations. The American Lawyers Code of Conduct, a proposed code of professional responsibility prepared by the American Trial Lawyers Association, takes a different approach to the issue of conflicts of interest. The Code provides, in § 2.1, that so long as "each client who is or may be adversely affected by the divided loyalty is fully informed of the actual or potential adverse effects and voluntarily consents" an attorney may continue to represent multiple clients. This approach fails to recognize that the "consent" of many people, especially those not accustomed to dealing with attorneys or those who are

The Code of Professional Responsibility requires the attorney to avoid conflicts of interest between multiple clients. The disciplinary rules provide that he must terminate multiple representations if the exercise of his independent professional judgment will be affected unless it is "obvious he can adequately represent the interests of each" and each client consents to the representation after full disclosure. Under this standard, the attorney must determine whether his independent professional judgment will be affected by the multiple representation of both the entity and its employee in a section 1983 suit. Once the attorney determines that the governmental entity has a defense which is unavailable to the governmental employee and which might result in dismissal of the suit against the entity, it is difficult, if not impossible, to imagine how the attorney's independent professional judgment can fail to be impaired. The governmental client (normally the one who pays the bills) will desire dismissal from the suit, while the employee will prefer to have the employer remain as a defendant. The judgment of the attorney will inevitably be biased in favor of his "true" client, the governmental agency.

It can be argued that no real conflict exists, even if the governmental entity is dismissed from the suit. If the employee is held liable for any damages, the money will ultimately come out of the government's treasury, so long as the employee's action was within the scope of his employment. Accordingly, there is no conflict, or even potential conflict, between the governmental employee and his employer. The difficulty with this argument is that it does not take into account the employee's desire to avoid having any judgment entered against him, as well as the desire to have his employer remain a codefendant. Regardless of whose money is ultimately at stake, it is difficult to conceive of an attorney who represents the employee alone favoring any attempt of a codefendant to dismiss itself from the litigation. Moreover, it is difficult for an employee to have confidence in an attorney who is attempting to dismiss the entity on the grounds that the employee acted independently. From that perspective, it is evident that an attorney's independent judgment is impaired.

Once it is evident to the attorney that the entity possesses defenses that will enable it to dismiss itself from the litigation, it is incumbent upon him to disclose the potential conflict to the employee and offer the employee independent counsel if he wants it. Failure to disclose the potential conflict immediately

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forced to deal with the attorney of the employer, will often not be a truly informed and meaningful consent to continue dual representation.

upon discovery of the entity's defenses leads to the situation contemplated in Ethical Consideration 5-15. Once the governmental entity actually decides to defend on the basis that it is not responsible for its employee's actions, the litigation may be well under way. For the attorney to withdraw from representation at that point would severely prejudice the employee. Moreover, the attorney may be required to withdraw as counsel to either party because of the possible breach of an attorney/client privilege between the employee and his prior attorney.[129]

The conflict of interest problem presented by defense of section 1983 actions is intensified by the Supreme Court decision in *Upjohn Co. v. United States*,[130] which considered the nature and extent of the attorney/client privilege in the corporate context. The question in *Upjohn* was whether the Internal Revenue Service could subpoena the results of a questionnaire circulated by the company's general counsel to discover the extent of "questionable" payments made overseas by the corporation to foreign officials. The court of appeals held that the questionnaire was not privileged. Since the attorney's client was a corporate entity, the privilege only ran to the "control group" *i.e.*, senior policy making management, because only such policy making officials have an identity with the corporation as a whole.[131]

The Supreme Court rejected the control group test and found the subpoenaed questionnaire privileged. The Court held that the attorney/client privilege extended at least to the lower level management officials of Upjohn who supplied answers to the questionnaire. To adopt a control group limitation on the extent of the privilege would frustrate the purpose of the privilege allowing the corporte attorney full access to the facts. The Supreme Court failed, however, to define the attorney/client privilege in the corporate context, leaving it to a case by case development.[132]

The governmental attorney, and the corporate attorney, represent a corporate entity and the same questions of attorney/client privilege exist for both. As in any litigation, the governmental attorney defending a section 1983 lawsuit must initially ascertain the factual background and sift through the facts with an eye to the legally relevant.[133] Factual investiga-

129. ABA CODE OF PROFESSIONAL RESPONSIBILITY No. 4, DR4-101, Preservation of the Confidences and Secrets of a Client.

130. 101 S. Ct. 677 (1981).

131. United States v. Upjohn Co., 600 F.2d 1223, 1226 (6th Cir. 1979), *rev'd*, 101 S. Ct. 677 (1981).

132. Upjohn Co. v. United States, 101 S. Ct. at 686.

133. *Id.* at 683-85.

tions will often reach middle and lower level management employees. The facts the attorney receives from such employees in light of *Upjohn* are most likely privileged and may not be disclosed. *Upjohn* accentuates the need for the governmental attorney to determine early whether any potential conflict of interest exists between governmental and individual codefendants in a section 1983 action. If the governmental attorney fails to recognize and disclose a potential conflict of interest which later arises, the attorney will be required to remove himself from the *entire litigation* as he possesses confidential information from two codefendants whose positions are in conflict. Obviously, this is a less than desirable result from the stand point of both the attorney and the client.

The unique nature of the different defenses available to different parties created by the various Supreme Court interpretations of section 1983 places the attorney representing multiple defendants in an ambiguous position. He represents multiple clients who have differing defenses which ultimately may conflict with each other. In fact, it could be argued that whenever multiple defendants are present in a section 1983 action a *per se* conflict exists and each party is entitled to independent counsel. In any event, at the earliest stage of the litigation the attorney must make an intensive examination of the facts to determine whether a conflict of interest between codefendants is possible. Failure to do so can only lead to difficulties for both the clients and the attorney, in the worst case resulting in a malpractice suit. As one commentator has noted in a different context, "conflict of interest problems are rarely clear, but most error usually occurs because the attorney fails to recognize the problem."[134] So long as counsel is at all times cognizant of his obligation to maintain his independent professional judgment on behalf of his clients, and as long as the attorney is prepared to err on the side of terminating multiple representation, conflict of interest problems may be recognized and dealt with properly.[135]

CONCLUSION

The *Owen* case represents a policy decision by the Supreme Court favoring individual civil rights over governmental effi-

134. Mallen, *Insurance Counsel: The Fine Line between Professional Responsibility and Malpractice*, 45 INS. COUN. J. 244 (1978).

135. This is not to say that a governmental employee is always entitled to independent counsel when sued for actions taken in his official capacity absent a conflict of interest. In Corning v. Village of Laurel Hollow, 48 N.Y.2d 348, 398 N.E.2d 537 (1979), the New York Court of Appeals ruled that city officers were not entitled to reimbursement for legal fees incurred in the defense of a civil rights suit where the employees refused a defense offered them by the city attorneys.

ciency and economy. Governmental entities must act to minimize their exposure to section 1983 litigation, while at the same time retaining as much discretion to act as possible.[136] The governmental entity's attorney will play a vital role in shaping governmental policy and programs to achieve this goal. Moreover, the governmental attorney must be extremely careful of the potential conflict of interest inherent in much section 1983 litigation. To the extent that both the government and its attorney cooperate in this endeavor, the impact of *Owen* on the efficient provision of governmental services can effectively be minimized.

136. Governmental bodies, as a result of the *Owen* opinion, will increasingly turn to "civil rights" insurance as protection. While necessary, such insurance policies must be very carefully scrutinized by legal counsel. Areas of particular concern include the scope of coverage and the persons covered. Some policies in this field have been drafted so that only the entity is an insured party; where the plaintiff sues the members of the governing body individually the insurance company has disclaimed coverage. Failure to review such policies carefully may result in expensive and useless insurance protection.