No. 78-1779

OWEN

v.

CITY OF INDEPENDENCE, MO.

Cert. to CA8 (Bright, Ross; Van Oosterhout, concurring)

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SUMMARY.

This case involves the question whether a municipality is entitled to good faith immunity when sued under § 1983. The Court specifically left this issue upon in Monell v. Dept of Social Services, 436 U.S. 658 (1978). The CA8 initially held that no good faith defense was available to a municipality sued directly under the 14th amendment. However, upon GVR in light of Monell, the CA concluded that a Bivens suit was not available due to the availability of a § 1983 suit, and further that good faith immunity to § 1983 actions is available to municipalities.

In the past this Court has granted immunities under § 1983 when it found such immunities imbedded in the common law. I conclude that good faith immunity was not afforded municipalities at common law. I also conclude that policy considerations do not support such immunity. It is not unfair to subject the municipality itself to liability for actions taken in an effort to serve the public interest which are determined to have injured an individual, although it is unfair to hold the individual official liable. Second, absence of municipal immunity will not cause undue timidity in official decision-making. Finally, municipalities are adequately protected by the ruling in Monell that they can be held liable only for actions pursuant to official policies, not for merely employing a tortfeasor. Thus I conclude that qualified immunity for municipalities should be rejected and the CA should be reversed.

I. FACTS.

Petr George D. Owen was appointed Police Chief of the City of Independence, Missouri in Jan. 1967 by then City Manager Robert Broucek. His appointment was for an indefinite term, he was given no contract of employment, and there was no de facto tenure system which would have given him a reasonable expectation of continued employment. For a substantial period prior to March 1972, petr and the City Manager, Lyle Alberg, had several disagreements over petr's administration of the Police Dept. In early March 1972, a gun which had been recorded as destroyed by the Dept's property room was discovered in the hands of a felon. In mid-March, Alberg initiated an investigation of the police property room. The City Auditor reported to Alberg that there were insufficient records to make an adequate audit of the property room and that there was no evidence of any criminal acts, or violation of any law, in the administration of the property room. At an informal meeting with City Council members on or before Apr. 10, 1972, City Manager Alberg discussed the investigation and told the members that he would take action to correct any problems in the administration of the property room. On Apr. 10, Alberg communicated with petr, who was on vacation, over the telephone and asked him to resign as Police Chief and accept another position in the Dept. Petr requested a conference with Alberg the following day. On Apr. 11 petr met with Alberg, and Alberg

told petr he was dissatisfied with petr's performance, including administration of the property room. Petr again was requested to resign. Petr said he would fight to remain Police Chief and Alberg told petr that his employment would be terminated. On Apr. 13, Alberg arranged for a police lieutenant to take the position of Police Chief, but did not formally make this appointment. On that day Alberg released the following public statement:

> At my direction the City Counselor's office, in conjunction with the City Auditor have completed a routine audit of the police property room.
>
> Discrepancies were found in the administration, handling and security of recovered property. There appears to be no evidence to substantiate any allegations of a criminal nature.
>
> Steps have been initiated on an administrative level to correct these discrepancies.

Alberg was away from the City on the weekend of Apr. 15-16, and in his absence, lame-duck City Councilman Roberts requested copies of the audit and statements of witnesses in the investigation of the property room. The Assistant City Manager, unaware of Alberg's intent to keep the reports confidential, complied with Robert's request. During the weekend Roberts read the reports and decided they should be made public.

At the City Council meeting on Monday, Apr. 17, Councilman Roberts read a statement after completion of the scheduled business. The statement alleged that petr had taken two television sets from the property room for his own personal use, that numerous firearms in the custody of the police dept had found their way into the hands of others, including undesirables, that narcotics being

held by the dept had mysteriously disappeared, that traffic tickets had been fixed, that inappropriate requests had been made to the police court, that the unusual release of felons had occurred and that there were gross inefficiencies on the part of a few high ranking officers of the police dept. Roberts then moved that the reports be made public, that they be turned over to the prosecuting attorney 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 report, and to complete the investigation.

The City Council approved the motion, with six members in favor and one abstaining. The press and public were present at the city council meeting, and the statement, motion and firing received extensive publicity, including headlines such as "Probe Culminates in Chief's Dismissal."

The following day, Alberg implemented his prior decision to discharge petr. Petr received a written notice that he was terminated under § 3.3 of the City Charter, effective Apr. 10, 1972. Petr requested that Alberg provide him with written notice of the reasons for the termination and a hearing. Thereafter, petr's attorney also requested a hearing on the reasons for petr's discharge. The requests were denied.

After termination of petr's employment, Alberg referred the investigation reports and statements to the county prosecuting attorney. The case was presented to the grand jury, which returned a "no true bill." No further investigation has been made of petr's administration of the police dept.

II. PROCEEDINGS BELOW.

Petr brought suit under § 1983 and the Fourteenth Amendment, against the City, city manager Alberg, and the current members of the City Council, in their official capacities. He seeks a declaration that his discharge violated due process, reinstatement (this claim has now been dropped since petr has reached the age of mandatory retirement) and backpay. The DC (Becker, J.)(W.D. Mo.) found that petr was not entitled to notice and a hearing with respect to his termination. The DC ruled that the circumstances of petr's discharge did not impose a stigma upon his reputation. This was because the only official reason given for the discharge was § 3.3 of the City Charter, which was not stigmatizing. Second, Councilman Robert's statements had no causal relation to the firing because Alberg had already decided to terminate petr. Third the City Council was prohibited by the City Charger from attempting to influence the City Manager's hiring and firing decisions and finally, petr was completely exonerated of criminal charges by Alberg's public statement that there was not evidence to substantiate any criminal allegations.

The DC also ruled that the individual defendants acted in good faith and therefore would have been entitled to immunity if they had been sued in their official capacities. It reasoned that city officials could not have known that an untenured administrative official was entitled to a statement of reasons for his discharge and an opportunity for a hearing,

prior to this Court's decisions in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sinderman, 408 U.S. 593 (1972).

However, the City Manager and City Council members were sued in their official capacities, which meant that any relief ultimately would come from the City. The DC then considered whether the City could assert a good faith defense against liability based directly upon the Fourteenth Amendment. The DC concluded that imposition of liability on a governmental unit for good faith acts of public officials would impair the ability of public officials to perform their duties forthrightly. Thus it found that the City also should have the benefit of good faith immunity.

The CA[8] initially reversed. It agreed that petr could assert an action directly against the City under the Fourteenth Amendment (Bivens). It disagreed with the DC, however, that there was no violation of due process in this case. The CA pointed out that the crucial issue in determining whether a governmental employer has deprived an employee of a liberty interest is whether, in connection with termination of employment, the employer makes a charge which might seriously damage the employee's standing and reputation in the community, citing, e.g., Bishop v. Wood, 426 U.S. 341 (1976) and Paul v. Davis, 424 U.S. 693, 708-10 (1976). The CA also took note of this Court's decision in Codd v. Velger, ____U.S. ____, 97 S.Ct. 882 (1977). There, Velger was dismissed and his personnel file indicated he apparently had attempted suicide. The Court held he did not state a claim because the record showed no allegation that the material in the file was false. The Court stated:

> Assuming all the other elements necessary to make out a claim of stigmatization under Roth and Bishop, the remedy mandated by the Due Process Clause . . . is "an opportunity to refute the charge." . . . "The purpose of such notice and hearing is to provide the person an opportunity to clear his name."

The CA was convinced petr was stigmatized because Roberts, in his capacity as city councilman, released a statement to the press impugning petr's honesty, the city council appeared to lend support to the statement by voting at an official meeting to refer the reports to the prosecutor and the city manager fired petr the next day. This, according to the CA, was stigma in connection with his discharge, according to the meaning of that requirement in this Court's cases.

The CA rejected petr's claimed property interest in his job, and that issue apparently is not raised on cert.

The CA found the proper remedy to be a monetary award in the amount petr's earnings were diminished by the fact that he was deprived of his good name. The CA reasoned that ordering the city to provide petr a hearing now would amount to no relief at all.

The CA also ruled that the good faith of a municipality does not constitute a defense to equitable monetary relief. The primary justification for the good faith defense, to insure that public officials will not hesitate to discharge their duties out of fear of personal monetary liability, Wood v. Strickland, 420 U.S. 308, 319-21 (1975), was found not to exist when the city itself will bear the award. Thus the CA held

that petr is entitled to a declaratory judgment that his discharge deprived him of constitutionally protected liberty without due process, reversed the judgment, and remanded for a determination of compensatory relief.

Judge Van Oosterhout dissented. He felt that any stigma suffered by petr was not in connection with his discharge, basically adopting the reasoning of the DC.

Thereafter, this Court decided in Monell v. Dept of Social Services, 436 U.S. 658 (1978), that municipalities can be sued directly under § 1983. The Court then vacated the CA's decision for reconsideration in light of Monell.

On remand, the CA reaffirmed its holding that petr had been deprived of a liberty interest without due process. However, it held that since Monell afforded a remedy against a city, there was no need for a Bivens-type action, and furthermore, interpreted Monell to mean that cities are entitled to qualified immunity.

The CA noted that the Court decided in Monell that cities are not entitled to absolute immunity. However, the opinions implied that cities are entitled to some limited immunity, as yet undefined. The CA affirmed the DC's finding that the city officials acted in good faith, and thus affirmed the judgment of the DC. Judge Van Oosterhout concurred, agreeing with the interpretation of Monell and reaffirming his belief that there was no deprivation of due process.

III. CONTENTIONS.

A. Petr. Petr first summarizes Monell. Monell stated that the Civil Rights Acts were intended to give a broad remedy, that the Eleventh Amendment is no bar to municipal liability and that local governmental bodies may be sued for monetary, declaratory or injunctive relief, where the action alleged to be unconstitutional implements a decision officially promulgated and adopted by that body's officers. Monell held that a municipality cannot be held liable solely because it employs a tortfeasor, that is solely on a respondeat superior theory. 436 U.S., at 684-85, 687, 696, 699-700. Petr also points out that the Court expressly left open the question of municipal immunity and did not imply that some immunity is available:

> "[W]e have no occassion to address, what the full contours of municipal liability under § 1983 may be. . . . [W]e expressly leave further development to another day." 436 U.S., at 695.
>
> [W]e express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to absolute immunity, lest our decision that such bodies are subject to suit under § 1983 'be drained of meaning.'" 436 U.S., at 701.

This Court developed the immunities afforded under § 1983 by looking to the common law. It has been recognized that the face of the statute "admits of no immunities," Imbler v. Pachtman, 424 U.S. 409, 417 (1976), and the Court has

recognized immunities only when it is unable to "believe that Congress . . . would impinge on a tradition [of immunity] so well grounded in history and reason by covert inclusion in the general language [of § 1983]." Tenney v. Brandhove, 341 U.S. 367, 376 (1951). The approach of the Court to the immunity question has been focused on common law immunities because it seemed unlikely that Congress would have abolished well-established immunities by its silence. In Tenney v. Brandhove, supra, the legislative immunity was traced from England, through colonial times and to the Constitutional itself. In Pierson v. Ray, 386 U.S. 547, 553, 554, the Court found that "[f]ew doctrines were more solidly established at common law than the immunity of judges . . . ." In Scheuer v. Rhodes, 416 U.S. 232, 239 n.4, 246 n.8 (1974) and Woods v. Strickland, 420 U.S. 308, 318 (1975), the Court based qualified immunity of executive officials and school board members on the common law immunity those officials enjoyed. In Imbler, supra, the Court reviewed its past immunity decisions and stated that "each was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."

If, as in the present case, the immunity claimed by the defendant is one which it did not enjoy at common law, this ends the inquiry. The Court has made clear that it is not its function to make up new immunities, but only to determine whether Congress wanted to maintain those recognized by the common law.

Thus petr's next point is that municipalities did not enjoy qualified immunity at common law. There appear to be no cases prior to 1871 holding that a city was exempted from liability because its officials acted in good faith. And suits against cities, both in tort and contract, were well known.

Senator Stevenson stated the prevailing law as follows:

> "Where a particular act, operating injuriously to an individual, is authorized by a municipal corporation, by a delegation of power either general or special, it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual. But as a general rule a corporation is not responsible for the unauthorized and unlawful acts of its officers, although done under the color of their office; to render it liable it must appear that it expressly authorized the acts to be done by them, or that they were done in pursuance of a general authority to act for the corporation on the subject to which they relate (Thayer v. Boston, 19 Pick. 511). It has also been held that cities are responsible to the same extent, and in the same manner, as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit." Cong. Globe, 42d Cong. 1st Sess. 762. (emphasis added).

Petr finds Senator Stevenson's reference to Thayer v. Boston, 19 Pick. 511 (1837) significant because Thayer was a leading case in which the Mass. S.J.C. held that a municipality would be held liable in a tort action despite the good faith belief of its officials that they were acting lawfully. Petr also cites cases from other states, Wisconsin, New York, and Ohio, which followed Thayer.

Even assuming that the analysis proceeds beyond the determination that cities were not afforded immunity at common law, petr contends that the policy considerations supporting the immunities upheld by this Court in the past are not present in the case of cities. Three reasons generally have been given for qualified official immunity: 1. personal liability would deter officials from acting forcefully and in the public interest; 2. personal liability would deter the most capable candidates from seeking office; 3. personal liability for acts done in good faith in pursuit of public benefits is unfair to public officials.

It appears obvious that the second two reasons do not apply to municipalities, so I will not spend time summarizing petr's arguments to this effect. I might note, that, in terms of the fairness criteria (# 3), the balance seems to weigh in favor of no immunity. It seems fair that the costs of pursuing public benefits be spread among the public, rather than concentrated upon particular victims of good faith overreaching.

The first factor is the one petr must focus upon. Petr first notes the public officials make decisions every day which, if wrong, may impose substantial cost upon the city treasury. Public officials fire employees knowing that they will have to pay for the action if a civil service commission or a grievance panel finds the action improper. Cities build airports knowing that inverse condemnation suits could cost hundreds of thousands of dollars. City officials weigh risks every day in decision-making. It is perfectly appropriate that the constitutional risks be included in the

decision-making calculus. It would be strange if constitutional rights were given less weight than contractual or statutory rights. The purpose of the first factor, avoiding inhibition of forceful decision-making, was to avoid the inhibition created by personal considerations, i.e. the risk of personal financial loss. The purpose of qualified immunity was not to permit officials to disregard completely the possibility that their actions might result in constitutional harm.

Petr next argues that qualified immunity for cities would defeat the full remedial purpose of the Civil Rights Acts. He argues that legislative statements to the effect that the Civil Rights Acts would protect ever expanding constitutional guarantees demonstrates that Congress did not want to limit the protections of the Acts to definitively settled questions of constitutional law. Petr uses this case as an example. This Court as early as U.S. v. Lovett, 328 U.S. 303, 314 (1946), recognized that stigmatization of an employee by a governmental employer implicates liberty interests. This had also been recognized prior to petr's discharge in Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Moreover, several courts of appeals had upheld the right to a name-clearing hearing, and Roth and Sinderman were pending in this Court. Thus the broad good faith immunity granted by the CA relieves officials of the duty of making any attempt to predict the course of constitutional law.

Recent decisions of this Court are thought by petr to illuminate the policy considerations weighing against a grant of qualified immunity. In Hutto v. Finney, 436 U.S. 678, 699

n.32. (1978), this Court stated that the concern expressed in Wood v. Strickland that officials would exercise their discretion with undue timidity is not applicable to an award against the public treasury. In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), the court upheld absolute immunity for individual members of a regional planning agency. The Court noted that "there is no reason why relief against the [agency] itself should not adequately vindicate petitioners' interests," 440 U.S., at 405 n.29, citing Monell. Petr also reviews a string of lower court cases that have reasoned that governmental liability does not unduly deter officials from performing their duties and exercising their discretion without timidity.

Petr recognizes that a panel of the CA10 agrees with the CA 8. See Bertot v. School Dist. No. 1, Albany County Wyoming, no. 76-1169 (Nov. 15, 1978), vacated pending rehearing en banc. However, the panel opinion contained very little analysis and petr finds it unpersuasive. Judge Breitenstein's dissenting opinion is much more persuasive. Petr's reply brief points out that the CA10 has now reversed itself en banc, in a opinion which strongly supports petr's arguments.

Petr argues that even if the good faith defense bars damages, it does not bar equitable relief. He relies upon Wood v. Strickland, supra, where the Court stated that "immunity from damages does not ordinarily bar equitable relief as well." In Cleveland Board of Educ. v. LaFleur, 414 U.S. 632, 638 (1973), the Court affirmed backpay as appropriate relief. Restitution in the form of backpay has long been held to be equitable relief.

Finally, the CA's failure to enter a declaratory judgment that petr's rights were violated is completely inexplicable. This refusal deprives petr even of the possibility of recovering attorneys' fees under the Civil Rights Attorneys' Fees Act.

B. Resps.

Resps have created a theory of Monell which I must confess I do not fully understand. I suspect this "creativity" stems from an inability to answer petr's rather forceful and straightforward arguments, which resp makes very little attempt to do. However, I will attempt to set out resps' theory as accurately as possible, given my lack of understanding of what they are talking about.

Resps distinguish between a "conduct" case and a "policy" case under Monell. They define a policy case as one in which an officially promulgated and adopted policy or "persistent, widespread, permanent, well settled, deeply imbedded or traditional 'customs or usages with the force of law'" cause the deprivation. A "conduct" case, is defined as the instance in which Monell precludes municipal liability, that is, one in which the municipality merely employs a tortfeasor. This type of action lies only against the individual employee, who may assert the good faith defense. See Br. for Resps at 14-15. Resp analogizes the difference between the policy case and the conduct case to the administrative law concepts of rulemaking and adjudication. Resp argues that municipalities are liable only for the promulgation of an unconstitutional policy, and not for

the execution of an unlawful policy.

Resp argues that the distinction between policy and conduct is the touchstone for all further analysis. Resp is particularly concerned that after Monell, policy cases will be treated as conduct cases, or in other words, that courts will "treat governing as a tort." Br. of resp at 20-21.

Resps next set forth their version of the conduct case. In conduct cases, a plaintiff's prima facie case traditionally has involved allegations of state of mind, duty, proximate cause, and the other normal tort factors. Resps especially emphasize state of mind and assert that "if a plaintiff fails to carry his burden of proof in these regards, he should not have the right to any relief, legal or equitable, and he is not the 'prevailing party' for purposes of awarding attorney fees." Br. for Resp 23. Furthermore, resp asserts that "usually egregious conduct that "shocks the conscience" must be present.

Next resp explains the policy case. First resp argues, based on notions of deference, federalism, comity and judicial restraint, courts should be hesitant to declare policies void. Resp makes up some requirements which it feels will further this goal. The policy to be reviewed must be identified precisely, questions of constitutional invalidity must be raised in a plaintiff's first pleading, the plaintiff must

have a direct and personal interest in the question, it is the duty of the courts to resolve all doubts in favor of validity, there is a strong presumption of validity and the party asserting the unconstitutionality of a policy has a heavy burden of sustaining his claim. "Presumptions of validity require proof showing unconstitutionality beyond a reasonable doubt." Br. for resp 25.

Next resps make the argument that "it is not a tort to govern." Without really giving any reasoning or analysis, resps come up with the following proposition:

> If injury is traceable solely to a policy itself and not misconduct, then government should be given "cost free" notice and opportunity to change that policy, it if is unconstitutional. Government hardly could go on if, to some extent, values incident to property and liberty could not be diminished somewhat without paying for every change in the general law -- through damages for tortious conduct or compensation for inverse condemnation.

Having now constructed two types of § 1983 cases, with an almost impossible burden of proof placed on the plaintiff in each, the City argues that plaintiff met his burden of proof under neither.

Although previously in its brief, the City equated the conduct case with the respondeat superior case which cannot be asserted against a municipality, the City now asserts that "if the entity can be held liable . . . for the conduct of [its] officials", the qualified immunity available to the officials should carry over to the City. To resps, this was a conduct case because the CA

determined that the conduct of the City's highest ranking officials could "fairly be said to represent official policy." Plaintiff's initial case was about the conduct of the City Manager and the City Council. Policy, as opposed to conduct, was discovered only after this Court vacated the original CA decision in light of Monell.

Resps' next section in their brief, "legislative history of section 1983 revisited" can be summarized in a one sentence quote from that section: "Monell's review of the legislative history of § 1983 is found not to suggest that tort concepts are to be applied differently between entity defendants and individual defendants."

Resp next discusses the common law immunities (or lack thereof) afforded municipalities. "Studying the common law rules as they existed in 1871 pertaining to municipal immunity leaves one with the realization that such immunity has always been recognized and necessary in some form." Br. for Resp 34. However, resp does not cite much authority to support its "study of the common law rules as they existed in 1871." Rather, resps go into a discussion about how immunity defenses were carried down from the English crown, commenting that it is not clear whether the king could do not wrong or the king was not allowed to do any wrong. The only sources cited are two cases, City of Freeport v. Isbel, 83 Ill. 440 (1877) and Coolidge v. Brookline, 114 Mass. 592 (1874), which allegedly stand for the proposition that municipalities could not be held liable for simple negligence of its officers.

Next, the City points out the unfairness in the treatment of local government bodies under § 1983. States have sovereign immunity and employees have good faith immunity. Acts of cities are held to be state action for the purpose of making the Fourteenth Amendment applicable, but they are not afforded the protection of state sovereign immunity.

Finally, the City makes an argument that is responsive to the issues in the case. It asserts that not allowing good faith immunity will cause public officials to "think twice before acting along a course other than the tried and true." Br. for Resp 39. For policy reasons, resp argues that public officials must be "allowed to engage in conduct which might be tortious if done by private parties." Br. for Resp 39. Rather than bring damage actions, plaintiffs should be remitted to the traditional remedies for attacking governmental policies, through the limited scope of review under the separation of powers doctrine. "Such challenges . . . carry with them the potential for systematic relief against the policy itself instead of isolated, piecemeal damage awards. Such suits allow vindication of public, versus private, interests." Id.

Resps further argue that failure to grant good faith immunity would encourage plaintiffs to bypass suit against the individual wrongdoer, and would "pave the way for federal courts to control major policy and budgetary decision of local government, for vexatious litigation that would cause decision makers to set avoidance of municipal liability above what might otherwise be in the best interests of the public, and for overwhelming money judgments against a city that could

literally cause certain government functions in large cities to cease and cause small governments to suffer total bankruptcy." Br. for Resp 40.

Assuming that a good faith defense exists, the City argues that it should be a defense to declaratory and equitable relief as well (and presumably injunctive relief also, although resps merely state "bar to any relief"). Next, resps argue that backpay is not really an equitable remedy. Finally, denying a declaratory judgment also was within the lower courts' discretion because plaintiff established no legitimate entitlement to backpay.

Resp's last argument is that there was no due process deprivation because there was no causal relationship between the firing and the statements made by Councilman Roberts.

C. Amici.

The ACLU, the NYC ACLU and the Center for Constitutional Rights have filed a joint amicus brief and the National Education Ass'n and the Lawyers' Committee for Civil Rights have filed a joint brief.

These brief generally add little to petr's arguments. The NEA/Lawyers Committee does have a more thorough discussion of the common law of municipal liability. The brief summarizes the types of actions for which municipalities were liable in 1871, citing many cases as examples of each type of liability. They were liable for: federal constitutional violations, at that time the most important of which was the Contracts

Clause; federal statutory violations, such as for infringement of patents; state constitutional violations, of which takings clauses were routinely enforced against municipalities; state statutory violations; wrongful discharge of employees, treated as contract cases; contract breaches generally, especially the failure to pay interest on municipal bonds; and torts.

The NEA/LC brief also discusses its research on the immunity afforded municipalities.

> There were literally thousands of reported cases as of 1871 awarding damages against municipalities for wrongs they were found to have committed. We do not purport to have read all of them. We have read several hundred of those cases and examined contemporaneous treatises discussing thousands more. We did not find a single case in which a municipality was held to have committed an actionable wrong and yet was insulated from paying damages from those injured by that wrong. Indeed, there appear to have been only a handful of cases in which the question of a damage immunity for municipalities was even addressed, and in each it was rejected out of hand. It is always difficult to prove a negative; we cannot say that no case exists in which some court found some municipality immune from damages; we can only say that we could not find one and the treatises do not mention any. But the question here is whether there was a municipal immunity from damages so well established in the law of the time that Congress must have intended to adopt it as part of § 1983. Brief for NEA/LC at 16.

The NEA/Lawyers Committee next discusses two types of immunity which municipalities were afforded prior to 1871. The first of these was sovereign immunity. At that time, municipalities were considered to be performing their "governmental" functions through a delegation of the state's power. Therefore, they benefitted from the sovereign immunity of the state in performance of these functions. However, when

a municipality voluntarily chose to perform other "proprietary" functions, sovereign immunity did not apply. Since sovereign immunity does not apply to municipalities sued under § 1983, this immunity is irrelevant. Congress chose to override whatever sovereign immunity municipalities had by creating a cause of action against the municipalities in § 1983.

A second type of immunity protected decisions of municipalities which were discretionary or legislative in nature. For example, if the municipality decided to put a public works project in one area, rather than another, it could not be sued under the "reasonable man" standard. This immunity also has no applicability, say amicus. First, there is no discretion to violate the constitution. Second, the inquiry under § 1983 is not whether a particular decision is reasonable, but whether it violates the constitution.

The ACLU, et al., brief adds very little. The ACLU and the NYCLU are counsel to petrs in Sala v. County of Suffolk, petn for cert. pending, which raises the same issue. There the County defendant successfully invoked the good faith defense for a strip-search policy which violated the Fourth Amendment.

The ACLU, et al., argue that if any good faith defense is afforded, municipalities should nonetheless be required to proceed at their own risk whenever any federal court in any jurisdiction has held the particular policy to be unconstitutional, or when the face of the constitution makes clear that the policy implicates constitutional rights. Any other rule would encourage municipal indifference to constitutional rights.

IV. DISCUSSION.

As is probably clear by now, I find petr's arguments very strong and persuasive, and resps' arguments incomprehensible.

First, I am convinced that municipalities were not afforded good faith immunity, or anything similar, at common law. While, I must admit that I have not researched the question at all, much less to the extent asserted by the NEA and the Lawyers Committee, I find their presentation, and that of petr, convincing. The cases cited by resp demonstrate only that cities sometimes could not be held liable for mere negligence on a respondeat superior theory, not that they had a good faith defense for their policies. I find the opinion of Chief Justice Shaw of the Mass. SJC in Thayer v. Boston particularly convincing:

> There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was an act done by the officers having competent authority, . . . and especially if it was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damages sustained by an individual, in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress, except against the agents employed . . . ." 19 Pick. 515-16.

This Court's past cases upholding official immunities under § 1983 have all turned on the availability of that immunity at common law. I think the inquiry probably should stop here, since municipalities had no immunity at common law.

However, even if policy considerations are looked to, I think they support petr. The only relevant policy factor is whether imposition of liability on the municipality for good faith policies which later turn out to be unconstitutional will unduly deter those bodies from governing. I conclude not. Municipalities already are liable in contract and tort for policy judgments which turn out to have been wrong. I see no reason to afford constitutional rights less protection. It seems desirable to me to place this burden on the municipality in order to encourage officials to weigh constitutional factors in the decision-making balance. While the prospect of personal individual liability tends to skew the public official's perception of the issue in a conservative direction, the prospect of municipality liability only gives constitutional issues their proper weight in the process.

I think resps' distinction between policy and conduct cases under Monell is wrong. A true "conduct" case is not actionable against the city because it is a respondeat superior case. However, Monell does not limit municipal liability to its acts in promulgating a policy. The municipality also is liable for any damages caused by enforcement of that policy. For example, the policy in Monell concerned pregnancy. However, the plaintiff's damages stemmed from enforcement and application of that policy to her. I also am not persuaded by resps' argument

that the Courts cannot overturn municipal policies on constitutional grounds unless the policy is irrational. It may be rational for the City to conclude that it does not want to give termination hearings, but if the Constitution requires them, rationality is irrelevant.

If a good faith immunity defense does exist, then I think it probably should bar monetary relief of any sort, whether legal or equitable. The only policy which could underlie such an immunity is preventing budgetary considerations from affecting the city's judgments, and this policy would apply to both equitable and legal awards against the public fisc. However, the argument that good faith immunity should apply to declaratory judgments and injunctions is crazy and unprecedented. The immunities afforded by this Court's past decisions affect only monetary remedies. The Constitution would never change if the courts could not enter an injunction or declaration that an action previously thought constitutional is now unconstitutional. Brown v. Board of Education could not have been decided.

Thus I agree that the failure to give petr a declaration is inexplicable.

Finally, I note that resps have argued that the CA was incorrect in finding a deprivation of due process, and the notations on the pool memo indicate that you were concerned about this. I do not believe this question is properly before the Court. It is not raised in the petn, and resps did not cross-petn for review of this determination by the CA. It is not briefed by petr or any amici.

To me, the question on the merits is close and turns on whether the stigma was imposed in connection with petr's employment. It seems to me that given this chain of events, the stigma was imposed by the City in connection with petr's employment. However, I believe the Court should assume, without commenting upon the issue, that there was a deprivation of due process, because I do not think resps made a timely request for review of this ruling by the CA.