DOS, 3/20/80

No. 78-1779, Owen v. City of Independence

POWELL, J., dissenting:

The Court today holds that the City of Independence may be liable in damages for violating a constitutional right that was unknown when the events in this case occurred. ~~The Court's decision is gravely flawed.~~ It finds a denial of due process in the city's failure to grant petitioner a hearing to clear his name after he was ~~fired~~ discharged. But ~~petitioner's~~ her dismissal involved only the proper exercise of discretionary powers according to prevailing constitutional doctrine. The city imposed no stigma on petitioner that would require a name-clearing hearing under the Due Process clause.

On the basis of this ~~fanciful~~ alleged deprivation of rights, the Court interprets 42 U.S.C. § 1983 to impose strict liability on municipalities for constitutional violations. This strict liability

approach inexplicably departs from this Court's prior decisions under § 1983 and runs counter to the concerns of the Forty-second Congress when it enacted the statute. The Court's ruling also ignores the vast weight of common-law precedent as well as the current state law of municipal immunity. For these reasons, and because this decision unnecessarily will hamper local governments, I dissent.

I

The Court does not dispute the District Court's findings of the facts surrounding petitioner's dismissal. Ante, at ____. It nevertheless rejects the District Court's conclusion that "the circumstances of [Owen's] discharge did not impose a stigma of illegal or immoral conduct," and thus no due process hearing was necessary. 421 F. Supp. 1110, 1122 (WD Mo. 1976). Careful analysis of the record, however, supports the District Court's view that petitioner suffered no constitutional deprivation.

A

From 1967 to 1972, ~~petitioner~~ Owen served as Chief of the Independence Police Department at the pleasure of the City Manager. 1/ Friction between Owen and City Manager Alberg flared openly in early 1972, when charges surfaced that the Police Department's property room was mismanaged. The City Manager initiated a full internal investigation.

~~By April 12, 1972~~, In early April, the City Auditor ~~had~~ reported that the records in the property room were so sparse that he could not conduct an audit. The City Counselor also reported that "there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room." 560 F.2d 925, 928 (CA8 1977). In a telephone call on April 10, the City Manager asked Owen to resign and offered him another position in the Department. The two met on the following day. Alberg expressed his unhappiness over the property room situation and again requested that Owen step down. When Owen refused, the City Manager responded that he would be fired.

no specific date?

April 10 — before auditor's report.

David — should all this section be moved to beginning of ¶ — so that events are stated chronologically?

On April 13, the City Manager asked Lieutenant Cook of the Police Department if he would be willing to take over as Chief. Alberg also released the following statement to the public:

"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." Id., at 928-929.

The District Court found that the City Manager decided on Saturday, April 15 to replace Owen as Chief of Police with Lieutenant Cook. 421 F.Supp., at 1115. Before the decision was announced, however, the internal reports on the property room ~~fell into the hands of~~ were obtained by Paul Roberts, a member of the City Council whose term was scheduled to expire after the April 17 Council

meeting. At that session, Roberts read a prepared statement that accused police officials of "gross inefficiencies" and various "inappropriate" actions. App. 24. He then moved that the Council release the reports to the public, refer them to the Prosecuting Attorney of Jackson County for presentation to a grand jury, and recommend to the City Manager that he "take all direct and appropriate action permitted under the Charter." Id., at 25. The Council unanimously approved the resolution.

On April 18, Alberg "implemented his prior decision to discharge [Owen] as Chief of Police." 560 F.2d, at 929. The notice of termination stated simply that Owen's employment was "terminated under the provisions of Section 3.3(1) of the City Charter," App., 17. That charter provision grants the City Manager complete authority to remove "heads" of administrative departments "when deemed necessary for the good of the service." Owen's lawyer requested a hearing on his client's termination. The City Counselor responded that "there is no appellate procedure or forum provided

by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." App. 27.

The City Manager referred to the Prosecuting Attorney all reports on the property room. The grand jury returned a "no true bill," and there has been no further official action on the matter. Owen filed a state lawsuit against Councilman Roberts and City Manager Alberg, asking for damages for libel, slander, and malicious prosecution. Alberg won a dismissal of the state law claims against him, and Councilman Roberts reached a settlement with Owen. 2/

This action was filed in 1976. Owen alleged that he had been denied his liberty interest in his professional reputation when he was dismissed without formal charges or a hearing. App. 8, 10. 3/

B

Due process requires a hearing on the discharge of a government employee "if the employer creates and disseminates a false and defamatory impression about the employee in connection with

his termination." Codd v. Velger, 429 U.S. 624, 628 (1977) (per curiam). This principle was first announced in Board of Regents v. Roth, 408 U.S. 564 (1972), which was decided in June of 1972, ten weeks after Owen was discharged. The pivotal question after Roth is whether the circumstances of the discharge so blackened the employee's name as to impair his liberty interest in his professional reputation.

The events surrounding Owen's dismissal "were prominently reported in local newspapers." 560 F.2d, at 930. Doubtless the public received a negative impression of Owen's abilities and performance. But for a name-clearing hearing to be necessary, the employer must make a public statement that either "might seriously damage [the employee's] standing and associations in his community," or alleged "that he had been guilty of dishonesty, or immorality." Board of Regents v. Roth, 408 U.S., at 573. No hearing is required after the "discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons

for the discharge." Bishop v. Wood, 426 U.S. 341, 348 (1976).

The City Manager gave no specific reason for dismissing Owen. Instead, he relied on his discretionary authority to discharge top administrators "for the good of the service." Alberg made no reference to immoral or dishonest action. Indeed, in his "property room" statement of April 13, Alberg said that there was "no evidence to substantiate any allegations of a criminal nature." This exoneration was reinforced by the grand jury's refusal to endorse a prosecution in the matter. Thus, nothing in the actual firing cast such a stigma on Owen's professional reputation that his liberty was infringed.

The Court concedes that the City Manager's actions established no stigma. Rather, it concludes that stigma derived from events "connected with" the firing. Ante, at ____; 560 F.2d, at 937. The Court attaches great significance to the resolution adopted by the City Council at its April 17 meeting. But that

resolution merely recommended that Alberg take "appropriate action," and the District Court found that there was no "causal connection" between events in the City Council and the firing of Owen. 421 F. Supp., at 1121. Two days before the Council met, Alberg had decided to dismiss Owen. Indeed, Councilman Roberts stated at the meeting that the City Manager already had asked for Owen's resignation. App., 25. 4/

Even if the Council resolution is viewed as part of the discharge process, Owen has demonstrated no denial of his liberty. Neither the City Manager nor the Council cast any aspersions on Owen's character. Alberg absolved all connected with the property room of any illegal activity, while the Council resolution alleged no wrongdoing. 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. Still, nothing in the actions of the City Manager or the City Council would trigger a constitutional right to a name-clearing hearing.

The statements by Councilman Roberts were not so measured or benign, but they provide no basis for this action against the City of Independence. Under Monell v. New York City Dep't of Social Services, 436 U.S. 658, 691 (1978), the City cannot be held liable for Roberts' statements on a theory of respondeat superior. That case held that under § 1983 municipalities are liable for constitutional deprivations only if the challenged action was taken "pursuant to official municipal policy of some nature." As the Court noted, "a municipality cannot be held liable solely because it employs a tortfeasor." Ibid. (emphasis in original). The statements of a single councilman scarcely rise to the level of municipal policy. 5/

As the District Court concluded, "At most, the circumstances . . . suggested that, as Chief of Police, [Owen] had been an inefficient administrator." 421 F. Supp., at 1122. The Court attempts to find constitutional stigma in the interaction of unobjectionable official acts with the unauthorized statements of a lone councilman

with no direct role in the discharge process. ~~However much one may regret any~~ Although some notoriety ~~that~~ attended Owen's firing, the City may not be held liable for public misapprehension of the clearly stated reasons for the dismissal. There was no constitutional injury; there should be no liability. 6/

II

Having found a constitutional deprivation where ~~I detect~~ only the valid exercise of governmental authority had occurred, the Court holds that municipalities are strictly liable for their constitutional torts. Until two years ago, municipal corporations enjoyed absolute immunity from § 1983 claims. Monroe v. Pape, 365 U.S. 167 (1961). But Monell v. New York City Dep't of Social Services, supra, held that local governments are within the term "person" in the statute, and thus are liable for constitutional violations inflicted by municipal policies. 436 U.S., at 681. Monell did not reach the question whether municipalities ~~might~~ enjoy a qualified immunity or good faith defense against § 1983 actions. Id., at

695; Id., at 713-714 (POWELL, J., concurring).

Following today's decision, municipalities will have gone in two short years from absolute immunity under § 1983 to strict liability. As a policy matter, I believe that strict municipal liability ~~illogically~~ unreasonably subjects local governments to damage judgments for actions that were reasonable when performed. It will convert municipal administration into a hazardous slalom course where the constitutional obstacles are both unknown and unknowable. Moreover, the Court's decision conflicts with the apparent intent of the drafters of the statute, with the common law of municipal tort liability, and with the current state law of municipal immunities.

A

Section 1983 provides a private right of action against "any person" acting under color of state law who imposes or causes to be imposed a deprivation of constitutional rights. 7 / Although the statute makes no reference to immunities, this Court has held that the law "is to be read in harmony with general principles of tort

immunities and defenses rather than in derogation of them." Imbler v. Pachtman, 424 U.S. 409, 418 (1976). See Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

This approach reflects several concerns. First, the common-law traditions of immunity for public officials could not have been repealed by the "general language" of § 1983. Tenney, supra, 341 U.S., at 376; see Imbler v. Pachtman, 424 U.S. 409, 421-424 (1976); Pierson v. Ray, 386 U.S. 547, 554-555 (1967). In addition, "the public interest requires decisions and action to enforce laws for the protection of the public." Scheuer v. Rhodes, 416 U.S. 232, 241 (1974). Because public officials will err at times, the "concept of immunity assumes . . . that it is better to risk some error and possible injury from such error than not to decide or act at all." Id., at 242. See Wood v. Strickland, 420 U.S. 308, 319-320. By granting some immunity to governmental actors, the Court has attempted to ensure that public decisions will not be dominated by fears of liability for actions that may turn out to be unconstitutional. Public

officials "cannot be expected to predict the future course of constitutional law." Procunier v. Navarette, 434 U.S. 555, 562 (1978).

In response to these considerations, the Court has found absolute immunity from § 1983 suits for state legislators, Tenney v. Brandhove, supra, judges, Pierson v. Ray, 386 U.S. 547 (1967), and prosecutors in their prosecutorial functions, Imbler v. Pachtman, supra. Other officials have been granted a qualified immunity which protects them when they have in good faith implemented policies that reasonably were thought to be constitutional. This limited immunity has been accorded to police officers, Pierson v. Ray, supra, state executive officers, Scheuer v. Rhodes, supra, local school board members, Wood v. Strickland, 420 U.S. 308 (1975), the superintendant of a state hospital, O'Connor v. Donaldson, 422 U.S. 563 (1975), and prison officials, Procunier v. Navarette, supra.

Important public policies support the extension of qualified immunity to local governments. First, as recognized by the doctrine

of separation of powers, some governmental decisions should be at least presumptively insulated from judicial review. Chief Justice Marshall wrote in Marbury v. Madison, 5 Cranch. 137, 170 (1803), that "[t]he province of the court is, . . . not to inquire how the executive . . . perform[s] duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." The allocation of public resources and the operational policies of the government itself are among those areas that lie peculiarly within the competence of executive and legislative bodies. When charting those policies, a local official should not have to gauge his employer's possible liability under § 1983 if he incorrectly -- though reasonably and in good faith -- forecasts the "course of constitutional law." Excessive judicial intrusion into such decisions can only distort municipal decisionmaking and discredit the courts. Qualified immunity would provide presumptive protection for those discretionary governmental

David - Ask Jon about adding this quote to Brante

acts, while still leaving the municipality liable for bad faith or unreasonable constitutional deprivations.

To the extent that today's decision will inject constant consideration of § 1983 liability into local decisionmaking, it will sap the independence of local governments and their ability to respond to the needs of their communities. Only this Term, we noted that the "point" of immunity under § 1983 "is to forestall an atmosphere of intimidation that would conflict with [officials'] resolve to perform their designated functions in a principled fashion." Ferri v. Ackerman, ___ U.S. , ____ (No. 78-5981, slip op., at 10). The Court now argues that although local officials might modify their actions unduly if they had no personal immunity under § 1983, they are unlikely to do so when the locality itself will be held liable. This contention reflects a ~~low regard for~~ municipal officers and a misunderstanding of the political process. Responsible local officials will be concerned ~~personally~~ over potential judgments against their ~~employers~~ for constitutional torts.

Moreover, they will be accountable within the ~~within the~~ political system for subjecting the municipality to adverse judgments. With officials looking over their shoulders at strict municipal liability for unknowable constitutional deprivations, the resulting governmental paralysis would be little different from that caused by fear of personal liability. Cf. Wood v. Strickland, 420 U.S., at 308; Scheuer v. Rhodes, 416 U.S., at 242.

In addition, basic fairness requires a qualified immunity for municipalities. The good faith defense recognized under § 1983 imposes liability only when officials "knew or should have known" of the constitutional right that was allegedly infringed, and "knew or should have known that their conduct violated the constitutional norm." Procunier v. Navarette, 434 U.S., at 562. The standard incorporates the idea that liability should not attach unless there was notice that a constitutional right was at risk. This idea applies equally to governmental entities as to individual officials. Municipalities are no better able than individuals to predict the development of

constitutional doctrine.

The Court nevertheless ~~blithely~~ suggests that as a matter of social justice, municipal corporations should be held strictly liable even if they could not have known that a particular action would violate the Constitution. After all, the Court urges, local governments can "spread" the costs of any judgment across the local population. Ante, at . The Court neglects, however, the fact that ~~that~~ many local governments lack the resources to withstand substantial unanticipated liability under § 1983. Even enthusiastic proponents of municipal liability have conceded that ruinous judgments under the statute could imperil local governments. E.g., Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L. Rev. 922, 958 (1976). 8/ By simplistically applying the theorems of welfare economics and ignoring the reality of municipal finances, the Court imposes strict liability on the least prosperous level of government. 8/ For municipalities, the result will be confusion and in some situations a severe limitation on their ability to serve the public.

David - add a note observing that jury verdicts often run into millions. Ask me about publication of ATLA

B

The Court searches in vain for legal authority to buttress its misguided policy judgment. Today's decision finds no support in the legislative record of the Civil Rights Act of 1871, or in the traditional and present law of municipal tort liability. These conventional sources of our law all point to the need for qualified immunity for local governments.

1. Section 1983 was enacted as part of the 1871 Civil Rights Act, yet nothing in the history of that legislation supports the Court's decision. In fact, the concerns articulated in lengthy debates on the Act suggest that the members of the Forty-second Congress would be appalled by this ruling.

The dispute over municipal liability under § 1983 has focused on the defeat of the Sherman amendment during the deliberations on the Civil Rights Act. E.g., Monroe, supra, 365 U.S. 187-191; Monell, supra, 436 U.S. at 664-690. Sen. Sherman proposed that local governments be held vicariously liable for constitutional deprivations caused by

riots within their boundaries. As originally drafted, the measure imposed liability even if municipal officials had no actual knowledge of the impending disturbance. 9/ The amendment, which did not affect the part of the Civil Rights Act that we know as § 1983, was approved by the Senate but rejected by the House of Representatives. After two revisions, both Houses passed what is now codified as 42 U.S.C. § 1986. The final version applied not just to local governments but to all "persons," and imposed no liability unless the defendant knew that a wrong was "about to be committed." 10/

Because Sen. Sherman initially proposed strict municipal liability for constitutional torts, the discussion of his amendment offers an invaluable insight into the attitudes of his colleagues on the question now before the Court. Much of the resistance to the measure flowed from doubts as to Congress' power under the Constitution to impose vicarious liability on local governments. Monell, supra, at 673-683; id., at 706 (POWELL, J., concurring). But opponents of the amendment made

additional arguments that strongly support recognition of qualified municipal immunity under § 1983.

First, several legislators expressed great trepidation that the proposal's strict liability approach could bankrupt local governments. They warned that liability under the proposal could bring municipalities "to a dead stop." Cong. Globe, 42d Cong., 1st Sess., 763 (1871) (Sen. Casserly). See id., at 761 (Sen. Stevenson); 772 (Sen. Thurman). Rep. Bingham argued that municipal liability might be so great under the measure that it would deprive a community "of the means of administering justice." Id., at 798.

Some congressmen argued that strict liability would inhibit the effective operation of municipal corporations. The fear of liability, Rep. Kerr insisted, could deter local officials from the exercise of "necessary and customary functions." Id., at 789. See id., at 763 (Sen. Casserly); 808 (Rep. Garfield).

Most significant, though, the opponents criticized the imposition of liability without any

showing that a municipality knew of an impending constitutional deprivation. Sen. Sherman defended this feature of the amendment as a characteristic of riot acts long in force in England and this country. Cong. Globe, 42d Cong., 1st Sess. 760. But Sen. Stevenson argued against creating "a corporate liability for personal injury which no prudence or foresight could have prevented. . . ." Id., at 761. In the most thorough critique of the amendment, see Monell, supra, at 668, n.18, Sen. Thurman ~~who~~ carefully reviewed the riot acts of Maryland and New York. He emphasized that those laws imposed liability only when a plaintiff proved that the local government both had notice of impending injury and had the power to prevent it. Cong. Globe, supra, at 771.

> "Is not that right? Why make the county, or town, or parish liable when it had no reason whatsoever to anticipate that any such crime was about to be committed, and when it had no knowledge of the commission of the crime until after it was committed? What justice is there in that?" Ibid.

These concerns were echoed in the House of Representatives. Rep. Kerr complained that "[i]t is not required, before liability shall attach, that it shall be known that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality." Id., at 788. He denounced the "total and absolute absence of notice, constructive or implied, within any decent limits of law or reason," adding that the proposal "takes the property of one and gives it to another by mere force, without right, in the absence of guilt or knowledge, or the possibility of either." Ibid. Similarly, Rep. Willard argued that liability "is only warranted when the community . . . has proved faithless to its duties." Id., at 791. He criticized the absence of a requirement that it be "prov[ed] in court that there has been any default, any denial, any neglect on the part of the county, city, town, or parish to give citizens the full protection of the laws." Ibid. See id., at 799 (Rep. Farnsworth).

Partly in response to these objections, the final form of the amendment conditioned

liability on a demonstration that the defendant knew that constitutional rights were about to be denied. Rep. Poland introduced the new measure, noting that "any person who has knowledge of any of the offenses named. . . . it shall be his duty to use all reasonable diligence within his power to prevent it." Id., at 804 (emphasis supplied). The same point was made by Rep. Shellabarger, the sponsor of the entire Act and with Rep. Poland a member of the conference committee that produced the final draft. Ibid. See id., at 807 (Rep. Garfield).

On the Senate side, one conferee stated that under the final version

> "in order to make the [municipal] corporation liable as a body it must appear in some way to the satisfaction of the jury that the officers of the corporation, those persons whose duty it was to repress tumult, if they could, had reasonable notice of the fact that there was a tumult, or was likely to be one, and neglected to take the necessary means to

prevent it." Id., at 821 (Sen. Edmunds). Sen. Sherman disliked the revised provision. He complained that "before you can make [a person] responsible you have got to show that they had knowledge that the specific wrongs upon the particular person were about to be wrought." Id. 11/

These objections to the Sherman amendment apply with equal force to strict municipal liability under § 1983. Just as the Forty-second Congress refused to hold municipalities vicariously liable for deprivations that could not be known beforehand, this Court should not hold those entities strictly liable for deprivations caused by actions that reasonably and in good faith were thought to be legal. Equally, the Court's approach today shares with the Sherman amendment the potential for spawning onerous judgments against local governments and distorting the decisions of officers who fear possible liability for their actions. Congress' refusal to impose those burdens in 1871 ~~surely~~ undercuts ~~any attempt~~ any historical basis for federal judges during by this Court ~~to do~~ so now. 12/

2. The Court's decision also runs counter to the common law in the nineteenth century, which recognized substantial tort immunity for municipal actions. E.g., 2 J. Dillon, The Law of Municipal Corporations 862-863, 875-876 (2d ed. 1873); Williams, Municipal Liability for Tort 9, 16 (1901). Most nineteenth-century courts held that municipal corporations could not be liable for acts undertaken in their "governmental," as opposed to their "proprietary," capacity. ~~Although the~~ Still, the governmental/proprietary distinction ~~now applies in~~ ~~[illegible] states~~, see infra, at ____, is significant primarily because it was so widely accepted when § 1983 was enacted. 13/ It is inconceivable that a Congress thoroughly versed in current legal doctrines, see Monell, supra, 436 U.S., at 669, would have intended through silence to create the strict liability regime imagined now by ~~the~~ this Court.

Most states now use other criteria for determining when a local government should be liable in a damage action.

More directly relevant to this case is the common-law distinction between "discretionary" and "ministerial" duties of local governments. This Court wrote in Harris v. District of Columbia, 256

U.S. 650, 652 (1921), "[W]hen acting in good faith municipal corporations are not liable for the manner in which they exercise discretionary powers of a public or legislative character." See Weightmann v. Corporation of Washington, 66 U.S. (1 Black) 39, 49 (1861). The rationale for this immunity derives from the theory of separation of powers. In Carr v. The Northern Liberties, 35 Pa. St. 324 (1860), the Pennsylvania Supreme Court explained why a local government was immune for damage caused by an inadequate town drainage plan.

> "[H]ow careful we must be that courts and juries do not encroach upon the functions committted to other public officers. It belongs to the province of the town council to direct the drainage of our towns, according to the best of their means and discretion, and we cannot directly or indirectly control them in either. No law allows us to substitute the judgment of the jury . . . for that of the representatives of the town itself. . . ." Id., at 329.

That reasoning, which was applied frequently in the nineteenth century, 14/ parallels the theory behind qualified immunity under § 1983. Indeed, this Court has recognized the importance of preserving the autonomy of executive bodies entrusted with discretionary powers. Scheuer v. Rhodes held that because high executive officials have broad responsibilities, their "range of discretion must be comparably broad." 416 U.S., at 247. Consequently, the immunity available under § 1983 varies directly with "the scope of discretion and responsibilities of the office." Ibid. Strict municipal liability can only undermine that discretion.

3. Today's decision also conflicts with the current law in forty-three states and the District of Columbia. All of those jurisdictions provide municipal immunity at least analogous to a "good faith" defense. Thus, for municipalities in ninety per cent of our jurisdictions, the Court irrationally creates broader liability for constitutional deprivations than they face for other torts.

David - On p 26 you say most states have abolished the governmental/proprietary distinction. In this Sub-Part 3, you are talking about good faith immunity for both types of actions (as I understand it). Try making this distinction clearer

Ten states have laws creating municipal tort liability but barring damages for injuries caused by discretionary decisions or by the good-faith execution of a validly enacted though unconstitutional regulation. 15/ Municipalities in those states have precisely the form of qualified immunity that this Court has granted to executive officials under § 1983. Another twelve states provide even broader immunity for local governments. Five of those have retained the governmental/proprietary distinction, 16/, while statutes in Michigan and Arkansas grant even broader protection to municipal corporations. 17/ Statutes in five other states protect local governments from tort liability except for particular injuries not relevant to this case, such as those due to motor vehicle accidents or negligent maintenance of streets and public buildings. 18/

Seventeen states and the District of Columbia follow the common-law rule against recovery for damages imposed by discretionary decisions that are confided to particular officers

or organs of government. 19/ Indeed, the leading commentators on governmental tort liability have noted both the appropriateness and general acceptance of municipal immunity for discretionary acts. See Restatement (Second) of the Law of Torts, § 895C(2) & comment g (1979); K. Davis, Administrative Law of the Seventies, § 25.13 (1976); W. Prosser, Torts 986-987 (4th ed. 1971); . In four states, local governments enjoy complete immunity from tort actions unless they take out liability insurance, 20/ and only six states impose the kind of blanket liability constructed by the Court today. 21 /

C.

The Court turns a blind eye to this overwhelming evidence that municipalities ~~should have a limited immunity. This willful ignorance is~~ especially unfortunate becasue suits under § 1983 typically concern evolving constitutional standards. A good faith defense is much more important for those actions than when ordinary tort liability is involved. The duty not to run over a pedestrian with a municipal bus is far less likely

have enjoyed ~~limited~~ a qualified immunity, and to the policy considerations that for the life of this republic have justified its retention.

(This disregard of precedent and policy is)

to change than the constitutional obligation to provide the bus driver with a hearing after he is fired. Many times, there may be no way for a municipality to know that its policies contravene a constitutional right about to be decreed.

In this case, the right of a discharged government employee to a "name clearing" hearing was not recognized until our decision in Board of Regents v. Roth, supra. That ruling was handed down ten weeks after Owen was discharged and eight weeks after the city denied his request for a hearing. By stripping the City of any immunity, the Court punishes it for failing to predict our decision in Roth. As a result, local governments and their officials will face the unnerving prospect of crushing damage judgments if a policy that is valid under current law is later found to be unconstitutional. I can see no justice or wisdom in that outcome.