

file

lfp/ss 03/15/86 Pembaur
PEMM SALLY-POW

Mike: What would you think of revising the new footnote 4
along the following lines:

"As a reason for applying Steagald retroactively,
Justice Stevens (concurring opinion, infra, at 3, n. 3),
states that 'in a civil context' the societal costs of
retroactivity are not as serious as where a criminal
ruling is imposed retroactively. I see little to be
gained by attempting to compare societal costs, as they
can be severe in either situation. It is important to
remember that the decisions of this Court in Monell and
City of Independence have deprived local governmental
units of both sovereign immunity and qualified immunity.

In addition, although a county prosecutor normally has absolute immunity, it now may be doubtful whether the deputy sheriffs and police officers will be able successfully to assert even qualified immunity under this Court's recent decision in Malley v. Briggs, slip opinion _____. As I noted in dissent in that case, the threat of personal damages liability on law enforcement personnel is likely to make such persons - especially thoughtful ones with families to support - hesitant to enforce the law in cases that, viewed with hindsight, may be doubtful. In this case, the petitioner has chosen to sue only the county for \$20 million - not the deputy sheriffs. It may be that this county could pay such a judgment without serious financial effect. This cannot be said about less prosperous cities and counties. In the end,

the taxpayers in many cases will bear the burden of large punitive damages awarded by juries without the standards that govern criminal law fines. Of course, I do not suggest that citizens whose constitution rights have been infringed are not entitled to the remedies provided by law. But thoughtful persons familiar with the geometric expansion of §1983 and tort suits in recent years, have reason for concern as to the societal costs that often extend far beyond the outcome of a particular case. Apart from the episodic manner in which some plaintiffs are made millionaires by juries, many of the ablest citizens now simply decline to serve in local governments or on the many types of citizen boards and agencies (e.g., local school boards) that are so important in a democratic

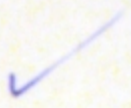
society. In addition to the embarrassment of being sued, liability insurance often is unavailable or too costly.*

There is nothing whatever in the record to support the

conclusion reached by Justices White and O'Connor. See

Note to Mike: Ask the library to give you the last annual report of the Administrative Office and show you the tables that contain the statistics on the increase each year in civil rights cases filed both in state and federal courts. You may be able to identify a long footnote I added at the end of a dissenting opinion a few years ago in which I showed the expansion of §1983 suits going back to Monroe v. Pape. At that time my recollection is that these suits increased from two or three hundred §1983 cases in 1965 to some 16,000 by 1980.

This case refutes these suggestions by Justice Stevens and



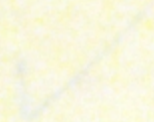
lfp/ss 03/15/86 Rider A, (Pembaur) Test of Justice

PEMRA SALLY-POW

There is nothing whatever in the record to support the inference relied on by Justices White and O'Connor. Nor has this Court ever held that because a policy has been adopted by one city or county we may assume that similar policies have been adopted by neighboring cities or counties. After all, the city and county in this case are separate governmental entities.

Moreover, and again contrary to the views of my colleagues, this Court has never held - at least to my knowledge - that we may presume that simply because certain conduct is permitted by existing law, it must have been adopted as county policy. The undisputed facts in this case refute these assumptions by Justices Stevens and

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O'Connor. (Here, return to the present text of footnote
7).

March 21, 1981

Mike: Is the city still in the case? What is its
position? Tell me orally.

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[unclear]

[unclear]
[unclear]