**Bound By Oath | Season 2 | Episode 7: The Shooting of Bobby Moore**

**Part 2**

**John**: Hello and welcome to Part 2 of our episode on municipal liability. If this is your first time listening, I strongly recommend you back up and start with Episode 1. And if you missed the first part of this episode about the shooting of Bobby Moore in Little Rock, likewise, please back up and start with Part 1 of Episode 7. Before we get to the outcome of Bobby Moore's mother's claim for damages against the City of Little Rock, we're going to sketch out the history of municipal liability under Section 1983.

> **David Achtenberg**: This was anti-terrorist legislation

**John**: Just like liability for state and local officials, that story starts when Congress passed the Ku Klux Klan Act of 1871. And there's a 90-year gap until *Monroe v. Pape*.

**Houston Stevens**: Those were killer cops that raided us. If it wasn't for the kids, they probably would have killed him. If we hadn't made all that noise that might've killed him.

> **Donald Page Moore**: And as the Deputy Chief of Detectives would ask questions of Mr. Monroe, he was striking or punching this flashlight into the stomach of the naked man.

**John**: We talked about *Monroe v. Pape* on Episode 5. The case is historic because it revitalized Section 1983 and it allowed constitutional claims for damages against individual officials to go

forward in federal court. But the Monroe family also argued they should be able to sue the City of Chicago.

> **Donald Page Moore**: Of course, we have gone further and we have alleged that the City of Chicago is liable.

**John**: And on that claim, the Supreme Court was dubious. After all, Section 1983 only authorizes lawsuits against persons.

> **Section 1983**: Any person ... shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

**John**: But are cities persons? No one in Congress in 1871 stood up and said so during the debates over the Ku Klux Klan Act. Nevertheless, the lawyer for the Monroe family argued that Congress definitely intended for cities to liable for damages. Because seven weeks before Congress passed Section 1983, it passed a different law, known as the Dictionary Act, with the purpose of helping courts to interpret the text of the laws Congress passed. It provided definitions of certain common words and also basic rules of grammatical construction.

> **Donald Page Moore**: This dictionary statute said, among other things, that the word person may be construed to apply to bodies corporate and politic … unless the text of the statute indicates otherwise.

**John**: In the Dictionary Act, Congress said that when we write a law and use the word person, unless we explicitly say otherwise, person also means bodies corporate and politic -- that is, municipalities.

> **Donald Page Moore**: Everybody in 1871 who had any legal training whatsoever must have assumed that bodies politic and corporate meant cities.

**John**: And indeed prior to *Monroe v. Pape*, the Supreme Court had entertained Section 1983 suits against cities.

> **Donald Page Moore**: The prior holdings of this Court -- in *Holmes against City of Atlanta* and *Douglas against the City of Jeannette* -- implicit in those cases is a holding the municipal corporations can be made parties-defendant.

**John**: Those cases were challenges to, respectively, segregated golf courses and a city ordinance that required Jehovah's Witnesses to get a permit before they could go door-to-door.

> **Donald Page Moore**: That must mean that a city is within the phraseology "every person." Because the Act makes every person liable to an action at law, suit in equity or other proper proceeding for redress.

**John**: In both of those earlier cases, the plaintiffs were seeking injunctions -- a court order telling the city to stop enforcing their unconstitutional policies.

**Donald Page Moore**: ...suit in equity...

**Section 1983**: ...suit in equity...

**John**: Otherwise known as a suit in equity. The Monroe family, on the other hand, was asking for money damages.

**Donald Page Moore**: ...action at law...

**Section 1983**: ...action at law...

**John**: Otherwise known as an action at law. The text of Section 1983 expressly allows for the whole kit and kaboodle: injunctions, money damages, or quote “any proper proceeding for redress.” But by a unanimous vote, the Supreme Court said Chicago could not be sued for damages.

**David Achtenberg**: It claimed that Congress didn't think that municipalities were persons. And it claimed that you could tell that because they rejected something called the Sherman Amendment.

**John**: That’s Professor David Achtenberg of the University of Missouri - Kansas City School of Law.

**David Achtenberg**: The Sherman Amendment was a proposal to make municipalities liable for the actions basically of the Klan.

**John**: As we talked about on Episode 4, Section 1983 was one section of a larger bill that ultimately had six sections, each of which provided for different measures and mechanisms to combat the Ku Klux Klan. One additional mechanism that was put forward by Senator Sherman, a Radical Republican from Ohio, was a proposal was to make municipalities liable for outrages perpetrated by the Klan and other similar groups.

**David Achtenberg**: The belief was that the powerful people in the community, the plantation owners, etc, really did have the power to prevent these things from happening. And if you made the city, the county, etc, liable, they as the biggest taxpayers would have an incentive to stop it. The second reason for it was to provide compensation to people who were injured, the survivors of people who were murdered, people whose houses were burned, people who were whipped, or otherwise terrorized. And that this could come from the community as a whole. In a way, it was like social insurance.

**John**: The Sherman Amendment was modeled after state laws called Riot Acts that had long been on the books and that traced back to England.

**David Achtenberg**: The most notable early Riot Act in the United States arose after the Pennsylvania anti-Catholic riots, in which mobs burned down a convent. And the idea behind the Riot Acts and the way they generally worked was that if the city or county had notice that something was going to happen and if they had the ability to prevent it, then the city would be liable for the damages created by the mob.

**John**: However, the Sherman Amendment was a radical departure from that model.

**David Achtenberg**: The Sherman Amendment did not require any notice of the riot or other mob action and didn't require for liability that the defendant had the ability to prevent it.

**John**: Ultimately, for that reason and others, Congress rejected the Amendment. One opponent was none other New Jersey Senator Frederick Frelinghuysen, the author of Section 1983.

**David Achtenberg**: And he gave a great example. He said, under this version of a Riot Act, the United States government would be liable for everything that Confederate Army did. Because the United States government failed to stop them from doing it. And, of course, that was an absurd situation.

**John**: 90 years later, in *Monroe v. Pape*, the Supreme Court said: if Congress rejected the Sherman Amendment that must have meant that Congress didn't want cities to be liable for constitutional violations.

**David Achtenberg**: The argument against municipal liability was: Because the Congress rejected the Sherman Amendment, they must not have wanted municipalities to be liable. But that just doesn't make sense. Congress rejected a form of liability without fault. That is, where the city had done nothing wrong, the city would still be responsible.

**John**: The Sherman Amendment was about holding cities vicariously liable for the actions of third-parties. The Monroe family, on the other hand, was merely asking for Chicago to be held liable for the actions of its own employees.

> **Donald Page Moore**: Most of the barrage of criticism which the Sherman Amendment faced was based ... on the obvious injustice -- or what seemed to them the obvious injustice -- of subjecting the city to liability for actions, not of persons over whom the city had direction and control but over private individuals who were not the employees of the city and not subject to its disciplinary controls in the same sense that a police officer would be.

**John**: But the Supreme Court brushed that argument to the side. And then a few years later, in a case called *City of Kenosha versus Bruno*, the Court doubled down and said that not only could cities not be sued for damages under Section 1983, but they also couldn't be sued for injunctions. Which created a really strange and untenable situation.

**David Achtenberg**: A group of civil rights lawyers discovered an anomaly. And that was that there were two lines of decisions that went in opposite directions and were like ships passing in the night.

**John**: In 1954, in *Brown v. Board of Education*, the Supreme Court said that segregation in public schools was unconstitutional. And in the wake of that decision, federal courts had granted numerous injunctions ordering local governments to desegregate their schools.

**David Achtenberg**: So at this point, you have the school desegregation cases in which the Supreme Court, without even bothering to comment on it, had upheld relief against school

districts. And you had the 1983 cases that said you couldn't sue cities for damages or for injunctive relief. And that was an anomaly.

**John**: Without really saying much about it, the Supreme Court had just assumed that federal courts had the authority to order school districts to desegregate. It hadn't relied on Section 1983 or any other statute to give plaintiffs a cause of action. Seemingly it just thought that federal courts had the inherent power to imply a remedy directly under the Constitution. But then outside the context of school desegregation, all of a sudden the Court was saying other kinds of constitutional claims against local governments couldn't go forward. Something had to give. Either desegregation was on shaky ground or the Court's holdings in *Monroe* and *Bruno* were. And in 1978, just 18 years after *Monroe*, the Supreme Court said: we were wrong. Cities can be sued under Section 1983.

**David Achtenberg**: The Court took the issue head on. And it decided that the Monroe Court had simply misread the meaning of the Sherman Amendment.

**John**: In a case called *Monell v. Department of Social Services of the City of New York*. Here's Justice Brennan announcing the Court's decision in *Monell*:

> **Justice Brennan**: We have reexamined the debates over the 1871 Act and are satisfied that *Monroe* and *Pape*'s holding, that Congress excluded municipalities … in Section 1, now Section 1983 was wrong. … Accordingly, *Monroe v. Pape* is overruled insofar as it holds that local governments are not persons within the term every person in Section 1983.

**John**: In *Monell*, the Court said the Dictionary Act meant what it said. Cities are persons for the purposes of Section 1983. But there was a very dark lining to that silver cloud.

> **Justice Brennan**: But our opinion goes on to consider what must be proved to hold local governments and such officials liable.

**John**: The dark lining is that the *Monell* decision, and even more so the decisions that came after it, make it really hard to sue cities.

**Fred Smith**: At the same time that the Supreme Court said that you could sue cities, they also introduced this very high barrier.

**John**: That's Professor Fred Smith of the Emory University School of Law.

**Fred Smith**: Because in most cases, one isn't going to be able to identify an unconstitutional policy, when their rights have, in fact, been violated.

**John**: In *Monell*, the Supreme Court said that cities could be liable under Section 1983 if they adopted an unconstitutional policy.

**Fred Smith**: So if a city literally itself, the City Council, votes for an unconstitutional ordinance, you can sue the city.

**John**: In *Monell*, New York City had adopted a policy that required pregnant city employees to take an unpaid leave of absence well before it was medically necessary.

**Fred Smith**: But there had to be a policy if a police officer at the local level violated someone's rights by engaging in an unreasonable search or engaging in unreasonable force, that alone isn't going to be enough to allow the person who has been injured to sue the city itself.

**John**: Which, scholars have argued, is a fundamental misunderstanding of the purpose of Section 1983. The problem Congress was trying to address in 1871 was local officials committing or turning a blind eye to outrages -- with or without the blessing of formal city policy. If a sheriff was mistreating freedmen or failing to protect them from mob violence, usually there wouldn't be a county policy saying to do that. Nevertheless, in *Monell*, the Supreme Court said that liability would be tied to policy.

**Fred Smith**: And what's happened since that early case is that during the course of the 1980s, the Court began to define policy, more and more narrowly.

**John**: The Court did recognize that -- without an official vote by the city council -- sometimes informal policies and customs would develop among city employees and that those customs could be unconstitutional. And in cases after *Monell*, courts began to work out the rules for determining when an informal policy was a still a policy you could sue over.

**Fred Smith**: What you really need to show in order to show a policy, you need to be able to point to a final policymaker who is what they call deliberately indifferent, which is a standard

really unknown in other areas of the law outside of the Constitution, and outside of Section 1983. And so it's something higher than negligence, something higher than gross negligence.

**John**: To hold a city liable, it's not enough that a mid-level employee or even a high-level official who supervises a lot of people has imposed or tolerates unconstitutional conduct. It has to be a final policymaker -- someone who is high enough in the city's hierarchy to make policy. And to show that a final policymaker is deliberately indifferent, you not only have to show they knew or should have known about an unconstitutional practice, you almost have to show that they intended that practice -- or at least something pretty close. That's a tough standard to meet, and it only kicks in in constitutional cases.

**Fred Smith**: But of course, that's not the only kind of municipal liability that exists. That is, if a bus driver in Atlanta, who works for the city, if they hit my car -- and they're negligent when they do it -- then I can recover. And it's not a constitutional case. It doesn't have anything to do with Section 1983. It almost certainly wouldn't be a federal case. So every state then has its own rules with respect to when you can sue a city.

**John**: If a bus driver hits your car, you are not going to have to prove that the bus driver's boss' boss tolerates or encourages bad driving.

**Fred Smith**: You could certainly sue cities in a wider range of circumstances then you can sue under Section 1983.

**John**: We're going to come back to the *Monell* doctrine. But first we're going to talk about a path not taken. In the *Monell* decision, the Supreme Court rejected something called respondeat superior. Justice Brennan.

> **Justice Brennan**: We hold that they cannot be held liable on a respondeat superior theory, that is be held liable solely because the local government body employs the person who causes the plaintiff's harm.

**David Achtenberg**: Ordinarily, an employer is liable for the acts of its employees that were performed in the course and scope of the employee's employment -- even the misconduct of its employees.

**John**: The doctrine of respondeat superior says that liability for harm caused by an employee in performance of that employee's duties falls on the employer. If you are an employer and your employee disregards all your instructions, policies, and common sense, and in the process harms somebody, you can still be held vicariously liable. In *Monroe v. Pape*, the Monroe family argued that Chicago should be held liable under a respondeat superior theory.

> **Donald Page Moore**: We suggest that the doctrine of respondeat superior -- which is very old, which is very socially useful, and which is something that lawyers absorbed into their bloodstreams with their first law school course in torts -- is implicit in the provisions of the Fourteenth Amendment.

**David Achtenberg**: Municipal respondeat superior was well established common law doctrine in 1871. It applied to private employers. It applied to municipalities. There were many, many cases that said the doctrine applied identically to both. There were treatises that said the same thing.

**John**: The Supreme Court's opinion in *Monell* contained an extensive historical analysis of congressional intent in 1871, and it purported to follow that intent. So one would think that if the Court was going to finally allow municipal liability, it would do so under the standard that everyone in 1871 was familiar with. But the Supreme Court rejected respondeat superior. And bizarrely, to reach that holding, the Court once again relied on Congress' rejection of the Sherman Amendment.

**David Achtenberg**: The Court in *Monell* justified its no respondeat superior holding on the basis that the Court, by rejecting the Sherman Amendment, rejected all forms of vicarious liability.

**John**: The Court's reasoning was that liability flowing from employee to employer is supposed to provide incentives for employers to hire, train, and supervise better; it is also supposed to ensure compensation for the victim by making available an entity that can actually afford to pay. In *Monell*, the Court said that by rejecting the Sherman Amendment, Congress had rejected both of those goals, commonly known as deterrence and risk-spreading. And if you reject the goals that justify vicarious liability in the first place, you therefore reject vicarious liability altogether.

**David Achtenberg**: That makes absolutely no sense. Because, of course, rejecting a very extreme form of vicarious liability -- there's liability for the actions of a mob that often came from another county, which you couldn't have stopped -- making you liable for that is a long way from making you liable for acts of your own employees.

**John**: And so in the same opinion that said the Sherman Amendment did not prevent cities from being liable for constitutional violations, the Court then held that the Sherman Amendment did prevent cities from being liable on a respondeat superior basis.

**David Achtenberg**: And when I say it didn't make any sense -- I'm not the only person who thought that. Justice Rehnquist wrote a memo to the other justices, saying if cities are liable, they should be liable on a respondeat superior basis. And he said the same thing in conference.

**John**: The standard the Court settled on in *Monell* makes it dramatically more difficult to hold municipalities liable than a respondeat superior regime would have.

**David Achtenberg**: So why did the court do this? One reason that's been suggested is that the court was very concerned about the effect on cities' finances. The case was decided in the middle of a financial crisis, when people were seriously talking about a city like New York possibly having becoming insolvent.

**John**: There is another possibility, however.

**David Achtenberg**: But another factor is the possibility that it was just a compromise that had to be done to get the votes to overturn an important, only 18-year-old decision that said that cities couldn't be held liable at all. And one person whose vote appeared to be needed was Justice Powell.

**John**: Justice Powell was appointed to the Supreme Court after *Monroe v. Pape*. And he thought that when it came to suing individual officials, Justice Frankfurter had been right and the rest of the Court had been wrong about the color of law.

**David Achtenberg**: He thought that individuals should not be held liable under Section 1983 unless they were acting pursuant to state law. So a police officer who violated state law and the Constitution by beating up a suspect would not be liable under Section 1983 under his theory, which of course was Frankfurter's position in *Monroe*.

**John**: We talked about Frankfurter's view on Episode 5. He thought that if an official was following a city policy or a state law, then you could sue them under 1983. But that meant that some of the most serious violations where officers went rogue and violated local law, like the officers in Monroe versus Pape had done, those couldn't be addressed in federal court.

**David Achtenberg**: It seems that what was going on was Brennan was writing an opinion that would get Powell's vote.

**John**: To get Justice Powell's vote, Justice Brennan, who wrote the opinion in *Monell*, took a page out of Justice Frankfurter's book.

**David Achtenberg**: Basically, he took the Frankfurter position on color of law and made it a requirement for municipal liability. So Frankfurter wanted no one to be liable unless they were acting pursuant to state or local law. *Monell*, in essence, said the city would not be liable unless its employees were acting pursuant to city policy or city law.

**John**: Justice Frankfurter didn't get his way when it came to suing individual officials. But his legacy and his thinking live on when it comes to suing municipalities. After *Monell*, in a series of cases, the Court spelled out and refined its test for when claims against municipalities could go forward, which today lawyers call the *Monell* doctrine.

**David Achtenberg**: And it ended up that there would be essentially four routes to municipal liability. One, the easiest one was formal policy.

**John**: If a municipality passes an unconstitutional law like the one at issue in *Monell*, then you can sue.

**David Achtenberg**: The second form is custom or what we might call informal policy. The fact that the city's employees continue to do something for an extended period of time, and the city doesn't stop them from doing it. It's sort of the wink-and-a-nod policy.

**John**: In the Josh Hastings' case in Little Rock, Bobby Moore's mother argued that the police department had a custom of ignoring and concealing police misconduct and that that custom caused Bobby's death.

**David Achtenberg**: A third possibility is inadequate training or supervision. The idea here is that in some situations, even without respondeat superior, an employer might be responsible for the acts of the employee because they hadn't trained them properly.

**John**: Sylvia Perkins also argued that the LRPD's failure to adequately train and supervise Josh Hastings caused Bobby's death.

**David Achtenberg**: The Court limited that very sharply, said it must be so bad -- the training must be so bad -- that it shows deliberate indifference to the rights of the public. And then you also have to show that if proper training had been provided, the violation wouldn't have occurred.

**John**: A fourth route to municipal liability comes from the decision to hire a problematic employee in the first place.

**David Achtenberg**: You can hold the city liable if proper screening would have revealed that the plainly obvious consequence of hiring this employee would have been violation of that particular right.

**John**: At least initially, it wasn't set in stone that the standard for municipal liability would be as high as it has become.

**Fred Smith**: In the 1980s, the Court works out the rules. They work out the language about what a final policymaker is, what a final decision maker is, what deliberate indifference is. But they seemed open to applying those standards in ways that -- more strictly than I would like. But there were some opportunities for relief.

**John**: That's Professor Fred Smith of Emory again.

**Fred Smith**: By the time you get really to 1997 in *Brown* -- *Brown versus Bryan County* -- that's when you really start to see just how strict this is.

**John**: In *Brown v. Bryan County*, a deputy sheriff employed by Bryan County, Oklahoma dragged a woman out of the passenger seat of a car after a high-speed chase.

**Fred Smith**: A woman named Jill Brown was pulled out of her car was slammed to the ground with enough force to break both of her kneecaps. There was a lot of reason to believe that the sheriff who hired the officer who did that, that he knew or should have known that this particular officer posed a risk.

**John**: The deputy was the sheriff's great-nephew. And the sheriff knew before he hired him that he had an extensive criminal record, including guilty pleas for assault and battery and resisting arrest.

**Fred Smith**: And he knew that his great nephew had a long record of misdemeanors, some of which were violent, some of which involved vehicles, none of which were felonies. But there were a lot of them.

**John**: The deputy wasn't allowed to carry a gun on duty, which is another indicator that the sheriff had an inkling that he didn't have great judgment. And evidently, a jury agreed. And it found the sheriff was deliberately indifferent. But the Supreme Court overturned the verdict.

**Fred Smith**: The Supreme Court says, Well, look, none of these were felonies. At most, this was negligence. This wasn't deliberate indifference.

**John**: Here's Justice O'Connor announcing the Court's decision:

> **Justice O'Connor**: The deputy here may have been a poor prospect for hire. But that is not because his eventual use of excessive force would have been a plainly obvious consequence of the decision to hire him.

**John**: Writing for the Court, Justice O'Connor said Jill Brown had to show that it was quote "highly likely" that the great nephew would inflict quote "this particular injury." Which suggests not only should the sheriff had known the deputy would commit excessive force, but perhaps a particular type of excessive force, like at a traffic stop. Or perhaps that he was particularly likely to break someone's kneecaps instead of their arm. Or that he was likely to use excessive force on a particular type of person. Or possibly against Jill Brown specifically.

> **Justice O'Connor**: The sheriff's action would have been deliberately indifferent … only if the deputy's use of excessive force against the person being arrested was a known or obvious consequence of the hiring decision.

**Fred Smith**: And so as a result, Jill Brown was not able to get relief.

**John**: The last time the Supreme Court heard a municipal liability claim was in 2011. In a case called *Connick v. Thompson*.

**Fred Smith**: In *Connick v. Thompson*, there's a man who was wrongfully given the death penalty.

**John**: In 1985 in New Orleans a man named John Thompson was convicted of two separate crimes, an armed robbery and a murder. Years later and just weeks before he was scheduled to be executed, his attorneys found a lab report that cleared him of the armed robbery.

> **Justice Ginsburg**: The lab reported to the prosecutors that the perpetrator's blood type was B. Thompson's blood type is O.

**John**: Prosecutors knew about and intentionally hid that lab report from the defense. And it turned out that prosecutors also hid exculpatory evidence in the murder case as well. For instance, an eyewitness said the murderer had short hair. John Thompson had a large afro.

> **Justice Ginsburg**: No fewer than five prosecutors concealed year upon year this and other evidence vital to Thompson's defense.

**Fred Smith**: So he spent 18 years in prison. And when he sued -- once he was ultimately exonerated -- a jury found in his favor, and they awarded him $14 million dollars.

**John**: Prosecutors are generally protected by absolute immunity. Even though they are required to turn over evidence favorable to the defense, it is literally impossible to sue them in civil court for failing to do so. So John Thompson sued the policymaker in charge of the prosecutors who violated his rights, the District Attorney. Thompson argued that not only had prosecutors failed to turn over evidence in his case, but that in four other separate cases prosecutors had failed to disclose evidence that later led to exonerations. Therefore, the District Attorney knew or should have known that his prosecutors were failing to live up to their obligations, and he had a responsibility to train them about those obligations. But the Supreme Court rejected that argument.

**Fred Smith**: But the Court said that wasn't really enough to say that this person was deliberately indifferent. And the Court said that even though there were other violations of the same type in this office that wasn't enough to show or to make it really obvious that prosecutors should be trained about people's constitutional rights with respect to turning over exonerating evidence.

**John**: The Court gave two reasons.

**Fred Smith**: Reason number one was, well, those other cases that had violations they were about physical evidence. And this case isn't about physical evidence. So it wouldn't be clear that you needed this particular type of training. And so therefore, it wasn't obvious for that reason.

**John**: The exonerating evidence in the other four cases, none of it was blood evidence or a lab report. So potentially there's some difference between seeing the need for training prosecutors to turn over blood evidence as opposed to other types of evidence.

**Fred Smith**: And then they said, and also, the other point here is that lawyers should know this anyway. Lawyers should know. Any prosecutor should know that they're supposed to turn over exonerating evidence. Because they learned that in law school. Because they learned it when they were studying for the bar. And because they learned that in continuing legal education classes. And therefore, a DA wouldn't know that it's obvious that they should instruct their prosecutors that you should turn over exonerating evidence.

**John**: There may be a due process right to obtain favorable evidence, but because of absolute immunity for prosecutors and because the deliberate indifference standard is so high for policymakers, you have no remedy when that right is violated and you wind up on death row.

**Fred Smith**: It is a deeply troubling decision. When I teach fed courts, it's an opinion where you can just see the pain in students eyes as you're going through the reasoning.

**John**: And if it wasn't clear, that was Justice Ginsburg helping us with the narration earlier.

**Justice Ginsburg**: I dissent from today's decision.

**John**: There is a troubling post-script to the *Connick* case.

**Fred Smith**: The consequence of *Connick* is that after that you had all these other cases out of that office where other people were saying, look, me as well. I also had a case where exonerating evidence had not been turned over.

**John**: But unlike John Thompson, who at least got his claims heard by a jury before the case got to the Supreme Court, those other plaintiffs did not get their day in court.

**Fred Smith**: All of them were dismissed at the motion to dismiss stage.

**John**: Today, the *Monell* standard is so high that it's basically another form of immunity.

**Fred Smith**: So what I've argued is that it's really probably conceptually helpful to think about this kind of protection that local governments get from suits as a form of local sovereign immunity.

**John**: As we talked about on Episode 2, the Supreme Court has said that you can't sue the federal government or state governments over constitutional violations committed by their employees because they are protected by sovereign immunity. You can sue local governments, but it probably makes sense to think of the high barriers to actually getting your day in court as another immunity doctrine in itself. We're going to take a break. And when we come back we will

return to Little Rock to see whether the maelstrom of misconduct and malfeasance at the LRPD were enough to make Little Rock liable for Josh Hastings shooting Bobby Moore.

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**BREAK**

**John**: But first, if you're a lawyer or a law student and you would like to do something about maelstroms of misconduct and malfeasance, please listen to this message from IJ President and General Counsel, Scott Bullock.

**Scott Bullock**: Good news. The Institute for Justice is hiring. For the lawyers and law students listening, do you want to work on the kinds of cases that motivated you to tune into Bound by Oath? We are looking for litigators with a passion for taking on issues like qualified immunity, civil forfeiture, abusive fines and fees schemes, and many others. At IJ, you will work on cutting edge constitutional cases that end widespread abuses of power and that secure the rights that allow individuals, the opportunity to pursue their dreams. In addition to litigation, IJ combines media relations, strategic research, legislative outreach, and grassroots advocacy to fight on behalf of those individuals who are denied their constitutional rights by abusive officers and officials. We are hiring in a number of those areas as well. Please visit our website at www.ij.org/jobs to learn more.

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**Sylvia Perkins**: When someone just take your child's life like that, it's like they take a part of your life.

**John**: That's Sylvia Perkins, Bobby Moore's mother. The morning after Bobby was killed, Sylvia and her family gathered at the apartment complex. They didn't know who shot Bobby.

**Sylvia Perkins**: Don't you know I stayed on that scene from 6 to 12 o'clock before anybody ever said anything to me. I didn't know if the police had shot my son or what. Only thing I know my baby had got shot.

**John**: The officers at the scene didn't tell the family anything. Including Terry Hastings, Josh Hastings' father.

**Sylvia Perkins**: I said Terry, Mr. Terry, Terry. Please. That's my son down there. Could somebody please tell me something? This man turned around, looked at me, and walked on down there.

**John**: Sylvia actually knew Lt. Hastings. Years earlier, he'd worked in her neighborhood.

**Sylvia Perkins**: Terry was on that scene. And I feel he shouldn't have been there. It was his son that done this.

**John**: And when police said initially that Bobby had tried to run over Josh, Sylvia immediately knew something was wrong.

**Sylvia Perkins**: And when they say that he was trying to run over him, that's the reason he shot him, I knew not. I knew then it was time to get a lawyer.

> **Mike Laux**: Good morning, may it please the court.

**John**: That's Sylvia's lawyer, civil rights attorney Michael Laux. In 2018, the U.S. Court of Appeals for the Eighth Circuit considered Sylvia's claims and whether she had put together enough evidence to get them before a jury. She argued that the LRPD had a custom of conducting facade investigations of excessive force.

> **Mike Laux**: The LRPD's system of investigation is akin to no investigation. Unscrupulous or opportunistic officers can engage in misconduct with little fear of repercussion.

**John**: And the city's attorney said well, it's true we didn't do the most thorough investigation in Bobby's case --

> **City's attorney**: We admitted that gear shifter was not tested. … Whether or not it was a perfect investigation is not the question at issue here.

**John**: But it was good enough.

**City's attorney**: We determined that that Bobby Moore was not traveling in the direction of Officer Hastings at the time of the shooting. And Chief Thomas believes that the car is actually in reverse at the time of the shooting. Which is why we found that he committed a policy violation. Which is why we worked to get him charged.

**John**: Actually, at least at first, it seems like the department initially tried to cover up Josh's misconduct. They hired a crime scene investigator with no engineering background who produced a report saying that everything had transpired the way Josh said it had. Another investigator who was initially assigned to the case was one of Josh Hastings' former supervisors, his field training officer right out of the academy, Ralph Breshears.

**Ralph Breshears**: Get out of the car! ...

**Suspect**: I can't get out please help me.

**John**: -- an officer with a history of untruthfulness who would go on to shoot someone and lie about it a few years later. But ultimately there was too much about the shooting of Bobby Moore that couldn't be explained away.

**Mike Laux**: The defendants are very quick to pat themselves on the back, because for the very first time in the history of the department, someone has been charged criminally for a police-involved shooting. And they say that that is proof that the system works.

**John**: Of course to succeed on a municipal liability claim, it's not enough to show that one investigation was a facade. There has to be a pattern.

> **City's attorney**: There has to be a similar pattern of similar unconstitutional misconduct. … And the only similar instances to this one, which I estimate they're not really similar, are ~~the~~ the other shootings at cars that preceded this one.

**John**: The city argued it's not enough to show a pattern of faulty investigations of excessive force generally. And it's not even enough to show a pattern of faulty investigations into police shootings. According to the city, Sylvia had to show there was a pattern of faulty investigations where police shot into a moving vehicle. If a police officer shot someone in a house or in a yard, that doesn't count. Supposedly. But even taking that as true, there were six other shootings by Little Rock police officers into moving cars around the same time period. And the city said: those don't establish a pattern either.

> **City's attorney**: They're all fundamentally different than the Bobby Moore shooting, because in each of those instances, the car was used or the officers felt like and reasonably believed that the car was or was going to be used as a deadly weapon.

> **Mike Laux**: The city is using the conclusions of investigations that we claim are corrupt to prove there's no corruption in the investigations.

**John**: In each of the other six incidents in the record, officers said they feared for their lives. But there's good reason to believe that's not true. Take, for instance, the shooting by Arthur McDaniel.

**Mike Laux**: Arthur McDaniel was involved in just a ridiculous police involved shooting back in 2010.

**John**: We talked about Arthur McDaniel in Part 1. He was the officer who berated the white woman with a biracial baby at a gas station, and he was the officer Josh Hastings was supposed to wait for on the night he killed Bobby Moore. Two years before that, Arthur McDaniel also fired into a moving car. He'd suspected the occupants of the car were burglars. And when he tried to pull them over, they fled.

**Mike Laux**: And then he gets into this lengthy chase with them, eventually traps them in the early morning hours with the sun coming up, traps them in a cul de sac in a residential neighborhood, gets out of his car, and then opens fire on the vehicle.

**John**: When McDaniel started shooting, the car was at least 40 yards away.

**Mike Laux**: He just starts taking potshots at the car, even though it's nowhere near him -- not even going in his direction. And there's like residential homes all over the place.

**John**: McDaniel killed the driver and wounded his adult son.

**Mike Laux**: He shoots the son in the face. And there's a woman in there he didn't hit. And then a fourth guy, gets out and tries to run away. And McDaniel starts taking potshots at him -- unarmed. The guy is unarmed.

**John**: Years later in a deposition, one of the officers who investigated the shooting testified that McDaniel had violated several department policies. For example, he got out of his patrol car and stood near the path of the fleeing car. Which department policy says never to do; you're not supposed to leave a position of safety. And McDaniel's explanation for shooting didn't make sense. He said he was afraid of being run over, but the car was traveling away from him when he fired. Nevertheless, the department not only exonerated him of any wrongdoing, it also named him Officer of the Month. But when Sylvia Perkins pointed to the Arthur McDaniel shooting and others like it as evidence that the LRPD conducted sham investigations, the district court -- before the case got to the Eighth Circuit -- said that her evidence was quote "too speculative." Meaning:

> **City's attorney**: None of those previous uses of deadly force were found to be unconstitutional.

**John**: It wasn't enough to present evidence from police reports and depositions that those shootings were fishy and that policy violations were ignored. For the city to truly be on notice that its investigations were insufficient, there had to be a finding of unconstitutionality.

> **City's attorney**: And without a finding of unconstitutionality the city cannot be on notice of a pattern of unconstitutional acts.

**John**: And who makes a finding of unconstitutionality? Usually, a court. And because none of the motorists in the other six cases had filed lawsuits, those shootings hadn't been found

unconstitutional, and there's no pattern. Similarly, the city argued that Josh Hastings' own personal history of misconduct didn't add up to a pattern.

> **City's attorney**: When you look at those 30 separate instances of misconduct … nine of which I believe are violations of the dashcam policy. Two times he didn't show up for court. I mean, they're not instances of serious misconduct.
>
> **Judge**: But it does demonstrate a persistent pattern of disregard for the policies of the department and the safety of the people of Little Rock? In other words they should not be subjected to the Hastings of the world.
>
> **City's attorney**: Perhaps he wasn't a great officer. But like the Supreme Court has said in *Bryan County versus Brown*, just because he wasn't the best officer doesn't mean that there's liability. There has to be a direct causal link between that misconduct and the shooting of Bobby Moore….
>
> **Judge**: Well, direct in what sense? There has to be a prior shooting?
>
> **City's attorney**: As far as similar misconduct goes, yes, that's what the Court has said.

**John**: According to the city, if Josh Hastings had shot somebody before Bobby Moore in a way that was found to be unconstitutional, maybe then the city would have been on notice that he wasn't being properly supervised or hadn't been properly trained. But all the other stuff he did short of shooting someone, that doesn't count towards a pattern.

> **City's attorney**: Because he didn't turn on his dashcam a few times, does not mean that he's going to going to shoot a 15-year-old Bobby Moore. That's just there's just no causal connection between those two things.

**John**: And the city argued that Josh Hastings had been disciplined at various points in his career.

> **City's attorney**: Josh Hastings was found not to have violated policy in any of those uses of force. He was still given … remedial training, I guess just in case.

**John**: According to the city, over the course of his career, Josh Hastings generated three Early Intervention System alerts after using force on members of the public a concerning number times over a given time period. And the department took a look and said his uses of force were justified. But even so he was ordered to go to remedial training and on another occasion to do biweekly counseling. But rather than showing that the city had been diligent, what that actually shows is that Josh Hastings got special accommodations.

**Mike Laux**: He gets these favors. He gets to do meetings and counseling and he actually was forced to attend the remedial use of force policy with a bunch of recruits. He's like a four-year vet, and he's in this class with a bunch of recruits.

**John**: The remedial training and the counseling were ad hoc, special favors outside the usual system of discipline. Just something to avoid disciplining him for real.

> **City's attorney**: So the idea that we just sat idly by … It's just not supported by the record.

**John**: Except that it is supported by the record. After digging through the city's records, Michael Laux found that the Early Intervention System alerted on Hastings not only the three times the city admitted to but an additional 16 times that the city either didn't know about or ignored. And for those additional 16 alerts, the department just sat idly by.

> **Mike Laux**: There's no reason that we shouldn't be able to get this case in front of a jury. We submitted phone books of evidence. We took 20 depositions. We didn't cut any corners. We did the hard work.

**John**: But in 2019, the Eighth Circuit dismissed the lawsuit before it could go to a jury. It accepted the city's arguments that you just heard, though the court did take note of other police shootings, not just the shootings into vehicles. But in each case the court said that while officers may have violated LRPD policies, there hadn't been a showing that they had violated the Constitution. The court noted that prior to shooting Bobby Moore, Josh Hastings had only been sued once for excessive force. So there was no pattern. And it said Josh Hastings' attendance at a Ku Klux Klan meeting -- and the city's failure to investigate if the association ran deeper than one meeting -- didn't show that it was plainly obvious Josh would shoot Bobby Moore. Neither the district court nor the Eighth Circuit acknowledged that Josh Hastings' trainers and supervisors had been a string of problem officers who were themselves untruthful about their own misconduct. Ultimately, the court held that there just wasn't enough evidence to satisfy the *Monell* standard.

**Sylvia Perkins**: The city should have been held accountable and the chief. They should have been accountable.

**Mike Laux**: How this does not get in front of a jury is baffling to me with all due respect.

**John**: But that's the lay of the land with municipal liability. Like with qualified immunity, what it will take to get in front of jury isn't always clear. Obviously, this is just one case, and plaintiffs do sometimes get their *Monell* claims before a jury. And we're going to talk just briefly about a couple of instances where they did. But first, we're going to talk about a trend in the lower courts that makes holding municipalities liable even harder than the Supreme Court has said it should be. That trend is best explained by a pair of cases decided by the U.S. Court of Appeals for the Sixth Circuit last year.

**Chris Rock**: People in the black community often worry that we might be a victim of police brutality.

**John**: The cases involve two separate incidents of police brutality in the City of Euclid, Ohio. In both cases, the plaintiffs sued not only the officers involved, but also the City of Euclid. Because the training -- and specifically the use-of-force training -- that officers received trivializes police brutality.

**Chris Rock**: Have you ever been face-to-face with a police officer and wondered: Is he about to kick my ass? Well wonder no more. If you follow these easy tips, you'll be fine.

**John**: The training featured a sketch by comedian Chris Rock that Judge Bush of the Sixth Circuit said was quote: "highly inappropriate for law enforcement instruction." The sketch,

among other things, recommended that black people get a white friend to ride in their cars with them to avoid being shot by police.

**Chris Rock**: A white friend can be the difference between a ticket and a bullet in the ass.

**John**: The training also featured a powerpoint presentation, the title slide of which had a cartoon of a police officer with a baton in riot gear beating an unarmed, unresisting person who's on the ground. A different slide had a photo of two officers, their faces taut, screaming, and pointing their guns. And the caption said "Bed bug! Bed bug on my shoe!"

**Easha Anand**: So unsurprisingly, the City of Euclid has a problem with police violence.

**John**: That's Easha Anand, who is a litigator at the MacArthur Justice Center and who asked the Supreme Court to take a look at police violence in Euclid.

**Easha Anand**: They escalate really quickly. They tase. They pepper spray. They even shoot people without really thinking twice about it.

**John**: And so the claim is Euclid's police training tacitly encouraged or at least failed to discourage unreasonable force. And separately that Euclid failed to give officers guidance on when or how to remove people from their cars, which is something that's at the root of the two cases.

**Easha Anand**: So story number one. In November 2016, Lamar Wright gets a text from his girlfriend as he's driving.

**John**: And he pulled over so he could answer and not to text and drive.

**Easha Anand**: And these two Euclid police officers decide that he didn't sufficiently use a turn signals. So they come up to the car.

**John**: Mr. Wright said he did use his turn signals, but there's no dash-cam footage. There is body-cam footage though, and what that shows is that Mr. Wright tried to comply with the officers commands.

> **Officer 1**: Get out of there! Show me your hands!
>
> **Officer 2**: Shut the car off.
>
> **Lamar Wright**: You're hurting my arm! You're hurting my arm!
>
> **Officer 2**: Taser deployment. Taser deployment.

**John**: He'd recently had a major surgery and had a colostomy bag stapled to his stomach. When the officers dragged him out of the car, it ripped out the staples.

**Easha Anand**: He's yelling in pain, and they wind up pepper spraying him and tasing him.

**John**: The officers said they were afraid he was going to shoot them, but no gun was found. And when he sued, the Sixth Circuit rejected the officers' claims that they were entitled to

qualified immunity. Because there was prior, on point caselaw that clearly established that it is unconstitutional to tase and pepper spray someone who is not actively resisting arrest. In the same opinion, the court ruled Mr. Wright's claims against the city could proceed as well because of the highly inappropriate use-of-force training officers received. That's case 1. Case 2 is the case that Easha and MacArthur Justice Center appealed to the Supreme Court.

**Easha Anand**: We don't have much detail on what happened because the officers' cameras and microphones are off.

**John**: In 2017, a Euclid officer shot and killed a man named Luke Stewart. Neither officer on the scene turned on their dash-cam or body mics, so most of what is known comes from the officers' accounts.

**Easha Anand**: Luke Stewart, who's 23 years old, is sleeping in his car outside of a friend's house. He's supposed to spend the night there. But the friend doesn't answer his phone, so he decides set to crash in his car.

**John**: At 7 in the morning, Euclid police officers -- one at the driver side window and one at the passenger side -- woke him up. They saw what looked like rolling papers and a digital scale in the car, so they wanted to investigate.

**Easha Anand**: They opened the door and start trying to drag him out of the car. Well, he panics and starts to drive away. One of the officers, the one at the passenger side, decides to hop into the car and close the door behind him.

**John**: Over the course of the next minute, the officer punched Luke in the head and tased him repeatedly.

**Easha Anand**: Mr. Stewart isn't violent or threatening or trying to fight this guy off or get him out of the car. Even on the officer's testimony, he's going 20 to 30 miles per hour.

**John**: Eventually, the officer pulled out his gun and shot Luke. And then, incredibly, the officer said at that point Luke started throwing punches. So the officer fired three more times.

**Easha Anand**: I've worked on a lot of policing cases. I haven't really heard of victims of police force who have been shot at point-blank range in the torso twice being able to reach over and punch someone. But even on the officer's telling, he fires his first two shots before Luke Stewart does anything that's remotely violent.

**John**: Luke's mother sued the officers, and the Sixth Circuit ruled that the shooting may have violated Luke's constitutional rights. However, the court granted qualified immunity to the officers because there was no prior case with sufficiently similar facts clearly establishing that it was unconstitutional.

**Easha Anand**: Basically no other officer has been foolish enough to get into the car with a victim and ride along for a minute before shooting them. So there's no clearly established law. And because of that, the officer gets off totally scot free.

**John**: But on the claim that city was liable for the shooting, which had all the same evidence about the improper training as the first case where the claims against the city are going to trial, this time the Sixth Circuit -- albeit three different judges -- ruled that the city gets off scot free as well.

**Easha Anand**: The Sixth Circuit says: Yes, this training program is really horrifying and should shock just about anyone. Yes, a Euclid police officer shot someone in violation of the Fourth Amendment. But because there's no clearly established law, not only can you not proceed against the officer who did the shooting but you can't prove the municipality deliberately indifferent. The only difference between these two cases is this clearly established law atop deliberate indifference rule. Lamar Wright basically argued the same cases Mary Stewart did. In fact, Lamar Wright had the exact same lawyers.

**John**: That's the troubling trend we're talking about. The Sixth Circuit, as well as four other circuits, have taken a test that comes from the qualified immunity context and protects individual officers and just dropped it into the municipal liability context on top of the already sky-high *Monell* standard.

**Easha Anand**: It's become a sort of backdoor way to smuggle in qualified immunity. And the consequences are really, really dire for civil rights plaintiffs. Because the Sixth Circuit's rule means that in exactly the circumstances where the courthouse doors are shut to you from proceeding against an individual officer, they're also shut to you from getting relief from the municipalities. You are left entirely without a remedy, even where someone violated your constitutional rights.

**John**: Which is not supposed to happen. In 1980, in a case called *Owen v. City of Independence*, the Supreme Court held -- in sweeping, categorical, and unmistakable language -- that cities do not get qualified immunity.

**Easha Anand**: The Supreme Court said that the policy reasons we justify qualified immunity against individuals those just don't apply to municipalities.

**John**: As it happens, *Owen* was litigated by a friend of this podcast. Professor David Achtenberg.

> **Chief Justice Burger**: We'll hear arguments next in *Owen against City of Independence, Missouri*. Mr. Achtenberg, I think you may proceed whenever you are ready.

**John**: Professor Achtenberg litigated the case with his father, who argued it. And they won.

**David Achtenberg**: In *Owen*, the lower court had held that cities were entitled to the same form of immunity as individual police officers or individual teachers or individual public employees.

**John**: In *Owen*, the Supreme Court said no. Cities don't get qualified immunity.

**David Achtenberg**: Now of course, they were still protected by the *Monell* doctrine, the no respondeat superior doctrine. But they would not be immune simply because the constitutional

question was unsettled at the time. Justice Brennan in the opinion suggested that this led to a very sensible scheme of relief.

**John**: Justice Brennan wrote that the presence of municipal liability essentially ensured that the victim of the constitutional violation would be compensated, even if qualified immunity protected the officer. It was in a way a safety valve. If you couldn't sue the officer because he acted reasonably when he violated your constitutional rights, then you could still in all likelihood sue the municipality instead. After all, in the words of Justice Brennan, it was important to first and foremost ensure that quote "the innocent individual who is harmed by an abuse of governmental authority . . . will be compensated for his injury."

**David Achtenberg**: Now, that didn't work out. Turned out that immunity for individuals kept getting stronger and stronger. And the liability of cities kept getting narrower and narrower. As a result of which more and more victims of constitutional violations didn't have any remedy. But at least that was the idea.

**John**: In recent years though, lower courts have been sidestepping *Owen*, and smuggling the clearly established rule from qualified immunity into municipal liability. So today, the big action at the Supreme Court isn't in trying to make the *Monell* doctrine better. It's to stop it from getting worse.

**Easha Anand**: All we're asking the Supreme Court to do is say we meant what we said in *Owen* when we said municipalities don't get qualified immunity. And so if you're interested in qualified immunity, and you're not sure you want to take the step of overruling it as to individual officers,

here's some really low hanging fruit for you, at the very least, make clear that this clearly established law business doesn't also protect municipalities. Because -- whatever you think about the Euclid police officers who shot Luke Stewart or tased Lamar Wright -- surely, they have more justification for immunity than the city that sat back, that had layers of review and still chose to train its officers in a way that made it seem like police brutality was just no big deal.

**John**: But last month, in May of 2021, the Supreme Court declined to hear Mary Stewart's petition. If you want to sue a city, there's an increasingly high bar to clear before you get your case to a jury. Which brings us to one final point: all of these immunity doctrines we've been talking about this season -- whether it's for federal officials, or state and local officials, or municipalities -- all of those hurdles you have to get past merely prelude the real action. You still have to prove your case before a jury. And one person we've talked to this season did get to take his municipal liability claim to a jury. Lee Saunders from Episode 3.

**Lee Saunders**: Being incarcerated you're not entitled to Holiday Inn conditions, but you're entitled to humane conditions. And the conditions that we were being forced to live in weren't humane at all.

**John**: The U.S. Court of Appeals for the Eleventh Circuit said that even though the guards at the Brevard County jail were entitled to qualified immunity for the overcrowded, filthy conditions in the Bubble that didn't mean Lee's lawsuit against the county couldn't go to trial. So in 2019, Lee presented his evidence to a jury. Using yoga mats, Lee's lawyer showed the jury exactly what it looks like to squeeze eight or more inmates into a 120-square foot cell. He showed the jury pictures and written complaints about conditions in the cells. The lawyers for Brevard

County, on the other hand, did not put on any of their own evidence. They denied conditions were as bad as Lee said, but they didn't do anything to show that things weren't that bad. Instead, they concentrated their efforts on attacking Lee's credibility and tried to turn the case into a game of he said/she said. Who are you going to believe, they asked the jury, a drug addict with a criminal record who just wants money or the upstanding policymakers of Brevard County? And the jury ruled for the county. Which illustrates really starkly what we're talking about this season. All these immunity doctrines that prevent plaintiffs from getting their day in court -- overcoming them doesn't mean you win your case. You still have to persuade a jury, and that's no picnic. Juries routinely reject even strong claims, and that's just one more reason why procedural barriers like the *Monell* doctrine and qualified immunity are not necessary to protect defendants from frivolous litigation. All they really do is close the courthouse doors to people with strong constitutional claims. On the next episode, we're going to talk about one more procedural hurdle that shields government officials from liability for some of the most egregious misconduct imaginable. Next time on Bound By Oath: absolute immunity.

**Credits**: Bound By Oath is a production of the Institute for Justice's Center for Judicial Engagement. This project was edited by Charles Lipper and Kais Ali at Volubility Podcasting. It is produced by Anya Bidwell and John Ross. With voice work by Sam Gedge. Audio from oral argument in the Supreme Court comes from Oyez. The theme music is by Cole Deines. We'd also like to take a moment to acknowledge a friend of this podcast, Coleman Watson. You heard Coleman on Episode 3. He was Lee Saunders' lawyer, and he recently suffered a terrible stroke. We wish him strength for his recovery, which is going to be a long haul. If you'd like to learn more, please visit this episode's webpage.