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Cities as Persons under 42 U.S.C. 1983: Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978)

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Cities as Persons under 42 U.S.C. §1983: Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978).

INTRODUCTION

After the Supreme Court held in *Monroe v. Pape*[1] that cities were not subject to suit under 42 U.S.C. § 1983[2] because they were not "persons" within the meaning of the Civil Rights Act of 1871,[3] one suffering a deprivation of some constitutional right had no cause of action against the city itself; although the individual-employee of the city responsible for the wrongful act could be held liable.[4] If the applicable state statute permitted, the aggrieved party could bring suit against the local government or the individuals responsible in a state court.[5] However, if a federal forum was chosen to adjudicate the alleged infringement of a constitutional right[6] and since the action could lie only against the individual employee, there was the possibility that the plaintiff would be without a remedy in the event the individual was protected either by some form of immunity[7] or by being "judgment-proof."[8] Therefore a plaintiff; such as the one in *Monroe*, who was the victim of an illegal search and seizure by city police;[9] could be left to shoulder any loss resulting from the denial of his constitutional rights. The harshness of this result led commentators to urge that municipalities bear the burden of compensation for violations of constitutional rights rather than the victim.[10] But the "nonperson" rule remained and was extended to other state and local instrumentalities by the lower federal courts.[11]

However in *Monell v. Department of Social Services of the City of New York*,[12] the Supreme court reexamined the "nonperson" rule of *Monroe* that granted cities absolute immunity, and reversed this holding of *Monroe* conclud-

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1. 365 U.S. 167 (1961).
2. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. Act of April 20, 1971, ch. 22, § 1, 17 Stat. 13.
4. Levin, *The Section 1983 Municipal Immunity Doctrine*, 65 GEO. L. J. 1483, 1485 (1976-77).
5. *See* note 58 *infra*.
6. If a civil action is brought pursuant to 42 U.S.C. § 1983, original jurisdiction of the federal courts is invoked by 28 U.S.C. § 1343 (1970). Subsection (3) gives the court jurisdiction:

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

7. *See* note 101 *infra* and accompanying text.
8. Kates & Kouba, *Liability of Public Entities under Section 1983 of the Civil Rights Act*, 45 S. CALIF. L. REV. 131 (1972).
9. 365 U.S. 167, 169 (1961).
10. Kates & Kouba, *supra* note 8, at 138.
11. Levin, *supra* note 4, at 1485 n. 6.
12. 436 U.S. 658 (1978).

ing that cities are now to be included in the word "person" under section 1983 and can be held accountable for damages as well as equitable relief under some circumstances.

The primary concern of this Note is to inquire into the factors that led to the abandonment of the "nonperson" rule after nearly two decades of reaffirmance and to consider the situations in which a city can be held accountable for violations of civil rights as opposed to those where the city still enjoys an immunity from section 1983.

I. THE CASE

In this class action plaintiffs were female employees of two city agencies: the New York City Board of Education and the New York City Department of Social Services.[13] The complaint challenged regulations that required pregnant employees to take unpaid absences from their jobs even though the employees were medically fit to continue employment.[14] The plaintiffs contended that there was also a "city-wide policy" of the city that required the leave of absence after an employee was in her fifth month of pregnancy. However, each agency could allow a two-month extension if a physician of the city approved the agency's decision.[15] The individual plaintiffs in the case at bar were compelled to relinquish their jobs when in fact, their personal doctors would have permitted them to continue employment for another month.[16] The plaintiffs brought their action under section 1983 against the city officials (heads of the agencies and the Mayor) as well as against the city itself praying for back pay awards and injunctive relief.[17] Although a similar practice had been held unconstitutional in *Cleveland Board of Education v. LaFleur*[18] the year before the district court's decision, the district court concluded that since the city's policy had been changed before the decision in *LaFleur,* the equitable remedies were moot.[19] Furthermore, plaintiff's claim for back pay was denied. Relying on *Monroe,* it was concluded that because a city was absolutely immune from damages under section 1983, plaintiffs could not alter the rule by bringing the action against the Mayor or other city administrators when, in effect, the relief of back pay would come out of the city treasury.[20]

On appeal the dismissal of plaintiff's action was affirmed.[21] In addressing the section 1983 issue, the appellate court relied on *Monroe* in holding that the city

13. 394 F. Supp. 853 (S.D.N.Y. 1975).
14. 436 U.S. 658, 661 (1978).
15. *Id.*, note 2.
16. 394 F. Supp. 853, 855 (S.D.N.Y. 1975).
17. 436 U.S. 658, 660-661 (1978).
18. 414 U.S. 632 (1974).
19. 394 F. Supp. 853, 855 (S.D.N.Y. 1975).
20. *Id.* (The plaintiffs also relied on Title VII of the Equal Employment Opportunity Act, 42 U.S.C. § 2000(e). This claim was rejected by the district court. It was one of the grounds for the petition of certiorari; but the Supreme Court limited its grant of certiorari to the section 1983 claim; *See* 436 U.S. 658, 660 n.1 (1978).
21. 532 F.2d 259 (2d Cir. 1976).

was not a "person." When plaintiffs conceded that the Department of Social Services was not a "person" because of its direct connection to the city, but asserted that the Board of Education was a "person" because of its independence; the court, in rejecting the distinction, stated, "We know of no rule of thumb that may be deemed controlling on the question whether independent agencies are to be considered 'persons' for the purposes of § 1983."[22] Reliance was placed upon previous cases that had held certain agencies of the city to be "nonpersons" and cases in which a particular agency had been held to be a "person" were either distinguished or rejected.[23] Concluding that Congress in amending Title VII in 1972 had seen fit to give a remedy to those discriminated against because of sex, it was considered proper not to extend section 1983 to cover these facts.[24]

Plaintiff's petition for certiorari was granted[25] to consider whether the agencies or the officials were "persons" within the meaning of section 1983;[26] a question that previously had been left open in *Mt. Healthy City Board of Education v. Doyle*.[27] The Supreme Court concluded that since it had determined numerous cases in which local school boards were defendants,[28] the time had come to overrule *Monroe* to the extent it granted absolute immunity to local governmental units under section 1983.[29] While affirming *Monroe's* holding that a municipality could not be held responsible for the violation of constitutional rights by its employees under the doctrine of *respondeat superior*,[30] the local governments could be held liable under section 1983 for an unconstitutional "policy" or "custom" practiced by the city without regard as to whether it was implemented by statute, regulation, or administration decision.[31] Therefore, since the act of dismissing plaintiffs from their employment because of their degree of pregnancy was an "official policy" of the city and was a deprivation of a constitutional right protected by section 1983, the judgments of the lower courts were reversed.[32]

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22. *Id.* at 263.

23. *Id.* The court also rejected the plaintiffs' claim that the officials could be subject to liability because the damages would be paid by the city. Scheuer v. Rhodes, 416 U.S. 232 (1974) was distinguished because there was no connection made that any of the administrators acted beyond the scope of their authority. The court characterized the plaintiffs' contention as follows, "Appellants would have us merge two discrete conceptions to award relief. They would have us entertain suit against the official who committed an unconstitutional act, without malice, solely ex officio, even though from the nature of the relief sought—back pay—an award must come out of the public treasury of the Board of Education." This the court refused to do. Relying upon an analogy, the court reasoned that since Congress had protected state treasuries with the Eleventh Amendment, Congress had protected the cities with the Civil Rights Act of 1871, 532 F.2d 259, 265-266 (2d Cir. 1976).

24. 532 F.2d at 276.

25. 429 U.S. 1071 (1977) (No. 76-1914).

26. 436 U.S. 658, 662-663. (1978).

27. 429 U.S. 274, 279 (1977).

28. 436 U.S. 658, 663 n. 5 (1978).

29. 436 U.S. at 663.

30. 436 U.S. at 663 n. 7.

31. 436 U.S. at 690-691.

32. *Id.* at 694-695.

II. BACKGROUND

A. *Section 1983, in General*

42 U.S.C. § 1983 was originally § 1 of the Civil Rights Act of 1871.[33] To successfully recover under section 1983 certain requirements must be met: "First the plaintiff must prove that the defendant has deprived him of a right secured by the 'constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage of any State or Territory.'"[34] In addition, the defendant has to be a "person" not shielded by any form of "immunity."[35]

B. *Supreme Court Decisions: Monroe, Moor, Kenosha, and Aldinger*

In 1961 the Supreme Court decided the landmark case of *Monroe v. Pape*.[36] There the plaintiff brought an action under section 1983 seeking to hold individual police officers and the city of Chicago liable for damages resulting from an illegal entry into the plaintiff's home by the officers and a subsequent detention of plaintiff by the police.[37] After the initial holding that the complaint stated cause of action against the individual police officers for their actions taken "under color" of state law, the Supreme Court held further, ". . . we are of the opinion that Congress did not undertake to bring municipal corporations within the ambit of § 1979"[38] [now section 1983]. Attention was focused on the Sherman amendment[39] to the Civil Rights Act of 1871 that would have imposed liability on cities and counties for acts of violence resulting in property damage.[40] Reasoning that since Congress had rejected the amendment, Justice Douglas, speaking for the Supreme Court, concluded that subjecting cities to damages under the statute ". . . was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them."[41] In the footnote, Justice Douglas recognized that this view was shared by the lower courts but that some cases had allowed equitable relief against a city.[42] In promulgating the "nonperson" rule for cities, one commentator suggested that the principle was to provide a uniform application of the word "person" in section 1983 actions.[43]

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33. *See generally* Shapo, *Constitutional Tort: Monroe v. Pape and the Frontiers Beyond*, 60 N. W. L. REV. 277 (1975-76).

34. Adickes v. Kress & Co., 398 U. S. 144, 150 (1970).

35. Fine v. City of New York, 529 F.2d 70, 73 (2d Cir. 1975).

36. 365 U.S. 167 (1961). *See generally* Bickel, *The Supreme Court 1960 Term*, 75 HARV. L. REV. 40, 211-216 (1961-62).

37. 365 U.S. at 169.

38. *Id.* at 187.

39. CONG. GLOBE, 42 Cong., 1st Sess. 633 (1871).

40. 365 U.S. at 188 n. 38 (1961).

41. Id. at 191. *Cf.* Comment, *Toward State and Municipal Liability in Damages for Denial of Racial Equal Protection*, 57 CAL. L. REV. 1142, 1165-1166 (1969).

42. *Id.* 365 U.S. at 191 n. 50.

43. Comment, *Suing Public Entities under the Federal Civil Rights Act: Monroe v. Pape Reconsidered*, 43 U. COLO. L. REV. 105, 107.

In the years following the *Monroe* decision, section 1983 was a central tool in protecting constitutional rights. But as the litigation increased, the lower federal courts were unsure how far the cities' immunity extended. An important issue was whether the city should be granted immunity under section 1983 if state law had abolished it. This issue was resolved by two Supreme Court opinions in 1973.[44]

The first was *Moor v. County of Alameda*[45] where plaintiffs sought to recover damages for injuries sustained from shotgun wounds because of the wrongful acts of the defendant deputy sheriffs, employees of the defendant, county.[46] The suit was brought in federal district court for both federal claims (section 1983 and section 1985) and state claims (California Torts Claims Act of 1963 which allowed a county to be "vicariously liable" for the acts of its employees).[47] Relying on *Monroe,* the Supreme Court upheld the district court's dismissal of the complaints; thus, reaffirming the absolute immunity for a local governing body under section 1983 even though the county was subject to suit under state law.[48] Furthermore, the Supreme Court upheld the district court's refusal to exercise its discretion in entertaining the state law claims under the doctrine of pendent jurisdiction.[49] The leading case for the exercise of pendent jurisdiction, *Mine Workers v. Gibbs,*[50] was distinguished on the ground that even though the district court in the present action had jurisdiction over the individual employees on both the federal and state claims, to exercise the jurisdiction of the state claims against the county would require an additional defendant, a factor not present in *Gibbs.* In addition, considerations such as jury confusion and respect for the state courts were emphasized in determining whether to exercise the jurisdiction.[51]

The dissenting opinion of Justice Douglas, the author of *Monroe,* focused on the "nonperson" rule. It was asserted that the counties should be considered as "persons" for equitable relief, in spite of the fact that *Monroe* did have "overtones" to that effect.[52] But the majority construed the cause of action as one for damages only.[53] Thus, the question of whether a local municipality was included in the word "person" under section 1983 if the cause of action prayed for only equitable relief and not damages remained subject to dispute.

However, the issue was resolved later in the 1973 term by *City of Kenosha v. Bruno.*[54] The plaintiffs, tavern-owners, brought a section 1983 action alleging that the defendant-cities had violated their fourteenth amendment right of procedural due process by denying their right to renew their liquor-licenses without

44. Levin, *supra* note 4, at 1494-1495.
45. 411 U.S. 693 (1973).
46. *Id.* at 695.
47. *Id.* at 696.
48. *Id.* at 709-710.
49. *Id.* at 717.
50. 383 U.S. 715 (1966).
51. Moor v. County of Alameda, 411 U.S. 693, 712-713 (1973).
52. *Id.* at 723.
53. *Id.* at 695 n. 2.
54. 412 U.S. 507 (1973).

a proper hearing. The district court allowed the plaintiffs' equitable prayer in the form of a declatory judgment and order requiring the city to grant the licenses.[55] Although the Supreme Court acknowledged the cases that had allowed equitable remedies as opposed to damages in section 1983 suits, this "bifurcated" approach was rejected and it was held that the district court had no jurisdiction to enforce the equitable claim. The conclusion was based on the *Monroe* analysis of the legislative intent behind section 1983 without citing or reexamining the history.[56] Noteworthy was the fact that Justice Douglas, in dissent, reaffirmed his position in *Moor* and urged that the equitable relief was not barred by section 1983 because the language in *Monroe* to that effect was merely "dicta."[57]

With the above issue resolved in favor of the cities in *Kenosha,* writers seized on the second holding in *Moor* to assert the position that the Supreme Court should expand the doctrine of pendent jurisdiction in order for federal courts to entertain suits under state law when the municipal immunity doctrine had been waived by the state, even though the municipality was immune under section 1983.[58] But any possibility of expansion was foreclosed by *Aldinger v. Howard.*[59] The plaintiff had alleged a violation of her due process rights when she was dismissed from her county job without a hearing. In the section 1983 claim she sought an injunction and damages against the county and the county officials. Relief was also grounded on state law.[60] In affirming the dismissal of the complaint the Supreme Court stated that, as to the pendant-party jurisdiction, "[B]efore it can be concluded that such jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence."[61]

III. ANALYSIS

After the expansion of the "nonperson" doctrine and the closing of what appeared to be all available "loopholes,"[62] new approaches were developed that would affirm the central holding of *Monroe,* but alter the holding of absolute immunity for local governments. One author, after distinguishing section 1983 "political cases" from "constitutional torts" contended:

> From this rough dichotomy of the section 1983 case law, one can discern two corresponding theories on which a city or other governmental

55. *Id.* at 508.

56. *Id.* at 513.

57. *Id.* at 516. *See* Comment, *Federal Jurisdiction-Municipal Immunity under the Civil Rights Act—Closing the Loopholes,* 52 N. C. L. REV. 1289, 1298-1301 (1974-75).

58. *See* Note, *The Municipality, Section 1983 and Pendent Jurisdiction,* 5 VAL. U. L. REV. 110 (1970). (In urging the adoption of pendant jurisdiction, the author notes that since 1958 many states have begun to abolish the distinction between "governmental" and "proprietary" acts, thus allowing cities to be held liable for the torts of its employees).

59. 427 U.S. 1 (1978). *See* Note, *Municipal Law: Expanding Damage Remedies in Federal Court of Municipal Deprivation of Constitutional Rights,* 30 OKA. L. REV. 944, 947 (1977).

60. 427 U.S. at 4.

61. *Id.* at 18.

62. *See* note 57 *supra.*

entity might be held liable. In "political" section 1983 cases—those that attack an allegedly unconstitutional government policy—the rationale for municipal liability would be clear: the plaintiff would simply show that he had been injured, that his injuries were fairly attributable to a government policy, and that the policy was unconstitutional. Alternatively in a constitutional tort action a plaintiff might attempt to sue a city on the basis of the *personal* liability created by *Monroe* and its progeny. The plaintiff's theory would be that, under the doctrine of *respondeat superior,* a municipality should be vicariously liable for the constitutional torts its officers commit within the scope of their employment regardless of whether the particular acts reflect official policy.

This article suggests that the leading precedents on municipal immunity are read most sensibly to protect cities only from the constitutional tool category of suits, which would impose vicarious liability. In a political case, where the city itself causes the constitutional injury, courts should not favor injunctive or declaratory relief over monetary relief. If damages are appropriate to redress an unconstitutional policy, the municipal immunity doctrine of section 1983 should not be interpreted to stand in the way.[63]

In overruling *Monroe,* insofar as it held cities were not "persons," but affirming Monroe's holding that cities could not be held liable under the *respondeat superior* theory, it can be argued that *Monell v. Dept. of Soc. Serv. of City of N. Y.*[64] embraces this view.[65]

At the threshold of his analysis, Justice Brennan, writing for the Supreme Court, reexamined the legislative history of the Civil Rights Act of 1871 and the refusal by Congress to adopt the Sherman amendment; the factor that he termed the "sole basis" for *Monroe's* holding that cities were not "persons" for section 1983.[66] Various commentators on the legislative intent had asserted that the conclusion in *Monroe* was incorrect.[67]

The opinion notes that H. R. 320, the bill in which Congress was to exercise its powers under the fourteenth amendment contained four sections. Section 1983 was originally section 1 of the Civil Rights Act of 1871 and passed without amendments. But sections 2 through 4 were more controversial.[68] The Sherman amendment was "not" part of section 1 but was added as a separate section and when rejected by the House, was sent to a joint committee. The original amendment did not place liability on the cities or counties, but on the individual citizens.[69]

63. Levin, *supra* note 4, at 1490-1491.
64. 436 U.S. 658.
65. *Id.* at 707 (Powell, J., concurring).
66. 436 U.S. at 664.
67. Kates & Kouba, *supra* note 8, at 132-136.
68. 436 U.S. at 665.
69. *Id.*

However, in redrafting the amendment, the conference committee subjected the local governments to damages if the individual defendant was unable to make the injured party whole. The amendment's purpose was to require property to be subject to the damages caused by the Ku Klux Klan with the result that the property owners who would be subject to the increases in taxes would take steps to prevent Klan violence.[70] Because this first conference substitute was rejected, a second conference redrafted the report and this substitute was enacted and is presently 42 U.S.C.§ 1986.[71] The Supreme Court concluded, "[B]ecause § 1 of the Civil Rights Act does not state expressly that municipal corporations come within its ambit, it is finally necessary to interpret § 1 to confirm that such corporations were indeed intended to be included within the 'persons' to whom that section applies."[72]

This conclusion was based on the debates of the first conference substitute.[73] In the debates the opponents of the Sherman amendment centered on the question of whether Congress could, within the bounds of the Constitution, impose such an obligation on local governments;[74] the opponents asserting that the Constitution prohibited the national government from imposing the duty of keeping the peace on cities and counties since that obligation was left to the states.[75] In reviewing the precedents relied upon by the opponents, the opinion acknowledged the fact that their views expressed the theories expounded by the Supreme Court during that period; but concluded that the opponents' grounds did not preclude the fact that cities could be persons under section 1983. This holding was based on the fact that even the opponents conceded that cities could constitutionally be held liable for their contractual obligations, thus distinguishing between obligations to provide protection and subjecting a local government to damages when the city or county was required by the state to maintain order, but had breeched this duty and violated the fourteenth amendment.[76] The Supreme Court reasoned further that the Federalism doctrine did not prevent suits against cities for their violations of Constitutional rights since cities were required to satisfy violations of the Contract Clause from their treasuries; and moreover, there was no Congressional intent to exempt cities from section 1 of the Civil Rights Act.[77]

In reviewing the debates on section 1, the opinion proceeded to inquire as to whether section 1 was intended to exclude cities because they were "artificial" persons. First, noting that this remedial section was not limited to blacks but included every "person" and was to be liberally construed by the courts,[78] it was concluded that there was no justification for granting cities total exemption

70. *Id.* at 667 n. 16.
71. 436 U.S. at 669.
72. *Id.*
73. *Id.*
74. *Id.* at 673.
75. *Id.* at 680.
76. *Id.* at 678-680.
77. *Id.* at 680-681.
78. *Id.* at 684.

under section 1 since cities, like "natural persons," could violate civil rights by their own actions.[79] This outcome was supported by the debates. For example, when section 1 was drafted it was partially in response to a case in which a city had unconstitutionally taken property, thus coming within the statute.[80] In addition, was the factor that at the time of the debates corporations were regarded as "persons" and cities had been included within this rule.[81] Finally, Congress had enacted the Dictionary Act,[82] that included in the word "person" the phrase, " 'bodies politic and corporate.' "[83] From this reconsideration of the legislative intent relied upon by *Monroe,* the Supreme Court held that local governmental units were now "persons" within the meaning of section 1983 and were subject to suit for damages and equitable relief—if the actions taken by the municipalities derived from either an "official policy," shown by regulations, statutes, or decisions; or informal "customs" practiced by the local government.[84]

In the second major portion of the majority opinion, the Supreme Court, relying on the same statements made by the Congressmen in the previous review of the legislative history, concluded that there was no Congressional intent to hold a city liable under the theory of *respondeat superior.*[85] Interpreting the language of section 1983, the Supreme Court stated that to be held liable for the deprivation of civil rights—the city had to have caused the injury by its administrative actions and not merely because of an "employer-employee relationship."[86] There was reluctance to incorporate the vicarious liability rule into the federal law and an awareness of the competing policy reasons concerning the rule. The considerations in favor of vicarious liability were rejected since they were the same justifications rejected by Congress in the vote on the Sherman amendment.[87] Therefore it was concluded that a local government was not responsible for the constitutionl torts of its "employees or agents."[88]

Guidance for interpreting this portion of the Court's holding, that the city must have caused the deprivation of the constitutional right, was given by the

79. *Id.* at 687.

80. *Id.*, See Barron v. Baltimore, 7 Pet, 243 (1834).

81. 436 U.S. at 687-689.

82. Act of Feb. 25, 1871, Ch. 71, § 2, 16 Stat. 431.

83. 436 U.S. at 688-689. *But see* (Rehnquist, J. dissenting) (the inquiry into the word "person" began with an analysis of the Dictionary Act and not the Sherman Amendment. He stated, "The Act expressly provides that corporations need not be included within the scope of the word 'person' where the context suggests a more liberal reach." Rehnquist notes that one of the main purposes of the Dictionary Act was not to mistakenly extend the right to vote to women, 436 U.S. at 719-720).

84. 436 U.S. at 690-691. (The opinion relied on Adikes v. S. H. Kress & Co., 398 U.S. 144, 167-168 (1970) in which the Supreme Court included "custom" because a practice could be so widespread that it had the force of an official written policy). (The opinion concluded that the tenth amendment was not in conflict with this holding; nor was the eleventh amendment because "Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes," 436 U.S. at 690 n. 54).

85. 436 U.S. at 691.

86. *Id.*

87. *Id.* at 694.

88. *Id.*

reference to *Rizzo v. Goode*.[89] Commenting upon *Rizzo*, the Court added in a footnote, ". . . we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability. . . ."[90]

Despite this valuable insight, the Supreme Court was not as instructive in giving guidance on other issues; most importantly, the question of "qualified immunity." In reversing the judgments of the lower courts, it was stated that the decision was only a "sketch" of a local government's liability under section 1983 and that ". . . we expressly leave further developments of this action to another day."[91] Although clear that a city could no longer rely on "absolute immunity,"[92] in Part IV of the majority opinion, the issue of whether a city was to retain a "qualified immunity" was left open.[93] Since reliance was on *Scheuer v. Rhodes*[94] to support the rejection of absolute immunity, an inference can be drawn that the test used in *Scheuer* will be applied to cities as well as city officials. Powell's concurring opinion supported this assumption by the contention that in the case of an official, liability may be imposed if there is no "qualified immunity" and that the majority's holding extends this rule ". . . to a local government when implementation of its official policies or established customs inflicts constitutional injury."[95]

As to whether the instant holding reversed the facts of *Monroe*, or the other cases following the "nonperson" rule, the opinion expressly declined to give any indication; with the exception of upholding *Kenosha's* rejection of the "bi-

89. 423 U.S. 362 (1976). (The plaintiffs instituted a class action under section 1983 against city officials alleging that the officials were responsible for a pattern of constitutional violations by city police officers. But the Court stated, "[A]s the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct," 423 U.S. at 371).

90. 436 U.S. at 694.

91. 436 U.S. at 695.

92. *Id.* at 700.

93. *Id.* at 701.

94. 416 U.S. 232 (1974). (Where parents of students killed at Kent State brought a section 1983 action against the Governor of Ohio, the Adjutant General of the National Guard, various officers of the National Guard, enlisted members of the National Guard, and the college president of Kent State University, the Supreme Court held that the eleventh amendment did not bar suits against the state officials under the authority of Ex Parte Young, 209 U.S. 123 (1908), and there was not an absolute immunity for the state officials; but only a qualified immunity. On the issue of the executive immunity the Court stated, ". . . a qualified immunity is available to officers of the Executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which the liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances coupled with good-faith belief that affords a basis for qualified immunity. 416 U.S. at 247-248). *See also* Wood v. Strickland, 420 U.S. 308 (1975) (Immunity of school board members). *See generally,* Fullwood, Immunity under 42 U.S.C. Section 1983, 7 N. C. CENT. L. J. 39 (1975-76).

95. 436 U.S. at 707-708. (Powell, J. concurring) (Justice Powell further stated that had the absolute immunity of a city been affirmed; eventually, the Supreme Court would be faced with an issue as to whether a plaintiff could invoke his action directly from the fourteenth amendment under the theory of Bivins v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971), 436 U.S. at 712).

furcated" approach.[96] Applying the holding of *Monell* that the liability of the city cannot be based "solely" on the theory of *respondeat superior,*[97] absent any showing of "policy" or "custom" employed by the city of Chicago that permitted its officers to resort to illegal searches and seizures in investigating crimes and therefore causing the violation of the victim's constitutional rights; the outcome of *Monroe* would be the same.

In addition, the decision was lacking in any discussion of policies for or against municipal liability. Justice Brennan noted the fact *Monroe* also refused to consider policy arguments.[99] In *Monroe* it was argued that the cities should be liable ". . . because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level."[100] These arguments have been repeated by commentators; for instance, one writer brought attention to the fact that even though there was a newly discovered right to have grievances heard in the federal courts after *Monroe,* the "nonperson" doctrine often denied any form of relief unless the individual defendant was able to satisfy the judgment; which in turn, created numerous decisions on various forms of immunity.[101] Because the burden usually fell on the innocent plaintiff, it was urged that placing the loss on the local government would be more equitable since the city or county could spread the loss among the taxpayers.[102] A further assertion was that the cities would be protected by the jury trial since juries favor cities over minorities (the most common plaintiffs in cases under section 1983).[103] Among the arguments advanced for not imposing liability on the municipality was that an individual officer would not be deterred from violating constitutional rights if he or she knew the employer would be ultimately responsible.[104] Also was the contention that cities, in obtaining liability insurance, have had the right to rely on the "nonperson" rule of *Monroe.*[105] The argument is weakened by the fact that cities are subject to suit in state courts[106] and can also be subject to suits under the general federal question jurisiction of 28 U.S.C. § 1331, provided the requirements of diversity of citizenship and of the amount of controversy are established.[107]

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96. 436 U.S. at 701 n. 66.

97. 436 U.S. at 701.

98. For an example of cases following the "nonperson" rule; but also refusing to impose vicarious liability; *See* Lyle v. Village of Golden Valley, 310 F. Supp. 852 (D.C. Minn 1970). For an example of cases that followed the "nonperson" rule; but which alleged an unconstitutional policy; *See* Black Brothers Combined, etc. v. City of Richmond, 386 F. Supp. 147 (E. D. Va. 1974).

99. 436 U.S. at 664 n. 8.

100. 365 U.S. 167, 191 (1961) (Footnotes omitted).

101. Katton, *Knocking on Wood, Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions,* 30 VAND. L. REV. 941, 955-956 (1977).

102. Kates & Kouba, *supra* note 8, at 138-139.

103. Hundt, *Suing Municipalities Directly Under the Fourteenth Amendment,* 70 N. W. L. REV. 770, 797 (1975-76).

104. *Id.,* at 783.

105. 436 U.S. at 717. (Rehnquist, J., dissenting).

106. *See* note 58 *supra.*

107. *See* City of Kenosha v. Bruno, 412 U.S. 507, 516 (1973) (Brennan, Jr., concurring). *See generally* Bodensteiner, *Federal Court Jurisdiction of Suits Against "Nonpersons" for Deprivation of Constitutional Rights,* 8 VAL. U. L. REV. 215 (1973-74); Note, *Damage Remedies against Municipalities for Constitutional Violations,* 89 HARV. L. REV. 922 (1975-76).

IV. CONCLUSION

Although *Monell* has abolished the absolute immunity doctrine for municipalities in section 1983 actions, plaintiffs are still precluded from holding local governments vicariously liable for the actions of their employees; and as a consequence, those injured may still be left without a remedy if the individual employee is not made to compensate for the violation of the right protected by the Constitution. However, *Monell* has altered the *Monroe* holding when the city has been shown to have caused the deprivation by its "official actions." The most important issue left unresolved is that of "qualified immunity." The questions of whether cities and counties will be given the same degree of qualified immunity as their officials or whether that degree will be of different dimensions will be developed in the lower federal courts. In formulating the new contours of qualified immunity for municipalities the assistance of briefs and arguments from counsel representing section 1983 litigants will be invaluable.

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