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Memorandum to: Mr. Justice Powell
From: Sam Estreicher
Date: November 4, 1977

Re: No. 75-1914, Monell v. Dep't of Social Services

Because I have heard through the "grapevine" that some of the other Justices may be receptive to a reexamination of Monroe v. Pape along the lines that I have suggested to you, I thought it might prove useful to offer a relatively brief restatement of my approach.

I propose a reexamination of the meaning of the 1871 Congress' rejection of the Sherman Amendment. In my view, the measure was rejected because (1) it sought to impose liability for failure to prevent or take action against lawlessness when many municipalities lacked general police powers under the law of their states, and (2) it imposed vicarious, indeed strict, liability for the conduct of private individuals. Contrary to the language of some of our prior decisions, I doubt where there was any general intention to shield municipal and county treasuries or whether the Republican legislators entertained serious doubts as to congressional power to legislate with respect to political subdivisions of a state.

The legislative history can best be understood as a limiting the statutory ambit to actual wrongdoers, i.e., a rejection of respondeat superior or other principle of vicarious liability. There is no dispute, after Monroe at least, that a public official can be held personally

answerable in damages for his own conduct in violation of the Constitution. The question is when can a governmental entity be held liable for its wrongdoing. Of course, the argument can be made that all action "under color of law" is attributable to the governmental entity which can be said to have authorized the conduct by clothing the wrongdoer with public office. This position was rejected in Monroe. And I would argue that the preclusion of governmental liability for the tortious conduct of individual officials which was not mandated or specifically authorized, and indeed may be violative of state or local law, is consistent with the rejection of vicarious liability as an operative principle of the statute. Since the claims in Monroe and Moor v. County of Alameda were expressly founded on the doctrine of respondeat superior, they would not be maintainable under my theory.

At the other extreme, local ordinances, school board regulations and consciously adopted policies or practices, in the Rizzo v. Goode sense, constitute conduct by the governmental entity qua entity. It would be absurd to hold public officials personally liable for implementing such laws or policies, unless, of course, the laws were patently unconstitutional. If there is any wrongdoing, it is in the policy itself, not in the implementation. If there is a "wrongdoer," it is the promulgator of the law or policy.

City of Kenosha v. Bruno involved the rejection of liquor licenses by the governing bodies of the municipality. Under my view, that case was wrongly decided. It was the first case to apply Monroe to conduct which was both authorized under state law and directly -- rather than vicariously -- responsible for the claimed constitutional injury. The legislative history of the Sherman Amendment, and the possibility that the approach taken in Monroe might not apply outside of the respondeat superior context, was neither briefed nor argued, for the Court raised the jurisidictional question on its own motion. My view, however, does not require overruling City of Kenosha, for no individual public officials were made party to that litigation at the outset. The Attorney General of Wisconsin intervened as party defendant, but the lower court had not addressed "whether the intervention of the Attorney General as a party would cure the jurisdictional defect which we now find to exist in appellees' complaint." 412 U.S. at 513-14. The Court remanded on this point. In all frankness, it should be noted that City of Kenosha involved a claim for equitable relief only.

One further point about City of Kenosha. That decision will have to be disturbed no matter what the Court does in the Monell case. Petrs have asserted a theory that is consistent with the language of City of Kenosha: resp public officials are indisputably "persons"

for purposes of § 1983, and City of Kenosha counsels against a "bifurcated application" of that term "depending on the nature of the relief sought against them." 412 U.S. at 513. From resps' point of view, however, the answer is that affirmance of CA 2's decision does not mean that public officials are not "persons" in § 1983 damages actions, but rather that such relief is not available against them.

In all likelihood, Aldinger v. Howard is also at odds with my approach. In that case, a county appointing officer, acting pursuant to a state statute which authorized him to "revoke each appointment at pleasure," discharged a clerk. Since the defendant was acting pursuant to express state authorization, there would be public entity liability for the consequences of this express policy of the public entity. It should be noted that plaintiffs in that case conceded that the county was not suable under the Act.

The difficult cases lie in the middle, where the public official is exercising delegated authority in a manner fully consistent with state and local law. I would break these cases down into two categories. First, there is the situation exemplified by a police chief who announces a policy to all field officers that they are to stop and frisk anyone they please without worrying about "articulable suspicion" or other legal mumbo-jumbo -- the type of police practice contemplated in the Rizzo decision. The police chief would be individually liable, I

would think. But is the city liable simply because it has not acted to curb this particular exercise of the authority delegated to the police chief? My tentative answer would be in the affirmative. The city has allocated its policy-making power in such a way that the police chief acts for the city in making policy on police matters. Accordingly, the city is responsible for its policy, even though promulgated by a delegatee.

Second, I would distinguish the case of a police chief who dismisses his secretary without a hearing or because of her first amendment activity. In such a case, the police chief, while acting "under color of law," is not making policy for the city. The police chief may be personally liable, barring any defenses, but he cannot be held liable in his official capacity.

One final note. No prior decision need be overruled if the Court holds that while governmental entities are not "persons" under the Act, the policies behind the rejection of the Sherman Amendment do not prevent retroactive or restitutionary relief against public officials in their official capacity where the governmental entity qua entity can be said to have worked the constitutional injury in question.

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I am not sure this discussion will persuade you to my view, but I thought you would appreciate a more coherent statement of this approach than is contained in the bench memo.