RE: Monell v. Dept. of Social Services, No. 75-1914

This memo is a brief and rough attempt to summarize my thoughts on this case. I am sorry if it is not polished but I am trying to get it to you as soon as possible.

The approach we discussed before the conference can be summarized as follows. Monroe v. Pape was, while correct on its facts, overbroad in its implication that a city is never a "person" for purposes of liability under 42 U.S.C. § 1983. Monroe wrongly read the defeat of the Sherman Amendment as indicating Congressional intent to exclude cities entirely from the scope of § 1983. In fact, as the amicus brief in this case persuasively shows, the Sherman Amendment was defeated only on the narrower basis that it was improper to impose upon municipalities the sort of strict liability for constitutional violations within their borders that the Amendment proposed. Monroe itself, which involved an attempt to impose vicarious liability upon a city for search and seizure violations committed by its policemen, can be justified under the same principle. In effect it was an attempt to impose simple respondeat superior liability for the unauthorized acts of municipal employees. But this case is different. Here petrs claim that the city's own formally adopted

policy of enforced pregnancy leave deprived petrs of constitutional rights. Where, as here, the claim is that the city's own actions violated a plaintiff's constitutional rights, I would allow the City to be sued.

As I understand the disquiet you expressed last might, it is as follows. You accept that, were this case res nova, this approach would be intellectually sound and appropriate. However, Monroe v. Pape and City of Kenosha v. Bruno have clearly held that a city is "not a person" under § 1983. Thus, this approach would require a square, if partial, overruling of those cases, which you are reluctant to do. Second, you are uneasy about imposing § 1983 liability upon cities since you think that § 1983 liability has been expanded beyond proper limits.

1. I do not think that stare decisis has much weight here. First, it cuts both ways. While it is true that Monroe and Kenosha are square holdings, it is also true that in a wide variety of cases, notably the school desegregation cases but also such cases as Roth, Tinker, and Pickering, jurisdiction has been asserted over school boards without question. Affirming the CA would indicate that jurisdiction did not exist in any of those cases. Thus, either way one will have to reject prior cases to some extent. Second, as I said yesterday, I don't think the reliance aspect of stare decisis has any weight here.

It is most unlikely that any city has committed constitutional violations in reliance upon its § 1983 immunity. Thus, stare decisis in this case comes down to an abstract intellectual principle, one which this Court has not been unwilling to reject when it strongly felt the earlier case was wrongly decided. E.g., Nat'l League of Cities or the Corvallis case. Moreover, one can (verbally at least) evade Monroe (by saying it was correct on its facts) and Kenosha (where no one challenged the vitality of Monroe in damages cases. Finally, if your concern is intellectual consistency, I think that ensuring a rational § 1983 jurisprudence should be of at least equal concern?

2. I am concerned that affirming the CA would lead ultimately to the virtual elimination of injunctions as a remedy for constitutional violations under § 1983. It is clear under Kenosha that the city itself cannot be enjoined. This case would hold that neither an agency of the city, nor municipal employees in their official capacity, can be liable in damages. But Kenosha squarely held that a "person" for damages isn't a "person" for injunctions. The clear application of this holding would be that agencies and employees sued in their official capacities could not be enjoined. An injunction could thus run only against an employee sued in his ~~official~~ capacity. But this would make the injunction worthless.

For example, if the members of a Board of Education were enjoined from establishing segregated schools, if they resigned or retired their successors -- not being parties to the prior suit -- would not be bound. This prospect appalls me.

Of course one could avoid this problem by importing into § 1983 jurisprudence the Ex parte Young fiction and allowing the official to be enjoined in his official capacity. However, as the petrs and amicus show, the sovereign immunity rationale of Ex parte Young has no application here, where we are construing a Congressional statute. Moreover, this would be intellectually atrocious. There is no way the word "person" can logically be tortured to produce that result. Most important, this result would require at least a partial overruling of the square holding of Kenosha. At least my approach overrules Kenosha only on an issue not squarely presented.

3. Scheuer v. Rhodes and the other immunity cases recognize that it is important to permit municipal officials to make decisions free from concern about possible damages liability. I agree. But the CA's holding, and Monroe to the extent it is involved here, work completely contrary to that goal. The individual officials would be liable (unless they are entitled to

immunity) for the conduct in question here, even though it was a matter of promulgating or enforcing official city policy; the city itself would not be. Would it not go farther to ensure unfettered administrative decision-making if the city were held liable for its own policies?

4 I think your most deeply felt concern is that § 1983 liability has been extended too far. But I do not think that perpetuating or extending erroneously law in the remedial area is a proper counterweight to erroneous substantive law. It is clear that in enacting § 1983 Congress intended to provide a remedy for violations of constitutional rights, even if Congress did not foresee how far constitutional rights might extend. The cases covered under the approach I advocate would involve what might be considered "core" violations, since the challenged activity would be municipal policy and not individual action. Even Justice Frankfurter would have considered this conduct to violate the statute. It is precisely in these cases that a remedy is most appropriate; it is precisely in those cases that it is most appropriate to impose liability on the city which is responsible for the challenged activity, as I stated above.

We are not dealing with a judicially implied remedy but a Congressionally enacted one. This

significantly limits, I think, the Court's freedom to take from Peter to pay Paul. To say that because § 1983 liability has been improperly extended on the periphery we are going to judicially reject Congressional intent (as demonstrated by the amicus brief) strikes me as an impermissible method of decision making for this Court to adopt. Moreover, I come back to the point I raised last night. As an intellectual matter and as a practical matter, do two wrongs make a right? What if in the future the Court agrees with you and cuts back on substantive § 1983 law? Then you will be faced with a square, on all fours holding as to municipal liability, a holding that you will (I think) recognize is erroneous, but one that will be much harder to overrule. I do not think that is a desirable result. Stick to your guns on the scope of § 1983 liability, but don't try to approximate the same goal here.

rl