Reviewed 1/6. Fascinating memo - must re-read

The Petr., police chief, was discharged by City Mgr - who had authority under Charter. The City Council merely received an investigation report (on laxity in taking care of drugs) to Prosecuting Atty for presentment to G/Jury.

DOS One Council member defamed Petr. & was sued separately. Then suit was under 1983 vs City, [redacted] & City Mgr & members of Council in their representative capacities.

Petr claimed violation of procs. interest in his job & liberty interest in his reputation. Also claimed (esp in Reply Brief) denial BENCH MEMORANDUM of D/P hearing. Demanded back-pay & declaratory & injunctive relief.

TO: Mr. Justice Powell

FROM: David CA8 & agreed with DC that there was no proc. right violated (no terms involved), but CA8 - on remand after

DATE: Jan. 1, 1980 Monell - reaffirmed its view that Petr's liberty interest in his good name had been

RE: No. 78-1779, Owen v. City of Independence impinged by official action of City Council & City Mgr. CA8 held, however, that as this occurred

QUESTIONS PRESENTED: before Roth & Sindermann, good faith was a valid defense. CA8 then accorded the City qualified immunity.

1. Following Monell v. Department of Social Services, 436 U.S. 658 (1978), should the qualified immunity available to individual officials be extended to local governments?

→ No official action or policy caused actionable harm to Petr. The [redacted] City Mgr & Council acted properly. Neither slandered Petr. The Council merely referred a report to the Prosecutor. It passed no judg. Nor did Mgr. slander Petr. He had right under City Charter to discharge. Only person who defamed Petr was Councilman Roberts - & he was sued separately.

2. Should the qualified immunity be applied against declaratory and equitable relief as well as damages?

I. INTRODUCTION

Petr was head of the city Police Department in 1972, when inefficiency in the property room came to light. Contraband that should have been destroyed was found in the possession of criminal suspects. Alberg, the city manager, resolved in early April that petr would have to go. On April 10, 1972, Alberg asked petr to resign and on the following day he threatened petr with discharge.

Since no defamation, no need for a "name clearing" hearing.

Absent official action or policy, we don't reach immunity issue.

On April 13, Alberg secured the agreement of another police officer to take over petr's job. The same day, Alberg stated publicly that a "routine audit of the police property room" had turned up "discrepancies." He also said, "There appears to be no evidence to substantiate any allegations of a criminal nature." On April 15, petr asked for a full statement of reasons for his discharge, along with an opportunity for a hearing on the merits of the discharge. Petr made a similar formal request on April 26, which was denied by Alberg on advice of counsel on May 3.

This suit arises primarily because of the events of the evening of April 17. Councilman Roberts, whose term of office expired two weeks later, acquired an internal city report documenting administrative shortcomings in the Police Dept. Roberts vigorously denounced petr in a Council meeting on April 17, and the Council then adopted a motion that the report be referred to the prosecuting attorney for presentation to the grand jury. Official action by City Council - but it was proper

Alberg discharged petr from his position the following day, stating only that he was terminated "under the provisions of Section 3.3(1) of the City Charter." Section 3.3(1) authorizes the city manager to dismiss police officials for the good of the service. Subsequently, the grand jury returned a "no true bill" against petr and the criminal matter was dropped. There was substantial publicity throughout the affair.

Petr filed suit against Roberts in state court, alleging libel, slander, and malicious prosecution. He obtained a financial settlement in that action. Petr also sued the current resps in federal court under § 1983 and the Fourteenth Amendment. He alleged

Suit vs. Roberts was settled.

Π sued City, City Mgr & Council

that he had been denied his "property interest" in his employment without due process, and that his "liberty interest" in his reputation were injured by the "stigma" imposed by the circumstances of his discharge. Petr sought declaratory and injunctive relief, including a hearing on his discharge, back pay, and attorney's fees. The DC entered judgment for resps because it found no property interest in continued employment, and because respondents "did not impose a stigma of illegal or immoral conduct on [Owen]'s professional reputation." Petn, at A67.

DC no stigma interest

CA8 affirmed the DC's ruling on the property interest claim, but reversed on the stigma/liberty issue. "[T]he action of the City of Independence as employer served to blacken Owen's name and reputation," the court ruled. Id., at A31. "That the stigmatizing charges did not come from the city manager and were not included in the discharge notice is immaterial, because the official actions of the city council released charges against Owen contemporaneous and, in the eyes of the public, connected with that discharge. It is the fact of the City's public accusation which is of prime importance, not which official made the accusation." Id., at A31-A32 (emphasis supplied). Presumably the only accusation that CA8 could refer to was the statement by Councilman Roberts, which is quoted liberally throughout petr's brief.

Judge Van Oosterhout dissented. He pointed out that any stigma had to come out of the City Council meeting, but that by local ordinance the council members were barred from any influence over the city manager's decisions to hire and fire. Judge Van Oosterhout conceded that under the circumstances the public impression of Owen's

dismissal might be negative, but insisted the "nothing in the discharge process itself cast a stigma upon plaintiff." Id., at A44.

CA8's decision was vacated by this Court following the decision in Monell, and remanded for further proceedings. On remand, the CA reaffirmed its substantive holding: "We conclude that the stigma attached to Owen in connection with his discharge was caused by the official conduct of the City's lawmakers, or by those whose acts may fairly be said to represent official policy." Id., at A4. The court, however, went on to find that the City was entitled to a good-faith immunity defense. The City Charter provided Owen no right to a hearing, the court noted, and the City had no reason to think the Constitution mandated one since the dismissal took place two months before this Court's rulings in Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sinderman, 408 U.S. 593 (1972). The City had no reason to suspect, then, that petr might have a post-dismissal right to a name-clearing hearing. Since the City, like the individual respondents, "acted in good faith and without malice," Petn, at A7, CA8 affirmed the judgement of the DC denying petr any relief.

II. DISCUSSION

My threshold problem with this case is that I believe CA8 erred in overruling the DC's decision on the violation of petr's "liberty" interest in his good reputation. Whatever stigma was attached to his name came from the statements of Councilman Roberts. Petr pursued a cause of action against Roberts in state court and

apparently won a settlement. His dismissal by the City was coincident to Roberts' statement and may well have contributed to the weight given to his remarks by the public. But the city manager had resolved to discharge petr before Roberts made his speech. Surely the City was not obligated to keep Owen on until it could be sure that there would be little or no public notice of his dismissal. Indeed, it is inconceivable that the head of a police department could be cashiered without attracting some attention. Since the discharge process itself cast no stigma on petr, I see little merit to his claim against the City, especially since he has already recovered against Roberts.

As this brief discussion suggests, there is also lurking in this case some question about the relationship between the City as a corporate entity and Roberts as a legislator. I am uncomfortable with the notion that defamatory statements by legislators can lead to liability for the entire governmental entity. There is a tangential relationship between this question and the issue currently before the Court in United States v. Gillock, and a stronger connection to the holding last term in Lake Country Estates v. Tahoe Regional Planning Agency. The latter case held that local legislators enjoy absolute immunity from §1983 suit for activities undertaken as part of their legislative duties. Regardless of whether petr could sustain an action against Roberts under §1983 (Roberts was not named as a defendant in this case), it disturbs me that CA8 thinks the City should be held responsible for his statements.

But Both of these points represent only background to this case. Neither is raised in the opinions below or the briefs. Moreover,

this Court clearly granted cert so it could wrestle with the post-Monnell immunity question, to which I now turn.

A. Monell -- The crucial holding in that case for this appeal is the statement that municipalities may be liable under § 1983 only for "customs" or "policies", but may not be sued on a respondeat superior theory for the isolated constitutional torts of its officers. The following passage is critical:

> "We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's poliy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation . . . we must reverse . . . . In so doing, we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be."

436 U.S., at 694-695. In your separate concurring opinion, you offered a few suggestive hints on this question. "There are substantial line-drawing problems in determining 'when execution of a government's policy or custom' can be said to inflict constitutional injury such that 'government as an entity is responsible under § 1983.'" Id., at 713. The facts in Monell, which involved a written directive that pregnant employees be placed on leave from government employment, presented "the clear case," but subsequent issues might

be more difficult.

A central ambiguity left by Monell is the distinction between isolated "acts" by government employees, which may be remedied through § 1983 suits against the individuals, and those constitutional deprivations that so flow from governmental policies and customs that the City is the proper defendant. See Note, Municipal Liability Under Section 1983: The Meaning of 'Policy or Custom', 79 Colum. L. Rev. 304 (1979). A situation like that in Monell -- involving a written policy that was followed down the line by public employees -- is an easy case. On the other side, a city clearly would not be liable for police brutality if, for example, the police department had stringent rules against such behavior and such incidents had never occurred previously. The gray area between these poles, however, is large.

On the basis of my current understanding of this case, I could argue that there was no governmental policy that injured petr. Rather, whatever stigma attached to him derived from ~~that~~ actions of Roberts, a legislator acting alone and not in accordance with any established government policy or custom. Neither the petr nor the courts below found the stigma to have come from the the full Council's action in referring the internal report to the local prosecutor, and that is the only corporate action that would appear to satisfy the "policy" criterion of Monell. It might be argued that any action by a "policymaking" official, as opposed to a down-the-line bureaucrat, represents Government policy. See Schnapper, Civil Rights Litigation After Monell, 79 Colum. L. Rev. 213, 222 (1979) (arguing that any "act" by a policymaking official is policy for the

Stigma did not come from Council's action

Petr's Reply Brief focuses on failure to provide hearing

purposes of a § 1983 suit after Monell). But this seems unconvincing when dealing with the statements of a lone legislator.

In petr's reply brief, he insists that he is attacking the denial of the hearing, not the actual stigma, and that the denial of a hearing was part of the City's "policy" of not granting such hearings. Thus focused, the issue before this Court is simply whether the City should be liable in Court for failure to provide such hearings.

B. Immunity -- It is important to distinguish the act/policy standard established in Monell from the immunity question. Even if an event is determined to fall within the "policy" category, a municipality would still not be liable to suit if it could assert a good-faith immunity defense. As a procedural matter, I would first look to the standard established by Monell -- was a policy involved? -- and then consider the immunity issue that was expressly reserved in that case. Thus the question argued in this case assumes that the stigma imposed ~~in this case~~ derived from a governmental policy under the act/policy dichotomy. The question then remaining is: Even if a governmental policy causes an unjustified constitutional deprivation, should the municipality have a qualified immunity from liability for that injury? The parties dispute this issue on three levels: (i) municipal immunities under the common law, (ii) the legislative history of § 1983, and (iii) general policy considerations.

Yes

1) Common Law -- Petr argues that unless the common law provided for immunity for municipalities, there is no basis for imposing such an immunity from § 1983 suits. Amicus National Education Ass'n lists at some length the circumstances under which

municipalities were subject to suit in the 19th century: breach of contract, statutory violations, and torts. I do not find this exercise especially enlightening, however. Nor do I

First, much of the NEA's focus is on the absence of immunity for damages. But in a section of City of Kenosha v. Bruno, 412 U.S. 507 (1973), which should survive Monell, this Court held that there can be no "bifurcated" immunity for local governments depending upon whether equitable or damages relief is sought. Second, it is clear that municipalities did have some immunities in the 19th century. Yes The distinction was between "governmental" and "proprietary" functions of the entity. To the extent that a municipality was acting within a charter from the State, under this view, the municipality was entitled to the State's sovereign immunity under the Eleventh Amendment. For functions that the local government had voluntarily undertaken functions at the behest of its citizens, it was subject to suit. This governmental/proprietary distinction is clearly most unwieldy, and, fortunately, has passed from the scene. But it does suggest that municipalities enjoyed some immunities, although it also suggests that those immunities were complete rather than qualified. Third, this Court has not always insisted on finding a common law immunity before agreeing to a § 1983 immunity. Although cases involving immunity of legislators and judges have relied on common law precedent, Procunier v. Navarette, 434 U.S. 555 (1978), found a qualified immunity for prison officials without even a glance at the common law. It might be argued that Navarette simply drew on the general discussions of executive immunity in cases like Scheuer v. Rhodes and Wood v. Strickland, but I would view the its neglect of

the common law as a rational response to the problem of applying a nineteenth century statute (§ 1983) to current social and legal situations.

2) Legislative History -- Monell chewed over the legislative materials of the 1871 Act pretty well. Petr argues that any type of immunity for municipalities would be inconsistent with the broad remedial intent of the 42d Congress. Amicus National Education Ass'n argues more specifically that congressional silence on the question of municipal immunity must mean that no such immunity was contemplated. Respondent replies only that federalism concerns should restrain our extension of liability in the presence of the congressional silence. I would offer a somewhat more adventuresome view of the legislative record of 1983. (I should point out that this view is based entirely on second-hand exposure to that record.) The pivotal event in the consideration of § 1983 was the defeat of the Sherman Amendment, which would have imposed vicarious liability on local entities for damage caused by mob violence. The congressional rejection of that "riot act" provision underlies Monell's conclusion that Congress did not intend a municipality to be liable for damages on a respondeat superior theory. Similarly, I would draw from that action some congressional concern over the consequences of unlimited liability for municipalities. This concern would provide some support, even if only indirect, for a version of municipal immunity. Monroe v. Pape, after all, was not entirely wrong in its interpretation of the legislative history.

3) Policy considerations -- Petr argues somewhat persuasively that the concerns that motivate qualified immunity for

individuals are inappropriate when the defendant is a corporate entity. Individuals might be likely to modify their behavior quite dramatically in the face of possible financial liability, or they might refuse to take public office. Municipalities, however, face financial liability in innumerable activities (such as inverse condemnation suits, breach of contract actions, etc.), and decisionmakers carry on with the functions of government without noticeable handicap. Petr's argument might be seen as falling within the "Goldilocks" paradigm: One of the purposes of imposing liability for constitutional deprivations under § 1983 is to change official behavior; for individuals, financial liability would be so burdensome that it would distort official conduct so qualified immunity is necessary; for governmental entities, however, the deterrent effect is just right. Petr also argues that we cannot worry about the financial consequences of such liability for local governments since we are talking about legal rights that must be remedied.

Resp rants about extra costs of liability but offers no hard evidence as to the possible magnitude of that cost or logical reason why those costs should not be viewed as the price of running a government. It also argues that unless municipalities, like individual officials, have qualified immunity, potential plaintiffs will tailor their suits to run against the governments at all times. I cannot say that this would be a bad outcome, however. Indeed, Congress has been considering legislation to waive sovereign immunity in Bivens suits in order to relieve executive officials of the threat of liability. So long as the constitutional deprivation derives from a "policy" of the government, it makes sense as an economic matter to

have the entire government internalize the cost and make appropriate adjustments of policy. Resp's argument is more telling in the context of "structural" remedies imposed by federal courts in § 1983 actions. From this point of view, the lack of immunity could result in a loss of local autonomy. In addition, resp points out that the federal government and the States have immunity from § 1983 actions, but the lowest and poorest level of government does not.

4) Summary -- Full consideration of the issue in this case -- which presents more nearly a legislative-type decision than do most cases -- is severely limited by the odd brief submitted by the City. Because I view the common law and legislative history inquiries as a draw between the parties at best (and as irrelevant at worst), I would focus on the policy of § 1983 and the best way to provide for the vindication of constitutional rights without obstructing government. On balance, petr's policy arguments seem stronger. There is no basis at this point in our history for arguing that municipalities enjoy some reflected 11th Amendment immunity. There has been no showing that without qualified immunity the burden of §1983 suits against municipalities will be too onerous. Since the entire community imposed the deprivation caused by a city policy, municipal liability seems appropriate since the entire community will bear the remedial costs and will have an incentive to change that policy.

C. This Case -- The City presents an attractive candidate for a good faith defense because from any rational viewpoint, there was no reason for it to know that the due process clause requires a name-clearing hearing before a public employee may be discharged in

stigmatizing circumstances. Indeed, the city manager diligently asked the city's attorneys if a hearing was required and those lawyers, writing before Roth and Perry v. Sinderman, assured him that no hearing was necessary. Still, on the merits of the argument, I am not sure that immunity is justified.

Consequently, I have spent some energy trying to figure out an alternative approach. The first, as noted above, would be to find that petr has no cause of action under § 1983 because he was not injured by any policy of the City. Petr's response is that his injury was caused by the failure to grant him a hearing, and that the City's policy at the time was not to grant such hearings. I think petr moves a bit too fast here. Roth held that a name-clearing hearing might be justified if the public employer made "any charge against [the discharged employee] that might seriously damage his standing and associations in his community." 408 U.S., at 573. If, as I argue above, the City cannot be held liable for Councilman Roberts's remarks, and if the discharge process as conducted by the city manager did not result in any direct implication of stigma, petr has no valid claim to a hearing. As in Roth, the City here neither alleged "dishonesty or immorality," nor took steps to bar petr's employment by other governments. Consequently, I would find that petr has no cause of action.

I figure I may as well give you the benefit (?) of my other ruminations on alternative holdings. One would concentrate on the retroactivity of Roth and Perry. Judged by the standards of Chevron Oil v. Huson, 404 U.S. 97 (1971), the holdings in those cases might not be properly retroactive: 1) They could be characterized as

presenting an "avulsive" change in the law; 2) They were likely to cause a burden on the courts; and 3) governmental institutions had ordered their affairs in reliance on the previous rule of law. Nevertheless, this seems a bit late to rule on retroactivity of 1972 cases, and there is no whisper of that issue in this case to date.

Which led me to the question of remedy. Perhaps the best approach would be to view petr's claim as similar to that in Carey v. Piphus, 435 U.S. 247 (1978), where your opinion for the Court held that denial of procedural due process was compensable by only $1 in damages. This all gets a bit thorny, since there is a substantial discussion in Piphus contrasting the injury caused by a denial of process with that caused by defamation. Piphus states that the common law's presumption of damages in defamation actions was reasonable, but that a similar presumption makes no sense in the context of a denial of process when the action taken -- in that case the suspension of students -- was justified. My confusion arises in connection with the characterization of petr's injury. He insists that he is complaining about the absence of a "name-clearing hearing. He does not challenge the propriety of his sacking. He does not allege that the City is in any way responsible for the defamatory remarks of Councilman Roberts. Thus his claim begins to sound very similar to that in Piphus. Yet he is also claiming that he is entitled to a hearing to remove the stigma of his removal. Again, so long as one can argue plausibly that there was no stigma imposed by the City's action, it is inconceivable that Piphus would not apply. I would not get this far in this case, however, since I think a conclusion that there was no stigma imposed by the city would strip

petr of any right to a hearing under Roth, and unsuit him.

David