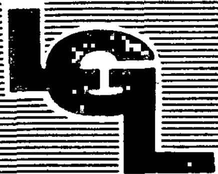
BULLETIN
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SCHOOL OF GOVERNMENT

A NEW SUPREME COURT VIEW OF GOVERNMENTAL IMMUNITY

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ON JUNE 6, the United States Supreme Court handed down a decision with important implications for all local governments. In Monell v. New York City Department of Social Services (46 U.S.L.W. 4569), the Court held that a person whose federal civil rights are violated by the official policy or custom of a local government may sue the government directly and may recover money damages from the unit's public funds.

The facts before the Court were these: The New York City social services department and the city's board of education had written policies forcing employees to take unpaid leave at an arbitrary point during pregnancy. In 1971 certain affected employees filed this § 1983 claim* as a class action, asking for an injunction against further enforcement of the policies and back pay for the time involuntarily lost from work. Significantly, they sued the governmental agencies directly and the agency heads in their official capacities rather than suing them as private individuals. (The six defendants were the department of social services and its commissioner, the board of education and its chancellor, the City of New York and its mayor.) Once action was filed, the departments dropped their leave requirements, but the employee-plaintiffs continued to press the back-pay portion of their claim. In 1974 the United States Supreme Court held such forced-leave policies unconstitutional (Cleveland Board of Education v. La Fleur, 414 U.S. 632).

In Monell, the district court and the Second Circuit Court of Appeals, which affirmed, recognized on the basis of La Fleur that the defendants

*"1983" refers to 42 U.S.C. § 1983, a portion of the federal Civil Rights Act of 1871, which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of 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."

had violated the employees' constitutional rights; following the precedent of Monroe v. Pape (365 U.S. 167 [1961]), however, these courts held that no monetary recovery was possible under § 1983 against any local government agency or its officers in their official capacities. Section 1983 states that "any person" who deprives another of his federal constitutional rights shall be liable to the aggrieved party. Monroe held that a municipality was not a "person" within the meaning of § 1983 and that Congress had never intended by that legislation to obligate public treasuries to reimburse individuals whose rights were violated by public agencies.

The Supreme Court here overruled the Monroe holding, thereby opening the way for the Monell plaintiffs to recover from the governmental defendants and indicating that in the future government itself, in certain circumstances, must reimburse persons with cognizable § 1983 claims against the governmental unit. The Monell majority opinion (by Justice Brennan joined by Justices Stewart, White, Marshall, Blackmun, Powell, and, in part, Stevens) first reviews the legislative history of § 1983 and reaches a different conclusion from the Monroe Court's holding--that is, "that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies." From that premise the Court reasons that plaintiffs may gain financial, declaratory, or injunctive relief from local governments when the plaintiff's constitutional rights have been abrogated by persons who are carrying out an official policy or custom of the governmental body. The opinion justifies overruling Monroe on four grounds. First, re-examination of congressional debate on § 1983 proves beyond a doubt that the Monroe Court misunderstood the meaning of the act. Second, Monroe has never been clear precedent because other opinions of the Court, ones in which jurisdiction was not challenged, have held some local governments (specifically, school boards) liable under § 1983. Third, Congress has recently indicated (through the Civil Rights Attorneys' Fees Act) a desire to hold all local governments liable under § 1983. Finally, the usual reason for keeping to precedent--that parties have relied on it--should not apply when reliance would mean allowing parties (here local governments) to continue to violate constitutional rights without fear of the consequences. Justice Powell's concurring opinion elaborates on the ill effects of Monroe and the need to overrule it, as well as on the advisability of placing responsibility on local government for its constitutional torts. The dissenting opinion, by Justice Rehnquist joined by the Chief Justice, reiterates the benefits of maintaining legal precedents, denies that the Monroe Court's construction of § 1983 was clearly mistaken, and expresses concern over the practical consequences for local government of removing its protection from liability.

Though Monell also reverses the holding (City of Kenosha v. Bruno, 412 U.S. 507 [1973]) that local governments are immune from suits for injunctions, its greater impact no doubt lies in the holding that these units can be liable for damages in § 1983 actions. The opinion raises but does not answer certain important questions concerning the scope of that damage liability. First, the Court left unclear which officials or employees are in a position to make the "official policies" that create potential liability. It stated that government is not liable for an independent wrongful action of an employee merely because of the employer-employee relationship: "[I]n particular, we conclude that a municipality cannot be held liable solely because it employs a tort-feasor--or in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." The facts of Monell made it easy for the Court to conclude that in that case

the challenged actions were taken in accordance with "official policies." The two New York City departments--education and social services--had written personnel policies over a period of years that were shown to be unconstitutional by Cleveland v. La Fleur. Still, the Court chose not to limit itself merely to recognizing liability for written policies or even liability for policies approved by the governing boards of defendant agencies. Instead, it specifically noted, in the following language, that employees beneath the level of board members may make policies for which the unit itself will be liable: "[I]t is when execution of a government's policy 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." I infer from this that most actions taken by sheriffs or city and county managers, for instance, and quite possibly many actions taken by lesser officers like chief jailers or department heads, are likely to be viewed by the courts as "official" actions (though of course, any official can also take independent wrongful actions for which he alone would be liable). It seems clear, on the other hand, that the unit need not bear the responsibility for unconstitutional actions taken by individual city or county employees without the approval of the governing board or a high-ranking official.

Attention should also be paid to the Court's use of the word "custom." Again, the majority could have restricted itself on the facts before it to holding that governments will be liable for their official policies, but it chose to point out that § 1983 applies to both policies and customs. "Although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." Just as the Court has warned that persons other than board (or council) members may incur liability for the unit, it is warning here that rules and regulations need not have been adopted by the unit's governing board in order to have official status for purposes of imposing liability.

The Court was careful to note that this case did not settle the issue of whether governments retain some kind of immunity that will partially protect them from § 1983 judgments even though they are "persons" who may be sued. The majority states, "[W]e have no occasion to address, and do not address what the full contours of municipal liability under § 1983 may be"--and later, "[W]e express no views on the scope of any municipal immunity beyond holding that municipal bodies sued under § 1983 cannot be entitled to an absolute immunity, lest our decision that such bodies are subject to suit under § 1983 'be drained of meaning.'"

Thus a full understanding of Monell's effect must await further litigation. Lower federal courts may apply the Wood v. Strickland (420 U.S. 308 [1975]) standard of immunity to governmental bodies, or they may develop a different standard. (Wood imposes personal liability on officials who violate basic constitutional rights of which they knew or should have known.) All that we know from Monell is that the Supreme Court will not allow an immunity so broad as to eliminate liability entirely.