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*By Patricia W. Morrison**

INTRODUCTION

Acting on a tip, police officers stake out an employment office. About 8:30 P.M., two figures appear at the back door and force the lock. Then they come in, the police confront them with guns drawn, warning: "Stop, Police!" One man freezes with his hands over his head; the other swings a crowbar at both officers, knocking a gun from one policeman's hand. The officers open fire—one shooting three shots, the other all six. The suspect is struck by four bullets, and is killed. The suspect's mother sues the officers and the city for a violation of her son's constitutional rights, claiming excessive use of force under the Civil Rights Act (42 U.S.C. section 1983) and asks for one hundred thousand dollars in damages.[1]

A woman living outside the city limits organizes a baseball team with her friends and neighbors and applies to the city for a permit to use the city ball diamonds. The city denies her request on the basis of a policy which allocates the use of the play fields according to prior practice and residency. The woman sues, claiming a denial of equal protection on the grounds of sex and residency discrimination under 42 U.S.C. section 1983 and the fourteenth amendment.[2]

In the 1950's, a municipal police department had established a policy of hiring women as police officers for certain specific services, *e.g.*, youth aid work. These women were recruited with the understanding that after serving three years, they would be eligible to take a special promotional examination for women only to become police specialists again in limited areas of police work, and that this opportunity was the only advancement open to them. The women employed under these terms routinely received those promotions.

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1. Facts based on Thompson v. Connelly, No. C1-75-44 (S.D. Ohio, Feb. 25, 1977).

2. Facts based on Tri-State Girls Softball Managers Ass'n v. Cincinnati, No. C1-78-182 (S.D. Ohio, filed Aug. 14, 1978).

When Title VII of the Civil Rights Act is passed, the Civil Service Commission reviews this policy and concludes that the city has a contractual duty to continue the policy until all women hired under this understanding have received their promotions. The next time the special examination is offered, male police officers apply to take it and their request is denied. They sue under 42 U.S.C. section 1983 and Title VII, alleging sex discrimination.[3]

A non-tenured teacher is notified in April that he will not be reemployed for the following year. Although the school board has no statutory duty to explain its decision, upon the teacher's request, the superintendent states the reason is that the teacher has acted in an unprofessional manner by making a phone call to a radio station concerning a dress code for teachers and by using an obscene gesture to correct students in a situation which occurred in the cafeteria. The teacher claims that the phone call is protected by the first amendment and, therefore, he is being fired for the exercise of his constitutional rights. He sues the board under 42 U.S.C. section 1983 for an infringement of his civil rights and demands reinstatement, back pay, and attorney's fees.[4]

These fact patterns illustrate typical examples of situations in which local governing units find their actions challenged by those who believe their civil rights have been violated by a policy or practice of the government. In the past, the government had a defense to all such claims, for the Supreme Court held in *Monroe v. Pape,*[5] that Congress did not intend to include municipalities within the scope of the Civil Rights Act of 1871, which created the right to recover for a deprivation of civil rights.

However, two recent Supreme Court decisions—*Mt. Healthy City School District Board of Education v. Doyle,*[6] and *Monell v. Department of Social Services of New York*[7]—have changed the law. These decisions expose local governing units to a substantial risk of suit in all cases where imaginative plaintiffs can claim that some official action has infringed upon their civil rights. Because of the rapidly expanding definition of civil rights, these decisions may have a significant impact on public bodies. It is the purpose of this article to review those decisions and to examine what defenses are available to local governments facing a potential avalanche of litigation.

3. Facts based on Ruprecht v. Civil Service Comm'n, No. A-7605078 (Hamilton County, Ohio C.P., Aug. 1, 1978).
4. Facts based on Mt. Healthy v. Doyle, 429 U.S. 274 (1977).
5. 365 U.S. 167, 187 (1961).
6. 429 U.S. 274 (1977).
7. 98 S. Ct. 2018 (1978).

I. JURISDICTION UNDER SECTION 1983

In the *Mt. Healthy* case, the initial issue considered by the Supreme Court was the jurisdictional question: Could the board of education be sued under the fourteenth amendment and 28 U.S.C. section 1331,[8] or under the Civil Rights Act, 42 U.S.C. section 1983 and 28 U.S.C. section 1343?[9] The district court rested its jurisdiction on section 1331, and the Supreme Court was satisfied to assume jurisdiction on that basis. The question whether a school district could be sued under section 1983 was explicitly deferred until another day.[10]

That day arrived in *Monell v. Department of Social Services of New York*.[11] The Supreme Court overruled the landmark case of *Monroe v. Pape*[12] and held that local governing bodies could be sued directly for monetary, declaratory, and injunctive relief in certain situations. *Monell* signals a fundamental shift in the direction of civil rights litigation against political subdivisions, but when viewed from the perspective of *Mt. Healthy* and the cases which have wrestled with the jurisdictional issue since *Mt. Healthy*, the Court's ruling in *Monell* appears inevitable.

The action provided under section 1983 of the Act runs against those who use their official authority to deny citizens their civil rights. The pertinent language reads: "[E]very person . . . who under color of state law . . . subjects or causes any citizen to be deprived of any civil rights . . . is liable for personal injuries . . . ."[13]

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8. 28 U.S.C. § 1331 (1976) is the general federal question jurisdictional statute. It reads in part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States." A cause of action premised on the fourteenth amendment which alleges damages in excess of $10,000 may be brought on the basis of section 1331 jurisdiction.

9. 28 U.S.C. § 1343 (1976) is the jurisdictional statute for civil rights actions. Unlike section 1331, section 1343 does not require a $10,000 amount in controversy. The pertinent language of section 1343 is as follows:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) 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;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

10. 429 U.S. at 278-79.

11. 98 S. Ct. 2018 (1978).

12. 365 U.S. 167 (1961).

13. 42 U.S.C. § 1983 (1976).

Section 1983 was originally enacted as part of the Civil Rights Act of 1871. That Act was passed to enforce the provisions of the fourteenth amendment of the Constitution at a time when authorities in some states were unwilling or unable to protect the rights of recently freed slaves and those who sympathized with them.[14] The effect of the Act was to prohibit states from passing legislation restricting the rights and privileges of its citizens,[15] to provide a federal remedy where state law was inadequate,[16] and more importantly, to grant federal jurisdiction when the state courts, although they possessed remedial powers, were not employing them in practice.[17]

A. *Municipal Immunity Before Monell*

Monroe v. Pape previously held that a municipality was not subject to suit under 42 U.S.C. section 1983 because it was not a "person" within the meaning of that statute. The Act was construed in *Monroe* to apply to city policemen but not to the municipal corporation itself. The Court reached that position after a careful review of the legislative history. Justice Douglas, writing for the majority,[18] noted that when the bill was in the Senate, Senator Sherman proposed an amendment which would have made "the inhabitants of the county, city, or parish" liable "to pay full compensation" to persons injured by the acts of their officials.[19] Although passed by the Senate,[20] the House re-

14. CONG. GLOBE, 42d Cong., 1st Sess., 244 (1871).

15. *Id.* at 268.

16. Kentucky law, for example, did not recognize the testimony of a black man against a white man; however, were the suit brought in federal court, federal rules, which permitted the testimony, would apply. *Id.* at 345 (remarks of Sen. Sherman).

17. *Id.* at 374. Senator Beatty of Ohio described the need for the bill as follows:

> [C]ertain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable . . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of law to these persons.

Id. at 428.

18. See the discussion in 365 U.S. at 188-90.

19. CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871). The proposed amendment reads:

> That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, by any persons riotously and tumultously assembled together, or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultously assembled together; and if such offense was committed to deprive any person of any right conferred on him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition and servitude, in every such case

jected the amendment,[21] and it was eventually dropped in conference.[22]

One objection to the rejected Sherman Amendment, as noted in *Monroe*, was that civil liability would paralyze local government by creating the potential of a lien against the city and hence of impairing its credit.[23] Opponents further objected that the municipality could be found liable even though it had no knowledge of the misdeeds of its officials.[24] Finally, opponents argued that the federal government had no authority to impose duties and, therefore, liabilities on counties and towns because they are subdivisions of the states.[25]

The holding in *Monroe* had broad ramifications. It was extended to counties in *Moor v. County of Alameda*[26] and to include equitable as well as money damages in *County of Kenosha v. Bruno*.[27] In *Aldinger v. Howard*,[28] the Supreme Court dismissed an action against a county which was joined with other individuals on the basis that a federal court could not exercise pendent jurisdiction over state claims against the county when the only other ground for jurisdiction was section 1983 which, of course, did not apply to counties.[29] The *Monroe* immunity was claimed by school districts as well, and although the circuits were divided, many held that school boards were not "persons" under 42 U.S.C. section 1983.[30] In addition, the Supreme Court had,

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the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction.

20. *Id.* at 705.

21. *Id.* at 725, 800-01.

22. *Id.* at 805.

23. *Id.* at 762 (remarks of Sen. Stevenson). The Supreme Court in *Monell* rejects this financial argument as a basis for the holding in *Monroe* and, for that matter, the rejection of the Sherman Amendment. 98 S. Ct. at 2023 n.9.

24. CONG. GLOBE, 42d Cong., 1st Sess. 788 (1871) (remarks of Rep. Kerr).

25. *Id.* at 794 (remarks of Rep. Poland).

26. 411 U.S. 693, 721 *rehearing denied,* 412 U.S. 963 (1973).

27. 412 U.S. 507, 512-13 (1973).

28. 427 U.S. 1 (1976).

29. *Id.* at 17.

30. *See, e.g.,* Singleton v. Vance County Bd. of Educ., 501 F.2d 429 (4th Cir. 1974); Sterzing v. Fort Bend Indep. School Dist., 496 F.2d 92 (5th Cir. 1974); Huntley v. N.C. State Bd. of Educ., 493 F.2d 1016 (4th Cir. 1974); Strickland v. Inlow, 485

prior to *Monell*, reviewed many cases in which school districts were before the Court on the basis of section 1983 jurisdiction. In some of these the section 1983 claim was the exclusive grounds for jurisdiction, but the jurisdictional question was not raised.[31] Even the *Monell* Court noted that it would be inconsistent to hold school boards liable under section 1983 when municipalities were not.[32]

B. *The Monell Decision*

The choice before the Supreme Court in *Monell* was whether to extend *Monroe* immunity to school boards or to overrule *Monroe* and subject local government to 1983 liability. The Court chose the latter.[33] In reaching that conclusion, Justice Brennan, who wrote the Court's opinion, re-examined the *Monroe* interpretation of the legislative history of the Civil Rights Act of 1871. First, he noted that the Sherman Amendment was a proposed addition to the Civil Rights Act of 1871 and not a modification of section 1 of that Act, which subse-

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F.2d 186 (8th Cir. 1973), *rev'd on other grounds sub nom.* Wood v. Strickland, 420 U.S. 308, *rehearing denied,* 421 U.S. 921 (1975); Harkless v. Sweeny Indep. School Dist., 388 F. Supp. 738 (S.D. Tex. 1975); Patton v. Conrad Area School Dist., 388 F. Supp. 410 (Del. 1975); Brown v. Bd. of Educ., 386 F. Supp. 110 (N.D. Ill. 1974); Howell v. Winn Parish School Bd., 377 F. Supp. 816 (W.D. La. 1974); Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973), *aff'd sub nom.* Goss v. Lopez, 419 U.S. 565 (1975); Pelisek v. Trevor State Graded School Dist. No. 7, 371 F. Supp. 1064 (E.D. Wis. 1974); Vanderzanden v. Trowell School Dist. No. 71, 369 F. Supp. 67 (Ore. 1973); and Bichrest v. School Dist. of Philadelphia, 346 F. Supp. 249 (E.D. Pa. 1972). *Contra,* Keckeisen v. Indep. School Dist. 612, 509 F.2d 1062 (8th Cir.) *cert. denied,* 423 U.S. 833 (1975); Aurora Educ. Ass'n v. Bd. of Educ., Aurora Public School Dist., 490 F.2d 431 (7th Cir. 1973), *cert. denied,* 416 U.S. 985 (1974).

31. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 636 (1974); Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 504 (1969); McNeese v. Bd. of Educ., 373 U.S. 668, 671 (1963). *See also* Milliken v. Bradley, 433 U.S. 267 (1977); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); East Carrol Parish School Bd. v. Marshall, 424 U.S. 636 (1976); Milliken v. Bradley, 418 U.S. 717 (1974); Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, *rehearing denied,* 411 U.S. 959 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, *rehearing denied,* 403 U.S. 912 (1971); Northcross v. City of Memphis Bd. of Educ., 397 U.S. 232 (1970); Carter v. West Feliciana Parish School Bd., 396 U.S. 226 (1969); Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Monroe v. Bd. of Comm'rs, 391 U.S. 450 (1968); Raney v. Bd. of Educ., 391 U.S. 443 (1968); Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Goss v. Bd. of Educ., 373 U.S. 683 (1963); Orleans Parish School Bd. v. Bush, 365 U.S. 569 (1961); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

32. 98 S. Ct. at 2038.

33. In so holding, the Supreme Court was quick to point out that it was not overruling the holding of *Monroe* that the doctrine of *respondeat superior* does not apply to cities under section 1983 for the constitutional torts of their employees. 98 S. Ct. at 2022 n.7.

quently became section 1983.[34] Second, Justice Brennan determined that the legislature rejected the Sherman Amendment because it attempted to make all cities, counties, and parishes liable for damage whether or not the municipality was authorized to exercise police powers:

> House opponents [of the Sherman Amendment] . . . thought the Federal Government could not, consistent with the Constitution, obligate municipal corporations to keep the peace if those corporations were neither so obligated nor so authorized by their state charters. And, because of this constitutional objection, opponents of the Sherman amendment were unwilling to impose damage liability for nonperformance of a duty which Congress could not require municipalities to perform.[35]

Accordingly, the Court concluded that "the debates on the Sherman Amendment show conclusively that the constitutional objections raised against the Sherman Amendment—on which our holding in *Monroe* was based . . . would not have prohibited congressional creation of a civil remedy against state municipal corporations that infringed federal rights."[36] That is, the Court now understands the Congressional debates on the Sherman Amendment to mean that the legislature found the amendment unconstitutional because it was creating a vicarious liability even in those cases where the local government, under state law, was powerless to act. When, however, it was the municipality itself which was acting unconstitutionally, there was no objection to its being held liable.

Finally, Justice Brennan discussed the choice of the word "person" in the original Civil Rights Act and concluded that it was meant to include legal as well as natural persons; a political entity such as a municipality was within the contemporary definition of "person."[37] On the basis of this reasoning *Monell* holds: "Local governing bodies . . . can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."[38] This holding explicitly includes practices of the governing body which are well enough settled to be customs even though not formally adopted. The Court, however, specifically

34. *Id.* at 2023.
35. *Id.* at 2024-25.
36. *Id.* at 2025.
37. *Id.* at 2032-35.
38. *Id.* at 2035-36.

excludes torts of employees which might expose the municipality to liability on a *respondeat superior* theory.[39] A municipality is not responsible for the wrongdoing of its employees when those employees are acting negligently within the scope of their employment.

The rest of the Court's decision is an apology for the failure to follow *stare decisis*, especially because *Monroe* had been so frequently cited by lower courts and even extended by the Supreme Court itself in *Moor*,[40] *Bruno*,[41] and *Aldinger*.[42] Having analyzed the legislative history of the original Civil Rights Act, the Court proceeded to justify its departure from *Monroe* as follows: (1) *Monroe* itself departed from prior precedents in which municipalities were sued under section 1983;[43] (2) the immunity of school boards would be inconsistent with recent expressions of congressional intent to make schools responsible for certain conduct;[44] (3) municipalities can assert no reliance claim to support absolute immunity for unconstitutional conduct;[45] (4) the *Monroe* construction of the 1871 Act was clearly wrong.[46]

II. THE NECESSITY FOR THE MONELL DECISION

An even stronger, although unacknowledged, justification for the Court's decision to overrule *Monroe* is the elimination of the flaw in

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39. *Id.* at 2036. The doctrine of *respondeat superior* is the procedure by which an employer is held responsible for the wrongdoing of his employees solely because of this employment relationship. The Court here is saying that the governing unit will not be held liable unless the employee's conduct is officially part of his duties; that is, unless the governmental unit itself is responsible for the wrongdoing.

This exception parallels the qualified immunity defense of public officers under the eleventh amendment. If the officer is acting within the scope of his employment—and therefore not personally liable for a tort—he is immune from suit even as the sovereign itself. Scheuer v. Rhodes, 416 U.S. 232 (1974). This defense is also consistent with the good faith defense of Wood v. Strickland, 420 U.S. 308 (1975) which held that a public official is not liable unless he knew or should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of others or unless he acted maliciously.

40. 411 U.S. 693 (1973).

41. 412 U.S. 507 (1973).

42. 427 U.S. 1 (1976).

43. 98 S. Ct. at 2037-38. The Court cites Northwestern Fertilizing Co. v. Hyde Park, 18 F. Cas. 393 (C.C.N.D. Ill. 1873) (No. 10,336); City of Manchester v. Leiby, 117 F.2d 661 (1st Cir. 1941); Hannan v. City of Haverhill, 120 F.2d 87 (1st Cir. 1941); Douglas v. City of Jeannette, 319 U.S. 157 (1943); Holmes v. City of Atlanta, 350 U.S. 879 (1955). Justice Rehnquist in dissent argues that the jurisdictional issue was not raised in any of those cases. 98 S. Ct. at 2048.

44. *See, e.g.*, 20 U.S.C. § 1605(a)(1)(A)(i) (1976).

45. 98 S. Ct. at 2040. Justice Rehnquist suggests that municipalities have relied on limited liability in insurance policies and indemnity ordinances. *Id.* at 2049.

46. *Id.* at 2041.

the jurisdictional basis of earlier civil rights cases. *Monell* establishes clear liability for local governments. Courts no longer have to stretch general federal question liability to the breaking point.

A. *The Difficulty Encountered in Attempting to Establish General Federal Question Liability*

It is important to recognize that in many cases, as noted above, the issue of jurisdiction was never raised. It was merely assumed that the jurisdictional basis claimed, often section 1983, was valid. However, in circumstances in which it was raised, the courts attempted to find jurisdiction under the fourteenth amendment and section 1331. This general federal question liability argument, recognized first in *Bivens v. Six Unknown Federal Narcotics Agents,*[47] presents two obstacles to the plaintiff. First he must have a $10,000 claim.[48] While courts require little more than a prima facie allegation,[49] the amount in controversy must be identified and alleged. Secondly, the plaintiff must overcome a serious flaw in the theory of extending *Bivens* jurisdiction to the fourteenth amendment claim.

Bivens involved plaintiffs whose fourth amendment rights were allegedly violated by federal rather than state agents. Unable to assert a claim under section 1983 which requires state action, plaintiffs sued under section 1331 claiming that the fourth amendment created a federal question cause of action. The Supreme Court in *Bivens* agreed that a violation of the protections guaranteed by the fourth amendment constituted a cause of action.

However, the fourteenth amendment, unlike the fourth, is not self-executing because of the additional language of section 5 of the fourteen amendment, which reads: "The Congress shall have power to enforce by appropriate legislation the provisions of this article." In *Ex parte Virginia,*[50] the Supreme Court interpreted that language as follows:

> It is *not said* that the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and im-

47. 403 U.S. 388 (1971).

48. There is a bill now before Congress to eliminate the amount in controversy requirement. H.R. 9622, 95th Cong., 2d Sess. (1978); S. 2389, 95th Cong., 2d Sess. (1978).

49. St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938); "[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *See also* Weinberger v. Wiesenfeld, 420 U.S. 636, 642 n.10 (1975); 429 U.S. at 276.

50. 100 U.S. 339 (1879).

> munities guaranteed. It is *not said* that a branch of government shall be authorized to *declare void* any action of a state in violation of the prohibitions. It is the power of Congress which has been enlarged. *Congress is authorized to enforce the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendment fully effective.*[51]

More recently, the Court has virtually ignored the provisions of section 5 and declared that the amendment gives courts the power to act directly.[52] In *Monell*, the Supreme Court again avoids that issue by finding the necessary congressional authority in section 1983.

If the *Bivens* rationale is applied to the fourteenth amendment, section 5 requires plaintiffs to find a federal statute on which to base their claim. The Civil Rights Act is just such a statute. However, since the cause of action is found in the statute—not in the amendment—it can be no broader than what the statute allows. Consequently, before section 1983 was construed in *Monell* to include school boards in its coverage, they could not be sued directly under the fourteenth amendment[53] without ignoring section 5.

Even before *Monell*, Congress had provided for school board liability in other statutes.[54] But under these statutes too, the liability is no greater than the statutes expressly state. Unless plaintiff can find a statutory violation by the school board itself, he has no cause of action. In short, if plaintiff must rely on congressional action rather than solely on the fourteenth amendment, the scope of his remedies is substantially limited.

The logical consequence of requiring a statutorily-created cause of action for civil rights litigation is that *Brown v. Board of Education*[55] and all the other landmark desegregation suits are vulnerable to attack on the basis of lack of jurisdiction. The courts had no authority to order integration because, until very recently, there were no federal statutes which enforced equal protection against school districts.

The decisions of the lower courts, between *Mt. Healthy* and *Monell*, which struggled with the issue of section 1331 jurisdiction

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51. *Id.* at 345 (emphasis added).

52. Oregon v. Mitchell, 400 U.S. 112, 264 n.37 (1970).

53. This issue was debated in the oral argument before the Supreme Court in *Mt. Healthy* and was recognized by the Court. 429 U.S. at 278. *See also* Weathers v. West Yuma County School Dist., 387 F. Supp. 552, 556 (D. Colo. 1974), *aff'd*, 530 F.2d 1335 (10th Cir. 1976). Efforts have been made to overturn *Monroe* by legislation, most recently in S.35, 95th Cong., 1st Sess. (1977). This bill, which has not passed Congress, would expand the definition of "person" in section 1983 to include states, municipalities, and all agencies thereof.

54. *See, e.g.*, 20 U.S.C. §§ 1703, 1706, 1708, 1710, 1718 (1976); *but see* dissent of Justice Rehnquist, 98 S. Ct. at 2049 n.2.

55. 347 U.S. 483 (1954).

reveal the reluctance of the judiciary to confront this embarrassing dilemma. Several cases recognized the jurisdictional issue but did not decide it. These include *Comtronics, Inc. v. Puerto Rico Telephone Co.*,[56] *Payne v. District of Columbia*,[57] and *Regents of the University of Minnesota v. NCAA*.[58]

The courts which discussed the issue most fully and ruled that suit could be brought directly on the fourteenth amendment and 28 U.S.C. section 1331, despite the language of section 5, are the Eighth and the Second Circuits. In *Owens v. City of Independence, Mo.*,[59] the court considered an action brought by a discharged policeman, against the city and its officials, to recover for an alleged denial of due process. The plaintiff sought reinstatement and back pay by way of a declaratory judgment and mandatory injunction. The city argued that it was not liable under section 1983 (even though its officials, individually, might be) and that plaintiff had no claim under section 1331 and the Constitution. The court did not determine the first issue because it ruled for the plaintiff on the second.

Judge Bright, who wrote the opinion, reasoned that under *Bivens* the Supreme Court had recognized that a federal court could fashion remedies without express congressional authorization when "necessary" or "appropriate."[60] While section 1983 may give local governments immunity from money damages (as held in *Monroe*), Judge Bright believed the Supreme Court was willing to consider alternative remedies against municipalities because of its remand in *Bruno*.[61] Therefore, on the basis of *Bruno* and *Bivens*, he permitted the section 1331 claim. The judge, however, expressly limited the holding to cases where equitable relief (including back pay) was sought; he carefully distinguished this decision from cases for false arrest, unlawful search and seizure, and police brutality where considerations of vicarious liability were at issue.[62]

The Second Circuit, in a decision that foreshadowed *Monell*, went even further. In *Turbin v. Mailet*,[63] the plaintiff claimed money damages for wrongful arrest. The action against the police officer was

56. 553 F.2d 701, 707 (1st Cir. 1977) (federal statute preempted more general remedy).

57. 559 F.2d 809, 823 (D.C. Cir. 1977) (issue not raised by plaintiff).

58. 560 F.2d 352 (8th Cir.), *cert. denied*, 434 U.S. 979 (1977) (issue was raised in terms of the plaintiff; court held the plaintiff had the right to bring the suit).

59. 560 F.2d 925 (8th Cir. 1977), *vacated on other grounds*, 98 S. Ct. 3118 (1978).

60. 403 U.S. at 399 (J. Harlan concurring).

61. 412 U.S. 507 (1973).

62. 560 F.2d at 933 n.9.

63. 579 F.2d 152 (2d Cir. 1978).

based on sections 1983 and 1988[64] but the suit against the city was brought directly on the fourteenth amendment. The court, *en banc,* recognized the fourteenth amendment "common law claim." In doing so, the court discounted the section 5 argument presented by the city as emasculating the modern Constitution. The court reasoned that section 1983 was Congress' first step in enforcing civil rights, but that act did not prohibit courts from expanding the liability when necessary or appropriate. Accordingly, the court held that when the municipality, acting through its authorized agents, clearly violates the Constitution, it can be held to account. Reason and policy so require.[65] The court, again anticipating *Monell*, did not extend the municipality's responsibility to the tortious acts of its employees.[66]

Courts which have denied the section 1331 claim since *Mt. Healthy* include the First Circuit Court of Appeals and district courts in Pennsylvania, New Mexico and Maine. In *Kosta v. Hogg*,[67] the administrators of an estate sued the town and its officials for violation of constitutional rights. Their jurisdictional claim was based on section 1983, and directly on the fourteenth amendment and section 1331. First, the court stated that were it to recognize a section 1331 claim, the defense of good faith identified in *Wood v. Strickland*[68] (under section 1983) would apply.[69] Then the court reviewed the section 1331 claim and the Supreme Court's decision in *Bivens*. The court said that *Bivens* teaches that before a cause of action should be allowed solely on the basis of a constitutional violation, the court should (1) "assess the existing remedies" and (2) "consider the extent to which there has been a Congressional or other determination that the supplemental remedy should not be available."[70] The court then noted that here, unlike *Bivens*, plaintiffs had a section 1983 remedy against the individual police officers. Furthermore, the court found legislative history and case law to suggest that municipalities should be immune.[71]

64. 42 U.S.C. § 1988 (1976) provides for attorneys' fees in certain civil rights litigation.

65. 579 F.2d at 164-65. The court ruled that the city is ordinarily not judgment proof; it can spread the cost of the judgment widely; and is in the best position to prevent the tortious conduct.

66. *Id.* at 165-66. The dissent based its position on the section 5 argument. *Id.* at 175-77. *See also* Murray v. Murray, 441 F. Supp. 120 (E.D. Pa. 1977); and Gentile v. Walker, 562 F.2d 193 (1977).

67. 560 F.2d 37 (1st Cir. 1977).

68. 420 U.S. 308, *rehearing denied,* 421 U.S. 921 (1975).

69. 560 F.2d at 40.

70. *Id.* at 42.

71. *Id.* at 43. *See also* 42 U.S.C. § 1983 (1976); Monroe v. Pape, 365 U.S. 167 (1961); Moor v. County of Alameda, 411 U.S. 693 (1973); Aldinger v. Howard, 427 U.S. 1 (1976).

Accordingly, it determined that there was no constitutional "necessity" in creating a remedy against a political subdivision for the wrongs of its employees. The court restricted its holding to vicarious liability situations and warned that it should not be extended to cases in which the municipality had ordered the constitutional violation.[72]

In *Jones v. McElroy*,[73] a case involving the conduct of police officers, the court discussed the section 1331 issue at length and concluded that it was not necessary to create a section 1331 remedy to protect plaintiff's constitutional rights: "Congress has provided various remedies for violations of fourteenth amendment rights and there is no reason to believe that the amendment will cease to have meaningful force if a cause of action for damages against municipalities is denied."[74] The court then reviewed other civil rights acts and concluded that "Congress has tailored the remedial provisions of its civil rights enactments to fit each particular problem confronted."[75]

The *Jones* decision is compatible with *Crosley v. Davis*,[76] which also involved alleged constitutional violations by police officers. Here again, the court discussed the *Bivens* decision as requiring, as a precondition for a direct cause of action under the fourteenth amendment, a finding of necessity and appropriateness. The court found no necessity because of remedies available against the individuals, concluding that the implication of a remedy against a municipality would be inconsistent with the legislative history of section 1983 and the Sherman Amendment, as discussed in *Monroe*, *Moor*, *Bruno*, and *Aldinger*, and, therefore, not appropriate. The court, however, limited its holding to actions for damages:

> We deem it important . . . to stress our conviction that the problems with the implication of a damage remedy against a municipal entity based upon the Fourteenth Amendment and section 1331 do not arise in suits for injunctive or declaratory relief, regardless of the exclusions of section 1983 . . . . We do not believe, for instance, that an injunction of the sort issued in *Brown v. Board of Education* can be undermined.[77]

In *Sandoval v. Brown*,[78] the court refused to imply a section 1331 remedy against a municipality for vicarious liability because of the Supreme Court's holding in *Bruno* and *Mt. Healthy*. Again the court

72. 560 F.2d at 45.
73. 429 F. Supp. 848 (E.D. Pa. 1977).
74. *Id.* at 857.
75. *Id.* at 858.
76. 426 F. Supp. 389 (E.D. Pa. 1977).
77. *Id.* at 396 (citations omitted).
78. 432 F. Supp. 1028 (D.N.M. 1977).

distinguished *Bivens* on the basis that the plaintiff had an alternative remedy here and Congress had intentionally excluded municipalities from such liability in section 1983.

Finally in *Curran v. Portland Superintending School Commission,*[79] the district court refused to recognize a section 1331 claim based on sex discrimination against a school board because Congress had provided an explicit remedy in Title VII.[80]

In addition to the cases discussed above, other courts had also reached the *Bivens* issue prior to the Supreme Court's statements in *Mt. Healthy*. These cases include the following which have permitted the suit: *Wiley v. Memphis Police Department,*[81] *Reeves v. City of Jackson,*[82] *Calvin v. Conlisk,*[83] *Skehan v. Board of Trustees of Bloomsburg State College,*[84] *Amen v. City of Dearborn,*[85] *Bosely v. City of Euclid,*[86] and several district court decisions. These citations are found in *Sandoval*[87] and *Jones.*[88]

In sum, before *Monell*, lower courts tended to deny a cause of action against a municipality for vicarious liability under the fourteenth amendment and section 1331. These courts, however, restricted their rulings to money damages. The only circuit court which had ruled on injunctive relief was the Eighth, and it held the political subdivision was subject to suit.

In *Monell*, the Supreme Court tacitly legitimized the holdings of these lower courts by recognizing the same distinction between cases where the governing body itself was responsible for the unconstitutional conduct and suits where the political entity was only vicariously liable. In the latter situation, a political subdivision cannot be sued under section 1983.

B. *Pre-Monell Suits under Section 1983 Against Individuals in Their Representative Capacity*

Another theory, prior to *Monell*, by which plaintiffs sought relief was to sue individual officers under section 1983 in their representative capacity, in the hope of thereby holding the legal entity to account.

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79. 435 F. Supp. 1063 (D. Me. 1977).
80. *Id.* at 1079. 42 U.S.C. §§ 2000e to 2000h-1 (1976).
81. 548 F.2d 1247 (6th Cir.), *cert. denied,* 434 U.S. 872 (1977).
82. 532 F.2d 491 (5th Cir. 1976).
83. 520 F.2d 1 (7th Cir. 1975), *vacated on other grounds,* 424 U.S. 902, *cert. denied,* 424 U.S. 912 (1976).
84. 501 F.2d 31 (3d Cir. 1974), *vacated on other grounds,* 421 U.S. 983 (1975).
85. 532 F.2d 554 (6th Cir. 1976).
86. 496 F.2d 193 (6th Cir. 1974).
87. 432 F. Supp. at 1029.
88. 429 F. Supp. at 856 n.9.

This approach, however, was not effective. Courts generally ruled that if the official was acting within the scope of his employment, he was not personally liable for money damages.[89] Although the individual officer might be enjoined from future wrongdoing,[90] that solution did not permanently change the practice of the governing unit and was at best a clumsy circumvention of the *Monroe* limitation on section 1983 liability. To the extent that local governments are to be accountable under section 1983, it is better that they be directly sued as is now permitted by *Monell*.[91]

III. DEFENSES OF GOVERNMENTAL ENTITIES IN SECTION 1983 LITIGATION

A. *The Vicarious Liability Defense*

In *Monell*, the Supreme Court itself identifies a major defense for governing units sued under section 1983. It specifically notes that the political subdivision is not responsible for the torts of its employees. If a city truck driver runs a red light causing an automobile accident, the city is not vicariously liable under *Monell*, nor is the board of education liable if a student shoots a paper wad and injures his friend's eye. On the other hand, in the example noted at the beginning of this article in which the non-resident was denied access to recreation fields because of a city's specific policy, the municipality may be liable if the plaintiff can establish a constitutional violation and an injury. Similarly, the policemen who were denied the opportunity to take a promotional examination may be able to hold the city responsible for its explicit policy of giving special promotional examinations for women only.

However, the distinction between an unconstitutional policy and employee negligence is not always so clearly defined. In the first example of the claim of excessive use of force by city police officers, plaintiffs may argue that the city policy which condones the use of deadly force in self-defense or which permits officers to carry two guns

89. Dinwiddie v. Brown, 230 F.2d 465 (1956), *cert. denied*, 351 U.S. 971, *rehearing denied*, 352 U.S. 861; Hardy v. Kirchner, 232 F. Supp. 751 (E.D. Pa. 1964); Thompson v. Baker, 133 F. Supp. 247 (D. Ark. 1955); Dunn v. Estes, 117 F. Supp. 146 (D. Mass. 1953), *aff'd sub nom.* Dunn v. Gazzola, 216 F.2d 709 (1st Cir. 1954). *See also* Poindexter v. Woodson, 357 F. Supp. 443 (1973); *aff'd*, 510 F.2d 464, *cert. denied*, 423 U.S. 846 (1975).

90. *See* 357 F. Supp. at 459.

91. The lower court held in *Monell*, 532 F.2d 259 (2d Cir. 1976), that individuals sued in their official capacities were not subject to section 1983 jurisdiction. *See also* Kornit v. Bd. of Educ., 542 F.2d 593 (2d Cir. 1976) (per curiam), *vacated on other grounds*, 98 S. Ct. 3118 (1978).

contributes to an officially sanctioned practice of excessive force for which the city is liable. Since the local governing unit is theoretically in a better position to pay a damage judgment than a government employee and is, therefore, a target defendant, political subdivisions can anticipate numerous suits which make such allegations.

B. *Eleventh Amendment Immunity*

In creating liability for local governments under section 1983, the *Monell* Court also notes that it is leaving undisturbed the eleventh amendment immunity of those units of government which are part of the state.[92] The scope of eleventh amendment immunity was discussed in *Mt. Healthy*, for the school district defendant argued that it was entitled to sovereign immunity because it was a creature of statute and an arm of the state.[93]

The eleventh amendment provides that no state is subject to suit by a citizen of another state.[94] The amendment was passed in response to *Chisholm v. Georgia*[95] which had held that states could be sued under the judiciary clause of the Constitution. Two days after *Chisholm* was announced, a resolution was introduced in the Senate proposing a constitutional amendment to overturn the ruling. Five years later, that resolution became the eleventh amendment.

The doctrine of sovereign immunity embodied in the amendment has been extended to encompass suits by foreign powers against a state;[96] by corporations against a state;[97] in admiralty;[98] by one state against another;[99] and by citizens of the state against the state.[100] The majority in the latter case, *Hans v. Louisiana,* explained the policy as follows:

> It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its

92. 98 S. Ct. at 2035 n.54.
93. Petitioner's Brief at 24, Mt. Healthy v. Doyle, 429 U.S. 274 (1977).
94. The eleventh amendment reads:
The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.
95. 2 Dall. 419 (1793).
96. Monaco v. Miss., 293 U.S. 312, 385 (1934).
97. Smith v. Reeves, 178 U.S. 449 (1900).
98. *Ex parte* N.Y., 256 U.S. 490 (1921).
99. New Hampshire v. Louisiana, 108 U.S. 76 (1883).
100. Hans v. Louisiana, 134 U.S. 1, 21 (1889). *Accord:* Scheuer v. Rhodes, 416 U.S. 232 (1974); *see also* Williams v. United States, 289 U.S. 553 (1933).

existence. The legislative department of the State represents its policy and its will; and is called upon by the highest demands of natural and political law to reserve justice and judgment, and to hold inviolate the public obligations. Any departure from this rule, except for reasons most cogent, (of which the legislature, and not the courts, is the judge) never fails in the end to incur the odium of the world, and to bring lasting injury upon the State itself. But *to deprive the legislature of the power of judging what the honor and safety of the state may require, even at the expense of a temporary failure to discharge the public debts, would be attended with greater evils than such failure can cause.*[101]

The doctrine of sovereign immunity has been sharply criticized by many,[102] and it has been eroded by the concept of implied waiver, under certain circumstances, when a state participates in federal programs,[103] but it is still recognized as a bar to judgments against the state treasury.[104] In *Mt. Healthy*, the Court examined a school district to decide whether a judgment against it was a judgment against the state.[105]

The Court stated that the test was whether the school board was "an arm of the state," and looked to state law to make that determination. In the *Mt. Healthy* case, Ohio law excluded political subdivisions from the definition of "state" in that portion of the law in which

101. 134 U.S. at 21 (emphasis added).

102. The arguments that state sovereignty is incompatible with natural justice and our federal system of government were advanced by the majority in *Chisholm v. Georgia*, 2 Dall. 419 (1793), and rejected by the passage of the eleventh amendment. *See also* Employees of the Dep't of Pub. Health and Welfare of Mo. v. Dep't of Health and Welfare of Mo., 411 U.S. 279, 298 (1973) (Brennan, J., dissenting); Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 705 (1948) (Frankfurter, J., dissenting); Krause v. State, 31 Ohio St. 2d 132, 149, 285 N.E. 2d 736, 746 (1972) (Brown, J., dissenting).

103. In *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), the Court held the state liable in tort on the basis of an interstate contract under the compact clause of the Constitution, U.S. CONST. art. I, § 10, cl.3; and the Merchant Marine Act (Jones Act) § 33, 46 U.S.C. § 688 (1970). In Parden v. Terminal Ry of the Alabama State Docks Dep't, 377 U.S. 184 (1964), the state was held liable under the Employers' Liability Act §§ 1-10, 45 U.S.C. §§ 51-60 (1970), when suit was brought by employees of a state owned railroad. In *Edelman v. Jordan*, 415 U.S. 651 (1974), which held a state not liable for retroactive payments to welfare recipients, *Petty* and *Pardon* were distinguished because in the Employers' Liability Act and the Jones Act, Congress specifically designated states as potential defendants.

104. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232 (1974); Edelman v. Jordan, 415 U.S. 651 (1974). *But see* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), a case against the state for sex discrimination under Title VII. The Court held plaintiffs could receive back pay because of the specific provisions of Title VII which were enacted pursuant to section 5 of the fourteenth amendment; that is, Congress acting under section 5, can waive a state's eleventh amendment immunity.

105. 429 U.S. at 280.

the state consented to suit—section 2743 of the Ohio Revised Code.[106] Since the board of education was a political subdivision and since a political subdivision was not the state, under Ohio law the Court concluded that the board of education was not entitled to sovereign immunity. This result, however, turns the rationale of *Hans*, as quoted above,[107] upside down. Although the General Assembly has determined that the "honor and safety of the state" did not require school boards to be sued and therefore did not waive their immunity, the Supreme Court ruled that the district could be sued for eleventh amendment purposes.[108] Clearly, the Supreme Court does not favor the immunity defense.

Since *Mt. Healthy*, lower courts have had no trouble in applying this eleventh amendment test. In *Unified School District No. 480 v. Epperson,*[109] the Tenth Circuit reasoned that a school district which could sue and be sued, execute contracts, hold personal property, and levy taxes was not an alter ego of the state and, therefore, not entitled to eleventh amendment immunity.[110]

On the other hand in *Flesch v. Eastern Pennsylvania Psychiatric Institute,*[111] the district court recognized the eleventh amendment immunity as a bar to a suit against the state's Department of Public Welfare, one of that department's institutions, and the State Retirement Board. Not only was the board of trustees of the institution directly appointed by the Governor, but also it was totally dependent on the department and the state for funding.[112] Similarly, the State Retirement Board was entitled to eleventh amendment immunity because it was an arm of the state.[113]

The issue of sovereign immunity will, of course, take on greater significance as a result of *Monell*. Even if a governmental unit is a section 1983 "person," it may have an eleventh amendment defense. While immunity defenses are generally in disfavor, the effect of *Monell*

106. OHIO REV. CODE ANN. §§ 2743.01-.20 (Page Supp. 1977).

107. 134 U.S. at 21.

108. Ohio law reaches just the opposite result. In Ohio the state cannot be sued without its consent. In section 2743 of the Ohio Revised Code the state consents to suit under certain terms and conditions. One of those is that suits be brought in a specially created Court of Claims. Another is that only the state in its most pristine nature may be sued; the state has not consented to suit when it is acting as a political subdivision. On those occasions the government retains its immunity unless other specific statutes express the contrary.

109. 551 F.2d 254 (10th Cir. 1977).

110. *Id.* at 260. *See also* Stoddard v. School Dist. No. 1, Lincoln County, Wyo., 429 F. Supp. 890 (D. Wyo. 1977).

111. 434 F. Supp. 963 (E.D. Pa. 1977).

112. *Id.* at 977.

113. *Id.*

will be to bring more attention to the subject and we may see some finer distinctions made. For example, it is difficult to discover the logic of extending sovereign immunity to the state but not to a municipality when they both derive their sovereignty directly from the state constitution. After *Monell* local governing units may well attempt to find in the eleventh amendment some of the protection they have lost, despite the fact that the Supreme Court has consistently distinguished between the state on the one hand, and municipalities on the other, for eleventh amendment purposes.[114]

C. *The "But For" Defense*

Mt. Healthy suggests the possibility of another defense for local governing units after *Monell* in certain limited situations. *Monell* holds political subdivisions liable if their expressed policy or practice violates the constitutional rights of a citizen but, in some situations, the conduct may not impose liability unless it was taken to accomplish an unconstitutional purpose. The most obvious example of this type of litigation is school desegregation suits. School districts have authority to select school sites and assign students to particular buildings but those decisions must not be motivated by discriminatory intent.

Mt. Healthy involved another typical situation for application of this defense. There, as outlined in the Introduction, the school board decided not to renew the contract of a non-tenured teacher. The teacher, Fred Doyle, had been with the school district for five years, but had not yet gained tenure when he received notification prior to April 30 that he would not be re-employed. Had the board decided to re-employ Mr. Doyle, it would have had to offer him a continuing contract. Under Ohio law,[115] a school board is not required to give detailed reasons for a non-renewal decision. However, in response to a request, the Superintendent advised him by letter that the decision was based on a showing of "a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships."[116]

The Superintendent then gave two examples of Mr. Doyle's conduct which he believed exemplified this lack of tact. The first was a phone call which Doyle made to a local radio station, WSAI, concerning a dress code for teachers; and the second was his use of obscene gestures to correct students in a situation which occurred in the cafeteria.

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114. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), as noted in *Monell*, 98 S. Ct. 2035 n.54.

115. OHIO REV. CODE ANN. § 3319.16 (Page 1977).

116. 429 U.S. at 283 n.1.

In Ohio the non-renewal decision is made by the board upon the recommendation of the superintendent. The individual board members testified that they were aware of additional incidents including an altercation with another teacher which resulted in a one-day suspension and the walk-out of a number of teachers, a demand for a second helping of spaghetti which ended with Mr. Doyle insulting the kitchen staff, his reference to certain students in connection with a disciplinary complaint as "sons of bitches," and an occasion when one of the board members believed that Doyle had lied to her.

Doyle sued the board and the individual board members in federal court, alleging that his first amendment rights were violated because the decision not to renew his contract was based on his phone call to the radio station, which was protected speech.[117] Judge Hogan, who heard the case in the district court, determined that the phone call to WSAI was protected by the first amendment. He then described the decision-making process as follows:

> Both the Board and the Superintendent were faced with a situation in which there did exist in fact reason independent of any First Amendment rights or exercise thereof, to not extend tenure. . . . As we see it and find it as a fact, the Superintendent and the Board were faced with a situation in which there were a number of moving causes, some permissible and some not permissible. The action based thereon, whatever its legal consequences, cannot be described as arbitrary or retaliatory or malicious or marked by bad faith.[118]

On the basis of the good faith defense, the court dismissed the individual board members; however, the board was retained as a defendant.

Judge Hogan then analyzed the situation in light of *Skehan v. Board of Trustees of Bloomsburg State College*.[119] *Skehan* involved a non-tenured college professor who was given a terminal year contract. The professor claimed the non-renewal decision was in retaliation for his exercise of first amendent rights and that he was entitled to a hearing under his contract with the university. While that dispute was pending, Skehan was discharged for several acts of insubordination. The district court ruled that Skehan was fired because of his refusal to

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117. The complaint also alleged that his participation in union activities was behind the board's decision, but this allegation was not proved and not advanced in the appellate courts.

118. Appendix, Petitioner's Brief for Cert. at 27-28, Mt. Healthy v. Doyle, 429 U.S. 274 (1977) [hereinafter referred to as Petitioner's Brief for Cert.].

119. 501 F.2d 31 (3d Cir. 1974).

follow directions but made no finding as to whether the terminal year decision was made in retaliation for the exercise of his constitutional rights. On appeal the Third Circuit reviewed his first amendment claim and stated: "It is clear that nonrenewal of a nontenured public school teacher's one-year contract, or midyear termination of that contract, may not be predicated even in part on his exercise of first amendment rights."[120] The court remanded the case to determine, *inter alia*,[121] whether the non-renewal decision was based on constitutionally protected reasons.

The district court in *Mt. Healthy* applied the *Skehan* standard to the facts before it and concluded that the board's decision not to renew Doyle's contract was based "in a substantial part" on a non-permissible reason. Accordingly, the court ordered Doyle reinstated with back pay and attorney's fees. The Sixth Circuit Court of Appeals affirmed the reinstatement and compensatory damages but vacated the award of attorney's fees.

The school board appealed, arguing that the presence of one constitutionally impermissible factor does not necessarily invalidate a school board's employment decision.[122] The Supreme Court reviewed the facts leading up to the non-renewal decision and after applying the "balancing test," developed in *Pickering v. Board of Education*,[123] ruled that the phone call to WSAI was protected conduct. The Court, however, established a new standard to review the board's action upon the finding that a constitutionally impermissible reason was a factor in its decision.

The Court noted that a non-tenured teacher can be non-renewed in Ohio for no reason whatsoever and without a prior hearing,[124] but the Court was troubled by the district court's statement that the board had reasons "independent of any First Amendment rights or exercise thereof, to not extend tenure."[125] The district court had concluded that the test was whether the impermissible reason played "a substan-

120. *Id.* at 39.

121. The court also remanded to determine (a) the governmental status of the college in regard to its liability for damages and a sovereign immunity defense; and (b) the nature of the academic freedom interest created by contract and plaintiff's consequent entitlement to a hearing under the contract. *Id.* at 45.

122. Petitioner's Brief for Cert. at 15.

123. 391 U.S. 563 (1968). The Supreme Court therein held that the test to determine whether the speech of a public employee was protected by the Constitution entails balancing "the interests of the teacher, as a citizen, in commenting upon matters of public concerns and the interest of the state, as an employer, in promoting the efficiency of the public service it performs through its employees."

124. 429 U.S. at 283.

125. *Id.* at 285 (quoting Appendix, Petitioner's Brief for Cert. at 12a).

tial part" in the decision, but the Supreme Court rejected the "substantial" test:

> A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.[126]

The Court's concern was with the consequences of the district court's rule. Justice Rehnquist offered, as an example of the undesirable results of the rule, the case of a marginal candidate who might guarantee his future employment by participation in constitutionally protected conduct which could not be ignored by the employer. This hypothetical case was compared to cases involving involuntary confessions followed by second confessions, where the issue was whether the first confession "tainted" the later statements.[127] The Court sought to "protect against the invasion of constitutional rights without commanding undesirable consequences. . . ."[128] Accordingly, it established a new procedure to review the challenged decision.

The Court held that initially the burden was on the employee to show (1) that his conduct was protected and (2) that the protected conduct was "a substantial" or "motivating factor" in the decision not to rehire. If the employee were successful in proving these facts, then the burden would shift to the employer to show that the same decision would have been reached "even in the absence of the protected conduct."[129] The case was remanded to apply the new test.

Village of Arlington Heights v. Metropolitan Housing Development Corp.,[130] decided at the same time as *Mt. Healthy*, elucidates the Court's definition of "motivating factor." There, a developer sought a zoning change to construct racially integrated, low and moderate income housing. The village denied the change and the developer sued in federal court alleging that the decision was racially motivated in violation of the fourteenth amendment and the Fair Housing Act.[131] The district court ruled in favor of the defendant[132] but the Court of Ap-

126. *Id.* at 285.
127. Lyons v. Oklahoma, 322 U.S. 596 (1944); Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 308 U.S. 338 (1939); Parker v. N.C., 397 U.S. 790, 796 (1970).
128. 429 U.S. at 287.
129. *Id.*
130. 429 U.S. 252 (1977).
131. 42 U.S.C. §§ 3601-3631 (1970).
132. 373 F. Supp. 208 (N.D. Ill. 1974).

peals for the Seventh Circuit reversed on the grounds that although the rezoning denial was not racially motivated, the effect of the decision would have a disproportionate impact on blacks and did not serve any compelling state interest.[133] The Supreme Court reversed and remanded on the grounds that the court of appeals had applied the wrong standard in determining whether there had been a violation of the fourteenth amendment.[134] The Court took this opportunity to expand upon its ruling in *Washington v. Davis*[135] (decided after the court of appeals decision) that official action is not unconstitutional simply because it results in a racially disproportionate impact.

In *Arlington Heights*, the Court said evidence of a racially disproportionate impact is not, by itself, proof of a constitutional violation but it should trigger further inquiry. When such evidence is present, the trial court must then look to evidence of intent or motive to determine whether there is a constitutional violation.[136] Noting that legislators and administrators rarely make a decision motivated by a single purpose, the Court stated that plaintiffs were not required to prove that the constitutional reason was the sole purpose, or even the "dominant" or "primary" one, for the decision.

The Supreme Court suggested that the required circumstantial or direct evidence of intent might be found in several areas including (1) the historical "background of the decision"; (2) the specific sequence of events leading up to the challenged decision; (3) "departure from the normal procedural sequence"; (4) "substantive departures from established practice"; (5) "legislative or administrative history"; and (6) in extraordinary circumstances, the testimony of the members of the decision-making body.[137]

By remanding the *Mt. Healthy* case for reconsideration in light of *Arlington Heights*, the Supreme Court was directing the district court to re-examine the evidence concerning the procedures and history of the decision not to renew Doyle's contract and the testimony of the school board members themselves to determine whether the vote not to renew was the result of the phone call to WSAI. In making its analysis, the trial court was instructed that the plaintiff had the burden of proof to establish that the inpermissible reason was a motivating factor, and that once the plaintiff carried that burden, the defendant then had the burden to show that it would have reached the same decision anyway.

133. 517 F.2d 409 (7th Cir. 1975).
134. 429 U.S. at 266.
135. 426 U.S. 229 (1976).
136. 429 U.S. at 265.
137. *Id.* at 267-68.

The *Mt. Healthy* case has not yet been heard on remand, but several other courts have applied the new test to matters before them. These decisions indicate that the *Mt. Healthy* decision has established a workable rule in school employment cases.

Johnson v. Butler[138] illustrates a court's application of the three-step analysis propounded in *Mt. Healthy*. A non-tenured teacher sued the school board members when her contract was not renewed, claiming that the decision was based on the fact that she had filed a grievance—which was later dropped—complaining about her status as a "floating" teacher and requesting a permanent room assignment. The principal, upon whose recommendation the board's decision was based, testified that Ms. Johnson had been insubordinate and displayed a poor attitude by leaving her classes unattended and by leaving the building early. The evidence showed that the teacher had consistently received satisfactory performance ratings, had left the classroom only to get supplies as was the custom, and had left the school premises early only for the purpose of transporting students to extracurricular activities which was permitted.

The court determined that under *Tinker v. DesMoines Independent Community School District*,[139] *Perry v. Sindermann*,[140] and *Pickering v. Board of Education*,[141] the teacher's conduct in complaining about her room assignment was protected by the first amendment. The plaintiff, therefore, had carried her burden of proving that she did have a constitutional claim. The court further considered whether plaintiff met her burden in regard to the second step, that of establishing that the protected conduct was a motivating or substantial factor in the board's decision.

The case had been submitted to an advisory jury with the following special instruction:

> 1. Has the petitioner, Donna L. Johnson, established by a preponderance of the evidence that her making a complaint to the school principal, John B. Leffel, concerning her room assignment was a substantial or motivating factor in the School Board's decision not to rehire her for the 1976-77 school year?[142]

The jury had answered in the affirmative. The court in its independent review concurred, noting that Mr. Leffel never criticized Ms. Johnson's teaching or indicated that her conduct was in any way unsatisfac-

138. 433 F. Supp. 531 (W.D. Va. 1977).
139. 393 U.S. 503 (1969).
140. 408 U.S. 593 (1972).
141. 391 U.S. 563 (1968).
142. 433 F. Supp. at 535.

tory until after she filed the grievance, which was the first grievance ever filed while he was principal.

The court then turned to the final step of the *Mt. Healthy* rule, *i.e.*, whether the board would have reached the same conclusion without the impermissible factor. Here the jury had been asked: "2. If the answer to question 1 is 'yes,' has the School Board shown by a preponderance of the evidence that it would have reached the same decision as to re-employment of Donna L. Johnson in the absence of her complaint concerning her room assignment.[143]

The jury found the board would not have reached the same decision and again the court agreed. The board rested its decision on the recommendation of the principal. The court reviewed the testimony of two of the board members and found that their concern was directly related to the protected conduct. Accordingly, the board failed to justify its non-renewal under the *Mt. Healthy* test and the teacher was reinstated with back pay.

Significantly, the *Mt. Healthy* standard does not permit the court to substitute its judgment for that of the defendant. While the court in *Johnson* reversed the board's decision, it did so because it could find no permissible reasons for the decision, not because it disagreed with the board's evaluation.

This test has been variously described by the lower courts. In *Ayers v. Western Line Consolidated School District,*[144] the Fifth Circuit characterized the *Mt. Healthy* test as a "same decision any way defense," and the Ninth Circuit, in *Wagle v. Murray,*[145] a case remanded by the Supreme Court for reconsideration in light of *Mt. Healthy*, applied a "but for" standard to determine the validity of the decision. The Eighth Circuit held in *Williams v. Day*[146] that if the impermissible reason was "not the basis of the Board's decision," the decision would stand. Likewise the Second Circuit affirmed a non-renewal decision even though the protected conduct made the school district "more certain of the correctness of its decision," quoting *Mt. Healthy.*[147] The Fifth Circuit remanded a non-renewal case with instructions to apply a "but for" test.[148]

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143. *Id.*

144. 555 F.2d 1309 (5th Cir. 1977).

145. 546 F.2d 1329 (9th Cir. 1976), *vacated and remanded sub nom.* Murray v Wagle, 431 U.S. 935, 560 F.2d 401 (9th Cir. 1977), *cert. denied sub nom.* Murray v. Wagle, 98 S. Ct. 729 (1978).

146. 553 F.2d 1160, 1163 (8th Cir. 1977).

147. Rocker v. Huntington, 550 F.2d 804, 806 (2d Cir. 1977).

148. Mack v. Cape Elizabeth School Bd., 553 F.2d 720, 722 (1st Cir. 1977).

Finally the Supreme Court itself characterized the *Mt. Healthy* standard as a "but for" test. In *Regents of the University of California v. Bakke*,[149] the district court described the purpose of the *Mt. Healthy* remand to determine "whether protected First Amendment activity had been the 'but for' cause of Doyle's protested discharge." In *Bakke*, the court noted that there was no reason to remand that case on *Mt. Healthy* grounds, because the sole basis for Bakke's rejection from medical school was purposeful racial discrimination. The court concluded that since there was "[no] record revealing that legitimate alternative grounds for the decision existed, as there was in *Mt. Healthy* . . . , a remand would result in fictitious recasting of past conduct."[150]

The reference to the *Mt. Healthy* decision by the Supreme Court in both *Bakke*[151] and *Arlington Heights* indicates that the court is willing to consider a *Mt. Healthy* defense in the context of discrimination as well as the first amendment. This fact broadens the availability of the defense for governmental units. Furthermore, the *Mt. Healthy* defense has wide application for local governments because, being political bodies, they often make decisions, or adopt policies and practices which are motivated by more than one purpose. For example, are baseball diamonds assigned on the basis of prior use in order to reserve them for male leagues, or are there legitimate, non-discriminatory reasons for that policy?[152]

Several cases since *Mt. Healthy* have dealt with the problem of the proper role of the court in reviewing executive or legislative action. *Branch v. School District No. 7 of Ravalli County*[153] is an especially helpful example. There, a non-tenured elementary school teacher claimed the decision not to renew her contract was based on her criticism of the school and its administration. The board members countered with other reasons. One disagreed with her teaching philosophy; another criticized her use of profanity and questioned her judgment in permitting a student's letter to appear in the newspaper; a third found that the teacher was uncooperative and had a low opinion of the school system.

The court carefully reviewed each reason offered by the board members. Although the court disagreed with the reasons the indivi-

149. 98 S. Ct. 2733, 2764 n.54 (1978).
150. *Id.*
151. 98 S. Ct. 2733 (1978).
152. This question puts a premium on legislative history and raises the issue as to the accuracy of official records as reflecting the true reasons for any legislative or executive action.
153. 432 F. Supp. 608 (D. Mont. 1977).

duals advanced, nevertheless, it refused to overturn the board's decision. Instead, it held that the non-renewal would stand because "the Board would have acted as it did in the absence of the protected conduct."[154]

In sum, the lower courts since *Mt. Healthy* have found the ability to protect the constitutional rights of plaintiffs without substituting judicial judgment for that of the administrators or executives whose decision is under review. The *Mt. Healthy* decision has established a workable rule in employment cases which can be expanded to other situations where the political subdivision has some discretion. It thus provides another possible defense to actions based on section 1983 jurisdiction.

D. *The "Good Faith" Defense*

Finally, local governing units may be able to establish a "good faith" defense as defined in *Wood v. Strickland*.[155] There, students who were expelled for violating a school rule prohibiting the use or possession of intoxicating beverages on school grounds at school functions, sued the school board members and administrators claiming a violation of their due process right to a hearing. The particular issue which the court considered was the circumstances under which school administrators and board members were entitled to immunity from liability when taking official action. The court traced the history of the common law doctrine of legislative and judicial immunity in *Tenney v. Brandhove*,[156] *Pierson v. Ray*,[157] and *Scheuer v. Rhodes*,[158] and concluded that school board members were entitled to a "qualified good faith immunity" under section 1983. The court discussed the circumstances and conditions of that immunity at length:

> To be entitled to a special exemption from the categorical remedial language of Section 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. . . . Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within his

154. *Id.* at 611.
155. 420 U.S. 308 (1975).
156. 341 U.S. 367 (1951).
157. 386 U.S. 547, 554 (1967).
158. 416 U.S. 232, 247 (1974).

> sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[159]

The Court was especially concerned with balancing the rights of students against the officials' duty to act, in an area where the law was changing so rapidly. The majority concluded that clearly established constitutional rights cannot be ignored with immunity, but neither can administrators and officials be expected to "[predict] the future course of constitutional law."[160] Chief Justice Burger and Justices Powell, Blackmun, and Rehnquist dissented,[161] protesting that this standard was too high:

> The court's decision appears to rest on an unwarranted assumption as to what lay school officials know or can know about the law and constitutional rights. These officials will now act at the peril of some judge or jury subsequently finding that a good faith belief as to the applicable law was mistaken and hence actionable.[162]

It is, naturally, this concern which creates the greatest potential for damage to local governments as a result of the *Monell* decision. Now the government itself—which, of course, can only act through its officials—becomes liable if those individuals are found to have guessed wrong.[163] The case, mentioned at the beginning of this article, of the promotional examinations which were limited to women police officers, is an example in point. There, the city had to decide between a policy which discriminated on the basis of sex, on the one hand, and a policy which violated certain contractual expectations, on the other hand.[164] Other affimative action policies might raise similar dilemmas.

Similarly, the example of the use of the baseball diamonds illustrates a case where this defense may serve as a shield. At the time when the city adopted the procedure of allocating playfields on the

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159. 420 U.S. at 322.

160. *Id.* (to the extent that this decision established a new test). *See Wood v. Strickland: Objectifying the Standard of Good Faith for School Board Members in Defense to Personal Liability Under Section 1983,* 10 LOY. L.A. L. REV. 149 (1976).

161. They concurred in the rest of the decision.

162. 420 U.S. at 329.

163. The dissenting justices were primarily worried that the high standard would discourage qualified persons from volunteering to assume public service, especially when it was not paid. *Id.* at 331. This consideration does not apply when the governmental entity itself asserts the defenses and, therefore, cuts against extension of the "good-faith" defense to *Monell* defendants.

164. The women, in fact, also sued in that case. Day v. Civil Service Comm'n, No. A-770423 (Hamilton County, Ohio C.P. filed, Jan. 21, 1977).

basis of prior use and residency, did a new non-resident team have a constitutional right to practice on a city diamond? If it did not, then a good faith defense might apply.

When these issues are fully briefed they are not easy to answer, but when they first arise in the legislative or executive context, they are even more difficult because they are not so clearly defined.[165] Hence the *Wood* decision has been generally criticized[166] and the treatment by the courts reveals that application of the test has often required extensive litigation.[167] Nevertheless, the good faith defense of *Wood* has not been restricted to school board members[168] and section 1983 litigation.[169] By extension it would be available to local governing units, sued for a violation of civil rights, as well.

CONCLUSION

The impact of *Monell* and *Mt. Healthy* is hard to predict. Initally, *Monell* exposes political subdivisions to substantial litigation where they were previously immune. However, in order to state a cause of action, the plaintiff must point to more than just unconstitutional conduct. Under *Monell,* that conduct must be sanctioned somehow by the governmental unit. Depending on the circumstances, the governmental defendant has various potential defenses including eleventh amendment immunity, a "but for" defense, and a "good faith" defense. If courts are willing to exercise the restraint they have shown in the public employment cases since *Mt. Healthy,* local governing units, which have always had the duty to protect constitutional rights, should be able to withstand this new onslaught of litigation.

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165. One commentator noted that the effect of the Supreme Court's decision was to: "[render] it virtually impossible to calculate what conduct is proscribed by the statute in advance of an actual judicial determination." *Second Guessing the Court: Ex Post Facto Liability Under 42 U.S.C. § 1983*, 28 BAYLOR L. REV. 339, 339 (1976).

166. *See, e.g., Second Guessing, supra* note 165 and *Objectifying the Standard, supra* note 160.

167. The following cases were all remanded for trial on the good faith issue: Goodman v. Parwatikar, 570 F.2d 801, 805 (8th Cir. 1978) (state mental hospital sued for constitutionally inadequate medical treatment); Jacobson v. Tahoe Regional Planning Agency, 566 F.2d 1353 (9th Cir. 1977) (planning authority sued by property owner for deprivation of property rights under *Bivens* theory); Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977) (municipal child welfare department sued for taking custody of children without due process); Rosado v. Santiago, 562 F.2d 114 (1st Cir. 1977) (malice found); Gentile v. Wallen, 562 F.2d 193 (2d Cir. 1977) (insufficient evidence of good faith); Williams v. Anderson, 562 F.2d 1081 (8th Cir. 1977) (black faculty sued school board for discrimination); Tatum v. Morton, 562 F.2d 1279 (D.C. Cir. 1977) (illegal search).

168. *See, e.g.,* O'Connor v. Donaldson, 422 U.S. 563 (1975).