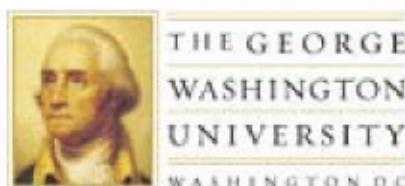


The Burger Court Opinion Writing Database

Monell v. New York City Department of Social Services
436 U.S. 658 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 11, 1977

MEMORANDUM TO THE CONFERENCE:

Re: 75-1914 Monell v. Dept. of Social Services of NYC

As I indicated at the Conference on the above case, tomorrow I will assign for the writing of a memorandum, pursuant to the usual practice when we have a "no court" situation.

Regards,

WJB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 12, 1977

Dear Bill:

Re: 75-1914 Monell v. Dept.

With the case in a "vague" 4-3-2 posture, I believe memos would help. I will ask Bill Rehnquist to do one articulating the views generally expressed by Harry, Bill and myself to follow Monroe v. Pape (although like Potter I "passed").

I leave it to you to have a memo done along the lines expressed by you, Byron, Thurgood, and John. Lewis' 11/11/77 memo puts him in the "in dubitante" category, hoping, as I do, that the memos will be "helpful."

This memo is to be read with the enclosed Assignment Sheet.

Regards,

W.B.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 13, 1978

Dear Bill:

Re: 75-1914 Monell v. Dept. of Social Services
of the City of New York

My absence from Washington attending a series of Judicial Conference committee meetings has prevented me from acting on your memorandum in this case.

I have now read it, and I am in general agreement with the position you express and would be prepared to join an opinion along those lines.

Regards,

WEB

Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 23, 1978

Re: 75-1914 - Monell v. Department of Social Services

MEMORANDUM TO THE CONFERENCE:

Of course Monell or any pending case can be discussed by anyone who desires. Since I received the several memos rather late today, I am prepared to listen but not to discuss.

Regards,

Regards,
WSB

Supreme Court of the United States
Washington, D. C. 20543

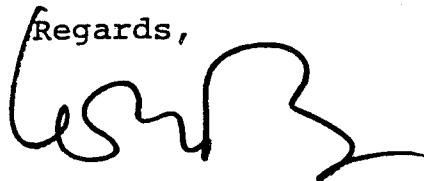
CHAMBERS OF
THE CHIEF JUSTICE

March 13, 1978

Re: 75-1914 - Monell v. Dept. of Social Services

Dear Bill:

With a large investment in this case, I suspect
you won't mind changing your memo into a dissent.

Regards,


Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1978

Dear Bill:

Re: 75-1914 - Monell v. Dept. of Social Service

Please join me in your dissent.

Regards,

W.E.B. /m

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 14, 1977

RE: No. 75-1914 Monell v. Department of Social Services
of New York City

Dear Chief:

I'll undertake to prepare a memorandum along the lines
Byron, Thurgood, John and I advanced at conference.

Sincerely,



The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 9, 1978

RE: No. 75-1914 Monell v. Department of Social Services of
the City of New York

Dear Bill:

Six weeks ago I promised to send you the enclosed "next week." I hope the delay hasn't unduly inconvenienced you. It still needs some polish (and condensing?) but I hope it will serve to let you get going on your response. I also hope on receipt of yours to give you my reaction more promptly. I guess we still want to circulate our final versions simultaneously.

Thanks so much for bearing with me so patiently.

Sincerely,



Mr. Justice Rehnquist

Wm. Brennan
1/9/78

This is copy I sent to Justice & he doesn't
send back - make another m. & sent to
WHR.

To: The Chief Justice
 ✓ Mr. Justice Stewart
 ✓ Mr. Justice White
 ✓ Mr. Justice Marshall
 ✓ Mr. Justice Blackmun
 ✓ Mr. Justice Powell
 ✓ Mr. Justice Rehnquist
 ✓ Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 30 JAN 1978

CIRCULATED
 1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1914

Jane Monell et al., Petitioners, v. Department of Social Services of the City of New York et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1978]

Memorandum of MR. JUSTICE BRENNAN.

Petitioners, a class of female employees of the Department of Social Services and the Board of Education of the City of New York, commenced this action under 42 U. S. C. § 1983 in July 1971.¹ The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.²

¹ The complaint was amended on September 14, 1972 to allege a claim under Title VII of the 1964 Civil Rights Act, as amended, 42 U. S. C. § 2000e (1970 ed., Supp. V). The District Court held that the 1972 amendments to Title VII did not apply retroactively to discrimination suffered prior to those amendments even when an action challenging such prior discrimination was pending on the date of the amendments. 394 F. Supp. 853, 856 (SDNY 1975). This holding was affirmed on appeal. 532 F. 2d 259, 261-262 (CA2 1976). Although petitioners sought certiorari on the Title VII issue as well as the § 1983 claim, we restricted our grant of certiorari to the latter issue. 429 U. S. 1071.

² The plaintiffs alleged that the city had a citywide policy of forcing women to take maternity leave after the fifth month of pregnancy. Amended Complaint ¶28, App. 13-14. The defendants did not deny this, but stated that this policy had been changed after suit was instituted. Answer ¶13, App. 32-33. The plaintiffs further alleged that the Board had a policy of requiring women to take maternity leave after the seventh month of pregnancy unless that month fell in the last month of the school year, in which case the teacher could remain through the end of the school term. Amended Complaint ¶¶39, 42, 45, App. 18-19, 21. This allegation was denied. Answer ¶¶17, 18, App. 35.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 23, 1978

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

Dear Lewis:

I very much appreciate your helpful and welcome comments on the Monell memoranda. I certainly cannot disagree with the first reservation you voice to my position, namely that we need not overrule Monroe and Moor but might simply restrict those cases to their facts. See my Memorandum at 8. I find your second suggestion--that in this case we should "recognize a defense for policies promulgated in good faith that affect adversely constitutional rights not clearly defined at the time of violation"--a bit more troublesome. What particularly bothers me about it is that the question of what type of immunity should be afforded municipal or quasi-municipal bodies if such bodies are suable directly under § 1983 has not been briefed in this case. I'd not like to repeat here the earlier errors of rushing to decision without adequate briefing. The possible confusion that can arise from such lack of briefing is painfully evident from the treatment given the question of the "personhood" of municipalities under § 1983 in Monroe, Moor, and Kenosha. Although I have a good deal of sympathy for affording municipal bodies the type of good faith defense you propose, I really do believe that the lower courts should grapple with the issue first, so that when the issue returns here, it will have been fully considered and fully briefed. I am not adverse, however, explicitly to direct the attention of the lower court on remand to the qualified immunity question, and provide the court with our views on the contours of the issue.

Monell v. Dept. of Social Services
Page 2

Parenthetically, I would like to voice my agreement with your observation, at pp. 9-10 of your memorandum, that "[i]f we continue to deny § 1983 relief against local governmental units, we strengthen the argument for Bivens relief [against these bodies]."

Sincerely,



Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

1st OPINION DRAFT

From: Mr. Justice Brennan

14 APR

SUPREME COURT OF THE UNITED STATES

Recirculated: _____

No. 75-1914

WJB
Place
1/14 APR

Jane Monell et al., Petitioners, | On Writ of Certiorari to
v. | the United States Court
Department of Social Services of | of Appeals for the Sec-
the City of New York et al. | ond Circuit.

[January —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners, a class of female employees of the Department of Social Services and the Board of Education of the City of New York, commenced this action under 42 U. S. C. § 1983 in July 1971.¹ The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.²

¹ The complaint was amended on September 14, 1972 to allege a claim under Title VII of the 1964 Civil Rights Act, as amended, 42 U. S. C. § 2000e (1970 ed., and Supp. V). The District Court held that the 1972 amendments to Title VII did not apply retroactively to discrimination suffered prior to those amendments even when an action challenging such prior discrimination was pending on the date of the amendments. 394 F. Supp. 853, 856 (SDNY 1975). This holding was affirmed on appeal. 532 F. 2d 259, 261-262 (CA2 1976). Although petitioners sought certiorari on the Title VII issue as well as the § 1983 claim, we restricted our grant of certiorari to the latter issue. 429 U. S. 1071.

² The plaintiffs alleged that New York had a citywide policy of forcing women to take maternity leave after the fifth month of pregnancy unless a city physician and head of an employee's agency allowed up to an additional two months of work. Amended Complaint ¶ 28, App. 13-14. The defendants did not deny this, but stated that this policy had been changed after suit was instituted. Answer ¶ 13, App. 32-33. The plaintiffs further alleged that the Board had a policy of requiring women to take maternity leave after the seventh month of pregnancy unless that month fell in the last month of the school year, in which case the teacher

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 10, 1978

Re: No. 75-1914, Monell v. Dept. of Social Services of the City of New York

Dear John:

Perhaps I can save you some unnecessary effort by responding quickly to your memo on the above.

First, with respect to the "full power" argument, I agree that this argument goes farther than is necessary and have already planned to rewrite this section.

Second, with respect to Part II-B, I had thought my footnote 58 on page 32 answered the concern you expressed at conference. As I indicate there, plaintiffs in Monroe interpreted their own complaint as stating a respondeat superior action.

Finally, Parts II-C and III were at least implicit in my earlier memorandum in which I thought a majority joined. I therefore included them explicitly in the draft since each seems to follow directly from Part I. Of course, both are open to modification, but I'd be better able to make changes if I knew the views of my colleagues concerning them. Accordingly, I confirm that I'd welcome expressions of such views.

Sincerely



Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 13, 1978

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

Dear Byron, Lewis and John:

Thank you very much for your memoranda. I'll undertake revisions of the circulated opinion to accommodate your views as best I can. Because of the pressure on the Printer it may be a few days before I get it around.

Sincerely,



Mr. Justice White
Mr. Justice Powell
Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

April 21, 1978

MEMORANDUM TO THE CONFERENCE

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

Enclosed is a revision of the proposed Court opinion in Monell. Parts II, III and IV are almost completely new in an attempt to accommodate the very helpful suggestions of Byron, Lewis and John. Part I(B) has also been substantially revised in an effort for greater clarity.

W.J.B. Jr.

P.P. 1, 2, 4, 5, 9, 12, 13, 14-20,

22, 24-25, 24-30, 31, 32,

33-41

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

21 APR 1978
Recirculated: _____

2d OPINION DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1914

Jane Monell et al., Petitioners, v. Department of Social Services of the City of New York et al. On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners, a class of female employees of the Department of Social Services and the Board of Education of the City of New York, commenced this action under 42 U. S. C. § 1983 in July 1971.¹ The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.²

¹ The complaint was amended on September 14, 1972 to allege a claim under Title VII of the 1964 Civil Rights Act, as amended, 42 U. S. C. § 2000e (1970 ed., and Supp. V). The District Court held that the 1972 amendments to Title VII did not apply retroactively to discrimination suffered prior to those amendments even when an action challenging such prior discrimination was pending on the date of the amendments. 394 F. Supp. 853, 856 (SDNY 1975). This holding was affirmed on appeal. 532 F. 2d 259, 261-262 (CA2 1976). Although petitioners sought certiorari on the Title VII issue as well as the § 1983 claim, we restricted our grant of certiorari to the latter issue. 429 U. S. 1071.

² The plaintiffs alleged that New York had a citywide policy of forcing women to take maternity leave after the fifth month of pregnancy unless a city physician and the head of an employee's agency allowed up to an additional two months of work. Amended Complaint ¶ 28, App. 13-14. The defendants did not deny this, but stated that this policy had been changed after suit was instituted. Answer ¶ 13, App. 32-33. The plaintiffs further alleged that the Board had a policy of requiring women to take maternity leave after the seventh month of pregnancy unless that month fell in the last month of the school year, in which case the teacher

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 25, 1978

Re: No. 75-1914, Monell v. Department of Social
Services

Dear Potter,

Thanks so much for your memorandum of April 24.

Let me say in reply that I understand that Whit Peters and Bob Litt have reached agreement on all the points they discussed yesterday with the exception of three, which are: (1) footnote 57, which Whit and Bob did not discuss, but which your memorandum identifies as troublesome; (2) footnotes 55 and 60; and (3) the question of how to deal with the claims asserted against the Mayor of New York and the Commissioner of the Department of Social Services given that the City and the Department were dismissed and plaintiffs-petitioners did not appeal this dismissal.

I confess that your reaction to note 57 as a "time bomb" surprises me. I think it states a well-settled principle of common law and I included it in the draft to make sure that people understood the limited nature of the terms "vicarious liability" and "respondeat superior" that are used in the text, since these terms (as indicated in the parts of Prosser and Harper & James cited in the opinion) are often used in different ways by different authors. Given the need for clarity, I would prefer not to drop footnote 57, but would prefer simply to add the following to it: "Whether fault or negligence in hiring, training, or direction states a cause of action under § 1983 is, of course, a question we have not addressed and we express no view on it here." Would not that meet your concern that the footnote might be read to imply that we are holding in this opinion that § 1983 would follow the common law with respect to negligent hiring, training, or direction?

As to the last part of note 55, it was meant to say only -- and I really think it says no more than -- that where the Constitution imposes a duty to act, § 1983 provides an avenue of redress when officials are deliberately indifferent to that duty. It was not intended to suggest, and I thought did not decide, when the Constitution imposes such a duty. Moreover, I think the reference to Estelle is faithful to the jump-cited material in that opinion, which is:

"We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' Gregg v. Georgia, supra, at 173 (joint opinion), proscribed by the Eighth Amendment. . . . Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." (emphasis added).

Since § 1983 does not distinguish between the Eighth Amendment and other types of constitutional violations, doesn't the last sentence of the quote necessarily decide that § 1983 goes as far as the Constitution with respect to deliberate indifference?

Note 55 is referenced in note 60 to allow me to keep Byron's language -- which I have unabashedly plagiarized in the text at page 34 -- as the description of the cause of action created by this opinion. I think Byron's language is particularly felicitous in describing the elements of the action in what is probably the more usual case of "positive" official policy leading to constitutional tort.

I would be willing to drop the material from note 55, where it is somewhat cumulative of Felix's language, but given my view that deliberate indifference is enough to hold a city under § 1983, I feel that I must qualify the text at note 60, which would otherwise seem to foreclose a deliberate indifference theory. You may differ with me on whether whether deliberate indifference is ever enough to hold a city, but can't we agree not to cut off either of our views in this case? This may be accomplished by having note 60 read as follows:

^{60/} In adopting this phrasing, we do not intend to foreclose the possibility that, where the Constitution imposes a duty on municipal officials to act -- as the Eighth and Fourteenth Amendments do with respect to the medical needs of prisoners, see Estelle v. Gamble, 429 U.S. 97 (1976) -- and official policy is one of deliberate indifference to that duty, § 1983 provides an avenue of redress against a local government as an entity. See id., at 104-105."

Would this be satisfactory to you (along with dropping the Estelle material in note 55)?

The third problem is one I confess I have not thought a great deal about. It seems to me that, at least outside of the Eleventh Amendment context, a suit against an official in his official capacity and a suit against the entity of which the official is an agent amount to the same thing: in either case the relief sought is not relief against the official personally, but exercise of the powers of his office or payment of monies from the entity's treasury. Therefore, since we accepted for cert. along with the question of the suability of school boards, the question "Whether local governmental officials . . . are 'persons' within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?", Pet. 8, I suppose I should add a footnote in an appropriate place saying something like: "Our holding today necessarily decides that local government officials sued in their official capacities are 'persons' under § 1983 for all purposes in those cases where a § 1983 plaintiff could also maintain an action against the local government, since official capacity suits are simply another way of pleading an action against a corporate entity."

On the other hand, the resolution proposed above leaves unanswered two things. First, what happens in the situation in which the corporate entity cannot be sued, i.e., the respondeat superior situation? I think the answer is that suit will not lie, since the equivalence between official capacity suits and suits against the entity need not be tortured here as it has been in the Eleventh Amendment context. Second, what should be the

result in this case in which petitioners-plaintiffs have "allowed" the City and the Department to be dismissed from the suit by failing to appeal their dismissal? I have no ready answer for this. It may be that the District Court can reinstate the City and Department or it may be that the courts below will feel they can go forward and grant relief without the City and the Department. Since we need not decide either of these issues now, my preference would be simply to add the footnote proposed above and leave it to the District Court and CA2 to sort out where this case goes from here.

I would appreciate any views you and other colleagues might have on how to resolve the last question. I hope to send a third draft to the printer in the next day or two, which would include the first two changes set out above plus other corrections we have agreed to make in response to comments by Bob Litt and by Sam Estreicher in Lewis' chambers.

Sincerely,

W.J.B., Jr.

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 2, 1978

Re: No. 75-1914, Monell v. Department of Social Services

Dear Lewis,

Thank you for your memo on this case. As you know, my clerks have been meeting informally with the clerks from a number of chambers (including your own) to hammer out rough spots in the second draft of my opinion for the Court. I think that this process has produced new language which meets all but two of the points raised in your memorandum, although in some cases the language adopted is slightly different from that you have suggested.

The two remaining points are footnote 57 and Estelle. As Byron's recent memorandum indicated, I have agreed to delete note 57. And, although I must say that I am quite reluctant to drop the Estelle point, in the interest of avoiding a flurry of opinions I will drop the last part of note 55 as well as any attempt to resurrect the point in note 60. I have also gone through Part II with care to remove the word "fault" whenever it might, by negative implication, indicate that we are creating a negligence cause of action under § 1983. To accomodate the dropping of Estelle and references to municipal fault, I will recast the last paragraph of Part II as follows (replacing what is now the carry-over paragraph on pp. 33-34):

"We conclude, therefore, that a local government may not be sued for the tort purely of its employees or agents. Instead, it 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. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see pp. 1-2 and n. 2, supra, we must reverse the judgment below. In so doing, we have no occasion to

address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases and we expressly leave further development of this action to another day."

The suggested text will require both footnotes 59 and 60 to be deleted.

Rather than attempt to make any more detailed response to your memorandum, I will send our well marked-up copy of Monell draft 2 to the printer for a third draft. I agree with you that "it [is] appropriate for the Court to make clear that [respondeat superior] does not support a §1983 claim against entities of government," and, accordingly, will keep Part II in the third draft. If it appears that we cannot attract a fifth vote for that Part, I will convert it into a plurality opinion in the fourth draft.

Sincerely,



Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

May 4, 1978

MEMORANDUM TO THE CONFERENCE

RE: No. 75-1914 Monell v. Department of Social Services
of the City of New York

Enclosed is completed draft revised primarily to accommodate the suggestions of Potter, Byron and Lewis. Those appear at pages 25, 26, 27, 30-35, 38-39 and 41.

The changes at 11, 13-14 and 20-22 are for purposes of clarification and organization only.

I hope that this circulation can be the basis for a final resolution of the Court's opinion.

W.J.B. Jr.

WJB
I am still much of the
and hope you will not make any further changes

CHANGES: 11, 13-14, 20-22, 25, 26, 27,
30, 31, 32, 33, 34-35, 38-39, 41

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

3rd OPINION DRAFT

SUPREME COURT OF THE UNITED STATES

Mr. Justice Brennan

No. 75-1914

Circulated:

Jane Monell et al., Petitioners, | On Writ of Certiorari to
v. | the United States Court
Department of Social Services of | of Appeals for the Sec-
the City of New York et al. | ond Circuit.

Recirculated:

5/4/78

[January —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners, a class of female employees of the Department of Social Services and the Board of Education of the City of New York, commenced this action under 42 U. S. C. § 1983 in July 1971.¹ The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.²

¹ The complaint was amended on September 14, 1972 to allege a claim under Title VII of the 1964 Civil Rights Act, as amended, 42 U. S. C. § 2000e (1970 ed., and Supp. V). The District Court held that the 1972 amendments to Title VII did not apply retroactively to discrimination suffered prior to those amendments even when an action challenging such prior discrimination was pending on the date of the amendments. 394 F. Supp. 853, 856 (SDNY 1975). This holding was affirmed on appeal. 532 F. 2d 259, 261-262 (CA2 1976). Although petitioners sought certiorari on the Title VII issue as well as the § 1983 claim, we restricted our grant of certiorari to the latter issue. 429 U. S. 1071.

² The plaintiffs alleged that New York had a citywide policy of forcing women to take maternity leave after the fifth month of pregnancy unless a city physician and the head of an employee's agency allowed up to an additional two months of work. Amended Complaint ¶28, App. 13-14. The defendants did not deny this, but stated that this policy had been changed after suit was instituted. Answer ¶13, App. 32-33. The plaintiffs further alleged that the Board had a policy of requiring women to take maternity leave after the seventh month of pregnancy unless that month fell in the last month of the school year, in which case the teacher

pp. 11, 33, 40

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 5/18/78

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1914

Jane Monell et al., Petitioners, *v.* Department of Social Services of the City of New York et al. } On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[January —, 1978]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners, a class of female employees of the Department of Social Services and the Board of Education of the City of New York, commenced this action under 42 U. S. C. § 1983 in July 1971.¹ The gravamen of the complaint was that the Board and the Department had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.²

¹ The complaint was amended on September 14, 1972 to allege a claim under Title VII of the 1964 Civil Rights Act, as amended, 42 U. S. C. § 2000e (1970 ed., and Supp. V). The District Court held that the 1972 amendments to Title VII did not apply retroactively to discrimination suffered prior to those amendments even when an action challenging such prior discrimination was pending on the date of the amendments. 394 F. Supp. 853, 856 (SDNY 1975). This holding was affirmed on appeal. 532 F. 2d 259, 261-262 (CA2 1976). Although petitioners sought certiorari on the Title VII issue as well as the § 1983 claim, we restricted our grant of certiorari to the latter issue. 429 U. S. 1071.

² The plaintiffs alleged that New York had a citywide policy of forcing women to take maternity leave after the fifth month of pregnancy unless a city physician and the head of an employee's agency allowed up to an additional two months of work. Amended Complaint ¶28, App. 13-14. The defendants did not deny this, but stated that this policy had been changed after suit was instituted. Answer ¶13, App. 32-33. The plaintiffs further alleged that the Board had a policy of requiring women to take maternity leave after the seventh month of pregnancy unless that month fell in the last month of the school year, in which case the teacher

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE W. J. BRENNAN, JR.

June 13, 1978

Memorandum re: Cases Held for No. 75-1914, Monell v. Department of Social Services

I have asked Mike Rodak to list the holds for Monell for the June 22 conference. Given the numbers involved, I am circulating the hold memo now to give everyone time to review the cases and to make sure I don't miss the ferry!

1. No. 75-1710, Rankin County Board of Ed. v. Adams

This litigation began in 1967 as a school desegregation suit with jurisdiction predicated on 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. The United States became an *amicus curiae* with the status of a party and has appeared here as an *amicus*. During the course of this suit, the district court ordered petitioners to desegregate the faculty of their school system. Apparently petitioners did this in part by demoting all black principals and firing 28 black teachers. The district court determined that petitioners had been guilty of job discrimination with respect to most of the demoted and fired school employees. On April 12, 1974, the parties entered into a stipulation resolving the claims of 20 of the employees and filed it with the district court, which prohibited implementation of the stipulated agreement insofar as it allowed back pay until it could determine whether back pay awards could be made consistent with the Eleventh Amendment.

Notwithstanding the district court's reservation of the Eleventh Amendment issue, it filed its reports relating to job discrimination with CA5 as its "final judgment." Of course, such reports could not be a final judgment because they did not end the lawsuit, but merely determined liability and ordered prospective relief while refusing to set damages. CA5 did not notice this apparent jurisdictional defect and went on to hold that Mississippi school boards were local governments, not part of the

W. J. Brennan
June 13, 1978

10411, 75-1914

Supreme Court of the United States
Memorandum

, 19

Levitt -

I read over your
proposed Final memorandum
last night. It reflects my
original thinking in this case
better than I can have
expressed it. I would
immediately have publicly agreed
with you except that I

Supreme Court of the United States
Memorandum

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I understand that John
Stevens is now having second
thoughts (you will remember
that he too originally agreed
with you and me), and
I would like to know what
he has to say.

Should we suggest that
this can be discussed on
Friday? P.S.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 23, 1978

No. 75-1914, Monell v. Dept. of Soc. Services

Dear Chief,

In light of Lewis Powell's memorandum of today, might it not be a good idea to discuss this case at our Conference tomorrow?

Sincerely yours,

P.S.
17

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 24, 1978

Re: No. 75-1914 - Monell v. Department of Social
Services of the City of New York

Dear Bill,

I spent a large part of yesterday carefully reading your circulation of April 21. Although I hope ultimately to be able to join you, the present draft contains several statements that cause me considerable concern. My law clerk, Bob Litt, has talked to Whit Peters about several of these concerns, and this is simply to let you know, without going into all the details, that Bob is in every respect speaking for me.

I give specific emphasis to only two of my concerns, one of which may not have been conveyed by Bob. First, footnote 57 on page 32 seems to me a veritable time bomb, particularly when it is read in the light of the last sentence in the text on page 33. Although we have never decided that there can ever be a §1983 action based on negligence alone, it seems to me that this footnote and sentence of text amount to a virtual invitation to not so ingenious lawyers to sue municipalities upon the ground that the municipalities were at fault with respect to hiring, training, or directing their erring policemen or other agents. Secondly, I could never agree that Estelle v. Gamble, an Eighth Amendment case involving a plaintiff who was imprisoned by the state, can be read as announcing the broad constitutional rule set out in the last part of your footnote 55 on page 30, and incorporated by reference in footnote 60 on page 34.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 26, 1978

Re: No. 75-1914 - Monell v. New York
City Dept. of Social Services

Dear Bill,

Your letter of April 25 convinces me that our differences are deeper than I had been willing to acknowledge, even to myself. In sum, I think I take a much more restrictive view of what we should decide or even discuss in this case than do you.

Specifically, I would decide only that, for the basic reasons discussed in Part I of your opinion, it now appears that the Court was mistaken in Monroe v. Pape, in holding that municipal corporations can never be within the ambit of §1983. I would hold that a municipal corporation is within its ambit in an action at law or suit in equity, when, through the affirmative, deliberate, knowing official action of its governing body, it is alleged to have deprived any person of any rights, privileges, or immunities secured by the Constitution or federal law. That, as I understand it, is the scope of the question presented by this case.

I would not imply, even by way of discussion that leaves the matter open, that a municipal corporation could ever be liable under §1983 for indifference, inaction, or through the actions of its agents when not carrying out affirmatively authorized municipal policy. I would not get into a

discussion of the law of respondeat superior or the law of torts. I would certainly not make use of the word "fault" which in the law of many states and in admiralty law is no more than a loose synonym for negligence.

It seems to me that, in view of the very thorough and exhaustive opinion you have written, it would be quite unfair of me to keep asking you to chip away at it -- a process that might lead ultimately to the distortion of your views without the real satisfaction of mine. Accordingly, I think the true interest of each of us would be better served if I filed a brief statement saying I do not join Part II of your opinion.

Sincerely yours,

P.S.

P.S. -- I have just read John's note, and it may be that he has said more briefly what I have tried to say above.

Mr. Justice Brennan

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Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 15, 1978

Re: No. 75-1914, Monell v. Dept. of Social Services
of the City of New York

Dear Bill,

I have now carefully read your revised opinion from beginning to end and I am glad to join. Many thanks for your generous and effective efforts in meeting the recalcitrant quibbles from your obstinate colleagues.

Sincerely yours,

C. S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 29, 1978

Re: 75-1914 - Monell v. Department
of Social Services
of City of New York

Dear Bill,

As I have told you, Part II is in general quite all right with me, and I now think I would include it whether there are five for it or not. The amendments to footnotes 55 and 60 suggested in your letter to Potter of April 25 are definitely an improvement. I would also prefer what you orally suggested to me today, namely, that you drop footnote 57.

Sincerely yours,

Byron

Mr. Justice Brennan

Copies to the Conference

Bill - I take it that under Part II, a city would not be liable for "deliberate indifference" or "negligence", even if its officials were, unless it ~~was~~ ^{no} official policy of the city to be indifferent or negligent. That would seem a difficult matter to establish.

DRW

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 25, 1978

Re: 75-1914 - Monell v. Dept.
of Social Services

Dear Bill,

As Lewis has indicated, we are indebted to both you and Bill Rehnquist for educating your Brethren as you have. I am grateful.

I also appreciate Lewis' memorandum. I agree with you and with him that school boards are persons for the purpose of §1983 but share his preference for not overruling Monroe and Moor. At this juncture, however, I am not at rest as to the possible immunity of school boards and prefer not to decide the issue. At least, that is my tentative view.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 12, 1978

Re: #75-1914 - Monell, et al v. Department of
Social Services of City of New
York, et al

Dear Bill,

Under your draft, as I understand it, a local governmental entity may be sued under § 1983 for its own transgressions but not for the fault purely of its employees or agents. The line between official policy for which the cities may be sued and vicarious responsibility for the sins of others is not immediately obvious. I take it, however, that the city would not be exposed to § 1983 liability where under its policies, such as those expressed in ordinances, its officials are given general missions together with some or a great deal of discretion as to how to implement them and the executing official, in good or bad faith, then invades an individual's constitutional rights. Officers authorized to make arrests on probable cause inevitably make mistakes, and it may be held in such cases that the Fourth

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 29, 1978

Re: 75-1914 - Monell v. Department
of Social Services
of City of New York

Dear Bill,

As I have told you, Part II is in general quite all right with me, and I now think I would include it whether there are five for it or not. The amendments to footnotes 55 and 60 suggested in your letter to Potter of April 25 are definitely an improvement. I would also prefer what you orally suggested to me today, namely, that you drop footnote 57.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 8, 1978

Re: 75-1914 - Monell v. Department of
Social Services of the
City of New York

Dear Bill,

I am content with your circulation
of May 4, 1978.

Sincerely yours,



Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 5, 1978

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

Dear Bill:

Please join me.

Sincerely,

J.M.

T. M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 5, 1978

Re: No. 75-1914 - Monell v. Department of Social
Services of the City of New York

Dear Bill:

I am still with you and hope you will not have
to make any further changes.

Sincerely,

JM.

T.M.

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 6, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 75-1914 - Monell v. Dept. of Social Service

I have read with great interest the very helpful memoranda of our two Bills and the ensuing correspondence from others. Although I indicated at our initial conference of November 4 that I was inclined to affirm (with a question mark), that inclination was dominated by the holdings in Monroe, Kenosha, and Moor to which I felt, as is usually (although not always) the case for all of us, some sense of stare decisis deference.

I think that the research that has been done as a result of the present case has proved to be most worthwhile. I have concluded that although we should not so indulge every day, we must now concede that the decision in Monroe is questionable. My inclination is to overrule it, but perhaps I could be persuaded, as are others, not to overrule it but to "confine it to its facts," even though that device so often is a euphemism for overruling.

I prefer to refrain from deciding now any school board immunity issue although I would not at all object, as Bill Brennan suggests in his letter of February 23, to a statement that that question remains open for consideration.

In sum, I now vote to reverse.

HaB.

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 27, 1978

Re: No. 75-1914 - Monell v. New York City
Department of Social Services

Dear Bill:

I have read with great interest the more recent writings in this case, and the correspondence. As of now, I am about where Potter and John are in their respective letters of April 26. It seems to me that if Monroe v. Pape is to be overruled, the Court is striking off in a new direction and we should move cautiously, one step at a time. There is much to be said, also, for Lewis' approach, and I shall be interested in what he comes up with.

Sincerely,

Harry

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 17, 1978

Re: No. 75-1914 - Monell v. Department of
Social Services

Dear Bill:

Please join me.

Sincerely,



Mr. Justice Brennan

cc: The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 11, 1977

75-1914 Monell v. Dept. of Social Services

Dear Chief:

As you will recall, my vote to reverse in the above case was about as tentative as a vote can be.

Since the Conference, I have devoted further time to the case with the hope of firming up a position one way or the other. I find this area of the law (1983 and the related issues of immunity) to be wholly unsatisfactory. In any event, I am not at rest, and wanted you - and members of the Conference - to know this before assignments are made.

My notes indicate that you and Potter also passed. This suggests the absence of a Court at this time. If any Justice is disposed to circulate a memorandum, I am sure I would find it helpful.

Sincerely,



The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 21, 1978

No. 75-1914 Monell v. Dept. of Social Services

MEMORANDUM TO THE CONFERENCE:

*Thru [initials]
draft was
delivered
by me personally
to Fetter. It was
revised in minor
 respects before
 circulation on 2/23*

I have now had an opportunity to review carefully the memoranda circulated by our two "Bills". Both are impressive and persuasive memos. As I think either could form the basis of a principled decision, I have found the case particularly troublesome. In any event, being satisfied that further delay will not make decision any easier, I will now firm up the tentative vote to reverse that I expressed at Conference. I add the following observations.

As to the legislative history debate, I am persuaded that Bill Douglas' reading of it in Monroe was wrong. Bill Rehnquist's memorandum makes a reasonable argument in favor of Monroe's interpretation of the Sherman Amendment's rejection. But I rather think that congressional concern was centered on the inequity of imposing liability on local units of government on the basis of respondeat superior or some other principle of

vicarious liability. Moreover, doubts about congressional power expressed in the debates stemmed from the attempted imposition of an extra-constitutional duty to curb private lawlessness, not from a perception that municipalities per se were beyond the reach of legislative authority under §5 of the Fourteenth Amendment. These points seem reasonably clear.

I have had some doubt that the word "person" was intended to include inanimate bodies. Its use is hardly an artful way to include municipalities or similar entities. Yet, I suppose the "plain meaning" approach was eroded long ago. There is the so-called "Dictionary Act," passed a month before the Civil Rights bill was introduced, which indicates a congressional understanding that "the word 'person' may extend and be applied to bodies politic and corporate. . . ." Act of Feb. 25, 1871, ch. 71, §2, 16 Stat. 431. While "an allowable not a mandatory" definition, Monroe, 365 U.S., at 191, it is evidence of special usage of the term "person". Moreover, I was painfully reminded only a few weeks ago that a majority of my Brothers thought the same word, used by Senator Sherman in 1890, included foreign governments, Pfizer, Inc. v. Government of India, No. 76-749 (decided January 11, 1978), as well as municipalities, Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1960).

With me, policy considerations weigh more heavily than any attempt to read meaning into ambiguous speeches by members of Congress a century ago or speculation whether the word "person" embraces the universe. Everyone agrees that §1983 authorizes suits against officials of governmental units both in their official and individual capacities. If one assumes that the municipality generally will indemnify an official sued for conduct within the scope of his authority, as it must if it is to attract and retain competent officers, board members and employees, it really does not matter which way one goes on the fiscal-impact argument. The municipality pays in either event.

In addition we have enshrined the fiction that allows mandatory injunctions, requiring the expenditure of large sums of money, in §1983 actions, e.g., Milliken v. Bradley, 97 S.Ct. 2749 (1977), at the same time that we proscribe recovery of damages. While the Eleventh Amendment requires application of the fiction to suits against the States, I am not inclined to extend it to suits against local governments. Local governments probably already bear the financial burden of 1983 suits, for damages as well as injunctive relief. Bill Rehnquist does make an arguable point when he suggests that juries may be more likely to escalate damages if a local government itself is named as a

defendant. I am not sure, however, that the average juror would view his or her local government or school board in the same light that jurors view insurance companies and railroads. After all, most jurors are taxpayers.

This brings me to what I suppose is the most troublesome aspect of a reversal in this case: its effect on the doctrine of stare decisis. To my mind, considerations of stare decisis cut in both directions. On the one hand, we have a series of rulings that municipalities and counties are not "persons" for purposes of § 1983. In the somewhat accidental manner that characterizes many of our § 1983 decisions, cf. Runyon v. McCrary, 427 U.S. 160, 186* (1976), we have answered a question that was never briefed or argued in this Court. The claim in Monroe was that the City of Chicago should be held "liable for acts of its police officers, by virtue of respondeat superior," Brief for Petitioners, O.T. 1960, No. 39, p. 21, namely, a warrantless, early morning raid and ransacking of a Negro family's home. Although Morris Ernst's brief for petitioners in Monroe contains a footnote reference to the Sherman Amendment, he had no incentive to present a view of the legislative history that would have foreclosed relief on a theory of respondeat superior.

In Moor v. County of Alameda, 411 U.S. 693 (1973), the only other relevant case presenting a substantial discussion of the legislative history of § 1983,

petitioners asserted that "the county was vicariously liable for the acts of its deputies and sheriff," id., 696, under § 1988. Although we reaffirmed explicitly Monroe's reading of the debates over the 1871 Act, petitioners in that case did not challenge "the holding in Monroe concerning the status under § 1983 of public entities such as the County." Id., at 700. Technically, the holding of Moor does not extend beyond the recognition that "Congress did not intend, as a matter of federal law, to impose vicarious liability on municipalities for violations of federal civil rights by their employees," and that §1988 "cannot be used to accomplish what Congress clearly refused to do in enacting § 1983." Id., at 710 & n. 27.

Only in City of Kenosha v. Bruno, 412 U.S. 507 (1973), did the Court confront a § 1983 claim based on conduct that was both authorized under state law and directly -- rather than vicariously -- responsible for the claimed constitutional injury. But in Kenosha we raised the jurisdictional question on our own initiative. Thus, the issues identified in the scholarly exchange between Bill Brennan and Bill Rehnquist simply have not been thoughtfully ventilated on any previous occasion.

On the other hand, affirmance in this case requires a rejection of this Court's sub silentio exercise

of jurisdiction over school boards in a great many cases. As Bill Rehnquist acknowledges, at least three of these decisions involved claims for monetary relief, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Cohen v. Chesterfield County School Board, 414 U.S. 632 (1974); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); also Vlandis v. Kline, 412 U.S. 441 (1973). There was an independent basis of jurisdiction in these cases because of the joinder of individual public officials as codefendants. But the opinions of this Court often made explicit reference to the school-board party, particularly in discussions of the relief to be awarded, see, e.g., Milliken v. Bradley, 97 S.Ct. 2749 (1977). And Congress has focused specifically on this Court's school-board decisions in several statutes. The exercise of § 1983 jurisdiction over school boards, even if not premised on considered holdings, thus has been longstanding. Indeed, it predated Monroe.

In my view, reversal would require the overruling only of Kenosha. I would simply limit Monroe and Moor to their facts. The preclusion of governmental liability for the tortious conduct of individual officials that was neither mandated nor specifically authorized by, and indeed was violative of, state or local law, is consistent with

the 42d Congress' rejection of vicarious liability as an operative principle of the 1871 Civil Rights Act.

The rationale of Kenosha may have to be disturbed in some fashion, whichever course the Court follows in this case. Acceptance of Bill Rehnquist's view would require, if I understand him correctly, importing into §1983 the approach of Ex parte Young, 209 U.S. 123 (1908), to preserve the availability of injunctive relief. While this is an understandable position, it does entail a "bifurcated application [of §1983] to municipal corporations depending on the nature of the relief sought against them." 412 U.S., at 513. A public official sued in his official capacity, concededly a "person" for purposes of injunctive relief, would become a non—"person" in a suit seeking a monetary recovery.

Moreover, under Bill's approach, I suppose we would have to say that Congress rejected the Sherman Amendment because it "wished to preserve the financial capacity of municipalities to carry out basic governmental functions" and "to insure the security of businessmen who traded with them." Our previous decisions have not identified these concerns as the principal reasons for the defeat of the Sherman proposal. Indeed, such considerations were minimized in Kenosha itself, which held that a municipality could not be sued for injunctive relief

under §1983 even though no monetary award was sought because a municipality is simply not a "person."

I have concluded that the prior decisions in this area do not require application of the usual stare decisis principle. There is no coherence in the relevant body of precedents. Indeed, there is a degree of confusion in principle that we now have an opportunity to rationalize.

Although, as indicated, I generally agree with Bill Brennan, I differ with his memo in two respect. First, Monroe and Moor should be restricted to their facts, rather than overruled. The Court simply could say that we have had no occasion previously to consider the availability of a §1983 damages remedy for constitutional violations that are the direct result of a policy decision by the government entity, rather than a failure to curb the unauthorized torts of its employees. See Rizzo v. Goode, 423 U.S. 362, 377 (1976) (discussing Swann and Brown).

There are substantial line-drawing problems, as Bill Rehnquist notes, but this case involves a formal, written policy of the municipal department and school board. It is the clear case.

Second, I would recognize a defense for policies promulgated in good faith that affect adversely constitutional rights not clearly defined at the time of

violation, cf. Procunier v. Navarette, No. 76-446; Wood v. Strickland, 420 U.S. 308 (1975). We have relied on the common law in defining immunities under §1983. See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976). The absolute immunity accorded governmental bodies under the common law would be modified to this extent. But this would be merely a modification rather than an abandonment of the common law protection.

One further thought: We see decisions increasingly that extend the Bivens rationale to state action. Lawyers apparently have got "the word" and complaints are being framed both under §1983 and directly under the Fourteenth Amendment. We will not be able much longer to avoid confronting the question whether, Congress having provided relief (through §1983) for state action, parties nevertheless are free to by-pass §1983 and to rely on federal question jurisdiction to sue municipalities for alleged Fourteenth Amendment violations. I do not know how I would answer this question, but I suppose we would retain greater flexibility under §1983 to make distinctions between claims of constitutional dimension and those that are not, than we would if Bivens-type remedies become generally available in state action cases. If we continue to deny §1983 relief against local governmental units, we

10.

strengthen the argument for Bivens relief. I would prefer to avoid this pressure.

I am grateful to both "Bills" for their most helpful contributions to our deliberations in this case.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 23, 1978

No. 75-1914 Monell v. Dept. of Social Services

MEMORANDUM TO THE CONFERENCE:

I have now had an opportunity to review carefully the memoranda circulated by our two "Bills". Both are impressive and persuasive memos. As I think either could form the basis of a principled decision, I have found the case particularly troublesome. In any event, being satisfied that further delay will not make decision any easier, I will now firm up the tentative view to reverse that I expressed at Conference. I add the following observations.

As to the legislative history debate, I am persuaded that Bill Douglas' reading of it in Monroe was wrong. Bill Rehnquist's memorandum makes a reasonable argument in favor of Monroe's interpretation of the Sherman Amendment's rejection. In my view, however, the Sherman Amendment was an attempt to impose vicarious liability on government subdivisions for the consequences of private

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 11, 1978

No. 75-1914 Monell v. Dept. of Social Services
of City of New York

Dear Bill:

As suggested in your note of April 10 to John, I am writing to give you my comments on your fine draft of an opinion for the Court in this case.

I intend to write separately at least for the purpose of stating the view that municipalities are entitled to a defense for policies promulgated in good faith that affect adversely constitutional rights not clearly defined at the time of violation. The absolute immunity accorded to governmental bodies at common law should be modified, lest we eviscerate the import of our decision in this case, but I would not abandon all common-law protection. While the considerations are somewhat different from those governing our qualified-immunity decisions, a rule of strict municipal liability imposes substantial costs in terms of the inhibition of the discretionary activities of governmental bodies. Moreover, the emphasis in your opinion on the "fault" principle and your recognition of the 42d Congress' rejection of the justifications for vicarious liability argue against the imposition of liability for innocent failure to predict the often uncertain course of constitutional adjudication.

These matters aside, while I would like very much to join your opinion, I am troubled by some of the language in the present draft. There are some sentences which can be worked out among the law clerks (who have conferred), and need not be stated here. But there are several areas that require revision before I would feel free to join your opinion in its entirety.

2.

First, I have considerable difficulty with your discussion in Part III. While I agree that a recognition of absolute municipal immunity would be inconsistent not only with our decision in Monell but also with the considerations that were controlling in Imbler v. Pachtman, Pierson v. Ray and Bradley v. Fisher, I see no need for an extended discussion of the wisdom, or lack thereof, of the common-law rule. The Chief's opinion in Scheuer v. Rhodes is ample authority for the proposition that on occasion the absolute immunity available to a class of defendants at common law must give way to the policies of §1983. A discussion that emphasizes modern criticisms and dismisses the doctrine of municipal immunity as "the largely repudiated common-law rule of absolute immunity" is unnecessary, does not address the question of the intention of the 1871 Congress, and has the effect of removing the historical basis for finding a qualified municipal immunity.

Second, I am in full agreement with John that Part II-C of your opinion is unnecessary. Since Aldinger v. Howard involved a pendent state claim, not a cause of action premised on § 1983 or other federal law, I do not consider it proper to cast doubt on Aldinger in this case.

Third, I see no need to discuss in this case whether "unwritten practices or predilections which have by force of time and consistent application crystallized into official policy" may "provide a basis for a suit against a local government" (pp. 29-30). I do not necessarily disagree with the proposition, as such, but I prefer to allow these points to develop in a case-by-case fashion. In a similar vein, I hope that you will delete the last seven lines in footnote 55 (p.30). Your quote from Rizzo v. Goode is quite persuasive, and I would not go further and suggest to the reader that Rizzo simply involved a pleading error. The relevance of Estelle v. Gamble to the matter at hand will be apparent to practitioners; ordinarily it is not our province to suggest legal theories for overcoming obstacles presented by our decisions.

Finally, I could not agree with the language on pp. 24 and 25 which states that Congress in § 1983 "intended to exercise its full power under the Fourteenth Amendment...." I am opposed to any view of § 1983 which

3.

transforms every case requiring an interpretation of § 1983 into an exercise in constitutional exegesis. The qualified immunity decisions, the negligence issue raised in Procurier v. Navarette, and my opinions in Ingraham v. Wright and Carey v. Piphus, are all premised on the proposition that the scope of §1983 and the reach of the Fourteenth Amendment are not necessarily coextensive. It seems to me that you can accomplish your objective by simply saying that Congress intended the term "person" to include all officials and entities within its constitutional reach, without suggesting that other features of the statute --e.g., the causation requirement-- are dictated either by the Constitution or by 1871 understandings of constitutional limits.

If these points are resolved and a few additional word changes are made, I believe I can join your entire opinion, although I also would write briefly to state my views on qualified municipal immunity, and perhaps my own separate reasons for being willing to reach our conclusion.

I apologize for this extended commentary, but after all you have written 38 eloquent pages!

Sincerely,



Mr. Justice Brennan

Copies to the Conference

LFP/lab

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 1, 1978

No. 75-1914 Monell

Dear Bill:

I now have had an opportunity to read your revised draft, circulated April 21.

Thank you for the revisions directed to the points raised in my letter of April 11. The new part III on stare decisis is quite persuasive, and includes much of what I would have said on this question in a concurring opinion. Moreover, if I could persuade you to accept my suggestions below, I can join Part II. It contains a helpful - and I think correct - explanation of why §1983 does not impose liability on government entities for the unauthorized misconduct of employees. In view of the fact that our previous cases - with the exception of Kenosha v. Bruno - primarily involved claims of respondeat superior liability against municipalities and counties, I think it appropriate for the Court to make clear that that theory does not support a §1983 claim against entities of government.

In sum, I believe my previously expressed concerns have now been reduced to the following narrowly focused suggestions:

1. As you know, I do not view §1983 as coextensive with the full power of Congress under the Fourteenth Amendment. A number of scholars share this view, including Gunther and Monaghan. I would therefore appreciate your considering the following clarifications:

(a) Page 24, first sentence in full paragraph: I would substitute "broad" for "complete".

(b) Page 25, the long paragraph in footnote 45: Rather than say that §1983 "represented an attempt broadly to exercise the power conferred by §5 of the Fourteenth Amendment", I would simply say that §1983 "represented an

attempt to include all officials and entities within the constitutional reach of Congress". It is unnecessary to suggest that other features of §1983 are dictated either by the Constitution or by 1871 understandings of constitutional limits.

(c) Page 26, middle of first full paragraph: I would modify the description of §1 as the only civil remedy "coextensive" with the Fourteenth Amendment. Perhaps you could say that the section provided a "broad" or "expansive" civil remedy to implement the guarantees of the Fourteenth Amendment.

2. Page 30, last sentence in footnote 55 & page 34, proposed footnote 60: I concur in Potter's view that explicit reference to Estelle v. Gamble is undesirable in this opinion. There may well be several tenable ways to read our decision in Estelle, but I am unwilling to suggest in this case that the "deliberate indifference" standard has application in contexts other than that of prisons, where the inmate is wholly dependent on prison officials for the satisfaction of basic human needs. Your discussion on pp. 29-30 makes quite clear that official policy can be expressed as unwritten, informal "custom." I can accept this where the custom is unmistakably sanctioned by the municipality. And your language at the top of p.34 does not foreclose a "deliberate indifference" theory in an Eighth Amendment context, where a prison department's established policy or "custom" with regard to prisoner medical needs "itself inflicts [constitutional] injury...." In short, I hope you will be willing to drop the Estelle sentence in note 55 (or proposed note 60) as unnecessary, reserving all mention of the reach of Estelle until we have a specific case.

3. I also agree with Potter that footnote 57 on page 32 (with respect to "fault") is unnecessary and touches on an issue yet to be resolved. While the footnote, as amended in your letter of April 25 to Potter, does not commit the Court to any particular proposition of law, it may be read as a "signal". In light of our reservation of the negligence issue in Procurier v. Navarette, I would remain silent here. We will have to confront the negligence issue soon enough without inviting it.

4. Page 38, discussion of the Attorneys' Award Act of 1976: You describe this as allowing "prevailing

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parties in §1983 suits to obtain attorneys' fees from the losing party". I am sure you intend only to state, in accord with the statutory language, that the Act merely confers discretion on the Court to allow such fees. Also, in light of Hutto v. Finney, I am somewhat troubled by your characterization of the congressional intent on page 39. I would simply say that Congress has "attempted to allow" such awards, not that Congress has "attempted to limit Monroe."

5. Your revision of Part IV as to immunity - leaving the issue entirely open - is quite acceptable. I no longer will write on the immunity issue, although my previously expressed view remains firm.

* * * *

I appreciate your efforts to accommodate the various suggestions from other Brothers and me. This is, however, a major new precedent and I am strongly disposed to move cautiously. If you will make the changes suggested above, I will be happy to join you - although I do not foreclose the possibility of having minor editing suggestions as I reread your comprehensive opinion.

Also, I still may write briefly to emphasize a point or two where we may have shades of difference that do not go to the essential merits of your opinion. This would not prevent me from joining you.

Sincerely,



Mr. Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 5, 1978

No. 75-1914 Monell v. Department of Social Services

Dear Bill:

As your 3rd draft substantially accommodates my concerns (for which I thank you), I am glad to join you.

Sincerely,



Mr. Justice Brennan

lfp/ss

cc: The Conference

Bill:

There is one language change that I would appreciate your making. The phrase "where state law did not impose such an obligation" (p. 33) could lead to an interpretation that respondeat-superior liability is possible where state law imposes such liability. I would prefer that the phrase be deleted. I recognize that this language appeared in previous drafts, but I just noticed it.

L.F.P., Jr.

Wm. Brennan 04/71
Copied only for the U.S. Supreme Court

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 5, 1978

No. 75-1914 Monell v. Department of Social Services

Dear Bill:

As your 3rd draft substantially accommodates my concerns (for which I thank you), I am glad to join you.

Sincerely,

LFP

Mr. Justice Brennan

lfp/ss

cc: The Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

17 MAY 1978

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SUPREME COURT OF THE UNITED STATES

No. 75-1914

Jane Monell et al., Petitioners, | On Writ of Certiorari to
 v. | the United States Court
 Department of Social Services of | of Appeals for the Sec-
 the City of New York et al. | ond Circuit.

[May —, 1978]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and add these additional views.

Few cases in the history of the Court have been cited more frequently than *Monroe v. Pape*, 365 U. S. 167 (1961), decided less than two decades ago. Focusing new light on 42 U. S. C. § 1983, that decision widened access to the federal courts and permitted expansive interpretations of the reach of the 1871 measure. But *Monroe* exempted local governments from liability at the same time it opened wide the courthouse door to suits against officers and employees of those entities—even when they act pursuant to express authorization. The oddness of this result, and the weakness of the historical evidence relied on by the *Monroe* Court in support of it, are well demonstrated by the Court's opinion today. Yet the gravity of overruling a part of so important a decision prompts me to write.

I

In addressing a complaint alleging unconstitutional police conduct that probably was unauthorized and actionable under state law,¹ the *Monroe* Court treated the 42d Congress' re-

¹ The gravamen of the complaint in *Monroe* was that Chicago police officers acting "under color of" state law had conducted a warrantless, early morning raid and ransacking of a private home. Although at

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 24, 1978

No. 75-1914 Monell v. Dept. of Social Services

MEMORANDUM TO CONFERENCE:

I propose to substitute the attached for present
footnote 6 on page 6 of my concurring opinion in the above
case.

L.F.P.
L.F.P., Jr.

ss

6. The doctrine of stare decisis advances two important values of a rational system of law:

(i) the certainty of legal principles, and (ii) the wisdom of the conservative vision, that existing rules should be presumed rational and not subject to modification "at any time a new thought seems appealing," dissenting opinion of Mr. Justice Rehnquist, post, at 5; cf. O. Holmes, The Common Law 36 (1881). But, at the same time, the law has recognized the necessity of change, lest rules "simply persist . . . from blind imitation of the past." Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). Any overruling of prior precedent, whether of a constitutional decision or otherwise, deserves to some extent the value of certainty. But I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations. That is the premise of the canon of interpretation that language in a decision not necessary to the holding may be accorded less weight in subsequent cases. I also would recognize the fact that until this case the Court has not had to confront squarely the consequences of holding § 1983 inapplicable to official municipal policies.

Of course, the mere fact that an issue was not argued or briefed does not undermine the precedential force of a considered holding. Marbury v. Madison, 1 Cranch 137

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

Stylistic Changes Throughout. Circulated: _____

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SUPREME COURT OF THE UNITED STATES

No. 75-1914

Jane Monell et al., Petitioners, | On Writ of Certiorari to
 v. | the United States Court
 Department of Social Services of | of Appeals for the Sec-
 the City of New York et al. | ond Circuit.

[May —, 1978]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, and add these additional views.

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¹ The gravamen of the complaint in *Monroe* was that Chicago police officers acting "under color of" state law had conducted a warrantless, early morning raid and ransacking of a private home. Although at

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Stevens

From: Mr. Justice Rehnquist

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SUPREME COURT OF THE UNITED STATES

No. 75-1914

Jane Monell et al., Petitioners, v. Department of Social Services of the City of New York et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December —, 1977]

Memorandum of MR. JUSTICE REHNQUIST.¹

While petitioners in my view tender only two bases for reversal of the judgment of the Court of Appeals for the Second Circuit in this case, the Conference discussion ranged a little more extensively than the limits of the questions on which we granted certiorari. This memorandum will therefore address what seem to me to be three seemingly separate, but nonetheless related, grounds for reversal: (1) Overrule the conclusion reached in *Monroe v. Pape*, 365 U. S. 167, 187 (1961), that "Congress did not undertake a bring municipal corporations within the ambit of § 1979 [§ 1983]"; (2) Allow that conclusion in *Monroe* to stand as a matter of form, but permit federal courts who have individual municipal officials before them as defendants to require those officials to use their statutory authority to draw checks upon the bank account of the municipal corporation in order to satisfy a judgment for damages; (3) conclude that the "school board" in this case is not the sort of "municipal corporation" exempted from liability under *Monroe v. Pape*, and therefore is a "person"

¹ Since only the Chief and Harry joined me in my vote to affirm at conference, I have not felt warranted in structuring this memorandum as a potential Court opinion in all but name. Should I persuade Potter and Lewis of the correctness of my view, I will obviously rearrange the form if not the substance of this memorandum.

Re: Copy

Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

Received from
Bill at 4.30 P.M.
on 3/5/78

ROUGH DRAFT

March 6, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1914 - Monell v. Department of Social Services

This memorandum replies to Lewis' circulation of February 23rd; the pressures of preparation for oral argument and Conference have prevented me from circulating it sooner.

As to the sense of what the Congress meant by the word "person" when it enacted § 1983 ~~in~~ in 1971, I think issue is pretty well joined between Bill Brennan and me. I would quite frankly concede that if at the time of Monroe v. Pape, 365 U.S. 167, the same thorough canvass of the legislative history had been made as we have done this Term, the Court should have concluded that the word "person" in 1983 did not exclude municipal

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 6, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-1914 - Monell v. Department of Social Services

This memorandum replies to Lewis' circulation of February 23rd; the pressures of preparation for oral argument and Conference have prevented me from circulating it sooner. As to the sense of what the Congress meant by the word "person" when it enacted § 1983 in 1971, I think issue is pretty well joined between Bill Brennan and me. I would quite frankly concede that if at the time of Monroe v. Pape, 365 U.S. 167, the same thorough canvass of the legislative history had been made as we have done this Term, the Court should have concluded that the word "person" in 1983 did not exclude municipal corporations. But it seems to me that the exchange of memoranda has likewise shown that this is by no means an open and shut question, and that the balance is about sixty-forty -- a balance which I do not regard as meeting the requirement for overruling an issue of statutory construction, as stated by

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist
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SUPREME COURT OF THE UNITED STATES

No. 75-1914

Jane Monell et al., Petitioners, | On Writ of Certiorari to
v. | the United States Court
Department of Social Services of | of Appeals for the Sec-
the City of New York et al. | ond Circuit.

[April —, 1978]

MR. JUSTICE REHNQUIST, dissenting.

Seventeen years ago, in *Monroe v. Pape*, 365 U. S. 167 (1961), this Court held that the 42d Congress did not intend to subject a municipal corporation to liability as a "person" within the meaning of 42 U. S. C. § 1983. Since then, the Congress has remained silent, but this Court has reaffirmed that holding on at least three separate occasions. *Aldinger v. Howard*, 427 U. S. 1 (1976); *City of Kenosha v. Bruno*, 412 U. S. 507 (1973); *Moor v. County of Alameda*, 411 U. S. 693 (1973). See also *Mt. Healthy City School Dist. v. Doyle*, 429 U. S. 274, 277-279 (1977). Today, the Court abandons this long and consistent line of precedents, offering in justification only an elaborate canvass of the same legislative history which was before the Court in 1961, and a single footnote, *ante*, at 31 n. 57, brushing aside the doctrine of *stare decisis*. Because I cannot agree that this Court is "free to disregard these precedents," which have been "considered maturely and recently" by this Court, *Runyon v. McCrary*, 426 U. S. 160, 186 (1976) (POWELL, J., concurring), I am compelled to dissent.

I

As this Court has repeatedly recognized, *Runyon, supra*, at 175 n. 12; *Edelman v. Jordan*, 415 U. S. 651, 671 n. 14 (1974), considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation. In all cases, private parties shape their conduct according to this

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

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SUPREME COURT OF THE UNITED STATES

Circulated: APR 26 1978

No. 75-1914

Jane Monell et al., Petitioners, | On Writ of Certiorari to
v. | the United States Court
Department of Social Services of | of Appeals for the Sec-
the City of New York et al. | ond Circuit.

[April —, 1978]

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1
pp 4-5, 8

+ Footnotes

Renumbered

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice R.

3rd DRAFT

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SUPREME COURT OF THE UNITED STATES dated: MAY 23 1978

No. 75-1914

Jane Monell et al., Petitioners, | On Writ of Certiorari to
v. | the United States Court
Department of Social Services of | of Appeals for the Sec-
the City of New York et al. | ond Circuit.

[April —, 1978]

MR. JUSTICE REHNQUIST, dissenting.

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As this Court has repeatedly recognized, *Runyon, supra*, at 175 n. 12; *Edelman v. Jordan*, 415 U. S. 651, 671 n. 14 (1974), considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation. In all cases, private parties shape their conduct according to this

✓ ✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 23, 1978

MEMORANDUM TO THE CONFERENCE

Re: 75-1914 - Monell v. Dept. of Social Services

Like Lewis, I found the two memoranda especially valuable. I am persuaded by Bill Brennan that Monroe misconstrued the actual intent of Congress on the question whether a municipality can be a person. Until I received Lewis' memorandum this afternoon, I was persuaded by Bill Rehnquist's discussion of stare decisis that we should probably not overrule the Monroe holding. Lewis now has be back in something of a quandary, and I would welcome further discussion of the case at Conference. I thought I should let you know that my views are not as settled as I had thought at the time of our original conference.

I should add that I do have a great deal of difficulty with Lewis' suggestion that the good faith defense should be extended to municipal corporations. Such an extension could hardly be justified on the rationale that we need to encourage people to accept public employment and to discharge their duties in a fearless manner.

Respectfully,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 12, 1978

Re: 75-1914 - Monell v. Department of Social
Services of the City of New York

Dear Bill:

With all respect, I am persuaded that you have given the discussion of respondeat superior in petitioners' brief in Monroe v. Pape, an unwarranted interpretation.

The City had argued that the complaint was properly dismissed because (1) it was not a "person," and (2) it was entitled to immunity. In an argument in the nature of a rebuttal, the petitioners referred to the doctrine of respondeat superior as an alternative basis for supporting the conclusion that the City is a person. See xeroxed page 25 attached.

In Part II of petitioners' brief in Monroe, which addressed the doctrine of immunity, petitioners argued that "all doubts as to the liability of the City under the act should be resolved in petitioners' favor." In support of that position they specifically argued:

"This case portrays a standard police procedure--whose victims are often innocent. This case is, among other things, a 'custom or usage' case." See xeroxed page 42 attached.

It seems to me that the Court must either overrule Monroe v. Pape, or else hold that the Monroe complaint did not allege a sufficient claim for relief against the City.

Respectfully,

Mr. Justice Brennan

Copies to the Conference



Supreme Court of the United States

Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 10, 1978

Re: 75-1914 - Monell v. Dept. of Social
Services of the City of New York

Dear Bill:

Although I expect to join Parts I-A, I-B, most of I-C, and II-A of your opinion, I do not presently plan to join Parts II-B, II-C, or III.

I plan to write a separate opinion in which I take issue with II-B and suggest that the discussion in Parts II-C and III is unnecessary and is not embraced within the question presented by the certiorari petition.

With respect to I-C, I cannot accept "the full power" argument; if that argument were valid, there would be no room for immunity for judges or other officials.

Respectfully,



Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 26, 1978

Re: 75-1914 - Monell v. Department of Social
Services

Dear Bill:

Your revised opinion is really excellent. I particularly appreciate your full treatment of the stare decisis issue and the changes in your discussion of Monroe v. Pape. Nevertheless, I am still persuaded that Parts II and IV of the opinion are merely advisory and should not be included in an opinion of the Court until the questions have been properly presented and argued. As presently advised, I therefore plan to join only Parts I, III, and V. I do not expect to write separately but merely to state in a sentence my reasons for not joining Parts II and IV.

Respectfully,



Mr. Justice Brennan

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: APR 27 1978

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SUPREME COURT OF THE UNITED STATES

No. 75-1914

Jane Monell et al., Petitioners,
v.
Department of Social Services of
the City of New York et al. } On Writ of Certiorari to
the United States Court
of Appeals for the Sec-
ond Circuit.

[May —, 1978]

MR. JUSTICE STEVENS, concurring in part.

Since Parts II and IV of the opinion of the Court are merely advisory and are not necessary to explain the Court's decision, I join only Parts I, III, and V.