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TO: Justice Marshall
FROM: Debra
RE: City of Canton v. Harris, No. 86-1088
DATE: December 21, 1988

Justice White has circulated a draft opinion in City of Canton v. Harris. It holds that under certain circumstances a municipality can be liable for the constitutional violations resulting from its failure to adequately train municipal employees.

Justice White's opinion has several positive aspects. First, it rejects the City's contention and that of the plurality in City of St. Louis v. Praprotnik (SOC, WHR, BRW, AS) that only unconstitutional policies are actionable under §1983. Second, the decision reverses CA6's confusing opinion and remands for a new trial so that Ms. Harris will have an opportunity to establish a constitutional violation under this new test.

There is some language that makes me pause. The opinion holds that the inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to persons' rights. Deliberate indifference, in the BRW's view, requires a deliberate or conscious choice by a municipality. This of course rejects respondent's argument that a showing of gross negligence or recklessness is all that is necessary.

At conference you were the lone dissent. As I wrote in my last memo (attached), I was under the mistaken belief that you could affirm CA6's decision to remand for a new trial while clarifying the standard of liability. WJB and JPS and possibly HAB share your view that municipal liability under §1983 should not be limited to intentional acts. WJB earlier indicated that he might write separately to propose a standard more generous to the §1983 plaintiff (gross negligence, recklessness or a more generous standard of deliberate indifference). I have spoken to his clerk since BRW's opinion has circulated and he has not discussed yet discussed the matter with WJB. I recommend waiting to see if WJB is writing and if so what.

where the municipality's inadequate training of its officers was "causally connected to the deprivation, which means proving that the lack of training was so reckless or grossly negligent that deprivations of persons' constitutional rights were substantially certain to result." Because the court found that the jury instructions allowed a finding of municipal liability on the alternative and impermissible ground that the City's supervisory personnel did a bad act, it reversed and remanded for a new trial.

I had recommended a vote to DIS or Affirm, assuming that one could write an opinion affirming CA6 while clarifying the standard of liability. I was not persuaded by the City's argument that section 1983 liability must be based on an unconstitutional policy and that a section 1983 plaintiff must show that the City intentionally adopted a