

To: Mr. Justice Blackmun
From: KE
Re: Mr. Justice Brennan's third draft in Monell v. New York
Dept. of Social Services, No. 75-1914

5/5/78

*This is a
good note*

Mr. Justice Brennan's third draft has eliminated the reservations that I had concerning his original approach to this case. In particular, Section II has been narrowed considerably. I am reassured by Justice Brennan's explicit disavowal of any expression of views on "what the full contours of municipal liability under §1983 may be." P. 35. Similarly, I am pleased that he omitted any reference to fault in the concluding paragraph of Section II and that he dropped footnote 57 of the second draft (containing a curious allusion to "fault" and vicarious liability). I am also happy with the deletion of any reference to Estelle v. Gamble, 429 U.S. 97 (1976). Compare p. 30 n. 55 of the second draft with p. 31 n. 56 of the third draft. (Also, Section III's discussion of stare decisis--and the justifications for overruling Monroe--remains very good.)

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Although Justice Stevens is technically correct in pointing out that Section II is not necessary to the decision in this case, I do not believe that strict "necessity" is the only test as to what belongs in an opinion. In some cases--and this is an example--it is useful to provide some guidance to lower courts and to parties who may be affected by the Court's decision. Here the Court is overruling prior law;

it is not inappropriate to offer some indication as to what the law now is. Justice Brennan's draft hits what I believe to be the right note in spelling out the logical consequences of today's decision without trying to decide difficult issues that have not been briefed.

I should add that Sam Estreicher, the Powell clerk who is working on this case, informs me that, although Justice Powell has joined Justice Brennan, Justice Powell will be circulating a short concurrence next week. In it, he will outline briefly his reasons for overruling Monroe and summarily restate the Court's holding so that the reader will not be altogether lost in the verbiage of the majority opinion. If you are still uncertain about Justice Brennan's writings, you may wish to await Justice Powell's circulation. However, I feel sure that you could safely join Justice Brennan now and, if you so choose, later join Justice Powell's circulation if you believe it helpful.