

To: Mr. Justice Powell

From: Sam Estreicher

Date: May 2, 1978

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

WJB's proposed language is open-ended ("we have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be"), but it may be innocuous because it says nothing. In light of his willingness to drop the last sentence in note 55, note 57, note 59 & note 60, we should permit him a measure of author's license.

The two remaining points are footnote 57 and Estelle. In my recent memorandum indicated, I have agreed to delete note 57. However, 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 57 as well as any attempt to resurrect the point in note 59. I have also gone through Part II with a view to removing the word "fault" whenever it might, by negative implication, indicate that we had created a negligence cause of action under § 1983. To accommodate the dropping of Estelle and references to municipal fault, I will reinsert the last paragraph of Part II as follows, retaining what is now the carry-over paragraph on page 12.

"We conclude, therefore, that a local government may not be sued for the tortious acts of its employees or agents. Instead, it is when a municipality's 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 is so liable under § 1983. Since this case involves municipal liability, official policy is the driving force of the constitutional violation found by the District Court, see pp. 1-2 and n. 1 supra, we must reverse our judgment below. It is so ordered. See also our judgment below.