To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-1160

BERTOLD J. PEMBAUR, PETITIONER *v.* CITY OF CINCINNATI ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[February ——, 1986]

JUSTICE WHITE, concurring in the judgment.

The forcible entry made in this case was not then illegal under either federal or state law. The City of Cincinnati frankly conceded that forcible entry of third-party property to effect otherwise valid arrests was standard operating procedure. There is no reason to believe that the county was acting otherwise and would have abjured using lawful means to execute the capiases issued in this case. In any event, the county officials who had the authority to approve or disapprove such entries opted for the forceful entry, a choice that was later held to be inconsistent with the Fourth Amendment. This election sufficiently manifested county policy to warrant reversal in this case.

This conclusion, however, does not require embracing the loose definition of county "policy" expressed in the Court's opinion. I do not agree that every act of a so-called policymaker should be accepted as the policy of the governmental entity that employs him, even when done in the general course of his regular duties. County officials are sworn like other officials to obey the law, and it would be absurd to hold that the sheriff or the prosecutor in this case would have been executing county policy had he beaten a prisoner to death or ordered it done. Imposing liability on the county for acts contrary to its law and policy and contrary to what its officials have sworn to do is nothing less than an application of

respondeat superior, a basis for liability that *Monell* rejected.

Federal and state constitutions, and probable municipal legislation as well, forbid arrests and searches without probable cause. It would be very odd to hold that a county nevertheless has a policy of disobeying the controlling law because of a single arrest by the sheriff who knew that he did not have probable cause, and even stranger if the sheriff made only a reasonable mistake as to whether there were grounds for arrest, perhaps in circumstances where this Court might divide 5–4. A county may delegate to its sheriff the authority to effect arrests in accordance with existing law; but it necessarily as well delegates to police officers on the beat the authority to arrest when they believe probable cause exists. Yet no one urges in this case that the county would be liable for the mistakes of individual police officers. If errors like this in the application of established law constitute a "policy," every improvident decision on a constitutional issue by a sheriff, a police officer, or a county or municipal judge would represent a policy permitting liability to be imposed on the local government.

Such results do not conform to my understanding of *Monell* or any of the cases following it. Hence, I cannot join the Court's sweeping statement that municipal liability attaches where a deliberate choice to follow a course of action is made from among the available alternatives by the official responsible for making decisions with respect to the subject matter in question. *Ante*, p. ——. Under that formulation, liability would attach for every deliberate, negligent, or merely mistaken act by such an official even though inconsistent with the policy of the municipality as defined by its ordinances, the controlling state statutes or by state and federal constitutions.

I put aside those cases in which it may be shown that a lawless sheriff has gone unchecked or that policemen are recurringly put on duty without adequate training. But

nothing like that warrants county liability in this case. What happened here was that officers followed a course that was not then forbidden by federal, state or local law but that later became illegal by virtue of a decision the retroactive application of which is not challenged by the county. The sheriff and the prosecutor were free under the law to make a choice and they made it. Hence, I concur in the judgment in this case.