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Public Information Office (202) 479-3211

Justice John Paul Stevens (Ret.)

EQUAL JUSTICE INITIATIVE DINNER
Honoring Justice Stevens
New York, New York
Monday, May 2, 2011

On two or three occasions a good many years ago I had the privilege of sharing with Lou Henkin the task of leading the discussion in seminars about justice and society at the Aspen Institute in Colorado. It was at the get-acquainted party preceding one of those seminars that I first met Bryan Stevenson. If I recall correctly, he was our youngest participant, and for that reason I had asked my wife, Maryan, to make sure that he had a fair opportunity to get acquainted with other members of our discussion group. As Maryan has often reminded me, if there was ever an example of unnecessary advice, that was it. Whether it was Bryan's good looks, his amiable personality, or even possibly his remarkable intelligence, he was easily the most popular member of our group.

Predictably, he also made repeated and stimulating comments that enhanced the quality of our discussions. Following Bryan's example, tonight I hope to stimulate discussion about an important issue that is often overlooked. It is an issue that none of the opinions mentioned in *Connick v.*

Thompson (2011), the recent case in which the Court overturned a judgment awarding damages to a man who had spent over 14 years on death row because the Orleans Parish District Attorney's office committed repeated and flagrant violations of their duty to turn over exculpatory evidence to the accused.

In an extremely thoughtful and well researched book entitled "Peculiar Institution," Professor David Garland explained that a principal explanation for the survival of the death penalty in America, when it has been abolished in most civilized jurisdictions, relates to reliance on local rather than more centralized decision-making in law enforcement. Locally elected prosecutors may

qualify for higher office by convicting vicious criminals and governors may lose any chance to become president if they are responsible for an erroneous decision to grant clemency. In a democracy where local judges and prosecutors are chosen by popular election, the interest in effective law enforcement that helped elect Richard Nixon and motivated campaigns to impeach Earl Warren, creates a problem of imbalanced incentives that ought to be addressed at the state and national level. I have decided to talk about the *Thompson* case tonight because it highlights one such opportunity: a simple potential change in a federal rule of law that would have salutary effects on the administration of justice.

My plan tonight is to highlight several shocking facts of the *Thompson* case and to comment on Justice Thomas' opinion for the Court, Justice Ginsburg's dissent, and Justice Scalia's concurring opinion responding to the dissent. My principal

objective in doing so is to call your attention to the need for revision of a federal judge-made rule of law that all three opinions accepted as valid for the purposes of the case.

As framed by Justice Thomas, the question before the Court was "whether a district attorney's office may be held liable . . . for failure to train based on a single *Brady* violation." As you know - and as Justice Ginsburg reminded us in the first sentence of her oral dissenting statement - "Nearly a half century ago, in *Brady* against Maryland, this Court held that due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment." Describing just one of the many examples of violations of that rule in the *Thompson* case, Justice Ginsburg noted:

"The prosecution in Thompson's murder trial failed to produce a police report containing an eyewitness description of the murderer as six feet tall with close cropped hair. Thompson is five feet eight inches tall and, at the time of the murder, he styled his hair in a large Afro.

No fewer than five prosecutors concealed, year upon year, this and other evidence vital to Thompson's defense. At his retrial on the murder charge, which yielded a prompt not guilty verdict, the defense introduced 10 exhibits containing evidence not disclosed when Thompson was first tried."

Even the so-called "single *Brady* violation" that provided the center-piece of the Court's analysis included at least two flagrant violations. Prior to Thompson's armed robbery trial in 1985, the crime lab had tested a swatch of fabric stained with the robber's blood; the lab reported to the prosecutors that the perpetrator's blood was type B. Thompson's blood was type O. The District Attorney for the Parish does not dispute that it violated Thomson's constitutional rights to withhold from defense counsel the blood-stained swatch and the lab report. The history of that withholding is disturbing.

Assistant District Attorney Gerry Deegan was one of the prosecutors in the armed robbery trial in 1985. On the first day of the trial he checked all of the physical evidence in the case out of the

police property room, including the blood-stained swatch. But he then excluded the swatch from the evidence delivered to the courthouse property room. Nine years later, after learning that he was terminally ill, Deegan confessed to a friend - Michael Riehlmann, also a former New Orleans Parish prosecutor - that he had suppressed blood evidence in the armed robbery case. For five years after Deegan's death, Riehlmann kept that information to himself. Ultimately, in 1999, Riehlmann executed an affidavit in which he attested that during the 1994 conversation, "the late Gerry Deegan said to me that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant."

The debate between Justice Thomas and Justice Ginsburg was over the question whether the evidence in the record supported the jury's finding that the District Attorney's office had been deliberately indifferent to Thompson's *Brady* rights and to the

need for training and supervision to safeguard those rights. In my judgment, Justice Ginsburg was the clear winner of that debate. Of particular interest is the fact that Justice Scalia thought it necessary to file a rebuttal to her dissent, in which he made this rather remarkable argument:

"By now the reader has doubtless guessed the best-kept secret of this case: There was probably no *Brady* violation at all - except for Deegan's (which, since it was a bad-faith knowing violation, could not possibly be attributed to lack of training)."

Justice Scalia has either overlooked or chosen to ignore the fact that bad faith, knowing violations may be caused by improper supervision. An overzealous prosecutor might adequately explain the *Brady* rule while simultaneously making it clear that violations of the rule - if undetected by courts - will never give rise to discipline and may even be rewarded. Prosecutors' electoral incentives and the facts of this case demonstrate that such prosecutorial malfeasance is of more than hypothetical concern.

Given this potential problem, why is it that when employees in a District Attorney's office commit flagrant violations of constitutional rights it is not grounds for imposition of tort liability on the attorneys' employer? In other words, why does the familiar common law doctrine of *respondeat superior* not subject a government employer to liability for constitutional torts committed by its employees acting within the scope of their employment? History, which I shall briefly discuss, is the answer. Afterward, I hope you will discuss two more important questions: is this prevailing rule wise, and, if not, what should be done about it?

The prevailing rule is a judge-made rule fashioned by dicta in Part II of the 1978 opinion in *Monell v. New York City Department of Social Services* and in the Court's 1985 holding in *Oklahoma City v. Tuttle*. The basis for the rule was the Court's interpretation of the legislative

history of Congress' rejection of a proposed amendment to the statute now codified as §1983 of Title 42 of the United States Code. I did not join the dicta in *Monell*, and I dissented in *Tuttle*. Instead of repeating my arguments there, I shall merely suggest that you may find what I had to say in the eleven pages beginning at page 834 of volume 471 of the U. S. Reports persuasive. My only regret is that Justice Scalia was not then on the Court. I feel sure that he would have had some interesting observations about a rule produced through such heavy reliance on legislative history.

In the years since *Tuttle*, historians have reviewed the use of history in *Monell*. Five of those studies are cited by Judge Posner in his recent opinion in *Vodak v. The City of Chicago*, a seven-year old lawsuit in which a class of 887 plaintiffs claim to have been unlawfully arrested while demonstrating against the war in Iraq. Omitting the citations to those studies - which

cover twelve lines of text since Judge Posner doesn't like footnotes - he succinctly summarized the law in this one sentence:

"For reasons based on what scholars agree are historical misunderstandings (which are not uncommon when judges play historian), . . . the Supreme Court has held that municipalities are not liable for the torts of their employees under the strict-liability doctrine of respondeat superior, as private employers are."

The facts that this judge-made rule misconstrued the intent of the Congress that enacted section 1983 and is based on a misunderstanding of relevant history might, of course, provide a principled basis for a judicial re-examination of the rule. But neither the Court nor the Congress is apt to change the rule without first asking the question whether the rule is wise. That is the question that my remarks tonight are intended to motivate you to discuss.

In a recent article in the *Texas Journal on Civil Liberties & Civil Rights* entitled "Congress Needs to Repair the Court's Damage to §1983," Ivan Bodensteiner not only provides us with his answer

to that question but also has drafted a proposed statutory amendment to implement it. He correctly notes that Congress has from time to time responded to judicial misconstructions of remedial legislation - citing, for example, the Pregnancy Discrimination Act of 1978 that corrected the Court's error in *General Electric Co. v. Gilbert* (1976), the Civil Rights Act of 1991 that took care of the Court's misguided interpretation of §1981 in *Patterson v. McClean Credit Union* (1989), and the Lilly Ledbetter Fair Pay Act of 2009. He argues that decisions that "have effectively made constitutional rights 'second class rights' when compared to rights created by the common law" qualify as the sort of damage that Congress needs to repair.

I would add just three comments, focusing more narrowly on respondeat superior. First, as the common law judges who fashioned the doctrine well knew, it provides a powerful continuing incentive

for employers to make sure that their employees are adequately trained. That incentive is especially important where electoral incentives encourage abuse. Second, application of respondeat superior would eliminate time-consuming and expensive controversies about the adequacy of the tortfeasor's training in countless §1983 lawsuits. Third, and by far most important, it would produce a just result in cases like Thompson's in which there is no dispute about the fact that he was harmed by conduct that flagrantly violated his constitutional rights.

Thank you for your attention.