

JUSTICE JOHN PAUL STEVENS (Ret.)

**JOHN'S ISLAND CLUB
FIVE O'CLOCK HOUR**

**Vero Beach, Florida
March 24, 2015**

About a month ago a *New York Times* editorial discussed two questions - first, whether the offices of prosecutors who repeatedly cheat and lie in order to obtain convictions should be held accountable for their wrongdoing, and second, when an innocent man spends years or decades in prison as a result of such misconduct, should he be compensated? The editorial suggested that the Supreme Court would have an opportunity to answer these questions if it granted the certiorari petition filed by Earl Truvia and Gregory Bright, two men who have recently been exonerated after receiving life sentences for a 1975 murder.

Four years ago in its opinion in *Connick v. Thompson*, 131 S. Ct. 1350 (2011), the Supreme Court majority responded to similar questions involving the same prosecutor's office that wrongfully convicted

Truvia and Bright by holding that the office was not liable unless it was following an unconstitutional policy of refusing to provide the defense with exculpatory evidence or had failed to provide its prosecutors with adequate training in the law. Single incidents of misconduct are not sufficient to prove either an unconstitutional policy or inadequate training. Whereas the office would be liable for damages if one of its investigators using his own car to drive to an interview with a prospective witness negligently injured a bystander, even intentional unconstitutional conduct by a prosecutor will not support recovery either against him as an individual or against the agency that employs him. In an ordinary tort case it would be absurd to require the injured pedestrian to prove that the driver's employer had failed to teach him how to drive safely before the pedestrian could recover compensation for his injury. In such cases the doctrine of respondeat superior imposes liability on employers for the torts committed

by their agents in the ordinary course of business. Not so with regard to prosecutorial misconduct that produces the conviction of an innocent defendant. The *New York Times* editorial suggested that there is something wrong with the law that needs to be changed. Unfortunately, however, it failed to identify the simple and obvious remedy that Congress could readily enact. Before discussing that obvious remedy, a few more words about the need for change are appropriate.

In the *Connick* case, Justice Ginsburg was so concerned about the consequences of the majority's decision that she announced her dissent in an oral statement from the bench. In that statement she identified this flagrant example of the prosecutor's breach of the rule requiring disclosure of material evidence tending to prove the defendant's innocence:

"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 not disclosed when Thompson was first tried."

But this was not the prosecutor's most serious violation. 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 that the perpetrator's blood type was B. Thompson's blood was type O. One of the prosecutors, assistant District Attorney Deegan, checked all of the physical evidence in the case out of the police property room, including the blood-stained swatch, but 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 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, however, in 1999 he executed an affidavit describing Deegan's admission that he had intentionally suppressed the exculpatory blood evidence.

The irony of this sad story is that proof of this bad faith conduct did not establish a failure to provide Deegan with adequate training, and therefore did not convince the majority of the Supreme Court that it should support recovery for the outrageous violation of the defendant's right to a fair trial.

I think it also ironic that neither the *New York Times* editorial, nor the certiorari petition that prompted the editorial, has asked the Supreme Court to correct its clearly erroneous earlier decision that refused to apply the ancient doctrine of respondeat

superior to actions brought under 42 U. S. C. §1983 for violations of constitutional rights. That earlier decision was made in an opinion written by then Associate Justice William Rehnquist in 1985 in the case of *Oklahoma City v. Tuttle*, 471 U. S. 808, from which, incidentally, I dissented.

But the greatest irony in this saga is the fact that the principal support for Rehnquist's opinion was an unnecessary discussion of the legislative history of section 1983 in a still earlier opinion in *Monell v. Department of Social Services of the City of New York*, 436 U. S. 658 (1978), written by Justice William J. Brennan. In his description of the history of section 1983, which was passed as part of the Ku Klux Klan Act, Brennan interpreted the Reconstruction Congress' rejection of a proposed amendment, known as the Sherman Amendment, that would have made municipalities liable for damages caused by any race riots - regardless of whether the city or any of its agents played any role in causing the riot or the damage - as having rejected

the doctrine of respondeat superior. In later years one historian after another has demonstrated that the rejection of the Sherman Amendment in 1871 provides no basis for refusing to apply the doctrine of respondeat superior to constitutional torts.

In a Fordham Law Review article entitled *Taking History Seriously: Municipal Liability under 42 U. S. C. §1983 and the Debate over Respondeat Superior*, David Jacks Achtenberg describes four legal truisms of the nineteenth century that both support respondeat superior liability and explain the Reconstruction Congress' rejection of the Sherman Amendment. The first truism was the legal unity of the master and servant. Nineteenth century law treated acts of a servant as acts of the master; or to use modern "law and economics" terminology, the acts of the agent were acts of the principal. Nineteenth century law thus viewed respondeat superior liability as the natural outgrowth of treating the servant as indistinguishable from the master. The second truism was the notion that

liability flowed from an employer's legal power to control or direct his servant's actions. The third truism was a belief that, by entrusting work to employees, an employer implicitly represented to the public that the employees were careful, competent, and well-intentioned. This concept is analogous to contemporary ideas about implied warranties. The final truism was the view that benefits and liabilities should be reciprocal. Thus, if an employer received the benefits of its employee's labor, it should bear the burden of its employee's liabilities.

As Achtenberg persuasively argues, these four truisms coalesce in support of respondeat superior liability. If a master is legally indistinguishable from his servant and is deemed to have control over the servant's actions, then respondeat superior liability is the logical conclusion of these premises. More importantly for how the Court has interpreted section 1983, none of these truisms would have supported the Sherman Amendment's vision of liability. In fact,

these truisms cut against such liability. Recall that the Sherman Amendment would have imposed liability on municipalities for race riots regardless of who was responsible for those riots. The Sherman Amendment would have made municipalities liable for the deeds of private actors – most often terroristic acts by the Klan. The Sherman Amendment was thus not limited to actions by the employees of a municipality. Given the legal truisms of the nineteenth century, it is unsurprising that Congress rejected the Sherman Amendment. The Supreme Court's interpretation of that rejection as a repudiation of respondeat superior liability was a plain misreading of history.

A simple change in the law that Congress could and should readily enact would authorize an appropriate and just remedy for innocent citizens wrongfully convicted by errant prosecutors. Moreover, simplifying the procedure for challenging the constitutionality of deliberate misconduct by prosecutors would eliminate the costly and time-consuming evidentiary disputes

about the adequacy of the training of their assistants. Indeed, the Court's jurisprudence has erected a complex and truly byzantine procedure for any wrongfully convicted defendant who seeks compensation for his years of wrongful incarceration. Although I have focused on the unconstitutional actions of prosecutors, a comparison to police officers may prove helpful in showing why a change in the law is appropriate. When a police officer is found personally liable for his unconstitutional conduct, such as the excessive use of force, municipalities are often protected from liability because of *Monell's* custom or policy requirement. But as Joanna Schwartz details in her New York University Law Review article entitled *Police Indemnification*, approximately 99.98% of damages awards for police misconduct are paid by municipalities. These blanket indemnification policies, as Schwartz explains, are functionally indistinguishable from respondeat superior liability. Given this practical reality, it is somewhat bizarre that a majority of the Supreme

Court has spent years constructing an intricate legal regime to insulate municipalities from liability for unconstitutional prosecutorial misconduct when those same municipalities indemnify their police officers who engage in unconstitutional conduct.

Similar policies do not exist for prosecutors because, unlike the police, they are absolutely immune from personal liability for their actions and thus there is no need for indemnification. Given prosecutorial immunity, surmounting *Monell's* custom or policy requirement is the only means of providing any remedy for defendants who are wrongfully convicted because the prosecution deliberately suppresses exculpatory evidence. The differences between police officers and prosecutors may justify individual immunity for prosecutors but not police, but surely those differences do not justify providing municipalities with an immunity for prosecutorial misconduct that is not available for police misconduct. Given this new empirical evidence showing that

municipalities are already willing to accept liability for their police officers' misconduct, there is little reason to believe that a congressional override of *Monell* would bankrupt municipalities.

There is a surprising unanimity among scholars supporting this simple – but profoundly important – proposed change in the law. As Ivan Bodensteiner points out in an article in the *Texas Journal on Civil Liberties & Civil Rights*, Congress could overturn *Monell* with a simple statutory change and "demonstrate a true commitment to protection of civil rights, unlike the Court's derogation of civil rights." I wonder whether the *New York Times* editorial staff might support this proposal instead of relying on an unavailable majority of the Supreme Court to correct its past mistakes.

Thank you for your attention.