

Fall 2013

Byron White-Hero and Scholar: Reflections About Punishment, Political Speech, and Public Liability

Justice John Paul Stevens

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Recommended Citation

Justice John P. Stevens, *Byron White-Hero and Scholar: Reflections About Punishment, Political Speech, and Public Liability*, 84 U. COLO. L. REV. 893 (2013).

Available at: <https://scholar.law.colorado.edu/lawreview/vol84/iss4/2>

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UNIVERSITY OF
COLORADO LAW REVIEW

Volume 84, Issue 4

2013

**BYRON WHITE—HERO AND SCHOLAR:
REFLECTIONS ABOUT PUNISHMENT,
POLITICAL SPEECH, AND PUBLIC
LIABILITY**

JUSTICE JOHN PAUL STEVENS (RET.)*

Inaugural Stevens Lecture
University of Colorado Law School
September 22, 2011

This is my third opportunity to deliver the first of a series of lectures honoring a distinguished member of the legal community. On each of these occasions, the assignment has been especially rewarding because the honoree was not only a brilliant lawyer with a distinguished professional career, but also a close personal friend. The first was Nathaniel Nathanson, my constitutional law professor who taught me to beware of “glittering generalities.” The second was Wisconsin’s Tom Fairchild, former Chief Judge of the Court of Appeals for the Seventh Circuit, who ran against the infamous Joe McCarthy in the 1952 U.S. Senate race, and who taught me that respect for precedent is generally more important than a judge’s appraisal of the merits of particular decisions. Today I shall say a few words about a truly great American hero with whom I spent many hours sharing a golf cart during his years as a senior citizen.

Federal judges who had the opportunity to meet Justice White in his chambers were always favorably impressed. I’m sure they all remembered not only his crushing handshake, but also the greeting that immediately made them feel welcome.

* Associate Justice (Ret.), United States Supreme Court. Justice Stevens gave this address for the Annual John Paul Stevens Lecture. This lecture brings a distinguished jurist to the University of Colorado Law School each year to discuss the state of the judiciary. Justice Stevens gave the inaugural address on September 22, 2011.

He would rise, extend his hand, and simply state, "Byron White." Years after their first meeting, my good friend Senior Judge Bright of the Eighth Circuit loved to recall their initial encounter, which began with this exchange, "Byron White," "Myron Bright."

Before joining the Court in 1975, I had met Byron on two occasions. The first was in Pearl Harbor during World War II when he was serving as an air combat intelligence officer on the staff of a carrier task force. It was after our meeting that the *Bunker Hill* was hit by a kamikaze attack in which Byron saved the lives of sailors buried under debris that no one else was strong enough to remove. I think Byron's experience as an intelligence officer seeking to understand the intent of the enemy on the basis of miscellaneous scraps of information may have influenced his approach to statutory interpretation after he became a judge. He firmly believed in using legislative history where appropriate. As he stated in a footnote quoting Chief Justice John Marshall, "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived."¹

Byron's footnote was responding to a criticism of the Court's use of legislative history that Justice Scalia had made in his concurring opinion in that case.² Justice Scalia's opinion noted that Justice Jackson had criticized the majority's use of legislative history in a separate opinion in 1953.³ Justice Jackson's primary criticism, however, was based on the inaccessibility of legislative history to lawyers outside of Washington.⁴ Developments in electronic research since 1953 have pretty well eliminated those concerns of Justice Jackson who, of course, was also expressing his own view rather than the view of the court.

My second meeting with Byron was in his office at the Department of Justice when he was the Deputy Attorney General in the Kennedy Administration. Working closely with Louis Oberdorfer, a former Yale classmate who had served as a law clerk for Justice Hugo Black when Byron clerked for Chief Justice Vinson, Byron was leading an effort to select top lawyers in the Justice Department on the basis of their talent

1. *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610–11 n.4 (1991).

2. *Id.* at 622 (Scalia, J., concurring).

3. *Id.* (citing *United States v. Pub. Util. Comm'n of Cal.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring)).

4. *Pub. Util. Comm'n of Cal.*, 345 U.S. at 319–21 (Jackson, J., concurring).

rather than their political sponsorship. Our conversation focused on the work of the Assistant Attorney General in charge of the Antitrust Division. My memory that we had similar views about the antitrust and business law issues seems to have been confirmed by our approaches to such cases after we became colleagues. That similarity may explain Byron's decision as the senior justice in the majority at our conference on the *Chevron* case—which involved the deference owed by judges to agency interpretations of ambiguous statutes—to assign the opinion to me.⁵ If the number of times that opinion has been cited is evidence of its importance, I must thank Byron for blessing my career with that assignment.

His career in the Justice Department came to an end in the spring of 1962 when President Kennedy selected him to fill the vacancy caused by Justice Whitaker's retirement. The Senate promptly confirmed Byron's nomination by voice vote, and on April 16, 1962, Chief Justice Earl Warren swore him in as an associate justice of the Supreme Court. Byron wrote opinions in at least two of the cases that were argued that week. In one of them, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, which involved a private treble damage action under antitrust laws, Byron wrote for a unanimous Court in holding that the plaintiff was entitled to a new trial.⁶ Appropriately, the conspiracy alleged in that case was to restrain trade in certain ores mined principally on the Colorado Plateau.

During his ensuing thirty-one years on the Court, Byron wrote so many opinions in so many different areas that I cannot begin to summarize them adequately. Instead, I shall limit my remarks to two aspects of his jurisprudence that seem especially relevant today and then comment on a case about which we disagreed. I shall begin with the Eighth Amendment because Byron wrote a dissent in an important case argued on his second day on the bench—*Robinson v. California*—in which the Court held that the rights protected by the Eighth Amendment were enforceable against state action.⁷

I.

The question in *Robinson*—as framed in Justice Stewart's

5. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

6. 370 U.S. 690 (1962).

7. *Id.*

majority opinion—was whether a California statute making it a criminal offense for a person to “be addicted to the use of narcotics” was unconstitutional.⁸ In their respective dissents, Justice Clark and Justice White disagreed with that formulation of the issue,⁹ but as Justice Harlan wrote in his concurrence, the trial judge’s instructions to the jury permitted its members to find the defendant guilty on no more proof than that he was present in California while addicted to narcotics.¹⁰ Accepting the majority’s interpretation, the holding is surely correct. Even though a prison sentence for a narcotics offense might not be unusual, it would surely be cruel and unusual if it represented punishment for a medical condition that merely created a propensity to use narcotics. The fact that Byron dissented is of interest because he later wrote so many significant opinions condemning cruel and unusual punishment.

For example, Byron was one of the five Justices supporting the judgment in *Furman v. Georgia*, which invalidated the death penalty as it was administered in 1972.¹¹ He also wrote the opinions for the plurality in *Coker v. Georgia*¹² and for the Court in *Enmund v. Florida*,¹³ which held, respectively, that death is an excessively severe punishment for raping an adult woman or for aiding and abetting a felony if the defendant neither took life, nor attempted or intended to take it. And, in my second year on the Court, Byron wrote a compelling dissent to the Court’s holding in *Ingraham v. Wright* that the Eighth Amendment does not prohibit corporal punishment in public schools, no matter how severe.¹⁴

While Byron disagreed with much of the reasoning in Justice Powell’s opinion for the Court in *Ingraham*, he did not dissent from Justice Powell’s statement that the constitutional prohibition against cruel and unusual punishment “proscribes punishment grossly disproportionate to the severity of the crime.”¹⁵

8. *Id.* at 660–61.

9. *Id.* at 679–81 (Clark, J., dissenting); *id.* at 685–87 (White, J., dissenting).

10. *Id.* at 678 (Harlan, J., concurring).

11. 408 U.S. 238 (1972) (per curiam).

12. 433 U.S. 584 (1977).

13. 458 U.S. 782 (1982).

14. 430 U.S. 651 (1977).

15. *Id.* at 667 (majority opinion). Indeed, Justice White reasoned from that proposition in his *Ingraham* dissent, noting that the majority’s holding that the Eighth Amendment protected only criminals, not schoolchildren, was curious “in

The validity of that proposition remained unchallenged until after Justice Scalia joined the Court. It then became the subject of debate in *Harmelin v. Michigan*,¹⁶ a case argued near the beginning and decided at the very end of the October 1990 Supreme Court term. Five Justices wrote opinions; both Justice White's debate with Justice Scalia and his debate with Justice Kennedy merit comment.

The case involved the constitutionality of a Michigan statute that provided for mandatory life imprisonment for possessing 672 grams of cocaine—an amount that would fit into the glove compartment of a car. Joined only by Chief Justice Rehnquist, Justice Scalia concluded that prior cases holding that the Eighth Amendment prohibits grossly disproportionate punishment should be overruled because the Eighth Amendment contains no proportionality guarantee.¹⁷ Justice Kennedy concluded that Justice Scalia's position was foreclosed by our earlier decisions but concurred in the judgment because he was not convinced that Harmelin's sentence was grossly disproportionate to the gravity of his crime.¹⁸ Writing for three of us in dissent, Justice White disagreed with both of them.¹⁹

Justice Scalia's thirty-five-page opinion includes a scholarly description of the history that gave rise to the prohibition against "cruel and unusual punishments" in the English Declaration of Rights of 1689. He argued that it was motivated primarily by the use of unauthorized and barbarous methods of punishment during the reign of James II.²⁰ That interesting argument must have been primarily the product of Justice Scalia's own research because neither of the briefs filed on behalf of the State of Michigan had advanced the argument that the Eighth Amendment did not contain any protection against disproportionately severe punishments. Those briefs did not cite the historical materials reviewed by Justice Scalia, beyond briefly quoting the *Ingraham* majority's summary of

view of the fact that the more culpable the offender the more likely it is that the punishment will not be disproportionate to the offense, and consequently, the less likely it is that the punishment will be cruel and unusual." *Id.* at 691 (White, J., dissenting).

16. 501 U.S. 957 (1991).

17. *Id.* at 965 (Scalia, J.).

18. *Id.* at 996–97, 1001, 1008–09 (Kennedy, J., concurring in part and concurring in the judgment).

19. *Id.* at 1009 (White, J., dissenting).

20. *Id.* at 967–73 (Scalia, J.).

the history leading up to the English Declaration of Rights.²¹

Among his responses to Justice Scalia's novel argument, Justice White relied persuasively on both plain language and common sense: a punishment of life imprisonment for overtime parking would be both cruel and unusual as those words are commonly understood and would be as offensive as punishing a criminal by the use of torture. Moreover, it is difficult to explain why the Framers would prohibit excessive fines (as the Eighth Amendment does explicitly) but not excessive terms of imprisonment. Justice White also noted that other scholars interpreting the historical evidence had reached the opposite conclusion from Justice Scalia.²²

That Justice White had the better of the argument over whether the Eighth Amendment contains a proportionality requirement is confirmed by a recent article by Professor Stinneford of the University of Florida Law School.²³ Professor Stinneford is generally critical of the Court's proportionality jurisprudence, but based on his exhaustive research, he concludes that each of the arguments advanced by Justice Scalia in his *Harmelin* opinion is "demonstrably incorrect."²⁴ Examining Anglo-American history; colonial American history; state constitutions, case law, and statutes shortly after the American Revolution; and nineteenth-century Supreme Court cases and legal commentators' views, Professor Stinneford

21. Brief for the State of Michigan as Amicus Curiae Supporting Respondent *Harmelin v. Michigan*, 501 U.S. 957 (1991), at 5 (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)). While the federal government's amicus brief cited some of the historical materials that Justice Scalia relied upon, it did not argue that the Eighth Amendment contains no proportionality guarantee. *Id.* at 23–24. The brief concluded that "[t]he historical record thus suggests that . . . the Eighth Amendment is particularly directed at the avoidance of arbitrarily harsh assertions of discretionary authority," but noted that "[t]o be sure, this value does not exhaust the Eighth Amendment's protection." *Id.* at 24.

22. *Harmelin*, 501 U.S. at 1011 n.1 (White, J., dissenting).

23. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011).

24. *Id.* at 927. Professor Stinneford explains:

The English version of the Cruel and Unusual Punishments Clause was specifically directed at excessive punishments, not simply illegal ones. In America, the phrase "cruel and unusual" was widely used within the legal system as a synonym for "excessive" and was not an "exceedingly vague" way to express the idea of disproportionality. Finally, the historical evidence shows that the Framers and early interpreters of the Cruel and Unusual Punishments Clause understood it to prohibit excessive punishments, not merely barbaric methods of punishment.

Id.

finds that “[t]here is no evidence that any of the Framers understood the Cruel and Unusual Punishments Clause to prohibit *only* barbaric methods of punishment.”²⁵

While Professor Stinneford endorses the Court’s answer to the threshold question of whether the Constitution requires proportionality review, he is highly critical of the way in which the Court has conducted such review. He argues that proportionality should be defined in terms of retributive justice—*i.e.*, “the punishment should fit the crime”—and excessiveness should be measured by prior practice.²⁶ He thus takes a position with respect to not only the debate between Justice White and Justice Scalia, but the debate between Justice White and Justice Kennedy as well. His comments resemble reasoning in Justice White’s dissent, which emphasized that the sentence imposed on Harmelin was harsher than that imposed for more serious crimes in the same jurisdiction or for the same crime in other jurisdictions.²⁷ Professor Stinneford writes,

There was no evidence that a life sentence without possibility of parole had ever been imposed on someone like Harmelin, a first-time offender with no aggravating factors. The statute requiring a minimum sentence of life imprisonment with no possibility of parole was new and was significantly harsher than prior practice would support. Nor was there any new evidence regarding the culpability of drug dealers. The Court should have found the punishment cruel and unusual.²⁸

Two final comments about cruel and unusual punishments: First, if retribution is the purpose that justifies the death penalty, then, as I explained in my separate writing in the *Baze* case, the Court’s jurisprudence that requires administration of that penalty to be designed not to inflict suffering has made the penalty—to use Justice White’s words—“the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.”²⁹ The extraordinary costs of administering the death

25. *Id.* at 947.

26. *Id.* at 961–73.

27. *Harmelin*, 501 U.S. at 1025–27.

28. Stinneford, *supra* note 23, at 977.

29. *Baze v. Rees*, 553 U.S. 35, 86 (2008) (Stevens, J., concurring) (quoting

penalty significantly outweigh its benefits. As my *Baze* opinion explained, that fact is particularly clear now that the primary justification for the penalty—the retributive impulse—is no longer satisfied by the penalty’s clinical design.

Second, if proportionality is constitutionally mandated, our policy makers should take a second look at the mandatory minimum sentencing statutes that are producing overcrowded prison populations. Similarly, they should take a second look at the mandatory deportation statutes that preclude the formerly permitted discretion of judges to determine whether an alien who has lived in this country for decades should be deported as punishment for a relatively minor offense.³⁰ In both cases, the mandatory nature of the statutes precludes judicial tailoring of the punishment to the lesser gravity of some covered offenses, which creates the risk of excessive punishment in particular cases.

II.

During my years on the court, I had the impression that Chief Justice Burger liked to write opinions in which the Court favored First Amendment claims and to assign Byron the task of writing opinions that members of the press could be expected to criticize. I shared some of Byron’s views in those cases.

Zurcher v. Stanford Daily,³¹ a case decided not long after I joined the court, provides an example. In *Zurcher*, a Stanford University student newspaper had published an article with photographs of a student protest at the University Hospital, during which police officers had been assaulted.³² The police searched the newspaper’s offices for other photographs that might reveal who had assaulted the officers, and the newspaper sued, claiming First and Fourth Amendment violations.³³ The newspaper argued that the First Amendment required a *per se* rule forbidding a warrant to search its offices and permitting only a *subpoena duces tecum*.³⁴ Byron wrote an opinion that rejected the newspaper’s claims. I dissented on the Fourth Amendment issue of whether the police search of the

Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).

30. See *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1478–80 (2010).

31. 436 U.S. 547 (1978).

32. *Id.* at 550–51.

33. *Id.* at 551–52.

34. *Id.* at 563.

newspaper's facilities was constitutional,³⁵ but, even though I did not join his opinion, I agreed with Byron that the First Amendment does not provide newspapers with a special immunity from the duty to produce evidence that other citizens must provide.

During the summer after the *Zurcher* decision, I was in California visiting with one of my closest friends, Robert Jamplis, a doctor on the Stanford hospital staff. He invited me to join him on his morning rounds because he thought one of his patients, a California trial judge, would enjoy meeting a member of the United States Supreme Court. It turned out that the patient was the judge who had issued the search warrant in the *Zurcher* case. Because I think the chance to meet a judge on the Court that had upheld his ruling and to express his enthusiastic approval of our work may have enhanced his rate of recovery, I thought it appropriate not to mention the fact that I had dissented in the case.

The incident reminds me of an encounter between Byron and a critic of the Court's First Amendment jurisprudence. At the beginning of Byron's talk to the Utah Bar Association in the summer of 1982, a member of the audience ran up to the front of the room and assaulted him.³⁶ The man's motivation was hostility to the Court's cases protecting certain sexually explicit materials; he was obviously unaware of the fact that Justice White had been a dissenter in the cases that offended him the most.³⁷ Thus, while the trial judge in *Zurcher* gave me credit for a decision from which I had dissented, Byron was attacked by a man who probably agreed with his opinions.

The most significant case that was pending when I joined the Court in 1975 was *Buckley v. Valeo*, in which the Court reviewed the constitutionality of the Federal Election Campaign Amendments of 1974.³⁸ Byron wrote a separate opinion effectively explaining why the distinction between limitations on contributions (which the Court upheld) and the limitations on expenditures (which the Court invalidated) did not make much sense.³⁹ He also persuasively explained why the Court should have respected the congressional judgment

35. *Id.* at 577–83 (Stevens, J., dissenting).

36. DENNIS HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 403 (1998).

37. *Id.*

38. 424 U.S. 1 (1976) (per curiam).

39. *Id.* at 257–66 (White, J., concurring in part and dissenting in part).

that effective campaigns could be conducted within the limits established by the statute.⁴⁰ As an introduction to his opinion, he correctly explained why the argument that "money is speech," and therefore that "limiting the flow of money to the speaker violates the First Amendment, proves entirely too much."⁴¹ He predicted that the Court's holding that a candidate has a constitutional right to spend unlimited amounts of money in an effort to be elected would unfortunately be interpreted as a holding that candidates have a constitutional right to purchase their election.⁴² Time has vindicated another of Byron's predictions: that "[w]ithout limits on total expenditures, campaign costs will inevitably and endlessly escalate."⁴³

Byron was clearly correct when he explained why the First Amendment does not protect a candidate's right to make unlimited campaign expenditures. Such expenditures pay for many non-speech items—such as taking straw polls, planning campaign strategy, travel for campaign workers, and perhaps a candidate's wardrobe. Indeed, the fact that the money used to finance the Watergate burglary could be classified as a campaign expense would surely not entitle that expenditure to the protection of the First Amendment.

As Byron pointed out, not only do expenditures finance activities other than speech, but history should have taught us that unlimited amounts of money tempt people to spend it on *whatever* money can buy to influence the election. Recognizing that financing unethical or illegal practices is low on every campaign organization's priority list, he argued that expenditure limits would play a significant role in preventing such practices because there "would not be enough of 'that kind of money' to go around."⁴⁴ Alluding to the scandals during the Nixon administration, he emphasized the importance of restoring and maintaining public confidence in federal elections. In his judgment, it was "critical to obviate or dispel the impression that federal elections are purely and simply a function of money," and it was quite proper for Congress to do so by limiting the amount of money that a candidate or his

40. *Id.*

41. *Id.* at 262–64.

42. *Id.* at 265–66.

43. *Id.* at 264.

44. *Buckley v. Valeo*, 424 U.S. 1, 265 (1976).

family could spend on a campaign.⁴⁵

In its response to Justice White, the majority simply (and incorrectly) assumed that limitations on expenditures could be equated with limitations on the amount of speech. Instead of asking whether the limitations set by Congress would impair a candidate's ability to conduct a fair campaign, the majority relied on the rhetorical flourish that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."⁴⁶ That colorful rhetoric assumes that limitations on the quantity of speech in public debates are just as obnoxious as limitations on the content of that speech. But there is nothing even arguably unfair about evenhanded rules that limit how much speech can be voiced in certain times or places or by certain means, such as sound trucks. If we view an election as a race between two competitors, or a species of debate between two adversaries, equalizing the amount of money that each contestant can spend in an attempt to persuade the decision-makers is fully consistent with the First Amendment. Otherwise, appellate court rules limiting the time that the advocates spend in delivering their oral arguments could be invalidated because such rules limit the speech of one adversary in order to enhance the relative voice of his or her opponent.

Byron's opinions in *Buckley v. Valeo* and other election law cases make clear that he would have agreed with my discussion of the First Amendment in the *Citizens United* campaign finance case over a year ago. In that case, the majority invalidated congressional limits on corporate expenditures in elections by rejecting the argument that speech of "corporations or other associations should be treated differently [from that of 'natural persons'] under the First Amendment."⁴⁷ Writing for the four-Justice minority, I concluded by emphasizing that the majority had thereby rejected "the common sense of the American people, who [had] recognized a need to prevent corporations from undermining self-government since the founding."⁴⁸ In so doing, I wrote, quoting Justice White's dissent in the *Bellotti* case, the majority opinion "elevate[s] corporations to a level of deference which has not been seen at

45. *Id.* at 265–66.

46. *Id.* at 248.

47. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342 (2010).

48. *Id.* at 478 (Stevens, J., dissenting).

least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests.”⁴⁹

III.

While I have mentioned a few of the many cases in which I agreed with Byron’s views, I think it appropriate to acknowledge that our friendship did not prevent either of us from disagreeing with the other. Our differing views on the abortion issue, for example, were set forth in our separate opinions in the *Thornburg* case, in which we disagreed as to the strength of the liberty interest implicated by a woman’s decision not to bear a child, and as to whether the government interest in protecting fetal life is equally compelling at all moments from conception to birth.⁵⁰

And, of course, Justice White’s vote was decisive in a host of cases in which he did not author an opinion. For example, Justice White joined Part II of Justice Brennan’s opinion in *Monell v. Department of Social Services of New York* in 1978,⁵¹ and Justice Rehnquist’s opinion in *Oklahoma City v. Tuttle* in 1985.⁵² Those opinions announced the rule that a municipality cannot be held liable for a constitutional violation on a *respondeat superior* theory, which is the theory that an entity is liable for all violations committed by its employees in the regular course of their employment. As I argued in my dissent in *Tuttle*, the rule against that theory of government liability qualified as a “judicial fiat that no litigant had asked the Court to decree.”⁵³ Two unusually important recent cases illustrate the need for a re-examination of that rule.

In the first, *Connick v. Thompson*, decided a few months ago, the Supreme Court overturned a judgment awarding damages to a man who had spent over fourteen years on death row because prosecutors in the New Orleans Parish District Attorney’s Office flagrantly violated their duty to turn over exculpatory evidence to the accused.⁵⁴ In the second, *Vance v.*

49. *Id.* at 479 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 817 n.13 (White, J., dissenting) (1978)).

50. *Thornburg v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 772–82 (1986) (Stevens, J., concurring); *id.* at 785–814 (White, J., dissenting).

51. 436 U.S. 658 (1978).

52. 471 U.S. 808, 818 (plurality opinion).

53. *Id.* at 834 (Stevens, J., dissenting).

54. 131 S. Ct. 1350 (2011).

Rumsfeld, decided a few weeks ago by the U.S. Court of Appeals for the Seventh Circuit, the court considered whether American citizens who claimed torture at the hands of military personnel in Iraq had sufficiently alleged that the Secretary of Defense personally authorized that policy of torture.⁵⁵ Under governing law, such allegations were necessary in order to proceed with their suit.⁵⁶

The basis for the rule announced in *Monell* and *Tuttle*, and applied in *Connick*, was the Court's interpretation of legislative history. That history concerned Congress' rejection of a proposed amendment to the statute now codified as Section 1983 of Title 42 of the United States Code.⁵⁷ In the year since *Tuttle*, historians have reviewed the analysis relied upon in *Monell*. Five of those studies were succinctly summarized by Judge Posner as follows:

For reasons based on what scholars agree are historical misreadings (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.⁵⁸

I would add that the rule not only was based on a misreading of legislative history, but also—and more importantly—is manifestly unwise. The New Orleans Parish Attorney's Office should be responsible for the constitutional torts of its agents without requiring proof that their training was inadequate.

Similarly, in the federal context, the plaintiffs in *Vance* should be permitted to recover damages from the United States government for constitutional rights violations by its lower-level employees. Those plaintiffs should not have to resort, as they much do under existing law, to claims that a former high-level official directly authorized or ordered those violations. The government itself, rather than retired officials, should

55. 653 F.3d 591 (7th Cir. 2011), *vacated*, 710 F.3d 193 (7th Cir. 2012) (en banc).

56. See *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (noting the "accurate stipulation that [government officials] may not be held accountable for the misdeeds of their agents" and that "[a]bsent vicarious liability, each Government official . . . is only liable for his or her own misconduct").

57. *Monell*, 436 U.S. at 665–83.

58. *Vodak v. City of Chicago*, 639 F.3d 738, 747 (7th Cir. 2011).

provide an appropriate remedy to victims in meritorious cases.

In a recent article in the *Texas Journal on Civil Liberties and Civil Rights*, Ivan Bodensteiner argues that Court decisions narrowing state and municipal liability under Section 1983 "have effectively made constitutional rights 'second class rights' when compared to rights created by the common law," and that this qualifies as the sort of damage that Congress needs to repair.⁵⁹ His concern applies in the federal context as well. By statute, monetary recovery may be had against the United States for some violations of state tort law by its employees, but that coverage does not extend to violations of the highest law of the land: the Constitution.⁶⁰ In a sense, then, this structure of our law places greater importance upon the former set of rights than the later.

I would add just three comments about the wisdom of respondeat superior liability for constitutional torts committed by government officials. First, as the common law judges who fashioned the doctrine well knew, it provides a powerful continuing incentive for employers to ensure, through affirmative steps if necessary, that their employees do not commit violations. Professors Catherine Fisk and Erwin Chemerinsky have written, "Vicarious liability, often called respondeat superior liability, advances the goals of the civil rights laws. . . . [I]t reduces the incidence of tortious conduct by providing a financial incentive for employers to prevent it by exercising care in hiring and disciplining employees and supervisors."⁶¹

Second, application of respondeat superior would eliminate time-consuming and expensive controversies about the tortfeasor's training in countless Section 1983 lawsuits. The current requirement to show a custom or practice of inadequate training necessitates costly investigation and discovery, which can burden both plaintiffs and the local governments from which they seek relief.⁶² A respondeat superior rule would

59. Ivan E. Bodensteiner, *Congress Needs To Repair the Court's Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29, 33 (2010).

60. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80.

61. Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS J. 755, 757, 785 (1999).

62. See Martin A. Schwartz, *Fundamentals of Section 1983 Litigation*, 17 TOURO L. REV. 525, 548 (2001) (explaining that section 1983 municipal liability claims based on a custom or practice are "very difficult to prove. It is also very time consuming to find that kind of evidence, requiring a lot of investigation and

eliminate that burden.

Third, and by far most important, such a rule would produce a just result in cases like Thompson's, in which there is no dispute that the plaintiff was harmed by conduct that flouted his constitutional rights. In such cases, it is proper that the government whose employees committed the violations should remedy them.

At the time of his appointment, Byron responded to press inquiries about his judicial philosophy by succinctly stating that his job was "to decide cases."⁶³ One of the reasons why he was such a great judge is that he did not have an agenda that he sought to achieve through his decisions. He took the cases one at a time, deciding each on the basis of an impartial and intelligent study of the relevant facts and law. His approach to the law was like his approach to golf, a game he loved. Byron enjoyed playing, practicing, and talking about golf. I particularly remember his tactful method of asking me about my game. He would never embarrass me by asking me what my score was. Instead, he would ask, "How many pars did you have?" If I were to answer a similar question about his work on the bench, I would conclude that his record in the hundreds of cases that he decided included an amazing number of pars and birdies, and even an occasional eagle.

discovery.").

63. Hutchinson, *supra* note 36, at 331.

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