

IMPLICATIONS FOR *CITY OF CANTON V. HARRIS* IN LIGHT OF *ASHCROFT V. IQBAL* AND *CONNICK V. THOMPSON*.

Presented to the National Police Accountability Project's Workshop at the 2010 National Lawyers Guild Law for the People Convention in New Orleans, Louisiana.

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This paper will discuss some of the implications of the recent decision of *Thompson v. Connick*,¹ a case which the U.S. Supreme Court has granted certiorari² and *Ashcroft v. Iqbal*,³ on the *City of Canton v. Harris*,⁴ standard of objective deliberate indifference to establish supervisory liability for "failure to train" cases.

1. THOMPSON V. CONNICK

Generally, prosecutors have immunity from civil liability for their actions while representing the state in judicial proceedings.⁵ But a district attorney's office may be liable under 42 U.S.C. § 1983 for violations of defendants' constitutional rights if a prosecutor's conduct is attributable to the municipality.⁶ The Fifth Circuit in *Thompson v. Connick*, affirmed a \$14 million § 1983 judgment against the New Orleans Parish District Attorney's Office for *Brady*⁷ violations (withholding blood

¹ *Thompson v. Connick*, 553 F.3d 836 (5th Cir. 2008) affirmed by an equally divided court in *Thompson v. Connick*, 578 F.3d 293 (5th Cir. 2009)(en banc).

² *Connick v. Thompson*, 2010 U.S. LEXIS 2612 (U.S., Mar. 22, 2010).

³ 129 S.Ct. 1937 (2009).

⁴ 489 U.S. 378 (1989).

⁵ E.g., *Hartman v. Moore*, 547 U.S. 250, 261-62 (2006); *Kalina v. Fletcher*, 522 U.S. 118, 125-26 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

⁶ See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-91 (1978) and *Owen v. City of Independence*, 445 U.S. 622, 638 (1980).

⁷ In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that due process requires the prosecution in a criminal case to turn over evidence that is favorable to the accused when the evidence is material to guilt or punishment. The Supreme Court later expanded the *Brady* rule to require the disclosure of evidence

tests that excluded Thompson as the assailant) during a prosecution for the 1984 robbery of Mr. LaGarde. It resulted in the conviction of John Thompson.⁸ He was sentenced to forty-nine and one-half years in prison for the attempted armed robbery. In a subsequent murder allegation in a unrelated case the same assistant district attorneys tried Thompson for the murder of Raymond T. Liuzza, Jr., who was robbed and shot in New Orleans. Because the robbery conviction would have been admissible as impeachment evidence had he testified, Thompson chose not to take the stand in his defense at his subsequent trial for the Liuzza murder.⁹ Thompson was convicted of first-degree murder and sentenced to death.¹⁰

Fast forward eighteen years, after Thompson had exhausted all appeals and was one month away from execution, an investigator discovered a copy of the withheld blood report in the LaGarde robbery case.¹¹ Thompson was then tested and found to have a different type of blood from that taken from the pants of the victim, which excluded him as the assailant and a stay of execution was subsequently granted. In a subsequent investigation, Assistant District Attorney Gerry Deegan was found to have deliberately withheld the blood report.¹² Thompson was granted a new trial for the armed robbery charge, but the District Attorney decided not to

that is relevant to the credibility of key government witnesses. *See Giglio v. United States*, 405 U.S. 150, 154 (1972).

⁸ “In a strategic move, the district attorneys successfully petitioned the Orleans Parish Criminal District Court to switch the order of the trials so that Thompson would be tried for the armed robbery first. The idea was that a guilty verdict in the armed robbery case would make Thompson unwilling to take the stand in the murder trial (due to the fact that a conviction from the attempted armed robbery trial could be entered into evidence against him, as impeachment, if he testified) and increase the likelihood of the death penalty.” *Thompson v. Connick*, 553 F.3d 836, 843 (5th Cir. 2008).

⁹ *Id.*, at 844.

¹⁰ *Id.*, at 844-45.

¹¹ *Id.*, at 845.

¹² *Id.*

prosecute¹³ and after some proceedings, his murder conviction was vacated.¹⁴ In the new trial Thompson testified and presented *thirteen pieces of evidence* prosecutors had previously withheld. The jury deliberated thirty-five minutes and acquitted Thompson.¹⁵

In 2003, Thompson filed suit against the Orleans Parish District Attorney's Office and various supervisors in their official capacity¹⁶ under § 1983 for wrongful suppression of exculpatory evidence¹⁷ alleging that *Brady* violations were caused by an unconstitutional official policy or alternatively, the District Attorney's "deliberate indifference to an obvious need to train, monitor, or supervise his prosecutors."¹⁸ The jury's verdict after trial found no "official policy" causing the suppression of exculpatory evidence, but did find that District Attorney Office and District Attorney Connick in his official capacity were liable for "failure to train" the subordinate prosecutors of their duties under *Brady* and awarded \$14 million for the harm to Thompson.¹⁹

A. The Panel's Opinion.

The District Attorney's Office appealed the judgment to the Fifth Circuit asserting (*inter alia*) absolute immunity, and that a single-incident cannot establish liability under § 1983.²⁰ The Fifth Circuit panel affirmed the district court judgment. The unanimous panel noted the "especially deferential" standard of review for jury

¹³ *State v. Thompson*, 825 So. 2d 552, 553 (La. Ct. App. 2002).

¹⁴ *Id.*, at 557-58.

¹⁵ *Thompson*, 553 F.3d at 846.

¹⁶ *Id.*

¹⁷ *Thompson v. Connick*, 578 F.3d 293, 296 (5th Cir. 2009).

¹⁸ *Id.*, at 296-97.

¹⁹ *Id.*

²⁰ *Id.*, at 296.

verdicts²¹ and concluded that a reasonable jury could have found that the District Attorney's Office was "deliberately indifferent to the need to train" on *Brady* issues²² citing *City of Canton v. Harris*,²³ where the Court held that where a municipality's failure to train its employees in a relevant respect evidences deliberate indifference to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983."²⁴ The *Thompson* court rejected the District Attorney's argument that a pattern of *Brady* violations was necessary to establish "deliberate indifference"²⁵ and cited circuit and Supreme Court cases showing that a single incident could support such a finding.²⁶ The panel found that there was adequate evidence to support the jury's verdict, that the need to train prosecutors on *Brady* issues was obvious, that prosecutors were inadequately trained²⁷ and that DA Connick knew that a failure to train his subordinates would result in *Brady* violations.²⁸ The panel found that *Brady* violations were a "highly predictable consequence" of his failure to train²⁹ and "no pattern of similar violations was necessary to put Connick on notice" that training to

²¹ *Thompson*, 553 F.3d at 851.

²² *Id.*

²³ 489 U.S. 378 (1989).

²⁴ *Id.*, at 388-89 ("Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983. As Justice Brennan's opinion in *Pembaur v. Cincinnati*, 475 U.S. 469, 483-484 (1986) (plurality) put it: "[M]unicipal liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives" by city policymakers.

²⁵ *Thompson*, 553 F.3d at 852.

²⁶ *Id.*

²⁷ *Id.*, at 858.

²⁸ *Id.*, at 853.

²⁹ *Id.*, at 854.

prevent such violations was needed.³⁰ The court found that Assistant District Attorney Deegan's intentional suppression of the exculpatory evidence did not undermine the deliberate indifference theory because “the Brady violation *was not solely* the result of Deegan's actions.”³¹ The Circuit granted a rehearing *en banc*.

B. The *En Banc* Opinion.

The Circuit issued three opinions. Chief Judge Jones, Judge Clement, and Judge Prado, each addressed a distinct question raised by the issue of municipal liability.³² In brief, Judge Clement’s dissent was a review of the record and its application to what he described as the “heighten” deliberate indifference standard governing single-incident liability with an emphasis on the evidence produced by Connick. Judge Prado's opinion emphasized the appellate court's limited authority to overturn a jury verdict and reviewed the evidence below adopted in a light most favorable to the jury’s verdict.³³ Judge Jones’ argued that the supervisory misconduct was entitled to absolute immunity.³⁴ The issue of absolute immunity is not addressed in *Connick v. Thompson*, presently before the Supreme Court³⁵ and therefore will not be a subject of discussion in this paper. The *en banc* opinions reflected the lack of agreement on the issues presented.

³⁰ Id.

³¹ Id., at 856 emphasis added.

³² *Thompson v. Connick*, 578 F.3d 293, 293-95, 301-09 & 311-14.

³³ Id. at 311-14.

³⁴ Judge Jones’ opinion addressed *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 860-63 (2009) on supervisory immunity and the impact of the \$14 million dollar judgment against the District Attorney, but distinguished the case factually urging reversal on policy grounds. *Thompson*, 578 F.3d at 295, 301-09, 311-14.

³⁵ See *Connick v. Thompson*, 130 S. Ct. 1880 (2010) (granting certiorari limited to Question 1 presented by the petition) and Petitioners’ Brief on the Merits at pg i., “[w]hether failure-to-train liability may be imposed on a district attorney’s office for a prosecutor’s deliberate violation of *Brady v. Maryland*, 373 U.S. 83 (1963), despite no history of similar violations in the office.”

i. Judge Clement's Dissenting Opinion In Favor of Reversal of the Jury.

Judge Clement argued that the jury had gone too far in drawing inferences for the failure to train from the evidence and the district court had erred in giving deference to the jury's verdict in denying the post judgment motions.³⁶ "[A] jury's freedom to draw reasonable inferences does not extend so far as to allow the jury to draw an inference which amounts to mere speculation and conjecture."³⁷ His caution that the verdict was based on vicarious liability was very similar to that echoed in *Ashcroft v. Iqbal*.³⁸ "The Supreme Court has repeatedly cautioned that if we neglect these stringent standards, we risk collapsing the distinction between vicarious liability and direct liability."³⁹ Heightened standards also guard against the potentially 'endless exercise of second-guessing municipal employee-training programs,' a task for which federal courts are ill suited."⁴⁰ Judge Clement repeatedly emphasized that the culpability standard of deliberate indifference for failure to train cases was higher than for other § 1983 cases equating the *City of Canton* standard as requiring intentional conduct. "'Deliberate indifference' implies a sense of callousness⁴¹ and is 'treated, as it is elsewhere in the law, *as tantamount to intent*, so that inaction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that [the] setting [of] policy

³⁶ See *Thompson v. Connick*, 2007 U.S. Dist. LEXIS 29717 (E.D. La., April 23, 2007).

³⁷ *Thompson v. Connick*, 578 F.3d at 297 citations omitted.

³⁸ 129 S.Ct. 1937 (2009).

³⁹ Citing *City of Canton*, 489 U.S. at 391-92.

⁴⁰ *Thompson v. Connick*, 578 F.3d at 298, citing *City of Canton*, 489 U.S. at 392.

⁴¹ Citing *Estelle v. Gamble*, 429 U.S. 97, 106 n.14 (1976) and *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 (5th Cir. 1994).

presupposes.”⁴² The dissent further argued that the level of culpability required to establish liability which would allow entities to escape liability unless “the policymaker was aware of training deficiencies, typically by a pattern of similar deprivations.”⁴³ Where there was no pattern Judge Clement acknowledged that the plaintiff can nonetheless establish liability based upon a single violation of constitutional rights but only where the need for training was “so obvious”⁴⁴ and “only when the deprivation of constitutional rights is a “highly predictable consequence” of the training deficiency.”⁴⁵

Judge Clement then turned to what he entitled as “Heightened Causation: *Moving Force*.”⁴⁶ He emphasized “that in addition to a heightened standard of culpability, plaintiffs must meet a heightened standard of causation in order to hold a municipality liable under § 1983.”⁴⁷ In his view the “moving force” concept required that the plaintiff prove that the “deficiency in training must be the *actual cause* of the constitutional violation.”⁴⁸

In applying the facts to his double “heightened” standards of culpability and causation Judge Clement opined that Thompson failed to prove that the admitted absence of a district attorney training program on *Brady’s* constitutional due process

⁴² *Thompson v. Connick*, 578 F.3d at 298, citing *Bryan County*, 520 U.S. at 419 (Souter, J., dissenting) (internal footnote omitted).

⁴³ *Id.*, at 298.

⁴⁴ Citing *City of Canton*, 489 U.S. at 390.

⁴⁵ *Thompson v. Connick*, 578 F.3d at 298, citing *Bryan County*, 520 U.S. at 409 and *City of Canton*, 489 U.S. at 396 (O'Connor, J., concurring in part and dissenting in part) (finding that single incident liability for a failure to train only obtains where “[t]he constitutional duty of the individual officer is clear, and it is equally clear that failure to inform city personnel of that duty will create an *extremely high risk* that constitutional violations will ensue” (emphasis added in Judge Clement’s opinion)).

⁴⁶ *Id.*, at 300.

⁴⁷ Citing *City of Canton*, 489 U.S. at 391-92.

⁴⁸ *Thompson v. Connick*, 578 F.3d at 300.

requirements to disclose exculpatory evidence manifested deliberate indifference or that inadequate training on Brady obligations was the moving force behind the deprivation. Thus, Thompson failed to meet the standard for single-incident liability. He concluded that where a decision not to train was made far in advance of the alleged violation and there is no pattern of violations, “the need for training is simply not ‘so obvious.’”⁴⁹

ii. Judge Prado’s per Curiam Opinion In Support of the Judgment.

Judge Prado began clarifying that the appropriate standard of review following a jury trial in civil cases a basic and fundamental feature of federal jurisprudence which is protected by the *Seventh Amendment*. “A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.”⁵⁰ “[O]ur standard of review with respect to a jury verdict is especially deferential. As such, judgment as a matter of law should not be granted unless the facts and inferences point so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion.”⁵¹

Judge Prado chastised Judge Clement’s dissent because in his view it overlooked much of the evidence the jury heard and ignored the standard of review. “By reading the dissent, one would be hard pressed to even realize that a *jury* rendered the verdict in this case” because it “fails to acknowledge the deference we must accord to a jury's verdict.”⁵² He emphasized that a “review of the *full* record ... reveals that the dissent is merely quibbling with the jury's factual findings and that

⁴⁹ Id.

⁵⁰ Id., at 311, citing *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942).

⁵¹ Id., at 312, citing *Flowers v. S. Reg'l Physician Servs. Inc.*, 247 F.3d 229, 235 (5th Cir. 2001) and *Int'l Ins. Co. v. RSR Corp.*, 426 F.3d 281, 296-97 (5th Cir. 2005) (“A jury verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did.”).

⁵² Id at 311-312, emphasis in the original.

overstepped the bounds of an appellate court.”⁵³ “The dissent presents nothing more than a skewed version of the facts in favor of the District Attorney's Office.” He cautioned that “a court may not substitute its judgment on the facts for the jury's determination simply because inconsistent and uncertain inferences are equally supported by the proof,” concluding that the “dissent thus ignores the maxim that the jury is allowed to accept or reject competing evidence.”⁵⁴

a. The Evidence in Support of the DA’s Deliberate Indifference.

Turning to the evidence below, Judge Pardo reviewed numerous exhibits and testimony and discussed the reasonable inferences supporting the jury’s verdict that the District Attorney’s Office was deliberately indifferent. The major dispute was the dissent’s contention that no pattern of *Brady* violations existed.⁵⁵ The dissent had bolstered its argument with the District Attorney’s testimony that the Louisiana Supreme Court had only overturned four cases on the basis of *Brady* violations. Judge Prado responded that most *Brady* cases did not reach the highest court of the state.⁵⁶ Besides the withheld blood test report in the robbery case, Judge Prado also pointed to the previously mentioned thirteen items of testimony, eyewitness statements and other exculpatory evidence which had not been disclosed at Thompson’s first murder trial.⁵⁷ He focused on the fact that the U.S. Supreme Court had overturned a previous conviction, secured just one year prior to Thompson's murder trial, because the District Attorney's Office had knowingly withheld eyewitness statements in violation of *Brady*.⁵⁸ Thus, Judge Prado opined that from

⁵³ Id., citing the panel’s opinion *Thompson*, 553 F.3d at 843-46.

⁵⁴ Id., citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, (2000) (in reviewing a jury's verdict an appellate court “may not make credibility determinations or weigh the evidence”).

⁵⁵ Id., at 313.

⁵⁶ Id.

⁵⁷ Id., at 313 and fn.1.

⁵⁸ Id., citing *Kyles v. Whitley*, 514 U.S. 419 (1995).

that evidence, the jury may have reasonably concluded that the District Attorney's Office had been deliberately indifferent to *Brady* obligations by failing to enact training measures in response to a pattern of violations.⁵⁹

b. The Deliberate Indifference Standard and Intentional Conduct.

The per curiam opinion addressed the dissent's conflation of deliberate indifference and intent, asserting that they "are not synonymous." "They are instead separate, albeit sometimes legally equivalent, concepts."⁶⁰ He supported the conclusion that a plaintiff "need not show actual intent for a jury to find liability under the deliberate indifference standard with a number of seminal Supreme Court cases."⁶¹ It was also supported with the observation that the *City of Canton v. Harris* test for deliberate indifference is an "objective standard,"⁶² that does not require intentional conduct and that Fifth Circuit precedent for deliberate indifference is "a *lesser* form of intent."⁶³ He explained that although a "finding of deliberate indifference is thus tantamount to a finding of intent in the context of municipal liability," but also made the distinction that "a finding of deliberate indifference does not *require* a finding of intent" which was what the district court

⁵⁹ Id.

⁶⁰ Id., *Bd. of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 419 (1997) ("Deliberate indifference is thus treated, as it is elsewhere in the law, as tantamount to intent, so that inaction by a policy maker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes.").

⁶¹ Id., citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002), (the fact-finder can *infer* deliberate indifference "from the fact that the risk of harm is obvious," citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

⁶² Id., citing *Farmer*, 511 U.S. at 841.

⁶³ Id., citing *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 453 n.7 (5th Cir. 1994) (internal quotation marks omitted and emphasis in the original.)

had instructed the jury,⁶⁴ concluding that the “dissent improperly adds this intent element, thereby recasting the meaning of deliberate indifference so as to assign error to the district court.”⁶⁵

Judge Prado also addressed other issues related to jury instructions not central to the concerns of this paper. He concluded that the circuit court was bound to uphold the jury verdict in the absence of facts demonstrating that a reasonable jury could not have found as this one did.⁶⁶

2. *ASHCROFT v. IQBAL, THE CONNECTION.*

In *Ashcroft v. Iqbal*, complained of abuse and mistreatment while confined as a result of petitioners’ discriminatory post 9/11 designation of him a person of high interest on account of his race, religion, or national origin, in contravention of the *U.S. Const. amends. I and V*.⁶⁷ Certiorari was granted following the Second Circuit’s denial of pre-discovery qualified immunity.⁶⁸ *Iqbal* was a case discussing *individual* supervisor liability, not entity liability as in *City of Canton v. Harris* or *Connick v. Thompson*. However, this discussion of *Iqbal* is in the context of analyzing the trends of the Supreme Court in the area of supervisor and entity liability with an eye towards the future of entity and supervisor liability under § 1983.

*Iqbal*⁶⁹ was a *Bivens*⁷⁰ case where the Ashcroft (“Ashcroft”) defendants, following a denial of a motion to dismiss at the pleading stage, petition for certiorari on two questions. The first was “[w]hether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a

⁶⁴ Id., 313-314, citing *Thompson*, 553 F.3d at 859-63.

⁶⁵ Id., 314.

⁶⁶ Id.

⁶⁷ *Iqbal v. Ashcroft*, 129 S.Ct. 1937, 1942 (2009).

⁶⁸ *Iqbal v. Hasty*, 490 F.3d 143, 147 (2nd Cir. 2007).

⁶⁹ 129 S.Ct. 1937 (2009)

⁷⁰ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.”⁷¹ This issue raised was whether the complaint had alleged sufficient facts.

The second question was “[w]hether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, *they had constructive notice* of the discrimination allegedly carried out by such subordinate officials.”⁷² The dissent pointed out that the petition did not raise the issue of whether a cabinet-level supervisor who had *actual knowledge* of, condoned, or acquiesced or were otherwise deliberately indifferent to allegedly unconstitutional acts committed by subordinate officials can be subject to liability under *Bivens*.

The standards or elements for a claim of supervisory liability where there was actual knowledge had not been briefed or argued by the parties in *Iqbal* because Ashcroft had conceded in his briefings to the Supreme Court “that a supervisor's knowledge of a subordinate's unconstitutional conduct and deliberate indifference to that conduct” were grounds for *Bivens* liability.⁷³ Nonetheless, the majority adopted the following language:

[Plaintiff] argues that, under a theory of “supervisory liability,” petitioners can be liable for “knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees.” (Cites omitted.) That is to say, respondent believes *a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution*. We reject this argument. Respondent's conception of “supervisory liability” is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action -- where masters do not answer for the torts of their servants -- the term “supervisory liability” is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own

⁷¹ *Iqbal*, 1955.

⁷² *Id.*, 1956, emphasis added.

⁷³ *Iqbal*, 1956, Souter, J., citing Ashcroft's cert. petition which quoted *Farmer v. Brennan*, at 837.

misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, **purpose rather than knowledge** is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.⁷⁴

In his dissent Justice Souter made clear that the majority's comments in *Iqbal* should not be considered the holding of the case and should be considered dicta.⁷⁵ First, he points out that the case was decided by the majority on the grounds that at the pleading stage the allegations are "conclusory" and therefore are "not entitled to be assumed true."⁷⁶ Second, the dissent felt it was blindsided by the majority because the issue of supervisor liability being actionable where there was actual knowledge of a subordinate's unconstitutional conduct had been conceded by Ashcroft and was essentially off the table.

... because of the [Ashcroft] concession, we have received no briefing or argument on the proper scope of supervisory liability, much less the full-dress argument we normally require. (Citation omitted.) We consequently are in no position to decide the precise contours of supervisory liability here, this issue being a complicated one that has divided the Courts of Appeals. This Court recently remarked on the danger of "bad decisionmaking" when the briefing on a question is

⁷⁴ *Iqbal* at 1948.

⁷⁵ "Dicta" is defined as: "(1) Opinions of a judge which do not embody the resolution or determinations of the court. (2) Expressions in a court's opinion which go beyond the facts before the court and are therefore individual views of the author of the opinion and not binding in subsequent cases." Black's Law Dictionary, West Pub., 5th Ed. p. 408.

⁷⁶ *Iqbal*, at 1958, "...what is most remarkable about [the majority's] foray into supervisory liability is that its conclusion has no bearing on its resolution of the case. The majority says that all of the allegations in the complaint that Ashcroft and Mueller authorized, condoned, or even were aware of their subordinates' discriminatory conduct are 'conclusory' and therefore are 'not entitled to be assumed true.'"

“woefully inadequate,” (citation omitted) yet today the majority answers a question with no briefing at all. The attendant risk of error is palpable.⁷⁷

Justice Souter seems to be making a clarion warning of potential misreading of the majority’s comments. The dangers of a circuit adopting the *Iqbal* majority’s comments which were not briefed nor argued were found by Souter to be “apparent in its cursory analysis, which rests on the assumption that only two outcomes are possible here: *respondeat superior* liability...or no supervisory liability at all.”⁷⁸ “The dichotomy is false. Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct of his subordinate.”⁷⁹ Justice Souter discussed many circuit opinions that articulate theories of supervisor liability,⁸⁰ none of which were discussed by the majority. However, some of these theories may have given rise to the Court’s concern that “gross negligence” may be seen as “implied knowledge” similar to some definitions of “constructive notice.” This may explain *Iqbal*’s majority’s concern with *respondeat superior* and the comments rejecting “a supervisor’s mere knowledge” as a standard.

⁷⁷ *Id.*, 1957.

⁷⁸ *Id.*, 1958.

⁷⁹ *Id.*

⁸⁰ Citing the First, Second, Sixth, and Eighth Circuits distinguishing between *respondeat superior* liability and supervisory liability) and listing the First, Third, Seventh, Eighth, Tenth and D.C. circuits setting forth “quite a spectrum” of theories for supervisory liability, citing *Baker v. Monroe Twp.*, 50 F.3d 1186, 1194 (3d Cir. 1995); *Woodward v. Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992); *International Action Center v. United States*, 365 F.3d 20, 28, (DC Cir. 2004)(or where supervisors ““know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see””) (quoting *Jones v. Chicago*, 856 F.2d 985, 992 (7th Cir. 1988); *Hall v. Lombardi*, 996 F.2d 954, 961 (8th Cir. 1993) (where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 902 (1st Cir. 1988)(where the supervisor was grossly negligent).

Thus, the only reasonable conclusion is that the *Iqbal* majority's comments was rejecting "constructive notice"⁸¹ or "imputed by law" concepts.⁸² This may be inferred the majority's words "mere knowledge"⁸³ as distinguished from "actual notice."⁸⁴ It may be concluded that the majority's comments were addressed to an implied in law concept of supervisor liability which the majority apparently interpreted as *Iqbal*'s argument, they should not be read as encompassing all theories of supervisor liability.

⁸¹ "Constructive Notice" is information or knowledge of a fact imputed by law to a person (although he may not actually have it) because he could have could have discovered the fact by proper diligence and his situation was such as to cast upon him the duty of inquiring into it." Black's Law Dictionary, West Pub., 5th Ed. p. 958 (in pertinent part).

⁸² The concept of constructive knowledge is almost exclusively a negligence concept. See e.g., *Dodge Center v. Superior Court*, (1988) 199 Cal.App.3d 332, 338 [244 Cal.Rptr. 789] (discussing cause for negligent entrustment, resting on a demonstration of knowing entrustment to an incompetent or dangerous driver with actual or constructive knowledge); *Ortega v. Kmart* (2001) 26 Cal.4th 1200, 1205 [114 Cal.Rptr.2d 470] (the owner's actual or constructive knowledge of the dangerous condition as a key to establishing its liability).

⁸³ "Mere" is defined as "being nothing more nor better than what is specified: *a mere child*." Webster's College Dictionary, Randomhouse Pub. Co. 1995 p. 848.

⁸⁴ "Actual notice has been defined as notice expressly and actually given and brought home to the party directly. **The term "actual notice" however is given a wider meaning as embracing two classes, express and implied;** the former includes all knowledge of a degree above that which depends upon collateral inference or which imposes upon the party the further duty of inquiry; the latter imputes knowledge to the party because he is shown to be conscious of having the means of knowledge. In this sense actual knowledge is such notice as is positively proved to have been given to the party directly personally or such as he is presumed to have received personally because the evidence within his knowledge was sufficient to put him on inquiry." Black's Law Dictionary, West Pub., 5th Ed. p. 957, emphasis added.

3.

COMMENTS AND THOUGHTS

A. A Trend to Shield High Policymakers.

My observation from the majority's comments requiring "purpose rather than knowledge" to establish supervisor liability in *Iqbal* and the dissent in *Thompson v. Connick (en banc)* defining deliberate indifference as only being established by "intentional" conduct is consistent with a movement to limit the ability of Americans to seek redress against high government officials whose conduct in office and in service of the people who pay their salary should be most open to scrutiny in a court of law. For example, Judge Clement's dissent urging that the "moving force" concept required that the plaintiff prove that the "deficiency in training must be the *actual cause* of the constitutional violation⁸⁵ flies in the face of well established federal principles of causation that there are many factors or things including the conduct of two or more persons can operate at the same time either independently or together to cause injury.⁸⁶ This trend is contrary to the principles of § 1983 and comes at a time when our nation has seen some of the worse examples of human rights abuses at home and abroad by subordinates cause by decisions of high government official.

B. Principles of Compensation and the Moral Dimension of Fault.

The principles of the U.S. human rights law § 1983⁸⁷ have (at least) two

⁸⁵ *Thompson v. Connick*, 578 F.3d at 300.

⁸⁶ See e.g., Ninth Circuit Model Jury Instruction 9.8 entitled "Causation" discussing the instruction on the "moving force" and citing *Jones v. Williams*, 297 F.3d 930, 937 n.7 (9th Cir.2002) where the circuit in a § 1983 case in which the district judge gave the following "concurrent cause" instruction to address allegations of supervisory and group liability: "[M]any factors or things or the conduct of two or more persons can operate at the same time either independently or together to cause injury or damage and in such a case each may be a proximate cause."

⁸⁷ 42 U.S.C. § 1983 creates "'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the

components - compensation and deterrence.⁸⁸ The claim for compensation rests not just on the fact of wrongful injury but also on the defendant's fault which supplies the moral dimension to the fact of causation. Thus, insistence of the dissent in *Thompson v. Connick (en banc)* in requiring a pattern of *Brady* violations before an official can be held liable for failing to train subordinates fosters a supervisor's tolerance of repeated acts of dishonesty by subordinates whose immoral and unethical conduct results in sending potentially innocent people to jail, prison or even death as in the case of Mr. Thompson who was one month away from death. It seems logical that the assistant district attorneys in Connick's office felt fairly comfortable withholding exculpatory evidence as evidenced by thirteen pieces of exculpatory evidence that were finally disclosed at Mr. Thompson's retrial.⁸⁹ It essentially means that the supervisor who knows of e.g., *Brady* abuses can turn a blind eye comfortable in the thought that even if sued as long as there is no "pattern," then there is no liability. It sanctions the one-two-three or more "get out of jail free cards" to the supervisor who condones illegal and immoral conduct of subordinates.

C. Principles of Deterrence and Fostering Feigned Ignorance.

Of greater importance to society, as well as the individual plaintiff, is the inhibition of governmental misconduct.⁹⁰ That's what the Bill of Rights and constitutional law is all about! Deterrence is also a central purpose of this system because government employees deliver basic government services. Their interactions

Constitution." *Carey v. Phipus*, 435 U.S. 247, 253 (1978).

⁸⁸ See e.g., *Robertson v. Wegmann*, 436 U.S. 584, 590-592 (1978) (the basic purposes of an award of damages under § 1983 is: (1) to compensate plaintiffs for injuries caused by deprivations of their federal constitutional or statutory rights; and, (2) the award often serves an important function "to prevent or deter 'official illegality.'").

⁸⁹ *Thompson*, 553 F.3d at 846.

⁹⁰ See e.g. Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. Rev. 1023, 1031 (2010) ("suits deter only when the defendant will suffer a direct financial penalty" listing citations.)

with individual citizens are frequently non-consensual and sometimes coercive, violent and sometimes deadly. Subordinate line-level officials therefore face a higher prospect that their actions will produce conflict and harm. Unlike employees and their supervisors in the public sector, however, governmental officials typically cannot appropriate for themselves the benefits of good performance, which tend to run to the public at large. The result has been argued to be “a skewed incentive structure that may conducive to defensive, cost-minimizing behavior inimical to the public interest.”⁹¹

The dissent in *Thompson v. Connick (en banc)* argues that only if a supervisor acts with affirmative intentional misconduct will a person harmed by a subordinate state a claim. *Iqbal's* majority would require a supervisor to act with “purpose” and “knowledge” of a subordinate’s unconstitutional acts to be actionable. In those situations where the supervisor acts with “intent to harm” or with a “purpose” to harm, the causal connection between harm to the plaintiff and the act of the defendant is typically clear. In contrast, if these levels of culpability are adopted by the Supreme Court, it would seem that the result will be those injured by a supervisor’s **affirmative or intentional failure to act** with knowledge of the subordinates unconstitutional acts will not be able to seek redress. The causal connection between the plaintiff’s injury and a supervisor’s inaction may be provable by the rules of evidence and standard jury instructions⁹² yet, instead of deterrence, supervisors will have a very substantial motivation “to take refuge in the zone between ‘ignorance of obvious risks’ and ‘actual knowledge of risks.’”⁹³ As a consequence, only intentional “purposeful” conduct will make a supervisor subject to the rule of law. In contrast, erroneous, improper or *intentional inaction* (which can be equally harmful and costly) will provide a refuge for further supervisor incompetence or misconduct. This imbalance increases the incentive for officials to

⁹¹ See e.g. J.C. Jeffries, Jr. *In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 74, (1988) citing authorities.

⁹² “Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence ... and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” *Farmer*, 842-843 internal citations and comments omitted.

⁹³ *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

protect themselves by doing less or even nothing. It encourages a culture of willful blindness and feigned ignorance to constitutional violations. It sanctions a code of silence. It encourages supervisors to turn a blind eye to obvious and repeated unconstitutional conditions and undercuts the right of Americans to vindicate customs and patterns of civil rights violations.

In *Iqbal*, Justice Souter argues that the comments on supervisor liability of the majority should not be adopted as a definitive statement of the contours and scope of supervisory liability reaching from the highest cabinet level official to local government officials nationwide. Nonetheless, the Court's momentum appears to be to insulate entities and policymakers from liability, even, for example, where they have deficient or absolutely no training of subordinates on issues which come up daily as in *Thompson v. Connick* or where supervisors know that detainees are being subjected to abuses as in *Iqbal*. This remains a serious issue for human and civil rights advocates, as it is increasingly obvious that many decisions which result in abuses of human and constitutional rights stem from the highest levels of administration and are not the product of "rouge" or individual actors. The greater the insulation from being held liable from civil rights laws will most likely result in even less accountability and an increased sense of impunity.

D. The Future of *City of Canton v. Harris*.

Finally, can we expect the Supreme Court to eviscerate the objective deliberate indifference standard of *City of Canton v. Harris*?⁹⁴ There the court held "[w]here a § 1983 plaintiff can establish that the facts available to city policymakers put them *on actual or constructive notice* that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied."⁹⁵ Prior to *Iqbal*, the majority of courts have applied the *City of Canton* standard of objective deliberate indifference to supervisory

⁹⁴ The Supreme Court set the level of fault in municipal liability failure-to-train cases as deliberate indifference in *City of Canton*, 489 U.S. at 388.

⁹⁵ *Id.*, see also *Farmer*, 511 U.S. at 840-41 citing Justice O'Connor's separate opinion for three Justices that agreed with the Court's "obvious[ness]" test and observed that liability is appropriate when policymakers are "on actual or constructive notice" of the need to train.

liability for the “failure to train” cases.⁹⁶ While *Iqbal* only addressed individual supervisor liability and did not discuss the liability of governmental entities under *Monell*,⁹⁷ It appears that the Supreme Court’s granting certiorari in *Connick v. Thompson* will be the place where *Iqbal* and *City of Canton* collide. To focus the clash *City of Canton*, held that the city can be held liable, not because it has a policy that is unconstitutional, but because it knew, or should have known that its failure to train, supervise or discipline would cause the subordinate’s constitutional violation.⁹⁸ In contrast, the majority’s dicta in *Iqbal* would require that the supervisor not merely cause a constitutional violation, but must act “with purpose” to present the level of culpability needed to establish the underlying constitutional wrong. While *Iqbal* decided individual supervisor liability in a discrimination case and *City of Canton* is the standard of entity liability for a failure to train, nonetheless, conceptually they are at odds. Whether *Iqbal* will have an effect on some or all § 1983 supervisor claims will most likely be previewed in October 2010 when *Connick* is scheduled to be argued.

R. Samuel Paz*

*BIO: Mr. Paz is the current Vice President of the National Police Accountability Project, a Board Member of the ACLU of Southern California and on the National Board of ACLU and has served as an adjunct professor of law at Loyola Law School. In 1971, he graduated with honors from UCLA and received a Juris Doctor from the University of Southern California in 1974.

⁹⁶ See, e.g., *McDowell v. Brown*, 392 F.3d 1283, 1291 (11th Cir. 2004) (indicating that a municipality's action must have been “taken with ... deliberate indifference to its ... consequences”) (internal quotations omitted); *Tokar v. Armontrout*, 97 F.3d 1078, 1083 (8th Cir. 1996) (indicating that a cause of action against a supervisor for failure to supervise his subordinates can only be made when the supervisor exhibited deliberate indifference).

⁹⁷ *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 695 (1978) (deciding that a municipality can be found liable under § 1983 only where the municipality’s policy or custom causes the constitutional violation at issue, *respondeat superior* or vicarious liability will not attach).

⁹⁸ *Canton*, 489 U.S. at 388.