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To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquis
Mr. Justice Stevens

From: Mr. Justice Brennan

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SUPREME COURT OF THE UNITED STATES

No. 80-396

City of Newport et al., Petitioners, v. Fact Concerts, Inc. and Marvin Lerman. | On Writ of Certiorari to the United States Court of Appeals for the First Circuit.

[June —, 1981]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join dissenting.

The Court today considers and decides a challenge to the District Court's jury instructions, even though petitioners failed to object to the instructions in a timely manner, as required by Rule 51 of the Federal Rules of Civil Procedure. Because this departure from Rule 51 is unprecedented and unwarranted, I respectfully dissent.

Respondents filed suit against petitioners in federal District Court under 42 U. S. C. § 1983, alleging violations of their First Amendment rights. In their complaint and amended complaint, respondents prayed for punitive damages, as well as other relief. JA 11, 12, 13, 24, 25, 26. Respondents submitted a pretrial memorandum on the issue of punitive damages and, during trial, submitted an additional Memorandum on the Availability of Punitive Damages Against a Municipal Corporation, in response to the Court's request to both parties. Brief in Opposition to Pet. for Cert., at 8. At the close of the evidence, the Court instructed the jury explicitly and in detail that it could impose punitive damages against petitioners if they had acted maliciously, wantonly, or oppressively. JA 57–58. After giving the instruction, the Court summoned the attorneys to the side bar, inviting objections or suggestions concerning the intructions. R. A. 591–A to 591–B. For reasons not revealed in the record, counsel for

petitioners expressly declined to make any such objection or suggestion.[1] R. A. 591–B. The jury returned a verdict in favor of respondents, and awarded substantial punitive damages against each of the petitioners, including the City of Newport.

Petitioners moved for judgment notwithstanding the verdict, and for a new trial, arguing, *inter alia*, that punitive damages may not be imposed against a municipality under § 1983. The Court denied the motion, stating:

> "None of these legal arguments were ever raised at trial. In fact, the defendants failed to request that any of their current legal interpretations be inserted into the jury instructions and never objected to any aspect of that charge before or after the jury retired. . . . Therefore, defendants' untimely objections are not the proper basis for this post-trial motion." App. to Pet. for Cert., at B–2 to B–3 (citing Fed. Rule Civ. Proc. 51).

Petitioners' failure to object to the punitive damages instruction thus precluded them from raising the issue on post-trial motions. Not content to "rest its decision on this procedural ground *alone*," *id.*, at B–3 (emphasis added), however, the Court also held, in the alternative, that its punitive damages instruction was correct on the merits. *Id.*, at B–7 to B–10.

On appeal to the Court of Appeals for the First Circuit, the Court stated that petitioners' allegation of error in the punitive damages instruction

> "is flawed by the failure to object to the charge at trial. *See* Fed. R. Civ. P. 51. We may overlook a failure of this nature, but only where the error is plain and 'has seriously affected the fairness, integrity or public reputation of a judicial proceeding.'" App. to Pet. for Cert.,

[1] In contrast, counsel for respondents made two objections to the instructions, which the Court indicated it would consider before the jury retired. R. A. 591–A to 591–B.

at A–14, quoting *Morris* v. *Travisono*, 528 F. 2d 856, 859 (CA1 1976) (footnote and citation omitted).

The Court of Appeals then briefly canvassed the relevant precedents, stated that the law concerning punitive damages against municipalities under § 1983 is in a "state of flux," *id.*, at A–15, and concluded: "[W]e would be hard-pressed to say that the trial judge's punitive damages instruction was plain error. Nor is this a case containing such 'peculiar circumstances [to warrant noticing error] to prevent a clear miscarriage of justice.'" *Ibid.*, quoting *Nimrod* v. *Sylvester*, 369 F. 2d 870, 873 (CA1 1966) (citation omitted; brackets in original).

Respondents argue before this Court that the decision of the Court of Appeals should be affirmed, because petitioners failed to object to the punitive damages instruction.[2] They rely on Federal Rule of Civil Procedure 51, which states in relevant part: "No party may assign as error the giving or the

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[2] Respondents also argue, on the merits, that the punitive damages instruction was correct. Because I conclude that the Court of Appeals should be affirmed on a procedural ground, I need not consider this additional argument, except to observe that the Court's treatment of it may well reflect the absence of full consideration of the punitive damages question by the court below.

The Court thus relies on 19th century caselaw for the proposition that municipalities may not be held liable for punitive damages, without distinguishing between the common situation in which municipal liability is predicated on a theory of *respondeat superior*, and the more unusual situation in which the violation is committed in accordance with official governmental policy. See *ante*, at 11–15. Only in the latter situation have we held that a municipality may be sued under § 1983, *Monell* v. *Dept. of Social Services*, 436 U. S. 685, 690–691 (1978). It is the latter context that the Court's cited precedent is least relevant, and that its concern for "blameless or unknowing taxpayers," *ante*, at 19, is least compelling. Indeed, when the elected representatives of the people adopt a municipal policy that violates the Constitution, it seems perfectly reasonable to impose punitive damages on those ultimately responsible for the policy—the citizens.

failure to give an instruction unless he objects thereto before the jury retires to consider its verdict."

Rule 51 could not be expressed more clearly. Cases too numerous to list have held that failure to object to proposed jury instructions in a timely manner in accordance with Rule 51 precludes appellate review.[3] Rule 51 serves an important function in ensuring orderly judicial administration and fairness to the parties. The trial judge is thereby informed in precise terms of any objections to proposed instructions, and thus is given "an opportunity upon second thought, and before it is too late, to correct any inadvertent or erroneous failure to charge." *Marshall* v. *Nugent*, 222 F. 2d 604, 615 (CA1 1955). Moreover, the Rule prevents litigants from making the tactical decision not to object to instructions at trial in order to preserve a ground for appeal. In light of the significant purposes and "uncompromising language," *ante*, at 7, of Rule 51, courts should not depart lightly from its strictures.

Nevertheless, like other procedural rules, Rule 51 is susceptible to flexibile interpretation when strictly necessary to avoid a clear miscarriage of justice. Cf. *Wood* v. *Georgia*, — U. S. —, —, n. 5 (1981); *Carlson* v. *Green*, 446 U. S. 14, 17 n. 2 (1980); *Hormel* v. *Helvering*, 312 U. S. 552, 557 (1941).[4] Accordingly, the Courts of Appeals have developed

[3] See, *e. g.*, cases cited in J. Moore & J. D. Lucas, 5A Moore's Federal Practice, ¶ 51.04, at 51–9 to 51–18, n. 3 (1980); C. Wright & A. Miller, Federal Practice and Procedure, § 2553, at 639, nn. 34–52 (1971).

[4] This Court has considered issues not raised in the courts below only in "exceptional cases or particular circumstances . . . where injustice might otherwise result." *Hormel* v. *Helvering*, 312 U. S. 552, 557 (1941). Thus, in *Wood* v. *Georgia*, — U. S. — (1981), the issue of attorney conflict-of-interest could scarcely have been raised by the attorney whose conflict was under challenge. *Id.*, at —, n. 5. In *Carlson* v. *Green*, 446 U. S. 14 (1980), both parties consented to waiver of the procedural default, and the issue was closely related to the other main question in the case. Thus, fairness to the parties and sound judicial administration were promoted by the Court's decision to reach the issue. *Id.*, at 17, n. 2.

a "plain error" doctrine to deal with certain unchallenged jury instructions so contrary to law as to be manifestly unjust. Whatever the proper scope of such a doctrine,[5] courts and commentators uniformly agree that it should be applied only in exceptional circumstances. As the Court of Appeals for the First Circuit has noted, " 'If there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings.' " *Morris* v. *Travisono*, 528 F. 2d 856, 859 (CA1 1976), quoting C. Wright & A. Miller, Federal Practice and Procedure, § 2558, at 675 (1971). This was the standard applied by the Court of Appeals below. App. to Pet. for Cert., at A–14.

The Court states that the "problem with" respondents' argument that petitioners are barred from arising the punitive damages issue "is that the District Court in the first instance declined to accept it." *Ante*, at 7. But the District Court did not reject respondents' argument; on the contrary, it expressly held that petitioners' objections to the jury instructions were "untimely" under Rule 51, and therefore were "not the proper basis" for post-trial challenge. App. to Pet. for Cert., at B–3. Its prudential decision to discuss the merits as well does not detract from this holding.[6] As the

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[5] The Court declines to express any opinion on the plain error doctrine as it has been applied by the Court of Appeals. *Ante*, at 9. It is difficult to understand how the Court can purport to avoid this question, when it reverses a judgment predicated squarely on that doctrine. Nevertheless, I will join with the Court in leaving open the issue of the scope of exceptions to Rule 51, if any, to another day. For the purpose of this opinion, it is sufficient to conclude that exceptions to Rule 51 are no broader than those recognized by the Court of Appeals.

[6] It is not uncommon for courts to reach the merits as an alternative ground for decision on an issue otherwise unreviewable under Rule 51, either out of an excess of caution or as part of a plain error inquiry. *See, e. g., Kropp* v. *Ziebarth*, 601 F. 2d 1348, 1355–1356 (CA8 1979); *Mid-America Food Service, Inc.* v. *ARA Services, Inc.*, 578 F. 2d 691, 695–700 (CA8 1978); *Bilancia* v. *General Motors Corp.*, 538 F. 2d 621, 623 (CA4

Court of Appeals held, this procedural ground is sufficient to compel affirmance in the absence of a finding of plain error constituting manifest injustice. Petitioners themselves admit that the punitive damages question may be reviewed only under a plain error standard. Brief for Petitioners, at 27.

The Court today frankly admits that the instruction was not plain error, noting that the governing principles of law are "currently in a state of evolving definition and uncertainty." *Ante*, at 8. Nevertheless, it reverses the Court of Appeals. Such a reversal *necessarily implies* that the Court of Appeals' treatment of the procedural question was in error, but the Court provides not a hint as to what standard the Court of Appeals should have applied.[7] Indeed, the Court does not

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1976). Surely the Court does not mean to suggest that a party may obtain appellate review of an unchallenged jury instruction merely because the court offered such alternative grounds for decision.

[7] In effect, without defining or explaining it, the Court has carved out an expansive exception to the requirements of Rule 51. I suspect that the Court has not considered the broad repercussions of its treatment of the procedural default in this case, or the incongruity of its result in light of parallel procedural requirements in the criminal area. The Federal Rules of Criminal Procedure, which contain a provision—similar to Rule 51—that "[n]o party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict," Fed. Rule Crim. Proc. 30, also contain another provision: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. Rule Crim. Proc. 52 (b). The absence of a similar provision in the Civil Rules suggests that review of unchallenged jury instructions is intended to be more restrictive under the Civil than under the Criminal Rules. The Court's conclusion that petitioners' claim in this civil case should be heard despite the absence of plain error thus inverts the Rules, in violation of their spirit as well as their letter.

Similarly, certain procedural defaults in state and federal criminal trials preclude federal habeas relief in the absence of "cause" and "prejudice." See *Wainwright* v. *Sykes*, 433 U. S. 72, 90–91 (1977); *Davis* v. *United States*, 411 U. S. 233, 242–245 (1973). The Court's conclusion that petitioners' claim should be heard despite the absence of any claim of "cause" and "prejudice" thus suggests that the courts should be stricter

even state in so many words that the Court of Appeals erred, much less explain why.

The Court does assert that under the "special circumstances of this case" it would be "peculiarly inapt" to confine our review to the plain error standard employed below. It explains that the issue in this case is "novel," and that it "appears likely to recur." *Ante*, at 9. But *most* of the issues before this Court are novel and likely to recur: that is why they are considered worthy of certiorari. And to the extent issues are novel, it behooves us to grant certiorari in cases where there has been full consideration of the issues by the courts below, rather than cursory treatment under a plain error standard.

The Court also suggests that this case is somehow "special" because the issue "was squarely presented and decided on a complete record by the court of first resort, was argued by both sides to the Court of Appeals, and has been fully briefed before this Court." *Id.*, at 9. But these factors are present whenever the District Court reconsiders unchallenged jury instructions on the merits as an alternative holding, the Court of Appeals affirms on a plain error standard, and this Court grants certiorari. See n. 6, *supra*. In short, I see the circumstances of this case as anything but "special."

Applying settled principles, I conclude that the Court of Appeals was correct to affirm the District Court in this case. The jury instruction, as the Court admits, did not constitute "plain error." Moreover, as the Court of Appeals held, failure to review the instruction would not cause a clear miscarriage of justice, any more than would failure to review any other unchallenged jury instruction. There is no reason to treat punitive damages instructions differently from other instructions for Rule 51 purposes. See *Whiting* v. *Jackson*

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in enforcing procedural rules against prisoners facing incarceration than against civil defendants facing money judgments. The Court's priorities seem backwards to me.

State University, 616 F. 2d 116, 126–127 (CA5 1980) (no timely objection having been made, court's failure to give punitive damages instruction upheld except in exceptional cases); *Mid-America Food Service, Inc.* v. *ARA Services, Inc.*, 578 F. 2d 691 (CA8 1978) (no timely objection having been made, punitive damages instruction upheld in absence of plain error). Nor is the City of Newport entitled to special treatment by virtue of its governmental status. Cf. *Morris v. Travisono*, 528 F. 2d, at 856 (failure of state correctional officers in § 1983 suit to object to jury instructions not excused, even though the insrtuctions directed the jury to apply a harsher constitutional standard than had been established by precedent).

Indeed, I consider this a peculiarly *inapt* case to disregard petitioners' procedural default. There would be no injustice whatsoever in adhering to the Rule in this case. Petitioners were given clear notice that punitive damages would be an issue in the case; the jury instructions were unambiguous; petitioners had ample opportunity to object; they failed to do so, without offering any reason or excuse.[8] Whether their default was negligent or tactical, they have no cause now to complain. If these petitioners' default is to be excused, whose should not? If Rule 51 is to be disregarded in this case, when should it be enforced?

I dissent.

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[8] Petitioners have apparently abandoned their argument that the lack of a developed legal doctrine on municipal liability under § 1983 "mitigates the error" of their trial counsel. Pet. for Cert., at 9.