

## CONNICK v. THOMPSON: FORSAKING CONSTITUTIONAL DUE PROCESS FOR FEAR OF FLOODING LITIGATION AND LOSS OF MUNICIPAL AUTONOMY

### INTRODUCTION

In a remarkable decision over forty years ago, the United States Supreme Court in *Brady v. Maryland*<sup>1</sup> launched the modern development of prosecutorial disclosure requirements designed to uphold the due process guarantees of the Fourteenth Amendment.<sup>2</sup> Almost a century before the *Brady* Court's touchstone discovery rule, our nation anticipated the need to protect individual due process rights legislatively.<sup>3</sup> The Forty-second Congress introduced 42 U.S.C. § 1983 to target misconduct by government officials and provide a remedy for individual protections secured by the Fourteenth Amendment.<sup>4</sup> Coupling *Brady* and § 1983, a common goal shines through: fair treatment of the accused by those with the power to ensure it.

*Brady* and § 1983 are intended to ensure individual justice; however, the promises of *Brady* have largely not materialized, and the protections set out in § 1983 have been met with ever-changing interpretations.<sup>5</sup> In *Connick v. Thompson*,<sup>6</sup> the United States Supreme Court had the opportunity to address both of these longstanding ideals and reset the focus on fair practices and just results.<sup>7</sup> Yet the Court, clouded by a fear of overwhelming the court system and diminishing government autonomy, failed to take such a stand. In effect, the Court shied further away from the goals and protections sought in *Brady* and § 1983.

Part I of this Comment briefly describes the history and case law behind the development of the *Brady* rule and the evolution of § 1983 in Supreme Court jurisprudence. Part II summarizes the facts, procedural

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1. 373 U.S. 83 (1963).

2. U.S. CONST. amend. XIV, § 1; see *Brady*, 373 U.S. at 87 (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution”).

3. See Michael T. Burke & Patricia A. Burton, *Defining the Contours of Municipal Liability Under 42 U.S.C. § 1983: Monell Through City of Canton v. Harris*, 18 STETSON L. REV. 511, 512–13 (1989).

4. See 42 U.S.C. § 1983 (2006); Burke & Burton, *supra* note 3, at 513.

5. See generally Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 686–87 (2006) (detailing the dissonance between the grand expectations of *Brady* and the grim reality of criminal litigation today). For a discussion of the evolution of § 1983 in American jurisprudence, see Burke & Burton, *supra* note 3, at 516–18.

6. 131 S. Ct. 1350 (2011).

7. See *id.* at 1356 (addressing “whether a district attorney’s office may be held liable under § 1983 for failure to train based on a single *Brady* violation”).

history, and opinions in *Thompson*. Part III asserts three propositions: (1) the *Thompson* Court failed to recognize the ideals of *Brady* and the importance of training prosecutors in *Brady* evidence; (2) the Court retreated from the purpose of § 1983 due to an unfounded fear of overwhelming the court system and diminishing government autonomy; and (3) the *Thompson* Court could have maintained a high standard of § 1983 liability and ruled in *Thompson's* favor. This Comment concludes that *Connick v. Thompson* was wrongly decided, and in neglecting the promises of *Brady* and § 1983, the Court compromised individual rights guaranteed by the Fourteenth Amendment.

## I. BACKGROUND

### A. Section 1983: Expansion of Supreme Court Jurisprudence for the Protection of Individual Rights

Congress developed § 1983 to combat widespread misconduct of local officials and political authorities.<sup>8</sup> Designed to open the federal courts to private citizens, § 1983 became “[t]he primary vehicle afforded citizens for addressing constitutional deprivations” pervading the policies and practices of municipal officials and state authorities.<sup>9</sup>

Section 1983 provides, in pertinent part,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .<sup>10</sup>

For almost a century after its enactment, the Supreme Court interpreted this language narrowly, taking a restrictive view of the law’s textual implications.<sup>11</sup> The Court only permitted claims against officials in their individual capacity acting in accordance with state law; § 1983 did not provide a remedy for individuals injured by unsanctioned conduct.<sup>12</sup> In the landmark decisions of *Monroe v. Pape* and *Monell v. Department of Social Services of the City of New York*, the Supreme Court removed these restrictions and reinforced the original goal of individual, constitutional protection.<sup>13</sup>

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8. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 20 (2000).

9. *Id.*

10. 42 U.S.C. § 1983 (2006).

11. Burke & Burton, *supra* note 3, at 516; Gilles, *supra* note 8, at 23–24.

12. Burke & Burton, *supra* note 3, at 516 (discussing the restrictive applications of § 1983 liability prior to the Court’s decision in *Monroe v. Pape*, 365 U.S. 167 (1971)).

13. *Monroe*, 365 U.S. 167; *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

*Monroe* expanded the interpretation of § 1983 to permit suit in cases where a constitutional injury resulted from an official's abuse of power.<sup>14</sup> Allowing the *Monroe* plaintiff to bring suit against police officers who seized and detained him unlawfully, the Court opened the door for citizen claims against offending officials whose misconduct rested outside authorization by state law. The Supreme Court further expanded the scope of § 1983 seventeen years later in *Monell*, holding that municipalities were "persons" subject to liability under 42 U.S.C. § 1983.<sup>15</sup> The *Monell* Court acknowledged the legislative intent of the statute to provide "a broad remedy for violations of federally protected civil rights."<sup>16</sup> Still, the Court made clear that vicarious liability would not apply to claims brought under § 1983; liability would attach only "when execution of [the] government's policy or custom . . . inflicts the injury."<sup>17</sup> Although *Monell* declined to fully define the contours of this municipal liability, the Court ensured that municipalities would be held liable for causing the individual deprivation of federally protected rights.<sup>18</sup>

By reiterating the original intent of the legislation and expanding the scope of the statute, the *Monroe* and *Monell* decisions recognized the importance of combating widespread misconduct and protecting individual rights in the face of state and municipal power.

*B. Holding Municipalities Liable for Failing to Train Employees in City of Canton v. Harris*<sup>19</sup> and *Board of County Commissioners v. Brown*<sup>20</sup>

In post-*Monroe* and *Monell* Supreme Court jurisprudence, the Court faced varied § 1983 claims and interpreted the statute to provide for a myriad of constitutional wrongs attributable to municipal policies.<sup>21</sup> Still, the Court remained hesitant to impose municipal liability in cases where a non-policy-making employee committed an unconstitutional act, not attributable to an unconstitutional policy or custom of the government agency. However, in 1989, in *City of Canton v. Harris*, the Court expanded this understanding of "policy or custom" to include a municipali-

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14. 365 U.S. at 184, *overruled on other grounds by Monell*, 436 U.S. 658.

15. *Monell*, 436 U.S. at 690–691.

16. *Id.* at 685.

17. *Id.* at 694.

18. *Id.* at 694–95.

19. 489 U.S. 378 (1989).

20. 520 U.S. 397 (1997).

21. *See, e.g., Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 736 (1989) (remanding case to determine whether the defendants "can be considered policy makers . . . such that their decisions may rightly be said to represent the official policy of the [district] subjecting it to liability under § 1983"); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (finding that decisions of those "officials responsible for establishing final policy with respect to the subject matter in question" may result in municipal liability under § 1983); *Brandon v. Holt*, 469 U.S. 464, 471–73 (1985) (ruling that plaintiffs may amend their pre-*Monell* action to add city as defendant because they originally sued the director of the city's police department in his official capacity); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823–24 (1985) (finding that unconstitutional activity was caused by an existing unconstitutional municipal policy attributable to a municipal policy maker is ordinarily required to impose liability under *Monell*).

ty's decision not to adequately train employees in "their legal duty to avoid violating citizens' rights."<sup>22</sup> Assessing the plaintiff's claim of injury caused by failure of the police to provide proper medical care, the Court remanded the case to determine whether this failure could be properly attributed to the municipality's inadequate training program.<sup>23</sup> Liability would attach only if the decision to provide inadequate training rose to the level of an official government policy, where the failure to train in a relevant respect amounted to "deliberate indifference to the [constitutional] rights of persons."<sup>24</sup> The Court held that "the need for more or different training" must be "so obvious" that a failure to train could properly be characterized as "deliberate indifference" to constitutional rights.<sup>25</sup> Further, the deficiency in the city's training program "must be closely related to the ultimate injury" caused,<sup>26</sup> and a municipality cannot be held automatically liable for a single-incident mishap of one of its employees.<sup>27</sup> Remanding the case to the court below, the *Canton* Court provided one hypothetical example of this new standard of liability: "[T]he need to train officers in the constitutional limitations on the use of deadly force."<sup>28</sup> The Court explained that because city policymakers know with "moral certainty" that their police officers will use firearms to arrest fleeing felons, a failure to train the officers in the proper use of deadly weapons can be "characterized as 'deliberate indifference' to constitutional rights."<sup>29</sup> The opinion made clear that in such an event, if a city's failure to provide proper training results in actual injury, the city could be held liable under § 1983.<sup>30</sup>

Eight years later, the Supreme Court built upon the *Canton* failure-to-train rule in *Board of County Commissioners v. Brown* ("Bryan County").<sup>31</sup> Further clarifying the single-incident liability hypothesized in *Canton*, the Court pointed out instances in which an "inadequate training" claim could be the basis for § 1983 liability.<sup>32</sup> For example, municipal policy makers' continued adherence to a training program "that they know or should know has failed to prevent tortuous conduct by employees" can trigger municipal liability, as such inaction clearly shows "deliberate indifference."<sup>33</sup> The Court contrasted this scenario with the single incident of inadequate screening at issue in *Bryan County*. An isolated example of improper screening that was neither the obvious conse-

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22. *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011); *Canton*, 489 U.S. at 380.

23. *Canton*, 489 U.S. at 392.

24. *Id.* at 388.

25. *Id.* at 390.

26. *Id.* at 391.

27. *Id.* at 387.

28. *Id.* at 390 n.10.

29. *Id.*

30. *Id.* at 390.

31. 520 U.S. 397 (1997).

32. *See id.* at 407-08.

33. *Id.* at 407.

quence of improper training nor the last line in a pattern of violations did not amount to municipal liability under § 1983.<sup>34</sup> Although the Court suggested that for a successful § 1983 claim proof of a pattern of constitutional violations is “ordinarily necessary,” it acknowledged, as did *Canton*, that such evidence is not always imperative. Proof of multiple violations may not be required to prove deliberate indifference where the single violation of constitutional rights was the “highly predictable” and “obvious” consequence of failing to properly train.<sup>35</sup>

Whereas *Canton* set the stage for municipal liability by permitting § 1983 claims based on a city’s failure to properly train its employees, *Bryan County* clarified the contours and implications of the rule. Both decisions demonstrate the Court’s expanding interpretation of § 1983 as it maintains focus on protecting individual rights.

*C. Brady v. Maryland: The Importance of Stifling Prosecutorial Misconduct and Protecting Individual Due Process Rights*

In the century following the enactment of § 1983, the Supreme Court also specified the role of the prosecutor in promoting constitutional due process in the critical case of *Brady v. Maryland*.<sup>36</sup> After conceding that he participated in a gruesome murder, the accused discovered that the prosecutor failed to disclose an accomplice’s confession to the homicide.<sup>37</sup> The *Brady* Court determined that this suppression of evidence was in violation of constitutional due process and announced a new rule of discovery and mandatory disclosure.<sup>38</sup> Emphasizing a commitment to justice and fair play, the *Brady* Court set forth the rule that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>39</sup> Essentially, *Brady* provided that “on demand of an accused,” the prosecution had a duty to disclose any evidence that would tend to exculpate the defendant or reduce the penalty.<sup>40</sup>

Since this 1963 decision, the *Brady* rule has undergone significant judicial alteration. Some of the most notable revisions include eliminating the need for a defendant to specifically request *Brady* evidence,<sup>41</sup> requiring disclosure in cases of both exculpatory and impeachment evi-

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34. *Id.* at 408, 412–13, 415 (holding that a sheriff’s isolated hiring decision lacked adequate screening but did not warrant municipal liability).

35. *See id.* at 409–10.

36. 373 U.S. 83 (1963).

37. *Id.* at 84.

38. *Id.* at 86–87.

39. *Id.* at 87.

40. *See id.* at 87–88.

41. *See Gershman, supra* note 5, at 704–06 (referencing the holding in *United States v. Bagley*, 473 U.S. 667 (1985)).

dence,<sup>42</sup> and amplifying the importance of not distinguishing between the good and bad faith of the prosecutor.<sup>43</sup>

Nonetheless, one of the most prominent modifications deals with the judiciary's retrospective interpretation of the concept of "materiality."<sup>44</sup> Evidence is considered material only when there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different; essentially, its suppression reduces confidence in the outcome of the trial.<sup>45</sup> This retroactive evaluation of materiality affords prosecutors wide discretion in determining what constitutes *Brady* evidence and often results in the inconsistent application of the rule.<sup>46</sup> The indefinite standard makes it difficult to determine with certainty whether a given piece of evidence is material or of such significance that, if produced, it will affect the outcome of the trial to a "reasonable probability."<sup>47</sup> Not only is it difficult for prosecutors to decide what to disclose under *Brady*, but it is also difficult for the defense to know what evidence to request and for the courts to be certain their verdicts are just.

Despite these developments, the *Brady* Court auspiciously acknowledged that our system of justice "suffers when any accused is treated unfairly" and that commanding prosecutors to disclose favorable evidence to the accused is essential to promoting justice.<sup>48</sup> As such, *Brady* reflected the enduring commitment of our justice system to fair play and just results for individuals accused of crimes. The Court acknowledged, "Society wins not only when the guilty are convicted but when criminal trials are fair . . . ."<sup>49</sup>

In sum, § 1983 set the stage for municipal liability, and *Brady* defined prosecutorial responsibilities to the accused. Where *Brady* established the prosecutorial obligation to disclose evidence, § 1983 afforded individuals a cause of action for constitutional violations of this sort. Recently, almost a century since Congress enacted 42 U.S.C § 1983 and

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42. *Id.* at 702.

43. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97, 110 n.17 (1979).

44. *See, e.g.*, *United States v. Oxman*, 740 F. 2d 1298, 1310 (3d Cir. 1984) (noting the "tendency to adopt a retrospective view of materiality"); *United States v. Coppa*, 267 F. 3d 132, 140 (2d Cir. 2001) ("[T]he scope of the defendant's constitutional right . . . is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial."); Gershman, *supra* note 5, at 689.

45. *United States v. Bagley*, 473 U.S. 667, 678 (1985); *see also* *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (refining the *Bagley* standard holding that a showing of materiality depends on "whether in its absence [the defendant] received a fair trial, understood as the trial resulting in a verdict worthy of confidence").

46. *See, e.g.*, *Thompson v. Connick*, 553 F.3d 836, 853 (5th Cir. 2008), *rev'd*, 131 S. Ct. 1350 (2011) (noting "the difficulty in interpreting *Brady*" and the common understanding that *Brady* is a "'gray' area, subject to interpretation"); *Thompson*, 131 S. Ct. at 1365 (acknowledging that "*Brady* has gray areas and some *Brady* decisions are difficult").

47. *Bagley*, 473 U.S. at 682.

48. *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963).

49. *Id.* at 87.

more than thirty years since *Brady v. Maryland*, the Supreme Court in *Connick v. Thompson* faced the interplay between these seemingly complimentary theories.<sup>50</sup>

## II. *CONNICK V. THOMPSON*

### A. *Facts*

In 1985, the Orleans Parish District Attorney prosecuted John Thompson for murder and an unrelated charge of attempted armed robbery.<sup>51</sup> During the robbery investigation, a crime-scene technician collected a swatch of fabric stained with the robber's blood.<sup>52</sup> Two days before trial, the assistant district attorney, Bruce Whittaker, acquired the blood analysis and claimed he placed the report on the desk of his supervisor.<sup>53</sup> Not one prosecutor at the Orleans Parish Office disclosed the test results to Thompson's counsel, and the evidence remained suppressed throughout the trial.<sup>54</sup> In the weeks following, a jury convicted Thompson of armed robbery, and because of this conviction, Thompson opted not to testify in his own defense during his subsequent murder trial.<sup>55</sup> Thereafter, the jury convicted Thompson of murder and sentenced him to death.<sup>56</sup>

In late April 1999, after eighteen years in prison, fourteen of them isolated on death row, Thompson's private investigator unearthed the hidden crime lab report.<sup>57</sup> Thompson's attorneys discovered that Thompson's blood type did not match the blood swatch and approached the district attorney's office with the findings.<sup>58</sup> In light of the newly discovered evidence, the district attorney moved to stay the execution and vacate Thompson's armed robbery conviction.<sup>59</sup> Concluding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify at his murder trial, the Louisiana Court of Appeals reversed Thompson's murder conviction.<sup>60</sup> In 2003, the district attorney's office retried Thompson, presenting all undisclosed evidence; after only a thirty-five minute deliberation, the jury found Thompson not guilty.<sup>61</sup> On May 9, 2003, after serving more than eighteen years in prison, Thompson was set free.

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50. See *Thompson*, 131 S. Ct. 1350 (addressing liability under § 1983 based on a single *Brady* violation).

51. *Id.* at 1356.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1356–57.

61. *Id.* at 1376 (Ginsburg, J., dissenting).

Shortly thereafter, Thompson brought a § 1983 action against the district attorney's office, claiming that the office violated *Brady* by failing to disclose the crime lab report to the defense.<sup>62</sup> Thompson alleged liability on two theories: the *Brady* violation was the result of (1) an unconstitutional policy of the Orleans Parish District Attorney's Office and (2) Harry Connick's deliberate indifference to the obvious need to train prosecutors in *Brady*.<sup>63</sup>

### *B. Procedural History*

Before trial, Connick, the sole policy maker for the district attorney's office, conceded that his office violated *Brady* in its failure to disclose the crime lab report.<sup>64</sup> At trial, the jury rejected Thompson's claim that the *Brady* violation was the result of an unconstitutional office policy.<sup>65</sup> Nonetheless, the jury found the district attorney's office liable for failing to train its prosecutors and awarded Thompson fourteen million dollars in damages.<sup>66</sup>

Connick objected to any liability for failure to train, claiming there was no evidence that he was aware of a pattern of *Brady* violations.<sup>67</sup> The district court rejected this argument, concluding that a pattern of violations is not necessary to prove a § 1983 claim; failure-to-train liability attaches when a municipality demonstrates deliberate indifference to an "obvious" need for training.<sup>68</sup> The jury subsequently determined that additional *Brady* training in the Orleans Parish Office was "obviously necessary to ensure *Brady* violations would not occur"<sup>69</sup> and found in Thompson's favor.

A panel of the Fifth Circuit Court of Appeals affirmed the decision and reasoning of the district court, acknowledging that Thompson "did not need to prove a pattern" of similar *Brady* violations.<sup>70</sup> In 2009, a divided Fifth Circuit, sitting en banc, vacated the panel opinion, granted rehearing, and affirmed the district court's decision.<sup>71</sup> One year later, the United States Supreme Court granted certiorari to determine whether a district attorney's office may be held liable under § 1983 for failure to train based on a single *Brady* violation.<sup>72</sup>

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62. *Id.* at 1357 (majority opinion).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 1378 (Ginsburg, J., dissenting).

70. *Id.* at 1358 (majority opinion).

71. *Id.*

72. *Id.*

*C. Majority Opinion*

In an opinion authored by Justice Thomas and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito, the majority held that a district attorney's office cannot be held liable under § 1983 based on a single *Brady* violation and reversed the Fifth Circuit decision.<sup>73</sup> The majority opinion relied on the *Canton* rule that a failure to train must amount to deliberate indifference to the obvious need for more or different training.<sup>74</sup> Deliberate indifference required proof that a municipal actor knew or should have known that inadequate training would consequently cause city employees to violate citizens' rights.<sup>75</sup>

The Court's opinion built heavily on this *Canton* standard of deliberate indifference and apparent notice, incorporating the idea mentioned in *Bryan County* that, for the purpose of a failure-to-train claim, it is "ordinarily necessary" that the plaintiff prove a pattern of similar violations by untrained employees.<sup>76</sup> In cases where a plaintiff does not prove a pattern but instead asserts "single-incident" liability, the plaintiff must show that the failure to train is "so patently obvious" that a violation of citizens' rights is undoubtedly a "highly predictable" consequence.<sup>77</sup> The Court emphasized that this single-incident liability only attaches in a narrow range of circumstances and referred to the hypothetical set forth in *Canton* as fully representative of such a circumstance.<sup>78</sup>

Subsequently comparing Thompson's claim with the *Canton* hypothetical, the Court emphasized that the "obvious need for specific legal training" present in the *Canton* example is absent in the context of prosecutorial liability.<sup>79</sup> In stark contrast to the absence of legal training in the police force, "[a]ttorneys are trained in the law and equipped with the tools to interpret and apply legal principles."<sup>80</sup> Emphasizing this difference, the Court explained that law school requirements, licensing procedures, and continuing legal education are designed to ensure that all new attorneys know how to find, understand, and apply legal rules.<sup>81</sup> More specifically, the majority claimed it was "undisputed . . . that the prosecutors in Connick's office were familiar with the general *Brady* rule"; as such, additional training was unnecessary.<sup>82</sup> The Court concluded that recurring constitutional violations were neither "highly predictable" nor

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73. *Id.* at 1366.

74. *Id.* at 1359 (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

75. *Id.* at 1360.

76. *Id.* (citing *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 409 (1997)).

77. *Id.* at 1361 (citing *Bryan Cnty.*, 520 U.S. at 409).

78. *Id.* (citing *Canton*, 489 U.S. at 390 n.10 (1989) (providing an example of a city that arms and deploys its police force without training the officers in the constitutional limitation on the use of deadly force)).

79. *Id.*

80. *Id.*

81. *Id.* at 1361–62.

82. *Id.* at 1363.

the “obvious consequence” of “failing to provide prosecutors with formal in-house training” about *Brady* material.<sup>83</sup>

In sum, the majority placed Thompson’s failure-to-train claim outside *Canton*’s “narrow range” and determined that Thompson did not meet the necessary standard for municipal liability under § 1983.<sup>84</sup>

#### *D. Justice Scalia’s Concurring Opinion*

Concurring with the Court in full, Justice Scalia highlighted this case as one bad-faith prosecutor’s willing *Brady* violation, which “could not possibly be attributed to the lack of training.”<sup>85</sup> Justice Scalia stated that *Brady* mistakes are inevitable as are “all species of error routinely confronted by prosecutors.”<sup>86</sup> The district attorney’s office should not be held liable for its employee’s misconduct simply because it did not have a formal training program covering all species of *Brady* violations.<sup>87</sup> To allow such claims would result in numerous cases blaming municipalities and second-guessing the success of government training programs.<sup>88</sup> Justice Scalia explained that the majority’s rigorous standard of proof is necessary because without it failure-to-train liability would collapse into *respondeat superior* and “become a talismanic incantation producing municipal liability” in an overwhelming display of circumstances.<sup>89</sup> Justice Scalia concluded by doubting that any *Brady* violation existed at all.<sup>90</sup>

#### *E. The Dissent*

Reiterating the holding of *Brady v. Maryland*, the dissent, authored by Justice Ginsburg and joined by Justices Breyer, Sotomayor, and Kagan, emphasized that Thompson’s conviction was fundamentally unfair and the result of “long-concealed prosecutorial transgressions [that] were neither isolated or atypical.”<sup>91</sup> The dissent relied on the same *Canton* standard set forth by the majority: “Failure to train . . . can give rise to municipal liability under § 1983 ‘where the failure . . . amounts to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.’”<sup>92</sup> Refusing to accept the majority’s assertion that proof of a pattern of violations is “ordinarily necessary” or that Thompson’s case did not fit within *Canton*’s “narrow range,” the

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83. *Id.* (quoting *Board of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 409 (1997)).

84. *Id.*

85. *Id.* at 1369 (Scalia, J., concurring).

86. *Id.* at 1367.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1369.

91. *Id.* at 1370 (Ginsburg, J., dissenting).

92. *Id.* (second and third alteration in original) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

dissent asserted that the standard of municipal liability under § 1983 was sufficiently met in Thompson's case.<sup>93</sup>

The dissent refused to accept the idea that this case was merely the result of a lone attorney's conduct, asserting that four prosecutors, not one, participated in the suppression of evidence for nearly two decades.<sup>94</sup> The dissent pointed to evidence that demonstrated a blatant disregard for *Brady* guidelines furthered by "persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under § 1983."<sup>95</sup> The dissent provided an account of the numerous *Brady* violations "that infected Thompson's trials," including suppressed police reports with eye-witness accounts of the assailant, tape recordings proving the prosecution's key witness came forward subsequent to a reward offer, and the non-disclosure of blood-swatch test results.<sup>96</sup>

Further, the dissent described an illustrative history of Connick's cavalier approach to the importance of *Brady*'s disclosure requirements that "contributed to a culture of inattention" in the Orleans Parish District Attorney's Office.<sup>97</sup> The dissent demonstrated that the majority of prosecutors misunderstood *Brady* and the office "shirked its responsibility to keep prosecutors abreast of relevant legal developments concerning *Brady* requirements."<sup>98</sup> Not only were the Orleans Parish prosecutors uninformed about *Brady*,<sup>99</sup> but Connick, the office's sole policy maker, misunderstood the disclosure rule himself<sup>100</sup> and provided the office with inadequate *Brady* training.<sup>101</sup> In turn, the dissent found it "hardly surprising" that *Brady* violations occurred and directly affected Thompson's constitutional rights.<sup>102</sup>

Pointing to these numerous *Brady* violations and examples of prosecutorial misconduct, the dissent concluded that this evidence proved the deliberate indifference of the district attorney's office.<sup>103</sup> As such, the office should bear responsibility for the "gross, deliberately indifferent, and long-continuation violation of [Thompson's] fair trial right."<sup>104</sup>

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93. *Id.* at 1370–71, 1377.

94. *Id.* at 1370.

95. *Id.*

96. *Id.* at 1371–72.

97. *Id.* at 1382.

98. *Id.* at 1378.

99. *Id.* at 1378–80 (showing how the testimony of the four prosecutors engaged in prosecuting Thompson for armed robbery and murder revealed an inconsistent and flawed understanding of a prosecutor's disclosure obligations under *Brady*).

100. *Id.* at 1378 (explaining how Connick persistently misstated *Brady* requirements at trial).

101. *Id.* at 1379–80.

102. *Id.* at 1378.

103. *Id.* at 1382.

104. *Id.* at 1387.

## III. ANALYSIS

The *Thompson* Court failed to embrace the opportunity to reinforce the original ideals of justice and fairness emphasized in the enactment of 42 U.S.C. § 1983 and the landmark decision of *Brady v. Maryland*. The Court overlooked the downfall of proper *Brady* compliance and exchanged the protections of § 1983 claims for a fear of overwhelming the court system and diminishing government autonomy. As the dissent recognized, the Court could have maintained a high standard of municipal liability while still holding the district attorney's office liable for the constitutional violations it effectuated.<sup>105</sup> Nonetheless, the Court failed to meet the challenge of re-enforcing the importance of justice and providing individual remedy in the face of prosecutorial misconduct. The *Thompson* decision stifles the evolution of § 1983 jurisprudence and further erodes the essential goals and promises set forth in *Brady*.

A. *The Thompson Court Failed to Recognize the Shrinking Protections of Brady v. Maryland, Furthering Prosecutorial Inattention to the Importance of Disclosing Brady Evidence*

While acknowledging that the duty to produce *Brady* evidence is “[a]mong the prosecutors’ unique ethical obligations,” the majority opinion offered little explanation of the nature of this responsibility.<sup>106</sup> Focusing on the existence of various rules of professional conduct and responsibility, the Court assumed that prosecutors routinely make legal and ethical judgments in accordance with *Brady* standards.<sup>107</sup> The Court suggested that an attorney’s legal background and codified moral obligations entitle a district attorney’s office to rely on the prosecutors’ knowledge without providing specific training on *Brady* requirements.<sup>108</sup> In so assuming, the Court overlooked decades of scholarship and jurisprudence suggesting that many prosecutors lack a true understanding of their disclosure obligations and often fall short of compliance with *Brady*.<sup>109</sup>

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105. *Id.* at 1387 n.28 (maintaining the high standard set forth in the majority and emphasizing the infringements on Thompson’s rights in its analysis, the dissent concludes that Thompson met the standard).

106. *Id.* at 1362 (majority opinion).

107. *See id.* at 1362–63.

108. *Id.* at 1363.

109. *E.g.*, JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at 5 (2000) (noting that prosecutorial suppression of evidence combined with law enforcement misconduct accounted for sixteen to nineteen percent of reversible errors); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56 (1987) (documenting hundreds of overturned capital cases, including many where the prosecutor had suppressed exculpatory evidence); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 700–01 nn.38–42 (1987) (citing forty cases of *Brady* misconduct reflected in Supreme Court, state, and lower federal court decisions); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 848–70 (1997) (documenting fifteen state and federal decisions in which a criminal defendant has sought to challenge his conviction under *Brady*, most of which ultimately led to reversal of the defendant’s conviction).

### 1. The Growing National Problem with *Brady* Compliance

Because of the vague and retrospective definition of what constitutes material evidence warranting disclosure, modern judicial practice affords prosecutors certain discretion in defining and disclosing *Brady* evidence. Suppressed evidence is material only if it can be shown that there was a “reasonable probability that, had the evidence been disclosed to the defense” it could have affected the outcome of the trial, resulting in a verdict not “worthy of confidence.”<sup>110</sup> Essentially, the prosecutor is permitted to withhold evidence under the rational belief that, upon review of the case, the appellate court will conclude there was no “reasonable probability” that the evidence would have changed the result.<sup>111</sup> In turn, prosecutors enjoy extraordinarily wide latitude to conceal favorable evidence from the defense.<sup>112</sup> As the dissenters in *United States v. Bagley* predicted, this result-focused standard creates prosecutors who “gamble, . . . play the odds, and . . . take a chance that the evidence will later turn out not to have been potentially dispositive.”<sup>113</sup> Justice Marshall further explained the problem:

At the trial level, the duty of the state to effectuate *Brady* devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor . . . is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time . . . he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence . . . .<sup>114</sup>

Despite the fact that state and federal courts have heard thousands of instances of *Brady* violations and reversed hundreds of convictions

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tion); Ellen Yaroshesky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 278 (2004) (“All too often prosecutorial misconduct is one of the primary reasons for [the] breakdowns in the adversary system.”); Ken Armstrong & Maurice Possley, *Trial & Error; Part I: The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999 (reporting that since *Brady*, at least 381 defendants national have had a homicide conviction overturned based on concealed evidence by the prosecution). See generally JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM PART II: WHY IS THERE SO MUCH ERROR IN CAPITAL CASES AND WHAT CAN BE DONE ABOUT IT (2002) (detailing the prevalence of mistakes in capital punishment cases and the resulting effect of execution).

110. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

111. Gershman, *supra* note 5, at 689–90 (explaining how many prosecutors suppress evidence with a “completely rational expectation that the suppression either will not be discovered or, if discovered, will be found by the reviewing court to not be material”).

112. *Id.* at 690 (citing *Bagley*, 473 U.S. 667, 700 (Marshall, J., dissenting) (“The standard for disclosure that the Court articulates today enables prosecutors to avoid disclosing obviously exculpatory evidence while acting well within the bounds of their constitutional obligation.”)).

113. *Bagley*, 473 U.S. at 701 (Marshall, J., dissenting).

114. *Id.* at 696–97.

due to the prosecution's suppression of evidence,<sup>115</sup> professional discipline of prosecutors is rare.<sup>116</sup> Without clear legal guidelines, continuing professional development, or ethical sanctions, *Brady* violations and wrongful convictions are frequent.<sup>117</sup> Evidence of noncompliance with *Brady* by no means indicates that *all* prosecutors fail to comply with the rule; many prosecutors undoubtedly take their ethical responsibilities seriously. Nonetheless, the reported occurrence of *Brady* violations resulting in the deprivation of individual rights demonstrates enough oversight to generate concern and warrant a legal remedy. The *Thompson* Court failed to acknowledge the importance of this national problem and prevalent misconduct.

## 2. Lack of *Brady* Compliance Evident in Orleans Parish District Attorney's Office

Bolstering the claim of Connick's deliberate indifference to an obvious need for training is a history of *Brady* violations in the Orleans Parish District Attorney's Office under Connick's reign.<sup>118</sup> Of the seven men exonerated from capital punishment in Louisiana between 1981 and 2010, four were prosecuted in Orleans Parish and all four cases involved serious *Brady* violations.<sup>119</sup> Nonetheless, the *Thompson* majority quickly disregarded the examples as "not similar to the violation at issue here."<sup>120</sup> The Court explained that these past violations could not have put Connick on notice that specific training was necessary to avoid the instant constitutional violation because the current case involved scientific evidence and the previous violations did not.<sup>121</sup> The Court overlooks the resulting harm that ties these violations together, a consequence that should have put any policy maker on notice: four wrongful capital punishment convictions.

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115. See *supra* note 109.

116. See Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1596 (2003) (noting that existing rules of ethics fail to regulate large areas of prosecutors' professional conduct); Rosen, *supra* note 109, at 703-04 (discussing the absence of remedies against prosecutors); Weeks, *supra* note 109, at 877-78 (concluding that "the prospect of a civil suit under federal law for a *Brady* violation simply does not exist"); Yaroshefsky, *supra* note 109, at 288 (arguing that despite the "well documented and all too recurrent violation of professional responsibility," prosecutors who engage in the intentional suppression of exculpatory evidence "are rarely, if ever, disciplined").

117. See *supra* note 109.

118. Petition for Writ of Certiorari at 9 n.6, *Smith v. Louisiana*, 131 S. Ct. 2988 (2010) (No. 10-8145).

119. See *Kyles v. Whitley*, 514 U.S. 419, 454 (1995) (holding that prosecution's failure to disclose the evidence to the defense precluded the defendant from a fair trial); *State v. Bright*, 875 So.2d 37, 44 (La. 2004) ("[T]he State's failure to disclose the criminal history of its key witness . . . violated defendant's due process rights . . ."); *State v. Thompson*, 825 So. 2d 552, 557 (La. 2002); *State v. Cousin* 710 So.2d 1065, 1073 (La. 2001) (reversing murder conviction and death sentences on grounds that "clear violations of defendant's right to a fair trial . . . require reversal of the conviction").

120. *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011).

121. *Id.*

Assuming a history of suppression of evidence is not representative enough of Connick's cavalier attitude toward the disclosure of exculpatory evidence to the defense, *Thompson* further demonstrated that Connick himself had an inadequate understanding of *Brady*.<sup>122</sup> As the *Thompson* dissent illustrates, testimony of the other prosecutors in the office revealed similar misunderstandings.<sup>123</sup> Yet the Court overlooked the testimony of these officials, stating that an obvious need for additional training was still lacking.<sup>124</sup> Finally, the *Thompson* Court expressed distrust of the evidence proffered by the dissent, evidence that pointed to more *Brady* violations beyond the hidden blood swatch.<sup>125</sup> What the dissent deemed "violations that infected Thompson's trials,"<sup>126</sup> the majority referred to as "legally irrelevant facts."<sup>127</sup> This simple difference in language further shows the pervasive misunderstanding and legally inconsistent application of *Brady* in modern jurisprudence.

By failing to recognize the widespread misapplication of *Brady*, resulting in constitutional violations both in Orleans Parish and throughout the nation, the *Thompson* majority ignored growing prosecutorial indifference and undermined the importance of *Brady* compliance.<sup>128</sup> The Court assumed that prosecutors "understand constitutional limits, and exercise legal judgment," specifically in relation to *Brady* evidence, and subsequently overlooked the reality of the nature of many prosecutorial practices today.<sup>129</sup> Consequently, the Court failed to consider the power that upholding the need for *Brady* training could have on revitalizing the original ideals of *Brady* and ensuring a fair and truthful trial.

*B. The Court Retreated from the Ideals of § 1983 for Fear of Overwhelming the Court System and Second-Guessing Government Autonomy*

Section 1983 was originally enacted to eradicate widespread misconduct of state and local officials and guarantee individual protection under the Fourteenth Amendment. Focused on preserving the professionalism of prosecutors, the *Thompson* Court downplayed the original reason for permitting § 1983 claims and denied Thompson a remedy. Both the dissenting and majority opinions agreed that municipal liability under § 1983 for failure to train attached "where the failure amounts . . . to deliberate indifference" of a knowing municipality that obviously results in

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122. *Id.* at 1378 (Ginsberg, J., dissenting) (detailing how "Connick persisted in misstating *Brady*'s requirements").

123. *Id.* (noting that Dubelier, Assistant District Attorney, "simply relied on the police to flag any potential *Brady* information"). District Attorney Williams expressed uncertainty as to whether *Brady* material includes impeachment evidence. *Id.*

124. *See id.* at 1365 (majority opinion).

125. *See id.* at 1364 n.11.

126. *Id.* at 1371 (Ginsberg, J., dissenting).

127. *Id.* at 1364 n.11 (majority opinion).

128. *See id.* at 1365.

129. *Id.* at 1361.

a predictable violation of constitutional rights.<sup>130</sup> Nonetheless, where the dissent's attention centered on the need to protect individual due process rights, the majority opinion focused more readily on distinguishing attorneys from "average public employees" than on redressing Thompson's constitutional injury.<sup>131</sup> The fact that Thompson served eighteen years for a conviction falsified by the district attorney's office received no more than one reference in the majority opinion.<sup>132</sup> Instead, the Court's decision hinged on maintaining prosecutorial autonomy and preventing the flooding of courts with § 1983 claims.<sup>133</sup>

The Court repeatedly emphasized its central concern of preventing § 1983 liability from collapsing into *respondeat superior*.<sup>134</sup> The Court's preoccupation with maintaining prosecutorial autonomy and professionalism implicitly points to a fear that acknowledging a need for *Brady* training might undermine the current regime of municipal power.<sup>135</sup> Blaming the *Brady* violations on one lone prosecutor, the Court praised the unparalleled qualities of the legal profession. Highlighting how attorneys—unlike the hypothetical police officers mentioned in *Canton*—undergo unique legal education, on-the-job training, and ethics evaluations, the majority found it inconceivable that a failure to train district attorneys in *Brady* evidence would "obviously" result in constitutional deprivations.<sup>136</sup> Yet, a constitutional violation did occur. And the Court, retreating from the original intent of § 1983 to combat municipal misconduct, effectively overlooked the need to provide Thompson a remedy for "the deprivation of [his] rights."<sup>137</sup>

Justice Scalia reinforced this oversight in his concurrence.<sup>138</sup> Preoccupied with the repercussions of opening the prosecution to failure-to-train claims, Justice Scalia stated that without stringent restrictions a "failure to train" would become a talismanic incantation producing municipal liability "[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee" . . . .<sup>139</sup> Justice

130. *Id.* at 1370–71 (Ginsberg, J., dissenting) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

131. *Id.* at 1361 (majority opinion) (quoting *Connick v. Thompson*, 578 F.3d 293, 305 (5th Cir. 2009)).

132. *Id.* at 1355 (mentioning Thompson's wrongful imprisonment during the initial presentation of the case).

133. *See id.* at 1367 (Scalia, J., concurring).

134. *E.g., id.* at 1359 (majority opinion) ("[Employers] are not vicariously liable under § 1983 for their employees' actions."); *id.* at 1360 ("A less stringent standard of fault for a failure-to-train 'would result in *de facto respondeat superior* liability on municipalities." (quoting *City of Canton*, 489 U.S. at 392)); *id.* at 1365 ("[W]e must adhere to a 'stringent standard of fault,' lest municipal liability under § 1983 collapse into *respondeat superior*." (quoting *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997))).

135. *See id.* at 1361–63.

136. *Id.* at 1362–63.

137. *See Gilles, supra* note 8, at 20, 23 (quoting 42 U.S.C. § 1983 (2006)).

138. *See Thompson*, 131 S. Ct. at 1367 (Scalia, J., concurring).

139. *Id.* (first alteration in original) (quoting *City of Canton*, 489 U.S. at 392).

Scalia concluded that engaging the federal courts in such claims would diminish the autonomy of state and local governments and cause an “endless exercise of second-guessing municipal employee-training programs.”<sup>140</sup> Justice Scalia’s bold assertions made clear what the majority opinion implicitly feared: the diminished autonomy of state and local government agencies and a potential flood of litigants overwhelming the court system.

Overlooking the widespread *Brady* violations evidenced in Connick’s office and beyond, and overemphasizing the need to restrict municipal liability under § 1983, the majority’s conclusion was misguided. It failed to recognize the constitutional protections necessary to promote a fair and just system and to preserve individual rights in the face of state and municipal power. Focused on a fear of flooding the court system and undermining the professionalism of the district attorney’s office, the Court left Thompson back where he started: without redress for the deprivation of his constitutional rights.

*C. Coupling Brady Obligations with § 1983 Liability, the Thompson Court Could Have Maintained Its High Standard of Municipal Liability and Ruled in Thompson’s Favor*

*Connick v. Thompson* presented the Court with a unique opportunity to refocus a historically misguided understanding of *Brady* and further expand municipal liability under § 1983. The Court could have united the two concepts, curbing prosecutorial misconduct and upholding civil protections guaranteed by the Constitution. Focusing its attention on the autonomy of municipalities and the need to isolate them from fault prevented the Court from forming this union of Fourteenth Amendment jurisprudence. Moving beyond a preoccupation of potential vicarious liability and placing Thompson’s case within *Canton*’s narrow range of circumstances, the Court could have saved *Brady* from its misunderstood existence and honored Thompson’s § 1983 claim.

The Court’s fear of lowering the standard of municipal liability and subsequently flooding the court system was unfounded. Tellingly, in 1992, the Second Circuit applied the *Canton* rule to a similar § 1983 complaint alleging injury due to a failure to train prosecutors about *Brady*.<sup>141</sup> After holding the prosecution liable, the system was not flooded with unnecessary § 1983 claims or overwhelmed with municipal doubt.<sup>142</sup> In fact, in the twenty years following that case, the Second Cir-

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140. *Id.* (quoting *City of Canton*, 489 U.S. at 392) (internal quotation marks omitted).

141. *Walker v. New York*, 974 F.2d 293, 297–98 (2d Cir. 1992).

142. *See Thompson*, 131 S. Ct. at 1382 n.17 (Ginsberg, J., dissenting) (“There has been no ‘litigation flood or even rainfall,’ in that Circuit in *Walker*’s wake.” (quoting *Skinner v. Switzer*, 131 S. Ct. 1289, 1299 (2011))).

cuit experienced no successful lawsuits for single-incident *Brady* violations.<sup>143</sup>

Had the Court remained unclouded by a specious fear of diminishing municipal autonomy or flooding the court system, it could have expanded upon the § 1983 jurisprudence following *Canton* and *Bryan County*. Recognizing that the need for some training programs might be “so obvious” that a policy maker’s inaction could be characterized as “deliberate indifference” to constitutional rights, *Canton* and *Bryan County* left open the possibility of a “narrow range of circumstances” where single-incident § 1983 liability would attach.<sup>144</sup> Thompson’s claim falls within this range because (1) like armed police officers, prosecutors hold the power to change the life of an accused, (2) law school curriculum cannot substitute for professionally training prosecutors in the ethical execution of this power, and (3) Connick’s policy of inaction amounts to deliberate indifference to constitutional rights.

The *Thompson* Court, examining the *Canton* hypothetical, recognized the obvious need to instruct armed officers about the constitutional limitations of using deadly force.<sup>145</sup> Still, the Court asserted that the responsibilities in the legal profession rest in “stark contrast” to this scenario.<sup>146</sup> This assertion is misguided and illusory. As the *Brady* Court acknowledged in the formulation of its rule, allowing a prosecutor to withhold evidence and “shape a trial that bears heavily on the defendant . . . casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice.”<sup>147</sup> History shows that prosecutors have taken advantage of this role and subsequently deprived individuals of their constitutional rights.<sup>148</sup> Like an armed police officer, a prosecutor’s misconduct can have the power to effectively end the life of an accused.<sup>149</sup>

Moreover, the Court contrasts the “absence of training” of “police academy applicants” with the extensive legal training and professional responsibility expected of prosecutors. Relying on the various requirements of legal education cannot save an accused from constitutional vio-

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143. *Id.* (noting that there has been “no reported ‘single violation’ *Brady* case” since *Walker* (quoting Brief for Nat’l Ass’n of Criminal Def. Lawyers as Amicus Curiae Supporting Respondents at 39, *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (No. 09-571))); *Id.* (“*Walker* has prompted ‘no flood of § 1983 liability.’” (quoting Brief for Ctr. on the Admin. of Criminal Law, N.Y. Univ. Sch. of Law, et al. as Amici Curiae Supporting Respondents at 35, *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (No. 09-571))).

144. *Canton*, 489 U.S. at 388–90; *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 409 (1997).

145. *Thompson*, 131 S. Ct. at 1361.

146. *Id.*

147. *Brady v. Maryland*, 373 U.S. 83, 88 (1963).

148. *See supra* note 109.

149. *See supra* note 109; Gershman, *supra* note 5, at 688 (“[T]ragically, *Brady* violations have not infrequently contributed to the convictions of innocent persons who, because of the prosecutor’s suppression, lacked critical evidence to prove their innocence.”).

lations.<sup>150</sup> Generally, neither law school nor bar preparation adequately trains novice prosecutors in the requirements of *Brady* sufficient to substitute for further training in practice.<sup>151</sup> Many of today's law schools place minimal importance on teaching ethics and providing students with a realistic impression of the practice of law.<sup>152</sup> Unlike most other professions, law schools require no clinical or professional experience outside the classroom setting.<sup>153</sup> As a result, many novice attorneys enter the profession "virtually in the dark about how to practice law."<sup>154</sup>

In addition to providing minimal practical experience, most law schools today foster an adversarial mindset among lawyers, rather than an ethical one.<sup>155</sup> From the curved grading system to the minimal use of peer collaboration, law school pedagogy is inherently competitive.<sup>156</sup> Inexperience combined with competitive training often translates in prac-

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150. See *Thompson*, 131 S. Ct. at 1361–62 (attributing the main difference between average public employees and attorneys to legal training).

151. See *id.* at 1385–86 (Ginsburg, J., dissenting) (citing research indicating that since 1980, *Brady* questions on the Louisiana Bar Examination have not accounted for even 10% of the total points); see also *infra* note 152.

152. See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 13 (2007) ("The unfortunate reality is that law schools are simply not committed to making their best efforts to prepare all of their students to enter the practice settings that await them."); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 24 (2007) (emphasizing that "the underdeveloped area of legal pedagogy is clinical training"); Jason M. Dolin, *Opportunity Lost: How Law School Disappoints Law Students, the Public, and the Legal Profession*, 44 CAL. W. L. REV. 219, 221–25, 235–42 (2007) (discussing how law schools ineffectively prepare students and are therefore flooding the market with lawyers incompetent to practice); Ursula H. Weigold, *The Attorney-Client Privilege as an Obstacle to the Professional and Ethical Development of Law Students*, 33 PEPP. L. REV. 677, 678 (2006) ("[I]n most American law schools, students may graduate having very little practice or experience in many of the skills that lawyers must possess to represent clients competently and ethically.")

153. Compare Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 193 (1991) ("Law, unlike other professions, requires no formal apprenticeship."), with CAL. BUS. & PROF. CODE § 4996.2 (West 2010) ("Each applicant shall furnish evidence satisfactory to the board that he or she . . . [h]as had two years of supervised post-master's degree experience . . ."), and N.Y. EDUC. LAW § 7704(2)(c) (McKinney 2011) (stating that to qualify for a license as a "licensed clinical social worker," an applicant must "have at least three years full-time supervised postgraduate clinical social work experience"), and OHIO ADMIN. CODE 4757-19-01(C)(1)(e) (2011) (describing the licensure requirements of social workers to include "[n]ot less than four hundred clock hours of supervised practicum and/or field experience, with a primary focus on social intervention coordinated by a [sic] individual with an advanced degree in social work").

154. Dolin, *supra* note 152, at 235–36.

155. See Krista Riddick Rogers, Comment, *Promoting a Paradigm of Collaboration in an Adversarial Legal System: An Integrated Problem Solving Perspective for Shifting Prevailing Attitudes from Competition to Cooperation Within the Legal Profession*, 6 BARRY L. REV. 137, 138 (2006) ("[O]ne of the major underlying issues contributing to the crisis within the legal profession [is] a widespread competitive, adversarial mindset among lawyers . . ."); see also *infra* notes 156–57.

156. See, e.g., Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 777–79 (2004) (discussing that grade curves make one person's success another's failure); Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 572–73 (1998) ("Studies also suggest that legal education as it is currently configured tends to encourage the development of competitive relationships among law students, instead of collaborative, supportive connections.")

tice into the pressure to act unethically in order to win a case.<sup>157</sup> In turn, a desire to “win above all else” coupled with a lack of legal accountability causes prosecutors to forsake the *Brady* rule and take their chances hiding *Brady* evidence.<sup>158</sup> Even prosecutors attempting to comply with *Brady* may fail to disclose *Brady* evidence simply because they misunderstand the unclear doctrinal guidelines or wrongly interpret the “gray area”.<sup>159</sup>

Despite the increasing possibility of wrongful convictions, the minimal practical experience of novice attorneys, and the confusing nature of the *Brady* doctrine, District Attorney Connick did little to effectively prepare his office.<sup>160</sup> Connick testified that he was fully aware “that his prosecutors would regularly face *Brady* decisions”<sup>161</sup> and “that constitutional rights would be in jeopardy if prosecutors received slim to no *Brady* training,”<sup>162</sup> yet Connick gave prosecutors little to no *Brady* guidance.<sup>163</sup> The district attorney’s office was aware that its prosecutors, fresh out of law school, were not equipped with sufficient *Brady* training but shirked its responsibility nonetheless.<sup>164</sup> Prosecutors within the office confirmed that training at Orleans Parish was inadequate and the importance of disclosing *Brady* evidence unclear.<sup>165</sup> Moreover, the 1987 policy manual guiding office conduct devoted no more than four sentences to *Brady*, four sentences that were “inaccurate, incomplete, and dated.”<sup>166</sup> A quote from an Orleans Parish District Attorney, Eddie Jordan, further reveals the focus of *Brady* training in Connick’s office, “The [Connick] administration had a policy of keeping away as much information as possible from the defense attorney.”<sup>167</sup>

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157. See Roger C. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 *FORDHAM L. REV.* 1599, 1599, 1611 (2002) (explaining how everyday practice pushes even the most ethical lawyer to engage in conduct that is unjust and how as a result of “the often ambiguous standards of ethics rules, professional discipline has little or no role in preventing misconduct in litigation and only a limited role in protecting clients”); Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 *MINN. L. REV.* 705, 730 (1998) (discussing how new attorneys feel overwhelming pressure to act unethically); Rogers, *supra* note 155, at 138 (“This prevailing attitude of ‘anything to get ahead’ or ‘winning at all costs’ often manifests itself in intense competition for clients as well as gamesmanship-type tactics and overly aggressive unprofessional behavior often exercised under the guise of ‘zealously representing a client.’”).

158. See Gershman, *supra* note 5, at 690; see also *supra* note 116.

159. See *supra* note 46 and accompanying text.

160. *Connick v. Thompson*, 131 S. Ct. 1360, 1380 (2011) (Ginsburg, J., dissenting) (noting how Joseph Lawless, a criminal law and procedure expert qualified to testify in trial, characterized Connick’s *Brady* guidance as “the blind leading the blind”).

161. *Id.* at 1383.

162. *Id.* at 1384.

163. See *id.* at 1379–84.

164. *Id.* at 1387.

165. *Id.* at 1380 (pointing to a study conducted after Connick retired revealing that more than half of the assistant district attorneys in Connick’s office felt that they had not acquired necessary professional training).

166. *Id.* at 1381.

167. Campbell Robertson & Adam Liptak, *Louisiana Prosecutors’ Methods Raise Scrutiny Again*, *N.Y. TIMES*, Nov. 3, 20, at A19.

Connick ignored the pervasive misunderstanding of *Brady* obligations as well as the history of noncompliance within his office. In turn, four prosecutors, none of whom were able to clearly define *Brady* evidence when questioned at trial, participated in the suppression of material evidence that would have prevented John Thompson from serving eighteen years in prison.<sup>168</sup> Connick's disregard for the obvious need to train his employees amounts to a deliberate indifference to a known consequence of prosecutorial misconduct—wrongful convictions and subsequent deprivation of individual rights.

If the Court had embraced the similarities between the *Canton* hypothetical and Thompson's case, it could have saved *Brady* from its misunderstood existence in the prosecutorial community. While maintaining the high standards required for § 1983 liability, the Court could have reminded prosecutors of the significant role they play in the development of a trial and guided them to promote justice and fair play above all else.

#### IV. CONCLUSION

In reaching its conclusion, the *Thompson* Court failed to recognize a unique opportunity to reconcile the ideals of *Brady v. Maryland* with the original intent of 42 U.S.C. § 1983. Instead, the majority focused its attention on the need to isolate municipal autonomy from fault and purportedly save the court system from a flood of litigation. In so doing, the Court overlooked the growing problems with *Brady* compliance and stifled the expansion of § 1983. By shifting its focus to preventing the downfall of *Brady* and protecting the fundamental need to treat the accused fairly, the Court could have maintained high standards under § 1983, while simultaneously holding prosecutors liable and compensating Thompson for his loss. In failing to take a stand on legal misconduct, the *Thompson* Court jeopardized the rights of future accused individuals at the mercy of an adversary system.

Based on a misguided application of § 1983 and failure to acknowledge the growing problem of noncompliance with *Brady*, *Connick v. Thompson* was wrongly decided, leaving American jurisprudence one step further from empowering the constitutional protections guaranteed under the Fourteenth Amendment.

#### AFTERWORD

Only a few months after issuing the *Thompson* opinion, the Supreme Court granted review of yet *another* case demonstrating the Orleans Parish prosecutors' failure to comply with *Brady* obligations.<sup>169</sup> On January 10, 2012, the Court, by an 8–1 majority, reversed and remanded the murder conviction of Juan Smith, a conviction for which Smith had

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168. See *Thompson*, 131 S. Ct. at 1372, 1378–79 (Ginsburg, J., dissenting).

169. *Smith v. Cain*, 132 S. Ct. 627 (2012).

already served a seventeen-year prison sentence.<sup>170</sup> The Court based the reversal solely on the *Brady* violations of the Orleans Parish District Attorney's Office, specifically the failure of the office to disclose inconsistent eyewitness statements favorable to the defense and material to the verdict.<sup>171</sup> The Court additionally admonished the Orleans Parish Office for its historically misguided understanding of *Brady*, expressing shock that "[the] office is still answering equivocally on [such] a basic obligation . . . ."<sup>172</sup>

*Smith v. Cain* turns the number of capital-conviction reversals based on *Brady* violations at the hands of Connick's office to an astonishing five.<sup>173</sup> These reversals, in conjunction with the numerous other non-capital convictions vacated by appellate courts, further showcase the *Brady* violations that pervaded during Connick's tenure.<sup>174</sup> To be sure, the long history of misconduct by the Orleans Parish Office, buttressed by *Smith v. Cain*, does not automatically prove Thompson's § 1983 claim because § 1983 liability is not granted by a mere showing of repetition. However, the continued unearthing of that history serves to further highlight Connick's blatant disregard for *Brady* during his tenure as policy maker and in his handling of Thompson's case. Connick's deliberate indifference to a predictable violation of individual rights in *Thompson* and obvious need to train his office in proper *Brady* compliance increases in clarity with each misapplication of justice.

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170. *Id.* at 631.

171. *Id.* at 630–31.

172. Transcript of Oral Argument at 53, *Smith v. Cain*, 132 S. Ct. 627, 181 L. Ed. 571 (2012). (No. 10-8145).

173. *See supra* note 119 and accompanying text.

174. *See, e.g.*, *State v. Knapper*, 579 So. 2d 956, 961 (La. 1991); *State v. Rosiere*, 488 So. 2d 965, 969–71 (La. 1986); *State v. Perkins*, 423 So. 2d 1103, 1107–08 (La. 1982); *State v. Curtis*, 384 So. 2d 396, 398 (La. 1980); *State v. Falkins*, 356 So. 2d 415, 417 (La. 1978), *cert. denied*, 439 U.S. 865 (1978); *State v. Carney*, 334 So. 2d 415, 418–19 (La. 1976); *State v. Lindsey*, 844 So. 2d 961, 969–70 (La. Ct. App. 2003).

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