

Connick v. Thompson: An Immunity That Admits of (Almost) No Liabilities

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The criminal prosecutor, we are told, “may strike hard blows,” but “he is not at liberty to strike foul ones.”¹ The reality is not so evenhanded. Prosecutors routinely strike foul blows, obtaining convictions while concealing exculpatory evidence from defendants. A boxing analogy springs to mind when distinguishing “hard” and “foul” blows, but the parallel is strained; a significant number of prosecutors’ foul blows occur outside the ring of the courtroom. And neither judge nor defendant may ever know that the blow landed—or the extent of the damage it caused.

While ethical sanction and criminal prosecution provide theoretical deterrents to misconduct, they have proved ineffective in practice. Past Supreme Court rulings shield prosecutors and supervisory prosecutors from civil liability to their victims, which is the most effective deterrent to and remedy for these transgressions. This term, the Court decided that municipalities and their district attorneys’ offices were likewise civilly immune for most cases of these constitutional violations.

The Court reached this conclusion in *Connick v. Thompson*,² an appeal by the Orleans Parish District Attorney’s Office of a \$14 million civil award stemming from a wrongful conviction. Prosecutorial misconduct put John Thompson in prison for 18 years, 14 years of which were on death row.³ The facts of his case, as described by the Supreme Court, follow:

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¹ *Berger v. United States*, 295 U.S. 78, 88 (1935).

² *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

³ *Id.* at 1355.

In early 1985, John Thompson was charged with the murder of Raymond T. Liuzza, Jr. in New Orleans. Publicity following the murder charge led the victims of an unrelated armed robbery to identify Thompson as their attacker. The district attorney charged Thompson with attempted armed robbery.

As part of the robbery investigation, a crime scene technician took from one of the victims' pants a swatch of fabric stained with the robber's blood. Approximately one week before Thompson's armed robbery trial, the swatch was sent to the crime laboratory. Two days before the trial, assistant district attorney Bruce Whittaker received the crime lab's report, which stated that the perpetrator had blood type B. There is no evidence that the prosecutors ever had Thompson's blood tested or that they knew what his blood type was. Whittaker claimed he placed the report on assistant district attorney James Williams' desk, but Williams denied seeing it. The report was never disclosed to Thompson's counsel.

Williams tried the armed robbery case with assistant district attorney Gerry Deegan. On the first day of trial, Deegan checked all of the physical evidence in the case out of the police property room, including the blood-stained swatch. Deegan then checked all of the evidence but the swatch into the courthouse property room. The prosecutors did not mention the swatch or the crime lab report at trial, and the jury convicted Thompson of attempted armed robbery.

A few weeks later, Williams and special prosecutor Eric Dubelier tried Thompson for the Liuzza murder. Because of the armed robbery conviction, Thompson chose not to testify in his own defense. He was convicted and sentenced to death. In the 14 years following Thompson's murder conviction, state and federal courts reviewed and denied his challenges to the conviction and sentence. The State scheduled Thompson's execution for May 20, 1999.

In late April 1999, Thompson's private investigator discovered the crime lab report from the armed robbery investigation in the files of the New Orleans Police Crime Laboratory. Thompson was tested and found to have blood type O, proving that the blood on the swatch was not his. Thompson's attorneys presented this evidence to the district attorney's office, which, in turn, moved to stay the execution and vacate Thompson's armed robbery conviction. The Louisiana Court of Appeals then reversed Thompson's murder conviction, concluding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own

defense at the murder trial. In 2003, the district attorney's office retried Thompson for Liuzza's murder. The jury found him not guilty.⁴

Following his acquittal, Thompson filed a civil suit against both the Orleans Parish District Attorney's Office and the individual prosecutors involved in his case, claiming that they violated his constitutional rights by failing to disclose exculpatory evidence.⁵ Thompson alleged that the district attorney's office was liable for (1) an unconstitutional policy that led assistant district attorneys to pursue convictions without regard for constitutional evidentiary disclosure requirements; and (2) the office's deliberate indifference to the need to train prosecutors on required disclosure to defendants.⁶

While the jury rejected Thompson's claim that the Orleans Parish District Attorney's Office maintained an unconstitutional exculpatory evidence disclosure policy, it held the office liable for failing to train prosecutors to the extent that it was deliberately indifferent to constitutional duties. The jury awarded Thompson \$14 million, equivalent to \$1 million for each year he spent on death row, and the district court awarded more than \$1 million in attorney's fees and costs.⁷

District Attorney Harry Connick Sr. unsuccessfully appealed the ruling at the Fifth Circuit, but prevailed at the Supreme Court. In a 5-4 decision written by Justice Clarence Thomas, the Court held that a district attorney's office may not be held liable for a failure to train district attorneys on their duty to disclose exculpatory evidence. Justice Ruth Bader Ginsburg penned a dissent joined by Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan, stressing that "the conceded, long-concealed prosecutorial transgressions" in Thompson's case "were neither isolated nor atypical."⁸ Justice Antonin Scalia joined the opinion of the Court in full but wrote a

⁴ *Id.* at 1356-57 (citations omitted).

⁵ See discussion of *Brady v. Maryland*, 373 U.S. 83 (1963), nn.5, 7 & 10-11 and accompanying text.

⁶ *Thompson v. Connick*, No. Civ. A. 03-2045 (E.D. La., Nov. 15, 2005).

⁷ *Connick*, 131 S. Ct. at 1357.

⁸ *Id.* at 1370 (Ginsburg, J., dissenting).

concurrence (joined by Justice Samuel Alito) to rebut the dissent and stress the role of individual-prosecutor mischief in Thompson's case.⁹

In the wake of the *Connick* decision, John Thompson wrote a rebuttal of his own, in the form of an opinion piece in the *New York Times*, aptly titled "The Prosecution Rests, But I Can't":

I don't care about the money. I just want to know why the prosecutors who hid evidence, sent me to prison for something I didn't do and nearly had me killed are not in jail themselves. There were no ethics charges against them, no criminal charges, no one was fired and now, according to the Supreme Court, no one can be sued.¹⁰

This article focuses on the injustice of the *Connick* holding and the current regime of immunity for constitutional violations, but the case cannot be viewed in isolation. Section I explores the natural-law roots of the Constitution and the effort to "complete" our Founding document with the post-Civil War amendments and their supporting legislation—with particular attention to the civil remedies for constitutional violations by public officials. Section II explores the history of the Supreme Court's interpretation of prosecutorial immunity and how it diverges from the intent of the authors of the Fourteenth Amendment and the Civil Rights Act of 1871. Section III tracks the development of a similarly flawed doctrine of municipal liability that treats the tortious actions of public employees differently from those of private entities, another misinterpretation of the Civil Rights Act of 1871. Section IV shows how these two lines of government immunity jurisprudence converged in *Connick v. Thompson* to produce a manifestly unjust result, and how this state of affairs will continue until either the Court or Congress reverses a regime of immunity that facilitates constitutional violations.

I. Incomplete Constitution, Continuing Injustice

As the Founders famously put it, "all Men are created equal," and "they are endowed by their Creator with certain unalienable

⁹"The withholding of evidence in his case was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan's willful suppression of evidence he believed to be exculpatory, in an effort to railroad Thompson." *Id.* at 1368 (Scalia, J., concurring).

¹⁰John Thompson, "The Prosecution Rests, But I Can't," *N.Y. Times*, April 10, 2011, at WK 11.

Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”¹¹ With these words they put the former colonies on the path toward a republic based on Lockean principles of natural law. That was the theory. As is often the case, applying perfect theory to an imperfect world produces mixed results.

Chief among these imperfections, the Constitution did not protect the rights of the individual as completely as the Founders envisioned. “[I]t so happened when our fathers came to reduce the principles on which they founded this Government into order, in shaping the organic law, an institution from hell appeared among them.”¹² The “institution from hell” was slavery, and the political machinations necessary to accommodate slavery undermined the process of translating natural law into a parallel positive law framework. Thus, even though slaves had natural rights of life, liberty, and property, the positive law provided no mechanism for enforcing these rights at the federal level. The Bill of Rights did not apply against the states,¹³ so no remedy existed until the Civil War and the constitutional amendments that would follow.

The Civil War Amendments intended to set right the balance between the individual and the state: the Thirteenth to free the slaves, the Fourteenth to protect individual rights, and the Fifteenth to extend to freedmen the right to vote. These amendments were not intended as a redrafting of the Constitution, but rather as fulfilling the intent of the Declaration, or “completing” the Constitution.¹⁴

The goals of the Civil War Amendments are nowhere clearer than in the three foundational clauses of Section 1 of the Fourteenth Amendment: Government must not violate the rights of the governed (Privileges or Immunities Clause), must actively secure the rights of all her citizens (Equal Protection Clause), and must provide a fair and impartial referee where the rights of the individual and

¹¹ The Declaration of Independence para. 2 (U.S. 1776).

¹² Cong. Globe, 39th Cong., 1st Sess. 536 (statement of Rep. Thaddeus Stevens) (quoted in Michael P. Zuckert, *Completing the Constitution: The Fourteenth Amendment and Constitutional Rights*, 22 *Publius* 69, 81 (Spring 1992)).

¹³ *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

¹⁴ See, e.g., Michael P. Zuckert, *Completing the Constitution: The Fourteenth Amendment and Constitutional Rights*, 22 *Publius* 69 (Spring 1992); Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights and Fourteenth Amendment*, 47 *Temp. L. Rev.* 361 (1993).

the powers of the state come into conflict (Due Process Clause).¹⁵ Indeed, the Speaker of the House presiding over the Fourteenth Amendment debates declared Section 1 the “gem of the Constitution. . .because it is the Declaration of Independence placed immutably and forever in the Constitution.”¹⁶

While Section 1 was intended to be self-executing, the practical difficulties of asserting the Fourteenth Amendment’s guarantee in the Reconstruction-era South can hardly be overstated. Members of the Ku Klux Klan, often acting with varying degrees of state sanction, visited violence on the recently freed slaves. President Ulysses S. Grant sent a message to Congress asking for legislative support of more forceful measures to enforce civil rights in the South.¹⁷

In response, Congress enacted the Civil Rights Act of 1871, tellingly also referred to as the “Ku Klux Klan Act.”¹⁸ A significant objective of the Act was to allow plaintiffs claiming constitutional violations by state officials to file their claims in federal court, and to provide for both financial damages and equitable remedies such as injunctions.¹⁹ The Act’s provision facilitating civil suits against

¹⁵ This is not to downplay the role that due process has historically played as a guarantor of substantive liberties. The Fifth Amendment’s Due Process Clause served as the basis for early constitutional objections against slavery. See Robert J. Reinstein, *supra* note 14 at 395 nn. 184–85 (1993) and accompanying text. See also Timothy Sandefur, Privileges, Immunities, and Substantive Due Process, 5 N.Y.U. J. L. & Liberty 115, 134 (2010).

¹⁶ Cincinnati Commercial, Aug. 9, 1866, at 2 (quoted in Robert J. Reinstein, *supra* note 14 at 389).

¹⁷ President Grant’s message reads, in pertinent part:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. . . .

Cong. Globe, 42d Cong., 1st Sess., 244.

¹⁸ Pub. L. No. 42-22, 17 Stat. 13 (1871).

¹⁹ See Michael J. Gerhardt, The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability under Section 1983, 62 S. Cal. L. Rev. 539, 548–49 (1989).

government officials for constitutional violations, presently codified at 42 U.S.C. § 1983, provides the basis for what we today call Section 1983 suits. Section 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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.²⁰

There is some evidence to suggest that Congress did not intend for traditional common-law immunities to apply to Section 1983 suits, with potentially far-reaching effects for public officials, prosecutors included.²¹ As we will see, the Court has created freestanding doctrines of immunity that move significantly in the opposite direction, immunizing public officials even in cases of clear violations of constitutional rights.

The Supreme Court promptly and systematically undermined much of Congress's effort to complete the Constitution, dismantling the Fourteenth Amendment piece by piece. The Court first reduced the Privileges or Immunities Clause to incidental benefits of a national government, such as the right to "demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."²² The Court further thwarted the intent of the Fourteenth Amendment's drafters by declaring that it did not place the liberties affirmed by the Bill of Rights before the laws of the states.²³ Section 1983 lay "virtually dormant" until 1961, when the Court's selective incorporation of the Bill of Rights—making certain provisions effective against the states piecemeal—breathed new life into

²⁰ 42 U.S.C. § 1983 (2010).

²¹ Gerhardt, *The Monell Legacy*, *supra* note 19, at n.42 and accompanying text; Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 689–90 (1978).

²² Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1873).

²³ United States v. Cruikshank, 92 U.S. 542 (1875).

the Fourteenth Amendment's constitutional guarantees and the statutes created to facilitate its enforcement.²⁴

Section 1983's resurrection came to pass not through the Fourteenth Amendment's Privileges or Immunities Clause, but rather through the Due Process Clause. The Due Process Clause has since served double duty, protecting both "procedural" due process and "fundamental" due process.

Regardless of the source, rights must have remedies if they are to mean anything at all. That notion is not found solely within Section 1983, but at the heart of the Constitution. As Chief Justice John Marshall wrote in the foundational case of *Marbury v. Madison*, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."²⁵ This protection of the laws is insufficient if the remedy is so weak as to fail to deter future violations. As the *Marbury* court went on to say, "The government of the United States has been emphatically termed a government of laws, not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."²⁶ Yet that is the present situation with regard to prosecutorial misconduct, where those charged with enforcing the laws are, for all intents and purposes, relieved of any personal liability for constitutional violations.²⁷ This state of affairs is simply unacceptable.

As we turn to the two species of immunity that shield prosecutors from accountability, we should note that the plain text of Section 1983 makes no allowance for the immunity doctrines currently in place.²⁸ The Supreme Court has endeavored to read the statute in light of the common law as it stood in 1871, however, reasoning

²⁴ See Michael J. Gerhardt, 62 S. Cal. L. Rev. 539, 549–51 for a discussion of sovereign immunity and civil rights jurisprudence between 1871 and 1961. For a discussion of the development of the Court's selective incorporation doctrine, see Josh Blackman & Ilya Shapiro, Keeping Pandora's Box Sealed: Privileges or Immunities, *The Constitution in 2020*, and Properly Extending the Right to Keep and Bear Arms to the States, 8 Geo. J.L. & Pub. Pol'y 1, 47–50 (2010).

²⁵ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

²⁶ *Id.*

²⁷ See *infra* Section II, nn.35, 48 & 54–55 and accompanying text.

²⁸ *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (noting that the Civil Rights Act of 1871 "creates a species of tort liability that on its face admits of no immunities.").

that Congress would not abolish common-law tort principles “so well grounded in history and reason by covert inclusion in the general language.”²⁹ These doctrines include official immunity from liability so “well established” within the common law that “Congress would have specifically so provided had it wished to abolish the doctrine.”³⁰ While the Court will begin its inquiry into official immunity by determining whether “an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983’s history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions.”³¹

Unfortunately, the Court’s interpretation of Section 1983 is far less protective of essential liberties than the statute’s authors intended, creating immunity that fails to deter official misconduct. Congress meant to make government officials liable to those citizens whose rights they violate, but the Court has let both prosecutors and municipalities off the hook.

II. *Imbler* and the Creation of Absolute Prosecutorial Immunity

Connick revolved around municipal liability, at least in part, because individual prosecutors are quickly dismissed from Section 1983 suits derived from wrongful convictions. The unwarranted application of absolute immunity to prosecutors has forced wrongly convicted plaintiffs to pursue municipal liability for prosecutors’ misdeeds.

Prosecutors currently enjoy absolute immunity from prosecution for their actions because of the Court’s 1976 holding in *Imbler v. Pachtman* that prosecutors are absolutely immune for their courtroom advocacy. The prospect of immunizing public officials for unethical and illegal acts that resulted in constitutional violations sparked a sharp dissent by Justice Byron White—certainly no “bleeding heart liberal”—in *Imbler*. The decades since have brought White’s fears to life. Without a civil remedy available for defendants wronged

²⁹ *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

³⁰ *Pierson v. Ray*, 386 U.S. 547, 554–55 (1967).

³¹ *Malley v. Briggs*, 475 U.S. 335, 340 (1986) (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1984)).

in court, there is clearly insufficient incentive for prosecutors to release exculpatory evidence.

This section lays a brief foundation on the duty to disclose exculpatory evidence, explores the history of immunity for prosecutors, and shows how absolute prosecutorial immunity is both a misinterpretation of the state of the common law at 1871 and a recipe for systemic injustice in criminal prosecutions.

Brady v. Maryland

The modern prosecutor's duty to disclose exculpatory evidence to the accused comes to us from the Supreme Court's holding in *Brady v. Maryland*.³² In *Brady*, the appellant had confessed to and been found guilty of murder in connection with a robbery, but claimed at trial that his accomplice had committed the actual killing.³³ Brady had asked to see statements given by his accomplice but was not shown one statement where his accomplice confessed to the homicide. The Court held "that the 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."³⁴

While the Court held that both good-faith and bad-faith violations of constitutional rights require remedies such as appellate consideration of the prejudice suffered by the accused or a new trial, prosecutors remain immune from civil suit even in bad-faith cases. A bad-faith violation is no mere oversight, as Thompson's case illustrates. With a bad-faith *Brady* violation, the prosecutor deliberately suppresses or conceals evidence that she knows to be exculpatory in violation of ethical standards that require candor to the tribunal, and of laws contravening perjury. If successful, the result is not just a notch on the prosecutor's belt, but possibly an innocent citizen in jail while the real perpetrator of a serious crime roams free.

Imbler vs. Pachtman and Absolute Immunity for Prosecutors

A little over a decade after *Brady*, the Supreme Court faced the question of what degree of immunity prosecutors should enjoy when they violate constitutional rights. In *Imbler v. Pachtman*, the Court

³² 373 U.S. 83 (1963).

³³ *Id.* at 84.

³⁴ *Id.* at 87.

declined to apply qualified immunity to prosecutors, holding instead that they enjoy absolute immunity “in initiating a prosecution and in presenting the State’s case.”³⁵ The Court did leave open the possibility for prosecutors who acted as investigators or administrators rather than as officers of the court to be granted qualified—instead of absolute—immunity. Under the qualified immunity standard, officials remain immune “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”³⁶ The Court left for later holdings the contours of absolute versus qualified immunity.³⁷

A “functional test” has since evolved from *Imbler* that examines the type of action conducted by the prosecutor. Prosecutors (and police officers when they perform tasks that might normally be conducted by prosecutors) are not liable for missteps and mischief in the courtroom, but are subject to qualified immunity for duties further from the well of the court. A decade after *Imbler*, the Court held that a police officer filing a request for a warrant is subject to qualified, not absolute, immunity because no tradition of absolute immunity existed in 1871 that protected “one whose complaint causes a warrant to issue.”³⁸ And while prosecutors wield absolute immunity for their participation in a probable-cause hearing against a defendant, they have only qualified immunity for legal advice provided to police officers. To hold otherwise, the Court reasoned, “would mean that the police, who do not ordinarily hold law degrees, would be required to know the clearly established law, but prosecutors would not.”³⁹

Prosecutors likewise enjoy only qualified immunity for participating in pre-arrest investigations,⁴⁰ for false statements made at a press

³⁵ *Imbler*, 424 U.S. at 431.

³⁶ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

³⁷ “At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult questions, but this case does not require us to anticipate them.” *Imbler*, 424 U.S. at 432, n.31.

³⁸ *Malley*, 475 U.S. at 342.

³⁹ *Burns v. Reed*, 500 U.S. 478, 495 (1991).

⁴⁰ “A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 275 (1993).

conference announcing the arrest and indictment of a defendant,⁴¹ or for false statements in an affidavit supporting a finding of probable cause.⁴²

Imbler's Departure from Common Law and Justice White's Prescient Concurrence

While *Imbler's* shield against liability set in motion the snowball of immunity for advocacy functions that would ultimately wipe out prospects for supervisory and failure-to-train liability, Justice White's *Imbler* concurrence noted both the decision's departure from the common law and its pernicious potential.

White, joined by Justices William Brennan and Thurgood Marshall, concurred on the facts before the *Imbler* Court, but wrote separately to warn against extending absolute immunity to prosecutors "on claims of unconstitutional suppression of evidence" such as *Brady* violations.⁴³ Justice White's concurrence focuses on the absence of a historical basis for absolute prosecutorial immunity at common law and the incentives created by civil remedies, reasoning that extending absolute immunity to *Brady* violations "would threaten to *injure* the judicial process and to interfere with Congress' purpose in enacting 42 U.S.C. § 1983."⁴⁴

When the Civil Rights Act of 1871 was passed, prosecutors did not enjoy absolute immunity at common law for all actions. The common law recognized three forms of immunity: (1) judicial immunity, an absolute immunity that extended to judges, jurors, grand jurors, and others performing judicial functions;⁴⁵ (2) quasi-judicial immunity, commonly referred to today as "qualified immunity," or a partial immunity for "official acts involving policy discretion but not consisting of adjudication" that "could be defeated by a showing

⁴¹ "[The prosecutor] does not suggest that in 1871 there existed a common-law immunity for a prosecutor's, or attorney's out-of-court statement to the press. . . . Indeed, while prosecutors, like all attorneys, were entitled to absolute immunity from defamation liability for statements made during the course of judicial proceedings and relevant to them, most statements made out of court received only good-faith immunity." *Id.* at 273 (citations omitted).

⁴² *Kalina v. Fletcher*, 522 U.S. 118, 130–31 (1997).

⁴³ *Imbler*, 424 U.S. at 433 (White, J., concurring).

⁴⁴ *Id.* (emphasis in original).

⁴⁵ *Burns*, 500 U.S. at 499–500 (Scalia, J., concurring) (citing T. Cooley, *Law of Torts* 408–11 (1880)).

of malice”;⁴⁶ and (3) defamation immunity, which extended to “all statements made in the course of court proceeding” and protected witnesses as well as attorneys to ensure candor before the court.⁴⁷

The current immunity landscape is largely consistent with the common-law tradition. Judges⁴⁸ and legislators⁴⁹ enjoy absolute immunity for actions in their official capacity. State executive officers,⁵⁰ school board members,⁵¹ and police officers⁵² are protected only by qualified immunity.

While the public prosecutor did not exist in 1871 as it does today,⁵³ the functions of the modern prosecutor in some instances did enjoy absolute civil immunity at common law. As White wrote in his *Imbler* concurrence, “The general rule was, and is, that a prosecutor is absolutely immune from suit for malicious prosecution.”⁵⁴ If the rule were otherwise, prosecutors would be deterred from filing charges. And “prosecutors were also absolutely immune at common law from suits for defamatory remarks made during and relevant to a judicial proceeding.”⁵⁵ This is simply a manifestation of the aforementioned defamation immunity available to all witnesses at trial. And when prosecutors act not as witnesses but as complaining witnesses that make statements under oath to support warrants,⁵⁶ or act in investigatory and advisory roles, they enjoy only qualified immunity.⁵⁷

Yet Justice White’s *Imbler* concurrence spells out several reasons that *Brady* violations should be another area where qualified immunity, rather than absolute immunity, is appropriate.

⁴⁶ *Id.* at 500–01 (Scalia, J., concurring).

⁴⁷ *Id.* at 501 (Scalia, J., concurring) (citing J. Townshend, *Slander and Libel* 347–67 (2d ed. 1872); J. Bishop, *Commentaries on Non-Contract Law* §§ 295–300, pp. 123–25 (1889)).

⁴⁸ See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872).

⁴⁹ See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

⁵⁰ See *Scheuer v. Rhodes*, 426 U.S. 232 (1974).

⁵¹ See *Wood v. Strickland*, 420 U.S. 308 (1975).

⁵² See *Pierson v. Ray*, 386 U.S. 547 (1967).

⁵³ See *Imbler*, 424 U.S. at 421–24.

⁵⁴ *Id.* at 437 (White, J., concurring).

⁵⁵ *Id.* at 438.

⁵⁶ See, e.g., *Kalina, v. Fletcher*, 522 U.S. 118 (1997).

⁵⁷ See, e.g., *Burns v. Reed*, 500 U.S. 478 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259, 275 (1993).

First, no such immunity existed at common law. The common-law immunities from suits for malicious prosecution and defamation did not extend to the nondisclosure or suppression of exculpatory evidence.

Second, blanket absolute immunity is “not necessary or even helpful in protecting the judicial process. It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct.”⁵⁸ As Justice White points out, the possibility of imposing liability on public officials for the violation of constitutional rights “was precisely the proposition upon which § 1983 was enacted.”⁵⁹

A qualified immunity rule with regard to *Brady* violations would establish disclosure incentives that are entirely consistent with traditional common-law immunities. Defamation liability existed in order to encourage testimony and disclosure and to aid courts in their truth-seeking role.

It would stand this immunity rule on its head, however, to apply it to a suit based on a claim that the prosecutor unconstitutionally *withheld* information from the court. Immunity from a suit based upon a claim that the prosecutor suppressed or withheld evidence would *discourage* precisely the disclosure of evidence sought to be encouraged by the rule granting prosecutors immunity from defamation suits. *Denial* of immunity for unconstitutional withholding of evidence would encourage such disclosure.⁶⁰

The majority disputed this point, arguing that “[a] claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested.”⁶¹ Yet, as Justice White countered, permitting suits against prosecutors for suppressing evidence is justified by the positive incentives it creates, “that the only effect on the process of permitting such suits will be a beneficial one—more information will be disclosed to the court,” and this can be distinguished from allowing suits

⁵⁸ *Imbler*, 424 U.S. at 442 (White, J., concurring).

⁵⁹ *Id.*

⁶⁰ *Id.* at 442–43 (italics in original).

⁶¹ *Id.* at 431 (majority opinion).

based on the use of perjured testimony, where “prosecutors may withhold questionable but valuable testimony from the court.”⁶²

Yet the majority in *Imbler* created an enduring rule that continues to allow public officials to violate constitutional rights with impunity. Ironically, the qualified immunity rule that the Court feared would handicap prosecutors has proved more protective of officials than initially feared, and in retrospect the case for absolute prosecutorial immunity is weaker than when *Imbler* was written. Justice White would write the opinion of the Court in its next contemplation of immunity for functions commonly performed by prosecutors, *Malley v. Briggs*—decided only a decade after *Imbler*—noting that “[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”⁶³

Van de Kamp Rules Out Supervisor Liability

Yet *Imbler*’s liability protection of prosecutors for their misconduct or incompetence in the courtroom, particularly with respect to duties of disclosure to the accused, remains resolute. In 2009, the Court handed down *Van de Kamp v. Goldstein*, which barred a Section 1983 action for a wrongful conviction due to a district attorney’s office’s failure to institute an information-sharing system between deputy district attorneys and a failure to adequately train or supervise deputy prosecutors on disclosure of impeachment information relevant to witnesses for the prosecution.⁶⁴

Thomas Goldstein (no relation to the Supreme Court advocate) successfully filed a *habeas corpus* petition, alleging that his murder conviction hinged on the testimony of the appropriately named jailhouse informant Edward Fink. Fink had previously received reduced sentences for providing favorable testimony in other cases, a fact that some prosecutors knew but that was never shared with Goldstein’s attorney.⁶⁵ This constitutional violation, while not driven by *Brady* disclosure requirements, demanded Goldstein’s release.⁶⁶

⁶² *Id.* at 446 n.9 (White, J., concurring).

⁶³ *Malley*, 475 U.S. at 341.

⁶⁴ *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009).

⁶⁵ *Id.* at 859.

⁶⁶ The duty to disclose impeachment evidence such as prior testimony given for lenience in sentencing derives from *Giglio v. United States*, 405 U.S. 150 (1972).

Parallel to *Connick*, the Court refused to extend liability to supervisory prosecutors, finding that “prosecutors involved in such supervision or training or information-system management enjoy absolute immunity.”⁶⁷ Indeed, the *Van de Kamp* Court explicitly foreshadowed its holding in *Connick*, declaring that absolute immunity must extend to senior prosecutors “because one cannot easily distinguish, for immunity purposes, between claims based upon training or supervisory failures related to *Giglio* and similar claims related to other constitutional matters (obligations under *Brady v. Maryland*, for example).”⁶⁸

The Alarming Frequency of Brady Violations

The lack of an effective civil remedy deterrent against prosecutorial suppression of exculpatory evidence has demonstrably encouraged, or at least failed to discourage, misbehavior on the part of prosecutors.

In an article arguing for a “bad faith exception” to the absolute immunity dictated by *Imbler*, Pace University law professor Bennett Gershman points to “a large and growing body of empirical and anecdotal evidence suggesting that *Brady* violations are the most common type of prosecutorial misconduct, often occurring in the same prosecutor’s office, often committed by the same prosecutor, and that appear to occur disproportionately in capital cases.”⁶⁹

Multiple studies point to an alarming prevalence of *Brady* violations. The *Chicago Tribune* reviewed 11,000 homicide convictions and found that 381 had been reversed for *Brady* violations.⁷⁰ The Center for Public Integrity looked at 11,451 convictions reviewed by appellate courts for prosecutorial misconduct, finding reversible misconduct in 2,012 of the cases, the majority for *Brady* violations.⁷¹ The California Commission on the Fair Administration of Justice

⁶⁷ *Van de Kamp*, 129 S. Ct. at 861–62.

⁶⁸ *Id.* at 863 (citations omitted).

⁶⁹ Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, Amicus, Aug. 10, 2010, at 12–13, available at <http://harvardcrcl.org/wp-content/uploads/2010/08/Gershman;usPublish.pdf>.

⁷⁰ Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, *Chicago Trib.*, Jan. 10, 1999, at 3.

⁷¹ Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?* *The Ctr. for Pub. Integrity*, 2003, at 3–4.

reviewed 2,130 cases of alleged prosecutorial misconduct, finding misconduct in 443 cases, with *Brady* violations and improper argument the leading transgressions.⁷² A two-year investigation by the *Pittsburgh Post-Gazette* into 1500 allegations of prosecutorial misconduct found “hundreds of examples of discovery violations in which prosecutors intentionally concealed evidence that might have helped prove a defendant innocent or a witness against him suspect.”⁷³

The high rate of *Brady* violations is an expression of the inherent conflict in the roles prosecutors are asked to play. They are simultaneously participants in an adversarial system and expected to be neutral and detached officers of the court. The fact that they enjoy the absolute immunity of the latter simply exacerbates the intense career and political incentives they feel as the former. In highly publicized prosecutions, especially capital cases, these pressures are at their apex.

III. *Monell* and Municipal Liability: “Judicial Legislation of the Most Blatant Kind”

Just as the Court expanded immunity for prosecutors far beyond what they might have enjoyed in 1871, so too with liability for constitutional violations committed by public employees. Instead of applying traditional principles of vicarious liability that make employers liable for the torts of their employees, municipalities are generally only liable where the employee’s error stems from his employer’s policy or custom. As we will see, the history of common-law liability and the intent of the authors of the Civil Rights Act of 1871 do not support this conclusion. This doctrine is the product of, as Justice John Paul Stevens eloquently described, “judicial legislation of the most blatant kind.”⁷⁴

⁷² California Commission on the Fair Administration of Justice, Report and Recommendations on Reporting Misconduct, Oct. 18, 2007, at 3.

⁷³ Bill Moushey, Hiding the Facts: Discovery Violations Have Made Evidence-Gathering a Shell Game, *Pittsburgh Post-Gazette*, Nov. 24, 1998, at A-1, available at <http://www.postgazette.com/win/day3/us1a.asp>.

⁷⁴ *Oklahoma City v. Tuttle*, 471 U.S. 808, 842 (1985) (Stevens, J., dissenting).

Monroe v. Pape: Section 1983 Reborn, Municipalities Still Immune

As previously discussed, Section 1983 lay dormant for 90 years after its passage.⁷⁵ The statute only emerged as a protector of individual rights in the 1961 case *Monroe v. Pape*.⁷⁶ The facts in *Monroe* provide a litany of rights violations:

The complaint alleges that 13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further alleges that Mr. Monroe was then taken to the police station and detained on "open" charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him. It is alleged that the officers had no search warrant and no arrest warrant and that they acted "under color of the statutes, ordinances, regulations, customs and usages" of Illinois and of the City of Chicago.⁷⁷

This claim carried the day on account of the incorporation of the Fourth Amendment's guarantee against unreasonable searches and seizures against the states, a change effected via the Fourteenth Amendment's Due Process Clause a little over a decade before *Monroe*.⁷⁸ The Court held that the Civil Rights Act of 1871 afforded Monroe a federal civil remedy against the officers that snatched him from his home, and that this federal remedy stood independent of any state remedies.⁷⁹

The Court also held that Monroe's class of potential defendants did not include the City of Chicago; municipalities were not liable for the tortious constitutional violations of employees.⁸⁰ The Court

⁷⁵ See Section I, *supra* note 24, and accompanying text.

⁷⁶ 365 U.S. 167 (1961).

⁷⁷ *Id.* at 169.

⁷⁸ See *Wolf v. Colorado*, 338 U.S. 25 (1949). See also Section I, nn. 24–26 and accompanying text, discussing Due Process Clause incorporation.

⁷⁹ *Monroe*, 365 U.S. at 183.

⁸⁰ *Id.* at 191–92.

reviewed the history of the passage of the Civil Rights Act of 1871, focusing on the debate over a controversial amendment proposed by Senator John Sherman of Ohio.⁸¹ The Sherman Amendment would have imposed civil liability on municipalities for the violent or destructive actions of private parties, prodding “men of property” to reject “Kukluxism” in their cities and counties with the threat of emptying the public purse wherever local authorities tolerated Klan violence.⁸² The Court considered the 42nd Congress’s rejection of the Sherman Amendment sufficient reason not to extend civil liability remedies to municipal corporations, even though the distinction between private and public actors is an easy one to make.⁸³

Monell and Its Progeny: Municipal Liability for a “Custom or Policy”

The Court partially reversed course on the question of municipal liability in *Monell v. Dept. of Social Services of the City of New York*.⁸⁴ New York City government compelled female employees to “take unpaid leaves of absence before such leaves were required for medical reasons,” sparking a civil suit under Section 1983.⁸⁵

Reviewing the legislative history of the Civil Rights Act of 1871, the Court held that corporations, municipal corporations included, were “persons” that could be held civilly liable for constitutional violations. Section 1 of the Fourteenth Amendment clearly intended to incorporate liberties against the states, logically extending the enforcement mechanism provided in the Civil Rights Act of 1871 to local government actions.⁸⁶ The Court held that corporate personhood reached municipal corporations by virtue of both jurisprudence and legislation preceding and contemporary with the Civil Rights Act’s passage. The 42nd Congress, the very same one that passed the Civil Rights Act of 1871, also passed legislation providing

⁸¹ *Id.* at 187–90.

⁸² Cong. Globe, 42d Cong., 1st Sess. 792 (1871) (statement of Rep. Benjamin Butler).

⁸³ *Monroe*, 365 U.S. at 190–91.

⁸⁴ 436 U.S. 658 (1978).

⁸⁵ *Id.* at 660–61.

⁸⁶ *Id.* at 686–87 (discussing intent of Rep. John Bingham to overrule *Barron v. Mayor of Baltimore* with Section 1 of the Fourteenth Amendment). “Given this purpose, it beggars reason to suppose that Congress would have exempted municipalities from suit, insisting instead that compensation for a taking come from an officer in his individual capacity from the government unit that had the benefit of the property taken.”

guidance on the interpretation of federal statutes that included defining “bodies politic and corporate” as “persons.”⁸⁷

While the Court correctly held that municipal corporations are “persons” liable for constitutional torts, it limited that liability to actions taken by public employees pursuant to the employer’s “policy or custom.”⁸⁸ The Court explicitly ruled out *respondeat superior* liability for municipal constitutional torts.⁸⁹

Since *Monell*, the Court has elaborated on its “policy or custom” rule and expanded municipal liability to encompass some single-instance violations, but has never extended liability to a *respondeat superior* standard. As we will see, a significant number of these cases focus on the hiring and training of law enforcement officers.

In 1985, the Court held that an allegedly insufficient police training program did not support vicarious municipal liability for a single incident of excessive force in *Oklahoma City v. Tuttle*.⁹⁰ In contrast, the Court held a year later that a single decision by a municipal policymaker could, under the right circumstances, make a county liable for a constitutional tort in *Pembaur v. City of Cincinnati*.⁹¹ In *Pembaur*, a prosecutor ordered sheriff’s deputies to enter a doctor’s office in search of two of the doctor’s employees without a search warrant. Holding this action to be unconstitutional does not undermine absolute immunity for core prosecutorial functions under *Imbler*.⁹²

In 1989, in *City of Canton v. Harris*, the Court held that the “failure to train” theory of liability common to lawsuits against police officers requires a “deliberate indifference” on the part of the municipality for potential constitutional torts such that the “shortcoming [can] be properly thought of as a city ‘policy or custom’ that is actionable under § 1983.”⁹³ The plaintiff in *Canton* slumped to the floor several times in custody, and when asked if she needed medical attention,

⁸⁷ Act of Feb. 25, 1871 (Dictionary Act) § 2, 16 Stat. 431.

⁸⁸ *Monell*, 436 U.S. at 694.

⁸⁹ *Id.* at 693.

⁹⁰ 471 U.S. at 821 (1985).

⁹¹ 475 U.S. 469, 479–80 (1986).

⁹² *Id.* at 471–73. Note that the plaintiff in *Pembaur* did not sue the prosecutor in his personal capacity, believing that such a claim was foreclosed by *Imbler*. *Id.* at 474 n.2.

⁹³ *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

responded incoherently.⁹⁴ She suffered from emotional ailments and alleged that police officers should have determined that she required medical attention during her time in custody. The Court treated this claim skeptically, questioning what level of medical training police should reasonably be required to have, and distinguished this question from clear constitutional commands, such as training officers on when firearms and lethal force may be employed.⁹⁵ This hypothetical situation—a municipality’s deploying a police force without rudimentary training in constitutional constraints on lethal force—became a centerpiece for the majority’s discussion of municipal liability in *Connick v. Thompson*.

In 1997, the Court considered the “deliberate indifference” standard as applied to negligent hiring in *Board of the County Commissioners of Bryan County v. Brown*.⁹⁶ In *Bryan County*, a woman sustained serious leg injuries when she was forcefully pulled from a vehicle by a sheriff’s deputy.⁹⁷ The deputy had been hired in spite of a criminal record that included multiple misdemeanor convictions on charges from drunken driving to assault.⁹⁸ The Court held that inadequate screening in the hiring process only rises to the level of “deliberate indifference” where a constitutional violation “would be a plainly obvious consequence of the hiring decision,” and that the facts in *Bryant County* did not support such a conclusion.⁹⁹

The Case for Municipal Respondeat Superior Liability

A plain reading of Section 1983 and the legislative history of the Civil Rights Act of 1871 does not support the “policy or custom” threshold for municipal liability created by the Court in *Monell*. Justice Stevens concurred in *Monell* only so far as it correctly held that municipalities are liable for constitutional torts under Section 1983 and wrote a powerful dissent in *Tuttle* that points out the Court’s shameless judicial lawmaking in creating the “policy or custom” threshold for vicarious liability. Justice Stevens’s objections

⁹⁴ *Id.* at 381.

⁹⁵ *Id.* at 390, n.10.

⁹⁶ 520 U.S. 397 (1997).

⁹⁷ *Id.* at 400–01.

⁹⁸ *Id.* at 401.

⁹⁹ *Id.* at 412–13.

to any liability standard other than *respondeat superior* have only gained force since the *Monell* line of cases has developed.

Congress intended to provide a remedy against municipalities for constitutional torts when it passed the Civil Rights Act of 1871. The decision to create this civil remedy must be viewed in the context of the legislative history and the legal framework of vicarious liability that existed at the time of the Act's passage. The *Monell* Court correctly recognized that where the 42nd Congress said "person," it meant to include corporations, both private and public.¹⁰⁰

Not only did the 42nd Congress know what it meant when it said "person," then-existing and respected applications of *respondeat superior* doctrine against municipalities indicate that the same Congress intended to apply this liability to municipal corporations for torts committed by their employees.¹⁰¹ Blackstone remarked that "the wrong done by the servant is looked upon in law as the wrong of the master himself" a hundred years before the 42nd Congress debated the Civil Rights Act of 1871, making no allowance for municipal corporations.¹⁰² State courts in the years and decades leading up to 1871 considered it unremarkable that municipal employers were liable for the tortious actions of their employees.¹⁰³

¹⁰⁰ See *supra* note 87, discussing the Dictionary Act of 1871.

¹⁰¹ This is consistent with other Court holdings interpreting the intended scope of Section 1983. "One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

¹⁰² William Blackstone, 1 Commentaries *432.

¹⁰³ "When officers of a town, acting as its agents, do a tortious act . . . reason and justice require that the town in its corporate capacity should be liable to make good the damage sustained by an individual in consequence of the acts done." *Hawks v. Claremont*, 107 Mass. 414, 417–18 (1871); "Governmental corporations, then, from the highest to the lowest, can commit wrongful acts through their authorized agents for which they are responsible; and the only question is, how that responsibility shall be enforced. The obvious answer is, in courts of justice, where, by the law, they can be sued." *Allen v. City of Decatur*, 23 Ill. 332, 335 (1860) (cited at 471 U.S. 836 n. 8); "The liability of municipal corporations for the acts of their agent is, as a general rule, too well settled at this day to be seriously questioned." *Johnson v. Municipality No. One*, 5 La. Ann. 100 (1850); "That an action sounding in tort, will lie against a corporation, though formerly doubted, seems now too well settled to be questioned. And there seems no sufficient ground for a distinction in this respect, between cities and towns and other corporations." *Thayer v. Boston*, 36 Mass. 511, 516–17 (1837) (citations omitted).

Congressional debate over and rejection of the Sherman Amendment is not persuasive evidence of an intent to impose a liability standard other than *respondeat superior* on municipalities. The chairman of the Senate Judiciary Committee remarked that “nobody” objected to Section 1 of the Civil Rights Act of 1871, which would later be codified as Section 1983.¹⁰⁴ In contrast, the Sherman Amendment sparked fierce opposition because it would have imposed liability on local government for the criminal actions of private third parties, “an extraordinary and novel form of absolute liability.”¹⁰⁵ Congressional rejection of this unprecedented civil remedy does nothing to undermine the application of commonly accepted liability doctrines.¹⁰⁶

As Justice Stevens pointed out in his *Tuttle* dissent, *Monell*’s “policy or custom” doctrine is “judicial legislation of the most blatant kind.”¹⁰⁷ There is no historical or legislative basis for this constrained form of vicarious liability. The rationale for this policy choice—“concern about the danger of bankrupting municipal corporations”—is certainly a factor to take into consideration when crafting legislation affording civil remedies such as Section 1983, but that is an assessment properly made prospectively by Congress, not retroactively by the Court.¹⁰⁸

The policy concerns with regard to municipal liability do not all bend the calculus in favor of the state actor, so long as adherence to the Constitution retains any force. “The interest in providing fair compensation for the victim, the interest in deterring future violations by formulating sound municipal policy, and the interest in fair treatment for individual officers who are performing difficult

¹⁰⁴ “The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which has since become a part of the Constitution.” Cong. Globe, 42d Cong., 1st Sess., App. 68, 80, 83–85 (statement of Sen. George Edmunds).

¹⁰⁵ *Tuttle*, 471 U.S. at 839 (Stevens, J., dissenting).

¹⁰⁶ “The rejection of the Sherman Amendment sheds no light on the meaning of the statute, but the fact that such an extreme measure was even considered indicates that Congress thought it appropriate to require municipal corporations to share the responsibility for carrying out the commands of the Fourteenth Amendment.” *Id.*

¹⁰⁷ *Id.* at 842.

¹⁰⁸ *Id.* at 844.

and dangerous work, all militate in favor of placing primary responsibility on the municipal corporation."¹⁰⁹

IV. *Connick v. Thompson: Imbler, Monell, and Immunity Applied*

The Court's decision in *Connick v. Thompson* can now be placed in context against the history of the Fourteenth Amendment and the Civil Rights Act of 1871. The two lines of immunity discussed in the preceding sections—prosecutorial immunity under *Imbler* and municipal liability under *Monell*—converged in *Connick v. Thompson* to bar recovery where a prosecutor committed clear constitutional violations.

While it dwells on the *Monell* case and its progeny, the majority inadvertently makes an excellent case for either (1) acknowledging that the *Monell* "policy or custom" doctrine is irretrievably flawed and should be discarded in favor of municipal *respondeat superior* liability; or (2) vitiating the absolute immunity prescribed by *Imbler*, at least as it applies to *Brady* violations.

The Opinion of the Court and the City of Canton v. Harris Hypothetical

Justice Thomas wrote for the majority in *Connick*, agreeing with District Attorney Connick that he was not "on actual or constructive notice of" a need for more or different training on *Brady* disclosure requirements and therefore did not meet the "deliberate indifference" standard for liability under *City of Canton v. Harris*.¹¹⁰

The Court spends a significant amount of its energy comparing the facts in *Connick* to the hypothetical "deliberate indifference" scenario postulated in *City of Canton v. Harris* that bears illustrating here. In *Harris*, the Court posed the situation as follows:

For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see *Tennessee v. Garner*, 471 U. S. 1 (1985), can be said

¹⁰⁹ *Id.* at 843.

¹¹⁰ *Connick*, 131 S. Ct. at 1358.

to be “so obvious” that failure to do so could properly be characterized as “deliberate indifference” to constitutional rights.

It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are “deliberately indifferent” to the need.¹¹¹

In the *Garner* case cited above, a police officer pursued a fleeing burglar that the officer was “reasonably sure” was unarmed.¹¹² As the burglar scaled a fence, the officer fatally shot the burglar in the back of the head. The Court found that the shooting constituted an unreasonable seizure under the Fourth Amendment (as applied against the state via the Fourteenth Amendment) and held that “such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.”¹¹³

The hypothetically ill-trained police force unnecessarily shooting fleeing suspects will prove an ill fit for analyzing intentional prosecutorial misconduct in violation of a constitutional duty to disclose exculpatory evidence. First, excessive (presumably fatal) uses of force by police officers are unmistakable. A corpse or hospital report accompanies a use of force, while *Brady* violations may go undiscovered for years—as in John Thompson’s case—or never come to light at all. Second, the Court focuses on failure-to-train liability, a paradigm that may have some viability when it comes to analyzing police failures, but one that does not effectively address misbehavior by attorneys.

Dead Men Tell Tales, Brady Violations Don’t

After a recitation of the facts and relevant legal standards, Justice Thomas turns to the question of whether there was a pattern of *Brady* violations that should have prompted District Attorney Connick to institute training in *Brady* disclosure requirements. After noting that

¹¹¹ *City of Canton*, 489 U.S. at 390 n.10.

¹¹² *Tennessee v. Garner*, 471 U.S. 1, 3–4 (1985).

¹¹³ *Id.* at 3.

Louisiana courts had overturned four convictions from Connick's office in a 10-year span, Thomas dismissed this as a pattern.

None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.¹¹⁴

Using the hypothetical failure-to-train liability standard that the Court dwells on is tantamount to saying that while other officers had fatally shot four fleeing, unarmed suspects unnecessarily over the last 10 years, the officer in this instance incurs no municipal liability because he instead ran down a fleeing purse-snatcher with his police cruiser. The Court would have us believe that because the means of delivering a constitutional violation against the same essential liberty differ, the municipality is relieved of the burden of taking note of the constitutional violations and acting to prevent further missteps.

As a constitutional matter, this is nonsense. The burden that prosecutors bear under *Brady* is no lighter in the case of forensic evidence than that of eyewitness descriptions of an assailant that could prove exculpatory.¹¹⁵ Indeed, it may be heavier. Eyewitness accounts and testimony often prove less reliable and more contested than a forensic test with the certainty of a blood type determination, making an exculpatory blood test a disclosure more readily identifiable as one that must be made to meet *Brady* obligations.

¹¹⁴ Connick, 131 S. Ct. at 1360.

¹¹⁵ For example, initial descriptions of the perpetrator's hairstyle in Thompson's murder trial differed greatly from Thompson's hair and tended to implicate one of the prosecution's chief witnesses instead, but the prosecution team did not release these initial police reports to the defense. See *id.* at 1374 (Ginsburg, J., dissenting). This sort of evidence, though often less accurate than blood-typing, was found to be *Brady* material by the Supreme Court in a case involving a wrongful conviction. See *Kyles v. Whitley*, 514 U.S. 419 (1995). The *Kyles* case also focused on conduct in the Orleans Parish District Attorney's Office, nearly contemporaneous with Thompson's trial, and involving one of Thompson's prosecutors. See Brief of Respondent at 9, Connick v. Thompson 131 S. Ct. 1350 (2011) (No. 09-571).

There is a stark mismatch between the corpse of a fleeing cat burglar and an exculpatory clue buried in the paperwork of a criminal trial concluded decades ago. Because of the very nature of *Brady* violations, the vast majority certainly go undetected. Most criminal defendants never go to trial and contest the evidence against them, and many of the defendants that go to trial do so with overworked public defenders as counsel. The requirement of a pattern of similar violations in order to put a chief prosecutor on notice that his subordinates do not know or disregard their constitutional obligations smacks of the same outcome-oriented rationalization that produced *Monell's* "policy or custom" doctrine in the first place.

Prosecutors Are Not Police Officers

Prosecutors, Justice Thomas tells us at great length, are not police officers.¹¹⁶ Thompson's case strains the application of the *Canton* police-training hypothetical beyond its point of utility. The Court plainly sees this, but fails to make the obvious conclusion: If prosecutors are expected to be more competent at the point of hiring, and without court-scrutinized training programs, then they should be held liable for all the reasons that underpin individual qualified immunity and municipal *respondeat superior* with regard to the Civil Rights Act of 1871 and the common law at the time of its framing.

"The reason why the *Canton* hypothetical is inapplicable," Justice Thomas notes, "is that attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles."¹¹⁷

Further, attorneys, prosecutors included, are presumed to be competent from the moment they enter practice.

Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both. These threshold requirements are designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules.¹¹⁸

¹¹⁶ We should note that the comparison between prosecutors and police is not strained in one aspect. In Thompson's case, had the concealment of evidence remained hidden for a few weeks longer, Thompson's execution would have proceeded, and a corpse would have been the result, parallel to an unwarranted use of lethal force.

¹¹⁷ Connick, 131 S. Ct. at 1364.

¹¹⁸ *Id.* at 1361 (citations omitted).

Even with young and inexperienced lawyers in their first jury trial, the presumption remains “that the lawyer is competent to provide the guiding hand that the defendant needs.”¹¹⁹

The legal profession imposes other barriers to entry and self-policing mechanisms:

[A]ttorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession’s standards. . . . Prosecutors have a special “duty to seek justice, not merely to convict.” Among prosecutors’ unique ethical obligations is the duty to produce *Brady* evidence to the defense. An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.¹²⁰

Practicing law in a district attorney’s office also provides opportunities for junior attorneys to “train on the job as they learn from more experienced attorneys.”¹²¹ In the Orleans Parish District Attorney’s Office, “junior prosecutors were trained by senior prosecutors who supervised them as they worked together to prepare cases for trial,” and “[s]enior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments.”¹²² For all these reasons, “[f]ailure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*’s hypothesized single-incident liability.”¹²³

Justice Thomas is correct in making all the above observations about the differences between police officers and prosecutors, but these differences do not support the Court’s conclusion that Orleans Parish should be absolved of liability. Instead, John Thompson’s case should have prompted a reexamination of the existing municipal and prosecutorial liability doctrines, which provide neither sufficient remedy for constitutional violations nor sufficient deterrence to prevent future prosecutorial transgressions.

¹¹⁹ *Id.* (citing *United States v. Cronin*, 466 U.S. 648, 658, 664 (1984)).

¹²⁰ *Id.* at 1362–63.

¹²¹ *Id.* at 1362.

¹²² *Id.*

¹²³ *Id.* at 1361.

The Court's disparate treatment of prosecutors and police officers amounts to a naked exercise in judicial lawmaking.¹²⁴ The legal training that the Court uses to excuse municipalities from liability for attorneys' actions in *Connick* is the very same rationale it used in attributing liability to a municipality in *Pembaur v. City of Cincinnati*. Recall that in *Pembaur*, a prosecutor ordered sheriff's deputies to conduct a search for witnesses without arrest or search warrants specific to the premises.¹²⁵ While the Court might distinguish the two cases on the basis that the attorney in *Pembaur* was a supervisor and therefore a policymaker, this distinction is illusory.

Suppose that a police officer acting as an investigator for the Orleans Parish District Attorney's Office were inserted into the conceded *Brady* violation in John Thompson's prosecution. Suppose that this police officer was tasked with transporting evidence from the storage locker at the police station to the courthouse. What if this officer, and not "miscreant prosecutor" Gerry Deegan, had intentionally concealed the existence of the exculpatory blood-stained swatch that would have prevented Thompson's conviction from both the prosecution and the defense. There is nothing inherently prosecutorial about transporting evidence, and maintaining an unbroken evidentiary chain of custody is well within the duties of a police investigator. While the Supreme Court has never addressed Section 1983 liability for police officers who fail to turn *Brady* material over to prosecutors, the federal courts of appeal unanimously hold police officers liable for concealing exculpatory evidence.¹²⁶

¹²⁴ Expectations of police behavior are eminently malleable depending on the Court's desired outcome. The Court is willing to maintain a failure-to-train theory of municipal liability that infantilizes police officers and injects federal courts into scrutiny of what constitutes adequate law enforcement training in order to raise the burden of municipal liability to the "policy or custom" standard. At the same time, the Court has no qualms about relying on "the increasing professionalism of police forces, including a new emphasis on internal police discipline," when convenient to roll back the exclusionary rule. See *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

¹²⁵ *Pembaur*, 475 U.S. at 471-73.

¹²⁶ See, e.g., *Brady v. Dill*, 187 F.3d 104, 114 (1st Cir. 1999); (noting that "a police officer sometimes may be liable if he fails to apprise the prosecutor or a judicial officer of known exculpatory information"); *Walker v. City of New York*, 974 F.2d 293, 298-99 (2d Cir. 1992) (noting that "the police satisfy their obligations under *Brady* when they turn exculpatory evidence over to the prosecutors"); *Geter v. Fortenberry*, 849 F.2d 1550, 1559 (5th Cir. 1988) (holding that "a police officer cannot avail himself of a qualified immunity defense if he procures false identification by unlawful means or deliberately conceals exculpatory evidence, for such activity violates clearly

Yet a prosecutor in the same situation—one who makes the blood test results unavailable to the defense while in transit to the courthouse—who further consummates this omission with the constitutional sin of concealing evidence in presenting the state’s case to a court, remains absolutely immune. Both *Imbler’s* absolute prosecutorial immunity and *Monell’s* “policy or custom” requirement bar the victim from holding the prosecutor or his employer civilly liable. The result is that attorneys who give bad advice to police can be held liable, but those willing to get their hands dirty and *personally* violate citizens’ rights remain shielded from liability—as are their employers. This, we are told, is the cost of doing business with regard to criminal prosecution. We are also supposed to be comforted by the prospect of ethical sanctions and criminal prosecutions that can deter prosecutorial misconduct.

Prosecutor Discipline (In)Action

Just as the principles that animated the Declaration of Independence did not fully transfer into the Constitution, the theory that prosecutors who commit *Brady* violations will in turn be prosecuted

established constitutional principles’); *Jean v. Collins*, 221 F.3d 656, 659 (4th Cir. 2000) (en banc) (concluding that police who deliberately withhold exculpatory evidence, and thus prevent the prosecutors from complying with *Brady*, violate the due process clause); *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992) (holding that an officer’s “deliberate failure to disclose . . . undeniably credible and patently exculpatory evidence to the prosecuting attorney’s office plainly exposes him to liability under § 1983); *Moldowan v. City of Warren*, 578 F.3d 351, 381 (6th Cir. 2009) (holding that “there is no doubt that the police are . . . capable of depriving criminal defendants of a fundamentally fair trial by suppressing exculpatory evidence’); *Jones v. Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (holding that police officers who fail to disclose exculpatory evidence to prosecutors “cannot escape liability by pointing to the decisions of prosecutors’); *White v. McKinley*, 519 F.3d 806, 814 (8th Cir. 2008) (holding that “*Brady’s* protections also extend to actions of other law enforcement officers such as investigating officers’); *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1088 (9th Cir.) (holding that a “deliberate indifference” or “reckless disregard” standard is appropriate for Section 1983 suits based on *Brady* violations, rejecting inspectors’ request for a “bad faith” standard); *Robinson v. Maruffi*, 895 F.2d 649, 655–56 (10th Cir. 1990) (holding that officers’ “argument that their misconduct is shielded by the acts of the prosecutor, the grand jury, and the trial and appellate courts is disingenuous . . . their actions were dependent in that they relied upon the falsified statements and testimony produced by the defendants in making their respective decisions’); *McMillian v. Johnson*, 88 F.3d 1554, 1566–70 (11th Cir. 1996), amended by 101 F.3d 1363 (11th Cir. 1996).

criminally has not borne out in the real world. The threat of ethical sanction has also proved to be a “paper tiger” with regard to *Brady* violations.¹²⁷ Thompson’s case, tragic though it may be, is only remarkable in that it received national attention by making it all the way to the Supreme Court before the *Brady*-violation victim lost again in civil court.

As the dissent summarizes, more than one prosecutor knew of the concealed blood evidence in Thompson’s case and remained silent while Thompson sat on death row.

In 1994, nine years after Thompson’s convictions, Deegan, the assistant prosecutor in the armed robbery trial, learned he was terminally ill. Soon thereafter, Deegan confessed to his friend Michael Riehlmann that he had suppressed blood evidence in the armed robbery case. Deegan did not heed Riehlmann’s counsel to reveal what he had done. For five years, Riehlmann, himself a former Orleans Parish prosecutor, kept Deegan’s confession to himself.¹²⁸

Riehlmann learned of Thompson’s lawyers’ last-minute effort to save Thompson’s life and provided an affidavit describing Deegan’s admission to suppressing exculpatory evidence.¹²⁹ While it is encouraging that Riehlmann volunteered information that ultimately aided in Thompson’s exoneration and a reprieve from execution, Riehlmann held this information privately for five years while Thompson sat on death row.

Riehlmann’s inaction earned him professional discipline but not a penalty that would significantly deter parallel conduct in the future. Riehlmann faced ethical sanction for (1) his failure to report Deegan’s professional misconduct in a timely manner¹³⁰ and (2) “engaging in conduct prejudicial to the administration of justice.”¹³¹ The initial hearing found that Riehlmann’s conduct violated the latter charge, but that he did not have “knowledge of a violation” that obligated

¹²⁷ See, e.g., Richard A. Rosen, Disciplinary Sanctions against Prosecutors for *Brady* Violations: A Paper Tiger, 65 N.C. L. Rev. 693 (1987).

¹²⁸ *Connick*, 131 S. Ct. at 1374–75 (Ginsburg, J., dissenting).

¹²⁹ *Id.* at 1375 (Ginsburg, J., dissenting).

¹³⁰ La. Rule of Prof. Conduct 8.3(a).

¹³¹ La. Rule of Prof. Conduct 8.4(d).

a report of Deegan's conduct.¹³² On appeal, both the disciplinary board and the Louisiana Supreme Court rejected the conclusion that Riehlmann possessed anything less than "knowledge of a violation," and that he should have reported Deegan's confession of misconduct. As a skeptical Louisiana Supreme Court put it:

The circumstances under which the conversation took place lend further support to this finding. On the same day that he learned he was dying of cancer, Mr. Deegan felt compelled to tell his best friend about something he had done in a trial that took place nine years earlier. It simply defies logic that [Riehlmann] would now argue that he could not be sure that Mr. Deegan actually withheld *Brady* evidence because his statements were vague and non-specific.¹³³

Readers should temper their enthusiasm over Thompson's vindication with the sanction that Riehlmann received: a public reprimand, with one justice dissenting in favor of a harsher sanction.¹³⁴

An ethics committee is not the only forum for providing an effective disincentive against prosecutorial misconduct. When prosecutors conceal exculpatory evidence, it moves from the merely unethical to the plainly criminal, amenable to charges of obstruction of justice and violation of rights under color of law.

The application of criminal prosecution against Thompson's prosecutors provides an answer to classic query "who watches the watchmen?" Unfortunately, the answer is "other watchmen."

The Orleans District Attorney's Office did initiate grand jury proceedings in Thompson's case, with charges possible against the prosecutors who had concealed the exculpatory blood test results. The grand jury proceedings terminated after one day, withdrawn by District Attorney Connick, the head of the very office under investigation. "He maintained that the lab report would not be *Brady* material if prosecutors did not know Thompson's blood type. And he told the investigating prosecutor that the grand jury 'w[ould] make [his] job more difficult.' In protest, that prosecutor tendered his resignation."¹³⁵

¹³² In re Riehlmann, 2004-B-0680 (La. 1/19/05); 891 So. 2d 1239, 1243.

¹³³ *Id.* at 1248.

¹³⁴ *Id.* at 1249–50.

¹³⁵ Connick, 131 S. Ct. at 1375 (Ginsburg, J., dissenting).

The lack of criminal sanction in this case is shocking, but should not be surprising. The *Imbler* Court held out the possibility that a misbehaving prosecutor could be prosecuted for violating constitutional rights, citing a single case from California discussing the subornation of perjury for this proposition.¹³⁶ Unfortunately, that case “did not involve the prosecution of a prosecutor, as the Court’s citation would lead one to believe, nor did [it] suggest that a prosecutor would be subject to criminal charges, or that any prosecutor had ever been prosecuted in California for suborning perjury.”¹³⁷ Indeed, the one prominent example of a prosecutor spending any time incarcerated for professional misconduct—the former Durham, North Carolina district attorney, for his actions in the aborted Duke University lacrosse team rape trial—is so exceptional that it has taken on the name of the perpetrator in academic writings: the “Mike Nifong exception.”¹³⁸

V. Conclusion: Prosecutorial and Municipal Immunity after *Connick v. Thompson*

Unwilling to reverse doctrines of prosecutorial and municipal liability that allow intentional violations of constitutional rights in clear contravention of the intent of Section 1983, the Court reversed the Fifth Circuit and practically foreclosed the prospect of any route of recovery for intentional *Brady* violations. This decision must be viewed as the convergence of two lines of bad precedent. The Court clearly erred in *Imbler* in providing absolute immunity to prosecutors, then erred again in treating public actors differently from private ones with regard to vicarious liability in *Monell*.

Hopefully, the Court will revisit both of these issues in the future and reverse its flawed liability doctrines. Members of the Court are not blind to the fact that the current treatment of official liability is not well-grounded in history or policy. Justice Scalia has noted that “prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial (wherefore they

¹³⁶ *Imbler*, 424 U.S. at 429 n. 29 (citing *In re Branch*, 449 P. 2d 174, 181 (1969) (en banc)).

¹³⁷ See Gershman, *supra* note 69, at 31 n.161.

¹³⁸ See Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 *Hofstra L. Rev.* 275, 296 (2007) (noting that “the case undoubtedly has left the public with misperceptions about prosecutorial misconduct and the extent to which it is punished”).

are entitled to *qualified* immunity under § 1983).¹³⁹ Justice Breyer has asked “for further argument that would focus upon the continued viability of *Monell*’s distinction between vicarious municipal liability and municipal liability based upon policy and custom.”¹⁴⁰

If the Court is not willing to reverse itself on public immunities, legislative reform may provide a route for the vindication of due process. Political leaders with law-and-order bona fides openly recognize that the American criminal justice system locks up not just too many people, but too often the wrong people.¹⁴¹ A recalibration of the incentives that currently fail to deter *Brady* violations would make a worthy addition to any legislative agenda that follows from that recognition—and fulfill the intent of the Fourteenth Amendment and the Civil Rights Act of 1871 along the way.

¹³⁹ *Burns*, 500 U.S. at 500 (Scalia, J., concurring).

¹⁴⁰ *Bryan County*, 520 U.S. at 437 (Breyer, J., dissenting, joined by Stevens and Ginsburg, JJ.).

¹⁴¹ See, e.g., Sen. Jim Webb, Editorial: Why We Must Fix Our Prisons, *Parade*, Mar. 29, 2009, available at <http://www.parade.com/news/2009/03/why-we-must-fix-our-prisons.html?index=1>; David Keene, Editorial: Justice Delayed Shouldn’t Be Justice Denied, *Wash. Times*, July 26, 2011, available at <http://www.washingtontimes.com/news/2011/jul/26/justice-delayed-shouldnt-be-justice-denied/print/>.