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## Note

### **CONNICK v. THOMPSON: UNCLEAR MOTIVES BEHIND A MISGUIDED RESULT**

CLAUDE NICOLAS\*

In *Connick v. Thompson*,<sup>1</sup> the Supreme Court of the United States refined its jurisprudence in the area of municipal liability under the failure-to-train theory.<sup>2</sup> The Court held that a district attorney's office could not be held liable under 42 U.S.C. § 1983 for failure to train where the plaintiff did not prove a pattern of *Brady* violations.<sup>3</sup> The Court determined further that a municipality's failure to train prosecutors on *Brady* violations was not an obvious circumstance that was likely to deprive defendants of constitutional rights.<sup>4</sup>

In so holding, the Court deprived John Thompson of any legal relief after he had spent fourteen years on death row and was nearly executed for a crime he did not commit. As a matter of legal precedent, the Court failed to establish what would constitute a pattern of *Brady* violations sufficient to trigger municipal liability for violating 42 U.S.C. § 1983.<sup>5</sup> Further, the Court erred in ignoring the trial record, which detailed the many *Brady* violations the prosecutors committed and, because of this error, the Court improperly disturbed the jury's reasonable conclusion that untrained prosecutors' *Brady* vi-

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1. 131 S. Ct. 1350 (2011).

2. *See id.* at 1356 (“We granted certiorari to decide whether a district attorney’s office may be held liable under § 1983 for failure to train . . .”).

3. *Connick*, 131 S. Ct. at 1356. A *Brady* violation refers to the Supreme Court’s holding in *Brady v. Maryland* that “evidence favorable to an accused on request may not be suppressed by prosecution.” 373 U.S. 83 (1963).

4. *See id.* at 1361 (finding that the failure to train prosecutors on *Brady* violations was not the type of obvious circumstance likely to deprive citizens of constitutional rights that the Court found in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989)).

5. *See infra* Part IV.B.

olations would likely deprive defendants of their constitutional rights.<sup>6</sup> The Court should have ensured that municipalities would more vigilantly train their prosecutors about *Brady* violations by imposing liability on the District Attorney where, as in this case, the need for training was so obvious and the failure to train prosecutors about *Brady* was highly likely to deprive defendants of their constitutional rights.<sup>7</sup> Finally, the Court should have held that prior *Brady* violations would put a prosecutor's office on notice for the need to implement more training, regardless of differences in the types of evidence prosecutors withheld in those prior violations.<sup>8</sup>

### I. THE CASE

On April 12, 1985, John Thompson was convicted of attempted armed robbery, and on May 8, 1985, Thompson was convicted of first degree murder and sentenced to death.<sup>9</sup> Due to the unrelated attempted armed robbery conviction, Thompson decided not to testify at his murder trial,<sup>10</sup> fearing that the prosecution would have used the attempted armed robbery conviction to attack his credibility.<sup>11</sup> In state court, Thompson exhausted all available post-conviction relief, and on February 27, 1997, filed a habeas corpus action in the United States District Court for the Eastern District of Louisiana.<sup>12</sup> The district court denied Thompson's habeas corpus petition and the Fifth Circuit affirmed the denial.<sup>13</sup>

In April 1999, Louisiana set Thompson's execution date for May 20 of the same year.<sup>14</sup> Prior to Thompson's scheduled execution, however, a private investigator discovered that prosecutors failed to disclose a crime lab report in Thompson's attempted armed robbery case.<sup>15</sup> The lab report indicated that the perpetrator of the armed

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6. *See infra* Part IV.C.

7. *See infra* Part IV.C.

8. *See infra* Part IV.A.

9. *Thompson v. Connick*, No. Civ.A.03-2045, 2005 WL 3541035, at \*1 (E.D. La. Nov. 15, 2005), *aff'd*, 553 F.3d 836 (5th Cir. 2008), *aff'd*, 578 F.3d 293 (5th Cir. 2009) (en banc) (per curiam), *rev'd*, 131 S. Ct. 1350 (2011).

10. *Thompson v. Connick*, 578 F.3d 293, 296 (5th Cir. 2009) (en banc) (per curiam), *rev'd*, 131 S. Ct. 1350 (2011).

11. *State v. Thompson*, 825 So. 2d 552, 555 (La. Ct. App. 2002).

12. *Thompson*, 2005 WL 3541035, at \*1.

13. *Id.*

14. *Id.*

15. *Thompson v. Connick*, 578 F.3d 293, 296 (5th Cir. 2009) (en banc) (per curiam), *rev'd*, 131 S. Ct. 1350 (2011).

robbery had type B blood.<sup>16</sup> Thompson had type O blood.<sup>17</sup> The District Attorney's office and Thompson sought a stay of execution, and after an evidentiary hearing the trial court vacated Thompson's attempted armed robbery conviction.<sup>18</sup> Thompson then sought post-conviction relief regarding his murder conviction.<sup>19</sup> On October 26, 2000, the trial court reversed Thompson's death sentence, but did not grant him a new murder trial.<sup>20</sup> Thompson then appealed and on July 17, 2002, the Louisiana Fourth Circuit Court of Appeal reversed his murder conviction and sentence, and granted Thompson a new trial.<sup>21</sup> The court determined that because the unrelated attempted armed robbery conviction was improper, Thompson was denied the right to testify on his own behalf.<sup>22</sup> The court concluded that but for the improper attempted armed robbery conviction, Thompson would have testified in his murder trial.<sup>23</sup> In 2003, Thompson was retried for murder and found not guilty.<sup>24</sup>

On July 16, 2003, Thompson filed a lawsuit in the United States District Court for the Eastern District of Louisiana against District Attorney Harry F. Connick; Louisiana prosecutors Eric Dubelier, James Williams, and Eddie Jordan; and the Orleans Parish District Attorney's Office under 42 U.S.C. §§ 1983, 1985, and 1986.<sup>25</sup> The only claim that was tried before a jury was Thompson's claim under Section 1983 for the wrongful suppression of exculpatory evidence in violation of *Brady*.<sup>26</sup> The jury found that District Attorney Harry Connick was deliberately indifferent to the need to train his prosecutors on the constitutional requirement to disclose evidence favorable to a

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16. *Id.*

17. *Id.*

18. *Thompson*, 2005 WL 3541035, at \*1.

19. *Id.*

20. *Id.*

21. *Id.*

22. *State v. Thompson*, 825 So. 2d 552, 555–56 (La. Ct. App. 2002).

23. *Id.* at 557.

24. *Thompson*, 2005 WL 3541035, at \*1.

25. *Id.*

26. *Thompson v. Connick*, 578 F.3d 293, 296 (5th Cir. 2009) (en banc) (per curiam), *rev'd*, 131 S. Ct. 1350 (2011). Thompson also claimed malicious prosecution under Louisiana state law, intentional infliction of emotional distress, and civil conspiracy under 42 U.S.C. § 1985(3) and initiated a direct action claim against several insurance companies pursuant to Louisiana Revised Statute § 22:655. Complaint at 24–31, *Thompson v. Connick*, 2005 WL 3541035, No. Civ.A.03-2045 (E.D. La. Nov. 15, 2005).

criminal defendant.<sup>27</sup> The jury awarded Thompson \$14 million in damages and the defendants appealed.<sup>28</sup>

In a panel opinion, the United States Court of Appeals for the Fifth Circuit affirmed the jury's damages award.<sup>29</sup> The court concluded that Thompson established sufficiently that it was obvious that *Brady* training was necessary and that Connick's failure to train his prosecutors was very likely to cause those prosecutors to violate Thompson's constitutional rights.<sup>30</sup> The court also held that no pattern of similar violations was necessary to put Connick on notice that *Brady* training was needed.<sup>31</sup> Further, the court stressed that where there was a sufficient evidentiary basis for a jury finding, the court could not disturb that finding.<sup>32</sup> Consequently, the court concluded that a reasonable jury could have determined that Connick's failure to train caused prosecutors to violate Thompson's constitutional rights.<sup>33</sup> Lastly, the court found no reversible error in the trial court's jury instructions on deliberate indifference.<sup>34</sup>

Reviewing the case again, the Fifth Circuit granted an *en banc* rehearing of the appeal, thereby vacating the panel opinion.<sup>35</sup> In an opinion that produced no majority, the Fifth Circuit affirmed the district court's decision by a tie vote.<sup>36</sup> Fearing that, in the absence of immunity, the independence, integrity, and efficiency of prosecutorial offices would be jeopardized, Chief Judge Edith H. Jones would have reversed the district court's decision.<sup>37</sup> Judge Edith Brown Clement would have reversed the district court's decision because a municipality could be held liable for the individual constitutional torts of its employees only under very limited circumstances pursuant to *Bra-*

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27. *Thompson v. Connick*, No. 03-2045, 2007 WL 1200826, at \*1 (E.D. La. Apr. 23, 2007), *aff'd*, 553 F.3d 836 (5th Cir. 2008), *aff'd*, 578 F.3d 293 (5th Cir. 2009) (en banc) (per curiam), *rev'd*, 131 S. Ct. 1350 (2011).

28. *Connick*, 578 F.3d at 297.

29. *Thompson v. Connick*, 553 F.3d 836, 869 (5th Cir. 2008), *aff'd*, 578 F.3d 293 (5th Cir. 2009) (en banc) (per curiam), *rev'd*, 131 S. Ct. 1350 (2011).

30. *Id.* at 854.

31. *Id.*

32. *Id.* at 856–57 (quoting *Int'l Ins. Co. v. RSR Corp.*, 426 F.3d 281, 296–97 (5th Cir. 2005)).

33. *Id.* at 856.

34. *Id.* at 863.

35. *Thompson v. Connick*, 578 F.3d 293, 293 (5th Cir. 2009) (en banc) (per curiam), *rev'd*, 131 S. Ct. 1350 (2011).

36. *Id.*

37. *See id.* at 293–95 (Jones, C.J., dissenting) (discussing several reasons for reversing the lower court's ruling).

dy.<sup>38</sup> According to Judge Clement, Thompson failed to prove causation between the prosecutors' lack of training under Connick's supervision and their constitutional violation in not turning over the lab report because they did not know they had a legal obligation to disclose such evidence under *Brady*.<sup>39</sup>

Judge Prado concurred in the judgment and criticized the dissenters for ignoring the deference reviewing courts must give to a jury's verdict.<sup>40</sup> Further, Judge Prado stressed that where, as in this case, the jury's verdict is reasonably supported by the evidence, the reviewing court must uphold that verdict.<sup>41</sup> Appellate courts, therefore, would be required to view evidence and make inferences "in favor of the jury's verdict."<sup>42</sup>

The Supreme Court of the United States granted certiorari to decide whether a district attorney's office could be held liable under 42 U.S.C. § 1983 for failure to train based on one *Brady* violation.<sup>43</sup>

## II. LEGAL BACKGROUND

In *Connick*, the Court grappled with the legal test for establishing municipal liability under 42 U.S.C. § 1983 for a district attorney's alleged failure to train his prosecutors on *Brady* violations. In addressing Section 1983 liability, the Court has always had to determine which municipal actions would open the door to liability, and what a party seeking to hold a municipality liable would have to prove in order to prevail.<sup>44</sup> The Court was initially reluctant to find that Congress's intent in adopting Section 1983 was to assign potential liability against government bodies.<sup>45</sup> Nevertheless, the Court ultimately interpreted the section to open government bodies to liability<sup>46</sup> and defined the narrow routes of attack available to plaintiffs seeking to hold municipalities liable for constitutional violations.<sup>47</sup> In doing so, the Court stressed the necessity of establishing causation between the municipality's actions and the alleged constitutional harm, as well as evidence of culpability and not mere negligence on the part of the

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38. *Id.* at 296 (Clement, J., dissenting).

39. *Id.* at 308–09.

40. *Id.* at 311–12 (Prado, J., concurring).

41. *Id.* at 312.

42. *Id.*

43. *Connick v. Thompson*, 131 S. Ct. 1350, 1356 (2011).

44. *See infra* Part II.A–C.

45. *See infra* Part II.A.

46. *See infra* Part II.B.

47. *See infra* Part II.C.

municipality.<sup>48</sup> Further, the Court later fashioned a deliberate indifference standard for municipal liability where the municipality's alleged failure to train its employees caused a constitutional harm.<sup>49</sup> While the *Connick* Court's main focus was Section 1983 liability, Justice Thomas's discussion of *Brady* in the context of prosecutorial training warrants an analysis of the Court's own difficulty understanding *Brady*.<sup>50</sup> Given the *Connick* Court's insistence that *Brady* violations did not establish any obvious need for training, this Part will also offer a reflection on the tumultuous history of *Brady* jurisprudence, describing the Court's struggle to paint a cohesive picture of *Brady*.<sup>51</sup>

*A. Initially, the Court Determined that Municipalities Were Not "People" for 42 U.S.C. § 1983 Purposes*

Title 42 U.S.C. § 1983, which "confer[s] jurisdiction on the federal courts to enforce Section 1 of the Fourteenth Amendment,"<sup>52</sup> provides in pertinent 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 . . . .<sup>53</sup>

Before Section 1983 was codified, it was known as Section 1 of the Civil Rights Act of 1871.<sup>54</sup> In *Monroe v. Pape*,<sup>55</sup> the Supreme Court, for the first time, analyzed whether the Civil Rights Act of 1871

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48. *See infra* Part II.C.1.

49. *See infra* Part II.C.2.

50. *See infra* Part II.D.

51. *See infra* Part II.D.

52. *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 681 (1977) (citing Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2006))). Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

53. 42 U.S.C. § 1983 (2006).

54. *Monell*, 436 U.S. at 664.

55. 365 U.S. 167 (1961), *overruled by* *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

opened the door to liability against municipalities.<sup>56</sup> After thoroughly exhuming the legislative history of Section 1983, the Court decided in *Monroe*<sup>57</sup> that civil liability for violations of Section 1983 did not apply to municipalities.<sup>58</sup> The Court found Congress's rejection of what became known as the "Sherman Amendment" dispositive of Congress's intent to exclude municipalities from Section 1983 liability.<sup>59</sup> Senator John Sherman of Ohio proposed an amendment to the Civil Rights Act of 1871 that would have held the citizens of municipalities liable for acts of violence done against any harmed individual.<sup>60</sup>

The House of Representatives rejected the amendment,<sup>61</sup> because in its judgment Congress did not have constitutional authority to "impose any obligation upon county and town organizations."<sup>62</sup> Faced with what it viewed as Congress's antagonism toward some notion of municipal liability, the Court did not place municipalities within the ambit of Section 1983.<sup>63</sup> It is important to note, however, that the Court highlighted, but declined to address, the policy argument that municipal liability would cause governments to actively police constitutional violations against citizens.<sup>64</sup>

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56. *Id.* at 172. Section 1979 came onto the books as section 1 of the Ku Klux Act of April 20, 1871. *Id.* at 171. The Ku Klux Act was also known as the Civil Rights Act of 1871. See *Monell*, 436 U.S. at 665. This act was later codified as 42 U.S.C. § 1983. *Id.*

57. *Id.* Thirteen police officers allegedly broke into Monroe's house with neither a search warrant nor an arrest warrant. *Id.* at 169. The officers then "ransacked" the house and took Monroe to the police station where they detained him for ten hours without taking him before a magistrate. *Id.* The officers denied him a phone call to his family or attorney, and subsequently released Monroe without criminal charges. *Id.*

58. *Id.* at 187. See *supra* note 59, for the history of 42 U.S.C. § 1983.

59. *Monell*, 436 U.S. at 188–91.

60. CONG. GLOBE, 42d Cong., 1st Sess., 663 (1871). The Sherman Amendment read, in pertinent part:

[I]f such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense . . . . And execution may be issued on a judgment rendered in such suit and may be levied upon any property . . . of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory . . . .

*Id.*

61. *Id.* at 725.

62. *Id.* at 804.

63. *Monroe*, 365 U.S. at 191 (1961). See *supra* note 59, for the history of § 1983.

64. See *id.* (noting that "municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level[.]")



*B. The Court Determined That a Municipality Could Be Liable Where It Acted Unconstitutionally by Implementing an Official Municipal Policy*

In *Monell v. Department of Social Services of New York City*<sup>65</sup> the Court reexamined the legislative history of Section 1983<sup>66</sup> and determined that its decision in *Monroe v. Pape* “incorrectly equated the ‘obligation’ [that the Sherman Amendment imposed on municipalities] with ‘civil liability.’”<sup>67</sup> The Court overruled *Monroe*<sup>68</sup> and found that, contrary to what it had believed to be true in *Monroe*, the Sherman Amendment was *not* an amendment to Section 1 of the Civil Rights Act of 1871.<sup>69</sup> Instead, Senator Sherman intended Section 1 to be an amendment to Section 7,<sup>70</sup> the final section of the Civil Rights Act of 1871.<sup>71</sup> In fact, Section 1—now 42 U.S.C. § 1983—was not even a subject of debate in the committee conference that produced a draft of the Sherman Amendment.<sup>72</sup>

The Court reasoned that since Section 1983 merely granted jurisdiction to federal courts to enforce Section 1 of the Fourteenth Amendment—“a situation precisely analogous to the grant of diversity jurisdiction under which the Contract Clause was enforced against municipalities”—even those who voted against the Sherman Amendment would find Section 1983 suits against municipalities constitutional.<sup>73</sup> This revelation that the Court previously misunderstood the legislative history of Section 1983 compelled the Court to conclude that Congress actually did seek to include municipalities within the ambit of Section 1983.<sup>74</sup> Therefore, plaintiffs could sue local government entities under Section 1983 for all legally allowable forms of relief, where such entities violated the plaintiffs’ constitutional rights

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and declining to “reach those policy considerations”) (citing Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 514 (1955)).

65. 436 U.S. 658 (1977). In *Monell*, female employees of the Department of Social Services and the New York City Board of Education complained that those agencies “had as a matter of official policy compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.” *Id.* at 660–61.

66. *Id.* at 665–89.

67. *Id.* at 665.

68. *Id.* at 701.

69. *Id.* at 665–66.

70. Section 7 merely explained that the law would not “supersede or repeal” any laws already in existence, except laws that were contrary to the goals of the Civil Rights Act of 1871. Ch. 22, 17 Stat. 15 (1871).

71. *Monell*, 436 U.S. at 666.

72. *Id.*

73. *Id.* at 681–82.

74. *Id.* at 690.

while executing or implementing “a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.”<sup>75</sup>

The Court’s stipulation that liability would only attach to municipalities when official policy was the cause of the constitutional harm did not apply to formalized official policy alone.<sup>76</sup> The Court recognized a key reality—that “persistent and widespread discriminatory practices of state officials . . . could well be so permanent and well settled as to constitute a ‘custom or usage’ with the force of law.”<sup>77</sup> Because of this reality, even though a municipality did not formally approve a particular custom through “official decisionmaking channels,”<sup>78</sup> a municipality would still be liable under Section 1983 for a constitutional violation if that unofficial custom were responsible for the violation.<sup>79</sup>

*C. The Court Has Continually Balanced Theories That Would Not Give Rise to Section 1983 Liability Against Theories Under Which Plaintiffs Could Hold Municipalities Liable*

After exposing municipalities to potential Section 1983 liability,<sup>80</sup> the Court established in *Monell* that plaintiffs could not subject municipalities to *respondeat superior* liability under Section 1983.<sup>81</sup> Looking at the plain language originally passed in Section 1 of the Civil Rights Act of 1871,<sup>82</sup> the Court concluded that Congress did not intend to hold municipalities liable for merely employing a tortfeasor.<sup>83</sup> The language of the Civil Rights Act of 1871 imposed liability on municipalities where that municipality’s official policy caused the “employee to violate another’s constitutional rights.”<sup>84</sup> The Court determined that because Congress provided a causation element in Section 1983, it “did not intend § 1983 liability to attach where such causation was absent.”<sup>85</sup>

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75. *Id.*

76. *Id.* at 690–91.

77. *Id.* at 691 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970)).

78. *Id.*, 436 U.S. at 691.

79. *Id.* at 690–91.

80. *Id.* at 664–89.

81. *Id.* at 691.

82. *See supra* note 54.

83. *Monell*, 436 U.S. at 691.

84. *Id.* at 692.

85. *Id.*

1. *The Court Sought to Draw a Clear Line Between the Actions of Municipal Employees and of Municipalities in Determining When Section 1983 Liability Would Attach*

After establishing in *Monell* that official municipal policy had to cause the constitutional violation in question,<sup>86</sup> the Court in *Pembaur v. City of Cincinnati* addressed what types of decisions, made by which class of municipal personnel, would subject municipalities to Section 1983 liability.<sup>87</sup> In *Pembaur*, a licensed physician sued the City of Cincinnati pursuant to Section 1983 for violating the Fourth and Fourteenth Amendments.<sup>88</sup> The Court determined that where a prosecutor advised police officers that they could forcibly enter Pembaur's office, the prosecutor acted as the municipality's "final decisionmaker," and the advice, which constituted official municipal policy, caused police to violate Pembaur's Fourth Amendment rights.<sup>89</sup> The Court held that Section 1983 municipal liability would attach only where "a deliberate choice to follow a course of action [was] made from among various alternatives by the official or officials responsible for establishing final policy."<sup>90</sup> The Court was careful to note, however, that the mere incidence of a policymaking official acting within his or her discretion was not enough to establish Section 1983 liability.<sup>91</sup> The key inquiry would be whether that policymaking official was responsible for establishing *final* government policy regarding the course of action in question.<sup>92</sup>

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86. *Id.*

87. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 471 (1986) ("The question presented is whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy [*Monell*].").

88. *Id.* at 471, 474. A grand jury charged Pembaur with fraudulently accepting state welfare payments and issued subpoenas for two of Pembaur's employees to appear in court. *Id.* at 471-72. The employees did not appear, and the trial court issued capiases, the Ohio equivalent of an arrest warrant. *See id.* at 472 & n.1 (noting that a capias allows a county official to arrest and detain a person who has failed to appear in court to testify). Officers arrived at Pembaur's office to serve the capiases, but Pembaur did not let them enter. *Id.* at 472. The officers called the Hamilton County Prosecutor's Office, which instructed the officers that they could "go in and get" the employees. *Id.* at 473. Acting upon the County Prosecutors' advice, the officers forcibly entered Pembaur's office. *Id.*

89. *Id.* at 484-85.

90. *Id.* at 483. The Court concluded that state law would determine whether an official possessed final decisionmaking authority. *Id.* In *Pembaur*, the Court accepted that a county prosecutor had the requisite authority to determine municipal policy based on Ohio law. *Id.* at 484.

91. *Id.* at 481-82.

92. *Id.* at 483-84.

Taking its holding in *Pembaur* further, the Court in *Bryan County v. Brown*<sup>93</sup> decided that a municipality could not be liable under Section 1983 for allegedly failing to adequately screen an employee's background before hiring him.<sup>94</sup> The Court reiterated its holding in *Monell* that a plaintiff seeking to hold a municipality liable must establish that a municipal policy or custom caused the alleged constitutional violation.<sup>95</sup> The Court refined its Section 1983 jurisprudence by mandating that a plaintiff must prove that "the municipal action was taken with the requisite degree of culpability" and that such action directly caused the constitutional violation.<sup>96</sup> The Court recognized, however, that where a plaintiff alleged that a municipal action directly violated or caused an employee to violate constitutional rights, the culpability and causation requirements were usually met.<sup>97</sup>

In *Bryan County*, however, the Court did not address a municipality's policy or custom.<sup>98</sup> Instead, the Court addressed whether a municipality could be liable based entirely on its lawful decision to hire an employee who violated a plaintiff's constitutional rights when acting on his own and not under the command of a municipal policy or custom.<sup>99</sup> The plaintiffs in *Bryan County* could not establish that the municipality was culpable or that the municipality's actions caused the constitutional violation.<sup>100</sup> And, in the Court's view, a municipality's hiring decision might constitute some degree of negligence, but

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93. 520 U.S. 397 (1997).

94. *Id.* at 415–16. Brown and her husband were driving when they arrived at a police checkpoint. *Id.* at 400. The Browns turned away from the checkpoint and Bryan County officers Robert Morrison and Stacy Burns pursued the Browns' vehicle. *Id.* The car chase ended four miles from the police checkpoint. *Id.* Subsequently, Officer Morrison pointed his gun toward the Browns and ordered them to raise their hands. *Id.* Officer Burns ordered Mrs. Brown from the vehicle, and when she refused to exit, "he used an 'arm bar' technique, grabbing [Mrs. Brown's] arm at the wrist and elbow, pulling her from the vehicle, and spinning her to the ground." *Id.* at 400–01. Mrs. Brown had to undergo surgery to repair severely injured knees, and doctors advised her that she might need knee replacement surgery. *Id.* at 401.

The Browns sued under 42 U.S.C. § 1983, arguing that the municipality failed to adequately screen Officer Burns' background. *Id.* Specifically, "Burns had a record of driving infractions and had pleaded guilty to various driving-related and other misdemeanors, including assault and battery, resisting arrest, and public drunkenness." *Id.* At the time, Oklahoma law did not preclude the hiring of a police officer who had previously committed a misdemeanor. *Id.*

95. *Id.* at 403.

96. *Id.* at 404.

97. *See id.* at 404–05 (noting that when the claim is that a municipal action directly violates federal law "resolving the[] issues of fault and causation is straightforward").

98. *Id.* at 404–07.

99. *Id.*

100. *Id.* at 415–16.

not the culpability required to show the deliberate indifference that a municipality's failure to train might show.<sup>101</sup>

2. *The Court Expanded Section 1983 Liability to Constitutional Violations Stemming from a Municipality's Failure to Train Its Employees*

Having addressed the types of decisions that would give rise to Section 1983 liability,<sup>102</sup> the Court in *City of Canton v. Harris*<sup>103</sup> tackled the novel theory of attaching Section 1983 liability to municipalities where the municipality allegedly failed to train its employees.<sup>104</sup> In *Canton*, police officers arrested Harris, who showed signs that she was suffering from a medical condition.<sup>105</sup> The officers never obtained any medical attention for Harris while she was detained, and an hour after Harris was released from police custody, her family summoned an ambulance.<sup>106</sup> Doctors diagnosed Harris with several "emotional ailments" and hospitalized her for a week.<sup>107</sup> Harris then sued the City of Canton pursuant to Section 1983, alleging that it violated her "right . . . to receive necessary medical attention while in police custody."<sup>108</sup> While the Court did not decide whether Harris could hold Canton liable, it mandated that the deliberate indifference standard would apply to failure-to-train cases,<sup>109</sup> and remanded the case to the Sixth Circuit to decide whether Canton was liable using the deliberate indifference test.<sup>110</sup> The Court held that Section 1983 liability for the failure to train would attach to a municipality where "the failure to train amount[ed] to deliberate indifference to the rights of persons with whom the [municipal employee came] into contact."<sup>111</sup> As with prior decisions regarding Section 1983 municipal liability, the Court sought to narrowly define the circumstances under which municipali-

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101. *Id.* at 407, 409.

102. *See generally* Pembaur v. City of Cincinnati, 475 U.S. 469, 471 (1986) (addressing the question "whether, and in what circumstances, a decision by municipal policymakers on a single occasion may satisfy" the requirements of *Monell*).

103. 489 U.S. 378 (1989).

104. *Id.* at 380.

105. *Id.* at 381.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 388.

110. *Id.* at 392.

111. *Id.* at 388.

ties would be liable for failure to train.<sup>112</sup> The Court stressed that only where a plaintiff could establish deliberate indifference could a municipality's failure to train amount to a municipal policy.<sup>113</sup>

This requirement reflected the Court's opinion that in certain circumstances, "the need for 'more or different training' [might] be so obvious," and the lack of such training "so likely" to cause constitutional violations, that the municipal decision maker "can reasonably be said to have been deliberately indifferent to the need [for more or different training]."<sup>114</sup> It is here that the Court provided its famous hypothetical scenario in which Section 1983 liability would attach to municipalities for a single constitutional violation.<sup>115</sup> Central to the Court's vision of single-incident liability was the notion that by failing to train, where training was obviously necessary, a municipality could be said to have given tacit approval to constitutional violations.<sup>116</sup> In essence, the Court equated the decision not to train, or to provide insufficient training, with an official municipal policy that could cause constitutional harm.<sup>117</sup>

Still, the Court cautioned that proving a particular municipal employee was insufficiently trained would not necessarily give way to liability.<sup>118</sup> The insufficient training would have to actually cause the municipal employee to violate a plaintiff's constitutional rights.<sup>119</sup> The Court conceded that making this determination involved difficult

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112. *See id.* at 380 (holding that "under certain circumstances, [Section 1983 failure to train] liability is permitted by the statute.").

113. *Id.* at 389.

114. *Id.* at 390.

115. The hypothetical situation in which single-incident liability would attach to a municipality reads 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 can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

*Id.* at 390 n.10 (citation omitted).

116. *See id.* at 390 (stating that, where a lack of training will likely lead to constitutional violations, "the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury").

117. *Id.* The Court advised lower courts to focus on the "adequacy of the training program in relation to the tasks the particular [municipal employee] must perform." *Id.*

118. *Id.*

119. *Id.* at 391.

hypothetical calculations.<sup>120</sup> Importantly, however, the Court realized that determining whether a particular training regimen—or lack thereof—caused an actor to violate a plaintiff’s rights, like any other factual consideration, should be handled by the fact finder.<sup>121</sup>

Concurring in part and dissenting in part with the majority opinion in *Canton*, Justice O’Connor stressed that failure-to-train liability might be “proper where [a municipality was] aware of . . . a pattern of constitutional violations involving the exercise of [a municipal employee’s] discretion.”<sup>122</sup> Justice O’Connor looked to lower courts applying the deliberate indifference standard and noted that those courts required at least a pattern of similar incidents sufficient enough to place a municipal policymaker “on notice” of constitutional abuses.<sup>123</sup> Absent from Justice O’Connor’s discussion of the requirement of a pattern of constitutional abuses is any notion that the nature of the prior constitutional abuses be exactly the same.<sup>124</sup> Instead, Justice O’Connor cited lower court opinions that required a showing of a pattern of widespread, similar constitutional violations.<sup>125</sup>

Similarly, in dicta in *Bryan County* the Court suggested that in the context of a failure-to-train theory a “pattern of injuries [was] ordinarily necessary to establish municipal culpability and causation.”<sup>126</sup> The Court, however, reiterated the *Canton* application of single-incident liability by emphasizing that a showing that the constitutional injury at issue was the “highly predictable consequence” of a failure to train could be substituted for demonstrating a pattern of injuries.<sup>127</sup> Under this single-incident liability formulation, deliberate indifference could be established based on the “likelihood” that a constitutional injury would repeat and the “predictability” that a municipal employee lack-

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120. *Id.* The Court stressed that “matters of judgment” would be involved in determining how a “hypothetically well-trained” municipal employee would react in a circumstance that might implicate constitutional rights. *Id.* The Court acknowledged that even an adequately trained employee might violate a plaintiff’s constitutional rights, but ultimately, the Court stressed that the fact finder would be best suited to determine whether the sufficiency of a training regimen was the cause of any constitutional violation. *Id.*

121. *Id.*

122. *Id.* at 397 (O’Connor, J., concurring in part and dissenting in part).

123. *Id.*

124. *See id.* (making no mention of any requirement that the constitutional violations alleged in a pattern be exactly alike, though indicating that similarity of incidents is necessary).

125. *Id.*

126. *Bryan County v. Brown*, 520 U.S. 397, 409 (1997).

127. *Id.* at 409–10.

ing sufficient training would violate a citizen's constitutional rights.<sup>128</sup> In discussing the requisite showing to establish a pattern, the Court never scrutinized the types of evidence at issue in each prior constitutional injury.<sup>129</sup>

*D. Even in Light of a Clear Brady Test, the Court Has Struggled to Reach Consensus and Has Acknowledged Difficulty Applying Brady to Subsequent Cases*

While the *Connick* Court's primary objective was to address municipal liability under the failure-to-train theory, the Court also struggled with its own understanding of the prosecutorial obligations established in *Brady*.

In *Brady*, the Court dealt with a prosecutor's suppression of an extrajudicial confession in a murder trial.<sup>130</sup> The Court held that "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."<sup>131</sup> The Court did not make any determination regarding the actual nature of the evidence in question. Rather, the Court was concerned with the evidence's effect on the criminal defendant's "guilt or . . . punishment."<sup>132</sup>

In *United States v. Agurs*,<sup>133</sup> the Court did away with the request requirement of *Brady* when it determined that, in some cases, a feder-

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128. *Id.* at 409.

129. *See Canton*, 489 U.S. at 397 (O'Connor, J., concurring in part and dissenting in part) (stipulating that municipal discretion should be a feature of each incident in a pattern of constitutional violations rather than the requirement that similar types of evidence be at issue in a municipality's pattern of constitutional violations).

130. 373 U.S. 83, 84 (1963). Brady and his friend Boblit were convicted of first-degree murder and were sentenced to death. *Id.* While Brady confessed to participating in the crime, he maintained that Boblit was the killer. *Id.* Brady's counsel requested Boblit's extrajudicial statements, but the prosecution refused. In one of the withheld extrajudicial statements, Boblit admitted that he was the killer. *Id.* The Court held that the prosecutor's suppression of the statements violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 86.

131. *Id.* at 87.

132. *Id.*

133. 427 U.S. 97 (1976). Linda Agurs was convicted of stabbing Sewell to death. *Id.* at 98. At trial, Agurs's only defense was that Sewell attacked her with a knife first, and that she acted in self-defense when she stabbed Sewell. *Id.* at 100. After Agurs was convicted, the defense discovered that the prosecution had failed to disclose "that Sewell had a prior criminal record that would have further evidenced his violent character." *Id.* Sewell had previously pled guilty to two separate charges of carrying a deadly weapon and one charge of assault. *Id.* at 100-01. Knives were the weapons at issue in each of the deadly weapons charges. *Id.* at 101.



al prosecutor had a constitutional duty to disclose evidence that was favorable to the accused, even in the absence of a specific request for *Brady* material.<sup>134</sup> The Court recognized that there was no “unlimited discovery” requirement for prosecutors,<sup>135</sup> but the Court was ultimately concerned with the prospect of prosecutors possessing exculpatory evidence of which defendants were not aware.<sup>136</sup> In light of this possibility, the Court determined that, where the evidence at issue was “so clearly” exculpatory that it put the prosecution on “notice of a duty” to disclose, the prosecution should disclose regardless of the criminal defendant’s request or lack thereof.<sup>137</sup> Still, the Court established that the evidence at issue had to meet a standard of materiality that if the withheld evidence created a reasonable doubt about the defendant’s guilt, then a *Brady* violation existed.<sup>138</sup> Ultimately, a prosecutor would violate *Brady* where his or her withholding of evidence denied a defendant’s right to a fair trial.<sup>139</sup> Almost immediately after establishing this standard, however, the Court recognized that it was “inevitably imprecise.”<sup>140</sup>

In *Strickler v. Greene*,<sup>141</sup> the Court refined its *Brady* jurisprudence and set forth a three-factor test for analyzing whether a *Brady* violation existed. The Court analyzed *Brady* requirements in the context of contradicting testimonial evidence,<sup>142</sup> and again, the Court focused on the effect of the evidence as opposed to the nature of the evidence.<sup>143</sup> The Court set forth the following test: “[1] [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] pre-

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134. *Id.* at 107–08.

135. *Id.*

136. *Id.* at 106–07.

137. *Id.* at 107.

138. *Id.* at 112.

139. *Id.* at 108.

140. *Id.*

141. 527 U.S. 263 (1999). Tommy Strickler was convicted of murder and sentenced to death after abducting, robbing, and killing Leanne Whitlock. *Id.* at 266. At trial, a witness named Anne Stoltzfus gave detailed testimony about Whitlock’s abduction. *Id.* After trial, Strickler alleged that the prosecution failed to produce evidence consisting of “documents prepared by Stoltzfus, and notes of interviews with her, that impeach[ed] significant portions of her testimony.” *Id.* The Court noted that even absent Stoltzfus’s testimony, the evidence sufficiently supported Strickler’s guilt. *Id.*

142. *See id.* at 282 (observing that conflicting testimony established at least two of the three *Brady* factors).

143. *See id.* at 281–82 (setting out the *Brady* test, which is not concerned with the type of the evidence in question, but rather the effect of the evidence).

judice must have ensued.”<sup>144</sup> Even with this three-part test in place, the *Strickler* Court could not reach unanimity as to whether a *Brady* violation existed in that case.<sup>145</sup> Highlighting the distinction between the Court’s reasoning and his own, Justice Souter wrote: “In the end, however, the Court finds the undisclosed evidence inadequate to undermine confidence in the jury’s sentencing recommendation, whereas I find it sufficient to do that.”<sup>146</sup>

Given that both Section 1983 municipal liability and *Brady* are relatively young in the canon of Supreme Court decisions, the Court has left much to be resolved. The Court has not achieved a comprehensive cure-all to settle impending theories of Section 1983 liability,<sup>147</sup> and the Justices remain divided on where prosecutorial evidentiary obligations lie in the wake of *Brady*.<sup>148</sup>

### III. THE COURT’S REASONING

In *Connick v. Thompson*, the Supreme Court of the United States reversed the judgment of the United States Court of Appeals for the Fifth Circuit and held that a District Attorney’s office could not be held liable under 42 U.S.C. § 1983 for failure to train based on a single *Brady* violation.<sup>149</sup>

Justice Thomas, writing for the majority, determined that Thompson did not prove that District Attorney Connick had actual or constructive notice of the need for *Brady* training.<sup>150</sup> Consequently, Thompson did not prove that Connick was deliberately indifferent to such a need for more or different *Brady* training.<sup>151</sup>

First, the Court affirmed that, as established by *Monell*, under 42 U.S.C. § 1983 a local government could be held liable if the govern-

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144. *Id.*

145. *Compare id.* at 296 (rejecting a showing of “reasonable probability” that disclosure would have altered conviction or sentence), *with id.* at 297 (Souter, J., concurring in part and dissenting in part) (finding “reasonable probability” that disclosure could have altered the sentence). Although he agreed with the majority that the withheld Stoltzfus evidence was not material to Strickler’s guilt, Justice Souter believed that Strickler met the burden of establishing that there was a “reasonable probability that [the evidence] would have led the jury to recommend” a life sentence to the judge as opposed to a death sentence. *Id.* at 297.

146. *Id.* at 301–02 (reflecting further that these “differing conclusions largely reflect different assessments of the significance of jurors probably ascribed to the Stoltzfus testimony”).

147. *See supra* Part II.A–C.

148. *See supra* Part II.D.

149. *Connick v. Thompson*, 131 S. Ct. 1350, 1366 (2011).

150. *Id.* at 1360.

151. *Id.*

ment body deprived a person of rights or caused a person's deprivation of rights.<sup>152</sup> The Court noted, however, that pursuant to *Pembaur*, 42 U.S.C. § 1983 imposes liability on local governments "only for their own . . . acts," and does not hold governments "vicariously liable . . . for their employees' actions."<sup>153</sup> For a plaintiff "to impose liability on local governments under Section 1983," the plaintiff would have to prove that the local government's official policy caused his or her injury.<sup>154</sup> A local government's failure to train employees on their legal obligations to avoid violating a citizen's constitutional rights would be equivalent to an official government policy for Section 1983 purposes only in very limited circumstances.<sup>155</sup> The Court quoted *Canton v. Harris* to establish that under Section 1983 "a municipality's failure to train its employees . . . must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'"<sup>156</sup> A municipality could be liable under Section 1983 only if a plaintiff could prove this deliberate indifference.<sup>157</sup> The Court acknowledged that a pattern of *Brady* violations was necessary in most cases to demonstrate such deliberate indifference, and that absent any notice that a particular type of training was inadequate, a plaintiff could not establish that a local government was deliberately indifferent to the need for better training.<sup>158</sup>

Thompson argued that in the ten years before his armed robbery trial, Louisiana courts "overturned four convictions because of *Brady* violations" committed by Connick's assistant district attorneys.<sup>159</sup> The Court found, however, that Thompson did not prove a pattern of *Brady* violations by the prosecutors in Connick's office.<sup>160</sup> The Court

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152. *Id.* at 1359.

153. *Id.* (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986)) (internal quotation marks omitted).

154. *Id.* "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Id.*

155. *Id.*

156. *Id.* (quoting *Canton v. Harris*, 489 U.S. 378, 388 (1989)). See also *Bryan County v. Brown*, 520 U.S. 397, 410 (1996) ("'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.>").

157. *Connick*, 131 S. Ct. at 1360.

158. See *id.* ("Policymakers' continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the deliberate indifference—necessary to trigger municipal liability." (quoting *Bryan County*, 520 U.S. at 407) (internal quotation marks omitted)).

159. *Id.*

160. *Id.*

rejected Thompson's argument that the prior violations put Connick on notice for a need for better *Brady* training because "[n]one of those [four] cases involved failure to disclose" the type of evidence at issue in Thompson's case.<sup>161</sup> Justice Thomas reasoned that the prior *Brady* violations would have to be "similar to the violation at issue [in Thompson's case to] put Connick on notice that specific [*Brady*] training" was needed to avoid violating a person's constitutional rights.<sup>162</sup>

Next, the Court rejected Thompson's single-incident liability argument, which the Court in *Canton* acknowledged only when the need for training was so obvious that it reflected deliberate indifference.<sup>163</sup> In *Canton*, the Court gave the hypothetical example of a city sending armed police officers, who were untrained about the constitutional limits of their power, into the public to capture felons.<sup>164</sup> The *Canton* Court determined that given the obviously high probability of a police force's "attempt to arrest . . . felons and the predictability that an officer [without specific training would] violate a citizen['s] rights, . . . a city's decision not to train [police] officers about [the] constitutional limits" of their power could establish that the city was deliberately indifferent to the "highly predictable consequence" of police officers violating citizens' rights.<sup>165</sup> With the *Canton* hypothetical in mind, Justice Thomas acknowledged that local governments could be liable under Section 1983 without proof of a pattern of violations in such rare circumstances in which a government's failure to train its employees would obviously lead to violations of citizens' constitutional rights, as in the deadly force example given in *Canton*.<sup>166</sup> The *Connick* Court was not convinced, however, that the failure to train prosecutors about *Brady* violations fell within that limited circumstance in which a lack of training would obviously lead to constitutional violations.<sup>167</sup>

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161. *Id.* (observing that none of the prior cases "involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind").

162. *Id.* Justice Thomas cites no authority that requires or gives any indication that the evidence in the pattern of constitutional violations must be similar to the evidence in the alleged constitutional violation at issue to put the municipality on notice that more training is necessary. *See id.*

163. *Id.* at 1361.

164. *See supra* note 115.

165. *Connick*, 131 S. Ct. at 1361 (quoting *Bryan County v. Brown*, 520 U.S. 397, 409 (1996) (internal quotation marks omitted) (describing the reasoning in *Canton*)).

166. *See id.* (recognizing the validity of the deadly force example as creating "circumstances [where] there is an obvious need for some form of training").

167. *Id.*

The Court reasoned that there was no “obvious need for specific legal training” because, unlike an armed police officer who was unfamiliar with constitutional limitations, a lawyer was already “trained in the law and equipped with the tools to interpret and apply legal principals, understand constitutional limits, and exercise legal judgment.”<sup>168</sup> To illustrate that a prosecutor’s office could not be liable for a single *Brady* violation for failure to train, the Court declared that even novice lawyers were already well trained to understand *Brady* violations.<sup>169</sup> The Court reasoned that a law school education, combined with the requirement that lawyers pass the bar exam and satisfy continuing legal education requirements, was enough training to ensure that lawyers were competent to find, understand, and apply legal rules.<sup>170</sup> The Court concluded that in the absence of a pattern of *Brady* violations, a District Attorney could rely on his or her prosecutors’ professional training as sufficient for those prosecutors to understand *Brady*’s requirements.<sup>171</sup> Further, the Court reasoned that Thompson’s showing that the *Brady* obligations might be unclear was, by itself, insufficient to show that a District Attorney’s failure to train proved deliberate indifference.<sup>172</sup> Thompson was required to establish that Connick had notice that, absent training on *Brady* violations, it was obvious that prosecutors would violate *Brady*’s requirements.<sup>173</sup>

The Court acknowledged that prosecutors would not always make the right decision with regard to avoiding *Brady* violations, but the Court would not allow government liability based on Thompson’s argument that additional *Brady* training might have helped prosecutors make “difficult decisions.”<sup>174</sup> In its final assessment, the Court acknowledged that Connick’s prosecutors failed to carry out their ethical responsibilities, but reiterated that those ethical failures were not at issue in Thompson’s case.<sup>175</sup> The only question before the Court

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168. *Id.*

169. *Id.* at 1361–62 (citing *United States v. Cronin*, 466 U.S. 648, 658, 664 (1984)).

170. *Id.* at 1361.

171. *Id.* at 1363.

172. *Id.* at 1363–64.

173. *Id.* at 1365. In a concurring opinion, Justice Scalia joined the majority opinion in its entirety, but wrote separately only to rebut the dissent. *Id.* at 1366 (Scalia, J., concurring). Justice Scalia criticized the dissent for what he called an “excavation of the trial record” and proposed that in the present case “[t]here was probably no *Brady* violation at all . . . .” *Id.* at 1366, 1369. Justice Scalia reasoned that there was no Supreme Court precedent for requiring prosecutors to produce “untested” evidence under *Brady*, and that Connick could not have been put on notice to train his prosecutors on a requirement that had never been recognized by the Court. *Id.* at 1369.

174. *Id.* at 1363–64 (majority opinion).

175. *Id.* at 1365–66.

was “whether Connick, as the policymaker for the district attorney’s office, was deliberately indifferent to the need to train the attorneys under his authority.”<sup>176</sup> The Court ultimately decided that Connick was not.<sup>177</sup>

In a dissenting opinion, Justice Ginsburg stated that she would have affirmed the judgment of the Fifth Circuit awarding Thompson damages.<sup>178</sup> Justice Ginsburg concluded that the prosecutors’ concealment of exculpatory evidence for nearly two decades indicated that members of Connick’s office disregarded certain *Brady* requirements.<sup>179</sup> Next, Justice Ginsburg detailed the *Brady* violations that the prosecutors perpetrated, in the context of the case’s procedural history.<sup>180</sup> Finally, Justice Ginsburg rejected the majority opinion’s argument that the failure to train on the obligations of *Brady* would not obviously lead to violations of *Brady*’s constitutional requirements.<sup>181</sup> Justice Ginsburg argued that Connick’s novice prosecutors were not as well-prepared to understand *Brady* as the majority assumed, noting that even Connick conceded “that his prosecutors, because of their inexperience, were not so equipped.”<sup>182</sup> Further, given the difficulty any attorney would encounter when meeting *Brady*’s requirements, Justice Ginsburg stressed the importance of adequate training.<sup>183</sup> Justice Ginsburg also rejected the majority’s determination that a pattern

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176. *Id.* at 1366.

177. *Id.*

178. *Id.* at 1387 (Ginsburg, J., dissenting).

179. *Id.* at 1370.

180. *Id.* at 1371–76. Before Thompson’s armed robbery trial, he filed a motion requesting “access to all materials and information” favorable to him, evidence “relevant to [his] guilt or punishment, as well as . . . results or reports” regarding scientific tests. *Id.* at 1372. Connick’s prosecutors did not allow Thompson to inspect the robber’s blood. *Id.* Connick’s prosecutors officially granted Thompson permission to inspect the blood evidence, but someone signed the evidence out from the property room and did not return it until the day before Thompson’s trial. *Id.* at 1372–73. Prosecutors did not inform Thompson about the blood evidence’s location “and its . . . removal from the property room.” *Id.* at 1373. The report on the blood evidence clearly identified the robber’s blood type, and Connick’s prosecutors never provided the report to Thompson. *Id.* Prosecutors also withheld police reports that detailed statements by the eyewitness to the murder. *Id.* at 1371. These reports established that eyewitnesses had described a suspect whose physical description did not match Thompson. *Id.* Further, Deegan, a prosecutor in Thompson’s armed robbery trial, admitted that he had purposely suppressed blood evidence that would have exculpated Thompson. *Id.* at 1374.

181. *See id.* at 1382–87 (applying the *Canton* deliberate indifference standard to the conduct of District Attorney Connick’s prosecutors and concluding that single-incident liability would have been appropriate).

182. *Id.* at 1386.

183. *Id.*

of *Brady* violations was necessary to show deliberate indifference given that the text of 42 U.S.C. § 1983 did not contain such a limitation.<sup>184</sup>

#### IV. ANALYSIS

In *Connick v. Thompson*, the Supreme Court excised prosecutors' *Brady* violations from the limited class of circumstances that would merit single-incident liability under 42 U.S.C. § 1983.<sup>185</sup> In rejecting the dissent's correct assertion that prosecutorial misconduct should fall within this class, which was first illustrated by the contentiously debated *Canton* hypothetical, the majority made one of the Supreme Court's most puzzling arguments regarding the sufficiency of the legal training one receives in law school,<sup>186</sup> virtually immunizing prosecutors from Section 1983 liability for *Brady* violations.<sup>187</sup> In its next misstep, the Court left only confusion for lower courts to fill a gaping chasm in Section 1983 jurisprudence by deciding that a plaintiff could not establish a pattern of *Brady* violations where the evidence in the previous violations was "not similar" to the evidence at issue, without discussing the requisite level of similarity.<sup>188</sup> Lastly, without any discussion of the trial court's instruction on the deliberate indifference test, the Court incorrectly set aside a jury's determination that Harry Connick Sr., the Louisiana District Attorney, was deliberately indifferent to the need to train his prosecutors on *Brady* violations.<sup>189</sup>

##### A. *The Court Erred in Holding That a Municipality's Failure to Train Prosecutors on Brady Violations Was Not an Obvious Circumstance That Was Likely to Deprive Defendants of Their Constitutional Rights*

The Court first signaled what single-incident liability might look like in its *Canton* hypothetical.<sup>190</sup> This single-incident liability theory was premised on the reality that a "need for more or different training [might be] so obvious, and the inadequacy so likely to result in the violation of constitutional rights" that a municipality could exhibit

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184. *Id.*

185. *Id.* at 1366 (majority opinion).

186. *Cf.* Note, *Leading Cases*, 125 HARV. L. REV. 331, 331 (2011) ("[T]he Court found that general lawyerly skills justify a presumption that prosecutors are adequately trained to secure *Brady* rights, its support for this proposition is deficient, and its reading of doctrine is unduly narrow.").

187. *See infra* Part IV.A.

188. *See infra* Part IV.B.

189. *See infra* Part IV.C.

190. *See supra* note 115.

deliberate indifference by choosing not to train.<sup>191</sup> In *Connick*, a jury approved Thompson's argument that Connick was deliberately indifferent in failing to train his prosecutors on *Brady* obligations.<sup>192</sup> In light of evidence suggesting the pervasive disregard and misunderstanding of *Brady* in the District Attorney's office,<sup>193</sup> and the disagreements on the scope of *Brady* even among Justices of the Supreme Court,<sup>194</sup> the Court should have included prosecutorial misconduct within the ambit of single-incident Section 1983 liability. This outcome is especially warranted given that *Brady* violations are "pervasive and recurring,"<sup>195</sup> and courts often apply *Brady* inconsistently,<sup>196</sup> creating distrust in a prosecutor's ability to seek justice.<sup>197</sup>

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191. *Canton v. Harris*, 489 U.S. 378, 390 (1989).

192. See *supra* text accompanying note 27.

193. See *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011) (noting that "during the ten years preceding [Thompson's] armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office"). See also *id.* at 1378 (Ginsburg, J., dissenting) ("[E]ven at trial Connick persisted in misstating *Brady*'s requirements."); *id.* at 1379 ("[Assistant District Attorneys] Dubelier and Williams learned the prosecutorial craft in Connick's Office, and . . . their testimony manifested a woefully deficient understanding of *Brady*."); *id.* at 1380 ("[A] survey of assistant district attorneys in the [Louisiana District Attorney's] Office revealed that more than half felt that they had not received the training they needed to do their jobs.").

194. Compare *id.* at 1358 (majority opinion) (acknowledging that a *Brady* violation took place) with *id.* at 1369 (Scalia, J., concurring) (declaring that "[t]here was probably no *Brady* violation at all") and *id.* at 1370–81 (Ginsburg, J., dissenting) (arguing that the prosecutors egregiously violated *Brady*). See also *Strickler v. Greene*, 527 U.S. 263, 296 (1999) (holding that the plaintiff did not prove a *Brady* violation because he did not establish that there was a sufficient likelihood that his conviction or sentence would have been different had the evidence in question been disclosed); *id.* at 301–02 (Souter, J., concurring in part and dissenting in part) (concluding based on the same facts that a *Brady* violation did exist).

195. See Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 687 (2006) (noting that "despite reversals, guidelines, ethical oversight, and hortatory appeals to prosecutors to seek justice, *Brady*'s promise of transforming criminal trials from a 'sporting' theory of litigation into a genuine search for the truth has largely been unkept. Indeed, by exposing the seamy, secretive, and cavalier disregard by prosecutors of the rights of criminal defendants, *Brady* has engendered widespread cynicism about the capacity of prosecutors to comply with their constitutional and ethical obligations, as well as the willingness of courts and disciplinary agencies to hold prosecutors accountable for their derelictions.").

196. *Id.* at 689 (arguing that "[e]ven in those infrequent instances when a prosecutor's suppression of evidence is discovered, the judiciary's enforcement of *Brady* has been inconsistent, confusing, and increasingly deferential to the prosecutor's discretion").

197. Cf. Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 421, 442 (noting that prosecutors have little incentive to comply with *Brady* because of little oversight and almost no retribution for violations, and that *Brady* violations can contribute to "the erosion of public confidence in the ability of the judicial system to convict only the guilty and free the innocent").



If “tort remedies offer what is perhaps the best hope of achieving increased control over police illegality,”<sup>198</sup> the same should be true of illegality within any municipal organization that regularly affects the constitutional rights of citizens, especially a District Attorney’s office.<sup>199</sup> To counter this argument, Justice Thomas strayed far from the facts in Thompson’s case and crafted an argument that could only hold water if students learned and practiced the law in a vacuum. Justice Thomas’s view of prosecutorial misconduct was that district attorneys could not be responsible for the training of even the most novice attorney.<sup>200</sup> In Justice Thomas’s opinion, prosecutorial misconduct could not conceptually stem from a prosecutor’s lack of training, because, among other factors, all attorneys graduate from law school with sufficient training to handle any complex set of legal concepts, such as *Brady*.<sup>201</sup> Justice Thomas’s contention does not account for the fact that even the most well-trained attorneys arrive at different, and often, contradictory understandings of the same legal concept.<sup>202</sup> Connick conceded that his prosecutors were burdened by large case loads.<sup>203</sup> This fact puts into doubt Justice Thomas’s portrayal of novice lawyers “exercise[ing] legal judgment,”<sup>204</sup> free from the real-

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198. Foote, *supra* note 64, at 516.

199. See Connick v. Thompson, 131 S. Ct. 1350, 1385 (2011) (Ginsburg, J., dissenting) (“[A] municipality that empowers prosecutors to press for a death sentence without ensuring that those prosecutors know and honor *Brady* rights may be no less ‘deliberately indifferent’ to the risk of innocent lives.”); Jones, *supra* note 197, at 421 (“[T]he criminal justice system has not developed effective reforms to provide a remedy for defendants or appropriately sanction prosecutors for concealing evidence favorable to the defense.”).

200. *Connick*, 131 S. Ct. at 1363 (observing that “[i]n light of [the existing] regime of legal training and professional responsibility, recurring constitutional violations are not the ‘obvious consequence’ of failing to provide prosecutors with formal in-house training about how to obey the law”) (citing *Bryan County v. Brown*, 520 U.S. 397, 490 (1997)).

201. *Id.* at 1361–62 (2011).

202. See *supra* note 194. Justice Scalia, in his concurring opinion in *Connick*, relied heavily on *Arizona v. Youngblood*, 488 U.S. 51 (1988), in determining that there was probably no *Brady* violation in Thompson’s case. *Id.* at 1369 (Scalia, J., dissenting). *Youngblood*, however, did not deal with a straightforward *Brady* violation. It dealt with a police force’s failure to preserve semen samples that may have been “useful” to the defendant. See *Youngblood*, 488 U.S. at 55, 58 (observing that “[t]here is no question but that the State complied with *Brady* . . . here”). By contrast, *Brady* does not address usefulness, but rather whether evidence is exculpatory. *Brady v. Maryland*, 373 U.S. 83, 86–88 (1963). In Thompson’s case, the evidence at issue was clearly exculpatory.

203. *Connick*, 131 S. Ct. at 1378 (Ginsburg, J., dissenting).

204. See *id.* at 1361–63 (majority opinion) (portraying novice attorneys as possessing sufficient legal training to handle complex legal issues, while neglecting to address the work pressures and lack of understanding that were prevalent in Connick’s office). See also *Leading Cases*, *supra* note 186, at 337 (highlighting that Justice Thomas’s opinion in *Connick* was “flawed” because “it depends on the factual premise that legal training is sufficient to justify a presumption of adequacy for all prosecutors”).

world pressures that Justice Ginsburg acknowledged.<sup>205</sup> Further, Justice Thomas's reflections on the training power of continuing legal education<sup>206</sup> is less persuasive given the reality that "Louisiana did not require continuing legal education at the time of Thompson's trials."<sup>207</sup> Justice Thomas posits yet another argument for the infallibility of legal training: attorneys often get on-the-job training.<sup>208</sup> While Connick's office did have such training in place (a conference in which prosecutors would pre-try cases with a superior), Dubelier and Williams, the prosecutors in Thompson's trial, did not take part in this program before Thompson's case.<sup>209</sup>

When one sets aside Justice Thomas's argument and plugs the facts of *Connick* into the single-incident inquiry established in *Canton*, it becomes clear how dangerous an untrained prosecutor can be when wielding unchecked power to violate constitutional rights. The *Canton* single-incident liability inquiry requires that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."<sup>210</sup> This inherently requires that courts engage in a factual analysis.<sup>211</sup> In her dissent in *Connick*, Justice Ginsburg highlighted the vital facts necessary for such an inquiry. First, Connick acknowledged that his understanding of *Brady* was flawed.<sup>212</sup> Second, "[t]he testimony of other leaders in the District Attorney's Office revealed similar misunderstandings."<sup>213</sup> Lastly, Connick did not have an

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205. *Id.* at 1378, 1384 (Ginsburg, J., dissenting) (highlighting the day-to-day pressures that prosecutors often work under, and the actual pressures that prosecutors in District Attorney Connick's office faced, such as large case loads and pressure to gain convictions).

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

207. *Id.* at 1381 (Ginsburg, J., dissenting).

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

209. *Id.* at 1380 (Ginsburg, J., dissenting).

210. *Canton v. Harris*, 489 U.S. 378, 390 (1989).

211. *See id.* at 390 ("[T]he focus must be on adequacy of the training program in relation to the tasks the particular officers must perform.").

212. *Connick*, 131 S. Ct. at 1378 (Ginsburg, J., dissenting) ("Connick admitted to the jury that his earlier understanding of *Brady*, conveyed in prior sworn testimony, had been too narrow."); *id.* ("Connick urged that there could be no *Brady* violation arising out of 'the inadvertent conduct of [an] assistant under pressure with a lot of case load.'"). The trial court corrected Connick's belief for the jury when it instructed: "in determining whether there has been a *Brady* violation, the 'good or bad faith of the prosecution does not matter.'" *Id.* (citations omitted).

213. *Id.* at 1378-79 (providing numerous examples of *Brady* misunderstandings within the Louisiana District Attorney's office).

adequate system in place to ensure prosecutors understood *Brady*.<sup>214</sup> An expert witness described Connick's oversight of *Brady* competence as "the blind leading the blind."<sup>215</sup> Justice Thomas's conclusory response to these facts is puzzling: "it is undisputed here that the prosecutors in Connick's office were familiar with the general *Brady* rule."<sup>216</sup>

The facts of *Connick* illustrate the fallacy of Justice Thomas's contention that all prosecutors graduate "equipped . . . to know what *Brady* entails."<sup>217</sup> He admonished the dissent for not understanding the subtle nuances of *Canton*, stating, "The *Canton* hypothetical assumes that the armed police officers have no knowledge at all of the constitutional limits on the use of deadly force."<sup>218</sup> This assumption may be true, but the *Canton* hypothetical might also suggest that police officers, like any other municipal employees tasked with making life-and-death constitutional decisions, need continual monitoring and assessment of their understanding of constitutional obligations. Under this formulation—the same formulation under which a jury found Connick deliberately indifferent—an untrained prosecutor and an untrained police officer have the same potential to violate a citizen's constitutional rights.<sup>219</sup> Seeking to distinguish police officers from prosecutors, Justice Thomas declared, "[a]rmed police must sometimes make split-second decisions with life-or-death consequences."<sup>220</sup> But, as Justice Ginsburg correctly pointed out, "a municipality that empowers prosecutors to press for a death sentence without ensuring that those prosecutors know and honor *Brady* rights may be no less 'deliberately indifferent' to the risk to innocent lives."<sup>221</sup>

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214. *Id.* at 1380 ("Prosecutors confirmed that training in the District Attorney's Office, overall, was deficient."); *id.* at 1379 ("Connick has effectively conceded that *Brady* training in his Office was inadequate.") (citing Tr. of Oral Arg. 60.); *id.* at 1381 ("Louisiana did not require continuing legal education at the time of Thompson's trials. Primary responsibility for keeping prosecutors *au courant* with developments in the law, therefore, resided in the District Attorney's Office.") (citations omitted).

215. *Id.* at 1380.

216. *Id.* at 1363 (majority opinion). Indeed, Justice Thomas enlists no support from the record to support this declaration. *See id.*

217. *Id.*

218. *Id.*

219. *See id.* at 1385 (Ginsburg, J., dissenting).

220. *Id.* at 1361 (majority opinion).

221. *Id.* at 1385 (Ginsburg, J., dissenting). *Cf.* *Woodward v. Corr. Med. Servs. of Ill.*, 368 F.3d 917, 927 (7th Cir. 2004) (finding sufficient evidence that a municipality should have been on notice of the risk presented by a lack of nurse training to handle mentally ill inmates). The court in *Woodward* would not give the hospital a "one free suicide" pass despite the fact that no one had committed suicide in the past. *Id.* at 929. It would seem as

In this regard, the Sixth Circuit correctly held in *Moldowan v. Warren*<sup>222</sup> that *Brady* violations were a likely consequence of a lack of sufficient training.<sup>223</sup> The *Moldowan* court recognized correctly that Section 1983 would be an effective guardian of constitutional rights only if courts held municipalities accountable for *Brady* violations.<sup>224</sup> In addressing the failure-to-train theory, the court highlighted *Canton*'s fact-intensive analysis, which focused on the sufficiency of the training program in place in relation to the task the municipal employee had to perform.<sup>225</sup> The *Moldowan* court recognized *Canton*'s requirement that, given police officers' duty under *Brady* to produce evidence favorable to the accused, municipalities also had a "corresponding obligation" to sufficiently train officers on this duty.<sup>226</sup> The municipality in Thompson's case had a similar duty to sufficiently train its prosecutors.

The Sixth Circuit later solidified this approach in *Gregory v. Louisville*,<sup>227</sup> when it determined that "[w]idespread officer ignorance on the proper handling of exculpatory materials would have the 'highly predictable consequence' of due process violations."<sup>228</sup> Key to the *Gregory* court's analysis was the likelihood that ignorance of *Brady*, as shown by a complete absence of training, would likely cause constitutional violations.<sup>229</sup> Just as it did in *Moldowan*, the Sixth Circuit concluded that this inquiry would necessitate a factual analysis of the municipality's training program.<sup>230</sup>

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though had Louisiana executed Thompson, the Court would find no qualms in giving the District Attorney a "one free execution pass."

222. 578 F.3d 351 (6th Cir. 2009). In *Moldowan*, Jeffrey Moldowan was convicted of kidnapping, assault with intent to commit murder, and criminal sexual conduct. *Id.* at 365. After spending almost twelve years in prison, Moldowan was acquitted of all charges. *Id.* at 366. Moldowan then sued the City of Warren, among others, after discovering that those involved with his prosecution had withheld exculpatory testimonial evidence. *Id.* at 376.

223. *Id.* at 393.

224. *Id.* at 377.

225. *Id.* at 393.

226. *Id.*

227. 444 F.3d 725 (6th Cir. 2006). William Gregory sued the City of Louisville and other municipal agents after spending more than seven years in custody for a conviction that was later vacated after DNA testing proved his innocence. *Id.* at 735.

228. *Id.* at 753.

229. *Id.*

230. *Id.* at 753–54 (recognizing that the absence of expert testimony describing how exculpatory evidence was handled and lack of training provided "sufficient evidence to survive summary judgment on . . . failure to train allegations").

In both cases, the Sixth Circuit applied the *Canton* single-incident liability theory to find that *Brady* violations *did* fit within that theory.<sup>231</sup> Further, in both cases, the Sixth Circuit correctly acknowledged that *Canton* demanded a factual analysis of the training program at issue.<sup>232</sup> Justice Thomas, however, failed to engage in such an analysis, and his opinion ignored both Sixth Circuit cases.<sup>233</sup>

*B. By Suggesting That a History of Brady Violations Was Insufficient to Establish a Pattern of Constitutional Violations Due to Dissimilar Types of Evidence, the Court Made It Unclear for Future Courts What Such a Pattern of Violations Would Look Like*

Justice Thomas also erred in ruling that Thompson could not prove a pattern of *Brady* violations despite the fact that Louisiana courts overturned *four* previous convictions prosecuted by Connick's office because of *Brady* violations.<sup>234</sup> Some have argued that this proposition does not comport with the reality of the pervasive misconduct taking place in Connick's office.<sup>235</sup> Further, the Court has never tailored a *Brady* standard based on the type of evidence involved.<sup>236</sup> Therefore, Justice Thomas's stipulation that only similar *Brady* evidence would be required to put Connick on notice has no basis in the Court's *Brady* jurisprudence.

Justice Thomas demands that "[a] pattern of *similar* constitutional violations by untrained employees is 'ordinarily necessary' to dem-

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231. See *Moldowan*, 578 F.3d at 393; *Gregory*, 444 F.3d at 753–55 (applying the *Canton* single-incident liability inquiry to the facts of the case). See also *Moldowan*, 578 F.3d at 393 n.19 (holding the municipality liable even though *Moldowan* neither alleged nor proved a pattern of constitutional violations).

232. Cf. *Leading Cases*, *supra* note 186, at 337 ("Following *Canton*, the question whether a need for training is 'obvious' thus involves probabilistic reasoning about the likelihood of injury given repeated iterations of certain scenarios . . . and the likelihood that officials will abide by constitutional requirements absent specific guidance.").

233. See generally *Connick v. Thompson*, 131 S. Ct. 1350, 1355–66 (2011) (failing to analyze the adequacy of the specific training program in Connick's office and instead arguing for the proposition that lawyers generally receive good training).

234. *Id.* at 1360.

235. See Dahlia Lithwick, *Cruel but Not Unusual: Clarence Thomas Writes One of the Meanest Supreme Court Decisions Ever*, SLATE (April 1, 2011, 7:43 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/04/cruel\\_but\\_not\\_unusual.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html) ("In the 10 years preceding Thompson's trial, Thomas acknowledges, 'Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick's office.' Yet somehow this doesn't add up to a pattern of *Brady* violations in the office, because the evidence in those other cases wasn't blood or crime lab evidence. Huh?").

236. See *supra* Part II.D.

onstrate deliberate indifference for purposes of failure to train.”<sup>237</sup> The Court’s decision in *Bryan County*, however, specifically noted that a “pattern of *injuries*,” and not the strictly defined pattern of similar violations that Justice Thomas demands, would be “ordinarily necessary to establish municipal culpability and causation.”<sup>238</sup> In other words, so long as each of the previous *Brady* violations caused a constitutional injury, the type of evidence withheld would be immaterial.<sup>239</sup> Further, it would seem that Justice Thomas construes “violation” too narrowly in *Connick* given that the four previous violations were similar in that they violated *Brady*’s duty to disclose exculpatory evidence.<sup>240</sup> Bringing the discussion on municipal liability back to its intended function, Justice Ginsburg reminds the Court that 42 U.S.C. § 1983 never required a pattern of violations.<sup>241</sup>

This might seem like an insignificant distinction, but Justice Thomas bases his argument on a false notion that a single-incident liability inquiry into *Brady* violations requires a pattern of similar types of *evidence*.<sup>242</sup> However, what the Court actually envisioned in *Bryan County* was that Section 1983 failure-to-train liability required a pattern of *injuries*.<sup>243</sup> Justice Thomas accuses the dissent in *Connick* of misunderstanding the nuances of his argument,<sup>244</sup> yet he misunderstands the nuances of the Court’s own language in prior decisions.<sup>245</sup> This misunderstanding is especially problematic when one considers the contradiction inherent in declaring that evidence of four *Brady*

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237. *Connick*, 131 S. Ct. at 1360 (citing *Bryan County v. Brown*, 520 U.S. 397, 409 (1996)) (emphasis added).

238. *Bryan County*, 520 U.S. at 409 (emphasis added).

239. *Cf. id.* (referencing a “violation of a specific constitutional or statutory right”).

240. *See* Complaint at 21, 22, *Thompson v. Connick*, 2005 WL 3541035, No. Civ.A.03-2045 (E.D. La. Nov. 15, 2005) (detailing the history of misconduct in District Attorney Connick’s office). “[I]t was reported that after being convicted and imprisoned in 1975, Gregory Bright and Earl Truvia recently were released from prison after their convictions were thrown out on account of the failure of prosecutors from the Orleans Parish District Attorney’s Office to turn over exculpatory evidence.” *Id.* at 21 (citing *No Retrial for Two Freed from Prison in 1975 Case*, BATON ROUGE ADVOCATE, June 25, 2003, available at 2003 WL 4877582). On another occasion prosecutors in Connick’s office had “obtain[ed] the conviction and death sentence of [a] sixteen-year old defendant” by withholding exculpatory evidence. *Id.* at 21 (citing *Cousin v. Small*, 325 F.3d 627, 630 (5th Cir. 2003)). Thompson’s complaint reveals numerous sources that characterize Connick’s office as having a reputation for misconduct with regard to exculpatory evidence. *Id.* at 22.

241. *Connick*, 131 S. Ct. at 1386 (Ginsburg, J., dissenting).

242. *See supra* text accompanying note 237.

243. *See supra* text accompanying note 238.

244. *See Connick*, 131 S. Ct. at 1363–64 (describing the “nuance[d]” difference between the *Brady* training of police officers and prosecutors, and asserting that the dissent “misses the point”).

245. *See supra* text accompanying note 238.

violations does not constitute a pattern.<sup>246</sup> If this is so, what *would* a pattern of *Brady* violations look like? Justice Thomas does not offer a clear answer.<sup>247</sup>

*C. Because Determining “Deliberate Indifference” Requires a Fact-Intensive Inquiry, the Court Should Not Have Disturbed the Jury’s Conclusion That the District Attorney’s Office Was Deliberately Indifferent to the Need for Brady Training*

In *Canton*, in which the Court announced the test for determining Section 1983 liability under a failure-to-train theory, the Court also set the precedent, though not emphatically, that where lower courts applied the deliberate indifference test correctly, those particular judges and juries would be best equipped to decide, based on the facts, whether a municipality was deliberately indifferent in failing to train.<sup>248</sup> In *Connick*, however, the Court broke from this precedent, and, finding no issue with whether the trial court correctly applied the deliberate indifference test, completely set aside the jury’s finding that Connick was deliberately indifferent to the need to train his prosecutors, even though the jury followed the correct deliberate indifference standard.<sup>249</sup>

Why did the *Connick* Court overlook this part of the *Canton* opinion? The answer is unclear, but a hint lies in Justice Scalia’s positions in both the *Canton* and *Connick* decisions. In *Canton*, Justice Scalia joined Justice O’Connor’s concurrence, which would have had the Court directly apply the deliberate indifference test to the facts of *Canton* to decide whether the municipality was indifferent to the plaintiff’s constitutional rights.<sup>250</sup> In *Connick*, Justice Thomas did just

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246. See *Leading Cases*, *supra* note 186, at 337–38 (“[B]y discounting the probative value of a single discovered violation, holding that recently proven violations of the same right do not provide notice unless the right was violated in a similar manner, and treating even cursory training as presumptively adequate, *Connick* erects a much higher barrier to recovery than *Canton* contemplates for violations resulting from municipal decisions not to train.”).

247. See *Connick*, 131 S. Ct. at 1360.

248. See *Canton v. Harris*, 489 U.S. 378, 391 (1989) (deciding that the task of evaluating the relationship between lack of training and a plaintiff’s injury was one for the judge and jury of the lower court).

249. See *Connick*, 131 S.Ct. at 1365 (describing lower court reliance on evidence as “erroneous”); see also *Thompson v. Connick*, 553 F.3d 836, 861 (5th Cir. 2008) (determining that the trial court correctly elaborated the requirements of deliberate indifference that comported with the Supreme Court’s precedent). The Fifth Circuit did not find reversible error in the trial court’s instructions. *Id.* at 863.

250. *Canton*, 489 U.S. at 394 (O’Connor, J., concurring in part and dissenting in part).

that, setting aside the jury's determination<sup>251</sup>—which the majority in *Canton* would not have done.<sup>252</sup>

Justice Ginsburg provides “the more persuasive [opinion],”<sup>253</sup> however, correctly noting that there was “no cause to upset” the jury's verdict,<sup>254</sup> which was based on abundant evidence that the District Attorney's office was deliberately indifferent to the need for *Brady* training.<sup>255</sup> Guided by the trial court's three part instruction,<sup>256</sup> the jury reasonably concluded that Connick was deliberately indifferent.<sup>257</sup> Even after Justice Ginsburg revealed the long factual history of the prosecutors' egregious constitutional violations and misunderstanding of *Brady*,<sup>258</sup> Justices Thomas and Scalia found it hard to see how Connick could be on notice that his prosecutors were ill-trained.<sup>259</sup> Some have posited that the only way Justices Thomas and Scalia could have portrayed the Louisiana District Attorney's Office as having such

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251. See *Connick*, 131 S. Ct. at 1366 (reversing the judgment of the Fifth Circuit, which upheld Thompson's damage award from the district court).

252. See *Canton*, 489 U.S. at 392 (ruling that whether the plaintiff was able to prove deliberate indifference was a matter for the lower court, as opposed to the Supreme Court).

253. Editorial, *Failure of Empathy and Justice: The Court Refuses to See a Pattern of Abuse by Prosecutors Determined to Win at All Costs*, N.Y. TIMES, Apr. 1, 2011, at A26. See also *Leading Cases*, *supra* note 186, at 337 (calling the majority's opinion “unpersuasive”).

254. *Connick*, 131 S. Ct. at 1377 (Ginsburg, J., dissenting).

255. *Id.* at 1370.

256. The trial court instructed the jury as follows:

Deliberate indifference requires a showing of more than negligence or even gross negligence. For liability to attach because of a failure to train, the fault must be in the training program itself, not in a particular prosecutor. In order to find that the district attorney's failure to adequately train, monitor, or supervise amounted to deliberate indifference, you must find that Mr. Thompson has proved each of the following three things by a preponderance of the evidence:

First: The District Attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to an accused.

Second: The situation involved a difficult choice, or one that prosecutors had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed.

Third: The wrong choice by a prosecutor in that situation will frequently cause a deprivation of an accused's constitutional rights.

*Thompson v. Connick*, 553 F.3d 836, 860 (5th Cir. 2008).

257. See *id.* at 861, 863 (concluding that the trial court correctly elaborated the requirements of deliberate indifference that comported with the Supreme Court's precedent, and finding no reversible error in the trial court's deliberate indifference instruction).

258. *Connick*, 131 S. Ct. at 1371–87 (Ginsburg, J., dissenting).

259. See *id.* at 1360 (majority opinion) (declaring that despite four previous *Brady* violations, Connick could not be “put on . . . notice” that his prosecutors needed “specific training”); *id.* at 1366 (Scalia, J., concurring) (stating that there was “no pattern of [*Brady*] violations” to put Connick “on notice”).



clean hands was “by willfully ignoring [the] entire trial record.”<sup>260</sup> In fact, Justice Scalia was puzzled by the dissent’s “lengthy excavation of the trial record”<sup>261</sup> as though one could determine deliberate indifference without the aid of facts.<sup>262</sup> In light of the prosecutors’ many violations, Justice Scalia’s confusion seems highly disingenuous. In the end, Justice Thomas and Justice Scalia’s misapplication of Section 1983 jurisprudence<sup>263</sup> “weakens . . . municipal liability” to the point of it being a historical relic with no teeth to bite into future acts of even the most egregious prosecutorial misconduct.<sup>264</sup>

Applying Justice O’Connor’s reasoning in her *Canton* dissent, if Thompson established that “the facts available to [Connick] put [him] on actual or constructive notice” that his prosecutors needed more or different *Brady* training, the District Attorney’s office would clearly be liable under Section 1983.<sup>265</sup> Even assuming that Thompson could not hold the District Attorney’s office liable based on one *Brady* violation, the Court could have complied with *Canton* and remanded the case for a lower court to decide whether Thompson *did* establish a pattern of *Brady* violations.<sup>266</sup>

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260. Lithwick, *supra* note 235.

261. *Connick*, 131 S. Ct. at 1366 (Scalia, J., concurring).

262. The *Canton* Court acknowledged the difficulty of determining whether a municipality’s failure to train was the cause of an alleged constitutional injury, but just as with other fact-intensive determinations, it concluded that a judge and jury were best suited to make such determinations. *Canton v. Harris*, 489 U.S. 378, 391 (1989).

263. See *Leading Cases*, *supra* note 186, at 338 (“The Court’s decision to constrict municipal liability more than precedent requires is particularly imprudent in light of § 1983’s purposes. *Connick* displays an unalloyed emphasis on federalism and government efficiency, but these are not the only principles that animate § 1983, the basic objective of which is to create remedies to effectuate rights, like *Brady*, that might otherwise be left vulnerable to abuse. The *Connick* Court’s failure even to discuss compensation and deterrence—core implicit purposes of § 1983—thus constitutes both a flaw in its statutory analysis and a doctrinal sign of the times.” (citation omitted)).

264. *Id.* (“*Connick* . . . weakens the deterrence power of municipal liability by confining liability to those rare cases where the victim can prove a pattern of *Brady* violations. Before *Connick*, the possibility of litigation and damages for a *Brady* violation attributable to inadequate training constituted one of the few liability-based threats hanging over district attorneys who otherwise might not have been adequately incentivized to invest resources in training.”). See *id.* at 338–39 (“Discipline for violations remains virtually nonexistent.”).

265. See *Canton*, 489 U.S. at 396 (O’Connor, J., concurring in part and dissenting in part) (“Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied.”).

266. See *id.* at 391 (majority opinion) (“[J]udge and jury, doing their respective jobs, will be adequate to the task” of deciding whether failure-to-train liability should attach to a municipality.); *id.* at 392 (remanding to the lower court the deliberate indifference inquiry).

## V. CONCLUSION

In *Connick v. Thompson*, the Supreme Court of the United States refined its municipal liability jurisprudence under the failure-to-train theory.<sup>267</sup> By holding that a District Attorney's office could not be held liable under 42 U.S.C. § 1983 for failure to train based on one *Brady* violation,<sup>268</sup> the Court snatched *Brady* violations from the realm of single-incident liability the Court envisioned in *Canton*.<sup>269</sup>

Instead of providing clarity for lower courts, the *Connick* Court failed to establish what would constitute a pattern of *Brady* violations sufficient to trigger municipal liability.<sup>270</sup> Further, the Court turned its back on the many *Brady* violations the prosecutors committed and, because of this error, the Court improperly disturbed the jury's reasonable conclusion that untrained prosecutors' *Brady* violations would likely deprive defendants of their constitutional rights.<sup>271</sup> The Court missed the opportunity to ensure that municipalities would more vigilantly train their prosecutors and guard against constitutional violations.<sup>272</sup> Lastly, the Court should have stayed true to the *Canton* Court's intent and held that prior *Brady* violations would put a prosecutor's office on notice for the need to implement more training regardless of differences in the types of evidence prosecutors withheld in those prior violations.<sup>273</sup>

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267. *Id.* at 1356.

268. *Id.*

269. *See supra* Part IV.A.

270. *See supra* Part IV.B.

271. *See supra* Part IV.C.

272. *See supra* Part IV.C.

273. *See supra* Part IV.A.