THERE’S A BETTER WAY: WHY THE UNITED STATES SUPREME COURT’S CONNICK v. THOMPSON DECISION IS NOT ABSOLUTELY OUTRAGEOUS

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INTRODUCTION

In Connick v. Thompson, the U.S. Supreme Court recently reversed a $14 million verdict awarded to a former prisoner who was wrongfully convicted and served eighteen years in prison as a result of the district attorney’s office failing to disclose exculpatory blood-test evidence. The conduct of the assistant district attorneys in this case violated a longstanding rule first announced in Brady v. Maryland, that “evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.” Although the U.S. Supreme Court has held for some time that withholding such exculpatory evidence, commonly referred to as a “Brady violation,” violates a person’s Due Process Rights, is an egregious act, and is fundamentally unfair, this case is not based upon

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2. The Court has held that an actual Brady violation does not occur unless the withheld evidence is both 1) favorable; and 2) material. Brady v. Maryland, 373 U.S. 83, 87 (1963). At the outset there was considerable debate over whether there actually was a “violation” of Brady. However, Connick eventually conceded that point and as a result, the Court did not address whether a Brady violation had occurred.

3. Brady v. Maryland, 373 U.S. 83 (1963) (holding that “the suppression by the prosecution of evidence favorable to an accused on 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”).

4. Id. at 87.

5. Id.

these issues. Instead, this case deals with whether liability may be imposed on the municipality which employs the assistant district attorney who actually withholds the exculpatory evidence. The purpose of this article is not to dispute the grave injustice Thompson suffered, nor to suggest that he is not entitled to compensation for the injury he suffered, but only to explain why under the current law, it would be improper to hold the municipality liable under 42 U.S.C. § 1983 under these circumstances, and to suggest alternative ways in which the compensatory and deterrent goals of § 1983 may be established.

It is well known that in the criminal context, the only remedy established by the Court for constitutional violations is the “exclusionary rule” – the exclusion of the evidence from use against a criminal defendant at trial. In cases where exculpatory evidence is withheld, then the remedy might range from turning over the evidence, to a mistrial being declared, or as in Thompson’s case when the defendant is wrongfully convicted as a result of violation, the wrongful conviction overturned, and the defendant being given a new trial. There is no automatic monetary remedy awarded to the injured defendant when a Brady violation occurs. Similarly, in the civil context, there’s no automatic liability on a municipality that employs a tortfeasor merely based on the employee-employer relationship. In order to

7. Brady, 373 U.S. at 87 (discussing the fundamental requirement of fairness in the administration of justice).
8. In a criminal action, the primary issue surrounding Brady, typically involves determining whether the violation actually occurred by evaluating whether the evidence was both 1) favorable; and 2) material. See Brady, 373 U.S. at 87. See also U.S. v. Bagley, 473 U.S. 667, 668 (1985) (defining the standard of materiality). However, the Court in Connick did not address these issues. Although there was initially disagreement as to whether a Brady violation actually occurred, prior to the trial, Connick conceded that a Brady violation had occurred and as a result, those issues were not before this court and were not addressed. Connick, 131 S. Ct. at 1357.
10. In Weeks, the United States Supreme Court first adopted the federal exclusionary rule providing that unconstitutionally obtained evidence be inadmissible from trial against a defendant in the prosecution’s case in chief. See also Mapp v. Ohio, 367 U.S. 643, 654 (1961) (holding that “all evidence obtained by searches and seizures in violation of the constitution is, by that same authority, inadmissible in a state court”). Weeks v. United States, 232 U.S. 383 (1914).
11. Jones, supra note 6, at 443-47 (discussing the range of sanctions for Brady violations, stating that they fall between “the minimal sanction of compelled disclosure and the maximum sanction of dismissal” of the case).
12. Connick, 131 S. Ct. at 1356.
prevail in a civil action against a municipality, it must be premised upon a theory of liability for holding municipalities liable for violations of individuals’ constitutional rights.

The $14 million verdict awarded in this case against the District Attorney’s Office through its then District Attorney Harry Connick was brought under 42 U.S.C. § 1983. The U.S. Supreme Court has held that a municipality may be held liable under § 1983, but only in narrow circumstances. A municipality may only be held liable for “their own illegal acts” that violate an individual’s constitutional rights. They are not vicariously liable under § 1983 for their employees’ actions.

Since the municipality itself must have committed some illegal act, liability may be imposed only when the actor acts pursuant to a municipal “custom” or “policy” that violates a person’s constitutional rights. That custom or policy may be the municipality’s decision “not to train,” but when liability is based upon a “single incident,” as asserted here, as opposed to “a pattern of similar unconstitutional conduct,” it must be shown that the municipality acted with “deliberate indifference” to the known or obvious consequences of its decision.

13. Title 42 U.S.C. § 1983 provides in relevant part: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”


15. See Monell v. New York City Dep’t. of Soc. Servs., 436 U.S. 658, 694 (holding that “a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents”). See also Bd. of Comm’rs of Bryan Cty. v. Brown, 520 U.S. 397, 403 (1997) (holding that “Congress did not intend that a municipality “be held liable solely because it employs a tortfeasor”); City of Canton v. Harris, 489 U.S. 378, 385 (1989) (stating that “[r]espondeat superior or vicarious liability will not attach under §1983”).

16. City of Canton v. Harris, 489 U.S. 378, 390 n.10 (where the Court left open the possibility that liability may be imposed on a municipality for failure to train when upon a single incident, as the one hypothesized by the Court, because in such a situation the Court concludes it would be obvious that failure to provide training in a particular respect would result in unconstitutional consequences); See also Connick v. Thompson, 131 S. Ct. 1350, 1361 (2011) (discussing “single-incident” liability, upon which Thompson based his claim).


In other words, generally a “pattern of unconstitutional conduct” is “ordinarily necessary” to show that the municipality was on notice “that a course of training is deficient,” or of the need to train in a particular area, in this case, a prosecutor’s obligations under Brady. But a pattern of unconstitutional conduct is not necessary if the obvious consequence of failing to provide Brady training is that constitutional violations would occur yet they deliberately failed to provide such training. A plaintiff must then show that as a result of that failure to train, their constitutional rights were violated.

So the ultimate question of whether the DA’s office can be held liable in this case turns on two issues: Should it have been obvious to the District Attorney that failure to train his assistants about their obligations under Brady would have resulted in their withholding of exculpatory evidence, ultimately violating Thompson’s constitutional rights? And if so, did the failure to train the prosecutors about Brady “actually cause” the prosecutors to withhold the exculpatory evidence? For several reasons, and as the Court held in Connick, it did not.

To find municipal liability under the “failure to train” theory, would also require a finding that there was a lack of knowledge among the prosecutors about their duties under Brady; that a training program could have been put in place that would have provided the relevant Brady training; that such training would have prevented the Brady violation in question; and finally,

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20. Connick, 131 S. Ct. at 1360.
21. See infra Part IV for a discussion of the whether it should have been “obvious” to Connick that failure to train in a particular respect would result in unconstitutional consequences.
22. See infra Part V for a discussion of the Court’s causation requirement.
23. Id. at 1366 (holding that “this case does not fall within the narrow range of ‘single-incident’ liability hypothesized in Canton as a possible exception to the pattern of violations necessary to prove deliberate indifference in §1983 actions alleging failure to train”).
24. In a § 1983 claim based on failure to train, the plaintiff must be able to point to a training deficiency that he claims should have been provided by the municipality. However, Thompson had difficulty with this issue because it was “undisputed here that the prosecutors in Connick’s office were familiar with the general Brady rule,” Connick v. Thompson, 131 S. Ct. 1350, 1363.
25. See id. at 1363 (for a discussion of the “allegedly necessary training”).
26. Plaintiff alleging a municipal failure to train claim under § 1983 must show that: (1) he was deprived of a constitutional right; (2) municipality had training policy that amounts to deliberate indifference to constitutional rights of persons with
that it was the lack of that knowledge that actually caused the Brady violation.27 This article addresses why these assertions do not exist under these circumstances and as a result, liability cannot be imposed against the District Attorney’s Office.

In support of the Court’s holding in Connick, this article goes beyond their analysis of “deliberate indifference” only, and also places particular emphasis on the “causation” component of analysis that neither the majority nor dissenting opinions adequately addressed after failing to find the “deliberate indifference” requirement necessary to impose liability.28 This paper explains how the lack of Brady training did not, and in many instances does not, cause Brady violations, but instead how they are often caused by the deliberate and wanton conduct of a prosecutor who is well aware of his obligations under Brady or of his duty to make himself aware when unsure.29 Without establishing the causal link between the duty to train and the resulting Brady violation, municipal liability is improper under § 1983. Furthermore, in construing the applicability of § 1983 to these circumstances, this article also discusses “considerations of public policy,”30 such as the impracticability of compliance, what if any deterrent effects application would have, and whether imposing liability would further the compensatory goals of § 1983. To the extent that public policy is relevant, it also does not support a finding that liability is proper under these circumstances.31

Since this article does not in any way suggest that Thompson did not suffer a grave injustice and therefore should be entitled to compensation, this paper also addresses alternative

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28. See infra Part V discussing whether any failure of the District Attorney’s Office to provide Brady training “actually caused” the Brady violations.
29. See Jones, supra note 6, at 428-31 (discussing intentional Brady violations, stating that they exist “when the prosecutor fully understands the Brady disclosure duty, is aware of the existence of favorable evidence in the government’s possession, . . .but intentionally withholds the evidence to gain a tactical advantage in the litigation” and also discussing the “impact of intentional Brady violations” on the criminal justice system).
31. See infra Part VI discussing public policy considerations in construing § 1983.
remedies to § 1983 that are either currently being used or where efforts are being made to implement, in order to adequately compensate the wrongfully convicted and to deter future Brady misconduct.32 This article places particular emphasis on compensation statutes as the most effective and efficient way to compensate the wrongfully convicted due to the particular immediate physical and psychological needs they face upon release.33

In addressing these issues, Part I of this article gives an overview of Connick v. Thompson. Part II explains the requirements for liability of municipalities for failure to train under § 1983. Part III discusses the “relevant” training deficiency asserted by Thompson. Part IV discusses whether it is in fact “obvious” that Brady violations will occur if prosecutors do not receive formal Brady training. Part V addresses the lack of the required causal link between the municipalities’ failure to provide formal Brady training and the resulting violation of individual constitutional rights. Part VI addresses relevant public policy considerations in construing the applicability of § 1983 to Thompson’s case and similar Brady violations. Part VII discusses alternative remedies to compensate the wrongfully convicted and to deter future Brady misconduct.

I. OVERVIEW OF CONNICK V. THOMPSON

In early 1985, John Thompson was charged with both murder and an unrelated attempted armed robbery.34 During the investigation of the attempted armed robbery, police had taken a swatch from the pants of one of the victims of the armed robbery, which contained the blood of the perpetrator. The swatch was sent to the crime lab for testing.35 Two days before Thompson’s armed robbery trial, “assistant district attorney Bruce Whittaker received the crime lab’s report which stated that the perpetrator had blood type B.”36 Whittaker claimed to have placed the report on ADA James Williams’s desk who tried the case with ADA

32. See infra Part VII, discussing alternative remedies for compensating the wrongfully convicted.
33. See infra Part VII B. 3 for a thorough discussion of why compensation statutes are the most effective and efficient remedies for the wrongfully convicted.
35. Id.
36. Id.
Gerry Deegan.\textsuperscript{37} Williams denied having seen the report and there was no evidence to suggest that anyone knew what Thompson’s blood type was, nor were any efforts made to determine if his blood matched the blood found on the victims’ pants.\textsuperscript{38} Prior to trial, ADA Deegan had checked out all of the evidence from the police evidence locker, and all of the evidence except the swatch was checked into the courtroom evidence locker.\textsuperscript{39} Both Deegan and Williams prosecuted Thompson for armed robbery, “but did not mention the swatch or the crime lab report at the trial.”\textsuperscript{40} Thompson was found guilty of attempted armed robbery.\textsuperscript{41}

A few weeks after the armed robbery trial, both ADA Williams and special prosecutor Eric Dubelier tried Thompson for murder.\textsuperscript{42} Because of the armed robbery conviction, Thompson did not testify in his own defense in the murder trial because he knew, on advice of his attorney, that the armed robbery conviction would be used against him “to impeach his credibility.”\textsuperscript{43} Evidence suggested that absent the armed robbery conviction, Thompson would have most likely testified on his own behalf in the murder trial.\textsuperscript{44} Thompson was found guilty of first degree murder and “sentenced to death.”\textsuperscript{45} The armed robbery conviction was used in the penalty phase of the murder trial as an aggravating circumstance in the prosecutors obtaining the death penalty.\textsuperscript{46} After exhausting all appeals, Thompson was scheduled for execution on May 20, 1999.\textsuperscript{47}

In late April 1999, just a few weeks before Thompson was scheduled to be executed, his private investigator discovered the crime lab report in the files of the New Orleans Police Crime

\begin{footnotes}
\item[37] Id. at 1356.
\item[38] Id.
\item[39] Connick, 131 S. Ct. at 1356.
\item[40] Id.
\item[41] Id.
\item[42] Id.
\item[43] Id. at 1372.
\item[44] See Connick v. Thompson, 06-0361 (La. App. 4th Cir. 7/17/02), 825 So. 2d 552, 555-56 (finding that Thompson: 1) would have testified but for the improper armed robbery conviction; 2) had no prior felony convictions; and 3) had testified in his own defense at his armed robbery trial a little over a month prior to the murder trial).
\item[45] Connick v. Thompson, 131 S. Ct. 1350, 1356 (2011); See also State v. Thompson, 515 So. 2d 349 (La. 1987).
\item[46] Connick, 131 S. Ct. at 1372.
\item[47] Id. at 1356.
\end{footnotes}
Laboratory. 48 “Thompson was tested and found to have blood type O,” 49 which proved that he had not committed the attempted armed robbery. 50 Thompson’s attorneys presented this evidence to the DA’s office, who then moved to stay the execution and vacate the armed robbery conviction. 51 The Court of Appeal then reversed the murder conviction, claiming that the unconstitutional armed robbery conviction deprived him of his right to testify on his own behalf in the murder trial. 52 The DA’s office then retried Thompson for murder. 53 Thompson testified at the trial and was found not guilty. 54

After being found not guilty of the murder charge in the new trial, Thompson brought suit against the District Attorney’s Office and other parties for damages he suffered as a result of the eighteen years he served in prison. Under 42 U.S.C. § 1983, Thompson claimed that the District Attorney’s Office, through its prosecutors, violated his constitutional rights when they withheld the exculpatory evidence in violation of Brady v. Maryland. 55 “Thompson alleged liability under two theories: (1) the Brady violation was caused by an unconstitutional policy of the district attorney’s office; and (2) the violation was caused by Connick’s deliberate indifference to an obvious need to train the prosecutors in his office in order to avoid such constitutional violations.” 56

The jury found the district attorney’s office liable for failing to train the prosecutors and awarded Thompson $14 million in damages. 57 “A panel of the Court of Appeals for the Fifth Circuit affirmed.” 58 “The Court of Appeals en banc vacated the panel opinion, granted rehearing, and divided evenly, thereby affirming the District Court.” 59 The U.S. Supreme Court granted certiorari to address the question of “whether the District Attorney’s office may be held liable under § 1983 for failure to train based on a
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single Brady violation.”

II. MUNICIPAL LIABILITY UNDER § 1983 - SPECIFICALLY LIMITED LIABILITY

As stated above, Thompson’s action against the District Attorney’s Office was brought under Title 42 U.S.C. § 1983, which is the procedural vehicle by which individuals may bring actions against the government for violations of constitutional rights. Section 1983 provides in relevant part that:

“[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .”

This area of law, providing for recovery against municipalities under § 1983, is very well-settled. The courts have gone to great lengths in construing § 1983 to determine, not only whether actions could be brought directly against municipalities, but also what standards must be met in order to prevail. The Court has held that liability may be imposed on municipalities under § 1983, but in very limited circumstances. The Court has held that under § 1983, a municipality may be held civilly liable for violations of constitutional rights, but only “for their own illegal acts.” In other words a municipality is

60. Id. at 1356.
62. See Monell v. New York City Dep’t. of Soc. Servs., 436 U.S. 658, 690 (1978) (holding that “Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies” and that a municipality can be found liable under § 1983 only where the municipality itself causes the constitutional violation at issue); overruling Monroe v. Pape, 365 U.S. 167, 187 (1961) (shielding municipalities from suit under § 1983 and holding that “Congress did not undertake to bring municipal corporations within the ambit of §1983). See also Bd. of Comm’rs of Bryan Cty. v. Brown, 520 U.S. 397, 403 (1997) (stating that “[o]ur conclusion rested partly on the language of § 1983 itself” and “[o]ur conclusion also rested upon the statute’s legislative history”).
liable under § 1983 only when the municipality itself is responsible for the injury caused to the plaintiff. Under § 1983, a municipality is not automatically liable for the tortious acts of its employees based solely on the “existence of an employer-employee relationship with a tortfeasor.”64 With respect to municipal liability, there is no vicarious liability or liability under the theory of “respondeat superior”65 - where the employee effectively stands in the place of and acts on behalf of the municipality. Under § 1983, a municipality is only liable for its own actions that violate a person’s constitutional rights.

A. EMPLOYEE MUST BE ACTING PURSUANT TO OFFICIAL MUNICIPAL POLICY

Because of the requirement of illegal conduct on the part of the municipality itself, the employee violating constitutional rights must have acted according to “a municipal ‘policy’ or ‘custom’ that caused the plaintiff’s injury.”66 The “policies” in question are those decisions of a person or entity “whose acts may fairly be said to be those of the municipality” itself.67 It is only when the execution of the government’s policy or custom...inflicts the injury that the municipality may be held liable under § 1983.”68 Requiring that the employee be acting according to a municipal policy ensures that the municipality is being held liable only for “its own illegal conduct,” and not the

64. Monell v. New York City Dep’t. of Soc. Servs., 436 U.S. 658, 692-94 (1978) (holding that “a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents.”). See also Bd. of Comm’rs of Bryan Cty. v. Brown, 520 U.S. 397, 403 (1997) (holding that “Congress did not intend that a municipality “be held liable solely because it employs a tortfeasor”).

65. See Brown, 520 U.S. at 403 (noting that “We have consistently refused to hold municipalities liable under a theory of respondeat superior”); Oklahoma City v. Tuttle, 471 U.S. 808, 818 (1985); Pembaur v. Cincinnati, 475 U.S. 469, 478-79 (1986); Canton v. Harris, 489 U.S. 378, 392 (1989). But see Pembaur, 475 U.S. at 489 (supporting the theory of respondeat superior in construing liability under §1983 the court held that “both the broad remedial purpose of the statute and the fact that it embodied contemporaneous common-law doctrine, including respondeat superior, require a conclusion that Congress intended that a government entity be liable for the constitutional deprivations committed by its agents in the course of their duties).

66. Brown, 520 U.S. at 403.

67. Id. (quoting Monell v. New York City Dep’t. of Soc. Servs., 436 U.S. 658, 694 (1978). “Locating a policy ensures that a municipality is held liable only for those deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality.”).

actions of the employee himself. Therefore, in order for a plaintiff to recover under § 1983, he “must prove that ‘action pursuant to official municipal policy’ caused [his] injury.”

1. MUNICIPAL POLICIES INCLUDE DECISIONS NOT TO TRAIN

For purposes of § 1983, “[o]fficial municipal policy includes 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.” Among those decisions that may rise to the level of a policy for § 1983 purposes are “a local government’s decision not to train certain employees about their legal duty to avoid violating citizen’s rights.” However, there are only “limited circumstances in which an allegation of failure to train may form the basis for liability under 1983.” A plaintiff who brings an action under § 1983 claiming his rights were violated because of a municipality’s failure to provide adequate training has a very tough case to prove. “A municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.”

2. “DELIBERATE INDIFFERENCE”- A STRINGENT STANDARD OF FAULT

An allegation of inadequate training “may serve as the basis for § 1983 liability only where the failure to train amounts to a deliberate indifference to the rights of persons with whom the police come into contact.” In other words, the decision not to train in relevant respects, may serve as the “official municipal policy” for § 1983 purposes, [only] when the failure to train evidences a deliberate indifference to the rights of others. “Deliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or

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70. Id.
71. Id.
73. Connick, 131 S. Ct. at 1359. See also City of Oklahoma City v. Tuttle, 471 U.S. 808, 822-23 (1985) (“[A] ‘policy of ‘inadequate training’” is “far more nebulous, and a good deal further removed from the constitutional violation than was the policy in Monell.”).
74. Canton, 489 U.S. at 388.
75. Id. at 389.
obvious consequence of his action”\textsuperscript{76} or inaction. The necessary “deliberate indifference” refers to a “conscious” or “deliberate” choice by the municipality’s policymakers to follow a course of action made from among various alternatives.\textsuperscript{77} Thus, if the policymakers have “actual or constructive notice”\textsuperscript{78} that their failure to train employees in a particular respect will result in them violating citizens’ constitutional rights, yet they make a deliberate or conscious choice not to train in that respect, then they may be deemed to be deliberately indifferent to the known or obvious consequences of their actions. It is only under these limited circumstances that a decision not to train may be an official municipal “policy” for § 1983 purposes and the stringent standard of fault is met. Specifically, when the policymakers make a deliberate or conscious choice not to train when the known or obvious consequence of not providing the training is that citizens’ constitutional rights will be violated.

3. Single Incident Liability—Further Limitation on Liability

In trying to determine whether the known or obvious consequences of not providing certain training will be that citizens’ constitutional rights will be violated, it is “ordinarily necessary” that there be a “pattern of similar constitutional violations by untrained employees”\textsuperscript{79} to demonstrate that the municipality was on notice of the need to train, but chose to disregard that need. “Without notice that a course of training is deficient, decision-makers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.”\textsuperscript{80} But when a “pattern of similar constitutional violations” has occurred, it is much easier to demonstrate that the municipality made a conscious decision not to train when the policymakers knew that their decision would result in constitutional violations.

However, the Court has recognized that in even further limited circumstances, “in a narrow range of circumstances,”\textsuperscript{81}

\textsuperscript{76} Bd. of Comm’rs of Bryan Cty. v. Brown, 520 U.S. 397, 410 (1997).
\textsuperscript{77} See Canton, 489 U.S. at 389. See also City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985).
\textsuperscript{78} Connick, 131 S. Ct. at 1360.
\textsuperscript{79} Id., See also Bd. of Comm’rs of Bryan Cty. v. Brown, 520 U.S. 397, 409 (1997).
\textsuperscript{80} Connick, 131 S. Ct. at 1360.
\textsuperscript{81} Id. at 1361. See also Canton v. Harris, 489 U.S. 378, 390 (1989) n.10 (giving
liability may be imposed on a municipality when only a single incident has occurred, referred to as “single-incident liability.” The Court may find liability when only a single incident has occurred only when the unconstitutional consequences of failing to train are “patently obvious,” i.e., that the policymakers were deliberately indifferent to the obvious unconstitutional consequences of failing to train. Thus, even in situations where there has been no pattern of unconstitutional violations to put municipalities on notice of a need to train in a particular respect, a decision not to train may still form the requisite municipal policy needed for § 1983 liability, if it can be said that it was patently obvious that constitutional violations would occur without the training, yet the municipality deliberately chose not to provide such training.

4. MUNICIPAL LIABILITY STANDARD AS IT RELATES TO A PROSECUTOR’S BRADY VIOLATION

With respect to Brady violations, as in Thompson’s case, in order to hold the District Attorney’s office liable, it would not be sufficient merely to show that the plaintiff’s constitutional rights were violated as a result of the conduct of a prosecutor employed by the DA’s office. The existence of the employee/employer relationship does not automatically impose liability on the District Attorney’s Office, since there is no vicarious liability. To hold the DA’s office liable under § 1983, the plaintiff must demonstrate that the prosecutor was acting pursuant to a “municipal policy” when he withheld the exculpatory evidence. The decision of the District Attorney not to give the relevant

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82. Canton, 489 U.S. at 390 n.10 (posing a hypothetical situation, commonly referred to as the “Canton Hypothetical” as an example of a situation in which the Court concludes that municipality liability could be found only upon a single incident, because in such a situation the Court concludes it would be obvious that failure to provide training in a particular respect would result in unconstitutional consequences).

83. Id.; see also Connick, 131 S. Ct. at 1361 (relying on single-incident liability to establish the requisite municipal policy, which is discussed further in Part IV as it relates to the Thompson case).

84. For an example of a hypothetical situation in which the Court theorized that failure to provide training in a particular respect could properly be characterized as “deliberate indifference” to constitutional rights, see Connick, 131 S. Ct. at 1361. See also Canton, 489 U.S. at 390 n.10.
Brady training\textsuperscript{85} may serve as the necessary “municipal policy,” but only if the plaintiff can show that even though there had been no prior pattern of similar constitutional violations to put the DA on notice that the particular training was necessary.\textsuperscript{86} Also, it should have been “obvious” to the District Attorney that not providing the relevant Brady training would result in the prosecutors not knowing how to handle these situations, and the possibility of them withholding exculpatory evidence, thus violating citizens’ constitutional rights. However, he made a conscious choice not to provide such training.

B. CAUSAL CONNECTION BETWEEN MUNICIPAL POLICY AND DEPRIVATION OF RIGHTS

In addition to establishing that the employee acted pursuant to a municipal policy, in order to impose liability under § 1983, the plaintiff must satisfy a “rigorous” standard of causation\textsuperscript{87} as well, requiring demonstration of “a direct and deliberate causal connection between that municipal policy and the deprivation of a federally protected right.”\textsuperscript{88} The plaintiff must demonstrate that through the municipality’s deliberate conduct, the municipality, by failing to train, was the “moving force” behind the injury involved and, therefore, that the employee’s conduct was not. Moreover, “a court must carefully test the link between the policymaker’s inadequate decision and the particular injury alleged.”\textsuperscript{89}

For purposes of municipal liability for failure to train, the plaintiff must demonstrate that it was the lack of training that actually caused the employee to violate the plaintiff’s constitutional rights, and that had the employee had the appropriate training the constitutional violation would not have occurred. This assumes that there was a basic lack of knowledge or understanding about the appropriate course of action to take that the training would have provided, and that with that knowledge the employee would have taken the appropriate action.

\textsuperscript{85} Thompson conceded that the prosecutors were generally familiar with Brady, but claimed that there should have been specific training as to the particular Brady issue involved.

\textsuperscript{86} Part IV of this article contains a full and thorough analysis of this issue as it relates to Thompson’s case.

\textsuperscript{87} Bd. of Comm’rs of Bryan Cty. v. Brown, 520 U.S. 397, 405 (1997).


\textsuperscript{89} Brown, 520 U.S. at 410.
and not violated the individual’s constitutional rights. So with respect to a Brady violation, the plaintiff would have to prove that the prosecutor withheld the exculpatory evidence because of the lack of some knowledge or understanding about what his obligations were under Brady, under these circumstances that the training would have provided, and that had he had the training to provide that knowledge or information about what his responsibilities were under Brady, then he would not have withheld the evidence.90

Requiring this direct causal link between the lack of training and the subsequent violation of constitutional rights ensures that the municipality is being held liable only for its own illegal acts; in this case, the decision of the policymakers not to provide certain training and reduces the likelihood that the municipality would be held liable solely on the basis of employing a tortfeasor, which the court has consistently rejected.

III. THE “RELEVANT” TRAINING

As noted above, in order for the Court to have held the District Attorney’s Office liable for the violation of Thompson’s constitutional rights, Thompson had a burden of first proving that the District Attorney’s failure to train was with deliberate indifference to the obvious unconstitutional consequences of his decision. In other words, Thompson must show that it should have been “obvious” to the District Attorney that if he did not provide the relevant Brady training, the prosecutors, not knowing how to handle such situations, would withhold exculpatory evidence, thus violating citizens’ constitutional rights, yet he made a conscious choice not to provide such training. This analysis first begins with determining exactly what type of training deficiency the plaintiff alleges existed that Connick should have provided in this case.91 In other words, what constitutes the “relevant Brady training” as to substance and form?92 The next step would be to determine whether the obvious

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90. See infra Part V for a full discussion of the causal link between the failure to train and the Brady violation at issue.

91. See Connick v. Thompson, 131 S. Ct. 1350, 1368 (2011) (rejecting the dissent’s assertion that the necessary training should have been for Connick to instruct his prosecutors that Brady evidence includes “evidence that, if tested, can establish the innocence of the person who is charged,” the Court instead frames the question as “what legally accurate training would have prevented” the nondisclosure).

92. Thompson argued that there was a substantive deficiency in the prosecutor’s knowledge of Brady, arguing that “they were not trained about particular Brady
consequences of failing to provide such training would be that the prosecutor’s would withhold the exculpatory evidence in question.

Thompson does not allege that there was a general lack of knowledge about Brady’s basic requirement that exculpatory evidence be turned over to the defense. “[I]t is undisputed here that the prosecutors in Connick’s office were familiar with the general Brady rule.” Thompson claims that the prosecutors “were not trained about particular Brady evidence or the specific scenario related to the violation in his case.” It is not difficult to imagine that even if an attorney was aware of a basic requirement to turn over exculpatory evidence, there may still be some confusion over exactly what constitutes exculpatory evidence. Potential Brady material could present itself in a number of different ways, from prior statements of a state’s witness that could impeach his current testimony, to information that another person committed the crime, or as in this case, the presence of blood evidence whether it is known to match the defendant or not.

The plaintiff claims that Connick should have provided specific Brady training to the prosecutors to inform them that blood test evidence constitutes Brady material, whether it is known to match the defendant or not. He asserts that by not providing training to inform the prosecutors that blood test evidence, whether known to match the defendant or not, constitutes Brady material and should be turned over to the defense, it should have been obvious that when that scenario presented itself, that it was “highly predictable” that the prosecutors would make the wrong decision and withhold the evidence or the specific scenario related to the violation in his case.” Thompson also made an argument that the Brady training was also insufficient as to its form claiming that the lack of “formal training sessions constitute a complete absence of legal training.”

93. Id.
94. Id.
95. See infra Part VI. D for a detailed recitation of various types of Brady material which “includes third party confessions, victim or complainant recantation, eyewitness identifications of another person as the perpetrator, as well as descriptions of the perpetrator that are inconsistent with the defendant’s appearance.” Cynthia E. Jones, A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence, 100 J. CRIM. L. & CRIMINOLOGY 415, 423-25 (2010).
96. Connick, 131 S. Ct. at 1368 (referring to the evidence at issue as a “blood report not known to be exculpatory”).
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The Court in Connick quickly rejected this type of specificity of training, stating that “in virtually every instance...a § 1983 plaintiff will be able to point to something the city could have done to prevent the unfortunate incident.”\(^{98}\) For instance, if Connick had provided training that blood-test evidence in general is Brady material, and also provided training that evidence whether known to match the defendant or not is Brady material, the plaintiff could still claim that they did not receive specific training that blood-test evidence, whether known to match defendant or not, wasn’t provided.\(^ {99}\) This “sort of nuance simply cannot support an inference of deliberate indifference.”\(^ {100}\) A program need only be adequate to “enable employees to respond properly to the usual and recurring situations with which they must deal,”\(^ {101}\) and cannot be expected to anticipate every possible scenario in which an issue may present itself.

This puts Thompson in a proverbial Brady catch-22, because although he had great difficulty proving deliberate indifference claiming “specific” Brady training was required, Thompson would have had even greater difficulties had he conceded that only a ‘general’ understanding of Brady was necessary, because it is undisputed in this case “that the prosecutors in Connick's office were familiar with the general Brady rule.”\(^ {102}\) To this assertion, “Thompson suggests that the absence of any formal training sessions about Brady is the complete absence of legal training.”\(^ {103}\) However, this argument is also insufficient because “failure-to-train liability is concerned with the substance of the training, not the particular instructional format.”\(^ {104}\) So provided the

\(^{98}\) Connick v. Thompson, 131 S. Ct. 1350, 1363 (quoting Canton at 392 and citing Tuttle, 471 U.S. at 823).

\(^{99}\) Id.

\(^{100}\) Connick, 131 S. Ct. at 1363.


\(^{102}\) Connick, 131 S. Ct. at 1357-63, 1378 (although the prosecutors were generally familiar with the Brady rule, Connick was able to demonstrate that there was some confusion about specific Brady scenarios, and the jury ultimately found that “Connick...misunderstood Brady” and that “[o]ther leaders in the office...were similarly uninformed about Brady.”). This is likely the reason Thompson proceeded under a theory of single incident liability rather than claiming a pattern of violations. Thompson could more easily show a training deficiency as to this particular type of Brady violation; however, it had only occurred once.

\(^{103}\) Connick, 131 S. Ct. at 1363.

\(^{104}\) Id.
prosecutors received the relevant *Brady* knowledge, whether by discussing it over lunch, in the courtroom in passing, or attending a conference or CLE, they knew of their general obligation to provide *Brady* material to the defense, the DA’s office had satisfied their duty.

IV. NOT “OBVIOUS” THAT CONSTITUTIONAL VIOLATIONS WOULD OCCUR

The next step in determining municipal liability under § 1983 is to determine whether Connick was deliberately indifferent to the obvious unconstitutional consequences of his actions of not providing *Brady* training. In other words, did Connick make a conscious choice not to provide *Brady* training when it was “obvious” that if he did not provide the relevant training, the prosecutors would make the wrong choice and withhold exculpatory evidence? As outlined above, this standard of *obviousness* was articulated by the court in *Canton*, to be used in determining municipal liability in situations where there is no prior pattern of similar unconstitutional violations to put the municipality on notice that failing to train in a particular respect would result in unconstitutional consequences. When liability is based on only a single incident, the municipality is said to have been on notice of the potential violation, if the obvious consequences of failing to provide such training would be that individuals’ rights would be violated. An example of such circumstances, the Court noted in *Canton*, would be if a municipality failed to train police officers in the use of deadly force.105 The obvious unconstitutional consequences of failing to provide such training would be that officers would improperly use deadly force and violate individuals’ constitutional rights.106 In that case, the municipality would be said to be “deliberately indifferent” to the obvious unconstitutional consequences of its actions.107 Under those circumstances, the decision not to provide

105. *Canton*, 489 U.S. 390.  See also *Connick*, 131 S. Ct. at 1361 (discussing Canton’s hypothetical example of a situation where the unconstitutional consequences of failing to provide such training is so obvious that the decision amounts to deliberate indifference and therefore single-incident liability might be found.) *Tennessee v. Garner*, 471 U.S. 1 (1985) (setting the standard for when deadly force may be used in apprehending a suspect).
106. *Id.*
107. *Id.*
such training would amount to an official municipal policy sufficient to impose civil liability on the municipality. There are several reasons why the case at hand is distinctly different from the hypothetical case in Canton for imposing single incident liability that explains why it was not obvious that Connick’s failure to provide Brady training would result in constitutional violations.

A. EDUCATION, TRAINING, AND STANDARDS OF ETHICS AND PROFESSIONALISM IMPOSED ON LAWYERS

In analyzing what consequences should have been obvious to Connick when he failed to provide Brady training, the Court in Connick placed great emphasis on the education, training, and standards of ethics and professionalism imposed on lawyers, as compared to police officers. The court noted that “legal training is what differentiates attorneys from average public employees.” By the time an attorney enters the DA’s office for employment, he has already graduated from law school, which is at least three years of legal training, where he has learned to “find, interpret, and apply legal principles,” as well as “understand constitutional limits, and exercise legal judgment.” He has also taken and passed a comprehensive bar examination, which in the State of Louisiana includes testing in constitutional law as well as criminal law, criminal procedure, and evidence. ADAs also “train on the job as they learn from more experienced attorneys” who train and supervise them in the “preparation of cases.” The education and training that an attorney brings with him to the job is in stark contrast to a police officer who has not completed extensive independent education, training, and testing for several years in policing, including the use of deadly force, prior to seeking employment with a city police force. The police officer comes to the table with nothing, so the city has the responsibility of being sure that a police officer is

108. Connick, 131 S. Ct. at 1361-63.
109. Id. at 1361 (quoting Connick v. Thompson, 578 F.3d 393, 394-95 (5th Cir. 2009)).
110. Id. at 1361.
111. Id.
113. Id. at 1362.
properly trained to do the job for which he is being hired. Failing to provide such training would obviously produce unconstitutional consequences because police officers have virtually nowhere else from which they can obtain such training.

Additionally, most law students begin taking legal research their first semester in law school, and legal research continues to be an integral part of both the study and practice of law. Attorneys are well aware of the fact that when they are confronted with legal issues that they are unsure of how to handle, they must “perform legal research” to find out, or at a minimum, consult a more experienced attorney. Even judges have their criminal code and evidence handbook on the bench with them and often consult them for guidance. Few if any attorneys would think that they can make whatever decision they choose to make and hope for the best. After all, it is called the practice of law because there are laws—and it is an attorney’s job to find out what the law is. It is not unreasonable that a District Attorney would assume that if an attorney came across a Brady issue that he was not sure how to handle, that he would conduct the appropriate research that he’s been trained to conduct to find out how to handle the issue properly. A reasonable DA would not assume that if he does not provide that training himself that his assistants will simply make the wrong decision that he knows could violate a person’s constitutional rights. This is especially true in light of the fact that it is undisputed in Thompson’s case that all of the prosecutors were aware of the general duty under Brady to provide favorable evidence to the defense. So if there was any confusion as to its applicability in a particular case, then that attorney’s training in finding and interpreting the law should have compelled him to try to find out how to handle the

115. Id. at 1363 (noting that “[t]he Canton hypothetical assumes that the armed police officers have no knowledge at all of the constitutional limits on the use of deadly force.”).
116. See, e.g. SOUTHERN UNIVERSITY LAW CENTER, CATALOG 36 (2010-2011); LOUISIANA STATE UNIVERSITY LAW CENTER, CATALOG 29 (2011-2012).
118. Connick, 131 S. Ct. at 1363.
119. Supra, note 117.
120. For example, judges often utilize benchbooks and other manuals for reference rather than attempting to commit all substantive and procedural law to memory.
121. Connick, 131 S. Ct. at 1363.
particular issue—something every attorney has done countless numbers of times.

Furthermore, prior to being licensed to practice law, attorneys have had their character and fitness to practice law evaluated, have had ethical screenings and have ongoing ethics and professionalism obligations with which they must comply. An attorney who violates his or her ethical obligations is subject to professional discipline, including “sanctions, suspension, and disbarment.” These duties are designed to not only ensure that attorneys are aware of their professional obligations that they owe to their clients and to the profession, but to ensure that these obligations are enforced, and to impress upon attorneys their roles as fiduciaries to the court and the public at large. Prosecutors also have special duties under the rules of professional conduct in the fulfillment of their prosecutorial duties, including a special duty to comply with \textit{Brady}. “Prosecutors are not only equipped but are also ethically bound to know what \textit{Brady} entails and to perform legal research when they are uncertain.”

Although police officers may be sworn to uphold the law, they have no independent bodies imposing these standards of ethics and professionalism upon them, with the authority to impose sanctions when they’re violated. Police have no independent set of rules specifically informing them of their ethical and professional obligations, further placing that duty on their employers, the city, to provide any necessary training.

\begin{itemize}
\item \textit{Brady}, Connick, supra note 117.
\item Id. at 1363. See also Model Rules of Prof’l Responsibility R. 3.8(d) (defining the scope of the prosecutor’s duty to make timely disclosure of exculpatory evidence); La. CODE CRIM. PROC. ANN. art. 718 (2011) (requiring prosecutors to turn over favorable evidence to the defense).
\item Connick, 131 S. Ct. at 1363.
\item Rules pertaining to prosecutors. See supra note 117.
\end{itemize}
oversight, enforcement, and sanctions. In fact, courts have held that even with respect to *Brady*, “that the police satisfy their obligations under *Brady* when they turn exculpatory evidence over to the prosecutors,”¹²⁸ because it is the attorneys who have the knowledge [and ability] to determine *Brady*, not police officers.¹²⁹ Police officers, for the most part, are not capable of, are not trained to, nor are they expected to understand constitutional limits - attorneys are.

“In light of this 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.”¹³⁰ “A district attorney is entitled to rely on prosecutor’s professional training and ethical obligations in the absence of a specific reason, such as a pattern of [similar constitutional] violations”¹³¹ to put him on notice that the need for specific training exists. “A licensed attorney making legal judgments, in his capacity as a prosecutor about [what constitutes] *Brady* material, simply does not present the same ‘highly predictable’ constitutional danger as...an untrained officer.”¹³² As a result, these do not fall within the narrow instances envisioned by the court for imposing liability on a municipality for a single incident.

Without meeting this standard of obviousness, liability for a single incident is improper. As stated above, liability under these circumstances is extremely tenuous and may only be imposed in limited circumstances.

**B. ATTORNEYS ARGUABLY WERE TRAINED**

In addition, it may also not have been obvious to Connick that failing to provide *Brady* training would result in violations of individuals’ constitutional rights, because he was already well

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¹²⁸. Walker v. City of New York, 974 F.2d 293, 299 (2nd Cir. 1992); See also Campbell v. Maine, 632 F. Supp. 111, 121 (D. Me. 1985), aff’d, 787 F.2d 776 (1st Cir. 1986); but see Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975) vacated on other grounds, 424 U.S. 961 (1976).

¹²⁹. See Walker v. City of New York, 974 F.2d 293, 299 (2nd Cir. 1992) (noting that “[i]t is appropriate that the prosecutors, who possess the requisite legal acumen, be charged with the task of determining which evidence constitutes *Brady* material that must be discussed to the defense").

¹³⁰. *Connick*, 131 S. Ct. at 1363.

¹³¹. *Id.*

¹³². *Id.*
aware of the fact that the prosecutors all knew about their general obligation under *Brady*. That fact is undisputed. Although there may have been some confusion about specific *Brady* scenarios, as outlined above,\footnote{See supra note 92.} the prosecutor no doubt knew that favorable evidence was supposed to have been turned over to the defense.

V. FAILURE TO TRAIN DIDN’T “ACTUALLY CAUSE” THE *BRADY* VIOLATION

As outlined above, in order to impose liability on a municipality under § 1983, the plaintiff must not only show that by failing to provide the relevant training, the municipality acted with “deliberate indifference to the obvious unconstitutional consequences of its decision,” but “must [also] satisfy a ‘rigorous’ standard of causation.”\footnote{Id. at 404.} He must “demonstrate a direct causal link between the municipal action and the deprivation of federal rights”\footnote{Monell v. New York City Dep’t. of Soc. Servs., 436 U.S. 658, 694 (1978).} to demonstrate that through the municipality’s deliberate conduct, the *municipality* was the “moving force”\footnote{Brown, 520 U.S. at 410.} behind the injury involved and not the employees conduct. “[A] court must carefully test the link between the policymaker’s inadequate decision and the particular injury alleged,”\footnote{Connick, 131 S. Ct. at 1358. n.5.} to ensure that a municipality is held liable only for its own illegal acts, and not the acts of its employees.

Because the Court in *Connick* concluded “that Thompson failed to prove Connick’s deliberate indifference,”\footnote{Id.} they did not reach causation, and therefore did “not address whether [it was] the alleged training deficiency, or some other cause. . . [that] was the ‘moving force,’ that ‘actually caused’ the failure to disclose the crime lab report”\footnote{Although neither the majority nor dissent fully addressed the causation issue, there were various references made to whether the causal connection between the *Brady* violation and the resulting harm existed. See *Connick*, 131 S. Ct. at 1368, 1380.} in Thompson’s armed robbery trial.\footnote{Id. at 405 (1997).} To hold the DA’s office liable, Thompson was required to prove that Connick’s failure to train his assistants about their obligations under *Brady* is what ‘actually caused’ Deegan’s failure to disclose

\footnote{Id. at 404.}
the blood test evidence.\textsuperscript{141} Or in the alternative, that had Deegan been properly trained about his obligation under \textit{Brady} to turn over such evidence, he would not have withheld it. Based on the record, it is clear that this conclusion cannot be drawn.

\textbf{A. \textit{INTENTIONAL \textit{BRADY}} VIOLATIONS ARE NOT “CAUSED BY” INADEQUATE OR INSUFFICIENT TRAINING}

Based on the facts surrounding the \textit{Brady} violation in \textit{Connick}, it was clear that it was not the lack of \textit{Brady} training that “actually caused” Deegan to unconstitutionally withhold the evidence in Thompson’s case, but was an intentional abuse of power. In Thompson’s case, the facts indicate that Deegan clearly knew of his obligation under \textit{Brady} to turn over the blood-test results, even though he did not know whether or not the blood matched Thompson’s blood type. The facts indicate that on the first day of trial Deegan checked out all of the evidence from the police property room including the blood stained swatch, and checked all of the evidence into the courthouse property room, except the blood stained swatch.\textsuperscript{142} He and Williams also did not mention the existence of the blood test results or the swatch at the trial.\textsuperscript{143} Deegan and Williams were clearly intentionally trying to conceal the existence of the blood-test evidence at trial to gain an unfair advantage at trial, apparently recognizing that the evidence might have been favorable to the defense, and therefore triggering their duty to turn it over. At a minimum, Deegan and Williams knew that a \textit{Brady} issue had been raised, and if they had been acting in good faith,\textsuperscript{144} they would have either conducted research to resolve any ambiguity about the applicability of \textit{Brady}, or would have at least consulted with a more experienced attorney.

Furthermore, even if it were unclear at first glance as to

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\textsuperscript{141} \textit{Connick}, 131 S. Ct. at 1358 (addressing the additional “causation” issue that Thompson would have been required to prove in order for the Court to have imposed liability on the municipality).
\textsuperscript{142} \textit{Id.} at 1356.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} Although good or bad faith is irrelevant for purposes of determining whether a \textit{Brady} violation has occurred, it is relevant for purposes of determining municipal liability because a good faith violation might be a result of not knowing one’s obligation under \textit{Brady}, and therefore caused by a failure to train; while a bad faith, or intentional violation occurs when the prosecutor is well aware of his obligation under \textit{Brady}, but intentionally withholds the evidence anyway, in which case, the violation is not caused by a lack of \textit{Brady} training.
\end{flushright}
whether Deegan knew the blood test evidence was *Brady* material in light of the fact that Thompson’s blood type was unknown, his confession to his “colleague, Michael Riehmann in 1994,”145 “that he had suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant,”146 revealed that his actions were not the result of not knowing that the evidence should have been turned over under *Brady*, but was intentionally done “in an effort to railroad Thompson.”147 “If Riehmann’s story is true, then the ‘moving force’ behind the suppression of evidence was Deegan, not a failure of continuing legal education,”148 and therefore cannot be said to have been “actually caused” by inadequate or insufficient training.

“Intentional violations occur when the prosecutor fully understands the *Brady* disclosure duty, is aware of the existence of favorable evidence in the government’s possession, appreciates the exculpatory or impeachment value of the evidence, but intentionally withholds the evidence to gain a tactical advantage in the litigation.”149 Intentional violations are not the result of a lack of training, but are quite the contrary; they exist when a prosecutor is well aware of his obligation under *Brady* but chooses to disregard it. And although a *Brady* violation occurs irrespective of good or bad faith,150 intentional violations are the most egregious, occurring irrespective of training.151 As a result, providing *Brady* training would not cure these violations.

**B. PROSECUTORS KNEW ABOUT *BRADY***

The record also indicates that it was undisputed that the prosecutors in Connick’s office, in general, were familiar with *Brady* and its general requirement to turn over favorable evidence. If prosecutors are already aware of the duty that the suggested training would’ve provided, then it does not follow that the failure to provide training in that area would cause the resulting harm.

145. *Connick*, 131 S. Ct. at 1368.
146. *Id.*
147. *Id.*
148. *Id.*
The plaintiff, however, went to great lengths at trial to demonstrate that there was confusion among Connick’s ADA’s about some of the particulars of *Brady*, apparently trying to show that training was, in fact, needed.\(^\text{152}\) However, the Court quickly pointed out in *Connick* that the fact that *Brady* training might “have been helpful”\(^\text{153}\) doesn’t mean that the lack of training actually caused the violation in this case. Even “proving that an injury or accident could have been avoided if an [employee] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct will not suffice”\(^\text{154}\) to establish that it was in fact the lack of such training that actually caused the violation at issue. This simply cannot be established in the case of intentional *Brady* violations.

Assuming arguendo, that the *Brady* violation in *Connick* had not been intentional—any competent attorney receiving blood test evidence had to have known that the evidence was at least potentially *Brady* material, triggering further action on his part to either turn over the evidence in good faith, research the issue for clarity, or to have Thompson’s blood tested to determine unequivocally if the evidence was exculpatory. The fact that these gentlemen did neither, demonstrates the bad faith in which they operated—something training could not have prevented.

Also, on the issue of whether further training was needed to account for ambiguity within the office on *Brady*, the Court has noted that a “program need only be adequate to enable employees to respond properly to the usual and recurring situations with which they must deal,”\(^\text{155}\) and can’t be expected to anticipate every possible scenario in which an issue may present itself. Apparently, this issue was not the usual and recurring way in which *Brady* issues were raised, so the Court refused to require that type of specificity of training, apparently requiring only a general understanding of *Brady* and its requirements—which the prosecutors had. The Court found that with respect to *Brady*, the prosecutors had knowledge of “the usual and recurring situations with which [the prosecutors] must deal.”\(^\text{156}\) As a result, failing to

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\(^{152}\) *Connick*, 131 S. Ct. at 1378 (Ginsburg, J., dissenting) (stating that, “[a]bundant evidence supported the jury’s finding that additional Brady training was obviously necessary. . .”).

\(^{153}\) *Connick*, 131 S. Ct. at 1363.

\(^{154}\) *Id.* at 1363-64. See also Canton v. Harris, 489 U.S. 378, 391 (1989).

\(^{155}\) *Canton*, 489 U.S. 378 at 391.

\(^{156}\) *Connick*, 131 S. Ct. at 1363. See also *Canton*, 489 U.S. at 391.
provide training in an area in which prosecutors already had knowledge did not cause the violation.

VI. PUBLIC POLICY CONSIDERATIONS IN CONSTRUING § 1983

“In construing the scope of § 1983, the Court has sometimes referred to ‘considerations of public policy.’”\(^{157}\) Although the Court did not consider public policy in construing § 1983 in *Connick*, relevant policy concerns also do not support finding the DA’s office liable under these circumstances.

Considerations of public policy help to ensure that in construing a statute “where a public interest is affected,”\(^{158}\) it will be interpreted in a way that “favors the public,”\(^{159}\) and that will be in the best interest of the public at large. Section 1983 clearly affects a public interest because the statute not only imposes liability on those acting under the authority of the government, but also does so for violations of individuals’ constitutional rights—rights held by all citizens for the very purpose of protecting them from governmental abuses. Section 1983 is the procedural vehicle to bring actions against the government for violations of individuals’ constitutional rights. So when construing § 1983 for its applicability for municipal liability for failure to provide *Brady* training, the outcome should be that which will best serve the public good.\(^{160}\)

Relevant “policy considerations”\(^{161}\) generally include determining whether the proposed construction of the statute will foster the main purpose for which the statute was designed to


\(^{158}\) SUTHERLAND STATUTORY CONSTRUCTION § 56:1 (7th ed.)

\(^{159}\) Id.

\(^{160}\) See Noble v. City of Palo Alto, 89 Cal. App. 47, 50-51 (Cal. Ct. App. 1st Div. 1928) (defining “public policy” and noting that although “it has never been defined by the courts,” it “means the public good”).

further or promulgate,\textsuperscript{162} which in many cases requires examining the history and legislative purpose for which the statute was enacted.\textsuperscript{163} The legislative purpose could be to deter future misconduct,\textsuperscript{164} punish the wrongdoer,\textsuperscript{165} compensate the victim, or further some other state interest, such as public safety. Ultimately, the statutory interpretation should conform to and further the purpose of the law.\textsuperscript{166} Additionally, the Court will often consider whether there are more effective means of furthering the goal of the law than the imposition of liability in determining whether liability should be imposed in a given case.\textsuperscript{167}

Additional policy considerations will include examining who’s in the best position to pay and recoup the cost of imposing liability,\textsuperscript{168} the practicability of or burden on the entity to prevent the harm; and often includes a balancing of interests, usually the costs of imposing liability for the harm, against the benefits of imposing liability in a particular case.\textsuperscript{169} Policy is very flexible,

\begin{itemize}
\item \textsuperscript{162} See Owen v. City of Independence, 445 U.S. 622, 650 (1980) (considering the legislative purpose of § 1983 in construing its applicability to “good faith” municipal liability).
\item \textsuperscript{163} See Owen, 445 U.S. at 643 (considering the legislative intent in determining the effect of “good faith” on city liability); Imbler v. Pachtman, 424 U.S. 409, 421 (1976) (considering the history of “immunity” in considering prosecutorial immunity); Monell v. New York City Dep’t. of Soc. Servs., 436 U.S. 658, 685 (1978) (considering the history of and reason for § 1983 in construing municipal liability under § 1983).
\item \textsuperscript{164} City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 268-71 (1981) (considering whether the deterrence goals of §1983 are advanced by imposing punitive damages against municipalities under §1983).
\item \textsuperscript{165} Id. at 259-68 (discussing the retributive rationale of punitive damages in general and of §1983 in construing whether punitive damages are properly awarded against a municipality under § 1983).
\item \textsuperscript{166} Johnson v. Roman Catholic Church, 02-0429 (La. App. 1st Cir. 2/14/03), 844 So. 2d 65, \textit{writ denied}, 03-0730 (La. 5/9/03), 843 So. 2d 401 (La. 2003), \textit{writ denied}, 03-0778 (La. 5/9/03), 843 So. 2d 406 (holding that when the language of a law is susceptible to different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law).
\item \textsuperscript{167} See City of Newport, 453 U.S. at 269 (discussing whether there is a “more effective means of [furthering the goal of] deterrence” than by imposing punitive damages on the municipality).
\item \textsuperscript{168} See Owen, 445 U.S. at 655 (considering which party might be in the best position to pay and distribute the burden of the loss in construing § 1983 as it applies to considering “good faith” on municipality liability); Monell v. New York City Dep’t. of Soc. Servs., 436 U.S. 658, 693-94 (1978) (discussing the principle of “loss sharing” as an insufficient justification for holding the municipality liable under § 1983).
\item \textsuperscript{169} City of Newport, 453 U.S. at 270 (applying a balancing of interests in determining if the award of punitive damages on municipalities is appropriate,
and only serves as a relevant factor in helping to construe a statute to determine which construction will best serve the public at large.\textsuperscript{170}

To the extent that “policy” is relevant in this case, it also does not support finding municipal liability for failure to provide \textit{Brady} training for intentional \textit{Brady} violations.

\section*{A. \textbf{HISTORY AND PURPOSE OF MUNICIPAL LIABILITY UNDER \S 1983}}

Congress enacted \S 1983 to compensate those whose constitutional rights are violated by those acting under authority of state law. As outlined above, the U.S. Supreme Court first held that municipalities could be held liable under \S 1983 in \textit{Monell}. In its analysis, the Court held that imposing such liability could further the deterrent and compensatory goals of \S 1983. Since construction of a statute in a given scenario should conform to and further the purpose of the law, liability should only be imposed if it would further the deterrent and compensatory goals of \S 1983. Therefore, liability should only be imposed on the municipality for failure to provide \textit{Brady} training for intentional \textit{Brady} violations, if it would further the deterrent and compensatory goals for \S 1983.

\section*{B. \textbf{INADEQUACY OF COMPENSATION}}

A relevant policy consideration in determining if liability under \S 1983 is the best remedy for \textit{Brady} violations that result in unlawful incarcerations, is to consider whether imposing liability under these circumstances would adequately further the statute’s compensatory goals. In other words, can and will victims of wrongful conviction for \textit{Brady} violations, be adequately compensated under this statute? Even though actions under \S 1983, in general, can result in substantial awards, lawsuits under \S 1983 have never fared very well for the wrongfully convicted.\textsuperscript{171}


First, § 1983 is only open to a small group of the wrongfully convicted because it requires violation of a constitutional right, from which most wrongful convictions do not result. Although the circumstances surrounding Thompson’s wrongful conviction involved the violation of a constitutional right, the type of harm he suffered as a result of the constitutional violation, extended unlawful incarceration, places him within a unique category of individuals who face specific concerns as a result of the constitutional violation. As a result, how to best compensate him, is best considered from the perspective of considering how to best compensate victims of wrongful conviction in general.

Victims of wrongful conviction are generally released with none of the basic necessities of life. Upon release, many of them have nowhere to live, no transportation, minimum job skills, no education, poor health, and some have psychological trauma resulting from the extended unlawful incarceration. After serving 20 to 30 years in prison, many do not have family or friends to depend upon for assistance either. As a result, they need immediate assistance that address these specific needs. Many of them do not have the money or the time to hire an attorney to fight through the legal system for years prior to being compensated for the severe damages they have suffered. For these reasons, § 1983 may not be the best remedy to compensate them.

As it relates to the wrongfully convicted, § 1983 has been criticized for being costly, time-consuming, and may require the assistance of one or more seasoned attorneys to handle the complex litigation in the federal court system that could involve extensive pre-trial, trial, and post-trial litigation. Recovery under § 1983 also involves a basic “roll-of-the-dice,” as to whether, and how much assistance will be received, if any at all. Even Thompson’s case took more than 11 years to resolve, involved exonerates have been left uncompensated due to the absences of statutes and “[existing constitutional and common-law tort doctrines”]; Shawn Armbrust, When Money Isn’t Enough: The Case for Holistic Compensation of the Wrongfully Convicted, 41 AM. CRIM L. REV. 157, 161-66 (discussing the inadequacy and ineffectiveness of §1983 in compensating the wrongfully convicted).

172. See Armbrust, supra note 171, at 162 (noting that the most common cause of wrongful convictions is mistaken or perjured testimony from eyewitnesses).

173. See generally id. (calling for “holistic compensation” of the wrongfully convicted to address the “very real physiological, psychological, and financial issues” of the wrongfully convicted upon release).
There's a Better Way

several attorneys from across the United States, racked up extensive legal fees, and was appealed all the way to the United States Supreme Court, only to result in an unfavorable resolution. Having to wait years to be compensated, or ultimately not being compensated at all, does little, if anything, to assist in obtaining many of the immediate needs associated with being released from prison after 10, 20, or more years. Waiting years to enjoy basic life necessities that they would have had without the wrongful conviction, takes even more time away from a life that the wrongfully convicted has already lost a substantial part of. It goes without question that exonerees need compensation that is quick and efficient, accessible to all who qualify for it, with objective criteria for obtaining a set amount, and that addresses needs beyond basic monetary ones.

Section 1983 simply does not address these concerns; and the point of the article is that it’s also not designed for or intended to address these types of needs. This type of harm falls outside of the compensatory goals of § 1983, and therefore, is not the appropriate remedy for Brady violations that result in wrongful conviction.

C. DETERRENT EFFECTS

Furthermore, § 1983 was “intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well.”174 So a construction of § 1983 that best furthers its deterrent goals would be the best indicator of whether Congress intended a DA’s office be held liable for intentional Brady violations.

As outlined above, in a case such as this, where the government’s action in failing to provide Brady training, cannot be said to have “actually caused” the constitutional violation, then it only follows that even with an added incentive to provide such training by imposing liability on the DA’s office, intentional Brady violations would not necessarily be prevented. As explained above, an intentional Brady violation is not caused by the lack of training, and therefore additional training will not likely prevent such violations. Imposing liability on the municipality in this context may very well be an added incentive

for the policy maker to provide such training in an effort to prevent the litigation, but unlikely to serve the actual goal of § 1983, which is to actually prevent the violations from occurring in the first place. As outlined above, intentional violations are not the result of a lack of training, but are quite the contrary; they exist when a prosecutor is well aware of his obligation under Brady but chooses to disregard it.

The Court has considered municipal liability in the related context of whether punitive damages should be available against municipalities for the intentional, malicious, or otherwise bad-faith actions of its employees, and has held that in such a case “the deterrence rationale of § 1983 did not justify imposing liability on municipalities.” The Court reasoned that “it is far from clear that municipal officials, including those at the policymaking level, would be deterred from wrongdoing by the knowledge that large punitive awards could be assessed based on the wealth of their municipality.” Nor would they be more likely to take corrective action against offending officials unless punitive damages were awarded.

The same holds true in the present case. Assuming arguendo that the constitutional violation in Connick was a result of the lack of training, there is nothing to suggest that the threat of liability on the municipality would have resulted in significant changes to how Connick would have run the DA’s office since he faced no personal loss as a result of his actions. The Court reasoned that the alternative remedy of imposing personal liability for such conduct would be much “more effective as a deterrent than the threat of damages against a government employer.” “D]amages awards recoverable against individuals, as opposed to public entities, seem more likely to be effective as a deterrent than the threat of damages against a public employer since punitive damages assessed against an offending individual, based on his or her personal finances rather than the funds in the public treasury, or some other measure of governmental wealth, advance[d] the public’s interest in preventing repeated

175. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981) (holding that punitive damages are not recoverable against a municipality under §1983 because the retributive and deterrence goals of punitive damages and of §1983 are not significantly advanced by imposing punitive awards).
176. Id. at 268.
177. Id.
178. Id. at 269 (citing Carlson v. Green, 446 U.S. 14, 21 (1980)).
D. IMPRACTICABILITY OF COMPLIANCE

Furthermore, another relevant “policy” consideration that may assist in determining whether a duty should be imposed on an entity often entails examining whether that duty is one that could effectively be carried out. It would not serve the goals of preventing a certain type of harm, if the entity upon which liability is being imposed for failing to perform in a certain respect, is unable to carry out the duty imposed upon them for that purpose. In this case, the plaintiff seeks to have liability imposed on the DA’s office because the DA failed to provide a specific type of Brady training. As explained above, the plaintiff contends that prosecutors should have been informed that blood test evidence constitutes Brady material, whether it is known to match the defendant or not. Of course the Court rejected this type of specificity of training, stating that “in virtually every instance...a § 1983 plaintiff will be able to point to something the city could have done to prevent the unfortunate incident,” but that failure to act may not be a duty that the Court will necessarily impose. Instead, the Court has recognized that a “program need only be adequate to enable employees to respond properly to the usual and recurring situations with which they must deal,” and can’t be expected to anticipate every possible scenario in which an issue may present itself. For instance, Brady evidence may present itself in a number of different ways. As Cynthia Jones outlined:

Evidence is deemed to be exculpatory if it tends to negate guilt, diminish culpability, support an affirmative defense (duress, self-defense), or if the evidence could potentially reduce the severity of the sentence imposed....exculpatory evidence is...

180. See infra Part III for a discussion of The Relevant Brady Training that Thompson claims was required in Connick’s office.
[evidence] in dictating that someone other than the defendant committed the crime. Exculpatory evidence must be disclosed even if the prosecutor does not find the information credible or has other contradictory information. Exculpatory evidence includes third-party confessions, victim or complainant recantations, eyewitness identifications of another person as the perpetrator, as well as descriptions of the perpetrator that are inconsistent with the defendant’s appearance. Also included is forensic evidence that affirmatively excludes the defendant as the culprit or fails to link the defendant to crime scene evidence (including physical evidence such as DNA, fingerprints, or bite marks). The government is also required to disclose evidence regarding the existence of other suspects who either have a modus operandi similar to the charged offense or who had the motive, means, and opportunity to commit the charged offense.  

Thompson seems to imply that there must not only be particular training in all of these specific ways in which a Brady violation could occur, but also any variation on these ways in which a violation could occur. For example, based on the plaintiff’s position, prosecutors should not only be trained to know that eyewitness identifications of someone other than the defendant is Brady material, but also a number of variations on that type of evidence, such as any reservations the witness may have had in making the identification, or statements that they weren’t sure, didn’t know, or was not comfortable making an identification. This could lead to hundreds of potential variations in which Brady violations could occur. And according to Thompson, a number of different areas in which Brady training would be required.

But this would not be the only training suggested. Potential Brady violations are not the only way in which potential constitutional violations could occur. Should D.A. offices also be required to train about every requirement designed to prevent constitutional violations and every nuance of those requirements as well? For instance, should they be required to also provide training in the various nuances of Fourth Amendment violations

184. Jones, supra note 6, at 423-25.
as well as training in the various nuances of Fifth Amendment violations as well? Where do you draw the line on how much training would be required to protect the DA’s office? It’s the very fact that the law is so vast, and has so many nuances, that aspiring attorneys must complete law school and take a bar exam prior to obtaining a license to practice law, as outlined above.\textsuperscript{185} This is also the reason why it is not unreasonable for DAs to rely on that training and their understanding to make themselves aware when they don’t know how to handle a particular situation, rather than to seek to provide training themselves. 

It would appear that imposing such a duty on the DA’s office would be a burden to the office and would divert from the primary functions of the office- the key reason why DAs are immune from personal liability in carrying out their prosecutorial duties.\textsuperscript{186} The impracticability of being able to comply with such a requirement seems to veer away from imposing such a duty on the DA’s office.

E. OTHER RELEVANT POLICY CONSIDERATIONS

Other relevant policy considerations include determining who is in the best position to pay, and a balance of the costs of imposing liability against the benefits of imposing such liability. As outlined above, the deterrent benefits of imposing liability against a municipality under these circumstances are minimal, particularly in light of other more effective means of deterrence. Similarly, § 1983 has not historically been an adequate means of compensation for the victims of \textit{Brady} violations, nor does it address much of the harm these victims face. As a result, the benefits of imposing liability under § 1983 are minimal as compared to the huge financial costs on the municipality-costs that are ultimately passed on to the general public. Large multi-million dollar judgments are a major financial burden on a municipality, when it is still unlikely that the deterrent and compensatory goals will be furthered by the imposition of liability.

Although the municipality may be in the best position to pay

\textsuperscript{185} \textit{Supra} Part IV. A discussing the education, training and standards of ethics and professionalism imposed on lawyers.

\textsuperscript{186} See \textit{Imbler v. Pachtman}, 424 U.S. 409, 424-47 (1976) (holding that prosecutors acting within the scope of their prosecutorial duties have absolute immunity from § 1983 lawsuits).
and recoup the cost of compensating the victims of Brady violations, § 1983 may not be the most adequate procedural vehicle by which to meet those goals.

VII. ALTERNATIVE REMEDIES

It is undisputed that Thompson’s constitutional rights were violated by prosecutors in Connick’s office, and that as a result he was deprived of his liberty, and a substantial part of his life which was almost ended as a result of the violation. Thompson undoubtedly suffered a grave injustice at the hands of one or more prosecutors in this case. However, according to the U.S. Supreme Court and as outlined in this article, § 1983 is not the most effective remedy for such wrongs. So the question becomes, what is the appropriate remedy for Brady violations, and in particular those that are a result of prosecutorial misconduct that results in lengthy unlawful incarcerations? It seems that any remedy for Brady violations should be addressed in three respects: 1) How to best handle Brady violations procedurally at the trial level when discovered either prior to or after conviction and sentencing; 2) How to compensate victims for violations that result in incarceration, particularly lengthy incarcerations; and 3) What are effective means of deterring future Brady violations?

A. PROCEDURALLY HANDLING BRADY VIOLATIONS

When Brady violations are discovered prior to trial, the courts will naturally require the withheld evidence to be turned over to the defense.187 The defense may be entitled to a continuance depending upon how late in the process the Brady material is discovered, to prepare the case for trial.188 There is also legislation that provides for striking the testimony or declaring a mistrial if discovered during the trial.189 If the Brady violation is discovered after the trial has concluded, the defendant may be entitled to a new trial,190 provided he can establish that

187. See Jones, supra note 6, at 443 (discussing the current sanctions scheme for Brady violations).
188. Id.
190. See Giglio v. United States, 405 U.S. 150, 154 (1972) (“A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .”) (quoting Naupe v. Illinois, 360 U.S. 264, 271 (1959))
the evidence was both exculpatory, and material, i.e., that there was a reasonable probability that the outcome of the trial would likely have been different. Of course, if the withheld evidence completely exonerates the defendant, as in Thompson’s case, the case will either be dismissed if the defendant has not been convicted, or the conviction and sentence vacated if after conviction.

Some scholars have even suggested more aggressive handling of Brady violations at the trial level to serve as a better deterrent against future misconduct, arguing that by being required only to “hand over the evidence,” prosecutors are not being required to do anything more than they were already required to do in the first place. More non-traditional measures to better deal with Brady violations at trial include giving a “Brady instruction,” which would require informing the jury of the government’s intentional suppression of Brady evidence, or allowing “a consciousness of a weak case inference,” where evidence of intentional Brady misconduct is admissible at the trial to show the government’s consciousness that their case is weak. Each of these remedies is designed to not only punish prosecutors for intentional Brady violations, but to act as a deterrent against future Brady misconduct.

B. COMPENSATING THE WRONGFULLY CONVICTED - BRADY OR OTHERWISE

Perhaps the most difficult hurdle to overcome after individuals have been wrongfully convicted as a result of Brady violations or otherwise, is figuring out the best way to adequately compensate them for the wrongful convictions and lengthy jail sentences they’ve served as a result of the violations.

(alterations in original).

193. See Jones, supra note 6, at 443.
194. See id. at 447-53.
195. See id. at 453-68.
196. See id. at 453-55.
In the past, the correctional systems often added insult to injury when an exoneree was released from prison by offering them the standard ten or twenty dollar check and a bus ticket to nowhere to begin their lives again after release from custody. It has only been within recent years with the advent of DNA testing, advocacy groups, and other individuals calling attention to the number of wrongfully convicted, that support has grown for compensating them after exoneration. For the most part, the wrongfully convicted have only had three possible avenues to not only compensate them for the time they’d already lost serving lengthy prison sentences, but to also help them to re-establish themselves to prepare for the future. Basically, compensation could either come from filing lawsuits against the state, from the introduction of a private bill before the state’s legislature, or from recovery under compensation statutes.

1. PRIVATE BILLS

Perhaps the most highly controversial method of obtaining compensation for a wrongful conviction has been through private bills. Obtaining compensation by private bills requires persuading a legislator to introduce a private bill during a legislative session for individual compensation, who must then get the approval of both the House of Representatives and Senate, then ultimately the governor’s signature before obtaining compensation for the exoneree. “Although compensation in

198. See Kimberly Grant, Ten Dollars for Twenty-Four Years: Providing Justice for Exonerees Using Victim-Offender Mediation, 15 No. 1 DISP. RESOL. MAG. 1 (discussing the case of Louisiana exoneree Michael Williams who received a check for $10 after serving 24 years in prison). See also Alberto Lopez, $10 And a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted, 36 GA. L. REV. 665 (2002) (discussing the case of Michael Ray Graham, Jr. who, upon exoneration, received “what every inmate receives upon being released from prison – whether guilty of the crime charged or not – ten dollars and a denim jacket”).

199. See Alberto Lopez, $10 And a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted, 36 GA. L. REV. 665 (2002) (examining the flaws in existing compensation schemes and proposing a scheme that would award money damages to the wrongfully convicted for both economic and non-economic harm).


these bills could be generous,\textsuperscript{202} this process obviously requires having political connections,\textsuperscript{203} often the result of a case gaining quite a bit of publicity in the media that few exonerees will have after just coming out of prison,\textsuperscript{204} ultimately reducing the process to a basic “popularity contest.”\textsuperscript{205} Also, compensation through private bills can be a very lengthy process depending upon whether the legislator has the necessary support to get the bill passed.\textsuperscript{206} In the well known case of Isadore Zimmerman of New York, it took over 20 years before obtaining compensation for the exoneree through private compensation.\textsuperscript{207} Another case involving the wrongful conviction of two men for murder and sentenced to death, took 22 years to recover via private bills.\textsuperscript{208} Although these may not be the typical time limits for gaining compensation through private bills, these are certainly possibilities, which is what makes compensation by private bills so arbitrary.

Private bills are also not guaranteed and will have varying amounts of compensation with no apparent basis for determining the compensation amount. For instance, according to the Innocence Project, in 2005 Florida awarded Wilton Dredge $22 million for twenty-two years of wrongful imprisonment, which comes to about $1 million per year.\textsuperscript{209} Three years later, Alana Crotzer received $1.25 million after serving twenty-five years of wrongful conviction, receiving only about $50,000 per year.\textsuperscript{210}

obtaining compensation by private bill).
\textsuperscript{202} Armbrust, supra note 171, at 166.
\textsuperscript{203} See Adele Bernhard, \textit{When Justice Fails: Indemnification for Unjust Conviction}, 6 U. CHI. L. SCH. ROUNDTABLE 73, 94 (1999) (discussing the “need for political connections of the person introducing the bill”).
\textsuperscript{204} See Armbrust, supra note 171, at 66 (discussing the case of Edward Honaker, noted that “upon his release from prison, found a lawyer who was a friend of a state legislator, who- after introducing a bill on four occasions- obtained $500,000 in compensation for Honaker). 
\textsuperscript{205} See Innocence Project, supra note 200, at 13.
\textsuperscript{206} See Armbrust, supra note 171, at 166-67 (explaining that one of the major disadvantages of obtaining compensation by private bill is that it can be a lengthy process and requires political connections).
\textsuperscript{207} See id. at 167 (discussing the case of Isadore Zimmerman, whose legislative bill for compensation had been passed, but was vetoed by the governor on three separate occasions before it was finally signed in 1981- just 14 weeks before he died).
\textsuperscript{208} See Bernhard, supra note 201, at 94-95 (discussing the case of Freddie Pitts and Wilber Lee who were pardoned by the governor of Florida in 1975 and after two trials and nine years on death row, were finally awarded compensation in 1998).
\textsuperscript{209} See Innocence Project, supra note 200.
\textsuperscript{210} See id.
Compensation by private bills is simply not effective. According to the Innocence Project, “[o]nly 9% of the more than 240 people who have been exonerated through DNA testing received compensation through private bills, making it the least likely remedy for the wrongfully convicted.”211 This type of uncertainly, the need for political connections, and no objective criteria for determining the compensation amount or who can receive it, makes this method of compensation both ineffective and insufficient.

2. LAWSUITS

Generally speaking, lawsuits similarly have not been an effective remedy for compensating the wrongfully convicted as a result of prosecutorial misconduct.212 Prosecutors have immunity from personal liability for their actions in their official capacity.213 The U.S. Supreme Court recently reaffirmed prosecutorial immunity from such suits holding that “prosecutors are absolutely immune from liability in § 1983 suits brought against prosecutorial actions that are ‘intimately associated with the judicial phase of the criminal process,’ because of ‘concern that harassment by unfounded litigation’ could both ‘cause a deflection of the prosecutor’s energies from his public duties’ and lead him to ‘shade his decisions instead of exercising the independence of judgment required by his public trust.’”214 The Court’s recent decision makes it highly unlikely that exonerees will ever be able to recover from a prosecutor directly, even for intentional or malicious actions.

Similarly, the U.S. Supreme Court in Connick barred recovery against the municipality for the prosecution’s intentional or unintentional Brady violations that result in wrongful incarceration—further limiting the possibility of recovery from lawsuits. Although there may have been recovery under § 1983 in general for Brady violations in other contexts, most

211. Id.
212. See Bernhard, supra note 201, at 86-92 (discussing “The Inadequacy of Common Law Tort Actions and Civil Rights Legislation”).
214. Van de Kamp v. Goldstein, 129 S. Ct. 855, 857 (2009) (holding that the chief deputy district attorney and district attorney were entitled to absolute prosecutorial immunity).
wrongful convictions are not the result of Brady violations, or constitutional issues at all for that matter, making § 1983 an unlikely remedy for most of the wrongfully convicted.

In cases where § 1983 might be a viable remedy, it still poses significant difficulties for the wrongfully convicted. Actions under § 1983 have been primarily criticized for the time it takes to recover, the expense of litigation, and the fact that only a few wrongful convictions actually result from constitutional violations. Because of the many basic needs the wrongfully convicted face after being exonerated after years of unlawful incarceration, the wrongfully convicted ultimately need a remedy that is quick, efficient, and that provides for comprehensive compensation to address many of the specific issues exonerees face upon release. As a result, many advocates of compensating the wrongfully convicted typically favor direct compensation statutes. As explained below, compensation statutes address many of the basic deficiencies of § 1983 as it relates to the wrongfully convicted. They are much more timely, efficient, and are accessible to all who qualify for it with objective criteria for obtaining a set amount. Many compensation statutes also address needs beyond basic monetary ones.

3. COMPENSATION STATUTES

The most effective compensation scheme that’s been developed thus far for compensating the wrongfully convicted has been through direct compensation statutes. Compensation statutes have gained growing support in recent years and have been recommended by many advocates and advocacy groups as the most effective means of compensating the wrongfully convicted.

215. See Innocence Project, supra note 200, (noting that 75% of those exonerated using DNA testing involved eyewitness misidentification); See also Armbrust, supra note 171, at 162 (noting that the most common cause of wrongful convictions is mistaken or perjured testimony from eyewitnesses).

216. See Bernhard, supra note 201, at 403 (noting that “civil litigation is expensive, time consuming, and uncertain”). See also Part VI B for a discussion of how § 1983's compensatory goals are not furthered for the victims of the wrongful incarceration.

217. See Innocence Project, supra note 200 (recommending compensation statutes, including sample legislation, etc.). See also Bernhard, Justice Still Fails, supra note 171, at 707 (encouraging “state legislators to enact responsible, practical compensation statutes”).

218. See infra Part VII (b)(3).
convicted. According to the Innocence Project, 27 states, including the State of Louisiana now have direct compensation statutes. These statutes typically provide a certain amount for each year of incarceration up to a certain amount. They also generally provide additional benefits such as medical benefits, job skills training, education assistance, and psychological counseling. For the most part, compensation statutes have three primary benefits: 1) they provide “a uniform approach to compensating the unjustly convicted,” 2) they “are easy to use and resolve claims rapidly,” and 3) they provide a comprehensive remedy that addresses needs beyond basic monetary needs. Although these statutes have also been criticized as not being the most adequate compensation, their benefits strongly support continuing to advocate for their implementation.

a. Provides a Uniform Approach to Compensation

One of the primary benefits of compensation statutes is that they “bring rationality to a situation that is otherwise more akin to a lottery or popularity contest.” As outlined above, lawsuits and private bills tend to result in varying amounts of recovery from case to case. The recovery amount an exoneree receives can range significantly based on political connections, to the case’s popularity in the media, to no apparent reason at all for the discrepancy. Compensation statutes, however, generally provide a set amount of recovery for each year of wrongful incarceration, usually with a maximum amount. For example, Louisiana’s statute provides for $25,000 for each year of wrongful

219. See supra note 199 (discussing advocates and advocacy groups supporting compensation statutes).
221. See Innocence Project, supra note 200.
222. Bernhard, Justice Still Fails, supra note 171, at 708.
223. Id. at 709.
224. See e.g. LA. REV. STAT. ANN. § 15:572.8 (2011) (Louisiana’s compensation statute which provides for job skills training, mental health counseling and college tuition assistance). See also Part VII B.3.c, discussing the broad range of remedies provided by compensation statutes.
225. See Armbrust, supra note 171, at 168-69 (discussing three primary problems that plague the statutory compensation system, including the need for pardon, the inadequacy of recovery, and the lack of holistic recovery).
227. See infra Part VII B.1.2.
228. See Armbrust, supra note 171, at 166-68.
incarceration up to a maximum of $250,000,\(^{229}\) whereas Texas's compensation statute provides for $80,000 for each year served with no maximum.\(^{230}\) Some statutes also outline the manner in which the recovery amount will also be paid.\(^{231}\) For example, Louisiana's recovery amount will be paid at a maximum of $25,000 a year over a ten year period. Although the maximum recovery amount may vary from state to state, with some states having a maximum of $50,000 that some critics claim is inadequate, to other states that have no maximum recovery at all, at least the exoneree knows that he can recover if he meets the qualifications, and he also has an objective basis by which to calculate the recovery amount.

**b. QUICK AND EASY**

Compensation statutes are also much easier to use and can resolve claims much more efficiently than potentially lengthy lawsuits. Some exonerees have been awarded compensation based solely on the court reading the uncontested petition of the claimant.\(^{232}\) Many statutes establish specific time limitations in which a hearing on the petition must take place, in many cases 6 months or less,\(^{233}\) and also provide for a decision from the court as soon after the hearing as practical. Although six months can be an extremely lengthy amount of time for a person who has been recently exonerated and needs immediate assistance, this is far better than the 20 years that Zimmerman waited to be compensated under a private bill, or even the more than years that John Thompson waited for compensation under § 1983, only to be overturned by the U.S. Supreme Court.

The qualifications for recovery are not very complicated either, although they may not always be easy to meet. Many statutes only contain two basic requirements for recovery:\(^{234}\) 1) that the petitioner's conviction be reversed or vacated; and 2) that he proves he is "factually innocent of the crime for which he was

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234.  *Id.*
The standard of proof for “factually innocent” ranges from “clear and convincing” to “preponderance of the evidence” and may be proven by scientific and/or non-scientific evidence, depending on the state. A petitioner can establish that his conviction was reversed or vacated by copies of the judgment, opinion, or pardon that vacated his conviction or sentence.

Although these requirements are not always easy to meet, if for example, an exoneree cannot establish that he’s factually innocent due to lack of DNA evidence, it nevertheless opens up an avenue of recovery to a number of exonerees who would not otherwise be able to recover any compensation at all without the statute. The requirements for recovery under these compensation statutes are no doubt far less complicated and lengthy than recovery under § 1983 or private bills.

**c. PROVIDES A COMPREHENSIVE REMEDY**

Another advantage of compensation statutes is that they provide a comprehensive remedy. There’s no dispute that many individuals who have been incarcerated for long periods of time may lack education and job skills, and may also suffer from physical and psychological illnesses as a result of the incarceration. Many compensation statutes address these issues. For example, the Louisiana compensation statute will pay for job skills training for up to three years; medical and counseling services for up to six years; and will also pay for college tuition and fees. In addition to these services, Texas also provides for compensation for child support payments, necessary documentation, such as a state identification card, and assistance completing documents and forms necessary to obtaining available aid and programs. Illinois also provides for

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235. **LA. REV. STAT. ANN. § 15:572.8 (2011).**

236. **See e.g., D.C. CODE § 2-422 (2012); IOWA CODE ANN. § 663A.1 (2012); LA. REV. STAT. ANN. § 15:572.8 (2011); MASS. GEN. LAWS ANN. ch. 258D §1 (2012); N.J. STAT. ANN. §§ 52:4C-1 (2012); N.Y. CT. CL. ACT § 8-b, (Consol. 2012); and OKLA. STAT. tit. 51 § 154 (2012).**

237. **See e.g., OHIO REV. CODE ANN. § 2305.02 & § 2743.48 (LexisNexis 2012); and TEX. CODE ANN. §§ 103.001; 103.051; 103.052; 103.1041 (West 2012).**

238. **See LA. REV. STAT. ANN. § 15:572.8 (2011).**

239. **See generally, Bernhard, supra note 171 (noting that “[m]oney alone can never repair damage done by an undeserved prison sentence or fully compensate for pain and suffering”).**

240. **See LA. REV. STAT. ANN. § 15:572.8 (2011).**

241. **See TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001; 103.051; 103.052;**
job search and placement services.\textsuperscript{242} These additional services could provide tens of thousands of additional dollars in compensation to an exoneree, depending upon which services are needed or utilized. And although some may argue that these services could also be addressed by the properly compensated individual himself, it is a fact that many of the deserving individuals are not sufficiently compensated to provide for these services themselves.

d. COMPENSATION STATUTES CONTINUE TO EVOLVE

As outlined above, compensation statutes by far are not without flaws. As argued, some critics claim “compensation is inadequate, varies from state to state, and that there are difficult hurdles to overcome in order to qualify,”\textsuperscript{243} However, compensation statutes have gained popularity and support in recent years as advocates\textsuperscript{244} have pushed for better compensation and more comprehensive assistance under the statutes.\textsuperscript{245} For example, in recent years, several states have increased both minimum and maximum recovery amounts, and have added more comprehensive assistances to the statutes. For example, in 2011 Louisiana’s maximum recovery increased from a total of $150,000 to $250,000; job skills training has increased from one year to three years; and medical benefits have increased from a total of three years to six years.\textsuperscript{246} Several other states have also amended their statutes in recent years to better compensate exonerees and provide for more comprehensive remedy. To date, twenty-seven states have compensation statutes. Additional efforts are being made to encourage more states to enact compensation statutes.\textsuperscript{247} Although not perfect, compensation statutes are by far the most effective means of compensating the wrongfully convicted—they are less costly and time-consuming than other remedies, and provide for a uniform approach to comprehensive remedy.

\textsuperscript{242} See 705 ILL R.S. Ch. 505/8(c) (2012).

\textsuperscript{243} Bernhard, Justice Still Fails, supra note 171.

\textsuperscript{244} THE INNOCENCE PROJECT, www.innocenceproject.org (last visited Mar. 30, 2012). See also the extensive writings of Adele Bernhard, supra note 171.

\textsuperscript{245} See Armbrust, supra note 171 at 170-81.

\textsuperscript{246} See LA. REV. STAT. ANN. § 15:572.8 (2012).

\textsuperscript{247} See supra note 185 containing advocates and advocacy organizations call on states to enact compensation legislation.
C. DETERRING FUTURE BRADY VIOLATIONS

Addressing the remedy for Brady violations, particularly those that result in wrongful incarceration, also involves considering the best way to deter future Brady violations. It appears that the most effective means of deterring future Brady violations is to impose “serious consequences for prosecutors who fail to comply with the requirements of Brady.”\(^{248}\) Prosecutors enjoy immunity from personal liability for actions in their official capacity.\(^{249}\) So it is unlikely that victims will be able to hold prosecutors personally liable for Brady violations. Furthermore, compensation statutes do not provide any direct deterrence for these types of violations. In fact, part of the simplicity of compensation statutes is the fact that they do not involve nor require any findings of fault or imposition of any sanctions on anyone in particular that may have caused the wrongful conviction.\(^{250}\)

Proposals to more effectively address this type of prosecutorial misconduct include “more aggressive use of the state bar disciplinary process to punish prosecutors for violating the professional standards that make it unethical for them to withhold favorable evidence.”\(^{251}\) Reports suggest that prosecutors are rarely disciplined for violations of their legal and ethical duties. Other proposals call for “criminal sanctions and contempt citations against prosecutors.”\(^{252}\) Also, better administrative procedures between the police departments and DA’s offices to log and track evidence may help to prevent violations.\(^{253}\)


\(^{249}\) See Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (holding that prosecutors acting within the scope of their prosecutorial duties have absolute immunity from § 1983 lawsuits).

\(^{250}\) See generally Bernhard, supra note 171, at 408 (discussing that fact that because there is no fact-finding, there is no way to know whether the person on whose behalf the bill was introduced is truly innocent). Similarly, there is also no way to determine by whose fault the wrongful conviction occurred.

\(^{251}\) Jones, supra note 6, at 436.

\(^{252}\) Id. at 437.

CONCLUSION

As it is currently written, 42 U.S.C.A § 1983 is not an adequate remedy for the victims of wrongful incarcerations resulting from Brady violations, especially intentional violations. As in the case of John Thompson, the prosecutors had the requisite training because they knew of their obligations under Brady in general, even though they may not have received specific training about their specific obligation under this scenario.

Furthermore, intentional Brady violations are not actually “caused by” any lack of training. But instead, they are caused by the willful conduct of prosecutors who are well aware of their obligations under Brady but choose to disregard it. As a result, the U.S. Supreme Court correctly held that Thompson was not entitled to compensation under § 1983 for failure to train.

However, Thompson, like so many others wrongfully convicted, is entitled to compensation for the grave injustice he suffered as a result of the violation of his constitutional rights.