

## Legally Blind: Hyperadversarialism, Brady Violations, and the Prosecutorial Organizational Culture

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# ARTICLES

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### INTRODUCTION

With great power comes great responsibility.

—*Uncle Ben, Spider-Man*<sup>1</sup>

Power tends to corrupt, and absolute power corrupts absolutely.

—*Baron Acton*<sup>2</sup>

The immense power of the prosecutor in the American criminal justice system cannot be overestimated.<sup>3</sup> This is particularly so in a system of mandatory sentences and plea bargains, which provides the prosecution with substantial leverage against defendants.<sup>4</sup> It is, therefore, distressing that prosecutors are among the least accountable legal actors in the criminal courtroom workgroup.<sup>5</sup> A study conducted by the

<sup>1</sup> SPIDER-MAN (Columbia Pictures 2002).

<sup>2</sup> Letter from Lord Acton to Bishop Creighton (1887), in 1 LOUISE CREIGHTON, LIFE AND LETTERS OF MANDELL CREIGHTON 372 (1904).

<sup>3</sup> Kay Levine & Malcolm M. Feeley, *Prosecution*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 12224, 12224 (Neil J. Smelser & Paul B. Baltes eds., 2001).

<sup>4</sup> MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 156 (1992); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 224–25, 231 (2006); see Stuart S. Nagel, *The Tipped Scales of American Justice*, in LAW AND ORDER: THE SCALES OF JUSTICE 47, 51 (Abraham Blumberg ed., 2d ed. 1973).

<sup>5</sup> Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price: Disciplinary Action Is Rare After Misconduct or Mistakes*, N.Y. TIMES, Mar. 21, 2004, at 25, available at <http://www.nytimes.com/2004/03/21/nyregion/when->

Center for Public Integrity found more than 2000 cases of prosecutorial misconduct that occurred between 1970 and 2003; these cases have resulted in dismissed charges, reversed convictions, and reduced sentences.<sup>6</sup> Another study, conducted by Chicago Tribune reporters, uncovered staggering rates of conviction reversals due to prosecutorial misconduct.<sup>7</sup> Such instances of misconduct are distressing enough in themselves but are made even worse in light of their contribution to perverse, unjust trial outcomes. While the emphasis in wrongful conviction analysis has traditionally been on fault during the investigative stage, such as eyewitness identification error,<sup>8</sup> a coerced false confession,<sup>9</sup> and the use of a “jailhouse snitch[],”<sup>10</sup> government misconduct by the police or the prosecution accounts for as much as nineteen percent of wrongful convictions.<sup>11</sup>

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prosecutors-err-others-pay-price-disciplinary-action-rare-after-misconduct.html. See generally PETER F. NARDULLI, *THE COURTROOM ELITE: AN ORGANIZATIONAL PERSPECTIVE ON CRIMINAL JUSTICE* (1978). The “workgroup” terminology comes from Eisenstein and Jacob. JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* (1991).

<sup>6</sup> Elliott & Weiser, *supra* note 5.

<sup>7</sup> Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice To Win: Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at N1; Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice To Win: Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, at N1; Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice To Win: Reversal of Fortune*, CHI. TRIB., Jan. 13, 1999, at N1; Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice To Win: The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at N1.

<sup>8</sup> Eyewitness identification error was a factor in 53.5% of wrongful convictions for capital crimes, making it the most ubiquitous error. Rob Warden, Exec. Dir., Ctr. for Wrongful Convictions, Nw. Univ. Sch. of Law, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row: An Analysis of Wrongful Convictions Since Restoration of the Death Penalty Following Furman v. Georgia* (May 2, 2001), available at <http://www.deathpenaltyinfo.org/StudyCWC2001.pdf>.

<sup>9</sup> Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 266, 270, 281–82 (1996); see also RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 196 (2008).

<sup>10</sup> To the extent that some scholars say that this evidence should be inadmissible in death penalty cases, see Rory K. Little, *Addressing the Evidentiary Sources of Wrongful Convictions: Categorical Exclusion of Evidence in Capital Statutes*, 37 SW. U. L. REV. 965, 968, 971 (2008).

<sup>11</sup> Warden, *supra* note 8.

The Model Rules of Professional Conduct<sup>12</sup> and the guidelines for prosecutors in the ABA Criminal Justice Standards<sup>13</sup> provide very little in the way of guidance, beyond the vague directive to “seek justice.”<sup>14</sup> A substantial number of prosecutors lose sight of the uniqueness of their position and the ethical obligations it entails, suggesting that these vague instructions are unhelpful.<sup>15</sup> It is therefore imperative to examine the reasons for misconduct and to construct accountability structures that address them.

While in some cases these incidents of misconduct are due to isolated malicious behavior, the literature on prosecutorial misconduct increasingly regards it as a broader phenomenon stemming from overzealousness and conviction-oriented “tunnel vision.”<sup>16</sup> “The ideal of the justice system,” writes Jocelyn Pollock, “is that two advocates of equal ability will engage in a pursuit of truth, guided by a neutral judge. The truth is supposed to emerge from the contest.”<sup>17</sup> The two advocates, however, do not share the same duties. The prosecutor, while representing the people or the government, has an ethical duty “to seek justice, not merely to convict.”<sup>18</sup> Therefore, while both sides may suffer from biases regarding the strength of their cases, these biases are more ethically problematic and have more severe implications when they characterize prosecutorial offices.

This Article discusses the phenomenon of prosecutorial bias and its possible causes, effects, and remedies, in the context of *Brady* discovery violations. As an example of the ineffectiveness of the existing legal approach to prosecutorial misconduct, the

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<sup>12</sup> See generally MODEL RULES OF PROF'L RESPONSIBILITY (2011).

<sup>13</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY § 3-1.2(c) (1993) (providing that “[t]he duty of the prosecutor is to seek justice, not merely to convict”).

<sup>14</sup> R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty To “Seek Justice”*, 82 NOTRE DAME L. REV. 635, 636–37 (2006).

<sup>15</sup> Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High-Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1453–56 (2007).

<sup>16</sup> *Id.* at 1481.

<sup>17</sup> JOYCELYN M. POLLOCK, *ETHICAL DILEMMAS & DECISIONS IN CRIMINAL JUSTICE* 230 (7th ed. 2012).

<sup>18</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY § 3-1.2(c) (1993); see also Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORD. URB. L.J. 607, 608, 612, 642 (1999).

Article analyzes the Supreme Court's recent decision in *Connick v. Thompson*. In *Connick*, the Court denied the petitioner compensation for eighteen years wrongfully spent in prison for a murder and a robbery he did not commit, despite the fact that the conviction stemmed from prosecutorial nondisclosure of exculpatory evidence.<sup>19</sup> The opinion of the Court, penned by Justice Thomas, has been criticized for its insensitivity to Thompson's tragedy.<sup>20</sup> This Article does not include a critique of the decision's tenor, nor does it delve into federal court procedure technicalities. Rather, it criticizes the Court's understanding of prosecutorial intent and training from a social science perspective.

The issue in *Connick* was whether the prosecution's failure to disclose exculpatory evidence—deliberate dishonesty on the part of one prosecutor, aided by others in hiding his misdeed—can amount to “deliberate indifference” on the part of the office for training prosecutors in *Brady* violations.<sup>21</sup> But, as this Article argues, this debate misses the material point. Classifying a prosecutorial misdeed as either an act of a malicious individual or as the failure of an office to properly train its employees creates a dichotomy between malice and good faith that fails to address the fundamental problem, which is the existence of a pervasive prosecutorial subculture that generates confirmation biases, tunnel vision, and huge personal investment in a guilty verdict. Using literature from the classic empirical courtroom studies of the 1960s and 1970s, as well as recent cutting-edge studies in cultural cognition, this Article shows how a hyperadversarial system yields polarized organizational cultures, which hinder the ability of prosecutors and defense attorneys to see the other side's perspective, and compromises not only the quality of lawyering but also the fate of both defendants and victims. Ironically, by making prosecutors responsible for discovery, the Court has placed responsibility for discovery in the

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<sup>19</sup> 131 S. Ct. 1350, 1355–56 (2011) (finding a prosecutor's office not liable to a wrongfully convicted suspect who spent fourteen years on death row after it failed to disclose exculpatory evidence at his trial). The case is discussed in detail in Part I.

<sup>20</sup> Dahlia Lithwick, *Cruel but Not Unusual: Clarence Thomas Writes One of the Meanest Supreme Court Decisions Ever*, SLATE (Apr. 1, 2011, 7:43 PM), <http://www.slate.com/id/2290036/> (arguing that the majority opinion shows empathy only to the prosecution).

<sup>21</sup> *Connick*, 131 S. Ct. at 1358–60.

hands of those least likely to be able to perceive, interpret, and assess the evidence's exculpatory potential. Ultimately, neither legal remedy—sending a message through conviction reversal or inflicting punitive damages through a § 1983 verdict—is likely to be effective in eradicating *Brady* violations.

Part I presents the problem through an analysis of the opinion of the Court, Justice Scalia's concurrence, and Justice Ginsburg's dissent. Part II shows the role played by causation and culpability in framing the responsibility of prosecutors in discovery proceedings. Part III discusses the implications of discovery violations for § 1983 suits, in contrast to their role in direct and collateral review of the conviction itself. Part IV presents evidence from a solid body of literature in sociology and political science, explaining why the debate misses the essential understanding of how prosecutorial offices work. Part V tackles the thorny issue of prosecutorial, police, and judicial intent in constitutional violations, explaining why curbing § 1983 lawsuits to a narrow definition of respondeat superior is an inadequate solution for these violations. Part VI provides a series of solutions and recommendations, in the spirit of toning down hyperadversarialism: encouraging personnel transition between prosecution and defense, putting people who have been on both sides in charge of professional training, and reforming the law school curriculum and bar exams to address the need to develop the cognitive skill to see an issue from all perspectives, through the use of persuasive memo writing and performance tests. Finally, the epilogue provides an agenda for a future empirical study on prosecutorial and defense perceptions of facts and case strengths.

## I. *CONNICK V. THOMPSON*: AN EXERCISE IN PROSECUTORIAL MISCONDUCT

### A. *The Facts*

The respondent, John Thompson, brought a § 1983 lawsuit against Connick, District Attorney of Orleans Parish in Louisiana, for damages for eighteen years spent in prison,

fourteen of them on death row, for two unrelated crimes, neither of which he committed.<sup>22</sup> The story behind this wrongful conviction is tragic and infuriating.<sup>23</sup>

In 1984, Thompson was arrested for murder.<sup>24</sup> Another man arrested with him, as part of a plea bargain, agreed to testify against Thompson in the murder trial. As a result of the publicity following the murder charge, Thompson was identified by victims of an unrelated armed robbery as their attacker.<sup>25</sup> Thompson was charged with both offenses.<sup>26</sup> The prosecution decided to proceed with the burglary trial first, because a conviction would rule out Thompson's testimony in the murder trial and would allow them to seek the death penalty.<sup>27</sup> The prosecutors did not disclose to the defense several important pieces of exculpatory evidence, including impeachment testimony and a blood sample taken from the crime scene.<sup>28</sup> Thompson was convicted of burglary and subsequently chose not to testify in his murder trial,<sup>29</sup> so as not to open the door to admission of the burglary conviction. He was convicted for the murder<sup>30</sup> too and, due to the former conviction, sentenced to death.<sup>31</sup>

A month before Thompson's scheduled execution, a miracle occurred: A private investigator employed by the defense came across the blood sample taken from the crime scene almost twenty years before.<sup>32</sup> The blood type did not match

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<sup>22</sup> *Connick*, 131 S. Ct. at 1355–56; John Thompson, Op. Ed., *The Prosecution Rests, but I Can't*, N.Y. TIMES, Apr. 9, 2011, at WK11, available at [http://www.nytimes.com/2011/04/10/opinion/10thompson.html?\\_r=2&pagewanted=1&hp](http://www.nytimes.com/2011/04/10/opinion/10thompson.html?_r=2&pagewanted=1&hp).

<sup>23</sup> For an overview of the facts, see Nina Totenberg, *Man Wrongly Convicted: Are Prosecutors Liable?*, NAT'L PUB. RADIO (Apr. 2, 2011), <http://www.npr.org/2011/04/02/135053529/man-wrongly-convicted-are-prosecutors-liable>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Connick*, 131 S. Ct. at 1356.

<sup>27</sup> Totenberg, *supra* note 23.

<sup>28</sup> *Id.* It is important to note that the prosecutors did not know what Thompson's blood type was at the time. *Connick*, 131 S. Ct. at 1356. This detail became important later in the Supreme Court decision, but it also begs the undiscussed question why the police did not seek to establish a match. While this paper addresses prosecutorial, rather than police misconduct, hyperadversarialism might partially explain this glaring omission as well.

<sup>29</sup> Totenberg, *supra* note 23.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*



Thompson's.<sup>33</sup> Thompson was retried, presented evidence that another man committed the crimes,<sup>34</sup> and was acquitted of all charges.

Unbeknownst to Thompson at the time, several years before the discovery—when he had already been on death row for years—one of the prosecutors, diagnosed with a terminal illness, revealed to another prosecutor that he had withheld the exculpatory evidence.<sup>35</sup> Now aware of the misdeed, no one else in the prosecutor's office did anything to bring this information to light. After his exoneration, Thompson sued the prosecutor's office for damages under § 1983.<sup>36</sup> Connick conceded that the failure to disclose the blood sample was a *Brady* violation but argued that the violation could not be attributed to the municipality under § 1983 jurisprudence.<sup>37</sup> The jury awarded Thompson fourteen million dollars in damages—a million for every year wrongfully spent on death row.<sup>38</sup> A subsequent appellate decision noted that the robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense and so causally linked the prosecutors' misconduct in the burglary case to the conviction in the murder case.<sup>39</sup> The prosecutor's office appealed the decision to the Supreme Court.<sup>40</sup> On March 29th, the Supreme Court reversed, ruling in Connick's favor.<sup>41</sup>

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<sup>33</sup> *Id.*

<sup>34</sup> *Connick*, 131 S. Ct. at 1357. Note that the other man, who was dead by the time of retrial, was the original arrestee who cut a deal with the prosecution and provided evidence against Thompson. Accepting his word without a doubt as to his objectivity, when he was initially arrested for the same crime, is another example of the legal blindness caused by hyperadversarialism.

<sup>35</sup> Lithwick, *supra* note 20.

<sup>36</sup> *Connick*, 131 S. Ct. at 1355.

<sup>37</sup> *Id.* at 1357.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1356–57. Note that this causality was not only foreseen; it was relied upon by the prosecutors, who chose to proceed with the burglary trial first. The fascinating issue of prosecutorial exploitation of multiple charges to manipulate the defendant's right to testify merits further research and exceeds the framework of this paper.

<sup>40</sup> *Id.* at 1356. Note that this causality was not only foreseen; it was relied upon by the prosecutors, who chose to proceed with the burglary trial first. The fascinating issue of prosecutorial exploitation of multiple charges to manipulate the defendant's right to testify merits further research and exceeds the framework of this paper.

<sup>41</sup> *Id.* at 1355–56.

*B. Deliberate Indifference or Individual Misstep?: Justice Thomas' Opinion*

Justice Thomas announced the decision of the Court, stating that under the doctrine exposing states to liability for constitutional violations, the failure to disclose the evidence in this case did not entitle Thompson to compensation.<sup>42</sup>

Under the policy of the District Attorney's Office, wrote Justice Thomas, prosecutors were to turn crime lab reports and other scientific evidence over to the defense.<sup>43</sup> Despite this fact, and despite the prosecutors' concession that failure to do so constituted a *Brady* violation, Justice Thomas declared it was unclear whether, not knowing Thompson's blood type, the prosecution should have regarded the perpetrator's blood type as exculpatory evidence requiring disclosure.<sup>44</sup>

Even assuming that a *Brady* violation occurred, wrote Justice Thomas, government agencies are generally only responsible under § 1983 for their own actions, not those of their employees.<sup>45</sup> In order to establish liability, a plaintiff has to prove that the violation was not some personal mishap on the part of one of the employees but rather the product of official agency policy.<sup>46</sup> In this case, Thompson tried to link the activities of the particular group of prosecutors to the office policy by arguing that Connick failed to train his staff in their discovery obligations.<sup>47</sup>

The standard for proving a failure to train is very high. One way of proving failure to train requires plaintiffs to marshal impressive amounts of evidence, much of it regarding similar errors, to show that the municipality or institution exhibited "deliberate indifference" to the possibility of violation.<sup>48</sup> In this case, stated the Court, this burden was not met.<sup>49</sup> Evidence of similar *Brady* violations occurring in the same office is only relevant when such violations were of the same nature and

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<sup>42</sup> *Id.* at 1366.

<sup>43</sup> *Id.* at 1357.

<sup>44</sup> *Id.* at 1357–58.

<sup>45</sup> *Id.* at 1359.

<sup>46</sup> *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).

<sup>47</sup> *Connick*, 131 S. Ct. at 1360–61.

<sup>48</sup> *Id.* at 1360; *City of Okla. City v. Tuttle*, 471 U.S. 808, 822–23 (1985).

<sup>49</sup> *Connick*, 131 S. Ct. at 1365.

occurred before the violation in the plaintiff's case.<sup>50</sup> Some of the violations Thompson presented occurred after he had already been convicted.<sup>51</sup> Others did not involve a failure to disclose blood tests or scientific evidence specifically and therefore would not put Connick on notice that further training was needed.<sup>52</sup>

The other path open to plaintiffs is based on *City of Canton v. Harris*.<sup>53</sup> In *Canton*, the Supreme Court stated that in some cases the single constitutional violation would be so egregious that it, in itself, could prove lack of training.<sup>54</sup> The *Canton* conditions, wrote Justice Thomas, were not met in *Connick*.<sup>55</sup>

Finally, the Court found no causality between lack of training at the prosecutor's office and the *Brady* violation.<sup>56</sup> The Court wrote that attorneys learn about *Brady* and discovery as part of their law school education,<sup>57</sup> even though in many institutions criminal procedure is not a mandatory part of the curriculum. Their studies for the bar exam and continuing legal education requirements, to which they are subjected after certification, are additional opportunities to learn about the rules.<sup>58</sup> Moreover, all attorneys are subject to a moral character vetting before admission to the bar.<sup>59</sup> At the District Attorney's

<sup>50</sup> *Id.* at 1360.

<sup>51</sup> *Id.* at 1360 & n.7.

<sup>52</sup> *Id.* at 1360.

<sup>53</sup> 489 U.S. 378 (1989).

<sup>54</sup> *Id.* at 390 n.10 (1989) (stating the single-instance "*Canton*" hypothetical identified by the majority opinion in *Connick*).

<sup>55</sup> *Connick*, 131 S. Ct. at 1361, 1363. The decision distinguishes between training for police officers (the hypothetical posed in *Canton*, which would show a city's deliberate indifference to the "highly predictable consequence" that lack of training would lead to constitutional violations) and training for attorneys. *See id.* Ultimately, the high standard was not met. *Id.* at 1360, 1363–64.

<sup>56</sup> *Id.* at 1363 ("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 about how to obey the law.") (quoting *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 409 (1997)).

<sup>57</sup> *Id.* at 1363 (stating that the *Canton* hypothetical assumes a complete lack of knowledge on the part of police officers, and further stating that it is "undisputed here that the prosecutors in *Connick's* office were familiar with the general *Brady* rule").

<sup>58</sup> *Id.* at 1361. It is worthwhile to note that several states, including Connecticut and Massachusetts, as well as the District of Columbia, do not require continuing legal education for their attorneys. *MCLE Information by Jurisdiction*, ABA, [http://www.americanbar.org/publications\\_cle/mandatory\\_cle/mcle\\_states.html](http://www.americanbar.org/publications_cle/mandatory_cle/mcle_states.html) (last visited Oct. 28, 2013).

<sup>59</sup> *Connick*, 131 S. Ct. at 1362 (citing LA. STATE BAR ASS'N ARTICLES OF INCORP. Art. 14 § 7 (1988)). Moral character requirements usually pertain to convictions and

office, newcomers are usually supervised by more experienced attorneys, from whom they might learn how to handle discovery requests and issues.<sup>60</sup> In short, prosecutors, as opposed to police officers, the malfeasors in *Canton*, have more exposure to the general rules outlining their required conduct, which does away with the need for specific training on the matter.<sup>61</sup> Thus, according to Justice Thomas, more training would not have prevented the individual misdeed in Thompson's case, and the responsibility for his wrongful conviction did not lie with Connick.

### C. Was This a Brady Violation?: Justice Scalia's Concurrence

The concurring opinion went further than the majority in denying the causality between the lack of training and the failure to discover the evidence. According to Justice Scalia, the question of whether there was a "pervasive culture of indifference to *Brady*" was irrelevant;<sup>62</sup> the only question before the Court was whether "the need for training in constitutional requirements is so obvious *ex ante* that the municipality's failure to provide that training amounts to deliberate indifference to constitutional violations."<sup>63</sup> *Brady* violations, said Justice Scalia, are inevitable;<sup>64</sup> the nature of the violation here was highly personal. Deegan, the prosecutor at fault, confessed to Riehlmann, "in the same conversation in which Deegan revealed that he had only a few months to live[,] that he had 'suppressed blood evidence in the armed robbery trial of John Thompson that

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history of fraud or misrepresentation. See generally MODEL RULES OF PROF'L RESPONSIBILITY (2011). The majority supposedly suggests that this background check might guarantee a lesser likelihood of fraud in practice.

<sup>60</sup> *Connick*, 131 S. Ct. at 1362. "[I]n the Orleans Parish District Attorney's Office, junior prosecutors were trained by senior prosecutors who supervised them as they worked together to prepare cases for trial, and trial chiefs oversaw the preparation of the cases. Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments." *Id.*

<sup>61</sup> *Id.* at 1363. "A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same 'highly predictable' constitutional danger as *Canton's* untrained officer." *Id.*

<sup>62</sup> *Id.* at 1366 (Scalia, J., concurring).

<sup>63</sup> *Id.* (citing *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989)).

<sup>64</sup> *Id.* at 1367 (claiming that not only are *Brady* violations inevitable, but "[s]o are all species of error routinely confronted by prosecutors").

in some way exculpated the defendant.’”<sup>65</sup> In turn, Riehlmann kept quiet about the violation for five years.<sup>66</sup> This, said Justice Scalia, was a “good-faith nondisclosure of a blood report not known to be exculpatory,” which no amount of training would prevent.<sup>67</sup>

Because Riehlmann’s failure to come forward was an error made in good faith, said Justice Scalia, Thompson’s case could not be distinguished from the result in *Arizona v. Youngblood*.<sup>68</sup> In *Youngblood*, which dealt with destruction of potentially exculpatory evidence,<sup>69</sup> the Court held that destruction of evidence only constituted a violation when done in bad faith.<sup>70</sup> With regard to good-faith violations, the rule is the same for nondisclosure and destruction.<sup>71</sup> Justice Scalia speculated,

Perhaps one day we will recognize a distinction between good-faith failures to preserve from destruction evidence whose inculpatory or exculpatory character is unknown, and good-faith failures to turn such evidence over to the defense. But until we do so, a failure to train prosecutors to observe that distinction cannot constitute deliberate indifference.<sup>72</sup>

Justice Scalia finished his opinion “revealing” what he referred to as the “best-kept secret of this case,” which was that “[t]here was probably no *Brady* violation at all—except for Deegan’s (which, since it was a bad-faith, knowing violation, could not possibly be attributed to lack of training).”<sup>73</sup> Anyone else’s shortcomings, which were supposedly not in bad faith, did not trigger a duty to train, and therefore did not generate liability on Connick’s part.<sup>74</sup>

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<sup>65</sup> *Id.* at 1368.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1369 (citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)).

<sup>69</sup> In *Youngblood*, the evidence would have undoubtedly been exculpatory; Youngblood was exonerated in 2000 from his 1985 conviction. *Arizona Exonerated*, ARIZONA INNOCENCE PROJECT, [http://www.arizonainnocenceproject.org/AzIP\\_4/Exon.html](http://www.arizonainnocenceproject.org/AzIP_4/Exon.html) (last visited Oct. 28, 2013).

<sup>70</sup> *Youngblood*, 488 U.S. at 58.

<sup>71</sup> *Connick*, 131 S. Ct. at 1369.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* The smug tone of this assertion has triggered indignant critique. See, e.g., Lithwick, *supra* note 20.

<sup>74</sup> *Connick*, 131 S. Ct. at 1369–70.

*D. Systemic Disregard?: Justice Ginsburg's Dissent*

The essence of Justice Ginsburg's dissent was that Thompson had met the burden of proof required by *Canton*: The evidence showed systemic flaws in the administration of discovery and compliance with *Brady* standards that could be prevented through appropriate training. According to Justice Ginsburg, the evidence established "that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish."<sup>75</sup> While this was demonstrated as a general trend within the office, the incident itself had such obvious markings of flagrant disregard of *Brady* duties that it satisfied the *Canton* requirements.<sup>76</sup> Several prosecutors disregarded Thompson's *Brady* rights.<sup>77</sup> This disregard stemmed from a general animus and zeal-feeding prosecutorial policy in this case.<sup>78</sup> Thompson's conviction might explain this disregard: The prosecution made a strategic choice to file the robbery charges first, so that Thompson would not testify at his murder trial and would have a conviction on record to present at the death penalty phase.<sup>79</sup> Justice Ginsburg further pointed out that the case was not an example of a single isolated violation.<sup>80</sup> Beyond the blood evidence incident, there were other examples of *Brady* violations in the trial: The defense was not offered potential impeachment evidence,<sup>81</sup> nor was it made aware that the eyewitness description in the original police report did not match Thompson.<sup>82</sup>

Under these circumstances, argued Justice Ginsburg, "[t]he prosecutorial concealment Thompson encountered . . . is bound to be repeated unless municipal agencies bear responsibility . . . for

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<sup>75</sup> *Id.* at 1370 (Ginsburg, J., dissenting).

<sup>76</sup> *Id.* at 1377.

<sup>77</sup> *Id.* at 1370.

<sup>78</sup> For an example of the animus characterizing prosecutorial policy in this case, see *id.* at 1373 n.7 (citing the trial transcript that states, "During jury deliberations in the armed robbery case, Williams, the only Orleans Parish trial attorney common to the two prosecutions, told Thompson of his objective in no uncertain terms: 'I'm going to fry you. You will die in the electric chair.'").

<sup>79</sup> *Id.* at 1373 n.8.

<sup>80</sup> *Id.* at 1370.

<sup>81</sup> *Id.* at 1374.

<sup>82</sup> *Id.* ("Failure to produce the police reports setting out what the eyewitness first said . . . left defense counsel without knowledge that the prosecutors were restyling the killer's 'close cut hair' into an 'Afro.'").

adequately conveying what *Brady* requires and for monitoring staff compliance.”<sup>83</sup> The majority’s position was particularly problematic because the office prosecutors had come “fresh out of law school”<sup>84</sup> and their manual did not include a comment about impeachment evidence.<sup>85</sup>

This set of factors, wrote Justice Ginsburg, satisfied the requirements set in *Canton*: There was a certainty that the prosecutors would confront the situation; the situation involved a difficult choice or one where there had been a history of mishandling; and, as actually occurred in this case, the wrong choice would frequently cause a deprivation of rights.<sup>86</sup>

## II. *BRADY* AND DISCOVERY

### A. *Discovery and Adversarialism*

The discovery obligation is a relatively new trend in the common law adversarial system.<sup>87</sup> Its very nature conflicts with the concept of the trial as a “contest” between two teams, with the judiciary and jury playing only a secondary part;<sup>88</sup> revealing one’s information entails relinquishing the advantage of surprise.<sup>89</sup> It is no wonder, therefore, that its scope has been

<sup>83</sup> *Id.* at 1370.

<sup>84</sup> *Id.* at 1379 (internal quotation marks omitted).

<sup>85</sup> *Id.* at 1381 (noting that “the manual did not acknowledge what *Giglio v. United States* made plain: Impeachment evidence is *Brady* material prosecutors are obligated to disclose” (citing *Giglio v. United States*, 405 U.S. 150 (1972) (citation omitted))).

<sup>86</sup> *Id.* at 1382 (citing *City of Canton v. Harris*, 489 U.S. 378, 390 & n.10 (1989)).

<sup>87</sup> Steven M. Smoot, *Discovery in Texas Criminal Cases: How Far Have We Come?*, 8 AM. J. CRIM. L. 91, 91 (1980). As Smoot points out, the concept of “trial by surprise” was common in the criminal justice world as recently as maybe thirty years ago; since then, reforms have pretty much eliminated trial by surprise in favor of extensive pretrial wrangling.

<sup>88</sup> Of course, this ideal has not been fully preserved in reality. See William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 371–72 (2001). But some argue that in the criminal justice system it is more of a contest on behalf of the defense. The prominence of plea bargains in the system should not be seen as a fault in this model; as some argue, plea bargains are the logical conclusion of the adversarial process. See generally Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338, 340 (1982) (explaining several of the values unique to the adversarial system).

<sup>89</sup> Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 249 (1964); see also Sean Doran et al., *Rethinking Adversarialism in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 19 (1995).

under debate in the United States and in a number of other jurisdictions,<sup>90</sup> in which scholars and practitioners have presented arguments about the nature of the system. Discovery is an important, albeit not the only, method for providing information on the case early on,<sup>91</sup> allowing the parties to narrow the focus of trial when applicable. However, in a system based primarily on plea-bargaining, it becomes particularly important, in that it allows the parties more control over assessing the value of the case and therefore may ease negotiations based on more information.<sup>92</sup> Discovery is particularly important in determinate sentencing cases, because minute factual details may make a difference regarding the classification for sentencing purposes and will often be negotiated by the parties in the context of a plea.<sup>93</sup>

The trend in state law, in general, has been toward an expansion of discovery rights; federal law has lagged behind the states in promoting pretrial discovery.<sup>94</sup> Under most state law, the prosecution and the defense must, at a minimum, share their lists of witnesses with each other prior to trial.<sup>95</sup> While this obligation pertains to both parties, it is particularly crucial that the prosecution, acting as an “officer of the court,” comply with it.<sup>96</sup> Another important trend, also influenced by the prevalence

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<sup>90</sup> In Canada, for example, one of the prosecutors interviewed by James Wilkins has critiqued the imbalance between prosecution and defense duties to disclose, arguing that the defense should be required to disclose as much evidence as the prosecution. James L. Wilkins, *Discovery*, 18 CRIM. L.Q. 355, 371–72 (1975–76).

<sup>91</sup> Timothy B. Heavner, *Leaving No Stone Unturned: Alternative Methods of Discovery in Capital Cases*, 7 CAP. DEF. DIG. 38, 38, 40 (1995) (suggesting the use of a subpoena duces tecum or the Freedom of Information Act).

<sup>92</sup> Debra S. Emmelman, *Trial by Plea Bargain: Case Settlement as a Product of Recursive Decisionmaking*, 30 LAW & SOC’Y REV. 335, 345 (1996).

<sup>93</sup> Stephen H. Glickman & Steven M. Salky, *Rediscovering Discovery: It’s Time To Overhaul the Rules To Ensure Fair Treatment for Defendants in Federal Cases*, 4 CRIM. JUST. 12, 14–15 (1989). Even in systems in which sentencing is less determinate and sentencing factors are listed in a statute, discovery of facts may be crucial.

<sup>94</sup> *Id.* at 14.

<sup>95</sup> JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PROSECUTING CRIME 880–81 (4th ed. 2010).

<sup>96</sup> Tamara L. Graham, *Death by Ambush: A Plea for Discovery of Evidence in Aggravation*, 17 CAP. DEF. J. 321, 331 (2005). The symmetry between prosecution and defense is not the same in all states, and several countries, such as Israel and the UK, require almost unilateral discovery on the part of the prosecution, whereas most of the defense’s plan can be a surprise. M. Shalgi, Note, *Criminal Discovery in Israel*, 4 AM. CRIM. L.Q. 155, 158 (1966). Nonetheless, in almost all countries, there



of plea bargaining, has been an increasing informality in the discovery process, which in many settings is handled by direct communication between the parties, often without a specific request and without judicial intervention.<sup>97</sup>

*B. Subverting Adversarialism: Discovery of Exculpatory Evidence*

*Brady v. Maryland's* mandate that the prosecution disclose exculpatory evidence<sup>98</sup> is built upon previous decisions about prosecutorial mishandling of evidence. In *Mooney v. Holohan*,<sup>99</sup> the Supreme Court pronounced a rule against presenting perjured evidence;<sup>100</sup> *Brady* extended this rule from prohibiting false evidence to prohibiting the omission of exculpatory evidence.<sup>101</sup> Echoing two Third Circuit Court decisions,<sup>102</sup> the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>103</sup>

For the purpose of discussing adversarialism and prosecutorial responsibilities, it is important to make two observations about *Brady*. First, *Brady* explicitly rejects any requirement to prove mens rea on the part of the prosecutor.<sup>104</sup> Whether or not the lack of disclosure was due to bad faith, it is enough that the evidence was material to either guilt or sentence.<sup>105</sup> This is a harm-oriented, rather than an intent-

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is one piece of information that defendants must disclose: an alibi defense. *See, e.g., Williams v. Florida*, 399 U.S. 78, 85 (1970) (holding that the Fifth Amendment does not entitle a defendant in a criminal trial to refuse to disclose his alibi).

<sup>97</sup> Practices in this regard vary widely between states and even between prosecutorial offices. Wm. Bradford Middlekauff, *What Practitioners Say About Broad Criminal Discovery Practice*, 9 CRIM. JUST. 14, 16, 55-58 (1994).

<sup>98</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>99</sup> *Mooney v. Holohan*, 294 U.S. 103 (1935).

<sup>100</sup> *Id.* at 112.

<sup>101</sup> *Brady*, 373 U.S. at 86.

<sup>102</sup> *See id.* (citing *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952) and *United States ex rel. Thompson v. Dye*, 221 F.2d 763 (3d Cir. 1955)).

<sup>103</sup> *Id.* at 87. It is important to point out that, while some of the leading cases on *Brady* violations focused on evidence that went to the question of guilt, evidence useful for punishment mitigation is also "exculpatory evidence."

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

oriented, rule.<sup>106</sup> Second, and more importantly, the power of *Brady* is in its profound challenge of the adversarial “contest” model. The rule makes an important statement about the duties the prosecution owes to the defendant and to the interest of justice. Beyond refraining from making biased comments<sup>107</sup> or creating biased jury panels,<sup>108</sup> a rule requiring disclosure places an affirmative duty on the prosecution to help the defense make its case. Evidence collected by the police for the purpose of securing a conviction must be placed in the hands of the defense, even though—or in fact, because—it might secure acquittal.<sup>109</sup>

### C. Responsibility for Discovery: The Agurs-Bagley Debate

The revolutionary nature of the *Brady* rule, and complications resulting from its breadth and vagueness, required some elucidation in subsequent years. In *United States v.*

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<sup>106</sup> Based on causality rather than intent, this rule is similar to other criminal procedure rules, such as bail. It is different, however, from the rules about jury selection that have required intent. See *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). In *Batson*, the Court held that a defendant may show violation of his or her right to a jury venire drawn from a cross-section of the community only by a showing of purposeful racial discrimination by the prosecutor. *Id.* The defendant must show that, in his or her jury selection, the prosecutor used peremptory challenges to exclude members of the defendant’s “cognizable racial group” and must show such circumstances that “raise an inference that the prosecutor used [peremptory challenges] to exclude the veniremen from the petit jury on account of their race.” *Id.* Later decisions expanded the grounds for a *Batson* challenge, but the test and intent required remained the same. See, e.g., *Powers v. Ohio*, 499 U.S. 400, 416 (1991) (expanding *Batson* to cases which did not involve claimants and jurors of the same race but maintained the purposeful requirement of the discrimination). This leaves without remedy those who are harmed based on their race or other cognizable characteristic but who cannot show intent. Scholars examining implicit bias have argued compellingly that unconsciously held negative views about race affect our actions but cannot be shown to constitute intentional discrimination. See, e.g., Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action”*, 94 CALIF. L. REV. 1063, 1076 n.69 (2006).

<sup>107</sup> *Mitchell v. United States*, 526 U.S. 314, 330 (1999) (holding that the right to be free of negative inferences based on a failure to testify extends to the sentencing stage in federal trials); *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (holding that defendants are entitled to have the jury instructed that no inference may be drawn from a defendant’s refusal to testify); *Griffin v. California*, 380 U.S. 609, 615 (1965) (holding that a prosecutor’s comment on defendant’s failure to testify violated the self-incrimination clause of the Fifth Amendment).

<sup>108</sup> See *Batson*, 476 U.S. at 97.

<sup>109</sup> See, e.g., Note, *The Prosecutor’s Duty To Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1005 (1986).

*Agurs*,<sup>110</sup> the prosecution failed to disclose the victim's previous convictions for violent crime, which would have supported a self-defense argument.<sup>111</sup> Justice Stevens discerned three situations. First was prosecutorial reliance on perjured testimony, in which case the standard for setting aside the verdict depends on applying a "strict standard of materiality."<sup>112</sup> Second, nondisclosure in reply to a request for specific evidence also requires a test of materiality upon appeal.<sup>113</sup> *Agurs* presented a third situation. In *Agurs*, the defense made no specific request for information.<sup>114</sup> Rather, as became practice among defense attorneys at the time, there was a general request for *Brady* materials. This, the Court stated, presented a difficulty:

In many cases . . . , exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all *Brady* material" or for "anything exculpatory." Such a request really gives the prosecutor no better notice than if no request is made. If there is a duty to respond to a general request of that kind, it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made. Whether we focus on the desirability of a precise definition of the prosecutor's duty or on the potential harm to the defendant, we conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request at all.<sup>115</sup>

The Court in *Agurs* was therefore clearly trying to prevent abuse of *Brady* by the defense. The difficulty is one that has to do with the burden placed upon the prosecutor. The more interesting aspect of *Agurs* is that the limitation upon the prosecutor seems to be one of perception. In other words, what concerned Justice Stevens was that prosecutors would be required to look for the evidence not only *for* the defense attorney

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<sup>110</sup> *United States v. Agurs*, 427 U.S. 97 (1976).

<sup>111</sup> *Id.* at 100-01.

<sup>112</sup> *Id.* at 103-04.

<sup>113</sup> *Id.* at 104.

<sup>114</sup> *Id.* at 102 n.4.

<sup>115</sup> *Id.* at 106-07.

but also *with the eyes of* a defense attorney, which went beyond what he considered a reasonable expectation. *Agurs*, therefore, distinguishes between material evidence and evidence that has an “obviously exculpatory character.”<sup>116</sup> The latter category includes crucial evidence, but that standard may be relaxed in the case of a verdict that “is already of questionable validity.”<sup>117</sup>

This two-tier system concept was short lived, and the Court abolished it in *United States v. Bagley*.<sup>118</sup> In *Bagley*, the defense requested information regarding whether undercover agents serving as witnesses for the prosecution had been compensated for their testimony against the defendant.<sup>119</sup> Despite the fact that they had indeed been compensated, the prosecutor failed to disclose this fact, preventing the defendant from using the information as valuable impeachment evidence.<sup>120</sup> Rejecting the two-tier system adopted in *Agurs*, Justice Blackmun found that a single causation test would suffice to cover all eventualities.<sup>121</sup> Regardless of whether there was a general request, a specific request, or no request at all, the defendant is entitled to a remedy only in material cases—that is, “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>122</sup>

*Bagley*'s impact on state law was underwhelming. New York, for example, explicitly rejected its materiality test and retained the *Agurs* two-tier standard.<sup>123</sup> Post-*Bagley*, no jurisdiction reduced the scope of pretrial discovery.<sup>124</sup> In addition, the Rules of Professional Conduct for prosecutors continued to advocate a broad *Brady* standard of disclosure even absent a request from the defense, requiring the prosecution to disclose without request “[a]ny material or information within

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<sup>116</sup> *Id.* at 107, 109–11.

<sup>117</sup> *Id.* at 113.

<sup>118</sup> 473 U.S. 667, 682 (1985).

<sup>119</sup> *Id.* at 669–70.

<sup>120</sup> *Id.* at 670–72.

<sup>121</sup> *Id.* at 682.

<sup>122</sup> *Id.*

<sup>123</sup> *People v. Vilardi*, 76 N.Y.2d 67, 77–78, 555 N.E.2d 915, 920–21, 556 N.Y.S.2d 518, 523–24 (1990).

<sup>124</sup> Cary Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal To Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U. L. REV. 641, 657 (1989).

the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant."<sup>125</sup>

Moreover, informal practices of broad discovery remained the norm in various locales. In a survey of practitioners, it was reported that only a quarter of all cases entailed any judicial involvement in the discovery process, and many defense attorneys reported receiving more discovery than required by state law,<sup>126</sup> though this tendency was reported by some to be more common among "rookie" prosecutors<sup>127</sup> or when the prosecution had a strong case and wanted to encourage a plea bargain.<sup>128</sup> Despite declining constitutional protections, therefore, the practicalities of the workday have yielded and maintained a de facto broader discovery norm than required by Supreme Court case law.

#### D. *When Bad Faith Matters: Destruction of Evidence and Youngblood*

As mentioned above, prosecutorial mens rea, or bad faith, was deemed unimportant when assessing the need to disclose exculpatory evidence.<sup>129</sup> However, the Court established an intent-based rule with regard to the destruction of potentially exculpatory evidence.<sup>130</sup> In *Arizona v. Youngblood*, the prosecution lost samples of a sexual assault kit, leading to Youngblood's conviction for child molestation.<sup>131</sup> Had the court employed the guilt-free prejudice test from the *Brady-Bagley* line of cases, the sample analysis might have completely exonerated Youngblood, who, as it turned out, was indeed exonerated in 2000.<sup>132</sup> Rather than adopting an outcome-oriented test as in *Agurs* or *Bagley*, the Supreme Court reasoned, "[o]ur decisions in related areas have stressed the importance for constitutional

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<sup>125</sup> ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY § 11-2.1 (3d ed. 1996).

<sup>126</sup> Middlekauff, *supra* note 97, at 17.

<sup>127</sup> *Id.* at 17.

<sup>128</sup> *Id.* It may well be that wholesale disclosure, especially in the digital age, could hide exculpatory evidence in a forest of marginally relevant "trees."

<sup>129</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>130</sup> *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

<sup>131</sup> *Id.* at 54.

<sup>132</sup> Norman C. Bay, *Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 243-44 (2008).

purposes of good or bad faith on the part of the Government when the claim is based on loss of evidence attributable to the Government.”<sup>133</sup> Expressing concern about obliging the police to preserve evidence indefinitely, the Supreme Court refused to find a due process violation where the destruction could “at worst be described as negligent.”<sup>134</sup>

As with *Bagley*, the impact of *Youngblood* was rather limited.<sup>135</sup> While a few states—California,<sup>136</sup> Arizona,<sup>137</sup> Maine, and Ohio<sup>138</sup>—adopted a “bad faith” standard for destruction of evidence, most states deviated from this precedent, making bad faith immaterial for finding due process violations.<sup>139</sup> Later developments further eroded the *Youngblood* doctrine. The exculpatory and incriminatory potential of DNA evidence has dramatically increased, as has public awareness to the importance of such evidence.<sup>140</sup> Increasing numbers of exonerations have propelled forty-three states, the District of Columbia, and the federal government, to create legislation allowing for post-conviction DNA testing under certain circumstances, and, perhaps as a consequence, seventeen states, the District of Columbia, and the federal government now impose a “blanket” duty to preserve evidence.<sup>141</sup> Norman Bay attributes these developments to a preference for fairness over instrumental “education” of prosecutors.<sup>142</sup>

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<sup>133</sup> *Youngblood*, 488 U.S. at 57.

<sup>134</sup> *Id.* at 58.

<sup>135</sup> Daniel R. Dinger, *Should Lost Evidence Mean a Lost Chance To Prosecute?: State Rejections of the United States Supreme Court Decision in Arizona v. Youngblood*, 27 AM. J. CRIM. L. 329, 333–34 (2000) (noting *Youngblood*’s argument on appeal that testing the destroyed evidence could have conclusively proved the identity of the true assailant, thus exonerating him); see also *Youngblood*, 488 U.S. at 54–55.

<sup>136</sup> Dinger, *supra* note 135, at 343–44.

<sup>137</sup> *Id.* at 344–46.

<sup>138</sup> *Id.* at 346–47.

<sup>139</sup> *Id.* at 356.

<sup>140</sup> Bay, *supra* note 132, at 279–80.

<sup>141</sup> *Id.* at 284.

<sup>142</sup> *Id.* at 287.

### III. INTERLUDE: DISCOVERY VIOLATIONS IN THE CONTEXT OF § 1983 LAWSUITS

A survey of discovery law reveals a complicated set of expectations from prosecutors. In general, the prosecution's monopoly over police-collected evidence has imposed a fiduciary duty of sorts to disclose exculpatory evidence in its hands to the defense.<sup>143</sup> Post-*Brady* case law and legislation has focused on defining the extent to which it is fair to require prosecutors' compliance with this duty. The applicable case law and legislation feature two distinct schools of thought on the circumstances that should trigger mandatory discovery. Causation, exemplified by the *Agurs-Bagley-Vilardi* debate, turns on how material a piece of evidence must be in order for its nondisclosure to be an issue requiring remedy.<sup>144</sup> Culpability was the pivotal issue in *Agurs* and *Youngblood*.<sup>145</sup> *Agurs* emphasized the excessive burden of combing a case looking for evidence not specifically requested, and *Youngblood* limited prosecutorial liability by imposing a bad faith standard.<sup>146</sup> These divergent standards reflect a broader debate over whether the role of remedies for constitutional violations is to right wrongs for the particular defendant or teach law enforcement authorities a lesson. The post-Warren Courts have moved away from the practice of creating constitutional rules for deterrence purposes and toward more vague outcome-oriented, totality-of-the-circumstances tests.<sup>147</sup> In the discovery context, this trend explains why discovery violations are acknowledged only to the extent that they materially contributed to the conviction, and also why the Court may be skeptical about deterring prosecutorial behavior in evidence destruction cases that did not

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<sup>143</sup> *Brady v. Maryland*, 373 U.S. 83, 87–88 (1963).

<sup>144</sup> *See, e.g., United States v. Agurs*, 427 U.S. 97, 111–12 (1976).

<sup>145</sup> *See Arizona v. Youngblood*, 488 U.S. 51, 58 (1988); *Agurs*, 427 U.S. at 110.

<sup>146</sup> *See Youngblood*, 488 U.S. at 58; *Agurs*, 427 U.S. at 110; *see also* Bay, *supra* note 132, at 284, 302–06 (analyzing the interplay of these two ideas in the post-*Youngblood* legislation and litigation).

<sup>147</sup> CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 6–7 (5th ed. 2007); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 *GEO. L.J.* 185, 247 (1983); Hadar Aviram & Daniel L. Portman, *Inequitable Enforcement: Introducing the Concept of Equity into Constitutional Review of Law Enforcement*, 61 *HASTINGS L.J.* 413, 422 (2009).

involve bad faith.<sup>148</sup> What it does not explain is the distinction between the outcome-oriented standard in nondisclosure cases and the intent-oriented standard in destruction cases.<sup>149</sup>

In *Connick v. Thompson*, prosecutorial discovery misconduct was discussed in a different procedural context than the above cases. Having already been exonerated, Thompson did not sue to seek a reversal of his conviction, but rather to seek financial redress by placing responsibility upon the shoulders of his wrongdoers.<sup>150</sup> On one hand, the two proceedings are fundamentally different. In the § 1983 context, focus is shifted away from the outcome of the criminal trial, which has already been resolved, and toward the law enforcement agency itself. Thompson's New York Times op-ed, criticizing the Supreme Court's decision, ended with the words, "A crime was definitely committed in this case, but not by me."<sup>151</sup> The lawsuit, therefore, could be perceived as the trial of the wrongdoers, and therefore needs to probe deeper into their culpability. On the other hand, a broader understanding of wrongful convictions suggests that seeking financial compensation for years wrongfully spent in prison could, and perhaps, should be seen as an integral part of the "remedy package," rather than as a deterrent or educational device. Also, the comparison between the two proceedings raises the question of efficiency—that is, which of the two proceedings is more likely to ensure prosecutorial compliance and ethical behavior in the future? While some see reversals and overturned convictions as powerful tools of deterrence,<sup>152</sup> this may be simply

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<sup>148</sup> Cf. *Herring v. United States*, 555 U.S. 135, 137 (2009) (holding that where "the error was the result of isolated negligence attenuated from the arrest[,] . . . the jury should not be barred from considering all the evidence"); see also Hadar Aviram et al., *Moving Targets: Placing the Good Faith Doctrine in the Context of Fragmented Policing*, 37 *FORD. URB. L.J.* 709, 712 (2010).

<sup>149</sup> In *Thompson*, Scalia expressed at least an open mind to the possibility that the two standards should converge. See *Connick v. Thompson*, 131 S. Ct. 1350, 1369 (2011) (Scalia, J., concurring) ("Perhaps one day we will recognize a distinction between good-faith failures to preserve from destruction evidence whose inculpatory or exculpatory character is unknown, and good-faith failures to turn such evidence over to the defense.").

<sup>150</sup> *Id.* at 1355 (majority opinion).

<sup>151</sup> *Thompson*, *supra* note 22, at 2.

<sup>152</sup> This is comparable to the Fourth Amendment debate on the effectiveness of the exclusionary rule versus other compliance-inducing mechanisms, and some have suggested that the exclusionary rule (a within-trial remedy) has proven the best deterrent technique. SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990*, at 49–50 (1993) (citing the



due to their availability. More criminal defendants will appeal their convictions than sue under § 1983. On the other hand, remedies under § 1983 are available to address government wrongdoing beyond the confines of the criminal process, to people who were never convicted or even tried.

The common issue underlying all of these considerations is one that is rarely explored in case law: Whether, generally speaking, prosecutorial practice is conducive to developing the skills to spot exculpatory evidence, let alone to assess its strength. Prosecutorial misconduct allegations are not uncommon. For example,

[t]he Center for Public Integrity cited nearly six-hundred Texas appeals from 1970 until 2003 where defendant raised allegations of prosecutor misconduct. . . . In 152 of those cases, a court held the prosecutor's conduct prejudiced the defendant, resulting in a reversal and a remand of the conviction, sentence or indictment. Five of these defendants later proved their innocence.<sup>153</sup>

Examining discovery violations as examples of the broader phenomenon of prosecutorial misconduct, rather than on a case-by-case basis, reveals the narrowness and inadequacy of both intent-oriented and outcome-oriented regimes. If discovery violations stem from the experience of prosecutorial practice, individual malice or lack thereof becomes irrelevant to the outcome. The individual prosecutor should pay a professional price for her malice, but this malice is actually the product of a fertile organizational Petri dish. If inattention to, and disregard for, the possibility of innocence is a broad organizational phenomenon, the cases in which convictions are overturned, and the fewer cases in which exonerations occur, are merely a window into a more general culture of indifference. The next Part uses insights from both surveys of prosecutors and cultural cognition studies to demonstrate the existence of such a culture,

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exclusionary rule as contributing to significant reforms in the practice of law enforcement and criminal procedure in, for example, Chicago). For a colossal misunderstanding of this argument's implications, see generally Scalia's opinion in *Hudson v. Michigan*, 547 U.S. 586, 587–602 (2006).

<sup>153</sup> Kelly Gier, Note, *Prosecuting Injustice: Consequences of Misconduct*, 33 AM. J. CRIM. L. 191, 193 (2006) (footnotes omitted).

and as a consequence, to suggest that the legal framing of prosecutorial misconduct through the lenses of either causation or culpability is overly narrow and inadequate.

#### IV. LEGAL BLINDNESS: WHY PROSECUTORS DO NOT SEE EXCULPATORY EVIDENCE

##### A. *The Prosecutorial Organizational Culture*

The reasons for prosecutorial misconduct are complex, and analyzing those reasons depends on the focus of one's lens. From an ethical perspective, prosecutorial behavior is a reflection of the individual prosecutor's set of values and commitment to justice; as Michael Cassidy argues, various legally nebulous dilemmas faced by prosecutors can be solved through an appeal to personal virtues.<sup>154</sup> For example, the dilemma over whether to enter into a plea bargain with a turncoat accomplice<sup>155</sup> implicates virtues of courage and honesty.<sup>156</sup> Others, while acknowledging the important role of office culture in generating a sense of office ethics, still regard ethics as an individual virtue. In a candid insider's piece, Patrick Fitzgerald mentions the importance of hiring ethical candidates because such candidates are less likely to be corrupted in an environment of faulty ethics.<sup>157</sup> He also emphasized the importance of good supervisors in creating an ethical environment.<sup>158</sup> "Management has to have confidence that when they find that piece of *Brady* material on a Saturday afternoon, they will turn it over. If you do not have that confidence, you must take action."<sup>159</sup> However, as compared with other flaws or challenges an attorney may overcome, "when the issue is credibility and ethics, then that is something you cannot work with. A person either has it or does not, and ethics is an area where an office cannot compromise or bend."<sup>160</sup>

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<sup>154</sup> Cassidy, *supra* note 14, at 660, 693.

<sup>155</sup> *Id.* at 654.

<sup>156</sup> *Id.* at 660–61.

<sup>157</sup> Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor's Office*, 84 WASH. L. REV. 11, 13–15, 17–18 (2009). Fitzgerald's Article emphasizes that hiring ethical attorneys is one of a supervising attorney's many obligations in establishing an ethical office. *Id.*

<sup>158</sup> *Id.* at 20.

<sup>159</sup> *Id.* at 21.

<sup>160</sup> *Id.* at 22.

Other commentators, however, attribute prosecutorial misconduct to the broader set of social and organizational circumstances underlying their work. Peter Joy ascribes it to the broader prosecutorial work environment, arguing that the fact that head prosecutors are elected creates pressure to maintain a “tough on crime” image to appeal to the public.<sup>161</sup>

But even without the broader political context, there are workday-related variables that affect the quality of prosecutorial behavior. Criminal courtroom ethnographers have consistently argued that the realities of the criminal process create strong incentives to overcharge and to bargain. In 1964, Herbert Packer posited two models of the criminal process: a crime control model, emphasizing efficiency and a strong reliance on the investigative phase, and a due process model, emphasizing concern about wrongful conviction and providing constitutional safeguards limiting police and prosecutorial discretion.<sup>162</sup> Packer’s models reflected his impression of the constitutional revolution of the 1960s, spearheaded by the Warren Court. This revolution was characterized by a series of decisions incorporating the criminal justice provisions of the Bill of Rights into the Fourteenth Amendment and thus applying them to the states. Although the trend was largely reversed in later years, some of its effects, as well as its symbolic import, remained.<sup>163</sup> Some of these decisions created limitations on prosecutorial discretion<sup>164</sup> and behavior in the courtroom,<sup>165</sup> as well as during bargaining.<sup>166</sup> Social

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<sup>161</sup> Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 405.

<sup>162</sup> HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968). For more about the models, see generally Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 36 LAW & SOC. INQUIRY 237 (2011); Stuart Macdonald, *Constructing a Framework for Criminal Justice Research: Learning from Packer’s Mistakes*, 11 NEW CRIM. L. REV. 257 (2008); Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671 (1999).

<sup>163</sup> Arenella, *supra* note 147, at 185. Packer later grew disillusioned with the post-Warren Court decisions, expressing disappointment with due process at the end of his life. Aviram, *supra* note 162, at 244 n.1.

<sup>164</sup> *Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (“A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.”).

<sup>165</sup> *Griffin v. California*, 380 U.S. 609, 615 (1965).

scientists, however, had less faith in the Warren Court decisions' potential to reform the criminal process. Reviewing Packer's book in 1969, Abraham Blumberg observed that the models hid a reality that was closer to the crime control model: a system guided mostly by efficiency and plea-bargaining, more visible in the world of assembly-line cases in lower courts than in the echelons of the Supreme Court.<sup>167</sup> Even more incisive was Malcolm Feeley's observation that the two models were in fact made of the same fabric.<sup>168</sup> Due process, Feeley argued, was a normative, idealized concept generated by the Warren Court's constitutional rulings, masking the empirical reality, which was actually much closer to Packer's crime control model.<sup>169</sup> Doreen McBarnet pushed this angle further by arguing that the veneer of due process exists for the purpose of securing convictions under the guise of legitimacy, and therefore "due process is for crime control."<sup>170</sup> These critics suggested that the contrast between the models was false.<sup>171</sup> The image of the criminal trial as gleaned from Supreme Court decisions of the 1960s consisted of normative edicts to adhere to bright-line rules in police procedure and refrain from unchecked discretion. This set of bright-line rules was subsequently eroded by the Burger and Rehnquist Courts, in decisions that granted police officers and prosecutors more leeway and expressed more trust in their professional judgment.<sup>172</sup> Even at its height, the due process model did not trickle down to police stations and lower courts,

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<sup>166</sup> *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled").

<sup>167</sup> Abraham S. Blumberg, Book Review, 117 U. PA. L. REV. 790, 791 (1969) (reviewing HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968)).

<sup>168</sup> FEELEY, *supra* note 4, at 25–28 (discussing the commonalities between the two traditional models); *see also* Malcolm M. Feeley, *Pleading Guilty in Lower Courts*, 13 LAW & SOC'Y REV. 461, 462–63 (1979) (stating that "[d]iscussions of plea bargaining often conjure up images of a Middle Eastern bazaar" involving haggling over each case, when in fact such negotiations "are more akin to modern supermarkets," in which there is a "going rate" for each offense). The charade serves to convince defendants of their attorney's efforts on their behalf and to mollify them to accept a "deal" rather than going through the expense and humiliation of a trial certain to end in conviction. *Id.* at 464–65.

<sup>169</sup> *See* FEELEY, *supra* note 4 at 26–27.

<sup>170</sup> DOREEN J. MCBARNET, *CONVICTION* 156 (1981).

<sup>171</sup> *Id.*; *see also* FEELEY, *supra* note 4, at 25–28; Blumberg, *supra* note 167 (critiquing Packer's findings on the basis of several social science studies).

<sup>172</sup> Arenella, *supra* note 147, at 192–93.

where police maneuvering and plea bargains proliferated. Police officers relied on race and class for profiling purposes, and a culture of lies permeated the system.<sup>173</sup> Interrogations designed to circumvent *Miranda* and other safeguards yielded waivers of the right to silence, and the court's reliance on the resulting confessions as probative evidence created a disincentive to seek other types of evidence.<sup>174</sup> More pertinent to the topic of this Article is the fact that prosecutors operate in a system in which more than ninety percent of all cases are disposed via plea bargains.<sup>175</sup> In this system, prosecutors overcharge and establish a sentencing "menu" for particular crimes to promote early plea bargaining.<sup>176</sup> In short, much of the character of modern criminal justice, including prosecutorial behavior and decisionmaking, was established by the organizational culture of the police station and the courtroom, rather than by any form of malicious design on the part of a few interested parties.

An important part of this organizational culture lies in what Packer referred to as the "presumption of guilt."<sup>177</sup> Rather than being an evidentiary counterbalance to the presumption of innocence, the presumption of guilt is a statement of statistical confidence. Under this paradigm, law enforcement personnel, prosecutors, judges, and defense attorneys assume that anyone whose case passes through police investigation and a prosecutorial decision on charging has a high probability of being guilty of the offense of which he or she is accused.<sup>178</sup> If the process provides the police and prosecution with adequate power and discretion, it may dispense with formalities and safeguards

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<sup>173</sup> JERRY H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* 73–76, 230–31 (4th ed., 2011).

<sup>174</sup> Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, *supra* note 9, at 284.

<sup>175</sup> Douglas Savitsky, *The Problem with Plea Bargaining: Differential Subjective Decision Making as an Engine of Racial Stratification in the United States Prison System* 3 (Ctr. for the Study of Econ. & Soc'y, Working Paper No. 52), available at [http://www.economyandsociety.org/wp-content/uploads/2013/08/wp52\\_Savitsky\\_Plea\\_Bargaining.pdf](http://www.economyandsociety.org/wp-content/uploads/2013/08/wp52_Savitsky_Plea_Bargaining.pdf) (last visited Nov. 9, 2013).

<sup>176</sup> EISENSTEIN & JACOB, *supra* note 5, at 104; Feeley, *Pleading Guilty in Lower Courts*, *supra* note 168, at 464; David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 258 (1965). See generally MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1981); NARDULLI, *supra* note 5.

<sup>177</sup> PACKER, *supra* note 162, at 160–61.

<sup>178</sup> *Id.* at 160.

once the case comes to trial.<sup>179</sup> The resulting criminal practices are not, therefore, rooted in malice or trigger-happiness on the part of prosecutors, but rather in an assumption that defendants are guilty and securing their convictions is a priority.<sup>180</sup> Alan Dershowitz provides a simplified version of this practical *modus operandi*, which he refers to as the “thirteen Rules of the Criminal Justice Game”:

Rule I: Most criminal defendants are, in fact, guilty.

Rule II: All criminal defense lawyers, prosecutors and judges understand and believe Rule I.

Rule III: It is easier to convict guilty defendants by violating the Constitution than by complying with it, and in some cases it is impossible to convict guilty defendants without violating the Constitution.

Rule IV: Many police lie about whether they violated the Constitution in order to convict guilty defendants.

Rule V: All prosecutors, judges and defense attorneys are aware of Rule IV.

Rule VI: Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants.

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Rule XI: Most judges and prosecutors would not knowingly convict a defendant who they believe to be innocent of the crime charged (or a closely related crime).<sup>181</sup>

While Dershowitz’s rules are framed as practitioners’ impressions of the process, there is a body of social science literature confirming the existence of a prosecutorial organizational culture that adopts a presumption of guilt.<sup>182</sup> The adherence to a presumption of guilt is engrained in the history of the prosecutorial role. The modern conception of a public officer-prosecutor is fairly new; at the turn of the twentieth century, the criminal justice process was still initiated by private citizen complainants and mitigated merely by the discretion of

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<sup>179</sup> *Id.* at 160–61.

<sup>180</sup> *Id.*

<sup>181</sup> ALAN M. DERSHOWITZ, LETTERS TO A YOUNG LAWYER 80–81 (2001).

<sup>182</sup> *See, e.g.*, Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1621–22 (2006).

magistrates and top police officers.<sup>183</sup> The emergence of independent office holders was a response to biased and corrupt police practices, tied to contemporary concerns associated with prohibition and gambling enforcement.<sup>184</sup> However, upon the establishment of a district attorney's office, the new office holders quickly adapted to the political landscape and positioned themselves at the forefront of raiding and arrest activities, expressing cynical views toward the subjects of those activities.<sup>185</sup> This notion is so prevalent that it is widely affirmed by popular culture, which constantly reminds us that the presumption of innocence is widely regarded by prosecutors as legal fiction.<sup>186</sup>

What were the implications of this organizational culture for discovery practices? In a 1994 survey of practitioners, the nineteen prosecutor interviewees expressed mixed feelings about the practice of broad discovery.<sup>187</sup> The interviewees acknowledged that having a broad practice of discovery encouraged efficient proceedings regardless of the defendant's guilt, presumably because of the increased likelihood of reaching a plea bargain.<sup>188</sup> They expressed concerns, however, about potential intimidation of victims or witnesses whose identities would become known, as well as about the possibility of compromising informants.<sup>189</sup> Interviewees also had the general sense that the discovery process was an unreciprocated "one-way street" from prosecutors to defense attorneys. By providing the defense with a broad range of information, "bad guys" were allowed to beat the system.<sup>190</sup> In an organizational culture that

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<sup>183</sup> Allen Steinberg, *The "Lawman" in New York: William Travers Jerome and the Origins of the Modern District Attorney in Turn-of-the-Century New York*, 34 U. TOL. L. REV. 753, 754 (2003).

<sup>184</sup> *Id.* at 759–60.

<sup>185</sup> *Id.* at 767.

<sup>186</sup> Christine Alice Corcos, *Prosecutors, Prejudices and Justice: Observations on Presuming Innocence in Popular Culture and Law*, 34 U. TOL. L. REV. 793, 796 (2003). See generally Michael M. Epstein, *For and Against the People: Television's Prosecutor Image and the Cultural Power of the Legal Profession*, 34 U. TOL. L. REV. 817 (2003). Epstein highlights an important point. The representation of 'good' defense attorneys, such as Perry Mason, essentially aligns them with a prosecutorial role: Mason acquits defendants on grounds of factual innocence while at the same time implicating the real guilty party in the crime, affirming the commitment to actual guilt. *Id.* at 827.

<sup>187</sup> Middlekauff, *supra* note 97, at 15–16.

<sup>188</sup> *Id.* at 17.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 16.

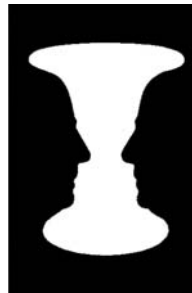
believes in guilt, it is not difficult to see how this mentality creates a tension between the wish to disclose enough incriminating evidence to guarantee cooperation and incentivize guilty pleas, while not disclosing information that might just help a guilty defendant win an acquittal on what is perceived to be a technicality.

This discussion prompts a different question: What generates the presumption of guilt in the first place, and how does it impact *Brady* practices? For an answer, the next section turns to social psychology literature and confirmation bias.

*B. Facts and Opinion: Insights from Cultural Cognition, Social Psychology, and Studies of Prosecutorial Culture*

Consider the following illustration:

FIG. 1



This optical illusion developed by Edgar Rubin demonstrates how the same object can be seen in two mutually incompatible ways: a vase or two profiles.<sup>191</sup> Which shape the viewer perceives depends on the way he or she resolves the figure-ground problem; the viewer can see either shape, but not both.

Evidence in a criminal case in an adversarial system can be conceptualized using the face-vase metaphor. Facts pertaining to a case can be seen to support a conclusion of guilt or innocence, depending on perspective. Granted, in some cases, such as when DNA evidence is provided, one conclusion may be more salient

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<sup>191</sup> EDGAR RUBIN, SYNSOPLEVEDE FIGURER fig.3 (1915). For more on optical illusions and their neurological explanation, see generally Uri Hasson et al., *Vase or Face? A Neural Correlate of Shape-Selective Grouping Processes in the Human Brain*, 13 J. COGNITIVE NEUROSCI. 744 (2001).



than the other, and therefore more likely agreed upon.<sup>192</sup> But many pieces of evidence, including witness testimonies and even defendant confessions, possess strengths and weaknesses and are therefore open to interpretation. The premise of an adversarial system is that both parties examine the same evidence and provide the jury with conflicting perspectives regarding its strength. But do the parties themselves see the evidence in conflicting ways? Research on social psychology and cultural cognition responds in the affirmative, and suggests that the source of distortion is not a neurological issue but rather a psychological phenomenon known as confirmation bias.

Confirmation bias is a mechanism that affects how we interpret information.<sup>193</sup> The theory behind the bias is that humans do not approach new information with an entirely blank mind. Rather, we perceive information through our already-tainted perspective, complete with our prior opinions and biases. We tend to be attached to our perception, and therefore seek information that confirms our already-solidified perspective and resist persuasion to the contrary.<sup>194</sup>

Studies conducted by cultural cognition scholars consistently find confirmation bias operating in legal and political matters.<sup>195</sup> In survey experiments, subjects consistently view not only opinions, but facts and hard evidence, through the prism of their political and social worldviews.<sup>196</sup> One such study examined

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<sup>192</sup> In some cases, the very fact that the evidence is “scientific” lends it more credibility as conducive to a conclusion of guilt, a phenomenon known as the “CSI Effect.” See, e.g., Arun Rath, *Is the “CSI Effect” Influencing Courtrooms?*, NAT’L PUB. RADIO (Feb. 6, 2011), <http://www.npr.org/2011/02/06/133497696/is-the-csi-effect-influencing-courtrooms>; see also Donald E. Shelton, *The “CSI Effect”: Does It Really Exist?*, 259 NAT’L INST. JUST. J. 1 (Mar. 2008), available at <http://nij.gov/nij/journals/259/csi-effect.htm> (reporting a survey indicating that viewers of CSI were likely to have a higher standard for scientific evidence and to expect scientific evidence, but suggesting that those expectations may be rationally related to the types of cases that are likely to include such evidence).

<sup>193</sup> Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098 (1979).

<sup>194</sup> JONATHAN BARON, THINKING AND DECIDING 195–96 (4th ed. 2008).

<sup>195</sup> For information on the cultural cognition project at Yale University, see generally YALE LAW SCH., THE CULTURAL COGNITION PROJECT, <http://www.culturalcognition.net/> (last visited Nov. 9, 2013).

<sup>196</sup> See e.g., Dan M. Kahan et al., *Whose Eyes Are You Going To Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 867, 870 (2009).

public perceptions using *Scott v. Harris*<sup>197</sup> as a case study. *Scott* was a § 1983 lawsuit arguing that a police chase caused an accident that left the plaintiff permanently disabled.<sup>198</sup> In reversing the district court decision, Justice Scalia referred to a police video introduced as evidence, arguing that the video clearly showed that the plaintiff endangered the public and the police, thus justifying the police chase.<sup>199</sup> Seeking to question the assumption that any possible reasonable juror would perceive the evidence in the same way, the researchers presented a thousand respondents with the video and asked them whether the plaintiff had in fact posed the kind of danger that justified the chase.<sup>200</sup> The findings cast doubt on Justice Scalia's assumption that the video would "speak for itself."<sup>201</sup> While most subjects agreed that the plaintiff posed some risk, there was disagreement not only regarding the normative question whether the police chase was justified but also regarding the degree of danger posed by the plaintiff.<sup>202</sup> The subjects' varied opinions correlated with their worldviews.<sup>203</sup> Subjects with a hierarchical—conservative, individualistic, free-market-oriented—worldview were significantly more likely to perceive Harris' driving as more dangerous than subjects subscribing to an egalitarian—progressive, communitarian, welfarist—worldview.<sup>204</sup>

In a similar study, subjects were presented with a hypothetical acquaintance-rape scenario based on *Commonwealth v. Berkowitz*<sup>205</sup> and were randomly assigned different legal definitions of rape.<sup>206</sup> They were asked to comment on the extent of their agreement with a series of factual statements—for example, whether the victim consented; whether the perpetrator believed that the victim had consented—as well

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<sup>197</sup> *Scott v. Harris*, 550 U.S. 372 (2007).

<sup>198</sup> *Id.* at 374–76.

<sup>199</sup> *Id.* at 378 n.5 (providing a URL for the video and stating that the Court was happy "to allow the videotape to speak for itself").

<sup>200</sup> Kahan et al., *supra* note 196, at 854–57.

<sup>201</sup> *Scott*, 550 U.S. at 378 n.5.

<sup>202</sup> Kahan et al., *supra* note 196, at 865–66 & figs. 2–4.

<sup>203</sup> *Id.* at 867.

<sup>204</sup> *Id.* at 879 (noting the distinction between hierarchical and egalitarian worldviews as used in other cultural cognition literature).

<sup>205</sup> *Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. Super. Ct. 1992) *aff'd in part, rev'd in part*, 641 A.2d 1161 (Pa. 1994).

<sup>206</sup> Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 767 (2010).

as with legal conclusions—for example, the perpetrator should be found guilty of rape.<sup>207</sup> The main finding was that the subjects' worldviews, rather than legal definitions, were the determining factor in establishing whether the defendant understood the victim to have consented to intercourse.<sup>208</sup> Subjects with hierarchical, individualistic worldviews tended to infer consent significantly more readily than subjects with egalitarian, communitarian perspectives.<sup>209</sup> This difference was found particularly between hierarchical and egalitarian female subjects.<sup>210</sup> Interestingly, the legal definitions did not make any significant difference in the inferences made by subjects regarding either facts or law.<sup>211</sup>

Cultural cognition studies identify confirmation bias as a function of worldview. But can confirmation bias be generated by a mere prompt for a partisan position? Apparently, in some situations, yes. Perhaps the most famous illustration of role-induced perception of reality is the Stanford prison experiment, in which participants were randomly assigned the roles of inmates and guards.<sup>212</sup> Both groups had thoroughly internalized their roles, to the point that “guard” cruelty and “inmate” anguish led to ending the study prematurely.<sup>213</sup> But conditioning does not have to be so extreme to yield confirmation bias. In a study by Dan Simon, Douglas M. Stenstrom, and Stephen J. Read, respondents were presented with the facts of a plagiarism incident at a university.<sup>214</sup> Respondents were randomly assigned roles as independent evaluators, counsel for the university, and counsel for the charged student. The respondents' assessment of the facts and the strength of the evidence varied significantly based on the role they were assigned to occupy.<sup>215</sup>

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<sup>207</sup> *Id.* at 771.

<sup>208</sup> *Id.* at 793.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 794.

<sup>211</sup> *Id.* at 795.

<sup>212</sup> Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 69 (1973).

<sup>213</sup> *Id.* at 81.

<sup>214</sup> Dan Simon et al., *Adversarial and Non-Adversarial Investigations: An Experiment 2*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1401723](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401723) (last revised Oct. 25, 2009).

<sup>215</sup> *Id.* at 10.

If a person's perception of the strength of evidence in a given case can vary so dramatically based on a mere prompt to be partisan, there is much more reason to assume such partiality on the part of professionals who spend months and years in an organizational culture encouraging certain views and discouraging others. In a 1963 law review article, Justice Brennan expressed his dismay with a prosecutorial perspective that perceives the criminal process as a "sporting contest," the creation of which attitude he ascribed to the adversarial process.<sup>216</sup> Ethnographical research done on prosecutorial and defense offices confirms that, while both parties are engaged in an effort to assess the strength of the evidence, their foci differ: Prosecutors assess whether their case is "convictable,"<sup>217</sup> and defense attorneys assess the value of their case for acquittal.<sup>218</sup>

Confirmation bias influences prosecutors and defense attorneys not only with respect to the evidence, but also with respect to the issue of discovery itself. In a survey of practitioners regarding discovery, prosecutors and defense attorneys disagreed over whether discovery proceedings caused undue delay in the progress of a case.<sup>219</sup> Moreover, when asked to report on the risks stemming from improper discovery practices, prosecutors tended to highlight the concern that overbroad discovery would provide defendants with information leading to witness intimidation,<sup>220</sup> whereas defense attorneys tended to be concerned that lack of proper discovery might yield wrongful convictions.<sup>221</sup>

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<sup>216</sup> William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?* 1963 WASH. U. L.Q. 279, 279. Ironically, an inquisitorial system, in which the jury is not presented with two versions of the truth but just with one, raises the concern that the jury might develop a confirmation bias as well and identify with the one position that is offered. Kent Roach, *Wrongful Convictions: Adversarial and Inquisitorial Themes*, 35 N.C. J. INT'L L. & COM. REG. 387, 391, 401–02, 421 (2010).

<sup>217</sup> Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 LAW & SOC'Y REV. 531, 541–42 (1997) (discussing the challenge in a segregated society of convincing jurors to empathize with a victim of color whose class and life experience may be quite unfamiliar to a white middle-class jury).

<sup>218</sup> Emmelman, *supra* note 92, at 336.

<sup>219</sup> Middlekauff, *supra* note 97, at 17.

<sup>220</sup> *Id.* at 18.

<sup>221</sup> *Id.* at 54. Interestingly, the judges surveyed were split on the matter. *Id.* at 19.

The above examples suggest, of course, that the problem of confirmation bias is not limited to prosecutors. Defense attorneys, too, perceive evidence through a biased lens. There is greater reason to worry, however, about confirmation bias in the prosecutorial context. Not only are prosecutors entrusted with the public interest, rather than with the zealous, partisan representation of a specific client;<sup>222</sup> they are also in control of the investigatory apparatus.<sup>223</sup> The list of disastrous consequences of “tunnel vision” for police officers and prosecutors is topped by the possibility of wrongful convictions.<sup>224</sup>

#### V. A COMMENT ON CONFIRMATION BIAS AND INTENT

The discussion above explains why ignoring the insidious effects of confirmation bias can lead to serious miscarriages of justice when prosecutorial intent to produce the miscarriage cannot be proven. This could lead to the belief that, when actual intent can be proven, there is no problem. However, the facts in *Connick* highlight another ironic consequence of intent-based rules: Sometimes, it is precisely the positive finding of intent that prevents us from remedying prosecutorial wrongs. Recall the facts in *Connick*: Justice Thomas’ opinion of the Court, as well as Justice Scalia’s concurring opinion, did not fail to find intent. Indeed, Deegan, the prosecutor who had originally handled the case, was not only aware of the existence of the blood test and of his failure to disclose it to the defense, but also plagued with guilt over this failure, which accompanied him to his deathbed.<sup>225</sup> Ironically, Deegan’s “guilty knowledge” of his misconduct was interpreted by both Justices as an outlier: His

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<sup>222</sup> Levine & Feeley, *supra* note 3. Further many prosecutors resent having to take on victim representation roles. Kay L. Levine, *Can Prosecutors Be Social Workers?*, (Emory Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Research Paper No. 05-41), available at <http://papers.ssrn.com/abstract=869433>.

<sup>223</sup> John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 1, 15–16 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008).

<sup>224</sup> ANTONIO LAMER, *THE LAMER COMMISSION OF INQUIRY PERTAINING TO THE CASES OF: RONALD DALTON, GREGORY PARSONS AND RANDY DRUKEN* 71–72 (2006), available at <http://www.justice.gov.nl.ca/just/publications/lamercontents.pdf>; Roach, *supra* note 216, at 391.

<sup>225</sup> *Connick v. Thompson*, 131 S. Ct. 1350, 1356 n.1 (2011).

intentional *Brady* violation highlighted the other prosecutors' lack of intent, and, as a consequence, his individualized failure negated the possibility of an institutional failure.

The Court's reluctance to ascribe Deegan's personal failure to a broader institutional culture could be seen as the general tendency of legal settings to distinguish between the individual and aggregate levels of analysis,<sup>226</sup> but it could also be read as another example of the judicial tendency to view law enforcement actions as benign. Good faith mistakes made by police officers, even those that suggest underlying systemic problems, preclude the exclusion of evidence.<sup>227</sup> The recent decision in *Herring v. United States* goes as far as to absolve police officers of guilt for mistakes made by other police departments, as long as those are merely negligent, not malicious or reckless.<sup>228</sup> In *Connick*, as in *Herring*, one actor's guilt ironically acted to absolve another actor and to satisfy ourselves with a narrow basis for personal accountability in lieu of broader institutional accountability.

In the *Brady* context, culpability becomes an issue not just through an explicit requirement to find intent but also as a side issue when analyzing issues such as causation and prejudice.<sup>229</sup> These nebulous situations make it even more problematic to tie prosecutorial misconduct to harm suffered by the defendant. Short of finding individual malice, it is very difficult to prove that departmental misconduct caused a particular harm. The

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<sup>226</sup> The best example of this trend, in a completely different context, is *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (declining to overturn petitioner's capital sentence on the basis of statistical data showing disparate sentencing by Georgia capital juries based on the race of defendant and victim). The dissent in *McCleskey* pointed out that previous decisions by the Court held that "a death sentence must be struck down when the circumstances under which it has been imposed 'creat[e] an unacceptable risk that the death penalty [may have been] meted out arbitrarily or capriciously or through whim or mistake.'" *Id.* at 323 (Brennan, J., dissenting) (alterations in original) (internal quotation marks omitted) (citing *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985)).

<sup>227</sup> *United States v. Leon*, 468 U.S. 897, 926 (1984) ("In the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.").

<sup>228</sup> *Herring v. United States*, 555 U.S. 135, 144 (2009). For more on the impact of fragmented policing on the allocation of guilt in police practices, see Aviram et al., *supra* note 148, at 715.

<sup>229</sup> Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121, 127 (1998).

personal-institutional dichotomy encouraged by such intent-based rules ignores the realities of confirmation bias and its origins: The same hyperadversarial culture is at the root of both intentional, malicious misbehavior and run-of-the-mill confirmation bias problems. The focus on the former makes the latter, which might be much more frequent, recede to the background.

Focusing on intentional miscarriages of justice at the expense of broader institutional problems misses the point that the dangers of unintentional or invidious discrimination lie in the very fact that it is unintentional. As such, it is hidden from view and from critique. Even if, as some argue, prosecutorial intent is always relevant in assessing conduct,<sup>230</sup> the potential for miscarriage of justice due to systemic or organizational flaws requires broadening our view of causality at least when awarding compensation for exonerees. In that respect, the effects of tunnel vision and confirmation bias are no different in the *Brady* context than they are in the contexts of police profiling, reliance on faulty evidence or search warrants, prosecutorial behavior during voir dire, or any other law enforcement blunder.

## VI. SOLUTIONS

One potential cynical reaction to my rejection of intent or bad faith as a helpful standard in assessing prosecutorial fallacies is that blaming a vague “prosecutorial culture” for miscarriages of justice fails to place the blame squarely upon deserving shoulders, and therefore fails to create proper incentives for ethical behavior. Moreover, ascribing all such miscarriages of justice to confirmation bias would seem to suggest that no viable solution exists. This Part refutes these claims by suggesting that prosecutorial misconduct can, and should, be recognized on different levels. Section 1983 suits are a particularly unproductive way of handling such situations. A proper, holistic approach to the problem should combine uncompromising disciplinary procedures against particular office holders who displayed bad faith, coupled with fundamental rethinking of the systemic features that encourage hyperadversarialism, confirmation bias, and adversarial hostilities.

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<sup>230</sup> *Id.* at 133.

Discussions about the efficacy of remedies in the criminal context have most often revolved around the exclusionary rule and its deterrent function vis-à-vis the police.<sup>231</sup> While some have considered personal sanctions against police officers to be of importance, the consensus seems to be that they are not sufficient as a remedy.<sup>232</sup> In order to make proceedings against prosecutors more effective, they need to include publicizing the offending prosecutor's record,<sup>233</sup> as well as downstream consequences in terms of case allocation<sup>234</sup> and implications for promotion.<sup>235</sup>

Making the government "pay" in a case outcome is also unsatisfactory in the prosecutorial context. The exclusionary rule has been regarded as an effective deterrent against police excess in both case law and empirical scholarship.<sup>236</sup> However, it does not have a direct equivalent in cases of prosecutorial discovery failures. The only equivalent is a well-publicized acquittal or exoneration, which does not have a similar effect given the rare frequency of its occurrence.<sup>237</sup> Moreover, the exonerative outcome of a single high-profile, post-conviction proceeding, even if the facts of the case expose us to particularly unsavory manifestations of prosecutorial conduct, does little in the way of consistent monitoring for such practices in the vast majority of criminal cases, which are resolved through plea bargaining, or, less commonly, in low-profile trials. As Maximo Langer points out in his analysis of prosecutorial adjudication, "Nondisclosure of evidence favorable to the defense hinders a central mechanism to check that prosecutors do not make plea

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<sup>231</sup> See Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure" Doctrine*, 100 J. CRIM. L. & CRIMINOLOGY 933, 990, 998 (2010).

<sup>232</sup> Matthew V. Hess, Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 UTAH L. REV. 149, 184.

<sup>233</sup> Gier, *supra* note 153, at 205–06.

<sup>234</sup> *Id.* at 208.

<sup>235</sup> See *id.* at 208–10.

<sup>236</sup> WALKER, *supra* note 152.

<sup>237</sup> BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 231 (2011). According to the Innocence Project, as of the writing of this Article, 311 individuals have been exonerated by DNA evidence. *Innocence Project Case Profiles*, INNOCENCEPROJECT.ORG, <http://www.innocenceproject.org/know/> (last visited Nov. 9, 2013).



proposals in weak cases.”<sup>238</sup> It is this bulk of unknown cases that requires solutions that go beyond disciplinary steps against a specific malicious or reckless prosecutor.

The suggested solutions to prosecutorial discovery oversights are, therefore, broader and more systematic. This Article suggests adopting intent-neutral compensation statutes for exonerees in all states, thereby divorcing the question of compensation from the question of prosecutorial mens rea. Given the questionable efficacy of alleviating confirmation bias with training in *Brady* doctrine, this Article suggests reforming hiring practices at prosecutorial offices so as to favor potential prosecutors who have done defense work in the past, and initiating a practice of a “devil’s advocate” case reader who would examine a given case from a defense perspective. Similarly, while drilling *Brady* doctrine into law students and bar takers would do little to prepare them to combat confirmation biases in practice, law school exams and bar essays can be structured in a way that encourages lawyers to view facts from multiple perspectives.

#### A. *Compensation Scheme for Exonerees*

Currently, only twenty-two states, the District of Columbia, and the federal government have compensation statutes for wrongful imprisonment.<sup>239</sup> Other states rely on special legislation or, more frequently, on exoneree-initiated § 1983 lawsuits.<sup>240</sup> If one accepts the premise that miscarriages of justice by the prosecution can occur as the result of organizational culture and confirmation bias, and that even incidents of individual malice thrive in prosecutorial Petri-dishes of overzealousness and hyperadversarialism, divorcing

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<sup>238</sup> Langer, *supra* note 4, at 272.

<sup>239</sup> Jessica R. Lonergan, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 405, 409 (2008); see also Shawn Armbrust, Note, *When Money Isn’t Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 167–68 (2004) (explaining that compensation regimes differ dramatically among states and various proposals are being considered for improving the mechanism). A thorough discussion of these systems exceeds the framework of this Article; the point is merely that guilt-based compensation is inadequate.

<sup>240</sup> For more on the inadequacy of the latter two systems, and the clear preference of the former, see generally Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999).

culpability for wrongful convictions from a finding of prosecutorial bad faith is the natural conclusion. The material question is what purpose the compensation serves. In cases of exonerees, who spend an average of fourteen years in prison for crimes they did not commit,<sup>241</sup> the main goal is to help the exoneree rebuild his or her life and to try to make up—to the extent that money can adequately do so—for the lost years of health, employment, education, living situation, and personal growth. Given this goal, the reason for the wrongful conviction is immaterial. Does it really matter, for purposes of restitution or compensation, whether the years of unjust imprisonment are the product of malice, recklessness, lack of training, or confirmation bias originating from prosecutorial organizational culture? “[W]hen the exercise of state power results in an erroneous confinement, the government whose police power made such confinement possible should to the extent feasible redress the victim’s injury, regardless of whether any government agent has played a culpable role.”<sup>242</sup>

Relying on statutory compensation does present a few challenges. One argument is that large expenditures on exoneree compensation may present difficulties to legislators who cannot budget for it,<sup>243</sup> but such an argument can be countered by creating a statutory cap.<sup>244</sup> Another hurdle might be the definition of exoneration; many cases, in which guilt has been seriously questioned, including by DNA evidence, do not end in a formal exoneration but rather in a plea bargain.<sup>245</sup> A hearing

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<sup>241</sup> GARRETT, *supra* note 237, at 180.

<sup>242</sup> Joseph H. King, Jr., Comment, *Compensation of Persons Erroneously Confined by the State*, 118 U. PA. L. REV. 1091, 1092 (1970). This notion also avoids the need to engage in calculations of comparative fault, which seem to completely miss the point by comparing a § 1983 lawsuit to an action in torts and especially have the potential for confounding the exoneree with his or her incompetent attorney. For the opposite position, expressed rather cynically, see Adam I. Kaplan, Comment, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 244–46 (2008). Comparative fault would, of course, not be necessary in a non-fault-based compensation system.

<sup>243</sup> Michael Higgins, *Tough Luck for the Innocent Man*, 85 A.B.A. J. 46, 51–52 (1999).

<sup>244</sup> Alberto B. Lopez, *\$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 705 (2002).

<sup>245</sup> Armbrust, *supra* note 239, at 171 n.110. Recently, Damien Echols, Jason Baldwin, and Jessie Misskelley were released from prison on an Alford plea after serving eighteen years—Echols on death row—for murders that DNA evidence strongly suggests they did not commit. Campbell Robertson, *Deal Frees ‘West*

before a disinterested factfinder for the purpose of determining compensation may open the door for compensating in such cases.<sup>246</sup> Finally, there is the potential argument that no-fault compensation fails to deter prosecutors from unethical behavior. The above discussion of confirmation bias, which ascribes far more incidents of miscarriage of justice to a hyperadversarial organizational culture than to deliberate malice, suggests otherwise. While compensation might be an incentive for preventing malfeasance in the future, it also serves an independent goal: helping exonerees overcome deep past deprivation. In order to achieve the latter, compensation should be prospective, rather than retrospective, and should focus on helping exonerees rebuild their lives, rather than on quibbling about questions of fault.<sup>247</sup>

*B. Prosecutorial Hiring Practices and “Devil’s Advocate” Positions*

The findings regarding confirmation bias cast doubt on the possibility of changing prosecutorial culture by training alone. There are, however, two other avenues to consider that might have greater impact on the way evidence is interpreted in prosecutorial offices: a change in priorities in hiring for prosecutorial positions and a different distribution of labor in the workplace.

The suggested strategy regarding hiring is to create a preference for prosecutors who have been previously employed as public or private defense attorneys. While such practices will not eliminate socialization to the new office culture, they will at least provide the office with personnel who are experienced in examining evidence with a skeptical eye. Given that, as late as the 1970s, most prosecutors in the United States also had a private practice in which they did defense work,<sup>248</sup> this is a much milder proposal than it might seem.

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*Memphis Three’ in Arkansas*, N.Y. TIMES, Aug. 19, 2011, at A1, available at <http://www.nytimes.com/2011/08/20/us/20arkansas.html>.

<sup>246</sup> Armbrust, *supra* note 239, at 171.

<sup>247</sup> This also means compensation should be more than monetary and should include help and support in housing, employment, and education. *Id.* at 160.

<sup>248</sup> Joy, *supra* note 161, at 409 n.49; see also CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.9.4 (1986).

With regard to workplace practices, it would be sensible to place responsibility for training on the shoulders of those who have had both prosecutorial and defense experience. Some also suggest assigning a particular prosecutor as “devil’s advocate” and requiring that cases be read skeptically by someone who is not personally invested in the case and who would be able to challenge the prosecutorial perspective on the facts.<sup>249</sup> This proposal, made generally in the context of prosecutorial misconduct, is particularly important in the context of discovery failures.

Finally, it is important to keep in mind the high percentage of cases in which discovery is an informal process occurring between the parties with no judicial involvement. It is possible that if the judiciary were required to take a more active role in discovery proceedings, as it does semi-formally in the context of plea bargains,<sup>250</sup> fewer discovery failures and omissions would occur.<sup>251</sup>

### C. Law School Pedagogy and Bar Testing

The final group of solutions pertains directly to the issue in *Connick*: the prospect of improving discovery proceedings through proper training in law schools. The discussion above clearly casts heavy doubt on the ability to create change through teaching of the black-letter *Brady* doctrine in law school. Knowing the rule that requires disclosure of exculpatory evidence is unlikely to make young prosecutors actually assess evidence differently in the field. However, there are some pedagogical steps that can be taken to help combat confirmation bias. First, an increasing percentage of law school education is conducted in clinical settings,<sup>252</sup> and research shows the immense effect of law

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<sup>249</sup> Bruce MacFarlane, *Convicting the Innocent: A Triple Failure of the Justice System*, 31 MANITOBA L.J. 403, 443 (2006).

<sup>250</sup> FED. R. CIV. P. 11.

<sup>251</sup> Tempering prosecutorial zeal through judicial review is recommended in other contexts of criminal trial. Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 348–49 (1992).

<sup>252</sup> The Carnegie report has encouraged law schools to incorporate more clinical education in the law school curriculum. See generally WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 115 (2007). Clinical education has also proven to be beneficial in improving students’ reasoning.

office work by students on their professional values.<sup>253</sup> Being under the tutelage of unethical supervisors in criminal practice clinics is unhealthy and the potential long-term damage to the formation of proper professional instincts and ethics requires that clinical settings be carefully monitored. In crafting the academic component of a clinical program, it is important to regard the ability to see a given scenario from different perspectives as an essential lawyerly skill, to the extent that it is not regarded as such now.<sup>254</sup> Second, law schools might want to consider requiring that students in criminal clinic placements spend time in each of the two offices. Since ideological alliances are formed fairly early on in the educational process, it is advisable for students to keep an open mind and strive to experience the system from multiple perspectives before seeking a permanent position as a lawyer.<sup>255</sup>

Finally, some changes to law school and bar exam structure might indirectly address confirmation bias and encourage flexibility of perspective. Bar exams have been criticized for testing rote memorization of legal doctrine and applying it to artificial settings.<sup>256</sup> Granted, the bar exam itself cannot be expected to be an educational tool of quality, and it is designed to

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Stefan H. Krieger, *The Effect of Clinical Education on Law Student Reasoning: An Empirical Study*, 35 WM. MITCHELL L. REV. 359, 383–84 (2008).

<sup>253</sup> Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537, 543–44 (1991).

<sup>254</sup> Norman Redlich, *Lawyer Skills Can Be Taught*, 3 LEARNING & L. 10, 12 (1976).

<sup>255</sup> This point was driven home to me rather forcefully when I conducted an in-class experiment at Hastings, replicating Dan Kahan, Dave Hoffman, and Don Braman's experiment on *Scott v. Harris*. The students, who had participated in the criminal practice clinic prior to taking the seminar, were asked to watch the video and comment on Harris' driving and on the justifiability of police action during the car chase. I threw in a demographic variable regarding former clinical practices. Students who had externed in prosecutorial offices tended to assess Harris' conduct as more dangerous than students who had externed in defense offices. While the numbers of students were too small to conduct significance tests, the anecdotal evidence might suggest one of two things: either the students were socialized into perceiving reality as prosecutors or defense attorneys during their semester at the clinic, or they had self-selected the party with which they interned based on their prior worldviews and ideologies. Either way, this suggests the need to balance out such tendencies with a more comprehensive placement policy.

<sup>256</sup> Soc'y of Am. Law Teachers, *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 447 (2002).

only test basic skills;<sup>257</sup> the questions must have a clear answer to be easily and properly graded, and it would be difficult to construct questions with shades of gray in them. Nonetheless, essay questions, and particularly performance tests, can easily be crafted in a way that requires bar takers to assess a given scenario from the perspective of one party and then take on the same scenario from the perspective of the opposite party. This is a particularly attractive choice with regard to performance tests, which require the application of problem-solving skills to a given set of materials and often involve writing a persuasive memo or other legal document.<sup>258</sup> Similarly, law school exams, which allow for more ambiguity, could also be structured in a way that would require students to address the same issue from two polarized perspectives and provide persuasive arguments for each.

#### EPILOGUE: AGENDA FOR A FUTURE STUDY

While this Article draws on rich experimental literature regarding confirmation bias and cultural cognition of prosecutors, the specific impact of these phenomena on prosecutorial fact perception, while plausible, has not been experimentally tested yet. The discussion here sets the stage for a future experimental study that will expose prosecutors and defense attorneys to criminal cases with evidentiary materials, to test their assessment of the inculpatory or exculpatory potential value of the evidence. Such a study will randomly assign all participants, regardless of their institutional affiliation or identity, one of three positions: partisanship for either the prosecution or the defense or impartiality. The study will control for the length of time spent at the position, as well as for previous positions litigating for the opposite side. The study should also include groups of law students who hope to practice as prosecutors or

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<sup>257</sup> Suzanne Darrow-Kleinhaus, *A Response to the Society of American Law Teachers Statement on the Bar Exam*, 54 J. LEGAL EDUC. 442, 444 (2004).

<sup>258</sup> See, e.g., *California Bar Exam Instructions*, STATE BAR OF CALIFORNIA, [http://www.calbarxap.com/applications/CalBar/info/bar\\_exam.html](http://www.calbarxap.com/applications/CalBar/info/bar_exam.html) (last visited Nov. 9, 2013). The current format of the California Bar Exam requires applicants to complete, among other things, two “performance tests,” in which applicants are provided with a “case file” and a “library” of legal resources, from which applicants must complete a legal brief, memo, or other such document within the time period provided. *Id.*

defense attorneys, before and after spending time in prosecutorial and defense offices, thus enabling us to differentiate between the effects of personal self-selection and organizational culture. It is hoped that the study's results will either support or undermine the confirmation bias theory, thus allowing scholars to understand better why *Brady* mishaps occur, why the legal fault-based standard barely skims the surface of organizational partisanship, and how the criminal process can be better structured, free of hyperadversarial tension and conducive to truthful fact-finding.