

Florida State University College of Law
Scholarship Repository

Scholarly Publications

Spring 2012

Brady, Trust, and Error

Samuel R. Wiseman

Florida State University College of Law

Follow this and additional works at: <https://ir.law.fsu.edu/articles>

 Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Criminal Procedure Commons](#), and the [Fourth Amendment Commons](#)

Recommended Citation

Samuel R. Wiseman, *Brady, Trust, and Error*, 13 *LOX. J. P. INT. L.* 447 (2012),
Available at: <https://ir.law.fsu.edu/articles/461>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

BRADY, TRUST, AND ERROR

*Samuel R. Wiseman**

INTRODUCTION

The Supreme Court's retreat¹ over the last thirty-plus years from the expansive Fourth Amendment and robust exclusionary rule of *Katz*² and *Mapp*³ – the backwards march accompanied by the steady drumbeat of the threat of unsolved crimes and unpunished criminals⁴ – provides the narrative structure to criminal procedure classes everywhere. More recently and less obviously, the scope and enforcement of the *Brady v. Maryland*⁵

* Assistant Professor, Florida State University College of Law (J.D., Yale Law School; B.A., Yale University). Tamara Piety and Lyn Entzerth offered thoughtful feedback, and Cabell Fassnacht provided excellent research assistance. I am grateful to Imre Szalai and the Loyola University New Orleans College of Law Journal of Public Interest Law for inviting me to participate in this symposium on *Connick v. Thompson* and prosecutorial immunity.

1. *See, e.g.*, *Herring v. United States*, 555 U.S. 135, 147-48 (2009) (refusing to exclude evidence when police negligently collected evidence under a warrant that had been recalled and affirming the “good faith” rule); *id.* at 141 (finding that “the benefits of deterrence must outweigh the costs” for the exclusionary rule to apply); *Whren v. United States*, 517 U.S. 806, 819 (1996) (allowing pretextual stops by police); *Dow Chem. Co. v. United States*, 476 U.S. 227, 238-39 (1986) (holding that aerial surveillance of a facility did not require a search warrant); *United States v. Knotts*, 460 U.S. 276, 287 (1983) (holding that monitoring of beeper signals did not require a search warrant); *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979) (holding that “the installation and use of a pen register” did not require a search warrant); *Rakas v. Illinois*, 439 U.S. 128, 134 (1978) (denying Fourth Amendment standing when incriminating evidence is found in a search “of a third person’s premises”); *Stone v. Powell*, 428 U.S. 465, 494 (1976) (denying federal habeas corpus relief for a Fourth Amendment claim “where the State has provided an opportunity for full and fair litigation” of the claim); *United States v. Pineda-Moreno (Pineda-Moreno I)*, 591 F.3d 1212, 1216-17 (9th Cir.), *reh’g en banc denied*, 617 F.3d 1120 (9th Cir. 2010) (relying on *Knotts* in holding that monitoring a car with GPS does not require a search warrant). *But see* *United States v. Maynard*, 615 F.3d 544, 557 (D.C. Cir. 2010), *cert. granted sub nom* *United States v. Jones*, 131 S. Ct. 3064 (2011) (holding that GPS monitoring requires a search warrant).

2. *Katz v. United States*, 389 U.S. 347 (1967).

3. *Mapp v. Ohio*, 367 U.S. 643 (1961).

4. *See, e.g.*, *Herring*, 555 U.S. at 147 (“repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system”).

5. 373 U.S. 83, 87 (1963) (holding that “the suppression by the prosecution of

disclosure rule has been similarly curtailed. *Connick v. Thompson*,⁶ limiting municipal liability for *Brady* violations under § 1983,⁷ is the latest example. In the last ten years the Court has also called into serious doubt the application of *Brady* to the plea bargaining process⁸ and repeatedly adopted restrictive interpretations of the statute governing federal habeas for state prisoners,⁹ an important avenue for establishing *Brady* violations. This trend is more difficult to explain, at least at first glance.

The Fourth Amendment exclusionary rule comes at an obvious cost to the criminal justice system's ability to convict the guilty, although the exact price is hotly contested.¹⁰ More broadly, the Fourth Amendment itself involves an implicit

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").

6. 131 S. Ct. 1350, 1356 (2011).

7. 28 U.S.C. § 1983 (2006).

8. *United States v. Ruiz*, 536 U.S. 622, 633 (2001) (holding that the government need not disclose impeachment evidence prior to a guilty plea); *Ruiz*, 536 U.S. at 633-34 (Thomas, J., concurring) (arguing that *Brady* does not apply at all prior to plea bargains). See also Samuel Wiseman, *Waiving Innocence*, 96 MINN. L. REV. (forthcoming 2012) (describing how some circuits have followed Justice Thomas's view), available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1606911.

9. See, e.g., *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011), for federal habeas cases, limiting review under § 2254(d) to "the record that was before the state court that adjudicated the claim on the merits;" *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011) (presuming that a claim has been adjudicated on the merits "[w]hen a federal claim has been presented to a state court and the state court has denied relief," and thus requiring federal habeas court deference under the Antiterrorism and Effective Death Penalty Act).

10. See, e.g., Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease*, 68 S. CAL. L. REV. 1, 43 (1994) (concluding that "the exclusionary rule has not been responsible for the release of dangerous criminals who prey on society"); Dallin Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970) (concluding that improper search and seizure "frequently results in the immediate termination of the prosecution" in an empirical study that focuses primarily on deterrence). A limited effect is reported in Peter F. Nardulli, *The Societal Costs of the Exclusionary Rule: An Empirical Assessment*, 8 AM. B. FOUND. RES. J. 585 (1983) (showing a success rate of suppression in only approximately 0.6 percent of the fewer than five percent of cases in which motions to suppress were filed); U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, *THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA 2* (1982) (showing a failure to prosecute approximately one-third of drug cases in Los Angeles County as a result of improper searches). See also Samuel Estreicher & Daniel P. Weick, *Opting for a Legislative Alternative to the Fourth Amendment Exclusionary Rule*, 78 UMKC L. REV. 949, n.8 (citing to and describing some of these sources).

tradeoff: more privacy for less security.¹¹ If there are a few more government agents looking through our phone records or arresting us on expired warrants, there are fewer unbroken crime rings and criminals going free on technicalities. Or at least that's the idea. In the *Brady* context, on the other hand, the tradeoffs are less obvious. As announced by the Court in 1985, exculpatory evidence is "material" under *Brady* "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."¹² Under this formulation, and in stark contrast to the Fourth Amendment, there is little chance of a windfall for the truly deserving of conviction – only those who may well have been acquitted had all the available evidence been presented can get relief. What, then, is motivating the Court's erosion of the *Brady* right and its remedies? And can it be justified? After identifying the trend in Part I, this essay will suggest some possible answers in Part II.

I. NARROWING *BRADY*, DIRECTLY AND INDIRECTLY

A. REDUCING COMPLIANCE: *CONNICK V. THOMPSON* AND *VAN DE KAMP V. GOLDSTEIN*

At trial, prosecutors of the Orleans Parish District Attorney's office failed to turn over the blood evidence that would ultimately prove defendant John Thompson's innocence.¹³ Another prosecutor failed again nine years later after receiving the deathbed confession of a conscience-stricken colleague.¹⁴ As a result of these failures, Mr. Thompson spent eighteen years in prison and came within weeks of execution before a private investigator finally uncovered the crucial evidence.¹⁵ The facts of *Connick v. Thompson* are as gripping as its outcome – no relief – is galling. In reaching this result, the Court severely limited municipalities' liability under § 1983 for failing to train their prosecutors to comply with *Brady*. This will presumably, in the natural course of events, reduce training and, ultimately,

11. Cf. Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, U. ILL. L. REV. 1461, 1464 (2010) (observing that "the Court views (and has viewed for the past several decades) Fourth Amendment disputes as a tension-filled clash between public interests, such as law enforcement, and individual interests, such as privacy and autonomy" but disputing the validity of this view).

12. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

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

14. *Id.* at 1356, n.1.

15. *Id.* at 1357.

compliance.¹⁶

The Court has long held that § 1983 does not impose *respondeat superior* liability on municipalities; their liability must stem from their own “acts.”¹⁷ For the purposes of § 1983, local governments act by setting official policy. “Official policy” can be formal, e.g., a city ordinance or a rule in a police department handbook, or informal, e.g., customs or practices not written down (and perhaps not even spoken about) but “so persistent and widespread as to practically have the force of law.”¹⁸ In *Connick*, the jury had rejected the claim that the relevant *Brady* violation was the result of a policy, formal or informal, against complying with *Brady*.¹⁹ Instead, it found liability based on what the Supreme Court has referred to as a policy of “failure to train.”²⁰ To establish this type of liability, a plaintiff must show that the local government’s failure to provide training “evidences a ‘deliberate indifference’ to the rights of its inhabitants.”²¹ Deliberate indifference must generally be shown by establishing a pattern of constitutional violations that the existing training regime has failed to prevent.²² Thompson, however, did not argue that he had established such a pattern. Instead, he relied on an exception to the pattern requirement, discussed in two Supreme Court cases, in situations where the potential for constitutional violations in the absence of training is sufficiently obvious.²³ Although the Court has never actually affirmed liability on this theory, *Canton v. Harris* did provide a

16. See Susan A. Bandes, *The Lone Miscreant, The Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 FORDHAM L. REV. 715, 727-28 (2012) [hereinafter Bandes, *The Lone Miscreant*] (explaining that prosecutorial misconduct is a “leading cause of wrongful convictions,” emphasizing the “need for training” to prevent misconduct, and observing that *Connick* “rejected the need for prosecutorial training”).

17. *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986).

18. *Connick*, 131 S. Ct. at 1359.

19. See Respondent’s Brief on the Merits at 7, *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (No. 09-571) 2010 WL 3167311 at *1.

20. *Bd. of Cnty Comm’rs v. Brown*, 520 U.S. 397, 410 (1997).

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

22. *Brown*, 520 U.S. at 407 (“If a program does not prevent constitutional violations, municipal decision makers may eventually be put on notice that a new program is called for. Their continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action – the ‘deliberate indifference’ – necessary to trigger municipal liability.”).

23. *Id.* at 398; *Canton*, 489 U.S. at 390.

hypothetical example: arming police officers without providing training on the use of deadly force.²⁴ Thus, Thompson argued, the risk of *Brady* violations resulting from failure to provide relevant training to young prosecutors was so obvious as to allow a finding of deliberate indifference to the rights of the defendants prosecuted. Going further, Thompson argued that he had demonstrated that Connick, the policymaker for Orleans Parish, was personally deliberately indifferent to the risk of *Brady* violations as illustrated by his failure to provide training despite, *inter alia*, his own ignorance of *Brady's* requirements, his awareness that his young prosecutors needed training to comply with *Brady's* “elastic” demands, his lack of interest in ensuring that his prosecutors did not commit violations, and the fact that as of the time of Thompson’s conviction, courts had already found four *Brady* violations committed by his office.²⁵

The Court, split five-to-four, rejected both theories. In concluding that the risk of untrained prosecutors committing *Brady* violations was not sufficiently obvious, the court pointed to the grounding in legal reasoning and research that lawyers receive in law school,²⁶ the “threshold requirement” of the bar exam, the existence of continuing-education obligations, and the opportunity for “on-the-job” training.²⁷ As for Thompson’s argument that Connick was personally and deliberately indifferent, the Court disposed of it in a footnote, fixating on Thompson’s use of the phrase “culture of indifference,” and

24. *Canton*, 489 U.S. at 390 n.10 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

25. See Respondent’s Brief on the Merits at 8-12, 37-41 *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (No. 09-571); see also Jennifer E. Laurin, *Prosecutorial Exceptionalism, Remedial Skepticism, and the Legacy of Connick v. Thompson*, UNIV. OF TEX. SCH. OF LAW (Public Law and Legal Theory Research Paper Series No. 202, 2011), available at <http://ssrn.com/abstract=1934250> (describing Thompson’s arguments).

26. If *Connick* is indeed one of the “meanest” decisions in the Court’s history, see Bandes, *The Lone Miscreant*, *supra* note 16, at 716 (quoting Dahlia Lithwick, *Cruel but Not Unusual*, SLATE, Apr. 1, 2011, <http://www.slate.com/id/2290036/>), it does have at least have one heartening aspect: at a time when the value of the current system of legal education is being widely questioned, a majority of the Supreme Court has given it a ringing endorsement. See, e.g., Clifford Winston, *Op-Ed: Are Law Schools and Bar Exams Necessary?*, N.Y. TIMES, Oct. 24, 2011, http://www.nytimes.com/2011/10/25/opinion/are-law-schools-and-bar-exams-necessary.html?_r=2; Paul Campos, *Welcome to my Nightmare*, INSIDE THE LAW SCHOOL SCAM BLOG, (Aug. 7, 2011, 6:40 AM), http://insidethelawschoolscam.blogspot.com/2011_08_01_archive.html (arguing that “law professors are scamming their students”).

27. *Connick*, 131 S. Ct. at 1361-64.

concluding that this “culture” could not be evidence of Connick’s subjective awareness, but was, rather, “essentially an assertion that Connick’s office had an unconstitutional policy or custom,” a claim rejected by the jury.²⁸

The Court did not limit itself to rejecting the arguments that Thompson actually made, however. Although it recognized that Thompson did “not contend” that he had established the requisite municipal indifference to warrant the need for training through a pattern of *Brady* violations, the Court nonetheless reached out to observe that the four *Brady* violations predating Thompson’s 1985 trial could not have supplied the necessary notice that training was needed because they did not involve “failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind,” and so were “not similar to the violation at issue here.”²⁹ The Court explained the need for this extraordinary level of specificity by the fact that Orleans Parish prosecutors were familiar with the “general *Brady* rule,” and so did not have “the utter lack of an ability to cope with constitutional situations that underlies the *Canton* [arming untrained police officers] hypothetical.”³⁰

Thus, *Connick* radically restricts municipal liability for *Brady* violations resulting from a municipality’s failure to train its prosecutors.³¹ It will be the rare case indeed in which a plaintiff is able to produce a pattern of factually similar, judicially identified *Brady* violations.³² While plaintiffs may still establish liability through the existence of an official but informal policy (i.e., a custom or practice) of violating *Brady*, they will likely be hampered, as Thompson seems to have been, by the existence of a

28. *Id.* at 1364 n.10.

29. *Id.* at 1360 n.7.

30. *Id.* at 1363. In the *Canton* hypothetical, the Court cited *Tennessee v. Garner*, which held that the use of deadly force to stop an unarmed suspected burglar from escaping over a fence was an unreasonable seizure under the Fourth Amendment. *Canton*, 489 U.S. at 390 n.10 (citing *Tennessee v. Garner*, 471 U.S. 1 (1985)). It is beyond the scope of this essay to determine whether the men and women of law enforcement should take umbrage at the Court’s belief that recent law school graduates are better equipped to decide questions with which even “judges struggle,” 424 U.S. 409, 425 (1976), than police officers are to realize that it isn’t reasonable to shoot a non-dangerous suspect in the back as he’s trying to escape.

31. See Bandes, *The Lone Miscreant*, *supra* note 16, at 718 (suggesting that *Connick* limits municipal failure to train liability “perhaps to the vanishing point”).

32. See *id.* at 723 (“Demanding judicial reversals sets a bar that is not only unprecedented but onerously high in *Brady* cases.”).

formal policy mandating compliance. Two years earlier, the Court eliminated supervisory prosecutors' individual liability for failures to train or supervise their subordinate attorneys.³³

Since *Imbler v. Pachtman* in 1976, prosecutors have enjoyed absolute immunity from § 1983 claims arising from actions "intimately associated with the judicial phase of the criminal process."³⁴ *Imbler* left open, however, the question of whether this immunity extends to prosecutors' administrative functions.³⁵ Thomas Goldstein, who had served twenty-four years in prison on the basis of a conviction obtained in a trial in which the prosecution failed to disclose impeachment material as required by *Giglio*,³⁶ sought to exploit this narrow opening. He brought suit not against the attorneys who had prosecuted him, but against their chief supervisory attorneys, alleging that, *inter alia*, they failed to provide adequate training and oversight to their juniors.³⁷ The Court unanimously extended *Imbler* immunity, holding that the same concerns underlying the decision in that case – fear that the threat of suit could affect prosecutors' trial-related decisions, the danger of liability for honest mistakes, and the possibility of litigation years after the alleged violation – all required absolute individual immunity for failures to train or supervise.³⁸

The result of *Connick* and *Van de Kamp* is likely to be less *Brady* training for prosecutors, although how much less is, of course, difficult to predict. Fear of § 1983 liability is (or was) not the only thing motivating governments and supervisory prosecutors to provide guidance and supervision to their employees regarding their *Brady* obligations, of course. Ethical prosecutors and municipalities will see it as a duty. Less idealistically, policymakers and supervisors could fear that reversed convictions due to *Brady* violations by untrained junior prosecutors would lead to adverse political consequences.³⁹ On

33. *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009).

34. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

35. *Id.* at 431 n.33.

36. *Van de Kamp*, 555 U.S. at 339-40 (citing to *Giglio v. United States*, 405 U.S. 150 (1972)).

37. *Id.* at 340.

38. *Van de Kamp*, 555 U.S. at 346-48.

39. This was obviously not a concern for Harry Connick, Sr. And justifiably so, considering that he served for thirty years despite the numerous *Brady* violations committed by his office. See *Kyles v. Whitley*, 514 U.S. 419, 455 (1995) (Stevens, J.,

the other end of the spectrum, they could worry that junior prosecutors with only a general knowledge might disclose more than necessary out of fear of committing a violation. Indeed, both overdisclosure and underdisclosure (perhaps even in the same case) are likely results of untrained lawyers dealing with complex questions.⁴⁰ Nonetheless, as economists and, increasingly, legal scholars, never get tired of pointing out, people respond to incentives,⁴¹ and the incentives for providing that training have decreased: local governments won't face § 1983 liability for failing to provide it unless things are totally out of hand, and individual supervisors won't be liable even if they are totally out of hand. At the same time, the costs in supervisor time and energy of providing that training have remained constant. Even worse, governments have an incentive to keep their formal policies as broad and uninformative as possible – “comply with the Constitution” – in order to avoid potential liability from a document more detailed but correspondingly fraught with risk of error.

In sum, then, after *Connick* and *Van de Kamp* there will very likely be less *Brady* training and consequently more *Brady* violations. This will only compound the larger, widely known problem of the lack of an effective enforcement mechanism for *Brady*.⁴² *Brady* violations are difficult to discover – the only one with proof of the violation is often the violator. As a result, many are never revealed.⁴³ Indeed, the Court's recent decisions restrictively interpreting the statute governing federal habeas for state prisoners are likely to make *Brady* violations even less

concurring) (noting that the case, prosecuted by Connick's office, involved “many instances of the state's failure to disclose exculpatory evidence”).

40. Or maybe not – after all, lawyers have gone to law school and passed the bar exam – and then there's CLE. See *Connick*, 131 S. Ct. at 1361-62.

41. See Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA. J. SOC. POL'Y & L. 305, 320 (2001) (concluding that “[i]ncentives matter”); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 855 (1995) (observing “that people generally will perform better if they are given incentives to perform at a higher level”); see also Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, n.21 (2010) (describing incentives and citing to these and other sources).

42. See, e.g., Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 731-32 (1987) (explaining how prosecutorial discretion, immunity, and strict materiality standards in post-conviction review limit the consequences of *Brady* violations for prosecutors).

43. See, e.g., Burke, *supra* note 41, at 2128-29.

likely to come to light.⁴⁴ A large penalty would then seem to be required to offset the low risk of detection, but it does not presently exist. As discussed above, *Imbler* provides absolute individual liability, and, as richly illustrated by *Connick* itself, the threat of meaningful professional sanction or criminal prosecution⁴⁵ is more illusory than real. A grand jury investigation into the prosecutors who withheld the lab report was canceled after one day,⁴⁶ and the disciplinary action against Michael Riehlmann, the attorney who received his colleague's deathbed confession and failed to report it, resulted in only a public reprimand.⁴⁷ *Brady* violations do lead to vacated convictions, of course, but the defendants may still be retried – putting the violating prosecutor roughly where he would have been if he had disclosed in the first place. There remains the stigma that accompanies a judicial determination that a prosecutor has violated the Constitution, but even here the Court has weakened the disincentive, noting that even “honest prosecutors” can violate *Brady*.⁴⁸ Maybe so. After *Connick* and *Van de Kamp*, they will do so more frequently.

B. MOVING TOWARD LIMITING *BRADY* TO TRIAL: *UNITED STATES V. RUIZ*

In an equally troubling development, the Court has recently called into significant question the application of *Brady* to the plea bargaining process.⁴⁹ Roughly nineteen out of twenty

44. See, e.g., *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011); *Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011); see also Samuel Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. (forthcoming 2012) (describing *Cullen v. Pinholster* and its likely effects).

45. See *Imbler v. Pachtman*, 424 U.S. 409, 428-29 (1976):

We emphasize that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law. Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of § 1983. The prosecutor would fare no better for his willful acts. Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers (internal citations omitted).

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

47. *In re Riehlmann*, 891 So.2d 1239 (La. 2005).

48. *Van de Kamp*, 555 U.S. at 342 (quoting *Imbler*, 424 U.S. at 425). See also *Connick*, 131 S. Ct. at 1367 (Scalia, J., concurring) (“*Brady* mistakes are inevitable.”).

49. See generally Wiseman, *supra* note 8. This development is troubling, in part,

convictions are obtained by guilty plea.⁵⁰ Despite the enormous barriers to overturning a conviction after such a plea, twenty-three⁵¹ of the 275 convictions so far overturned as a result of DNA evidence⁵² were the result of guilty pleas. Although the merits of plea bargaining are beyond the scope of this essay, it is enough to say that innocent defendants sometimes conclude that it is in their best interest to plead guilty for a variety of reasons, including their assessment of the likelihood of conviction based on the known evidence.⁵³ A pre-trial *Brady* right can help defendants make a more accurate assessment, and thus reduce the number of wrongful convictions. Indeed, innocent defendants are often at a particular informational disadvantage, because they may know nothing about the crime.⁵⁴

And indeed, prior to 2002 many courts had recognized a *Brady* right in the pretrial period,⁵⁵ holding, for example, that *Brady* material was “pertinent not only to an accused’s preparation for trial but also to his determination of whether or

because “nondisclosure pre-plea” may be common. Janet Hoeffel, *Prosecutorial Discretion and the Core: The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1148 (2005) (citing to Ruiz).

50. Douglas A. Berman, *Should Juries Be the Guide for Adventures Through Apprendi-Land*, 109 COLUM. L. REV. SIDEBAR 65, 67 n.12 (2009) (citing Tracey Kyckelhahn & Thomas H. Cohen, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 1 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf> (finding that, in the nation’s 75 most populous counties, more than 95% of convictions occurred through guilty plea); U.S. SENTENCING COMM’N, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS Figure C (2009), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2008/FigC.pdf (reporting that 96.3% of all federal convictions in fiscal year 2008 were the result of guilty pleas).

51. See *When the Innocent Plead Guilty*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php; see also Wiseman, *supra* note 8 (manuscript at 10-11).

52. See INNOCENCE PROJECT, FACTS ON POST-CONVICTION DNA EXONERATIONS, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php; see also Wiseman, *supra* note 8 (manuscript at 56)

53. See, e.g., Wiseman, *supra* note 8 (manuscript at 56) (citing to the extensive literature on innocent defendants pleading guilty and their reasons for doing so).

54. See Wiseman, *supra* note 8 (manuscript at 10 n.42) (citing Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 951 (2008)).

55. See Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 653 (2007) (identifying three circuits, one federal district court, and appellate courts in eight states that found a “due process duty to disclose *Brady* material prior to the entry of a guilty plea”) (cited in Wiseman, *supra* note 8 (manuscript at 37)).

not to plead guilty.”⁵⁶ Only the Fifth Circuit and several lower courts declined to recognize a pretrial right to *Brady* material.⁵⁷

In 2002, the Supreme Court issued *United States v. Ruiz*, casting significant doubt on the existence of such a right.⁵⁸ *Ruiz* involved a challenge to a plea agreement which required the defendant to waive her right to receive impeachment information relating to the government’s witnesses and to receive information supporting any affirmative defenses she might have, but which explicitly recognized a continuing government duty to turn over evidence “establishing the factual innocence of the defendant.”⁵⁹ *Ruiz* refused to sign the waiver, and ultimately pleaded guilty and received a harsher punishment than she would have received had she signed the waiver and accepted the government’s offer.⁶⁰ The Ninth Circuit recognized a right to *Brady* material before signing a plea agreement, and held that this right could not be waived.⁶¹ In an opinion joined by eight justices, the Court held that “the Constitution does not require the Government to disclose material impeachment evidence,” or any information regarding any affirmative defense, “prior to entering a plea agreement with a criminal defendant.”⁶² In reaching this conclusion, the Court observed that “impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*,”⁶³ and found no relevant distinction between the right to impeachment information and the many rights that can be waived without an *ex ante* determination of their value.⁶⁴ Finally, performing a due process balancing test,

56. *United States v. Avellino*, 136 F.3d 249, 255 (2d. Cir. 1988) (cited in Wiseman, *supra* note 8 (manuscript at 49)).

57. McMunigal, *supra* note 55, at 653-54; *Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000).

58. *United States v. Ruiz*, 536 U.S. 622 (2001).

59. *Id.* at 625.

60. *Id.* at 625-26.

61. *United States v. Ruiz*, 241 F.3d 1157, 1167 (9th Cir. 2001).

62. *Ruiz*, 536 U.S. at 633.

63. *Id.* at 629.

64. *Id.* at 629-30 (“[T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances – even though the defendant may not know the *specific detailed* consequences of invoking it. A defendant, for example, may waive his right to remain silent, his right to a jury trial, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.”); *see also id.* at 630 (“It is

the Court concluded that the burden on the government in the form of exposed informants and the disruption of ongoing investigations outweighed the “limited” value of the right in question.⁶⁵ The Court treated the affirmative defense portion of the waiver summarily, noting that most of the same reasoning applied, and that “in the context of this agreement, the need for this information is more closely related to the *fairness* of a trial than to the *voluntariness* of the plea,” and “the value in terms of the defendant’s added awareness of relevant circumstances is ordinarily limited,” and outweighed by the costs to the government.⁶⁶ Justice Thomas concurred, stating briefly that *Brady* does not apply pretrial.⁶⁷

The full import of *Ruiz* is not clear, and the courts of appeals have split as to whether it forecloses the existence of a right to material exculpatory evidence prior to entering into a plea agreement.⁶⁸ As the Second Circuit has observed, both the basic

difficult to distinguish, in terms of importance, (1) a defendant’s ignorance of grounds for impeachment of potential witnesses at a possible future trial from (2) the varying forms of ignorance at issue in these cases.”); *id.* at 630-31 (“This Court has found that the Constitution, in respect to a defendant’s awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor. See *Brady v. United States*, 397 U.S. 742, 757 (1970) (defendant ‘misapprehended the quality of the State’s case’); *id.* (defendant misapprehended ‘the likely penalties’); *id.* (defendant failed to ‘anticipate a change in the law regarding’ relevant ‘punishments’); *McMann v. Richardson*, 397 U.S. 759, 770 (1970) (counsel ‘misjudged the admissibility’ of a ‘confession’); *United States v. Broce*, 488 U.S. 563, 573 (1989) (counsel failed to point out a potential defense); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (counsel failed to find a potential constitutional infirmity in grand jury proceedings).

65. *Ruiz*, 536 U.S. at 631-32.

66. *Id.* at 632.

67. *Id.* at 633-34 (Thomas, J., concurring).

68. *Cf. Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010) (“[T]he Supreme Court has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial. . .”); *and United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009) (concluding that *Ruiz* “never makes such a distinction” between types of pretrial evidence and that a distinction between impeachment and exculpatory evidence cannot be “implied from its discussion”); *and United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010) (citing *Jones v. Cooper*, 311 F.3d 306, 315 n. 5 (4th Cir. 2002) (noting that a prosecutor’s withholding “potentially relevant as mitigation evidence” prior to a plea does not merit invalidation of a guilty plea), *with McCann v. Mangialardi*, 337 F.3d 782, 787 (7th Cir. 2003) (observing that “*Ruiz* strongly suggests that *Brady*-type disclosure might be required under the circumstances” because exculpatory evidence is “entirely different. . . *Ruiz* indicates a significant

Brady right and its extension to impeachment information are centered on the likelihood of a finding of guilt if the concealed evidence had been considered.⁶⁹ From this perspective, it is difficult to distinguish between evidence that an alleged eyewitness has a strong incentive to lie and evidence, say, that another witness's testimony can provide the defendant with an alibi. On the other hand, when determining that the value of the pretrial *Giglio* right was limited, the *Ruiz* Court expressly noted that the existence of the government's promise to provide evidence of factual innocence "diminishes the force of [the] concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty."⁷⁰

The Court will ultimately have to resolve this question. If it reverses its recent trend and recognizes a right to *Brady* material before entering into a plea agreement, the administrative burdens on prosecutors will increase, perhaps significantly, given the staggering number of plea bargains – or perhaps not so significantly, if the right is defined narrowly.⁷¹ If it does not, an

distinction between impeachment information and exculpatory evidence of actual innocence" and that "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have actual knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea."). See also *In re Miranda*, 182 P.3d 513, 542-43 (Cal. 2008) ("*Ruiz* by its terms applies only to material impeachment evidence, and the high court emphasized that the government there had agreed to 'provide any information establishing the factual innocence of the defendant' regardless."); *Ollins v. O'Brien*, No. 03C579503C7175, 2005 WL 730987, at *11 (N.D. Ill. Mar. 28, 2005) (holding that "due process requires the disclosure of information of factual innocence during the plea bargaining process"). The Tenth Circuit, in an unpublished decision, looked to *McCann* and agreed with its reasoning. In *United States v. Ohiri*, the court concluded that "the Supreme Court [in *Ruiz*] did not imply that the government may avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence in the government's possession." *United States v. Ohiri*, 133 Fed. App'x. 555, 562 (10th Cir. 2005). The court explained that two elements make the facts in *Ruiz* substantially different from other plea cases, including the fact that the plea in *Ruiz* was a pre-indictment federal plea (under the fast-track program) selection and that it involved impeachment evidence. These contrasted with Ohiri's "eleventh-hour plea" on the day of jury selection and the prosecution's withholding of exculpatory evidence. See generally *Wiseman*, *supra* note 8 (manuscript at 39).

69. See *Friedman*, 618 F.3d at 154 (2d Cir. 2010); see also *United States v. Conroy*, 567 F.3d 174, 178 (5th Cir. 2009).

70. *Ruiz*, 536 U.S. at 631.

71. If the right included only convincing evidence of "factual innocence," for example, one would hope that few prosecutors in possession of such evidence would pursue a guilty plea. Some courts have recognized a general due process right to

uncertain number of innocent defendants will likely plead guilty when they otherwise would not have.⁷²

II. *BRADY* AS A SKEPTIC'S RULE IN A TRUSTING ERA

If, then, the Court has recently been restricting both the scope of the *Brady* rule and the remedies for violations, what has been motivating the rollback? As touched on above, in the Court's long and ongoing campaign to limit the reach of the Fourth Amendment and weaken or abolish the exclusionary rule, the rationale is clear and easy to understand. The Fourth Amendment limits what law enforcement can do to prevent and investigate crime, including very serious crimes like terrorist attacks. In return, of course, we get greater freedom from official observation and intrusion, and a bulwark against arbitrary and authoritarian government. The Court has clearly felt on numerous occasions that, on balance, we are better off with greater security despite the cost to the interests protected by the Fourth Amendment.⁷³ We may or may not agree with the values the Court has placed on these interests, but the formula itself is reasonable and probably unavoidable. The case against the Fourth Amendment exclusionary rule is even more straightforward: the Fourth Amendment must have a meaningful remedy, but few of us are happy to let the truly guilty go free.⁷⁴

withdraw a guilty plea in the face of "outrageous" government behavior, such as the suppression of highly exculpatory evidence. See Wiseman, *supra* note 8 (manuscript at 47) (citing Ferrera v. United States, 456 F.3d 278, 291 (1st Cir. 2006)); Matthew v. Johnson, 201 F.3d 353, 364 n.15 (5th Cir. 2000) (stating that "[e]ven if the nondisclosure is not a *Brady* violation," failure to disclose evidence pretrial may sometimes make it "impossible for [a defendant] to enter a knowing and intelligent plea").

72. But see John C. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 445 (2001) (arguing that *Brady* provides little benefit to defendants in the plea bargaining process).

73. See Herring v. United States, 555 U.S. 135, 147 (2009).

74. See, e.g., Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 792-93 (1994) (arguing that "the courts best affirm their integrity and fairness not by closing their eyes to truthful evidence [under the exclusionary rule], but by opening their doors to any civil suit brought against wayward government officials, even one brought by a convict" and that society "cherishes the notion that cheaters – or murderers, or rapists, for that matter – should not prosper"); Reinert, *supra* note 11, at 1465 ("The source of the ambivalence towards the exclusionary remedy is the perception, affirmed just last Term, that whenever invoked, the rule imposes a substantial cost on society in the form of permitting a guilty defendant to go free."); Herring, 555 U.S. at 141 ("The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free – something that 'offends basic concepts of the criminal justice system.'" (quoting United States v.

This desire to make sure the guilty are punished partially explains a previous generation of *Brady*-narrowing. *Brady* tells us “that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment,” but it does not explain what is “material.”⁷⁵ It has been suggested by scholars and judges that Justice Douglas used the word to mean, essentially, “relevant.”⁷⁶ Whatever the merits of such a rule, it would seem to demand that courts grant new trials on the basis of suppressed evidence when, due to the weight of the incriminating evidence, the suppressed, favorable evidence would have had little chance of leading to an acquittal. Because some of the beneficiaries of these windfalls could not be effectively retried due to fading memories and missing or dead witnesses, some truly guilty defendants would go free. Some wrongful convictions would also be prevented or overturned, of course, but the Court was ultimately not willing to accept this tradeoff.

In *Agurs*, the Court held that the *Brady* rule applied regardless of whether the evidence was requested by the defense, but that in such cases “[t]he proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. . . . If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.”⁷⁷ In *Bagley*, the Court applied this reasoning to all cases except those involving the prosecution’s use of perjured testimony, regardless of whether a request was made, holding

Leon, 468 U.S. 897, 908 (1984)); Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998) (describing “the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives”); Stone v. Powell, 428 U.S. 465, 490 (1976) (concluding that application of the exclusionary rule “often frees the guilty” and may generate “disrespect for the law and administration of justice”). Cf. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, U. ILL. L. REV. 363, 383 (1999) (arguing that allowing setting guilty defendants free under the Fourth Amendment – often justified by liberals in light of the deterrence enabled by the exclusionary rule – will not deter future police violations).

75. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

76. See, e.g., Scott Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 646-47 (2002) (citing *United States v. Bagley*, 473 U.S. 667, 703 n.5 (1985) (Marshall, J., dissenting) (arguing that there is “strong evidence that *Brady* might have used the word [material] in its evidentiary sense, to mean, essentially, germane to the points at issue.”); *Strickler v. Greene*, 527 U.S. 263, 298 (1999) (Souter, J., dissenting) (“*Brady* itself did not explain what it meant by ‘material’ (perhaps assuming the term would be given its usual meaning in the law of evidence False”).

77. *United States v. Agurs*, 427 U.S. 97, 112-13 (1976).

that “evidence is material 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. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”⁷⁸ As the Court further explained in *Kyles*, *Brady* is violated when the undisclosed evidence “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”⁷⁹

The result of this line of cases was to drastically reduce the chance that truly guilty defendants will benefit from *Brady*. If this is so, and the modern *Brady* rule does little more than protect (a lucky few of) the innocent, then the Court’s desire to ensure the punishment of wrongdoers cannot account for its recent limitations on the right and its remedies. The remainder of this essay will suggest a possible explanation.

A. THE COURT’S RENEWED FAITH

Part of the answer to the Court’s uneasy relationship with *Brady* surely lies in the complexity and uncertainty of the obligation placed on prosecutors. As *Kyles*⁸⁰ makes clear, the prosecutor’s duty to disclose can only be finally determined on the basis of the whole record – that is, after trial, when the violation (if any) has necessarily already occurred.⁸¹ As a result, the Court is clearly concerned about the possibility of punishing (if that’s the right word) even “honest prosecutor[s],”⁸² a danger heightened by the fact that the court has applied *Brady* to “evidence known only to police investigators and not to the prosecutor.”⁸³ Similarly, the Court is plainly concerned that a

78. *Bagley*, 473 U.S. at 682. See Sundby, *supra* note 76, at n.35 and accompanying text.

79. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

80. *Id.* at 434.

81. See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006) (“Because *Brady*’s materiality standard turns on a comparison of the supposedly exculpatory evidence and the rest of the trial record, applying the standard prior to trial requires that prosecutors engage in a bizarre kind of anticipatory hindsight review,” requiring them to “anticipate what the other evidence against the defendant will be by the end of the trial, and then speculate in hypothetical hindsight whether the evidence at issue would place ‘the whole case’ in a different light.” (footnotes omitted)).

82. *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976)).

83. *Kyles*, 514 U.S. at 438.

broad and vigorously enforced *Brady* rule would be inconsistent with the American system of competitive justice, causing prosecutors to “shade [their] decisions”⁸⁴ towards disclosure and risking “displace[ment of] the adversary system as the primary means by which truth is uncovered.”⁸⁵

These explanations, however, do not tell the entire story. They represent only one side of the equation – the costs, or perceived costs, of the *Brady* rule, which, presumably, have remained fairly constant over the last ten years. The moving force behind the Court’s recent ambivalence towards *Brady* likely lies on the other side, in the Court’s perception of *Brady*’s benefits.

In a world in which prosecutors can be trusted not to prosecute when they have serious doubts about the guilt of the defendant, or at the very least to make sure the jury hears all the evidence, the need for *Brady* isn’t especially pressing – mistakes will happen, but they will be rare, and can to some degree be ameliorated by rules allowing for the presentation of new evidence after conviction.⁸⁶ When *Brady* was issued in 1963, this was not the world of the American criminal justice system. In a sad history that scarcely needs to be recounted here, entrenched institutional and societal racism, combined with a dearth of meaningful procedural protections for the poor and unconnected, led to injustice on a massive scale, and the Warren Court’s attempt to combat these problems through constitutional criminal procedure is another narrative arc familiar to law students everywhere.⁸⁷ *Brady*, of course, is a Warren Court decision, and a product of that era: if state prosecutors could not be trusted not to convict the innocent by suppressing evidence, a federal remedy was necessary. Similar motivations underlay the Court’s resurrection of § 1983⁸⁸ and its expansive approach to

84. *Van de Kamp*, 555 U.S. at 341 (quoting *Imbler*, 424 U.S. at 423).

85. *United States v. Bagley*, 473 U.S. 667, 675 (1985).

86. *Cf. Alafair Burke, Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 488 (2009) (“If a conscientious prosecutor faces exculpatory evidence that would shake her faith in any conviction she might obtain without the evidence, then she will presumably dismiss charges against the defendant. This would render disclosure of the evidence, and *Brady* itself, irrelevant.”).

87. David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1805 (2005) (observing that “criminal procedure in the Warren Court era was famously preoccupied with issues of illegitimate inequality, particularly those associated with race.”).

88. *See Monroe v. Pape*, 365 U.S. 167 (1961).

federal habeas,⁸⁹ necessary enforcement mechanisms for *Brady*, and other constitutional rights.

As the worst abuses of the past were curtailed (and the justices of the Warren Court were replaced), the Court's perceived need for skepticism of the conduct and motivations of police and prosecutors (and government generally) declined.⁹⁰ But in 1976 the Court still felt compelled, when granting prosecutors absolute immunity from § 1983 liability, to reassure us that it did not "leave the public powerless to deter misconduct or to punish that which occurs," and that "18 U.S.C. § 242, the criminal analog of § 1983," remained available.⁹¹ And Justice White, speaking for two other justices, could argue that absolute immunity should not extend to *Brady* claims because "it is reasonable to suspect that most such violations never surface. . . . [making it] all the more important, then, to deter such violations by permitting damage actions under 42 U.S.C. § 1983 to be maintained in instances where violations do surface."⁹²

Similarly, even while dissenting from the Court's decision allowing municipal liability in *Pembaur v. Cincinnati* in 1986, Justice Powell could affirm, joined by Chief Justice Burger and soon-to-be-Chief Justice Rehnquist, that "[t]he primary reason for imposing § 1983 liability on local government units is deterrence, so that if there is any doubt about the constitutionality of their actions, officials will 'err on the side of protecting citizens' rights,"⁹³ and that "law enforcement officials, as much as any other official, 'ought to err on the side of protecting citizens' rights' when they have legitimate doubts about the constitutionality of their actions."⁹⁴ Turning to federal habeas, as late as 1989 Justice O'Connor could command the votes of the Court's conservative wing to agree with the second Justice

89. *See, e.g.*, *Townsend v. Sain*, 372 U.S. 293, 322 (1963) (requiring a federal habeas hearing).

90. *Cf.* Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 750-65 (2011) (describing the "post-Warren Court shift toward a conservative criminal procedure doctrine" but arguing that this shift resulted partially from a decline in the participation of "impact litigation organizations" in Court litigation and not necessarily from improved conditions). *See also id.* at n.5 (collecting other accounts of the post-Warren criminal procedure shift).

91. *Imbler v. Pachtman* 424 U.S. 409, 428-29 (1976).

92. *Id.* at 443-44 (White, J., concurring).

93. *Pembaur v. Cincinnati*, 475 U.S. 469, 495 (1986) (Powell, J., dissenting) (quoting *Owen v. City of Independence*, 445 U.S. 622, 652 (1980)).

94. *Id.*

Harlan that “[t]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.”⁹⁵

If the Court’s level of skepticism had been on a long decline, recently it seems to have fallen off a cliff. Pointedly, Justice Thomas’s opinion in *Connick* does not address the need for deterrence. In *Harrington v. Richter*, Justice Kennedy, writing for a unanimous court, disavowed the very idea that state courts might tailor their behavior in response to the possibility of federal habeas review: “There is no merit to the assertion that compliance with § 2254(d) should be excused when state courts issue summary rulings because applying § 2254(d) in those cases will encourage state courts to withhold explanations for their decisions. Opinion-writing practices in state courts are influenced by considerations other than avoiding scrutiny by collateral attack in federal court.”⁹⁶ Perhaps the most revealing quote comes from the also-unanimous *Van de Kamp*: “[M]embers of a large prosecutorial office, when making prosecutorial decisions, could have in mind the consequences in terms of damages liability [when] they are making general decisions about supervising or training Moreover, . . . better training or supervision might prevent most, if not all, prosecutorial errors at trial”⁹⁷ As of 2009, the Court gives so little consideration to the need for deterrence that this can be part of an argument *against* liability.

B. THE CASE FOR SKEPTICISM

If the Court’s retreat from *Brady* is indeed the result of a renewed trust in the fairness and integrity of the nation’s police and prosecutors, it is, by its own logic, surely understandable, if not ultimately defensible. Although there is considerable disagreement over the extent of our progress, few would argue that we have come a long way from the days of *Powell v. Alabama*, at least with respect to the most obvious abuses.⁹⁸ And if prosecutors are generally less inclined to commit “miscarriages of justice,” there is less need for a rule explicitly adopted to

95. *Teague v. Lane*, 489 U.S. 288, 306 (1989) (plurality opinion) (quoting *Desist v. United States*, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting)).

96. *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011)

97. *Van de Kamp v. Goldstein*, 555 U.S. 335, 347 (2009).

98. *Powell v. State of Alabama*, 287 U.S. 45 (1932).

prevent them.⁹⁹ But even if every governmental actor were to act in perfect good faith, a robust – and robustly-enforced – *Brady* rule would still be needed, as there remains a compelling reason to be skeptical of prosecutorial decision making. Modern mind sciences, backed by investigation into confirmed wrongful convictions, have compellingly demonstrated the ways in which cognitive biases can lead even the most honest and fair-minded prosecutors to discount exculpatory evidence when deciding to prosecute (and to continue prosecuting). As Alafair Burke has neatly explained:

As an initial matter, the prosecutor’s case screening for guilt may not be especially protective of the defendant. Because of confirmation bias, prosecutors “testing” a hypothesis of the defendant’s guilt may be likely to search the case evidence for proof confirming that hypothesis to the detriment of exculpatory evidence. Once the prosecutor forms a personal belief in guilt, that belief becomes “sticky” as selective information processing, belief perseverance, and cognitive consistency will prevent the prosecutor from revisiting her conclusion. Tunnel vision also impairs the prosecutor’s ability to identify material, exculpatory evidence to which the defense is entitled under *Brady v. Maryland*, as selective information processing will cause the prosecutor to overestimate the strength of her case without the evidence at issue and to underestimate the evidence’s potential exculpatory value. Finally, the prosecutor’s role as a first and constant case screener may lead to cascading effects on other prosecutors, judges, and jurors, who might be less scrutinizing for reasonable doubt because of an assumption that charges are pursued only against the guilty.¹⁰⁰

99. United States v. Bagley, 473 U.S. 667, 675 (1985).

100. Bandes, *The Lone Miscreant*, *supra* note 16, at 731 (describing prosecutorial tunnel vision and “other cognitive biases”); Alafair S. Burke, *Neuroscience, Cognitive Psychology, and the Criminal Justice System: Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79 (2010). See also Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479, 491-92 (2006) (identifying the “recurring theme” of “the prosecutor’s tendency to develop a fierce loyalty to a particular version of events” with respect to a suspect’s guilt and explaining that one contributing factor to this tunnel vision is that “[p]rosecutors may begin with an assumption that the suspect would not have been arrested unless he was guilty, and that assumption will affect the way they filter and assess all subsequent information”); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610, 1614, 1618 (2006) (proposing “cognitive psychology as providing a potential basis for explaining the mechanism underlying the prosecutor’s bias” in judging whether to disclose *Brady*

evidence and evaluating the value of the evidence itself, including “[c]onfirmation bias, selective information processing, and belief perseverance,” and observing that “some social science evidence suggests that self-awareness is not enough to prevent cognitive bias” (citing P. C. WASON & P. N. JOHNSON-LAIRD, *PSYCHOLOGY OF REASONING: STRUCTURE AND CONTENT* 194-97 (1972)); Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 880-88 (1975); *id.* at 1603 (“The phenomenon of confirmation bias suggests a natural tendency to review the reports not for exculpatory evidence that might disconfirm the tested hypothesis, but instead for inculpatory, confirming evidence.”); Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 196, 198 (2007) (concluding that as a result of selective information processing, in which “people readily accept evidence that is consistent with their current beliefs and find reasons to distrust or dismiss contradictory evidence,” “[i]f the file [of the accused] does contain any exculpatory or mitigating information, the prosecutor will devalue it as a result of her pre-existing beliefs”); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, WIS. L. REV. 291, 327 (2006) (explaining that for police detectives, “deciding where and what type of evidence to look for is significantly influenced by the theory of how the crime unfolded,” and that “[i]mportant physical evidence, either confirmatory or exculpatory, might . . . be overlooked if the theory of the case prevailing at the time of evidence collection later proves wrong”); *id.* at 331 (observing that “role pressures naturally incline prosecutors to investigate in ways that confirm guilt, to fail to recognize and hence fail to disclose to the defense exculpatory evidence”); Jonathan A. Fugelsang & Kevin N. Dunbar, *A Cognitive Neuroscience Framework for Understanding Causal Reasoning and the Law*, 359 PHIL. TRANSACTIONS ROYAL SOC’Y LONDON B 1749, 1749-54 (2004) (explaining that “evidence inconsistent with one’s beliefs is more likely to invoke neural tissue associated with error detection and conflict monitoring” (cited in Bades, *Loyalty*, at 492)); Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, WIS. L. REV. 399, 427 (2006) (noting “the suppression of material evidence” as the “leading cause” of wrongful convictions, observing that prosecutors are rarely held accountable for their errors, and that this causes further prosecutorial bias (citing Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence* app. at 265 (2000)); Dianne L. Martin, *Lessons About Justice from the “Laboratory” of Wrongful Convictions: Tunnel Vision, the Construction of Guilt, and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002) (“Investigators focus on a suspect, select and filter the evidence that will ‘build a case’ for conviction, while ignoring or suppressing evidence that points away from guilt.”); Barbara O’Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1036 (2009) (explaining that prosecutors could potentially be a check on police detectives, who “may overlook leads pointing in other directions and become overly committed to pursuing the wrong suspect,” but that prosecutors and police “work together closely,” and police guide “how the case is prosecuted”); *id.* at 1039-40 (arguing that the expectation that the prosecutor will objectively weigh the need to disclose *Brady* evidence is “unrealistic” and that “if prosecutors can convince themselves that the rule does not even apply, they need not be concerned with the remote possibility that the defense will discover the failure to disclose”); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 961-62 (1999) (quoting prosecutors, in explaining their interviews with cooperators, as admitting that “[y]ou do not want a complete set of materials that you have to

Thus, a strong *Brady* rule is necessary not only to deter the Gerry Deegans of the world who would consciously suppress exculpatory evidence, but to help overcome the unconscious biases of even the most scrupulous prosecutor. From this perspective, it is desirable that local governments and chief prosecutors should “take account”¹⁰¹ of the risk of liability in order to nudge them to “err on the side of protecting citizens’ rights”¹⁰² when they would otherwise honestly, but incorrectly, decide that a given piece of evidence need not be disclosed. *Brady* is a skeptic’s doctrine. It remains necessary because we should doubt not the average prosecutor’s desire to “see that justice is done”¹⁰³ in every case, but his ability to do so.

CONCLUSION

As Mr. Thompson’s sad ordeal demonstrates, the threat of wrongful conviction – whether obtained at trial or through a plea agreement – remains, despite the enormous legal and societal progress of the last half-century. *Brady*, despite its many flaws,¹⁰⁴ remains an important tool for the prevention of wrongful convictions, but one that the Court has recently weakened in both scope and remedy. Implicit in these decisions is the notion that the need for the *Brady* rule has greatly diminished. The Court’s renewed faith in the motives and workings of the justice system is understandable; its failure to acknowledge and respond to overwhelming evidence of its flaws is deeply unfortunate.

disclose” and that “there are cases where the assistant forbade the agent from taking notes. It’s prevalent in big cases. The extent of de facto *Brady* issues is significant because most oral statements do not get turned over.”); *id.* at 945 (quoting a prosecutor as admitting that “many people do not want to uncover facts that are inconsistent with their theory of the case”).

101. *Van de Kamp*, 555 U.S. at 347.

102. *Owen v. City of Independence*, 445 U.S. 622, 652 (1980).

103. *Connick v. Thompson*, 131 S. Ct. 1350, 1365 (2011).

104. *See, e.g.*, Daniel S. Medwed, *Brady’s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1539-40 (2010) (describing the prevalence of *Brady* errors (despite prosecutors’ efforts to comply), their contribution to wrongful convictions, and the infrequency of *Brady* sanctions for prosecutors); Andrew Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1150 (2005) (describing how *Brady* “is fraught with accuracy-reducing risks” because “the discovery of violations often turns on extraordinary defense efforts and dumb luck”).