Printed in U.S.A.
Vol. 110, No. 1

Notes and Comments

ENSURING INSURANCE: ADEQUATE AND APPROPRIATE COVERAGE FOR *BRADY* CLAIMS IN ILLINOIS*

Joe Delich

ABSTRACT—The increase in wrongful conviction litigation has engendered a number of new doctrinal problems. This Note examines the existing rules governing insurance coverage for wrongful-conviction-related torts, in particular, due process claims for *Brady* violations. It then explores the rationale for the continuous trigger doctrine in the asbestos context, and argues that wrongful conviction claims call for a similar approach due to comparable latency concerns. There is a particular focus on Illinois law due to the state's prevalence of wrongful conviction litigation and recent shifts in the law governing insurance triggers for malicious prosecution.

AUTHOR—J.D. Candidate, Northwestern University School of Law, 2016; B.A., University of Nebraska–Lincoln, 2010. A special thanks to Professors Sam Tenenbaum and Nadav Shoked for making law school more fun. Thanks also to everyone on the *Northwestern University Law Review* whose suggestions improved this Note immeasurably, and who did the less fun work of helping put this in print. A final thank you to my fiancée, Celina Guerra, for everything else. All errors and omissions are my own.

*Author's Note: The author has worked on litigation involving some of the cases discussed in this Note and versions of some arguments have been presented in filed briefs.

It is an axiom of the law that for every wrong there is a remedy.
—*Fuller v. Aylesworth*, 75 F. 694, 696 (6th Cir. 1896)

INTRODUCTION

The advent of DNA testing and increased awareness among both the public and law enforcement has led to an unprecedented rise in the exoneration of individuals who were wrongfully convicted of crimes they did not commit. Official misconduct is a contributing factor in nearly half of wrongful convictions.[1] The most common manifestation of official misconduct is the suppression of exculpatory evidence—a *Brady* violation.[2]

[1] NAT'L REGISTRY OF EXONERATIONS, THE FIRST 1,600 EXONERATIONS 11 (2015), http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf [http://perma.cc/ZDG8-YHSY] [hereinafter THE FIRST 1,600 EXONERATIONS] (official misconduct was a contributing factor in 45% of all cases and 60% of homicide convictions).

[2] SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 66 (2012), http://www.law.umich.edu/special/exoneration/

While 42 U.S.C. § 1983 does provide an exonerated plaintiff with a legal theory of recovery to obtain damages for *Brady* violations,[3] difficult questions of liability still arise when the insured municipality inevitably seeks coverage for the claim under its Law Enforcement Liability (LEL) policies. Because the wrongfully convicted are often in prison for years, if not decades,[4] this precipitates disputes between numerous insurers and municipalities about multiple policies. As civil litigation stemming from wrongful convictions has risen,[5] courts have attempted to referee these disputes by applying the trigger approach for the tort of malicious prosecution to more or less every wrongful-conviction-related tort.[6] As a result, only a single year's insurance policy, that which was in place during the triggering event, is implicated by any given wrongful conviction.

This approach is problematic for three reasons, which are especially acute as they relate to *Brady* violations. First, the existing approaches to insurance triggers for malicious prosecution are outdated and do not reflect the recent substantial increase in exonerations. Second, applying a uniform trigger across all torts ignores the substantive doctrinal differences between them, the agency relationships and actions behind them, and the disturbing

Documents/exonerations_us_1989_2012_full_report.pdf [http://perma.cc/UK48-KAJN] ("The most common serious form of official misconduct is concealing exculpatory evidence from the defendant and the court.").

[3] *See* 42 U.S.C. § 1983 (2012); Sunil Bhave, *The Innocent Have Rights Too: Expanding* Brady v. Maryland *To Provide the Criminally Innocent with a Cause of Action Against Police Officers Who Withhold Exculpatory Evidence*, 45 CREIGHTON L. REV. 1, 2 (2011) ("Through the possibility of compensatory and punitive damages, § 1983 suits against police officers could serve as an effective deterrent against the withholding of exculpatory evidence to obtain convictions.").

[4] *Basic Patterns*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Basic-Patterns.aspx [http://perma.cc/3SMP-GBR7] (noting that the average length of imprisonment is nine years, with 39% of exonerees imprisoned for ten years or more, and 59% imprisoned for at least five years).

[5] *See, e.g.*, John Conroy & Rob Warden, *A Tale of Lives Lost, Tax Dollars Wasted and Justice Denied*, BETTER GOV'T ASS'N, (June 18, 2011), http://www.bettergov.org/investigations/wrongful_convictions_1.aspx [http://perma.cc/TY54-XKTR] (describing a study suggesting that in Illinois, "the total financial cost to state taxpayers will approach or surpass $300 million in the next several years as 16 civil suits now pending and a 17th to be filed later this year are settled or come to trial"); *see also Recent Findings*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Recent-Findings.aspx [http://perma.cc/F2T3-HDFL] (noting that 2014 was a record year for exonerations and that there was an increase in conviction integrity units within prosecutors' offices).

[6] *See, e.g.*, Northfield Ins. Co. v. City of Waukegan, 701 F.3d 1124, 1130–32 (7th Cir. 2012) (mentioning due process claim before exclusively discussing trigger for malicious prosecution); Am. Safety Cas. Ins. Co. v. City of Waukegan, 678 F.3d 475, 477–78 (7th Cir. 2012) (noting underlying claim for suppression of exculpatory evidence without elaboration and applying equivalent trigger for malicious prosecution and "constitutional wrongs"); Nat'l Cas. Co. v. McFatridge, 604 F.3d 335, 337 (7th Cir. 2010) (noting claim of suppressed exculpatory evidence but foregoing separate discussion of due process claim accrual); *see also* Poventud v. City of New York, 750 F.3d 121, 134, 138 (2d Cir. 2014) (vacating lower court's summary judgment decision and finding that the lower court failed to distinguish between *Brady* claims and malicious prosecution).

temporal quality of the harm suffered by people wrongfully incarcerated. Third, to the extent the current approach has the virtue of simplifying the assignment of liability, it does so poorly and unfairly to the detriment of all involved—the insurance companies, the municipalities, and the exonerees.

The financial implications of these issues are increasingly troubling. While phrases like "municipal insurance coverage" may evoke sad and stilted images of the disappointed Willy Loman, the law's inadequate response to the rapid increase in exonerations threatens to leave municipalities without coverage for the sometimes extraordinary liability at issue in these claims. But this is not merely a question of fairness between cities and their insurers or of unexpected impositions on taxpayers. In an era where local and state governments increasingly exist in the shadow of financial distress,[7] judgments against less prosperous municipalities may carry the threat of bankruptcy and become virtually uncollectible. If every wrong is to have a remedy, courts must modify their approach to insurance triggers for *Brady* claims and wrongful-conviction-related torts more generally. To stay the course runs the risk of making exonerees victims of the justice system twice over.

The courts should instead adopt a continuous trigger like that used in asbestos exposure cases.[8] Both wrongful convictions and asbestos cases involve latency difficulties, though of different natures. Nonetheless, these differences actually support the case for treating wrongful convictions like asbestos exposure. By applying a continuous trigger, courts will simultaneously be in a position to assign liability where it belongs and also maintain the option of distributing liability equitably across multiple policies, if necessary. In other words, it would free courts to be both more and less precise in apportioning liability, and this flexibility would in turn further the parties' contractual intentions to indemnify the wrongful acts of law enforcement. Replacing the current formalism with a more realistic and flexible approach is necessary to facilitate actual coverage for all the wrongful acts of law enforcement. Otherwise, incoherency in legal doctrines like *Brady* will unnecessarily place some conduct beyond the reach of

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[7] *See, e.g.*, Michael Lewis, *California* and *Bust*, VANITY FAIR (Nov. 2011), http://www.vanityfair.com/news/2011/11/michael-lewis-201111 [http://perma.cc/2Y7T-QG4X] ("From 2002 to 2008, the states had piled up debts right alongside their citizens': their level of indebtedness, as a group, had almost doubled, and state spending had grown by two-thirds."); STATE BUDGET CRISIS TASK FORCE, REPORT OF THE STATE BUDGET CRISIS TASK FORCE: FINAL REPORT (Jan. 14, 2014), http://www.statebudgetcrisis.org/wpcms/wp-content/images/SBCTF_FINALREPORT.pdf [http://perma.cc/Y2AC-WQCB] (finding that "[s]tate and local revenues only partially recovered since the recession that began in 2008" and that "[r]eductions in federal spending have made state and local finances more chaotic and more difficult to manage").

[8] *See* 15 STEVEN PLITT ET AL., COUCH ON INSURANCE § 220:27 nn.6–7 (3d ed. 2014).

insurance policies that were surely meant to cover them. The current triggering approach reaches the absurd result of essentially finding that some wrongful acts by law enforcement will not be covered by any LEL policy, even if a municipality diligently purchased one every year. Most importantly, however, flexibility would ensure an adequate remedy for the exoneree.

There are strong doctrinal and policy reasons for the application of a continuous trigger. An isolated trigger is ill suited to the complicated chronology of *Brady* violations and its status as a process tort committed by individual actors. Illinois insurance law has explicitly rejected treating protracted events as discrete, to the benefit of insurance companies.[9] A continuous trigger apportioning culpability for a consolidated constitutional harm like imprisonment is imprecise, if not intractable. Concerns about wrongful convictions mirroring the protracted litigation associated with asbestos exposure are mitigated by both the limited number of exonerees in absolute terms and the more easily divisible nature of days in prison (as opposed to disease and exposure). Accordingly, Part I will examine the relatively recent and dramatic increase in exonerations and civil litigation for wrongful convictions, particularly in Illinois. This will provide context and highlight how modern developments are significant enough to render the prior doctrine out of date. Part II will provide a brief overview of the development of the *Brady* doctrine and examine particular behavior that rises to the level of a *Brady* violation. Part III will explore another wrongful-conviction-related tort: malicious prosecution. It will also explain a number of the relevant insurance principles governing the triggering of policies in wrongful conviction suits, and briefly discuss the continuous trigger applied in asbestos cases and its rationale. Part IV will argue that the single isolated policy trigger used for malicious prosecution claims is incompatible with the *Brady* doctrine. Finally, Part V will assert that a continuous trigger doctrine, such as that used for asbestos exposure, is better suited to address *Brady* claims because it is easily administered and better tracks the substantive conduct underlying *Brady* violations.

Ultimately, a continuous insurance trigger is the best hope for coherence and common sense, and the best insurance against communities otherwise powerless to redress their wrongs. A continuous trigger for *Brady* violations is also an opportunity for courts to craft a rule on the back end that mitigates the *Brady* doctrine's failures and disappointments during the trial at the front end. Nothing can adequately compensate for a wrongful conviction, but ensuring something is better than nothing and a necessary

[9] *See* Addison Ins. Co. v. Fay, 905 N.E.2d 747, 756 (Ill. 2009).

acknowledgment that our society will hold itself accountable for the imprisonment of the innocent.

I. WRONGFUL CONVICTIONS AND EXONERATIONS: PREVALENCE, CAUSES, AND COSTS

In order to contextualize the practical significance of this doctrinal dilemma, this Part will outline the prevalence, causes, and costs of wrongful convictions. Between January 1989 and May 18, 2015, there were 1600 individual exonerations.[10] Texas, New York, California, and Illinois account for 698 of the exonerations between them, with 151 in Illinois alone.[11] The advent of DNA testing and the work of clinics have made possible the exoneration of people who were wrongfully convicted and substantially increased both public and law enforcement awareness about the problem of wrongful convictions.[12] While DNA exonerations may have raised awareness of the problem of conviction integrity, a far larger number of exonerations are accomplished without DNA testing.[13] Of the 1600 people exonerated between January 1989 and May 18, 2015, only 398 of them were exonerated through the use of DNA evidence.[14]

Looking forward, the incidence of exonerations is on the rise, with a record 91 in each of 2012 and 2013, and 125 in 2014.[15] Official misconduct was a contributing factor in nearly half of all exonerations as of May 18, 2015.[16] The most common type of misconduct is the suppression of exculpatory evidence, so-called *Brady* violations.[17] The problem has persisted and, in fact, increased to such a degree that Chief Judge Kozinski recently declared, "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."[18]

As exonerations of wrongfully convicted individuals continue to accumulate, city and state governments will also increasingly be forced to

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[10] THE FIRST 1,600 EXONERATIONS, *supra* note 1, at 2.

[11] *Id.* at 12.

[12] *See* Steve Schmadeke & Dan Hinkel, *Prosecutors from Across U.S. Discuss Correcting Their Own Mistakes*, CHI. TRIB. (Oct. 29, 2014, 9:16 PM), http://www.chicagotribune.com/news/ct-conviction-integrity-northwestern-alvarez-met-20141029-story.html [http://perma.cc/SE22-9E53] (discussing prosecutor participation in conviction integrity conference and implementation of conviction integrity units).

[13] THE FIRST 1,600 EXONERATIONS, *supra* note 1, at 5.

[14] *Id.*

[15] NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2014, http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf [http://perma.cc/68JN-PE4E].

[16] THE FIRST 1,600 EXONERATIONS, *supra* note 1, at 11 (official misconduct was a contributing factor in 45% of all cases and 60% of homicide convictions).

[17] *See* GROSS & SHAFFER, *supra* note 2, at 66.

[18] United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting).

defend themselves against sizeable civil claims by the exonerees.[19] The liability for wrongful convictions can be considerable and complicated because of the generally long gap in time between the initiation of a prosecution and the ultimate exoneration.[20] These complexities are compounded by the existence of years of insurance policies and legal principles ill suited to sorting out liability appropriately, and there is reason to think that, as more claims are filed, courts will be forced to adopt new approaches.[21] This is especially true in light of the fact that misconduct and the suppression of exculpatory evidence play such a prominent role in wrongful convictions. Not only is the suppression of exculpatory evidence a significant contributing factor, it is one that is particularly difficult to detect and can span decades.[22]

II. THE *BRADY* DOCTRINE

The *Brady* doctrine protects a defendant's right to exculpatory or impeachment evidence available at the time of trial.[23] In 1963, *Brady v. Maryland* held that constitutional due process requirements imposed an affirmative duty on prosecutors to disclose favorable evidence to defendants.[24] While the *Brady* decision was initially perceived to be a powerful protection for defendants' due process rights, it has failed to deliver

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[19] *See* Conroy & Warden, *supra* note 5.

[20] *Id.* ("Through the Illinois Court of Claims, the state provides compensation to the wrongfully convicted based on their years of imprisonment, and those costs totaled $8.2 million. A total of $31.6 million has been paid to private attorneys to defend governments and their employees in civil suits filed after exoneration, and $155.9 million has been paid to exonerees in settlements and judgments. Total litigation and compensation expenditures were $195.7 million. . . . The BGA/CWC study found a substantial lag time between wrongful conviction and exoneration (the average length of imprisonment in the 85 cases was more than 10 years). Thus in Illinois, the financial costs and the attendant human toll is likely to proceed apace for the foreseeable future.").

[21] *See* Jonathan L. Schwartz & Kelly M. Ognibene, *The Contours of Malicious Prosecution and False Imprisonment Coverage: The Shawshank Redemption Reimagined*, FOR THE DEFENSE, May 2011, at 58, 62 ("In other words, while a host of insureds and insurers seeking contribution from other insurers later in the tail of coverage have been unable, in general, to secure coverage under policies purchased later in the tail, as individuals file more wrongful conviction lawsuits, we can expect to see more nuanced and complex insurance claims that may require courts following the majority rule to interpret the trigger of coverage more flexibly than they currently do.").

[22] *See* GROSS & SHAFFER, *supra* note 2, at 67 ("Misbehavior is rarely advertised. If misconduct is not uncovered in litigation or by journalists, we don't know about it. As a result, our data underestimate the frequency of official misconduct, as we've mentioned.").

[23] Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 423 (2010).

[24] 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

on its promises.[25] This is the result of both the practical difficulties in the application of the doctrine and court decisions refining it in a way that significantly relaxed the burden placed on prosecutors.[26] In regard to the former, two competing policies drive the difficulty of *Brady* doctrine application—"upholding the adversarial nature of the criminal justice system while simultaneously placing a premium on fairness and justice."[27]

A *Brady* violation consists of (1) the prosecution's suppression of evidence that is (2) "favorable to the defense" and (3) "material to an issue at trial."[28] Generally speaking, evidence favorable to the defense can be either exculpatory evidence or impeachment evidence.[29] *Brady* violations can often be characterized as either omissions or positive action interchangeably—for instance, destroying evidence versus failing to disclose the destruction of evidence.[30] The interplay between action and omission in the *Brady* doctrine generates difficulties and is discussed below in Part IV.

The question of "when" *Brady* violations occur is of utmost importance for analyzing insurance triggers and one of the primary sources of the current confusion in this and other contexts.[31] The Supreme Court recently limited *Brady*'s application to trial,[32] but the doctrine still implicates actions taken both before and after trial. In 2009, the Supreme Court held in *District Attorney's Office for the Third Judicial District v. Osborne* that there is no *Brady* obligation on prosecutors to disclose exculpatory evidence uncovered

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[25] Leslie Kuhn Thayer, *The Exclusive Control Requirement: Striking Another Blow to the* Brady *Doctrine*, 2011 WIS. L. REV. 1027, 1028–29 ("But, while originally touted as a 'superhero' decision, the power and scope of the *Brady* doctrine's protection have fallen well short of its expectations."); *see also* Jones, *supra* note 23, at 415 ("The government's duty to disclose favorable evidence to the defense under *Brady v. Maryland* has become one of the most unenforced constitutional mandates in criminal law.").

[26] Thayer, *supra* note 25, at 1029.

[27] *Id.* (citing United States v. Bagley, 473 U.S. 667, 675 (1985)). A series of judicial refinements have also restricted the doctrine's effectiveness. *See id.* One example is the Supreme Court's establishment of a materiality standard requiring a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. Some state courts also impose an additional "exclusive control" requirement on evidence, finding no *Brady* obligation exists when the evidence is not in the exclusive control of the prosecution and a reasonably diligent defense lawyer could have discovered it himself. Thayer, *supra* note 25, at 1031.

[28] Boss v. Pierce, 263 F.3d 734, 739–40 (7th Cir. 2001).

[29] Jones, *supra* note 23, at 423; *see also, e.g.*, Manning v. Miller, 355 F.3d 1028, 1033 (7th Cir. 2004) (providing an illustrative example of the wide range of conduct and evidence that constitutes *Brady* material, such as inducing a witness to give a false identification, creating false evidence, or destroying exculpatory evidence).

[30] *See, e.g.*, *Manning*, 355 F.3d at 1033 (noting the plaintiff's allegation that government agents "failed to tell prosecutors" about their alleged misconduct).

[31] *See, e.g.*, *infra* Part IV, for a discussion of the current circuit split over *Brady* claim accrual in the context of retrials.

[32] Dist. Att'y's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52 (2009).

post-conviction.[33] This decision clearly restricted *Brady* material to the evidence available at the time of trial.[34] But despite the *Osborne* decision's emphasis on *Brady* as a trial right, the Seventh Circuit has continued to find obligations to disclose *Brady* material in the post-conviction context.[35] The Seventh Circuit interpreted *Osborne* to mean only that there is no *Brady* obligation to disclose *new* exculpatory evidence that comes into existence after trial.[36] In other words, in the Seventh Circuit, there remains a duty to disclose any and all *Brady* evidence that existed at the time of trial in at least some post-conviction proceedings.[37]

The temporal confusion of the *Brady* doctrine also has pretrial implications. The duty to disclose known *Brady* material falls on prosecutors, but ignorance of *Brady* material known to the police does not shield a prosecutor from committing a *Brady* violation. In *Kyles v. Whitley*, the Supreme Court found there is an affirmative duty on prosecutors "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[38] Not only can prosecutors be attributed constructive knowledge of evidence known to law enforcement, but under some circumstances police officers themselves may be liable for

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[33] *Id.* at 68–69 ("The Court of Appeals went too far, however, in concluding that the Due Process Clause requires that certain familiar preconviction trial rights be extended to protect Osborne's postconviction liberty interest.").

[34] *Id.* at 69 ("[The respondent's] right to due process is not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief. *Brady* is the wrong framework.").

[35] Whitlock v. Brueggemann, 682 F.3d 567, 588 (7th Cir. 2012), *cert. denied sub nom.* McFatridge v. Whitlock, 133 S. Ct. 981 (2013).

[36] *Id.* ("The . . . defendants also contend that Whitlock and Steidl have no right to exculpatory evidence at post-conviction or clemency proceedings, but they misunderstand the *Brady* right. It is a trial right; the reason there is a continuing obligation on the state to disclose evidence is not because of some special right associated with post-conviction or clemency but because 'the taint on the trial that took place continues throughout the proceedings, and thus the duty to disclose and allow correction of that taint continues.' As we explained at length before, *Brady* and its progeny impose an obligation on state actors to disclose exculpatory evidence that is discovered before or during trial. This obligation does not cease to exist at the moment of conviction. Otherwise no one could argue a *Brady* point either on direct appeal or in a collateral attack . . . ." (citations omitted) (quoting Steidl v. Fermon, 494 F.3d 623, 630 (7th Cir. 2007))); Fields v. Wharrie, 672 F.3d 505, 514–15 (7th Cir. 2012) ("A prosecutor's *Brady* and *Giglio* duties may survive the conclusion of a trial. . . . Therefore, a defendant's conviction is not final as a matter of law until he exhausts the direct appeals afforded to him, and, until that exhaustion, he is entitled to the full breadth of due process available. . . . Accordingly, a prosecutor's *Brady* and *Giglio* obligations remain in full effect on direct appeal and in the event of retrial because the defendant's conviction has not yet become final, and his right to due process continues to demand judicial fairness. . . . His disclosure responsibilities do not end until the defendant either has been acquitted or has availed himself of all the direct process to which he is entitled.").

[37] *Fields* expressly articulated the duty in connection only to direct appeals and retrials, while *Whitlock* simply noted that a conviction does not extinguish the duty. *Fields*, 672 F.3d at 514–15; *Whitlock*, 682 F.3d at 588. This arguably leaves open the question of whether the Seventh Circuit would find a duty to disclose exculpatory evidence in collateral attacks on convictions.

[38] 514 U.S. 419, 437 (1995).

Brady violations. The Seventh Circuit has found police officers liable for *Brady* violations when they deliberately concealed evidence or provided misleading information to non-negligent prosecutors.[39] The implications of *Brady*'s complex timelines are analyzed below in Part IV.

III. MALICIOUS PROSECUTION AND INSURANCE COVERAGE FOR WRONGFUL CONVICTION TORTS

This Part will outline the current insurance coverage regime for wrongful conviction torts—the blanket application of the trigger for malicious prosecution torts to *Brady* claims and the associated doctrinal uncertainty that has emerged in recent years—and then propose a possible solution. While the problem of wrongful convictions is national in scope, Illinois is a particularly instructive state for analyzing future difficulties with wrongful conviction insurance litigation. In particular, a 2011 study projected the future costs to Illinois state taxpayers of wrongful conviction litigation to approach $300 million within several years, which makes the stakes especially high for both Illinois municipalities and Illinois exonerees as a group.[40] Moreover, Illinois is consistently in the top four states by sheer number of exonerations,[41] and it is also one of the few states applying the "minority rule," discussed below in Section B, for triggering insurance coverage for malicious prosecutions.[42] As a result, a specific focus on Illinois law is useful not only because of the relatively large amount of civil litigation stemming from wrongful convictions, but also because the laws governing insurance coverage have been recently and vigorously litigated and continue to be contested due to Illinois's outlier status nationally.[43] Accordingly, this

[39] *See, e.g.*, Newsome v. McCabe, 256 F.3d 747, 752 (7th Cir. 2001) ("Prosecutors kept in the dark by the police (and not negligent in failing to hire other persons to investigate the police) won't improve their performance with or without legal liability for their conduct. Requiring culpable officers to pay damages to the victims of their actions, however, holds out promise of both deterring and remediating violations of the Constitution."); Jones v. City of Chicago, 856 F.2d 985, 994 (7th Cir. 1988) ("[A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision. . . . They cannot hide behind the officials whom they have defrauded.").

[40] *See* Conroy & Warden, *supra* note 5.

[41] THE FIRST 1,600 EXONERATIONS, *supra* note 1, at 12.

[42] Am. Safety Cas. Ins. Co. v. City of Waukegan, 678 F.3d 475, 479 (7th Cir. 2012) ("*McFatridge* thus represents a minority view, which the insurers (and the Association) urge us to abandon. A minority it may be, but *McFatridge* does follow the lead of the only Illinois appellate decision on the issue.").

[43] *See* Northfield Ins. Co. v. City of Waukegan, 701 F.3d 1124 (7th Cir. 2012); *Am. Safety*, 678 F.3d 475; Nat'l Cas. Co. v. McFatridge, 604 F.3d 335 (7th Cir. 2010); Westport Ins. Co. v. City of Waukegan, 75 F. Supp. 3d 821 (N.D. Ill. 2014); Indian Harbor Ins. Co. v. City of Waukegan, 33 N.E.3d 613 (Ill. App. Ct. 2015), *petition for leave to appeal denied*, 32 N.E.3d 674 (Ill. 2015); St. Paul Fire and Marine Ins. Co. v. City of Zion, 18 N.E.3d 193 (Ill. App. Ct. 2014), *petition for leave to appeal denied*, 23 N.E.3d 1207 (Ill. 2015).

Part will discuss the dominant approach to triggering, the Illinois minority approach to triggering, and a possible third path—a continuous trigger—found primarily in asbestos litigation.

A. The Dominant Approach to Wrongful Convictions

As general background, victims of wrongful convictions may file civil lawsuits for a number of claims under 42 U.S.C. § 1983 and state law, but courts typically only analyze two for potential insurance triggers: false arrest and malicious prosecution.[44] In *Wallace v. Kato*, the Supreme Court held that false arrest and false imprisonment claims accrue when a defendant is held pursuant to legal process, while malicious prosecution claims accrue upon the favorable termination of legal proceedings.[45] Courts have treated these as stages of a wrongful conviction that mark two potential insurance triggers,[46] but without much consideration have generally placed all other wrongful conviction torts under the umbrella of one of these time stages. Triggers for *Brady* violations are either addressed in a cursory fashion or not at all, and courts generally apply the same trigger used for malicious prosecution (with some important exceptions).[47]

Malicious prosecution is a substantive tort, not a procedural one, and is focused in part on the existence of malice and the absence of probable cause for the institution of judicial proceedings.[48] While the favorable termination of the legal proceedings is a requisite element, the "gist" of the tort is the filing of charges.[49]

It is uncontroversial that a malicious prosecution claim accrues at exoneration, but nationally the law is divided on whether insurance coverage

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[44] *See Am. Safety*, 678 F.3d at 481 ("One episode of malicious prosecution (or constitutional violations leading to wrongful conviction) has just one trigger: exoneration. There can be a second claim. As the Supreme Court held in *Wallace*, wrongful arrest is a distinct theory of liability that can be pursued immediately after the arrest.").

[45] 549 U.S. 384, 389–92 (2007).

[46] *See, e.g.*, *Am. Safety*, 678 F.3d at 481.

[47] *See, e.g.*, *Northfield Ins. Co.*, 701 F.3d at 1130–32 (mentioning due process claim before exclusively discussing trigger for malicious prosecution); *Am. Safety*, 678 F.3d at 477–78 (noting underlying claim for suppression of exculpatory evidence without elaboration and applying equivalent trigger for malicious prosecution and "constitutional wrongs"); *Nat'l Cas. Co.*, 604 F.3d at 337 (noting claim of suppressed exculpatory evidence but foregoing separate discussion of due process claim accrual); *see also* Poventud v. City of New York, 750 F.3d 121, 134, 138 (2d Cir. 2014) (vacating lower court's summary judgment decision and finding that the lower court failed to distinguish between *Brady* claims and malicious prosecution).

[48] *See* Newsome v. McCabe, 256 F.3d 747, 751–52 (7th Cir. 2001); Ritchey v. Maksin, 376 N.E.2d 991, 993 (Ill. 1978).

[49] City of Erie v. Guar. Nat'l Ins. Co., 109 F.3d 156, 160 (3d Cir. 1997) ("Courts adopting the majority rule have cited two major principles to explain why the tort of malicious prosecution occurs at the time the criminal charges are filed. One common theme is that the 'essence', 'gist', or 'focus' of malicious prosecution is the filing of the underlying charges.").

should trigger at the initiation of prosecution or when the claim actually accrues at exoneration.[50] Most states trigger insurance coverage at the initiation of the criminal proceedings, with only a few, including Illinois, applying the "minority rule" that triggers coverage at the favorable termination or exoneration, when the claim accrued.[51]

The majority rule triggering at the initiation of proceedings is justified by primarily two considerations: (1) the "essence" or "gist" of the malicious prosecution tort is the filing of charges, and (2) it protects the "unwary insurance companies" from people or municipalities purchasing coverage in anticipation of a termination of proceedings that is favorable to the criminal defendant, such as issuing a *nolle prosequi*,[52] that would cause accrual of a claim.[53]

B. Illinois, the Minority Rule, and Doctrinal Upheaval

The minority rule, on the other hand, is justified on the grounds that the tort of malicious prosecution is not "completed" until exoneration, and an aversion to the long tail of liability created by the majority rule trigger.[54] In Illinois, the minority rule is also justified primarily on the basis of precedent, which has recently been called into doubt.[55] Until recently, the only Illinois case addressing the trigger for malicious prosecution was a 1978 Illinois Appellate Court decision, *Security Mutual Casualty Co. v. Harbor Insurance Co.*, which was reversed on other grounds by the Illinois Supreme Court.[56] In 2010, the Seventh Circuit held that *Security Mutual* established the rule in Illinois that coverage for malicious prosecution is triggered at exoneration, and reaffirmed this holding in two 2012 decisions.[57] In *American Safety v. City of Waukegan*, Judge Easterbrook noted that *Security Mutual* "stood unquestioned for 34 years—no court in Illinois has so much as hinted at

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[50] *See id.* (noting "there is no agreement on when the tort of malicious prosecution occurs for insurance coverage purposes"). Because *Wallace* held false arrest claims accrue once a person appears before a judge, in the wrongful conviction context most false arrest claims will be timebarred by the statute of limitations, as that claim was in *Wallace* itself. *See* 549 U.S. at 390.

[51] *See Am. Safety*, 678 F.3d at 479; *City of Erie*, 109 F.3d at 160.

[52] A notice the prosecution has been abandoned. *Nolle Prosequi*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[53] *City of Erie*, 109 F.3d at 160–61.

[54] *Am. Safety*, 678 F.3d at 480 (noting that "for these torts, exoneration is the final element" and that the majority "position also implies a long tail on liability, which is opposite to the industry's usual view that liability should be as close as possible to the policy dates").

[55] *See* St. Paul Fire & Marine Ins. Co. v. City of Zion, 18 N.E.3d 193, 198 (Ill. App. Ct. 2014), *petition for leave to appeal denied*, 23 N.E.3d 1207 (Ill. 2015).

[56] 382 N.E.2d 1 (Ill. App. Ct. 1978), *rev'd on other grounds*, 397 N.E.2d 839 (Ill. 1979).

[57] Northfield Ins. Co. v. City of Waukegan, 701 F.3d 1124, 1137 (7th Cir. 2012); *Am. Safety*, 678 F.3d 475, 478–79; Nat'l Cas. Co. v. McFatridge, 604 F.3d 335, 337, 345 (7th Cir. 2010).

doubts about its conclusion" and that its reversal on grounds other than the merits did not deprive it of precedential value.[58] Nonetheless, in 2013 an Illinois circuit court issued an opinion rejecting *Security Mutual* as binding precedent and applying the majority rule to a malicious prosecution claim.[59] Another circuit court followed suit in January 2014.[60] The Illinois Appellate Court affirmed both decisions, and the Illinois Supreme Court denied petitions to appeal in both cases.[61]

C. Sudden Uncertainty and the Opportunity for Doctrinal Innovation

The suddenly uncertain state of insurance law in Illinois offers a useful opportunity to reconsider the triggers for coverage of wrongful conviction torts, especially for the triggers for *Brady* violations, and for drawing comparisons to the approach taken in asbestos exposure cases. In asbestos exposure cases, many courts have applied a continuous trigger and assigned liability across any relevant policies held during the entirety of the time the exposure occurred.[62] Courts adopted continuous triggers to maximize recovery by the injured parties and to resolve causation problems created by the long latency period between exposure and the manifestation of injury.[63] This approach has been criticized for providing parties more coverage than they purchased and imposing an undue burden on insurance companies because "[c]ontinuous-trigger rulings in asbestos cases have been the ruin of more than one insurance company."[64] As a result, courts are likely to be extremely wary of any novel continuous trigger rules. Nonetheless, many of the same concerns are present in the context of *Brady* violations. In *Owens-Illinois, Inc. v. United Insurance Co.*, the New Jersey Supreme Court noted:

> Our concepts of legal causation were developed in an age of Newtonian physics, not of molecular biology. Were it possible to know when a toxic substance clicks on a switch that alters irrevocably the composition of the body . . . we

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[58] *Am. Safety*, 678 F.3d at 478–79.

[59] St. Paul Fire & Marine Ins. Co. v. City of Zion, No. 10 MR 2227, 2013 WL 3476145, at *18 (Ill. Cir. Ct. May 10, 2013).

[60] Indian Harbor Ins. Co. v. City of Waukegan, No. 13 MR 0425, at 17–18 (Ill. Cir. Ct. Jan. 30, 2014).

[61] Indian Harbor Ins. Co. v. City of Waukegan, 33 N.E.3d 613, 615 (Ill. App. Ct. 2015), *petition for leave to appeal denied*, 32 N.E.3d 674 (Ill. 2015); St. Paul Fire & Marine Ins. Co., v. City of Zion, 18 N.E.3d 193, 195 (Ill. App. Ct. 2014), *petition for leave to appeal denied*, 23 N.E.3d 1207 (Ill. 2015).

[62] *See* Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting from Mass Products*, 64 MD. L. REV. 613, 647 (2005) (noting that "many courts now follow the 'triple-trigger' or 'continuous-trigger' approach and hold that any insurer who provided coverage at any time between the initial exposure of the victim to the product and the subsequent manifestation of disease is liable"); *see also* Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1045 (D.C. Cir. 1981); Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974, 993–95 (N.J. 1994).

[63] *See, e.g.*, *Owens-Illinois*, 650 A.2d at 981, 985, 993.

[64] Am. Safety Cas. Ins. Co. v. City of Waukegan, 678 F.3d 475, 481 (7th Cir. 2012).

> might be more confident that . . . damages had taken place during a particular policy.[65]

The harm imposed by *Brady* violations is similarly opaque and resistant to traditional notions of causation, and a similar trigger approach warrants consideration.

IV. THE *BRADY* DOCTRINE IS INCOMPATIBLE WITH ISOLATED INSURANCE TRIGGERS

This Part will demonstrate that the insurance triggers used for malicious prosecution claims are incompatible with *Brady* violations for three reasons. First, determining the moment "when" a *Brady* violation occurs is a labyrinthine and likely futile task. Second, malicious prosecution's single triggering event ignores the unique nuance of a *Brady* violation. Finally, *Brady* claims, unlike malicious prosecution claims, raise procedural, not substantive, issues. Each of these three contentions will be addressed in turn below.

A. Multiple Proceedings—The Circuit Split Over the Accrual of Brady *Claims*

1. Doctrinal and Practical Difficulty.—It is doctrinally difficult to determine "when" a *Brady* violation occurs.[66] The four primary reasons for this include: (1) the complexity arising from potentially large numbers of individual tortfeasors and multiple violations involving the same piece of evidence, (2) the temporal disconnect between the "harm" at trial and the actual *Brady* violation, (3) the long timespans involved and the potential for retrials, appeals, and post-conviction proceedings, and (4) the secretive nature of the violations themselves. These factors confound accrual determinations and threaten to leave municipalities underinsured for wrongful convictions, which will not only burden already debt-laden communities but will also threaten to deprive the wrongfully convicted of adequate recoveries.

Moreover, *Brady*'s incompatibility with current insurance doctrine is clear from the courts' tendency to conflate *Brady* claims with malicious prosecution suits. Both the majority and minority rules for malicious prosecution preclude the possibility of triggering coverage for *Brady* violations that occur *during* a person's incarceration. A few courts have narrowly acknowledged separate triggers for every trial or retrial for certain

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[65] 650 A.2d at 985.

[66] *See infra* Section IV.A.2.

torts in an approach highly similar to the malicious prosecution trigger.[67] Applying a rule crafted for malicious prosecution to *Brady* violations is problematic because it is designed for a tort that captures an entire judicial proceeding and therefore is ill equipped to capture the types of discrete, individual actions at issue in *Brady*. While the state's filing of charges is the unitary act that gives rise to a malicious prosecution claim, police officers and prosecutors might individually violate *Brady* when they suppress or otherwise fail to disclose exculpatory evidence, which might occur before, during, or after trial.[68] By separating the trigger from the actions that give rise to suits for *Brady* violations, courts are drastically limiting the ability of municipalities to insure themselves against suits for years of wrongdoing perpetrated by law enforcement against people after they have been convicted.

2. Attempts to Reconcile the Doctrinal Difficulty.—The question of "when" *Brady* violations occur is far from an academic or theoretical problem. Courts are already wrestling with the notion of when *Brady* claims accrue in circumstances where a defendant is subjected to multiple trials or reaches a plea agreement after an initial trial is invalidated.[69] Though many of these cases do not deal with the insurance implications, they are concerned with whether and when a *Brady* violation is barred by the Supreme Court decision *Heck v. Humphrey*,[70] and when the statute of limitations begins to run. While *Heck* would appear to bar any *Brady* claims until a defendant has been exonerated, the later decision *Wallace v. Kato* introduced complications.[71] After *Wallace*, courts must analyze whether a civil § 1983

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[67] *See, e.g.*, Westport Ins. Co. v. City of Waukegan, 75 F. Supp. 3d 821, 827 (N.D. Ill. 2014) (finding Fifth Amendment false confession claim could trigger coverage for each trial and retrial without explicitly discussing *Brady* claims); Coregis Ins. Co. v. City of Harrisburg, No. 1:03-CV-920, 2006 WL 860710, at *11 (M.D. Pa. Mar. 30, 2006) (rejecting a continuous trigger for *Brady* violations but leaving open the possibility of retrials triggering other coverage); *see also* Jackson v. Barnes, 749 F.3d 755, 760 (9th Cir. 2014) (finding a defendant's § 1983 *Brady* claims from his first trial were not barred by *Heck*). For a brief discussion of *Heck* and its significance, see *infra* note 70. *But see* Owens v. Balt. City State's Att'ys Office, 767 F.3d 379, 390 (4th Cir. 2014) (finding a defendant's "*Brady*-like" claims did not accrue until *nolle prosequi* was entered).

[68] *See infra* Section IV.B.

[69] *See, e.g.*, *Owens*, 767 F.3d at 390; *Jackson*, 749 F.3d at 760; Poventud v. City of New York, 750 F.3d 121, 134 (2d Cir. 2014); Smith v. Gonzales, 222 F.3d 1220, 1222–23 (10th Cir. 2000).

[70] 512 U.S. 477 (1994). *Heck* established the eponymous "*Heck* bar" that prevents defendants from mounting collateral attacks on their convictions through civil suits. It established the rule that civil lawsuits that would "necessarily imply the invalidity" of a conviction or sentence must be dismissed until the conviction or sentence has been invalidated. *Id.* at 486–87. The corollary to this is that a claim cannot accrue and the statute of limitations cannot begin to run until the conviction activating the bar has been invalidated. *Id.* at 489.

[71] 549 U.S. 384 (2007). *Wallace* held that courts must look to the closest common law analogue for when claims accrue, and that because a false arrest claim accrues once a defendant is held pursuant to

claim arises out of the trial itself, or something just incidentally associated with it.[72] When a defendant is subjected to multiple trials and brings suit for a *Brady* violation that occurred at the initial trial while he or she is undergoing a retrial, a court is forced to assess whether that violation is self-contained in the initial trial or unavoidably connected to the subsequent one. In other words, it has to make a determination about when *Brady* claims accrue. Three circuits have found that a *Brady* claim for violations during an invalidated trial cannot impugn subsequent trials or plea agreements, and that the *Brady* claim thus accrues immediately upon invalidation of the trial.[73] The Fourth Circuit held that the *Brady* claims of a defendant subjected to multiple trials do not accrue until the convictions are invalidated and the state enters a *nolle prosequi* ending the possibility of further proceedings.[74]

The Fourth Circuit's *nolle prosequi* requirement prevented claims from being barred by the statute of limitations.[75] The Ninth and Second Circuit cases found that more immediate accruals allowed people facing retrial and people who plead guilty to a lesser charge to bring suit.[76] The Tenth Circuit in *Smith* found the claims timebarred because they accrued immediately after a conviction was vacated, even while the defendant remained in prison.[77] However, the court was careful to note that the claims would not have accrued had the defendant "remained subject to . . . serious charges and . . . on trial for his life . . . when the malicious prosecution conspiracy again result[s] in presentation of the false case against him."[78]

These cases highlight how *Brady* violations can be conceptualized as both discrete and monolithic. In *Smith*, the Tenth Circuit has captured this dual nature by allowing claims to go forward where they can be sensibly compartmentalized, but reserving the ability to preserve the viability of claims that cannot in the interest of justice. An analogous commonsense approach for insurance triggers is desirable.

3. Implications.—What is clear from these cases is that a municipality in the Ninth Circuit stands a better chance of obtaining coverage from the policy in place when a *Brady* violation actually occurred than a municipality

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legal process, it does not necessarily impugn the judicial process, and therefore the statute of limitations begins to run at that moment. *Id.* at 388, 391–94.

[72] *Id.* at 390–91. For example, in *Wallace* the claim was about how the defendant got to the courthouse, not what happened in the courthouse itself.

[73] *Jackson*, 749 F.3d at 761; *Poventud*, 750 F.3d at 134, 138; *Smith*, 222 F.3d at 1222–23.

[74] *Owens*, 767 F.3d at 390.

[75] *Id.*

[76] *Jackson*, 749 F.3d at 761; *Poventud*, 750 F.3d at 134, 138.

[77] *Smith*, 222 F.3d at 1222.

[78] *Id.* at 1223 (quoting Robinson v. Maruffi, 895 F.2d 649, 655 (10th Cir. 1990)).

in Illinois, where a court ushers everything under the umbrella of malicious prosecution. Merely adopting the Ninth Circuit's approach, however, is problematic not only because it may be inconsistent with the Supreme Court's decision in *Wallace*,[79] but because it will threaten to bar later claims by wrongfully convicted exonerees under the statute of limitations, if applied without tolling. Moreover, it will generate an incredibly fact-intensive approach that is made even more difficult in the face of the secretive and ongoing nature of many *Brady* violations.[80] In other words, what the circuit split over *Brady* claim accrual reveals is that *Brady* claims are different, exhibiting characteristics of both discrete, self-contained torts and ongoing torts like malicious prosecution. It is this lack of clarity that has been unaddressed by current insurance doctrines and creates the risk of suboptimal outcomes and underinsurance for municipalities.

B. The Interplay of Action and Omission in the Brady *Doctrine*

Application of the single-trigger approach to *Brady* violations ignores the positive actions that can lead to *Brady* violations while simultaneously disregarding the fact that *Brady* claims are directed at individual, not state, conduct. As background, *Brady* violations can often be characterized as either omissions or positive action interchangeably. This observation is little more than semantic, but it is nonetheless significant for purposes of insurance coverage. The framing of the doctrine as an affirmative duty to disclose suggests a characterization of *Brady* violations as omissions. But the failure to disclose may also be accomplished by positive actions, for instance when a police officer destroys or conceals evidence. In this case, the violation could still easily be characterized as the non-happening of the disclosure to the defense, but this negative definition swallows up any nuance or definition that would more accurately capture the wrongful behavior. The tension generated by these equivalent yet competing frameworks is at least one contributing factor to the improper application of the malicious prosecution trigger to *Brady* violations.

An example from an actual *Brady* case can demonstrate both the unintuitive implications of conceptualizing violations solely as omissions and the tenuousness of locating violations at trial rather than any other point

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[79] *See Owens*, 767 F.3d at 390 ("Here, the parties acknowledge that, unlike in *Wallace*, false imprisonment is not the tort 'most analogous' to Owens's § 1983 claims. Instead, they properly agree that the tort of malicious prosecution, which the *Wallace* Court recognized as an 'entirely distinct' tort, provides the closest analogy to Owens's *Brady*-like claim. . . . Thus, following *Wallace*, we must determine the start date of Owens's § 1983 claims by looking to the start date of the common-law tort most analogous to his claims—here, malicious prosecution.").

[80] *See, e.g.*, Third Amended Complaint at 25, Rivera v. Lake Cty., No. 12 C 8665 (N.D. Ill. Sept. 22, 2014).

in time. In the Seventh Circuit case *Manning v. Miller*, the plaintiff, Manning, was a former FBI informant who alleged that FBI agents framed him for kidnapping and murder.[81] After his convictions were overturned, he brought a *Bivens* claim[82] and a 42 U.S.C. § 1983 claim against the agents for conspiracy to deprive him of his constitutional rights.[83] The defendants argued the *Brady* claims amounted to a conspiracy to commit perjury, for which there is absolute immunity from civil liability.[84] The court disagreed and upheld Manning's *Brady* claim because the alleged conduct went "beyond perjury."[85] The alleged conduct spanned years and included inducing a false witness identification, inducing fabricated testimony, fabricating evidence of a confession, destroying the tapes they alleged had contained a recording of the confession, and their failure to disclose any of these actions.[86]

At the outset, it is clear that the behavior proscribed by *Brady* is far more diverse and nuanced than just the mere failure to act. But it is the court's immunity analysis that reveals the questionable integrity of the omission characterization. The *Manning* court noted that the inquiry into absolute immunity for perjury was fact dependent, with cases falling on a spectrum.[87] While there is absolute immunity from civil liability for committing perjury, whether there is immunity for participating in someone else's perjury is more complicated.[88]

The *Manning* court noted one case, *House v. Belford*, that held that a witness and a prosecutor were both immune from civil liability for conspiracy to commit perjury, while another case, *Newsome v. McCabe*, did not extend immunity to nonwitnesses who helped prepare perjured testimony.[89] An examination of the cases invoked by *Manning* reveals that whether a rule governing the divergent outcomes can have any integrity is debatable at best. *House* did not involve *Brady* suppressions and held that

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[81] 355 F.3d 1028, 1030 (7th Cir. 2004).

[82] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390–97 (1971) (holding Fourth Amendment implies a civil cause of action).

[83] *Manning*, 355 F.3d at 1030–31.

[84] *Id.* at 1031.

[85] *Id.* at 1032–33.

[86] *Id.*

[87] *Id.* at 1031 ("The law regarding immunity is very fact dependent, and the various facts courts have considered reveal a spectrum of behavior that has ultimately been categorized as immune or not immune.").

[88] *See id.* ("On the end of the spectrum where behavior is solidly considered to be immune from civil liability is perjury.").

[89] *Id.* at 1032 (citing House v. Belford, 956 F.2d 711, 720 (7th Cir. 1992); Newsom v. McCabe, 256 F.3d 747 (7th Cir. 2001)).

attempts to "differentiate between a conspiracy to present perjured testimony and the act of presenting perjured testimony is a distinction without a difference. A person may not be prosecuted for conspiring to commit an act that he may perform with impunity."[90] *Newsome*, on the other hand, held that the defendants "were not held liable for conspiring with the eyewitnesses to commit perjury; their liability is under the due process clause because they concealed exculpatory evidence—the details of how they induced the witnesses to finger Newsome."[91]

In other words, there might be immunity for preparing perjured testimony, and giving perjured testimony, if one simply discloses to the defendant evidence of the perjurious behavior. This distinction is tenuous on its face and bears a significant resemblance to the "distinction without a difference"[92] at issue in *House*. But the use of *Brady* violations to dictate the outcomes in the immunity analysis for perjury creates even greater tension with the notion of *Brady* as a trial right. In other words, if it is accepted that *Brady* exclusively concerns itself with the corruption of the trial process itself, then the harm is not when the preparation of the testimony was undisclosed, but when the perjury occurred.[93]

The only possible counter is that *Brady* does not ensure a perfectly fair trial, but is merely intended to give defendants a fighting chance to persuasively call the other side a liar at trial. This is a conception of *Brady* almost exclusively as a sword and not a shield from misconduct.[94] The result is a situation where there is immunity for preparing perjured testimony, but some kinds of preparations that rise to the level of *Brady* violations could incur liability. But of course in a practical sense reconciling *Brady* disclosures with perjury is almost impossible—in most situations, perjured incriminating testimony implies a failure to disclose exculpatory evidence (one's knowledge of one's perjured testimony). Not only is the immunity

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[90] *House*, 956 F.2d at 720.

[91] Newsome v. McCabe, 319 F.3d 301, 304 (7th Cir. 2003).

[92] *House*, 956 F.2d at 720.

[93] Consider whether there is a claim for the destruction of exculpatory evidence without a conviction. *See* Whitlock v. Brueggemann, 682 F.3d 567, 588 (7th Cir. 2012) ("We have suggested, without squarely holding, that 'a trial that results in an acquittal can never lead to a [valid] [sic] claim for a *Brady* violation because the trial produced a fair result, even without the exculpatory evidence.'") (quoting Mosley v. City of Chicago, 614 F.3d 391, 397 (7th Cir. 2010)), *cert. denied sub nom*. McFatridge v. Whitlock, 133 S. Ct. 981 (2013).

[94] Also consider the situation where a police officer destroys a videotape of a coerced confession. The failure to disclose the existence and destruction of the tape surely denies the plaintiff a shield against perjured testimony. If he knew about the destruction, he could provide evidence or testimony to that effect. But the destruction of the video itself denied the plaintiff a powerful weapon. There is surely a distinction here that matters. The destruction of the tape is more harmful (and also involves failed disclosure) than a failure to disclose that a confession was coerced on its own.

meaningless at that point, but it ignores the seemingly obvious fact that the Fifth Amendment should proscribe framing people for crimes, not merely choosing to remain silent about it.

There are three key points to observe: (1) the slippery and branching nature of *Brady* is obscured by categorical phrases like "*Brady* is a trial right" or "failure to disclose"; (2) testimonial immunity analysis demonstrates some of the incoherencies that arise from trying to compartmentalize *Brady*—how can perjured testimony not implicitly violate *Brady*?;[95] and (3) courts do not have a principled way of identifying when *Brady* violations *occur*. The *Newsome* immunity analysis displays a willingness to locate *Brady* occurrences apart from trial in order to reconcile finding liability for violations with other doctrines like immunity.

Tellingly, *Manning* is not an isolated case. For example, in *Whitlock v. Brueggeman*, the court undertook an immunity analysis for three different time periods in which constitutional violations were alleged against a prosecutor.[96] This inquiry makes little sense if process torts occur only at trial. In *Whitlock*, the court considered when a prosecutor's unethical investigative tactics, such as coercion, culminate in a due process violation when the evidence obtained is introduced at trial.[97] In this situation, the prosecutor still enjoys absolute immunity (rather than the qualified immunity afforded police officers) because the violation associated with the evidence "cannot be traced back as far as its creation."[98] This is at least in part because "[e]vidence collected with these kind of suspect techniques, unlike falsified evidence and perjured testimony, may turn out to be true."[99] However there is no absolute immunity for the prosecutor who fabricated evidence because the act itself violates due process so long as the evidence caused the claimant an injury by being introduced in a prosecution.[100] So in this case, the due process violation accomplished by the evidence can "be traced back as far as its creation."[101] Here, again, the interplay between *Brady* as a positive action and omission is evident. There are also temporal distinctions that are in tension with the notion of *Brady* as a trial event.

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[95] But on the other hand, the destruction of evidence in furtherance of that same perjury is the definition of *Brady* itself—this suggests that multiple violations could center around a single piece of evidence.

[96] 682 F.3d at 576.

[97] *Id.* at 584–85.

[98] *Id.* at 585.

[99] *Id.* at 584.

[100] *Id.* at 584–85 ("[The] creation of false evidence also violates due process, so long as a plaintiff can show the fabrication actually injured her in some way.").

[101] *Id.* at 585.

The potential for application of a single isolated insurance trigger, as for malicious prosecution, not only overlooks the positive actions that run afoul of the *Brady* doctrine, it ignores the reality that *Brady* claims target individual conduct (or the failure to train those individuals) rather than state conduct itself (as is the case with a malicious prosecution claim).

C. Individual Culpability and the Procedural Interests of Brady

Section 1983 *Brady* claims target individual conduct that deprives people of due process, while malicious prosecution claims provide a remedy for being subjected to process without probable cause. Applying the malicious prosecution trigger to *Brady* violations completely ignores this individual culpability by only considering the process itself (or lack thereof) rather than the actions depriving someone of due process.

The essence of the *Brady* obligation is procedural—it is designed to reinforce the fairness of trials.[102] In *United States v. Bagley*, the Supreme Court held that: "The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."[103]

This procedural quality of the *Brady* obligation is an important distinction from the substantive torts that often accompany *Brady* claims.[104] These procedural concerns at the heart of *Brady* should inform any analysis of when *Brady* violations occur and what harm ensues.

The *Brady* doctrine's status as a trial right does not inherently provide a uniform or singular approach to identifying *when* violations occur. The complications that arise in the event of multiple proceedings, or when multiple tortious actions center on a single piece of evidence, are, in fact, always present in any *Brady* violation. Any simplicity promised by the contention that *Brady* violations are simply monolithic omissions that occur at trial can only be illusory. Trials themselves have too many discrete parts, and immunity analyses will continue to raise difficult doctrinal problems. Rather, the procedural and trial concerns at the center of *Brady* should drive a more practical inquiry into when actions and omissions eliminated opportunities to counter incriminating evidence presented at trial. These opportunities can occur at any time because frustrating a defendant's ability

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[102] United States v. Bagley, 473 U.S. 667, 675 (1985).

[103] *Id.*

[104] Newsome v. McCabe, 256 F.3d 747, 751–52 (7th Cir. 2001) (finding the plaintiff did not have a malicious prosecution claim but did have a *Brady* claim).

to present exculpatory evidence challenging a conviction is clearly a deprivation of due process.

V. A CONTINUOUS TRIGGER SHOULD BE APPLIED TO COVERAGE FOR *BRADY* VIOLATIONS

This Part will first explain why a continuous trigger rule resolves the doctrinal and practical difficulties discussed in Part IV, and how applying a continuous trigger to coverage for *Brady* violations is also warranted by the existing doctrine. Second, it will contend that a continuous trigger is justified by practical concerns related to identifying *Brady* violations and the activation of policy triggers by them. Finally, it will argue that a continuous trigger facilitates the realization of certain policy concerns related to both maximizing recovery for the victims of wrongful conviction and minimizing the impact of those recoveries on financially distressed communities.

A. A Continuous Trigger is Consistent with the Brady *Doctrine.*

Brady violations are conceptually, doctrinally, and temporally distinct from malicious prosecution and warrant a distinct and continuous trigger. As discussed above, *Brady* violations and malicious prosecution are different torts, composed of different elements.[105] While malicious prosecution is a substantive tort focused more broadly on the lack of probable cause, *Brady* is a procedural right that focuses on individuals' disclosure of distinct pieces of exculpatory or impeachment evidence.[106] Malicious prosecution includes favorable termination as an element and aims to capture the judicial proceeding itself, while *Brady* targets actions taken and not taken within the judicial proceeding.

It is these differences that create the potential for *Brady* violations before, during, and after trial[107]—a temporality that would be nonsensical when applied to malicious prosecution. The right to evidence continues through post-conviction and clemency proceedings because "the taint on the trial that took place continues throughout the proceedings, and thus the duty to disclose and allow correction of that taint continues."[108]

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[105] *See* Strickler v. Greene, 527 U.S. 263, 281–82 (1999); Ritchey v. Maksin, 376 N.E.2d 991, 993 (Ill. 1978).

[106] *See Newsome*, 256 F.3d at 751–52.

[107] Fields v. Wharrie, 672 F.3d 505, 515 (7th Cir. 2012) (noting the *Brady* obligation "remain[s] in full effect on direct appeal and in the event of retrial"); Patterson v. Burge, 328 F. Supp. 2d 878, 889 (N.D. Ill. 2004) (noting *Brady* violations can occur before, during, or after trial).

[108] Whitlock v. Brueggemann, 682 F.3d 567, 588 (7th Cir. 2012) (quoting Steidl v. Fermon, 494 F.3d 623, 630 (7th Cir. 2007)), *cert. denied sub nom*. McFatridge v. Whitlock, 133 S. Ct. 981 (2013); *see also* Tillman v. Burge, 813 F. Supp. 2d 946, 963 (N.D. Ill. 2011) (looking at effect of *Brady* violations on post-conviction proceedings and state decision to oppose appeals).

Courts' routine conflation of *Brady* violations and malicious prosecution ignores these important differences, and a single isolated trigger is incapable of addressing the numerous and varied opportunities to violate a person's *Brady* rights. Even when a court is willing to apply a trigger for every trial and retrial, it mistakes the *object* of the *Brady* doctrine—exculpatory evidence known at trial—with the *violation* of the *Brady* doctrine, which is not confined to the trial itself. Courts already acknowledge the lack of temporal limitations on *Brady* outside of the insurance context. The Seventh Circuit has explained that the duty must be ongoing or else no one would be able to raise *Brady* issues on appeal or in collateral attacks.[109] The different immunity analyses in *Manning* and *Whitlock* are only possible if *Brady* violations are discrete actions that occur at different moments in time.[110]

The potential for multiple violations to center on a single piece of evidence, in addition to the strange timing issues created by ongoing suppressions of evidence withheld at an earlier trial, threaten to over-complicate the issues surrounding *Brady*. Section 1983 suits are "read against the background of tort liability."[111] This means that in "constitutional-tort cases as in other cases, 'a man [is] responsible for the natural consequences of his actions.'"[112] If police officers can be accountable for their actions and omissions that unlawfully keep people in prison, a municipality should be able to hold accountable its insurance policy for those same wrongful actions in that time period, something the current triggering rules do not allow for. Police officers will not be able to shield themselves from liability by pointing to their own prior bad acts or the prior bad acts of others, and insurance companies should be denied such a defense as well. For many *Brady* violations, it will be simple to tie a daily duty to disclose to a daily harm of incarceration that better fits reality.

Insurance law itself is also more consistent with a continuous trigger approach to *Brady* violations than with a single trigger. In Illinois, courts construe any ambiguities and limitations in an insurance policy liberally in favor of the insured.[113] Illinois employs the "cause theory" to determine whether an occurrence triggered coverage, which broadly means that an act that increased the insured's liability will constitute a separate occurrence.[114]

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[109] *Whitlock*, 682 F.3d at 588.

[110] *See id.*; Manning v. Miller, 355 F.3d 1028, 1033 (7th Cir. 2004).

[111] *Whitlock*, 682 F.3d at 582 (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)).

[112] Jones v. City of Chicago, 856 F.2d 985, 993 (7th Cir. 1988) (quoting *Monroe*, 365 U.S. at 187).

[113] *See* Am. States Ins. Co. v. Koloms, 687 N.E.2d 72, 75 (Ill. 1997) ("In addition, provisions that limit or exclude coverage will be interpreted liberally in favor of the insured and against the insurer.").

[114] Nicor, Inc. v. Associated Elec. & Gas Ins. Servs. Ltd., 860 N.E.2d 280, 287, 294 (Ill. 2006).

Brady violations likely present a case for joint and several liability.[115] The potential for law enforcement officers to find themselves jointly and severally liable because of actions taken post-conviction mandates triggering the policies for the same conduct.

Moreover, when analyzing omissions, Illinois courts will look to either the potential to revisit the omission or apply a "time and space" test to determine whether there are multiple triggers.[116] Under either of these approaches, it is clear that suppressions stretching across years of incarceration and post-conviction proceedings go beyond the mere effects of a single omission. Applying a malicious prosecution-style trigger to *Brady* violations ignores the human agency of the continued decision to withhold evidence and the potential for increasing liability by actions taken after trial, such as rehiding or refabricating evidence. A continuous trigger for *Brady* violations is therefore not only more consistent with *Brady* case law, but with the rest of insurance law itself.

B. A Continuous Trigger Resolves Practical Problems of Coverage

The continuous trigger that is applied to policies for asbestos exposure addressed a latency problem and difficulties in calculating and apportioning causation and liability across multiple policies.[117] *Brady* violations present extremely similar problems. They also present a latency problem, but it is caused by ignorance about the *cause* of the injury, rather than the injury itself. As a result, even though a person is aware that they are being harmed or injured, it may not fully come to light who is responsible for years, if ever. The secrecy that accompanies *Brady* violations may preclude ever obtaining an accurate and complete picture of who played what part in suppressing exculpatory evidence. In addition to problems of discoverability and time, a single piece of evidence might be implicated by multiple *Brady* violations. In this case, just as linking an injury to specific asbestos exposure dates is difficult, it may be hard to fairly divide liability among the multiple agents and actions that led to a single day of incarceration. A continuous trigger

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[115] *See, e.g.*, Watts v. Laurent, 774 F.2d 168, 179 (7th Cir. 1985) ("Federal common law principles of tort and damages govern recovery under section 1983. It is axiomatic that where several independent actors concurrently or consecutively produce a single, indivisible injury, each actor will be held jointly and severally liable for the entire injury." (citations omitted)).

[116] Addison Ins. Co. v. Fay, 905 N.E.2d 747, 756 (Ill. 2009); Roman Catholic Diocese of Joliet v. Lee, 685 N.E.2d 932, 938 (Ill. App. Ct. 1997).

[117] *See* Owens-Illinois, Inc. v. United Ins. Co, 650 A.2d 974, 985 (N.J. 1994) ("Our concepts of legal causation were developed in an age of Newtonian physics, not of molecular biology. Were it possible to know when a toxic substance clicks on a switch that alters irrevocably the composition of the body and before which no change has 'occurred,' we might be more confident that occurrence-causing damages had taken place during a particular policy period. The limitations of science in that respect only compound the limitations of law.").

avoids the temptation to engage in mathematics that can offer only the illusion of precision while still ensuring that liability is relatively fair across policies. An insurance company will only be responsible for days of imprisonment that occurred during its policies. If not every year, then at least every official proceeding could trigger a policy by representing another opportunity to come forward with the evidence.

Admittedly, if the adoption of *Brady*-triggers independent from malicious prosecution occurs, broad federal pleading requirements and the concealment that violates due process will necessitate extremely broad duties to defend against complaints alleging *Brady* violations. This is not necessarily a defect, however, because it will make insurers' assumption of their duty to defend the default, as opposed to the current regime where every insurer may try to deny the existence of its duty to defend.

C. Municipal Default and the Policy Implications of a Continuous Trigger

An important advantage of a continuous trigger is that it will ensure adequate recoveries for victims in addition to protecting financially distressed municipalities from enormous liabilities. This was a valid concern in asbestos litigation and it should be even more so in the *Brady* context, given the overriding interest in making sure people are not victims of the state twice over.[118] If insurance law proceeds unchanged in Illinois, the risk of municipal defaults and empty recoveries for the wrongfully convicted is real. For example, in 2003 the Illinois town of Brooklyn entered Chapter 9 bankruptcy after dropping its insurance in the face of mounting liabilities from embezzlement, police misconduct, and shrinking revenue.[119]

Additionally, a continuous trigger helps protect the expectations of municipalities, who typically face an enormous time lapse between the policies in place at initiation of a prosecution and the policy in place at exoneration. Currently, they must not only hope that their original insurer is still available to pay out claims, but also have difficulties in assessing both the risks of wrongful actions that are regularly increasing liabilities and the extent of their coverage for those actions. It is essentially impossible to

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[118] *See* Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1041 (D.C. Cir. 1981); *Owens-Illinois*, 650 A.2d at 992; James M. Fischer, *Insurance Coverage for Mass Exposure Tort Claims: The Debate Over the Appropriate Trigger Rule*, 45 DRAKE L. REV. 625, 649 (1997) ("Jurisdictions adopting the continuous trigger theory have also sought to substantiate their holding on the ground that it is consistent with the often stated public policy of maximizing coverage.").

[119] Better Gov't Ass'n, *How a Municipal Bankruptcy Grew in Brooklyn (Illinois)*, CHI. SUN TIMES (Dec. 6, 2014, 11:11 AM), http://chicago.suntimes.com/politics/7/71/213882/how-a-municipal-bankruptcy-grew-in-brooklyn-illinois [http://perma.cc/FRG2-7B3S?type=live] ("To save money the village let its liability insurance coverage lapse, a move that left it unable to afford mounting legal bills, settlements and judgments in lawsuits relating to the town's financial mismanagement, employee injuries and allegations of police misconduct.").

purchase additional insurance for liabilities arising and increasing from a conviction that has already occurred. Triggering only one policy completely ignores wrongful acts and omissions, furthering suppression for decades and essentially rendering this wrongdoing completely uninsurable.

A continuous trigger will incentivize insurers to encourage law enforcement, through premiums, to stop suppressing evidence. For now, the limitations on the misconduct triggering policies tilt the odds and incentivize an insurer to simply roll the dice and hope that no one gets out of prison. Additionally, any arguments for administrative efficiency apply even more strongly to a continuous trigger. Insurers are still likely to point the finger at each other in an effort to avoid liability when only one policy is triggered. If every policy is triggered, courts need only verify whether a municipality purchased coverage and from whom.

These are not the enormous and problematic implications that attended asbestos cases. While wrongful convictions are a significant problem, in absolute terms, they affect only a small number of individuals and insurance carriers. Liability is also contained—an insurer would only be liable for the days someone was in prison during its policy, which still offers insurers predictability.

CONCLUSION

The single, isolated trigger applied to malicious prosecution torts is incompatible with the *Brady* doctrine. Violations can occur multiple times, over multiple decades, in multiple proceedings. The inherent secrecy of the tort and the inability to calculate and apportion liability across policy periods in a principled way call for an approach that is flexible and comprehensive. A continuous trigger better tracks the substantive conduct underlying *Brady* violations and will ensure that the wrongfully convicted are not victimized a second time by municipal fiscal irresponsibility. A continuous trigger also offers administrative efficiency and will foreclose the contentious declaratory judgment proceedings that arise as insurers invariably attempt to avoid paying out on policies. At the very least, applying a trigger for every judicial proceeding, such as trials, retrials, direct appeals, habeas petitions, and parole hearings will provide coverage for every judicial event where a person is deprived of due process.