Journal of Criminal Law and Criminology

Volume 102 | Issue 4 Article 5

Fall 2012

Prosecutorial Training Wheels: Ginsburg's Connick v. Thompson Dissent and the Training Imperative

Timothy Fry

0091-4169/13/10204-1275
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 102, No. 4
 Printed in U.S.A.

COMMENTS

PROSECUTORIAL TRAINING WHEELS: GINSBURG'S *CONNICK V. THOMPSON* DISSENT AND THE TRAINING IMPERATIVE

Timothy Fry*

I. INTRODUCTION

On March 29, 2011, the Supreme Court released a 5–4 decision in *Connick v. Thompson*,[1] reversing an evenly divided en banc decision of the Fifth Circuit.[2] The Court held that a § 1983 suit could not be used to hold a prosecutor's office liable for a single *Brady* violation by a member of its staff[3] on the theory that the office provided inadequate training.[4] This

* J.D. Candidate, Northwestern University School of Law, 2013; B.A., Hope College, 2005. The author thanks his wife Gretchen for her assistance and support during these last three years. He also appreciates the support of the *Journal*'s editorial team, particularly Adam Israelov, Michael Krantz, Owen McGovern, Jessica Notebaert, and Olesya Salnikova, for strengthening this Comment and the faculty of Northwestern Law, in particular Ronald J. Allen, for shaping his understanding of law.

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

[2] Thompson v. Connick, 578 F.3d 293 (5th Cir. 2009) (per curiam). The en banc Fifth Circuit split eight judges to eight judges, thus affirming the district court's opinion allowing Thompson's § 1983 suit. *Id.* at 293. The Fifth Circuit, in granting a rehearing en banc, Thompson v. Connick, 562 F.3d 711, 711 (5th Cir. 2009), vacated a prior three-judge panel decision affirming the district court judgment, Thompson v. Connick, 553 F.3d 836, 869 (5th Cir. 2008).

[3] The *Brady* doctrine has evolved from *Brady v. Maryland*, 373 U.S. 83 (1963), as explained *infra* in notes 116–150 and their accompanying text. The *Brady* doctrine provides that the Due Process Clauses, U.S. CONST. amends. V, XIV, generally require a prosecutor to hand over "evidence [that] is material either to guilt or to punishment," *Brady*, 373 U.S. at 87. Appellate courts ask whether such evidence is "potentially exculpatory" before reversing verdicts or sentences.

decision overturned a $14 million jury award to respondent John Thompson, a former death row inmate who had been exonerated weeks before his scheduled execution.[5] Beyond merely clarifying the reach of a failure-to-train claim,[6] the majority and the dissent revealed starkly different views on training America's prosecutors.[7]

In the criminal cases underlying Thompson's § 1983 suit, the Orleans Parish District Attorney's Office in Louisiana tried Thompson separately for armed robbery and murder and secured convictions at both trials. In both trials, the prosecutor's office failed to turn over to the defense material evidence that cast doubt on Thompson's guilt—blood tests that indicated he had not committed the armed robbery and eyewitness testimony suggesting he was not the murderer.[8] After failing to turn over the blood tests, the Orleans Parish District Attorney's Office prosecutors secured the armed robbery conviction. This ensured Thompson would not take the stand in his own defense at the murder trial,[9] where he was convicted and sentenced to death. When a defense investigator discovered these undisclosed facts weeks before Thompson's scheduled execution, the court promptly reversed both of Thompson's convictions.[10]

After Louisiana unsuccessfully reprosecuted Thompson for both crimes, Thompson commenced a § 1983 suit against the Orleans Parish District Attorney's Office, prosecutors, and various officials. The only claim that went to trial alleged a failure to train prosecutors on their *Brady* doctrine obligations.[11] The jury awarded $14 million because the district attorney's office was "deliberately indifferent to the need to train, monitor,

---

[4] *Connick*, 131 S. Ct. at 1356; *see also* 42 U.S.C. § 1983 (2006) (providing claim against state government for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws").

[5] *Connick*, 131 S. Ct. at 1356–57.

[6] *See* City of Canton v. Harris, 489 U.S. 378, 390 (1989) (allowing for the possibility of failure-to-train claims for "deliberately indifferent" standards in preparing city employees).

[7] *See infra* notes 13–19 and accompanying text.

[8] *Connick*, 131 S. Ct. at 1356.

[9] *Id.* To make this point clearer, had Thompson testified at his own murder trial, the prosecution would have been able to introduce Thompson's past convictions. *Id.* at 1373 (Ginsburg, J., dissenting); State v. Thompson, 825 So. 2d 552, 556 (La. Ct. App. 2002) (observing that defense attorneys "advised Mr. Thompson at that time, that should he take the witness stand, that the fact that he has prior convictions, including the prior conviction for attempted armed robbery would come up before the jury, which it would not if he didn't testify"). Louisiana did not contradict Thompson's claim that he would have testified at his murder trial had he not been convicted at the improperly conducted armed robbery trial. *Thompson*, 825 So. 2d at 556.

[10] *Connick*, 131 S. Ct. at 1356–57.

[11] *Id.* at 1357.

and supervise [its] prosecutors to comply with the constitutional requirements concerning production of evidence favorable to an accused."[12] The Supreme Court, in reversing, claimed that the plaintiff had not met his burden because he could not show either an official policy or a pattern of violations that caused his harm.[13] Justice Thomas, writing for the majority, read the facts to say that only a single prosecutor withheld the evidence and Thompson's case was unique.[14] The office had no notice of *Brady* violations to correct through training.[15]

Justice Thomas went on to discuss how prosecutors' offices are protected more broadly from § 1983 suits because they employ trained attorneys. Individual prosecutors have received "professional training and [have] ethical obligations" to inform themselves of the *Brady* doctrine.[16] Specifically, the attorneys in the Orleans Parish District Attorney's Office graduated from law school, passed the Louisiana bar exam, and possibly attended continuing legal education training; they alone were responsible for their actions.[17]

In an impassioned dissent, Justice Ginsberg took direct aim at whether this "training" was adequate. She noted that the lead prosecutor's alma mater did not require criminal procedure, passing the Louisiana bar exam did not require knowledge of *Brady*, and the state did not require continuing legal education at the time.[18] In her dissent, which she read from the bench, she reasoned:

---

[12] Thompson v. Connick, No. CIV.A. 03-2045, 2007 WL 1200826, at *1 (E.D. La. Apr. 23, 2007).

[13] *Connick*, 131 S. Ct. at 1358.

[14] *Id.* at 1364. This statement was made despite, as already mentioned, the failure to provide Thompson with favorable evidence in two separate prosecutions and, as will be discussed, the habit of the Orleans Parish District Attorney's Office of violating the *Brady* doctrine, as evidenced by multiple Supreme Court cases.

[15] *Id.* at 1360.

[16] *Id.* at 1363 ("Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain."). Commentators have heaped scorn on Justice Thomas's opinion. *See, e.g.*, Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on* Connick v. Thompson, 80 FORDHAM L. REV. 715, 727–33 (2011) (arguing that the idea of self-training and self-regulation is a myth); Dahlia Lithwick, *Cruel but Not Unusual*, SLATE (Apr. 1, 2011, 7:43 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/04/cruel_but_not_unusual.html (arguing that Justice Thomas's opinion and Justice Scalia's concurrence misread the facts in *Connick* and showed how they were "pitiless and scornful" of an innocent man wrongfully prosecuted, and calling the opinion "one of the meanest . . . decisions ever").

[17] *Connick*, 131 S. Ct. at 1361–62.

[18] *Id.* at 1385 (Ginsburg, J., dissenting).

> A District Attorney aware of his office's high turnover rate, who recruits prosecutors fresh out of law school and promotes them rapidly through the ranks, bears responsibility for ensuring that on-the-job training takes place. In short, the *buck stops with him*. . . . The evidence in this case presents overwhelming support for the conclusion that the Orleans Parish Office *slighted its responsibility* to the profession and to the State's system of justice by providing no on-the-job *Brady* training. [The petitioner district attorney] was not "entitled to rely on prosecutors' professional training," for [he] himself should have been the principal insurer of that training.[19]

This Comment corroborates Justice Ginsburg's view of the necessity of prosecutor training by exploring the interplay between discretion, misconduct, and training. Specifically, in Part II, this Comment discusses how prosecutorial discretion can lead to cases of misconduct, which complex procedural doctrines like the *Brady* doctrine have been unable to eliminate. In Part III, this Comment reveals the weaknesses of current training regimes, which other proposals have not addressed. Finally, in Part IV, the Comment turns to a series of modest proposals to incentivize increased *Brady*-doctrine training. Without increased training, Justice Ginsburg's dissent will continue to echo as an unheeded warning against prosecutors who fail to provide proper due process protections for the accused, even those who are innocent.

II. PROSECUTORIAL DISCRETION AND ITS LIMITS

A. THE RESPONSIBILITY AND DISCRETION OF A PROSECUTOR

Prosecutors have enormous, wide-ranging discretion to choose what crimes to investigate, whether to entertain plea bargains, when to grant immunity to a potential witness, how to organize the state's case, which charges to prosecute, and even in which jurisdiction to bring a case.[20] Prosecutors are powerful actors, controlling the criminal justice system with an outsized impact on the wider political system.[21] Prosecutors' day-to-day

---

[19] *Id.* at 1387 (emphases added) (citations omitted).

[20] Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKELEY J. CRIM. L. 395, 398 (2009); Teah R. Lupton, *Prosecutorial Discretion*, 90 GEO. L.J. 1279, 1280 (2002).

[21] ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007) [hereinafter ARBITRARY JUSTICE]; *see also, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 25 (1998) (arguing that because prosecutors are the most powerful officials in the criminal justice system, they have a responsibility to use their discretion to overcome racial disparities in prosecutions and conviction rates); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 393, 405, 448 (1992) (describing prosecutors' growing power since the 1970s and arguing that while a prosecutor has always been "one of the most powerful officials in government," he

decisions happen behind closed doors and are virtually unreviewable.[22] Prosecutors are answerable only to other prosecutors,[23] who rarely prosecute such misconduct.[24] Elected prosecutors, despite having a responsibility to their electorates,[25] rarely face punishment at the ballot box because the public usually does not learn of the misconduct and even if it does, it may not care as long as convictions resulted.[26]

Prosecutorial discretion—deciding what legal actions to take, if any[27]—is a "residual concept" that leaves prosecutors the opportunity to exercise subjective judgment within the gaps of statutory and judge-made law.[28] Legal philosophers have typically not provided a more particular definition[29] because "like the hole in a doughnut," discretion exists in between restrictions and "is therefore a relative concept."[30] The theoretical base of discretion is the Anglo-American understanding of free will.[31] Since people choose whether to exercise their own power, they have *discretion* to make choices about their actions.[32] Discretion is likely inevitable due to human limitations[33] and resource limitations making

---

has become a "pervasive and dominant force in criminal justice").

[22] DAVIS, ARBITRARY JUSTICE, *supra* note 21, at 5.

[23] *Id.*

[24] *See infra* Part III.B.2.

[25] STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2005, at 2, 11 (2006) (reporting that all but three states and the District of Columbia elect their chief prosecutors); Abby L. Dennis, Comment, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 138 (2007) (arguing that despite responsibility to their electorate, prosecutors are most concerned with convictions because that is what they are ultimately judged on); *cf.* Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334, 350 (2002) (using a computer model to suggest that the electorate's focus on convictions is not misplaced).

[26] DAVIS, ARBITRARY JUSTICE, *supra* note 21, at 5; *see also* Ken Armstrong & Maurice Possley, *Trial & Error: The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1 [hereinafter *The Verdict*] (cataloging former prosecutors who were promoted or elected after demonstrated misconduct).

[27] Charles Breitel, *Controls in Law Enforcement*, 27 U. CHI. L. REV. 427, 427–28 (1960).

[28] James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651, 653.

[29] *Id.*

[30] Ronald M. Dworkin, *Is Law a System of Rules?*, *in* ESSAYS IN LEGAL PHILOSOPHY 25, 45 (Robert S. Summers ed., 1968) (suggesting that the meaning of "discretion" will depend on the context of authority and legal standards).

[31] *See* Breitel, *supra* note 27, at 427–28.

[32] *Id.*

[33] H.L.A. HART, THE CONCEPT OF LAW 120–32 (1961) (theorizing law as a union of primary and secondary rules, which needs to allow for discretion due to humanity's inability to predict all future quandaries).

punishment of all crimes impossible.[34] The Supreme Court has endorsed prosecutorial discretion on numerous occasions.[35]

Resource limitations make some discretion inevitable, but the modern criminal justice system guarantees wide-ranging discretion. There are likely over 4,000 federal crimes,[36] and that number is growing.[37] The state level mirrors the federal crime increase.[38] While this means that prosecutors face increasing trial dockets,[39] there are also numerous crimes

---

[34] Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533–35 (1970) (arguing that discretion also allows a prosecutor to consider the victim's opinions, avoid costly prosecutions, achieve other enforcement goals, and decide when correction can be best accomplished without prosecution).

[35] *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute."); United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982) (indicating that a prosecutor's discretion in selecting charges against an accused includes threatening additional charges if a plea agreement is not accepted); Oyler v. Boles, 368 U.S. 448, 456 (1962) ("[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.").

[36] JOHN S. BAKER, JR., HERITAGE FOUND., LEGAL MEMORANDUM, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES 1 (June 16, 2008), *available at* http://s3.amazonaws.com/thf_media/2008/pdf/lm26.pdf; *see also* Gary Fields & John R. Emshwiller, *Many Failed Attempts to Count Federal Criminal Laws*, WALL ST. J., July 23, 2011, at A10 (reporting on numerous failed attempts to count the number of federal crimes and explaining that past numbers have merely been estimates).

[37] BAKER, *supra* note 36, at 1 (finding that federal crimes are growing at an "average [of] 56.5 crimes per year"); John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crimes Legislation*, 5 ENGAGE 23, 26 (2004), *available at* http://www.fed-soc.org/doclib/20070321_oct04.pdf (discovering that over a seven-year period, Congress passed more new criminal sections in each election year than it did during all of that period's nonelection sessions combined).

[38] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 513–14 (2001) (finding an approximately four-fold increase in Illinois's criminal laws; a three-fold increase in Virginia's laws, despite the elimination of slavery-related crimes; and a two-and-a-half-fold increase in Massachusetts's laws since the 1850s—increases similar to the three-and-a-half-fold expansion in the U.S. Code's criminal section over the same time period).

[39] State-court felony filings rose 31% from 1996 to 2005. NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 2006, at 137–39 tbl.7 (2007) (totaling the individual state-court felony filings). This rapid increase is in accord with Professor Stuntz's finding of a 36% increase in state-court felony filings from 1978 to 1984 and an additional 51% increase from 1985 to 1991. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2555 n.9 (2004); *see also* Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. & CRIMINOLOGY 1119, 1134 n.45 (2012) (reporting that a junior prosecutor "is likely to have 75–100 cases on her desk"). *But see* COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 20 (2011) (reporting that criminal caseloads have declined 4% since 2006—a record year for state-court criminal caseloads).

that go unprosecuted.[40] This allows prosecutors to select the prosecutions they pursue and those they do not. Further, directly in response to their large dockets, prosecutors rely on plea agreements.[41] In state courts, plea agreements account for over 94% of felony convictions[42] and this rate is even higher in federal courts.[43] These agreements also often come early in an investigation when a prosecutor can dictate terms to a defendant before the defendant's attorney has had time to investigate the case.[44] No one reviews prosecutors' discretionary decisions to offer or not to offer such plea agreements.[45] Taking charging and plea-bargaining powers together, prosecutors have large discretion in determining criminal sentences. Often the prosecutor is setting the punishment for criminal acts with a force of law similar to that of the legislatures that write the initial law.[46]

Prosecutorial discretion is reinforced by immunity from civil lawsuits.[47] The first American case to extend immunity to a prosecutor was

---

[40] For instance, in fiscal year 1997, three years after the passage of the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902, there had not been a single federal prosecution based on this law. AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 20 (1998). *But see* Letter from Caroline Frederickson, Director, ACLU, to Sen. Arlen Specter, Chair, U.S. Senate Comm. on the Judiciary (July 27, 2005), *available at* http://www.aclu.org/womens-rights/aclu-letter-senate-judiciary-committee-regarding-violence-against-women-act-2005-s-119 (arguing that the Violence Against Women Act "dramatically improved the law enforcement response to violence against women" and should be reauthorized).

[41] Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 51 (1968) (arguing that without plea agreements, courts would be swamped with too many cases and too few resources).

[42] SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006, at 24 (2009).

[43] ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2010, at 83 tbl.D-4 (reporting that in 2010, of the 89,373 federal convictions, 87,001 (97%) were through plea agreement); *see also Plea Agreements*, 1A FED. PRAC. & PROC. CRIM. § 180 (4th ed. & 2011 Supp.) (describing federal percentages that exceed state percentages).

[44] DAVIS, ARBITRARY JUSTICE, *supra* note 21, at 44–45.

[45] Stuntz, *supra* note 39, at 2567.

[46] Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1513 (1993). This "price setting" of criminal punishment even occurred despite mandatory federal sentencing guidelines, which could have restrained such negotiations. *See generally* Stephen J. Schulhofer & Ilene H. Nage, *Plea Negotiations Under the Federal Sentencing Guildelines: Guideline Circumvention and Its Dynamics in the Post*-Mistretta *Period*, 91 NW. U. L. REV. 1284, 1292 (1997) (arguing that federal prosecutors use tools like "fact bargaining" to get around mandatory sentences in plea-bargaining encounters). This power has likely grown post-*United States v. Booker*, 543 U.S. 220 (2005), where the Supreme Court struck down the mandatory nature of the sentencing guidelines.

[47] Scott J. Krischke, *Absent Accountability: How Prosecutorial Impunity Hinders the Fair Administration of Justice in America*, 19 J.L. & POL'Y 395, 399 (2010).

an 1896 Indiana Supreme Court decision affirming dismissal of a complaint for malicious prosecution.[48] This decision became the majority rule in the United States.[49] By 1927, the Supreme Court endorsed this rule[50] by affirming per curiam the Second Circuit's holding that a prosecutor "is immune from . . . malicious prosecution based on an indictment and prosecution . . . ."[51] The Second Circuit grounded this rule in public policy considerations.[52] In 1976, the Supreme Court extended this common law rule of immunity to § 1983 civil rights claims.[53] This holding was limited to the "judicial phase of the criminal process."[54]

In subsequent cases, the Supreme Court further extended prosecutorial immunity. In *Van de Kamp v. Goldstein*,[55] the Court extended absolute immunity to administrative tasks, such as training, supervision, and management of information systems.[56] The Court's rationale for this expansion was that these administrative tasks relied on the prosecutor's "legal knowledge and the exercise of related discretion."[57] In other circumstances, the Court has granted qualified immunity to provide a "defense of good faith" for prosecutors performing certain official duties.[58] These official duties include: (1) advising the police;[59] (2) interacting with the media;[60] and (3) testifying as a complaining witness.[61] Qualified

---

[48] Griffith v. Slinkard, 44 N.E. 1001, 1002 (Ind. 1896) ("[I]f it be made in the due course of a legal or judicial proceeding, it is privileged, and cannot be the foundation of an action of defamation.").

[49] Imbler v. Pachtman, 424 U.S. 409, 422 (1976); *see also id.* at 422 n.19 (collecting state cases from Kansas, Mississippi, North Dakota, and Oregon).

[50] Yaselli v. Goff, 12 F.2d 396, 406 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927).

[51] *Yaselli*, 12 F.2d at 406.

[52] *Id.* ("The public interest requires that persons occupying such important positions and so closely identified with the judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions. They should be no more liable to private suits for what they say and do in the discharge of their duties than are the judges and jurors, to say nothing of the witnesses who testify in a case.").

[53] *Imbler*, 424 U.S. at 424.

[54] *Id.* at 430.

[55] 555 U.S. 335 (2009).

[56] *Id.* at 339.

[57] *Id.* at 344.

[58] Pierson v. Ray, 386 U.S. 547, 557 (1967); *see also* John D. Kirby, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 CORNELL L. REV. 462, 470 (1990) (explaining the development of qualified immunity for public officials under § 1983).

[59] Burns v. Reed, 500 U.S. 478, 495 (1991).

[60] Buckley v. Fitzsimmons, 509 U.S. 259, 269, 278 (1993) (applying a "functional approach" to extend absolute immunity only when a prosecutor is acting for the state at trial or in trial preparation, but not when the prosecutor acts as any other executive official would,

immunity will protect a prosecutor unless he or she knowingly violates clear constitutional standards.[62]

Since absolute or qualified immunity will be extended to most actions of a prosecutor, one concern is that immunity leads to an increase in prosecutors pursuing wrongful convictions and violating defendants' constitutional rights.[63] Chief Judge Learned Hand worried that immunity was a "balance between the evils" of leaving "unredressed the wrongs done by dishonest officers" and subjecting "those who try to do their duty to the constant dread of retaliation."[64] In the end, Hand, like the Supreme Court, decided that immunity reinforcing discretion was preferable to the alternative.[65] State legislatures have embraced this common law civil immunity through their statutes.[66] In interpreting these statutes and their common law antecedents, state courts, similar to federal courts, provide absolute immunity to prosecutors for actions within the scope of their duties.[67] All told, practical necessities and theoretical considerations make prosecutors powerful actors with protected, wide-ranging discretion.

---

for instance in speaking at a press conference, where qualified immunity is proper).

[61] Kalina v. Fletcher, 522 U.S. 118, 132–33 (1997).

[62] Doe v. Phillips, 81 F.3d 1204, 1211 (2d Cir. 1996); *see also* Camreta v. Greene, 131 S. Ct. 2020, 2030–31 (2011) (explaining test for government officials in a case involving child protective services official and county sheriff); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (announcing this rule for government officials).

[63] *See generally* Krischke, *supra* note 47, at 412–13 (linking the increased use of prosecutorial pressure on former inmates to "snitch" on their peers with the racial disparity of prison populations to suggest an unfair administration of justice).

[64] Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

[65] *Id.*

[66] *See, e.g.*, CAL. GOV'T CODE § 821.6 (West 2012) (providing that a prosecutor "is not liable for injury caused . . . within the scope of his employment, even if he acts maliciously and without probable cause"); *id.* § 820.2 (providing that a government official, including a prosecutor, "is not liable for . . . the exercise of the discretion vested in him"); COLO. REV. STAT. ANN. § 20-1-106.1(2) (West 2012) ("In the absence of the bad faith performance of the duties specified in this section, the district attorneys of the state of Colorado shall be immune from liability for the performance of said duties."); GA. CONST. art. 6, § 8, ¶ 1(e) ("District attorneys shall enjoy immunity from private suit for actions arising from the performance of their duties."); 42 PENN. CONS. STAT. ANN. § 8546 (West 2007) (providing defenses at the common law); TENN. CODE ANN. § 40-3-208 (2012) (providing that district attorneys "shall not be civilly or criminally liable for acts performed pursuant" to their duties).

[67] *See, e.g.*, Falls v. Superior Court, 49 Cal. Rptr. 2d 908, 915 (Ct. App. 1996) (providing absolute immunity for acts within the judicial process or associated with the judicial phase of the criminal process); Durham v. McElynn, 772 A.2d 68, 69 (Pa. 2001) (limiting absolute immunity to actions within scope of delegated authority).

B. THE PRACTICAL PROBLEMS WITH PROSECUTORIAL DISCRETION

Beyond the theoretical concern of prosecutorial discretion thwarting the rule of law[68] and the intuitive fear of untrained prosecutors using discretionary authority incorrectly, as implied in the previous section, discretion has also been blamed in a variety of situations where prosecutors cared more about winning a case than about justice.[69] The resulting wrongful convictions are more prevalent than one would hope. For instance, since the advent of DNA testing, there have been 301 exonerations in the United States of convicted prisoners.[70] In 1999, *Chicago Tribune* staff writers surveyed nationwide cases and found that 381 homicide convictions have been overturned since 1963 because the "prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false."[71] In sixty-seven of the cases, the defendant had been sentenced to death, and over half of those former death row inmates were subsequently released.[72] The authors of the report noted that the frequency of such withholdings is likely much higher than they found because they only examined homicide cases.[73] A year earlier, the *Pittsburgh Post-Gazette*'s Bill Moushey reviewed over 1,500 allegations of prosecutorial misconduct over a period of ten years and reached a similar conclusion.[74] In his review, the author found "hundreds of examples of discovery violations in which prosecutors intentionally concealed evidence that might have helped prove a defendant innocent or a witness against him suspect."[75]

The effect of such actions by prosecutors on defendants is well chronicled.[76] In a particularly egregious example, two men were

---

[68] *See supra* notes 27–34 and accompanying text.

[69] *See, e.g.*, DAVIS, ARBITRARY JUSTICE, *supra* note 21, at 4 (discussing her time at the Public Defender Service for the District of Columbia and stating that she found that most prosecutors saw their role as winning—i.e., getting a conviction in—every case); John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 180–81 (1965) (detailing a former prosecutor's admission that win–loss record affects status within the office). Compare these admissions with the meaning of justice: "That end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the facts." BALLENTINE'S LAW DICTIONARY 696 (3d ed. 1969).

[70] INNOCENCE PROJECT, http://www.innocenceproject.org (last visited Dec. 7, 2012).

[71] Armstrong & Possley, *The Verdict*, *supra* note 26, at 1.

[72] *Id.* Those that were not released were likely reprosecuted with this additional evidence included in the case.

[73] *Id.*

[74] Bill Moushey, *Discovery Violations Have Made Evidence-Gathering a Shell Game*, PITT. POST-GAZETTE, Nov. 24, 1998, at A-1.

[75] *Id.*

[76] *See, e.g.*, DAVIS, ARBITRARY JUSTICE, *supra* note 21, at 3–4, 132–34; Edward M.

wrongfully accused of murdering a ten-year-old girl.[77] The main evidence that linked the two men to the crime was a lie told by a police officer that one of the men had a "vision" of the crime scene that only someone on hand for the murder would have known.[78] Meanwhile, prosecutors did not pursue leads relating to a different man who pleaded guilty to two other murders, including that of another young female.[79] At a third trial, after new DNA evidence surfaced excluding the accused of being the murderers, a judge returned a verdict of not guilty.[80] The participants—three prosecutors and four police officers—were later indicted and then acquitted for the criminal conspiracy of creating the vision lie.[81]

A prosecutor's desire to win his case, either for individual reasons or as the result of incentive programs, may lead him to take actions that are not within ethical or legal bounds.[82] For instance, the *Denver Post* reported in 2011 that a district attorney's office offered prosecutors a monetary award, averaging $1,100, based in part on their felony conviction rates.[83] The

---

Genson & Marc W. Martin, *The Epidemic of Prosecutorial Courtroom Misconduct in Illinois: Is it Time to Start Prosecuting the Prosecutors?*, 19 LOY. U. CHI. L.J. 39, 39–41 (1987).

[77] *Rolando Cruz*, CTR. ON WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/cwc/exonerations/ilCruzSummary.html (last visited Nov. 18, 2012) [hereinafter *Cruz*, CTR. ON WRONGFUL CONVICTIONS]. *See also generally* THOMAS FRISBIE & RANDY GARRETT, VICTIMS OF JUSTICE REVISITED ch. 5 (rev. ed. 2005) (reporting the detailed story of the Rolando Cruz prosecution).

[78] Maurice Possley & Ken Armstrong, *Trial & Error: Prosecution on Trial in DuPage*, CHI. TRIB., Jan. 12, 1999, at 1 [hereinafter *Prosecution on Trial*].

[79] *Id.*

[80] *Cruz*, CTR. ON WRONGFUL CONVICTIONS, *supra* note 77.

[81] Possley & Armstrong, *Prosecution on Trial*, *supra* note 78.

[82] This does not mean that an incentive program could not positively reward behaviors leading to fairness. *See* Press Release, U.S. Dep't of Justice, Attorney General Holder Recognizes DOJ Employees and Others for Their Service at Annual Awards Ceremony (Oct. 27, 2010), *available at* http://www.justice.gov/opa/pr/2010/October/10-ag-1207.html (recognizing and rewarding Department of Justice officials at annual award ceremony for contributions to the Department). *See generally* Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 442 (2009) (encouraging a pay-for-performance model centered on certain desired behaviors); Tracy L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 873–75 (1995) (proposing that prosecutors be evaluated on whether they secured convictions or plea agreements on the same charge(s) they brought initially to disincentivize adding charges in an effort to secure plea agreements). Instead, this is more a statement about the types of financial programs that have been implemented.

[83] Jessica Fender, *DA Chambers Offers Bonuses for Prosecutors Who Hit Conviction Targets*, DENVERPOST.COM (Apr. 11, 2011, 3:43 PM), http://www.denverpost.com/news/ci_17686874.

reporter noted that this was an unusual scheme as prosecutors from other jurisdictions in the state believed that their prosecutors should be seeking justice as an incentive in itself.[84] The district attorney even acknowledged that there could be concerns of prosecutors "cherry-picking" easier cases to ensure convictions.[85] But instead of ending the program, the district attorney in charge of the office responded that the bonus was easily attainable enough not to encourage such cherry-picking to attain the bonus.[86] While this may be true, the potential for and, at least, the appearance of impropriety are present.

In another particularly disturbing "incentive program" during the 1970s, Chicago prosecutors had a contest to be the first person to convict two tons of defendants.[87] The "game" required prosecutors to literally weigh convicted felons on a scale.[88] The winning prosecutor would be the first person whose convicted defendants weighed a total of two tons.[89] Making the situation even harder to rationalize, the mainly white prosecutors described their trials and "contest" in racially explicit terms."[90]

More recently, special counsel Henry Schuelke reported on the misconduct of those within the Alaska U.S. Attorney's Office in the conviction of Senator Ted Stevens of Alaska on federal corruption charges.[91] Before sentencing, the Department of Justice moved to set aside the conviction after discovering undisclosed material information that all agreed was required to be turned over to defense attorneys before trial.[92] Such information would have strengthened and supported Senator Stevens's explanation and defense of the charges in the corruption probe.[93] After an investigation of the incident, special counsel Schuelke rejected the proffered rationale for the mistake and concluded that the two lead prosecutors "intentionally withheld and concealed material exculpatory information,

---

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] Maurice Possley & Ken Armstrong, *Trial & Error: The Flip Side of a Fair Trial*, CHI. TRIB., Jan. 11, 1999, at 1.

[88] *Id.*

[89] *Id.*

[90] *Id.* (calling the courthouses where they worked "Darkham" and "Rolling Ghettos," and calling the contest "N[-----]s by the Pound").

[91] Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009 at 1–2, *In re* Special Proceedings, No. 1:09-mc-00198-EGS (D.D.C. Nov. 14, 2011).

[92] *Id.* at 32.

[93] *Id.* at 38.

which was required to be disclosed."[94] Implicit in the report is the charge that the prosecutors intentionally withheld material information out of a desire to win—potentially for career advancement through prosecuting a sitting U.S. Senator—and an inherent conflict of interest in reviewing what information should be given to the other side.[95]

Prosecutorial discretion has led to practical problems and socially unacceptable results. Whether caused by an individual desire to win, incentive programs, or simply mistakes, discretion can lead to incorrect convictions and ruined lives.

C. BASIC LIMITS ON PROSECUTORIAL DISCRETION

The legal system attempts to impose limits on discretion in response to these unacceptable results.[96] The reason for limiting discretion is to reduce the threat to individual freedoms.[97] One of these discretion limitations is the constitutional requirement, as developed by the Supreme Court, of certain procedural safeguards for the accused. These safeguards reinforce Justice Sutherland's oft-quoted 1935 opinion in *Berger v. United States* that a prosecutor's goal "in a criminal prosecution is not that [she] shall win a case, but that justice shall be done."[98] In that case, the Supreme Court reversed a conviction because the prosecutor's misconduct had a "probable cumulative effect upon the jury," biasing jurors against the defendant.[99]

The petitioner in *Berger* had been indicted along with seven other defendants in two separate criminal conspiracies to counterfeit Federal Reserve Bank notes.[100] There was no direct evidence linking the petitioner to one of the conspiracies; the evidence only showed him potentially passing notes in the second conspiracy without further criminal activity.[101] However, he was convicted at a trial during which the U.S. Attorney "overstepped the bounds of . . . propriety and fairness" by: (1) misstating facts; (2) falsely attributing statements to witnesses; (3) suggesting out-of-court statements by his questions; (4) assuming prejudicial information not

---

[94] *Id.* at 36.

[95] William M. Welch & William W. Taylor, *The* Brady *Problem: Time to Face Reality*, NAT'L L.J., July 16, 2012, at 44–46.

[96] *Cf.* United States v. Batchelder, 442 U.S. 114, 125, 125 n.9 (1979) (stating that prosecutor discretion cannot implicate impermissible standards like "race, religion, or other arbitrary classification").

[97] Breitel, *supra* note 27, at 428.

[98] Berger v. United States, 295 U.S. 78, 88 (1935).

[99] *Id.* at 89.

[100] *Id.* at 79–80.

[101] *Id.* at 80.

presented as evidence; and (5) bullying witnesses.[102] The Court seemed disturbed that these improprieties were used to suggest that the petitioner was a part of both conspiracies since the evidence could only tie him to one.[103] In concluding, Justice Sutherland wrote, "[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[104]

One way that the law has attempted to rein in prosecutorial discretion is through required disclosures of certain evidence to the defense. For instance, upon a defendant's request, the Federal Rules of Criminal Procedure require a prosecutor to provide to the defense oral or written statements made by the defendant that the prosecutor plans to use at trial.[105] In addition, upon request, the prosecution is required to provide documents and objects that are material to preparing a defense or will be a part of the government's case-in-chief, in addition to a summary of expected expert witness testimony; the defendant's criminal record; and reports from any physical, mental, or scientific tests.[106]

States may also require these disclosures and others from prosecutors. For instance, Illinois requires the same disclosures upon request that the federal rules provide.[107] In addition, the state requires disclosure if a defendant requests information about anticipated witnesses, including any prior criminal record(s); statements by codefendants; and portions of grand jury hearing transcripts.[108] The state also requires disclosure, with or without a request, of electronic surveillance the state conducted on the defendant and any material evidence that tends to negate the guilt of the accused.[109] The prosecution must also provide to the defendant reports of any DNA evidence at issue in the trial.[110] Similarly, other states, such as

---

[102] *Id.* at 84.

[103] *See id.* at 81.

[104] *Id.* at 88.

[105] FED. R. CRIM. P. 16(a)(1)(A), (B).

[106] *Id.* at 16(a)(1)(D)–(G); *see also* Terence F. MacCarthy & Rosalie Lindsay Guimarães, *Pretrial Discovery in Federal Criminal Cases*, *in* FEDERAL CRIMINAL PRACTICE ch. 7 (2011) (explaining the federal rules for practicing attorneys).

[107] ILL. SUP. CT. R. 412(a)(ii), (iv), (v), (vi).

[108] *Id.* at (a)(i)–(vi).

[109] *Id.* at (b)–(c).

[110] ILL. SUP. CT. R. 417. For a fuller explanation of the Illinois state rules, see Leonard C. Goodman, *Illinois Criminal Pretrial Discovery*, *in* DEFENDING ILLINOIS CRIMINAL CASES, at ch. 4 (Thomas A. Lilien ed., 2010).

Maryland[111] and Arizona,[112] provide in their criminal procedure rules for mandatory material evidence disclosures without request and additional items upon the defense's request. Each of these codes attempts to provide information necessary to give the defense a fair trial.

Federal and state procedural codes are just one way of regulating discretion. Courts have also added their own requirements on prosecutors. One such regulation is the *Brady* doctrine described in the next part.

D. *BRADY* AND ITS PROGENY REQUIRE DISCLOSURE OF MATERIAL EVIDENCE

The Supreme Court held in the seminal *Brady v. Maryland* case that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[113] In the case, John Brady and Charles Boblit planned to rob a man for his car and his money.[114] At gunpoint, Brady and Boblit drove the victim to a nearby forest where they strangled him to death.[115] A jury convicted John Brady of first-degree murder and sentenced him to death, while in a separate trial, Boblit was also convicted and sentenced to death.[116] Maryland prosecutors tried Brady first; he admitted participating in the robbery leading to the murder, but claimed that Boblit "did the actual killing."[117]

At trial, Brady's attorneys conceded that he was guilty of first-degree murder through the felony-murder rule but asked the jury to sentence him "without capital punishment" due to Brady's claim that he did not actually kill the victim.[118] Unfortunately, the prosecution did not provide the defendant access, despite requests, to all of Boblit's extrajudicial statements.[119] One of those statements contained his admission to being the killer.[120] On appeal, the Maryland Court of Appeals affirmed Brady's

---

[111] MD. R. 4-262(d).

[112] ARIZ. R. CRIM. P. 15.1; *see also* C.P. Jhong, Annotation, *Right of Accused in State Courts to Inspection or Disclosure of Evidence in Possession of Prosecution*, 7 A.L.R.3d 8 (1966) (reporting on various state disclosure laws).

[113] 373 U.S. 83, 87 (1963).

[114] Brady v. State, 154 A.2d 434, 434 (Md. 1959).

[115] *Id.*

[116] *Brady*, 373 U.S. at 84.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

conviction but remanded the sentencing phase of the trial to allow Brady to use Boblit's statement because of his Fourteenth Amendment rights.[121]

The Supreme Court affirmed,[122] acknowledging the Maryland Court of Appeals' conclusion that the excluded statement could not reduce Brady's conviction below first-degree murder and thus left the state law ruling untouched.[123] In doing so, however, the Court for the first time ruled that a defendant was entitled to all "evidence favorable to an accused upon request"[124] under the Fifth and Fourteenth Amendments.[125]

After *Brady* and the requirement of disclosure upon request of material evidence, the Court heard a number of cases on the meaning and reach of the *Brady* doctrine. Potentially most importantly, after a nine-year detour,[126] the Court held that "material" evidence must be made available to the accused with *or* without request.[127] In *United States v. Bagley*, after the defense made a general request for information, evidence that could have impeached the prosecution's key witnesses—namely that the witnesses had been paid $300 to testify—was not provided.[128] After the defense discovered this information through a Freedom of Information Act request, the defendant appealed his conviction, arguing that the disclosure of this impeachable evidence would have changed the result of his trial and the failure to disclose denied him the due process rights guaranteed by *Brady*.[129] The district court disagreed[130] but the Court of Appeals for the Ninth Circuit reversed, suggesting that by not providing information for cross-examination, the prosecutor violated the defendant's right to a fair

---

[121] *Id.* at 85.

[122] *Id.* at 91.

[123] *Id.* at 90.

[124] *Id.* at 87. The importance of the word "requested" was underscored in later decisions of the Court. *See* United States v. Agurs, 427 U.S. 97, 106 (1976) ("In *Brady* the request was specific . . . [giving] the prosecutor notice of exactly what the defense desired."); Moore v. Illinois, 408 U.S. 786, 794–95 (1972) ("Important, then, are (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence."); *see also* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 5:2, at 220 (2d ed. 2011) (explaining that it was these subsequent cases that clarified *Brady*'s focus on specific requests for favorable material evidence).

[125] U.S. CONST. amends. V, XIV.

[126] *Agurs*, 427 U.S. at 103–07 (defining three different categories of disclosure information dependent on whether the accused requested the information and fashioning a test for each category).

[127] United States v. Bagley, 473 U.S. 667, 672 (1985).

[128] *Id.* at 671.

[129] *Id.* at 671–72.

[130] *Id.* at 673.

trial.[131]

The Court rejected this "automatic reversal" and remanded the case.[132] Instead of the Ninth Circuit's test or a previous Court test based on the general request, the undisclosed impeachment evidence should have been analyzed under the *Brady* materiality standard regardless of whether or how it was requested.[133] Under this standard, an appeals court must reverse a conviction "only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."[134] The standard for making this determination in all *Brady* reviews is a fact-intensive inquiry on the "reasonable probability" that the trial was fair without this evidence being shared with the defendant.[135] On remand, the Ninth Circuit again reversed and vacated Bagley's conviction.[136]

Since *Bagley*, U.S. courts have continued to struggle with *Brady* determinations. For instance, some courts continue to distinguish between circumstances where the defendant requested material information and those where he did not.[137] Subsequent case law revealed that the lower courts' question with respect to undisclosed evidence is "whether in its absence[,] [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence."[138] The Court went on to redefine this as "[a] 'reasonable probability' of a different result" when "the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'"[139] It is not surprising with such a subjective test that further analysis and exposition by the Supreme Court, lower federal courts, and state courts have been necessary.

---

[131] *See* Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983), *rev'd sub nom.* United States v. Bagley, 473 U.S. 667 (1985).

[132] *Bagley*, 473 U.S. at 674.

[133] *Id.* at 676.

[134] *Id.* at 678.

[135] *Id.* at 684; *id.* at 685 (White, J., concurring).

[136] Bagley v. Lumpkin, 798 F.2d 1297, 1302 (9th Cir. 1986).

[137] *See, e.g.*, Johnson v. Gibson, 169 F.3d 1239, 1254–55 (10th Cir. 1999) ("[A] request for specific information, as opposed to a general request . . . can lower the threshold of materiality necessary to establish a violation."); United States v. Vozzella, 124 F.3d 389, 392 (2d Cir. 1997) (utilizing the *Agurs* three-level analysis); Smith v. Sec'y of N.M. Dep't. of Corr., 50 F.3d 801, 826 (10th Cir. 1995) (noting that it is "more prudent for defense counsel to at least make a 'general request' for *Brady* material" than not to make any request); United States v. Joseph, 996 F.2d 36, 40 (3d Cir. 1993) (distinguishing a case with a specific request from a case where there was a general request); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE § 3-311(b) (1993) (prosecutor should make a "reasonably diligent effort to comply with a legally proper discovery request").

[138] Kyles v. Whitley, 514 U.S. 419, 434 (1995).

[139] *Id.* (quoting *Bagley*, 473 U.S. at 678).

A study of federal post-*Brady* reversals involving undisclosed evidence reveals some trends.[140] For instance, exculpating evidence is more likely to be material than impeachment evidence[141] and repetitive or cumulative information is ordinarily not material.[142] However, the inquiry remains fact-intensive; if the prosecution's case is filled with "gaps,"[143] includes "weaknesses and uncertainties,"[144] "suggestive of . . . another perpetrator,"[145] or is otherwise "tenuous,"[146] the evidence withheld is more likely to be material.

Post-*Brady* and *Bagley*, courts engage in a *post hoc* analysis of whether undisclosed evidence was material; the task for a prosecutor is much more difficult—an *ex ante* pretrial consideration of whether a piece of information will interact with potential trial evidence to the point where it will impact the case's outcome.[147] As a prosecutor is not under an obligation to disclose the entire investigative file,[148] the modern prosecutor must struggle with this *Brady* analysis. The test is fact-specific and is therefore inexact and complex, and it requires much training and understanding on the part of a prosecutor.[149] But the obligation is also counter to a prosecutor's natural inclination. The obligation asks prosecutors to stand in defense counsel's shoes, consider what information they would want, and then "reveal information that makes conviction less likely."[150]

Under Justice Thomas's view, this complicated test works because prosecutors have "professional training and ethical obligations."[151] Unfortunately, as outlined in the next section and as Justice Ginsburg

---

[140] Jason B. Binimow, Annotation, *Constitutional Duty of Federal Prosecutor to Disclose* Brady *Evidence Favorable to Accused*, 158 A.L.R. FED. 401 (1999 & Westlaw Supp. 2011).

[141] *See, e.g.*, United States v. Johnson, 592 F.3d 164, 171 (D.C. Cir. 2010); Boyette v. Lefevre, 246 F.3d 76, 92 (2d Cir. 2001).

[142] *See, e.g.*, Simental v. Matrisciano, 363 F.3d 607, 611 (7th Cir. 2004); United States v. Imbruglia, 617 F.2d 1, 4 (1st Cir. 1980).

[143] United States v. Sheehan, 442 F. Supp. 1003, 1009 (D. Mass. 1977).

[144] State v. Falkins, 356 So. 2d 415, 419 (La. 1978).

[145] Scurr v. Niccum, 620 F.2d 186, 191 (8th Cir. 1980); *see also* State v. Spurlock, 874 S.W.2d 602, 616–17 (Tenn. Crim. App. 1993) (holding that the prosecutor needed to turn over audio recordings implicating another person as the criminal actor).

[146] Monroe v. Angelone, 323 F.3d 286, 312 (4th Cir. 2003).

[147] Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2092 (2010).

[148] United States v. Agurs, 427 U.S. 97, 111 (1976).

[149] Barkow, *supra* note 147, at 2097–98.

[150] Welch & Taylor, *supra* note 95, at 45.

[151] Connick v. Thompson, 131 S. Ct. 1350, 1363 (2011).

feared, this training is simply inadequate, calling into question whether the *Brady* doctrine delivers on its due process guarantees and how it impacts the lives of criminal defendants.

III. POLICY PROPOSALS TO END PROSECUTORIAL MISCONDUCT FAIL BY NOT ADDRESSING PROSECUTORIAL TRAINING

A. PROSECUTORS LACK APPROPRIATE TRAINING

Despite a prosecutor's power and discretion, the only legal requirement for becoming a prosecutor is often no more than admission to the state's bar.[152] The National District Attorneys Association's suggestion is to require that "a prosecutor . . . be a member in good standing of the state's bar, except as otherwise provided by law."[153] This suggestion applies for prosecutors that are elected, appointed, or hired.[154] For the most part, states have not added additional requirements for hired prosecutors.[155]

However, some states add additional requirements for those who are in leadership positions or are elected.[156] Most often, this simply is a requirement that the individual is a resident within the office's jurisdiction, rather than that the individual meets any training or skill requirements.[157] The reason for this location requirement for lead prosecutors, even if not elected, is a preference that they be available to interact with the represented community, including local police and judicial officials, and be

---

[152] Admittedly, individual offices may have higher standards for hiring an attorney.

[153] NAT'L DISTRICT ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS § 1-4.1 (3d ed. 2009) [hereinafter NATIONAL PROSECUTION STANDARDS].

[154] *Id.*

[155] *See, e.g.*, MICH. OP. ATT'Y GEN. No. 803 (1948), at 740 (requiring that individual be admitted to the bar to be qualified to be a prosecutor) (citing People *ex rel*. Hughes v. May, 3 Mich. 598 (1855)); MO. REV. STAT. §§ 56.010–20 (West 1998) (adding only requirement to be twenty-one years old); N.H. REV. STAT. ANN. § 41:10-a (LexisNexis 2009) (appointing municipal prosecutors who must be "members of the New Hampshire bar" and "serve at the pleasure of the appointing authority"); OHIO REV. CODE ANN. § 309.02 (West 2005) (providing that the only requirement is being licensed to practice law).

[156] *See, e.g.*, LA. CONST. art. V, § 26(a) (1974) (requiring practice in state for five years preceding election); N.J. STAT. ANN. § 2A:158-1 (West 2011) (head county prosecutor must have been in practice in the state for at least five years).

[157] *See, e.g.*, IDAHO CODE ANN. § 31-2601 (West 2006) (stating that elected prosecutor must live in the county he or she will serve); LA. CONST. art. V, § 26(a) (1974) (requiring two years residence in the county that the prosecutor will represent); MO. REV. STAT. § 56.010 (adding a requirement to be a resident of the county for twelve months prior to an election); WASH. REV. CODE ANN. § 36.27.010 (West 2003) (requiring elected prosecutor to be a qualified elector of the county of the election). *See also* NATIONAL PROSECUTION STANDARDS, *supra* note 153, at § 1-4.1.

available in the case of an emergency.[158] In addition, many states also add that a prosecutor cannot hold another office while in the role.[159] For the most part then, America's prosecutors only need to be qualified to practice in their respective states, which will usually entail graduating from law school and passing the bar,[160] as Justice Thomas felt was adequate.[161]

To understand if these state requirements actually prepare prosecutors for practice, I reviewed the listed curriculums of the 202 law schools accredited by the American Bar Association (ABA). The study found that all schools offer courses in general criminal law and criminal procedure.[163] In addition, all but six law schools require criminal law as part of the school's graduation requirements.[164] On the other hand, only 53 ABA-accredited schools, or just over a quarter of all accredited schools, require a criminal procedure course to earn a degree.[165] Figure 1, *infra*, illustrates that the more recent a school's ABA accreditation, the more likely it is to require criminal procedure.[166] Yet even with this trend, most schools do not

---

[158] NATIONAL PROSECUTION STANDARDS, *supra* note 153, at § 1-4 cmt.

[159] *See, e.g.*, LA. CONST. art. V, § 26(c) (1974) (prohibiting criminal defense work during time in office); IDAHO CODE ANN. § 31-2601 (West 2011) (stating that no other office may be held); N.C. GEN. STAT. ANN. § 7A-61 (2011) (stating that a prosecutor "shall not engage in the private practice of law").

[160] *But see* STANDING ROCK SIOUX TRIBE CODE OF JUSTICE § 1-502 (1986) (amended 1991) (requiring age, high moral character, non-felon, physical ability to carry out the role, and no dishonorable discharges from the military, in addition to bar admission and graduation from an accredited law school).

[161] Connick v. Thompson, 131 S. Ct. 1350, 1363 (2011) ("Prosecutors not only are equipped but are ethically bound to know what *Brady* entails and to perform legal research when they are uncertain.").

[163] Note that not all law schools name their courses in the same way—some judgment calls had to be made. However, it was typically clear from course descriptions that a course in "Criminal Justice" dealing with the common law antecedents of the Model Penal Code was equivalent to a course in criminal law. Similarly, criminal procedure is a diverse topic that could encompass the federal rules of criminal procedure or the constitutional doctrines at work in criminal processes. Since, depending on the professor and the case book, discovery doctrines can be discussed in both, this analysis considered courses ranging from "Constitutional Criminal Procedure" to "Criminal Adjudication" to "Criminal Practice" as being under the heading of criminal procedure.

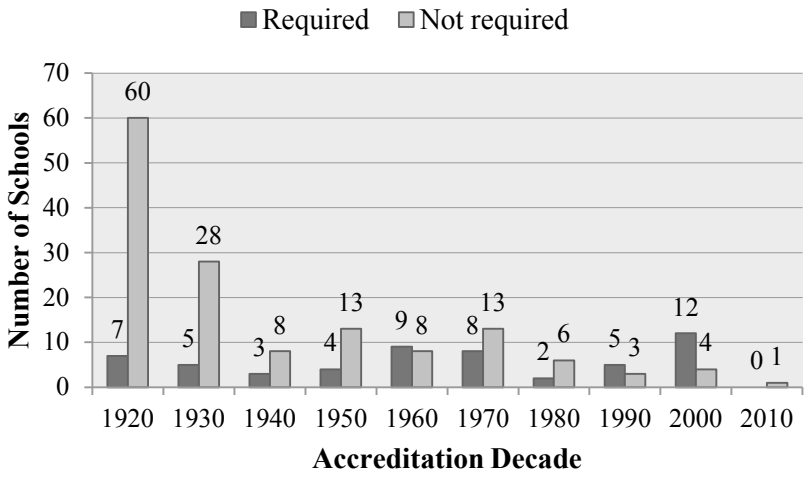
[164] The six schools without criminal law as a required course are: Creighton University School of Law, Lewis and Clark College Law School, the University of Arizona James E. Rogers College of Law, University of Miami School of Law, University of New Hampshire School of Law, and William Mitchell College of Law. *See infra* Appendix.

[165] *See infra* Appendix.

[166] A similar trend exists when you compare the law schools classified as tier one by U.S. News & World Report (only three out of fifty-three require criminal procedure) with those classified as tier four (twenty-four of the forty-five require criminal procedure). If these schools are also producing the most prosecutors, this trend may assist in training future

require criminal procedure to graduate. That said, a number of schools list the course as being a "preference course,"[167] a course to prepare for the bar examination,[168] one "[a]ll law students should take,"[169] or one of only a couple first-year electives.[170]

Figure 1
Does a Law School Require Criminal Procedure?



However, even if a law school requires criminal procedure, a law student may not learn about the *Brady* doctrine or the constitutional requirement to turn over material evidence. Different casebooks provide different pedagogical views[171] and may only peripherally reference *Brady v.*

prosecutors.

[167] *See, e.g.*, NOVA SOUTHEASTERN UNIVERSITY, SHEPARD BROAD LAW CENTER, http://nsulaw.nova.edu/students/course-descriptions.cfm (last visited Nov. 18, 2012) (including Criminal Procedure in a menu of three courses from which students must select two).

[168] *See, e.g.*, UNIVERSITY OF SAN DIEGO SCHOOL OF LAW, http://www.sandiego.edu/law/academics/jd/curriculum/graduation_requirements.php (last visited Nov. 18, 2012).

[169] *See, e.g.*, UNIVERSITY OF SOUTHERN CALIFORNIA, GOULD SCHOOL OF LAW, http://lawweb.usc.edu/why/academics/curriculum/upperDivision.cfm (last visited Nov. 18, 2012).

[170] *See, e.g.*, VILLANOVA UNIVERSITY SCHOOL OF LAW, http://www.law.villanova.edu/Academics/Degree Programs/JD/First Year.aspx (last visited Nov. 18, 2012).

[171] *Compare* ARNOLD H. LOEWY, CRIMINAL PROCEDURE: CASES, MATERIALS, AND QUESTIONS (3d ed. 2010) (containing thirty-two short chapters on topics ranging from sentencing questions to *Miranda* warnings to probable cause searches without a higher level organizational framework), *with* RONALD J. ALLEN ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE: AN EXAMINATION OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS AND RELATED AREAS (3d ed. 1995) (organizing material into three larger topic areas: an

Maryland.[172] Nor do all bar exams ensure that such information is understood before admission to the bar.[173] Therefore, there can be no guarantee that new prosecutors either understand or have studied important procedural doctrines, such as *Brady*.

Students leaving law schools without proper knowledge is not a problem unique to prosecutors' offices.[174] However, unlike a law firm that could simply reduce attorneys' starting salaries to pay for training, most prosecutors' offices are small and do not provide large salaries to reduce.[175]

---

introduction to the criminal process, the right to counsel, and the right to be left alone).

[172] *See, e.g.*, ALLEN ET AL., *supra* note 171, at 96–97 (citing *Brady* in an edited version of a different case); ANDREW E. TASLITZ, CONSTITUTIONAL CRIMINAL PROCEDURE 771 (3d ed. 2007) (referencing *Brady* in a footnote as support for statement that "prosecutors are constitutionally obliged to turn over to the defense . . . all material, exculpatory evidence"); WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF 706 (4th ed. 2001) (citing *Brady* to indicate the "ethical responsibility of the prosecutor" in an edited version of a case on right to counsel). *But see* ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE 621–22 (2008) (containing an edited version of *Brady* in a section entitled "Constitutional Discovery: A One-Way Street").

[173] For instance, the Louisiana bar examination does not require knowledge of *Brady* to pass the criminal procedure or criminal law section of the bar, since such questions make up less than 10% of the points allocated on those sections from 1980 to 2010. Connick v. Thompson, 131 S. Ct. 1350, 1385–86 (2011) (Ginsburg, J., dissenting) (noting one would not even need to pass those two sections to pass the exam). This continues. No questions on *Brady* were asked on the 2011 written exam. *See Louisiana State Bar Exam*, LA. SUPREME CT. COMMITTEE B. ADMISSIONS (July 25, 2011), http://www.lascba.org/exams/Questions July2011.pdf. More broadly applicable, the National Conference of Bar Examiners, which develops the Multistate Bar Exam given in forty-eight states, does not include *Brady* or disclosure obligations in its list of covered topics for the criminal procedure section of the test. *See Subject Matter Outlines*, NAT'L CONF. B. EXAMINERS, http://www.ncbex.org/assets/media_files/Information-Booklets/SMOs-from-MBEIB2012.pdf (last visited Nov. 18, 2012).

[174] *See, e.g.*, Richard A. Posner, *In Memoriam: Bernard D. Meltzer (1914–2007)*, 74 U. CHI. L. REV. 435, 435, 437–38 (2007) (arguing that since the 1960s, law schools have moved from a focus on the profession to a focus on academic debate and this may diminish the preparation law schools provide to students); Ashby Jones & Joseph Palazzolo, *What's a First-Year Lawyer Worth?—Not Much, Say a Growing Number of Corporate Clients Who Refuse to Pay*, WALL ST. J., Oct. 17, 2011, at B1 (reporting that "more than 20% of . . . in-house legal departments . . . are refusing to pay for the work of first- or second-year attorneys, in at least some matters"); David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1 (indicating that law school graduates are not trained in the basic legal issues they will be working on in law firms and that many law firm clients refused to pay hourly rates of first- and second-year associates). *But see* Aaron N. Taylor, *Why Law School is Still Worth It*, NAT'L JURIST, Nov. 2011, at 4 (arguing that law school is still worth the expense and prepares law students for a financially lucrative career); Michelle Weyenberg, *Practice Ready*, NAT'L JURIST, Oct. 2011, at 16 (reporting that a number of law schools are changing how they teach to ensure law graduates are "practice-ready for the real world").

[175] The average prosecutor's office in the United States, including part-time offices with

The financial resources of these offices are not usually high, and are certainly less than even those of small private law firms.[176] Complicating matters, prosecutors' offices face both high turnover and recruitment troubles.[177] Taken together, these factors place greater import on the incomplete knowledge of recent law school graduates and other new prosecutor hires. Unfortunately, despite the need for formal training, most training for new prosecutors is "training by fire."[178]

The National District Attorneys Association (NDAA) has long advised the creation of training programs: "[P]rosecutors should participate in formal training and education programs [and] . . . should seek out continuing legal education opportunities that focus specifically on the

---

a part-time chief prosecutor, has 9 staff members (both attorneys and support staff) and a median salary of $85,000. PERRY, *supra* note 25, at 3. However, even large offices serving municipalities of over 1 million people have a median salary for the chief prosecutor of only $149,000, comparable to the starting salaries at many large law firms. *Id.* These numbers have stayed consistent over the last decade, CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 2001, at 2–3 (2002) (reporting an average office size of nine staff members with an $85,000 median salary for the chief prosecutor), but have grown since the mid-1990s, CAROL J. DEFRANCES & GREG W. STEADMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1996, at 1 (1998) (reporting the same average office size in 1996 but with a $64,000 median salary for the chief prosecutor).

[176] The median annual budget for prosecutors' offices in this country is $355,000. PERRY, *supra* note 25, at 1. This amount is roughly equivalent to the average revenue per lawyer in 2009 at small private law firms with between two and eight attorneys, which would indicate that even these small firms have significantly more resources at their disposal than the average prosecutor's office in this country. *The Survey of Law Firm Economics: How Small and Midsize Firms Weathered the Storm*, NAT'L L.J. (Aug. 30, 2010), http://pdfserver.amlaw.com/nlj/SLFE_graphics.pdf (reporting that the average revenue per partner at these small firms was $350,000).

[177] PERRY, *supra* note 25, at 3 (reporting that 24% of offices had problems recruiting new staff, while 35% of offices had problems retaining staff); *see also* Armstrong & Possley, *The Verdict*, *supra* note 26, at 1 (noting that Orleans Parish District Attorney Harry Connick Sr. has a staff of 80 prosecutors, 30 of whom are new every year). *But see* DEFRANCES, *supra* note 175, at 1 (comparing favorably the number of full-time chief prosecutors in 2001 when over three-fourths of all chief prosecutors were full-time, to 1990 when about half of chief prosecutors were full-time).

[178] Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 569 (1999). This mentor–mentee training may indeed be worse than formal training if young prosecutors are learning from those who have committed *Brady* violations for competitive advantage in the past and are unrepentant. For instance, would informal training from the prosecutors participating in the two-ton conviction "game" be good? *See supra* notes 87–90 and accompanying text. Professors Levine and Wright's qualitiative study published earlier in this Issue reinforces the importance prosecutors place on mentorship. Levine & Wright, *supra* note 39, at 1163 (reporting that one prosecutor said about a mentor "that's where my training came from").

prosecution function."[179] Other national organizations have also assisted in sharing training best practices since at least the 1970s.[180] For example, the ABA has recommended that "[t]raining programs should be established . . . for new personnel and for continuing education of the staff."[181] Yet, it does not appear that these suggestions have been implemented across the nation. In fact, young prosecutors—faced with heavy caseloads, lower pay than other attorneys, and long hours—often do not have the time to reflect or learn from their on-the-job training.[182]

Similarly, both the NDAA and the ABA suggest offices provide prosecutors with handbooks and manuals to assist the offices' work and "guide the exercise of prosecutorial discretion."[183] Apart from the Department of Justice, which produces the United States Attorneys' Manual,[184] there is little evidence that many state or local prosecutors' offices develop these manuals.[185] In the end, many new prosecutors, as Justice Ginsburg fears, are simply not receiving the training—either in law school or in their new positions—necessary to follow complex criminal procedures such as the *Brady* doctrine.

B. PROPOSALS TO OVERCOME MISCONDUCT HAVE NOT INCREASED TRAINING

Legal scholars, perceiving the situations outlined earlier in this Comment, have sought ways to reduce the number of prosecutorial misconduct issues that accused defendants face. These proposed solutions

---

[179] NATIONAL PROSECUTION STANDARDS, *supra* note 153, § 1-5.3.

[180] *See generally* NAT'L ASS'N ATT'YS GEN., COMM. OFFICE ATT'Y GEN., PROSECUTOR TRAINING AND ASSISTANCE PROGRAMS (1972); NAT'L ASS'N ATT'YS GEN., COMM. OFFICE ATT'Y GEN., TRAINING AND ASSISTANCE PROGRAMS FOR LOCAL PROSECUTORS (1978).

[181] ABA STANDARDS FOR CRIMINAL JUSTICE: THE PROSECUTION FUNCTION, Standard 3-2.6 (1993) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE].

[182] Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 498 (2009); Levenson, *supra* note 178.

[183] NATIONAL PROSECUTION STANDARDS, *supra* note 153, § 1-5.4; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 181, Standard 3-2.5 (recommending that the guide be public except for "confidential" matters).

[184] U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL (1997 & amdts.), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/ [hereinafter UNITED STATES ATTORNEYS' MANUAL].

[185] *See* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for A Broken System*, 2006 WIS. L. REV. 399, 422 n.123 (reporting that in thirty years of practice the author had not seen a published manual or guideline in several cities and counties throughout two states). *But see* Levine & Wright, *supra* note 39, at 1150 (reporting that one of the three surveyed prosecutorial offices had a "forty-page manual").

have implicated all three branches of government, indicating that the failures are not attributable to a single government branch's lack of political will. However, the proposals have failed because they have not overcome (or even addressed) the fact that prosecutors are not getting the training they need.

1. *Proposed Legislative Solutions: Civil Liability Against the Government*

State legislatures have sought to grant innocent people an avenue for redress for the damages caused by their wrongful convictions through either civil actions or cash payments.[186] This can be an appropriate way to provide some compensation for the wrongfully convicted since, as outlined *supra* Part II.A, individual prosecutors are immune from civil liability. Responding to advocates, at least half of all U.S. states [187] and the District of Columbia[188] have added a statutory scheme to provide some remuneration for those wrongfully incarcerated. State schemes typically either pay a set amount for the time spent incarcerated,[189] pay a restitution amount for lost wages,[190] create a state board to set an individual's

---

[186] *See, e.g.*, N.Y. CT. CL. ACT § 8-b(1) (McKinney 1989 & Supp. 2012).

[187] *Compensation for the Wrongly Convicted*, INNOCENCE PROJECT, http://www.innocenceproject.org/fix/Compensation.php (last visited Mar. 8, 2012) (advocating for $50,000 per year of wrongful incarceration to fulfill the moral and legal obligation to those exonerated). The Innocence Project notes that while twenty-seven states and the District of Columbia have passed laws allowing some form of compensation for the wrongly accused, not all of these states provide financial compensation. *Id.* Instead, some only provide modest training programs. *See* MONT. CODE ANN. § 53-1-214 (2011) (providing educational training for those exonerated by postconviction DNA testing).

[188] Those that were either unjustly convicted, pardoned for innocence, or incarcerated for longer than their maximum term can bring a claim against the city government. D.C. CODE § 2-421 to -423 (LexisNexis 2001).

[189] Amounts range across states from $50 per day to $50,000 per year. For example, Missouri provides $50 per day in restitution but only to those found innocent by a postconviction DNA trial. MO. ANN. STAT. § 650.058 (West 2006 & Supp. 2012). On the other end of the spectrum, Alabama provides $50,000 per year of incarceration, for someone convicted of a state felony or incarcerated pretrial for at least two years without individual fault for the conviction. ALA. CODE § 29-2-156, -159 (LexisNexis 2003). Most states are between these two amounts. *See, e.g.*, LA. REV. STAT. ANN. § 15:572.8 (2012) (providing $25,000 per year, up to a total of $250,000, for an incarcerated individual who can prove he is "factually innocent of the crime").

[190] These payments can either be based on the individual's past income or based on an average wage in the state. For example, New Jersey provides an individualized assessment paying the greater of $20,000 or double the person's annual income, plus reasonable attorney's fees for those who "did not commit" the crime. N.J. STAT. ANN. § 52:4C-2, -5 (West 2009). On the other hand, Utah provides wrongfully convicted persons the monetary equivalent of the average annual nonagricultural payroll wage in the state for up to 15 years. UTAH CODE ANN. § 78B-9-405 (LexisNexis 2008).

particular compensation based on his time incarcerated,[191] allow for a civil action,[192] or, in the case of Texas, use a combination of schemes.[193] States often condition such schemes on whether a person can prove her own innocence.[194] The federal government, too, provides a claim for a maximum of $50,000 per year of wrongful imprisonment.[195]

To the extent that these laws and tort actions are intended to go beyond repayment and disincentivize prosecutors from pursuing actions that lead to wrongful convictions by forcing a negative externality onto the government,[196] they have failed.[197] The payments do not come from local

---

[191] *See, e.g.*, CAL. PENAL CODE § 4900 (West 2011) (providing means for innocent or pardoned incarcerated individuals to make a claim to the California Victim Compensation and Government Claims Board for payment); WISC. STAT. ANN. § 775.05 (West 2009) (providing up to $25,000 in total equitable relief with a rate of compensation of $5,000 per year of imprisonment to individuals who successfully petition the Claims Board by demonstrating innocence).

[192] For instance, New York provides a wrongfully convicted person the right to bring a civil lawsuit within two years of a pardon or dismissal. N.Y. CT. CL. ACT § 8-b(7) (McKinney 1989 & Supp. 2012). The court is to provide the sum of money that the court determines is fair and reasonable to compensate someone who (1) was pardoned or whose conviction was reversed or vacated, and (2) can prove that she did not commit the actions charged and her conduct did not bring about those actions. *Id.* § 8-b. This scheme has been influential in other states. *See* W. VA. CODE ANN. § 14-2-13a (LexisNexis 2009) (mirroring New York's wrongful conviction statute, N.Y. CT. CL. ACT § 8-b). Most states with a civil cause of action provide a cap on damages. *See, e.g.*, ME. REV. STAT. ANN. tit. 14, § 8242 (2003) (limiting damages to $300,000); OHIO REV. CODE ANN. § 2743.48(E) (West 2006) (limiting damages to $40,330 for each year in prison pro rata).

[193] Texas provides either an administrative procedure, TEX. CIV. PRAC. & REM. CODE ANN. § 103.051 (West 2011), or suit, *id.* § 103.001, but not both. In either process, the statute requires a showing of innocence that led to a pardon or other judicial relief. *Id.* § 103.001(a).

[194] *See supra* notes 189–193 (reporting a number of states' innocence requirements); *see also e.g.*, CONN. GEN. STAT. ANN. § 54-102 (West 2009) (requiring a person demonstrate release from jail on the "grounds of innocence" in a claim to the Claims Commissioner); LA. REV. STAT. ANN. § 15:572.8 (2012) (requiring petitioner to prove that he is "factually innocent of the crime" of which he was convicted); MASS. ANN. LAWS ch. 258D, §§ 1, 5 (LexisNexis 2004 & Supp. 2012) (requiring an "erroneous felony conviction" demonstrated by (1) a governor's pardon expressing belief in the individual's innocence or (2) judicial relief granted to indicate that the person was not guilty); MISS. CODE. ANN. § 11-44-7 (West 2012) (requiring actual innocence and that the wrongfully convicted individual did not perjure himself or fabricate evidence to bring about conviction). *But see* IOWA CODE ANN. § 663A.1(1)(d) (West 1998) (conditioning restitutionary claims on whether a felony conviction was "vacated or dismissed, or . . . reversed").

[195] 28 U.S.C. § 2513(a)(1), (e) (2006) (increasing maximum to $100,000 per year when "unjustly sentenced to death").

[196] Adam I. Kaplan, *The Case for Comparative Fault in Compensating the Wrongfully Convicted*, 56 UCLA L. REV. 227, 241 (2008).

[197] *See generally* Deborah Mostaghel, *Wrongfully Incarcerated, Randomly*

prosecutors' offices. Indeed, the state funds come from a state-wide fund and do not influence the local electorate selecting the district attorney. More likely, these laws provide small compensation for those whom the state agrees have been wronged—a worthy goal but not something that reduces abuses of discretion or the causes of the incarceration in the first place, as proper training might.

Pre-*Connick*, lower courts entertained § 1983 suits against municipalities for failing to train prosecutors in an effort to create incentives by imposing civil liability on prosecutors' offices.[198] However, as discussed in the Introduction, last Term the Supreme Court made it unlikely that such a theory can be used successfully in the future.[199] Civil liability is simply not a viable route to incentivize prosecutors to get proper training.

2. *Proposed Executive Solutions: Criminal Liability for Prosecutors*

Another proposal for realigning prosecutor incentives has been the criminal prosecution of prosecutors who intentionally withhold material evidence.[200] However, there is no indication that this type of liability for prosecutors is a likely source of success, either. After all, to seek criminal punishment against a prosecutor, another prosecutor, likely in the same office, will have to bring charges. Intuitively, that seems unlikely, or at least a potential conflict of interest. History has shown this premise to be true. For instance, in the 1999 *Chicago Tribune* study previously mentioned, six prosecutors were charged during the twentieth century.[201]

Compensated—How to Fund Wrongful-Conviction Compensation Statutes, 44 IND. L. REV. 503, 505–09 (2011) (suggesting that it is easy to be convicted but much more difficult to be exonerated). *But see* Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 101 (arguing that governments care about the trust of their communities and these laws help to grade that trust).

[198] *See* Walker v. City of New York, 974 F.2d 293, 300 (2d Cir. 1992); *see also* City of Canton v. Harris, 489 U.S. 378, 392–93 (1989) (vacating and remanding to allow the appellant to make a failure-to-train claim for police department misconduct); Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 41 (2000) (applying failure-to-train theory more broadly).

[199] Connick v. Thompson, 131 S. Ct. 1350, 1356 (2011) (holding that a prosecutor's office was not liable in a failure-to-train § 1983 suit when there was only a single *Brady* violation by a single staff member, despite evidence that this was a widespread problem).

[200] *See, e.g.*, Genson & Martin, *supra* note 76, at 57; Krischke, *supra* note 47, at 434. These proposals would not necessarily require new laws; purposeful withholdings could meet state standards of fraud. There is also at least one federal criminal statute that could apply. *See* 18 U.S.C. § 242 (2006) (prohibiting a person from depriving citizens of their constitutional rights under color of law).

[201] Possley & Armstrong, *Prosecution on Trial*, *supra* note 78, at 1.

Of those, two were acquitted, two had their charges dropped before trial, and only two were convicted—of misdemeanors with fines of $500 each.[202]

Meanwhile, the DuPage County, Illinois case referenced *supra* Part II.B, where the prosecutors made up evidence in an effort to convict two innocent men of killing a ten-year-old girl, led to a jury acquittal of the prosecutor and police defendants.[203] Showing how difficult it is to prosecute a prosecutor, some jurors were seen celebrating after the verdict was announced with the accused prosecutors and police officers at a local steakhouse.[204]

The results in DuPage County are not surprising. More than one prosecutor has expressed the feeling that, "[w]e don't ask people to investigate their own family and prosecutors are like family."[205] So while prosecutors try to keep the "greater good . . . in mind . . . [, p]rosecutors just don't prosecute prosecutors."[206] Further, these same prosecutors, found by judges to have violated defendants' rights, were often later rewarded with promotions or judicial appointments despite their misconduct.[207] All told, while many professions have successful self-regulation mechanisms, prosecutors have not implemented any proposals that could effectively check their own members.[208]

3. *Proposed Judicial Solutions: Bar Disciplinary Actions or Judicial Pressure*

State bar agencies' disciplinary action has also been suggested as an

---

[202] *Id.*

[203] FRISBIE & GARRETT, *supra* note 77.

[204] Alden Long, *Illinois Prosecutors and Police Acquitted Despite Evidence They Framed Defendant*, WORLD SOCIALIST WEB SITE (June 16, 1999), http://www.wsws.org/articles/1999/jun1999/dupa-j16.shtml.

[205] Possley & Armstrong, *Prosecution on Trial*, *supra* note 78.

[206] *Id.*

[207] *See* Ken Armstrong & Maurice Possley, *Trial & Error: Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at 1 [hereinafter *Break Rules*] (chronicling numerous Chicago-area prosecutors' subsequent career advancements after acknowledged misconduct).

[208] *See, e.g.*, Corn & Gershowitz, *supra* note 20, at 421 (advocating for a military command structure within prosecutors' offices to deal with discretion in the chain of command); Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2710 (2010) (advocating for the medical industry's checklisting approach to find errors); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 177–80 (2008) (promoting increased transparency and reporting). Each of these proposals would require prosecutors to report on each other. In the end, to reduce violations, prosecutors will have to desire that result.

effective tool to reduce prosecutorial misconduct.[209] These proposals build on the ABA's Model Rules of Professional Conduct, which require a lawyer to accept the disciplinary authority of the jurisdiction of his or her bar admission.[210] The state bar office has the authority to discipline prosecutors who violate discovery rules or other ethical obligations. The state bar could also pass additional requirements and rules regulating local prosecutors. The bar office standards that apply to prosecutors are already written[211] and are therefore theoretically enforceable.

The evidence suggests that this is merely theoretical or potential, as ethics rules are not being enforced in any systematic way. A 1980 to 1986 study found that of forty-one state bar disciplinary agencies that responded, thirty-five states reported that no *Brady*-type complaints were filed during that period.[212] In the ten years following this study, another commentator found only seven new cases seeking discipline for *Brady* violations.[213] The results from these seven cases were as follows: one charge dismissed, two charges not proven, one private reprimand, one public reprimand, one suspension of three months, and one suspension of six months.[214] A 1999 *Chicago Tribune* study found similarly ineffective disciplinary treatment—in 381 homicide cases where there was prosecutorial misconduct, there was not a single state bar action against a prosecutor.[215] However, a recent review of disciplinary action for *Brady*-type prosecutorial misconduct suggests that state bar agencies may be taking these issues more seriously. For example, in one case, a prosecutor received a five-year probation and a four-year suspension from practice.[216]

---

[209] Kelly Gier, *Prosecuting Injustice: Consequences of Misconduct*, 33 AM. J. CRIM. L. 191, 205 (2006); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 11–13 (2009).

[210] MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2011).

[211] MODEL RULES OF PROF'L CONDUCT R. 8.4(c)–(d) (2011) ("It is professional misconduct for a lawyer to: [(1)] engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or (2)] engage in conduct that is prejudicial to the administration of justice.").

[212] Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 730–31 (1987).

[213] Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 881–82 (1997).

[214] *Id.* at 882.

[215] Armstrong & Possley, *The Verdict*, *supra* note 26.

[216] Brentford J. Ferreria, *Ethical Considerations in Discovery*, *in* DOING JUSTICE: A PROSECUTOR'S GUIDE TO ETHICS AND CIVIL LIABILITIES 87, 90–102 (Amie L. Clifford, ed., 2d ed. 2007) (collecting cases where discipline imposed included suspensions of various

The few reported prosecutorial misconduct punishments might be surprising. One may anticipate that even if prosecutors defend their own and defense attorneys do not pursue complaints because of a repeat-player concern, judges would have the independence and desire for fairness to censure prosecutors or at least to report violations. Indeed, for this reason, the ABA standards guide judges to "inform the appropriate authority" if they know of violations of professional conduct or substantially question an attorney's honesty or trustworthiness.[217]

As with other proposals to reduce prosecutorial misconduct, judges have not played this role. Judicial opinions often state the unacceptability of prosecutorial misconduct and its affront to justice, yet judges not only fail to refer the prosecutor's behavior to the "appropriate authority," they often do not name the prosecutor in their opinion.[218] Further, in the state of California, where a statute requires judges to refer prosecutors for discipline when a misconduct violation reverses a conviction, not a single judge followed this rule and referred a prosecutor for discipline.[219] Whether this failure has more to do with a shared background,[220] their desire not to deter prosecutors,[221] or their inability to enforce misconduct issues,[222] it is clear

---

lengths and public censures; suggesting that while punishment remains irregular, it is taking place); *see also* Duff Wilson, *Judge Says He Will Suspend Durham Prosecutor Immediately*, N.Y. TIMES, June 17, 2007, at A-15 (reporting on the disbarment of the district attorney who pursued false rape charges against the Duke lacrosse players).

[217] MODEL CODE OF JUDICIAL CONDUCT R. 2.15 (2008). Of course, one may question who the "appropriate authorities" are and whether such authorities would publically report either these referrals or subsequent disciplinary action. Despite such concerns, it seems unlikely that such referrals are taking place regularly, as discussed in the text accompanying notes 218–222.

[218] *Cf. In re* Attorney C., 47 P.3d 1167, 1168 n.2, 1172 (Colo. 2002) (holding that a prosecutor has an ethical duty to disclose exculpatory evidence and that the prosecutor did not do so, but that the court would not punish the prosecutor and thus refrained from using the person's name in the opinion).

[219] CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, FINAL REPORT 71 (2008), *available at* http://www.ccfaj.org/documents/CCFAJFinalReport.pdf (finding no case of a judge reporting prosecutorial misconduct, despite fifty-four identified situations where California law required the judge to report and identify repeat offenders).

[220] Many judges are former prosecutors. *See, e.g.*, Armstrong & Possley, *Break Rules*, *supra* note 207, at 1 (finding forty-two former Cook County prosecutors as judges after cases reversed because of misconduct); Stephanie Woodrow, *Senate Confirms Three Ex-Prosecutors as Federal Judges*, MAIN JUSTICE (Dec. 23, 2010, 1:23 PM), http://www.mainjustice.com/2010/12/23/senate-confirms-three-ex-prosecutors-as-federal-judges/ (reporting on Senate confirmation for three ex-prosecutors and thirteen ex-prosecutors that the Senate did not act to confirm).

[221] Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1517 (2009).

[222] *Cf.* Ronald J. Allen & Ethan A. Hastert, *From* Winship *to* Apprendi *to* Booker*:*

that judges have not held prosecutors accountable. Without accountability, there is no incentive for local offices to train new prosecutors on *Brady* doctrine concerns. The mentors of these new prosecutors have never seen this as a problem because they have gone unpunished. And so, the proposed judicial solution is yet one more regulatory mechanism that has failed to show prosecutors a straight path, which training could reveal.

IV. INCENTIVES TO INCREASE TRAINING AND IMPROVE *BRADY* DOCTRINE COMPLIANCE

Despite numerous proposals, as outlined in Part III.B, *Brady* violations continue. The challenge for a would-be reformer is trying to make national proposals for local problems. While one may desire a national policy like "open file" discovery[223] or reducing the disclosure standard below materiality,[224] neither is likely to become the constitutional doctrine of the United States.[225] Similar desires to create civil liability or to implement the other national proposals outlined *supra* Part III.B are bound to fail because they do not deal with the local training problem.

Instead, what is needed to begin addressing *Brady* violations is a series of modest changes that build on current state trends and realign local incentives to encourage more training. When a state increases training, one trend may finally be overcome: Justice Ginsburg's concern of inadequately trained prosecutors.

A. CHANGE STATE WRONGFUL CONVICTION FUNDS TO HOLD COUNTIES RESPONSIBLE

A growing number of states now have wrongful conviction funds.[226] In general, these funds provide a convicted felon who served jail time and can demonstrate innocence either a cause of action against the state or an

Constitutional Command or Constitutional Blunder?, 58 STAN. L. REV. 195, 195–98 (2005) (arguing the courts have failed in their effort to regulate criminal charges available to prosecutors, which may suggest that courts would also be unable to regulate prosecutors' behavior in criminal cases).

[223] Two states currently have "open-file" discovery—North Carolina and Ohio. *See* N.C. GEN. STAT. § 15A-903 (2011); OHIO R. OF CRIM. PROC. 16 (2010). It is likely that some prosecutors' offices in the country have also adopted this as a policy and procedure. *See* Strickler v. Greene, 527 U.S. 263, 276 (1999) (noting that a Virginia county maintains an open-file policy for discovery). Yet it seems unlikely that this number will grow to a majority of jurisdictions any time soon, even if one supports the policy.

[224] Welch & Taylor, *supra* note 95.

[225] *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("We have never held that the Constitution demands an open file policy . . . .").

[226] *See supra* notes 188–195 and accompanying text.

administrative payment from the state.[227] In reviewing the statutes cited, all state and federal schemes internalize costs of wrongful convictions on the general taxpayer of the larger body. For example, California's law provides a payment from the state government based on the California Victim and Compensation Government Claims Board's determination of a fair amount.[228] This payment will be made from the government in Sacramento and not the county that hired or elected the prosecutor who acted improperly. This holds true throughout the country. None of the statutes hold accountable the local prosecutor's office in the jurisdiction—such as a county—where the wrongful conviction occurred.

By placing liability for the schemes on the state government, legislatures may help the wrongfully convicted person receive monetary compensation for the injustice in his life. The legislatures have not, however, addressed the incentives of local prosecutors seeking convictions. In fact, they may further misalign incentives because the state may step in to defend the conviction on appeal—or, if the state's compensation scheme requires a wrongfully convicted person to initiate a civil lawsuit, it may step in to defend that suit—to avoid a payout from the state-based fund, reducing the county's civil litigation costs. This does not rationally align incentives. A more effective incentive would require the county both to pay the costs of monetary compensation and to pay the legal bills for defending these actions. In addition, consideration could be given to salary reductions or modest financial penalties for the individual attorney to get her "skin" in the game. While such a plan may increase the incentive to avoid inappropriate prosecutions, lawmakers would also need to consider whether it might lead to a reduction in legitimate prosecutions of difficult cases or deter new professional prosecutors.

Such cost shifting—whether to counties or to individual prosecutors—would not necessarily need to break the bank. While it is arguable that the larger the percentage of funds put on local officials, the larger the behavioral change would be, even small amounts can have an outsized impact.[229] State governments could continue to supply most of the funding

---

[227] *See supra* notes 188–195.

[228] CAL. PENAL CODE § 4900 (West 2011).

[229] *Cf.* Robert D. Pritchard & Michael I. Curtis, *The Influence of Goal Setting and Financial Incentives on Task Performance*, 10 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 175, 182 (1973) (pointing out that incentives need to reach at least a minimal level before they have an impact—$3 worked better than 2¢); Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541, 562–63 (2006) (suggesting that the most important factor for conservation incentives was not the amount of the incentive, but that the incentive is in place across a time period).

and require, for instance, that counties contribute a modest 25% of wrongful conviction liability. Creative state legislatures could build a graduated system where county offices would be liable for a small monetary amount at first, which would serve as a warning and encourage behavioral change, but be liable for larger amounts of funds if misconduct continued over time. Or the legislatures could consider safe harbors for meeting certain training paradigms. Either modification would allow the county to engage in retraining programs ensuring prosecutors know their respective requirements. It could also allow the state scheme to give credit for such retraining in the amount it charges the county.

Either way, the state would likely remain a backstop if a county were unable to compensate the wrongfully accused. Together, the plan would align the state, the county, the prosecutor (facing reduced salary), and the defendant and result in fewer improper prosecutions.

B. REQUIRED TRAINING PROGRAMS ON *BRADY* EVIDENCE

While most prosecutors' offices in this country are organized at the county level and receive a significant portion of their funding from county government, state funding to prosecutors' offices is increasing.[230] With additional money being spent on the offices, state governments should be able to have more influence on their county prosecutors' offices' operations. With that additional power, states should insist on mandatory training programs as suggested by both the ABA and the NDAA.[231] Ideally, this would be for all staff members in each office. But at a minimum, states should insist on mandatory training for elected or appointed head district attorneys before providing state funding to the offices. This would be a powerful check on such offices and ensure that the proper training for prosecutors is taking place.

One might suspect this proposal of having the same multi-actor problem that prevents "open file" or civil liability proposals from working. The major difference is that "open file" would likely require the action of forty-eight *legislatures*. This proposal would only require the state *agencies* charged with distribution of funds to the county prosecutors to put some standards on the money going out their doors. This allows a different political actor, with different incentives, to influence local behavior. In that

---

[230] In 2005, less than a third of county prosecutors' offices received only county funds. PERRY, *supra* note 25, at 4. This is a large decline since 1994, when nearly half of all county prosecutors' offices received only county funds. CAROL J. DEFRANCES ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS, 1994, at 2 (1996).

[231] *See supra* notes 180–185 and accompanying text.

way, this incentive could be used quickly to add financial pressures on local offices to learn what prosecutors should already know under *Brady*.

This training could be in conjunction with a state bar's continuing legal education requirements. While a few states do not require continuing legal education,[232] most do.[233] States should require prosecutors to complete either additional hours of training in criminal-procedure-specific topics or require all of their hours to be on such topics. This would not require significant time or financial costs; continuing legal education is available for prosecutors online.[234] The state just needs to make a point of requiring training so that all prosecutors receive it.

C. NATIONAL GUIDELINES AND PROCEDURES FOR PROSECUTORIAL OFFICES

As explained in Part III.A of this Comment, national legal organizations recommend that local prosecutorial offices develop their own guidelines and policies to deal with the issue of discretion.[235] But many offices are small, serving a population below 250,000 people, and have a median staff size of ten, including nonattorney support staff.[236] While well-intentioned, it may be an inefficient use of resources for each of these offices to develop the policies and procedures that go into a document like the United States Attorneys' Manual.[237] With small staffs lacking the same cadre of experts as the Department of Justice, duplicating these efforts is difficult.

Instead, a national standard handbook could provide a base document that prosecutors' offices could modify to suit their local operations. Such a document would discuss best practices for *Brady* decisions, including how the doctrine works, what a prosecutor's obligations are, and guidelines for other discretionary decisions. The NDAA is likely the best organization to

---

[232] *See, e.g.*, Randy Foreman, *Continuing Legal Education in Michigan*, MICH. B. J., Jan. 2008, at 44 (noting that Michigan is one of eight states that does not require continuing legal education); *Advancing Your Career*, MASS. B. ASS'N, http://www.massbar.org/cle (last visited Dec. 5, 2012) (noting that "Massachusetts is one of the few non-mandatory [continuing legal education] states").

[233] *See MCLE Information by Jurisdiction*, A.B.A., http://www.americanbar.org/publications_cle/mandatory_cle/mcle_states.html (last visited Mar. 1, 2012) (providing information about required continuing legal education in each state); *see also supra* note 232 (noting how non-mandatory states recognize their rarity).

[234] Thomas J. Charron, *NDAA Begins Distance Learning*, PROSECUTOR, May/June 2005, at 6.

[235] *See supra* notes 179–185 and accompanying text.

[236] PERRY, *supra* note 25, at 3.

[237] UNITED STATES ATTORNEYS' MANUAL, *supra* note 184.

take on such a project. The organization had thirteen training conferences scheduled over the last six months of 2012[238] and numerous educational publications.[239] The organization would also have their *National Prosecution Standards* to begin the project. But such a document would need to go beyond being merely an "aspirational guide to professional conduct in the performance of the prosecutorial function."[240] It would need to include hypothetical situations, potential considerations of a prosecutor who faces challenges in understanding the doctrine, and guidance to fulfill *Brady* obligations. It would be the standard handbook of how to actually do the job of being a prosecutor, not just suggestions for how to be a professional. This guide would have the added benefit of being usable by a single prosecutor even if her office was not providing necessary training, thus ensuring all national prosecutors knew the basic requirements of the job.

V. CONCLUSION

As a postscript to the *Connick v. Thompson* case, earlier this year and for the second time in seventeen years,[241] the Supreme Court reversed a conviction involving the Orleans Parish District Attorney's Office for failing to follow the *Brady* doctrine requirements in a criminal prosecution.[242] In the latest case, *Smith v. Cain*, the petitioner asked the Supreme Court to reverse a first-degree murder conviction based solely on the testimony of a single eyewitness.[243] Unknown to the petitioner's trial defense team, the prosecution knew that the sole eyewitness had previously stated on more than one occasion that he could not identify his attackers.[244] Furthering this injustice, a newspaper photo of the petitioner as a witness may have tainted the eyewitness's identification.[245]

Despite such a clear violation of *Brady*, prompting Justice Scalia to suggest during oral argument that the respondent's attorney could have

---

[238] *All Upcoming Courses*, NAT'L DISTRICT ATT'YS ASS'N, http://www.ndaa.org/upcoming_courses.html (last visited Aug. 17, 2012).

[239] *Publications*, NAT'L DISTRICT ATT'YS ASS'N, http://www.ndaa.org/publications.html (last visited Dec. 5, 2012).

[240] NATIONAL PROSECUTION STANDARDS, *supra* note 153, at 1.

[241] Kyles v. Whitley, 514 U.S. 419 (1995).

[242] Smith v. Cain, 132 S. Ct. 627, 631 (2012).

[243] Transcript of Oral Argument at 3, 10–11, Smith v. Cain, 132 S. Ct. 627 (2011) (No. 10-8145), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-8145.pdf (discussing the lack of any other evidence linking the petitioner to the crime).

[244] *Id.* at 3, 6, 46 (explaining that detective's notes say the eyewitness "could not ID; would not know them if I saw them; can't tell if had faces covered; didn't see anyone").

[245] *Id.* at 5.

"stop[ped] fighting" about the necessity to turn over the information,[246] the respondent's attorney continued to argue that this eyewitness's contradictory statements made no difference.[247] In a relatively short opinion, the Supreme Court reversed because the prosecution's only evidence was cast into doubt by undisclosed material information.[248]

While the Orleans Parish District Attorney's Office clearly is an extreme example of prosecutorial misconduct,[249] *Smith v. Cain* represents one of countless *Brady* violations that occur each year.[250] Unfortunately, this misconduct happens more often than one would like and the misconduct is not contained to a single jurisdiction.[251] Prosecutorial misconduct threatens the due process rights of defendants. Legal scholars have spent much time trying to develop ways to police prosecutors or reduce their discretion. Yet these proposals have either not been adopted or have not had an impact.[252]

As this Comment discusses, the problem remains that prosecutorial training is simply not adequate to prepare lawyers to apply doctrines as complex as *Brady*. In *Connick v. Thompson*, Justice Thomas, writing for the majority of the Court, indicated his belief that as legal professionals, prosecutors have the training and ethical obligation to learn on their own.[253] While this may be theoretically true, Justice Ginsburg is correct in dissent that law school and current legal structures are not enough. Additional training is necessary. Whether this training comes in response to financial pressure, threat of job loss or financial penalties, or the dissemination of national standards, more is needed. Only then can the nation ensure that "justice shall be done."[254]

---

[246] *Id.* at 51; *see also id.* at 49–50 (Justice Kagan asking respondent whether her "office ever consider[ed] just confessing error in this case? . . . We took cert a while ago. I'm just wondering whether you've ever considered confessing error.").

[247] *Id.* at 29, 33, 38, 43–46.

[248] Smith v. Cain, 132 S. Ct. 627, 631 (2012). By contrast, Justice Thomas, the lone dissenter, spent much longer reviewing the factual record, *id.* at 633–39, and suggested that the information withheld from Smith was not enough to "establish[] a reasonable probability that the cumulative effect of this evidence would have caused the jury to change its verdict." *Id.* at 633.

[249] Brief for Orleans Public Defenders Office as Amicus Curiae Supporting Petitioner at 5–10, Smith v. Cain, 132 S. Ct. 627 (2012) (No. 10-8145), 2011 WL 3706111 (detailing the long history of *Brady* abuses committed over the last twenty years by the Orleans Parish District Attorney's Office).

[250] *See supra* Part II.B.

[251] *Supra* Part II.B.

[252] *See supra* Part III.B.

[253] *See* Connick v. Thompson, 131 S. Ct. 1350, 1361–63 (2011).

[254] Berger v. United States, 295 U.S. 78, 88 (1935).

APPENDIX

The following is a list of all 202 ABA-accredited law schools[255] with information about whether they *require* criminal law and criminal procedure.

School	Law	Procedure	Website
Albany Law School	Y	N	http://www.albanylaw.edu/media/user/registrar/Class_of_2012_Requirements.pdf
American University, Washington College of Law	Y	Y	http://www.wcl.american.edu/registrar/required.cfm
Appalachian School of Law	Y	Y	http://www.asl.edu/The-Program/Academic-Standards.html#curriculum
Arizona State University, Sandra Day O'Connor College of Law	Y	N	http://www.law.asu.edu/currentstudents/CurrentStudents/Academics/JurisDoctorCurriculum/FirstYearRequiredCourses.aspx, http://www.law.asu.edu/currentstudents/CurrentStudents/Academics/JurisDoctorCurriculum/UpperDivisionCourseOfferings.aspx, http://www.law.asu.edu/admissions/Admissions/DegreePrograms/JDProgram.aspx
Atlanta's John Marshall Law School	Y	N	http://www.johnmarshall.edu/futurestudent/j-d-program/courses/
Ave Maria School of Law	Y	Y	http://www.avemarialaw.edu/academics/RequiredCurriculum
Barry University, Dwayne O. Andreas School of Law	Y	Y	http://www.barry.edu/law/future-students/academic-program/full-time-day-program.html
Baylor University, Sheila & Walter Umphrey Law Center	Y	Y	http://www.baylor.edu/law/ps/index.php?id=75581
Boston College Law School	Y	N	http://www.bc.edu/schools/law/services/academic/programs/curriculum/guide/
Boston University School of Law	Y	N	http://www.bu.edu/law/prospective/jd/first/curriculum.html, http://www.bu.edu/law/prospective/jd/courses/

[255] The ABA has accredited 202 schools; the three schools that have been approved provisionally—UC-Irvine, La Verne, and UMass-Dartmouth—are denoted with an asterisk. *See ABA-Approved Law Schools by Year*, A. B. A., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools/by_year_approved.html (last visited Nov. 26, 2012). However, the ABA's accreditation of the Justice Advocate General's Legal Center and School is not for general law students, but for those pursuing a master of laws degree in military law. *See Judge Advocate General Graduate Course*, JUDGE ADVOC. GEN. LEGAL CENTER & SCH., https://www.jagcnet.army.mil/8525736A005BC8F9/0/CE89C60813E536118525735500 51C3D8?opendocument (last visited Nov. 26, 2012). Due to this limited accreditation and purpose, the school is not included in this analysis.

Brigham Young University, J. Reuben Clark Law School	Y	N	http://www.law2.byu.edu/page/categories/student_resources/course_materials/How%20to%20Choose%20Your%20Courses%202011-12.pdf, http://www.law2.byu.edu/page/?id=prospective&cat=admissions&content=requirements_for_graduation#view
Brooklyn Law School	Y	N	http://www.brooklaw.edu/academics/curriculum/firstyearprogram.aspx, http://www.brooklaw.edu/academics/curriculum/coursesbyarea.aspx
California Western School of Law	Y	Y	http://www.cwsl.edu/main/default.asp?nav=academic_programs.asp&body=academic_programs/first_year_curriculum.asp, http://www.cwsl.edu/main/default.asp?nav=academic_programs.asp&body=academic_programs/upper_class_curriculum.asp
Campbell University, Norman Adrian Wiggins School of Law	Y	Y	http://law.campbell.edu/page.cfm?id=392&n=curriculum
Capital University Law School	Y	N	http://law.capital.edu/JD_Curriculum/
Case Western Reserve University School of Law	Y	N	http://law.case.edu/Academics/JDCurriculum.aspx, http://law.case.edu/Academics/Concentrations/CriminalLaw.aspx
Chapman University School of Law	Y	N	http://www.chapman.edu/law/programs/courses/required.asp, http://www.chapman.edu/law/academic-programs/course-descriptions/required.aspx
Charleston School of Law	Y	Y	http://www.charlestonlaw.edu/Academic-Affairs/Graduation-Requirements.aspx
Charlotte School of Law	Y	Y	http://www.charlottelaw.org/sites/default/files/academics/Full-Time%20Day%20Fall%20Beginning.pdf, http://www.charlottelaw.org/sites/default/files/academics/Full-Time%20Day%20Spring%20Beginning.pdf
Chicago-Kent College of Law, Illinois Institute of Technology	Y	N	http://www.kentlaw.edu/depts/acadadm/handbook.html#1.2, http://www.kentlaw.edu/depts/acadadm/handbook.html#11.2
City University of New York School of Law	Y	N	http://www.law.cuny.edu/academics/courses.html, http://www.law.cuny.edu/academics/courses/first-year.html
Cleveland State University, Cleveland-Marshall College of Law	Y	N	https://www.law.csuohio.edu/academics/curriculum/jdrequirements, https://www.law.csuohio.edu/academics/curriculum/coursedescriptions-ad#C
College of William and Mary, Marshall-Wythe Law School	Y	N	http://web.wm.edu/law/academics/programs/jd/requirements/firstyearcourses/index.php?svr=law, http://web.wm.edu/law/academics/programs/jd/electives/courses/bytitle/index.php?svr=law
Columbia University Law School	Y	N	https://www.law.columbia.edu/jd_applicants/curriculum/1l, http://www.law.columbia.edu/courses/browse?global.c_id=3011
Cornell University Law School	Y	N	http://support.law.cornell.edu/students/forms/current_Course_Descriptions.pdf

Creighton University School of Law	N	Y	http://www.creighton.edu/law/academics/curriculum/index.php, http://www.creighton.edu/law/academics/coursedescriptions/index.php
DePaul University School of Law	Y	N	http://www.law.depaul.edu/programs/general%5Fjd/, http://www.law.depaul.edu/programs/course_descriptions.asp
Detroit College of Law (now Michigan State University College of Law)	Y	N	http://www.law.msu.edu/academics/ac-juris-sched.html, http://www.law.msu.edu/academics/courses.php?let1=C&let2=D
Dickinson School of Law (now Pennsylvania State University, The Dickinson School of Law)	Y	Y	http://law.psu.edu/academics/jd/first_year
Drake University Law School	Y	N	http://www.law.drake.edu/academics/?pageID=requiredCourses, http://www.law.drake.edu/academics/?pageID=coursesCD
Drexel University Earle Mack School of Law	Y	N	http://earlemacklaw.drexel.edu/studentLife/studentAffairs/graduation_requirements/; http://earlemacklaw.drexel.edu/academics/offerings/
Duke University School of Law	Y	N	http://www.law.duke.edu/curriculum/firstyr, http://www.law.duke.edu/curriculum/courseinfo/courses?upper=checked
Duquesne University School of Law	Y	Y	http://www.duq.edu/academics/schools/law/academic-programs/curriculum-outline
Elon University School of Law	Y	Y	http://www.elon.edu/e-web/law/academics/curriculum.xhtml
Emory University School of Law	Y	N	http://www.law.emory.edu/academics/academic-catalog/course-descriptions.html
Faulkner University, Thomas Goode Jones School of Law	Y	Y	http://www.faulkner.edu/JSL/academics/documents/revisedcurriculum.pdf
Florida A&M University College of Law	Y	N	http://law.famu.edu/go.cfm/do/Page.View/pid/50/t/Required-Course-Sequence; http://law.famu.edu/go.cfm/do/Page.View/pid/59/t/Elective-Courses
Florida Coastal School of Law	Y	Y	https://www.fcsl.edu/sites/fcsl.edu/files/audit%20Fall%2006%20and%20after%20_Skills_%20Curriculum%20Requirements-90%20credits-UPDATE2.pdf
Florida International University College of Law	Y	N	http://law.fiu.edu/academic-information/college-of-law-curriculum/; http://catalog.fiu.edu/2011_2012/Graduate/College_of_Law/Graduate_College_of_Law.pdf
Florida State University College of Law	Y	N	http://www.law.fsu.edu/academic_programs/jd_program/first_year.html, http://www.law.fsu.edu/academic_programs/curriculum/course_descriptions.html
Fordham University School of Law	Y	N	http://law.fordham.edu/registrar/18255.htm

George Mason University School of Law	Y	N	http://www.law.gmu.edu/academics/degrees/jd/jd_curriculum_2012_later, http://www.law.gmu.edu/academics/concentrations/crim_law
Georgetown University Law Center[256]	Y	N	http://www.law.georgetown.edu/academics/academic-programs/jd-program/full-time-program/first-year.cfm
Georgia State University College of Law	Y	N	http://law.gsu.edu/students/4755.html#fulltime
Golden Gate University School of Law	Y	Y	http://law.ggu.edu/media/law/documents/jd-prospectus-2013.pdf
Gonzaga University School of Law	Y	N	http://www.law.gonzaga.edu/academics/curriculum/required/
Hamline University School of Law	Y	N	http://law.hamline.edu/jd/course_descriptions.html, http://law.hamline.edu/course_descriptions.html
Harvard University Law School	Y	N	http://www.law.harvard.edu/academics/degrees/jd/index.html
Hofstra University School of Law	Y	N	http://law.hofstra.edu/academics/degreeprograms/jdprogram/fulltimejd/firstyear/index.html,
Howard University School of Law	Y	N	http://www.law.howard.edu/law_school_curriculum
Indiana University School of Law-Bloomington	Y	N	http://www.law.indiana.edu/degrees/doc/academic_regulations.pdf, http://apps.law.indiana.edu/degrees/courses/lookup.asp
Indiana University School of Law-Indianapolis	Y	N	http://indylaw.indiana.edu/courses/required.cfm, http://indylaw.indiana.edu/courses/elective.cfm
Inter American University of Puerto Rico, School of Law	Y	Y	http://www.derecho.inter.edu/inter/sites/default/files/documentos_generales/catalogo_2011.pdf
Lewis and Clark College Law School	N	Y	https://www.lclark.edu/live/files/8443
Liberty University School of Law	Y	Y	http://law.liberty.edu/index.cfm?PID=8966
Louisiana State University, Paul M. Hebert Law Center	Y	Y	http://www.law.lsu.edu/index.cfm?geaux=academics.requiredandelectivecourses, http://www.law.lsu.edu/globals/sitelibraries/academics/lsulawcatalog/LSULawCatalog_20122013.pdf
Loyola Law School-Los Angeles	Y	N	http://intranet.lls.edu/tracks/required.html
Loyola University-New Orleans College of Law	Y	Y	http://2009bulletin.loyno.edu/law/academic_regs/contents.php#req_course_ft, http://2009bulletin.loyno.edu/law/courses/electives_law.php, http://www.loyno.edu/~medina/descrip.htm
Loyola University-Chicago School of Law	Y	N	http://luc.edu/law/registrar/degree_requirements/guidelines.html,http://www.luc.edu/law/courses/criminal.html

[256] Georgetown features two tracks for first-year students—one requiring a traditional criminal law course and the other requiring a criminal justice seminar. *See First-Year Information*, GEORGETOWN L., http://www.law.georgetown.edu/academics/academic-programs/jd-program/full-time-program/first-year.cfm (last visited Nov. 26, 2012).

Marquette University Law School	Y	N	http://law.marquette.edu/current-students/graduation-requirements,
McGeorge School of Law, The University of the Pacific	Y	Y	http://www.mcgeorge.edu/Future_Students/JD_Programs/Requirements_and_Curriculum/First-Year_Required_Curriculum.htm, http://www.mcgeorge.edu/Future_Students/JD_Programs/Requirements_and_Curriculum/Upper_Level_Curriculum.htm
Mercer University, Walter F. George School of Law	Y	N	http://law.mercer.edu/academics/registrar/required15, http://www2.law.mercer.edu/courses/index.cfm?blockid=7
Mississippi College School of Law	Y	N	http://law.mc.edu/academics/first-year-curriculum/, http://law.mc.edu/academics/courses/#Criminal
New England Law/Boston	Y	Y	http://www.nesl.edu/students/required_courses.cfm
New York Law School	Y	N	http://www.nyls.edu/academics/catalog_and_schedule/required_courses, http://www.nyls.edu/academics/catalog_and_schedule/alpha_list
New York University School of Law	Y	N	http://www.law.nyu.edu/academics/courses/requiredfirstyearcourses/index.htm, http://its.law.nyu.edu/courses/index.cfm?sortLabel=Semester&searchButton=1&keyword=&coursetitle=&viewFirstYear=&CourseInstructorId=&CourseType=&AreasOfStudyID=11&CourseTerm=&ExactCode=&Block=&CourseCredits=&startTime=&endTime=&location=&pastSemesters=Y&page=2
North Carolina Central University School of Law	Y	N	http://law.nccu.edu/academics/curriculum-description/first-year-courses/, http://law.nccu.edu/academics/curriculum-description/recommended-courses/
Northeastern University School of Law	Y	N	http://www.northeastern.edu/law/academics/curriculum/first-year/index.html, http://www.northeastern.edu/law/academics/curriculum/upper-level/index.html
Northern Illinois University College of Law	Y	N	http://law.niu.edu/law/academic/first_year/index.shtml, http://law.niu.edu/law/academic/courses1.shtml
Northern Kentucky University, Salmon P. Chase College of Law	Y	Y	http://chaselaw.nku.edu/academics/full_time_day.php, http://chaselaw.nku.edu/academics/course_offerings.php
Northwestern University School of Law	Y	N	http://www.law.northwestern.edu/academics/jd/#gradreqs
Nova Southeastern University, Shepard Broad Law Center	Y	N	http://nsulaw.nova.edu/students/course-descriptions.cfm
Ohio Northern University Claude W. Pettit College of Law	Y	N	http://law.onu.edu/sites/default/files/Graduation%20Check%20List%20(Updated%2010-22-12).pdf
Oklahoma City University College of Law	Y	Y	http://law.okcu.edu/wp-content/uploads/2012/08/REQUIRED-CURRICULUM-01-July-20121.pdf
Pace University School of Law	Y	N	http://www.law.pace.edu/juris-doctor-program, http://www.law.pace.edu/course-descriptions-0
Pepperdine University School of Law	Y	Y	http://law.pepperdine.edu/academics/content/catalog2012.pdf, page 156

Phoenix School of Law	Y	Y	http://www.phoenixlaw.edu/downloads/Student%20Handbook.pdf
Pontifical Catholic University of Puerto Rico School of Law	Y	Y	http://spserver2008.pucpr.edu/derecho/index.php?option=com_content&view=article&id=145%3Acatalogo-2010-2012&catid=909%3Acatalogo&Itemid=199&lang=en
Quinnipiac University School of Law	Y	N	http://www.quinnipiac.edu/prebuilt/pdf/law_catalog2012-2013.pdf
Regent University School of Law	Y	N	http://www.regent.edu/acad/schlaw/academics/req_courses.cfm, http://www.regent.edu/acad/schlaw/student_life/docs/course descriptions.pdf
Roger Williams University School of Law	Y	Y	http://law.rwu.edu/academics/curriculum
Rutgers School of Law - Newark	Y	N	http://law.newark.rutgers.edu/admissions-financial-aid/first-year-curriculum-overview, http://law.newark.rutgers.edu/students/master-course-list#anchor
Rutgers School of Law-Camden	Y	N	http://camlaw.rutgers.edu/rutgers-law-school-rules-regulations-and-policies#rule6.1, http://camlaw.rutgers.edu/students/schedules/classes.shtml
Saint Louis University School of Law	Y	N	http://www.slu.edu/x48935.xml, http://www.slu.edu/x48939.xml
Samford University, Cumberland School of Law	Y	N	http://cumberland.samford.edu/students/student-records/course-requirements, http://cumberland.samford.edu/courses
Santa Clara University School of Law	Y	N	http://law.scu.edu/bulletin/academic-policies.cfm#Graduation, http://law.scu.edu/academics/courses/criminal-procedure-310.cfm
Seattle University School of Law	Y	N	http://www.law.seattleu.edu/Academics/Curriculum/Academic_Requirements.xml, http://www.law.seattleu.edu/Academics/Curriculum/Course_Offerings.xml
Seton Hall University School of Law	Y	N	http://law.shu.edu/Students/academics/curriculum/JD-Curriculum-Requirements.cfm, http://law.shu.edu/Students/academics/Course-Catalogue.cfm?subjectName=Criminal%20Law%20and%20Procedure
South Texas College of Law	Y	N	http://www.stcl.edu/admissions/student_status.html, http://www.stcl.edu/registrar/StudentHandbk2011-12revOct2011.pdf
Southern Illinois University School of Law	Y	N	http://www.law.siu.edu/Current%20Students/PDF/crsrqt.pdf
Southern Methodist University, Dedman School of Law	Y	N	http://www.law.smu.edu/Prospective-Students/J-D--Programs/Full-Time-J-D--Curriculum.aspx, http://smu.edu/catalogs/2009/dedman/law/curriculum.asp#mba
Southern University Law Center	Y	Y	http://www.sulc.edu/Departments/Enrollment/Registration/Catalog.html, http://www.sulc.edu/Departments/Enrollment/pdf/49337_SU_Catalog%20lowres.pdf
Southwestern Law School	Y	Y	http://www.swlaw.edu/academics/jd/dayprogram

St. John's University School of Law	Y	N	http://www.stjohns.edu/academics/graduate/law/academics/courses/C.stj, http://www.stjohns.edu/download.axd/591364a685314495845dcc7840965c15.pdf?d=Student%20Handbook%202011-12%20v5
St. Mary's University School of Law	Y	N	http://www.stmarytx.edu/law/index.php?site=firstYearCurriculum, http://www.stmarytx.edu/law/index.php?site=secondThirdYearCurriculum
St. Thomas University School of Law (Florida)	Y	N	http://www.stu.edu/LinkClick.aspx?fileticket=NrKTJKIUVpo%3d&tabid=850
Stanford University Law School	Y	N	http://www.law.stanford.edu/program/courses/#2nd-3rd_year_program, http://www.law.stanford.edu/program/courses/#1st_year_curriculum
Stetson University School of Law	Y	N	http://www.law.stetson.edu/academics/curriculum/required-curriculum.php#fulltimerequired, http://www.law.stetson.edu/offices/registrar/course-descriptions.php#electives
Suffolk University Law Center	Y	N	http://www.law.suffolk.edu/academic/jd/required.cfm, http://www.law.suffolk.edu/academic/jd/electives.cfm?Let=C
Syracuse University College of Law	Y	N	http://www.law.syr.edu/academics/course-descriptions/course-list.aspx?cat=19, http://www.law.syr.edu/academics/course-descriptions/course-list.aspx?cat=40
Temple University, James E. Beasley School of Law	Y	N	http://www.law.temple.edu/Pages/Current_Students/Current_Acad_Grad_Req.aspx, http://www4.law.temple.edu/courseinfo/CourseDescriptions.aspx
Texas Southern University, Thurgood Marshall School of Law	Y	Y	http://www.tsulaw.edu/academics/curriculum.html
Texas Tech University School of Law	Y	Y	http://www.depts.ttu.edu/officialpublications/LawSchool/index.html
Texas Wesleyan University School of Law	Y	Y	http://law.txwes.edu/CurrentStudents/CourseDescriptions/CourseDescriptions201112/tabid/1578/Default.aspx#lockstep
The Catholic University of America, Columbus School of Law	Y	N	http://www.law.edu/res/docs/registrar/Degree%20Requirements%20and%20FAQ.pdf
The George Washington University Law School	Y	N	http://www.law.gwu.edu/Academics/curriculum/Pages/elective.aspx, http://www.law.gwu.edu/Academics/curriculum/Pages/required.aspx
The John Marshall Law School (Chicago)	Y	N	http://www.jmls.edu/registrar/pdf/required-course-checklist.pdf
The Ohio State University, Michael E. Moritz College of Law	Y	N	http://moritzlaw.osu.edu/academics/graduation_requirements.php
The University of Akron School of Law	Y	N	http://www.uakron.edu/dotAsset/1837471.pdf, http://www.uakron.edu/law/curriculum/courseAE.dot.

The University of Alabama School of Law	Y	N	http://www.law.ua.edu/academics/
The University of Arizona, James E. Rogers College of Law	N	Y	http://www.law.arizona.edu/current_students/academic_programs/courses_master_list.cfm
The University of Arkansas School of Law-Fayetteville	Y	N	http://catalogofstudies.uark.edu/4362.php
The University of Montana School of Law	Y	N	http://www.umt.edu/law/students/firstyear.php
The University of New Mexico School of Law	Y	N	http://lawschool.unm.edu/academics/curriculum/one-L/index.php, http://lawschool.unm.edu/academics/curriculum/upperclass/index.php
The University of Tennessee College of Law	Y	N	http://law.utk.edu/academic-programs/jd-requirements/
The University of Texas School of Law	Y	N	https://www.utexas.edu/law/academics/degrees/jd.html
The University of Tulsa College of Law	Y	N	http://www.utulsa.edu/academics/colleges/college-of-law/Academic%20Programs/Juris%20Doctor%20Program.aspx
Thomas Jefferson School of Law	Y	Y	http://www.tjsl.edu/academics/curriculum-requirements/required-courses
Thomas M. Cooley Law School	Y	Y	http://www.cooley.edu/prospective/required.html
Touro College, Jacob D. Fuchsberg Law Center	Y	N	http://www.tourolaw.edu/Academics/?pageid=65
Tulane University School of Law	Y	N	http://www.law.tulane.edu/tlsAcademicPrograms/index.aspx?id=1732, http://www.law.tulane.edu/tlsAcademicPrograms/courseDetail.aspx?&__taxonomyid=2&__ecmcurrentpage=3, http://www.law.tulane.edu/tlsAcademicPrograms/courseDetail.aspx?&__taxonomyid=2&__ecmcurrentpage=4
University at Buffalo Law School	Y	N	http://law.buffalo.edu/Academic_Programs_And_Research/default.asp?firstlevel=0&secondlevel=2&filename=jd_program#first, http://law.buffalo.edu/Academic_Programs_And_Research/default.asp?filename=conCrimLaw#2
University of Arkansas at Little Rock, William H. Bowen School of Law	Y	N	http://ualr.edu/law/academics/curriculum/required-curriculum/, http://ualr.edu/law/academics/curriculum/course-descriptions/
University of Baltimore School of Law	Y	N	http://law.ubalt.edu/template.cfm?page=27, http://law.ubalt.edu/template.cfm?page=28, http://law.ubalt.edu/downloads/law_downloads/2011-2012%20Catalog%20Final%206-29.pdf
University of California-Berkeley, College of Law	Y	N	http://www.law.berkeley.edu/162.htm, http://www.law.berkeley.edu/8063.htm
University of California-Davis, School of Law	Y	N	http://www.law.ucdavis.edu/current/registrar/curriculum.html, http://www.law.ucdavis.edu/current/registrar/curriculum-upper-division.html
University of California-Hastings, School of Law	Y	N	http://www.uchastings.edu/academics/catalog/docs/CAT11-12.pdf

University of California-Irvine School of Law*	Y	N	http://www.law.uci.edu/registrar/curriculum.html, http://apps.law.uci.edu/CourseCatalog/Search.aspx
University of California-Los Angeles, School of Law	Y	N	http://www.law.ucla.edu/academic-programs-and-courses/curriculum/Pages/first-year-curriculum.aspx
University of Chicago Law School	Y	N	http://www.law.uchicago.edu/courses
University of Cincinnati College of Law	Y	N	http://www.law.uc.edu/prospective-students/academic-programs/first-year-curiculum, http://www.law.uc.edu/prospective-students/academic-programs/upper-level-experience, http://www.law.uc.edu/prospective-students/academic-programs/areas-study/criminal-law
University of Colorado Law School	Y	N	http://www.colorado.edu/law/academics/requirements.htm
University of Connecticut School of Law	Y	N	http://www.law.uconn.edu/student-handbook/academic-regulations/academic-requirements/requirements-juris-doctor-degree
University of Dayton School of Law	Y	N	http://www.udayton.edu/law/academics/jd_program/core_courses.php, http://community.udayton.edu/law/academics/curriculum/elective_courses.php
University of Denver Sturm College of Law	Y	N	http://www.law.du.edu/index.php/admissions/jd-admissions/degree-requirements, http://www.law.du.edu/index.php/registrar/course-information/required-courses/academic-requirements/required-course-list, http://www.law.du.edu/forms/registrar/course-list.cfm
University of Detroit Mercy School of Law	Y	N	http://www.law.udmercy.edu/index.php/academics1/required-and-bar-related-courses
University of Florida, Fredric G. Levin College of Law	Y	N	http://www.law.ufl.edu/academics/degree-programs/juris-doctor/course-selection
University of Georgia School of Law	Y	N	http://www.law.uga.edu/required-courses
University of Hawai'i, William S. Richardson School of Law	Y	N	http://www.law.hawaii.edu/jd/degree-requirements
University of Houston Law Center	Y	N	http://www.law.uh.edu/academic/jd.html, http://www.uh.edu/grad_catalog/law/law_courses.html
University of Idaho College of Law	Y	N	http://www.uidaho.edu/law/academics/courseanddescription/firstyearcourses, http://www.uidaho.edu/~/media/Files/orgs/Law/academics/Administration/Catalog-Law-Student-Handbook-2012-2013-9-4-12.ashx
University of Illinois College of Law	Y	N	http://www.law.illinois.edu/academics/curriculum
University of Iowa College of Law	Y	N	http://www.law.uiowa.edu/academics/, http://www.law.uiowa.edu/documents/courses.pdf
University of Kansas School of Law	Y	N	http://www.law.ku.edu/courses, http://www.law.ku.edu/requiredcourses

University of Kentucky College of Law	Y	N	http://www.law.uky.edu/index.php?pid=171
University of La Verne College of Law*	Y	Y	http://law.laverne.edu/wp-content/uploads/2010/02/Catalog-2011-12-Final.pdf
University of Louisville, Louis D. Brandeis School of Law	Y	N	http://www.law.louisville.edu/academics/1L, http://www.law.louisville.edu/academics/graduation-requirements
University of Maine School of Law	Y	N	http://mainelaw.maine.edu/academics/academic-program/list-courses.html
University of Maryland School of Law	Y	N	http://www.law.umaryland.edu/academics/program/, http://www.law.umaryland.edu/academics/program/curriculum/catalog/index.html
University of Massachusetts School of Law-Dartmouth*	Y	Y	http://www.umassd.edu/law/academics/curriculum/
University of Memphis School of Law	Y	Y	http://www.memphis.edu/law/currentstudents/coursestudy.php
University of Miami School of Law	N	Y	http://www.law.miami.edu/currentstudents/degree_requirements/jd_first_year_requirements.php?op=1
University of Michigan Law School	Y	N	http://web.law.umich.edu/_ClassSchedule/CourseList.asp
University of Minnesota Law School	Y	N	http://www.law.umn.edu/prospective/courseguide.html#s11, http://www.law.umn.edu/prospective/curriculum2.html
University of Mississippi School of Law	Y	N	http://law.olemiss.edu/academics-programs/j-d-program/curriculum/
University of Missouri-Columbia, School of Law	Y	Y	http://law.missouri.edu/academics/requirements.html#required
University of Missouri-Kansas City School of Law	Y	Y	http://law.umkc.edu/academics/j-d-requirements.asp
University of Nebraska College of Law	Y	N	http://law.unl.edu/curriculum#upper, http://law.unl.edu/curriculum#first
University of Nevada-Las Vegas, William S. Boyd School of Law	Y	N	http://law.unlv.edu/academics/courses/sample-curriculum.html#sample-fulltime; http://law.unlv.edu/academics/courses/list-of-electives.html
University of New Hampshire School of Law	N	Y	http://law.unh.edu/academics/jd-degree
University of North Carolina at Chapel Hill School of Law	Y	N	http://www.law.unc.edu/academics/courses/default.aspx; http://www.law.unc.edu/academics/courses/firstyear/
University of North Dakota School of Law	Y	N	http://law.und.edu/academics/courses.cfm, http://law.und.edu/students/policy-manual/general-requirements.cfm
University of Notre Dame Law School	Y	N	http://law.nd.edu/academics/degrees/j-d/first-year/, http://law.nd.edu/academics/degrees/j-d/second-and-third-years/
University of Oklahoma College of Law	Y	Y	http://jay.law.ou.edu/studentinfo/coursedescription/courses.cfm?action=udr, http://jay.law.ou.edu/studentinfo/coursedescription/courses.cfm?action=fyr
University of Oregon School of Law	Y	N	http://law.uoregon.edu/wp-content/uploads/2011/08/2012-13-Law-Course-Catalog.pdf

University of Pennsylvania Law School	Y	N	https://www.law.upenn.edu/academics/degrees.php, https://www.law.upenn.edu/academics/jd-requirements.php
University of Pittsburgh School of Law	Y	N	http://www.law.pitt.edu/academics/courses/catalog, http://www.law.pitt.edu/academics/courses/catalog/1L, http://www.law.pitt.edu/academics/juris-doctor
University of Puerto Rico School of Law	Y	N	http://ls-pt1.law.upr.edu/pls/portal/url/ITEM/BE204121592847FEA312916D7B6F8BDB
University of Richmond, T.C. Williams School of Law	Y	N	http://law.richmond.edu/academics/curriculum/first-year.html, http://law.richmond.edu/academics/curriculum/upper-level.html
University of San Diego School of Law	Y	N	http://www.sandiego.edu/law/academics/jd/curriculum/first_year_courses.php, http://www.sandiego.edu/law/academics/jd/curriculum/graduation_requirements.php
University of San Francisco School of Law	Y	N	http://www.usfca.edu/law/jd/curriculum/fulltime/
University of South Carolina School of Law	Y	N	http://law.sc.edu/academics/jd_description.shtml
University of South Dakota School of Law	Y	Y	http://www.usd.edu/law/academics.cfm, http://www.usd.edu/law/upload/CurriculumGuidebook.pdf
University of Southern California, Gould School of Law	Y	N	http://lawweb.usc.edu/why/academics/curriculum/firstYearCurriculum.cfm, http://lawweb.usc.edu/why/academics/curriculum/upperDivision.cfm
University of St. Thomas School of Law (Minnesota)	Y	N	http://www.stthomas.edu/law/academics/courses/firstyearcourses/, http://www.stthomas.edu/law/academics/courses/upperlevelcourses/
University of the District of Columbia, David A. Clarke School of Law	Y	Y	http://www.law.udc.edu/?page=FullTimeCurriculum
University of Toledo College of Law	Y	N	http://law.utoledo.edu/students/pdf/CourseDescriptions.pdf
University of Utah, S.J. Quinney College of Law	Y	N	http://www.law.utah.edu/current/course-list/, http://www.law.utah.edu/student-handbook/graduation-requirements/#required
University of Virginia School of Law	Y	N	http://www.law.virginia.edu/html/academics/curriculum.htm
University of Washington School of Law	Y	N	http://www.law.washington.edu/CourseCatalog/CourseList.aspx?YR=2011&Tp=LEVEL&Cd=FIRSTYEAR, http://www.law.washington.edu/CourseCatalog/CourseList.aspx?YR=2011&Tp=TOPIC&Cd=PUBCRIMINAL
University of Wisconsin Law School	Y	Y	http://www.law.wisc.edu/prospective/firstyear.htm
University of Wyoming College of Law	Y	N	http://www.uwyo.edu/law/current-students/courses-and-curriculum/curriculum.html#First%20Year%20Required%20Curriculum
Valparaiso University School of Law	Y	N	http://www.valpo.edu/law/current-students/law-registrar/c-resources/c-courses-2

Vanderbilt University Law School	Y	N	http://law.vanderbilt.edu/academics/curriculum/elective-courses/index.aspx, http://law.vanderbilt.edu/academics/curriculum/index.aspx
Vermont Law School	Y	N	http://www.vermontlaw.edu/Academics/Degrees/Juris_Doctor_%28JD%29/First-Year_Curriculum/First-Year_Spring_Semester.htm, http://www.vermontlaw.edu/academics/degrees/juris_doctor_%28jd%29/jd_courses.htm?page=3
Villanova University School of Law	Y	N	http://www.law.villanova.edu/Academics/Degree%20Programs/JD/First%20Year.aspx
Wake Forest University School of Law	Y	N	http://academics.law.wfu.edu/courses/, http://academics.law.wfu.edu/degree/jd/
Washburn University School of Law	Y	Y	http://washburnlaw.edu/curriculum/
Washington and Lee University School of Law	Y	N	http://law.wlu.edu/academics/page.asp?pageid=1100, http://law.wlu.edu/academics/page.asp?pageid=1102
Washington University School of Law	Y	N	http://law.wustl.edu/registrar/pages.aspx?id=8542; http://law.wustl.edu/academics/pages.aspx?id=178#1L
Wayne State University Law School	Y	N	http://law.wayne.edu/courses/required-first-year.php, http://law.wayne.edu/courses/elective-upper-level.php
West Virginia University College of Law	Y	N	http://law.wvu.edu/academics/courses_and_descriptions, http://law.wvu.edu/academics/curriculum
Western New England College School of Law	Y	N	http://assets.wne.edu/21/program_of_study_revised.pdf, http://www1.law.wne.edu/current/index.cfm?selection=doc.8301&courselisting=alpha&term=Spring
Western State University College of Law	Y	Y	http://content.wsulaw.edu/assets/Academics/Syllabi-Booklists/2011/program-of-study.pdf
Whittier Law School	Y	Y	http://www.law.whittier.edu/index/build/degrees-requirements/full-time-day-division/
Widener University School of Law- Harrisburg	Y	Y	http://law.widener.edu/Gateway/CurrentStudents/HarrisburgStudents/AcademicResources/Curriculum.aspx
Widener University School of Law-Wilmington (Delaware)	Y	Y	http://law.widener.edu/Gateway/CurrentStudents/DelawareStudents/AcademicResources/Curriculum.aspx
Willamette University College of Law	Y	N	http://www.willamette.edu/wucl/programs/jd/curriculum.html
William Mitchell College of Law	N	N	http://web.wmitchell.edu/students/curriculum/, http://web.wmitchell.edu/students/curriculum-courses/#C
Yale University	Y	N	http://www.law.yale.edu/academics/jdrequirements.htm, http://ylsinfo.law.yale.edu/wsw/prereg/course_overview.asp?Term=Fall
Yeshiva University, Benjamin N. Cardozo School of Law	Y	N	http://www.cardozo.yu.edu/MemberContentDisplay.aspx?cmd=ContentDisplay&ucmd=UserDisplay&userid=10354&contentid=3848, www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/registrar-124/Guide_to_Course_Selection2007-2008.pdf