

are entirely circumscribed by their state legislatures that it is so important that those statutes be faithfully interpreted.

Chief Justice Roberts has observed that “[t]he dilemma [of DNA testing] is how to harness DNA’s power to prove innocence without unnecessarily overthrowing the established system of criminal justice” — a task that “belongs primarily to the legislature.”⁹⁹ As the Chief Justice pointed out, almost every state legislature has enacted a statute to provide some postconviction access to DNA testing.¹⁰⁰ Where the state court of last resort has categorized a prisoner as ineligible for testing under the statute and there is no time for the legislature to act because execution is imminent, filing a § 1983 claim in federal district court now provides a narrow avenue for relief. *Skinner* thus reserves for federal courts a limited but crucial role in protecting prisoners’ rights to access state-provided procedures, which in turn helps preserve state legislatures’ place in controlling criminal justice systems.

2. *Scope of Municipal Liability.* — American prosecutors wield extraordinary power. Yet their professional mandate to do justice is an imperfect shield against mistakes and abuses that may imperil defendants’ rights — including the due process right protected by *Brady v. Maryland*’s¹ command that prosecutors disclose material exculpatory evidence. Observing that *Brady* violations are alarmingly common and have contributed to wrongful convictions, a growing chorus of experts has called for reforms to prosecutorial training and discipline.² Last Term, in *Connick v. Thompson*,³ the Court set these efforts back by holding that a district attorney’s office cannot be held liable under 42 U.S.C. § 1983⁴ for failure to train its prosecutors based on a single *Brady* violation.⁵ Although the Court found that general lawyerly skills justify a presumption that prosecutors are adequately trained to secure *Brady* rights,⁶ its support for this proposition is deficient, and its reading of doctrine is unduly narrow. Further, the Court completely ignored compensation and deterrence — two core purposes of § 1983. Ultimately, *Connick* constitutes yet another step down an improvident path that weakens prosecutorial accountability by segregating rights from the remedies that give them life.

that “such a derivative right imposes no obligation on states that provide no avenue at all for postconviction DNA testing”).

⁹⁹ *Osborne*, 129 S. Ct. at 2316.

¹⁰⁰ *See id.*

¹ 373 U.S. 83 (1963).

² *See generally* Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

³ 131 S. Ct. 1350 (2011).

⁴ 42 U.S.C. § 1983 (2006).

⁵ *See* 131 S. Ct. at 1356.

⁶ *See id.* at 1361–64.

On January 17, 1985, John Thompson was charged with the murder of Raymond Liuzza, Jr., the son of a prominent New Orleans executive.⁷ The *New Orleans Times-Picayune* splashed Thompson's picture across its front page, prompting Jay, Marie, and Michael LaGarde to identify him to the District Attorney's Office as the man who had attempted to rob them at gunpoint several weeks earlier.⁸ The perpetrator of that crime had left blood on Jay LaGarde's pants, a swatch of which was sent to the crime laboratory.⁹ Testing showed that the perpetrator had type B blood.¹⁰ Prosecutors disagreed over what happened to this report; subsequent investigation revealed that an Assistant District Attorney deliberately concealed it.¹¹ It is undisputed that this report was never disclosed to Thompson and was not introduced at trial.¹²

Thompson's murder trial lasted from May 6 to 8, 1985.¹³ The jury found him guilty and sentenced him to death.¹⁴ Thompson did not testify because he feared that the prosecution would challenge his credibility on the basis of the guilty verdict entered in his earlier trial for armed robbery.¹⁵ After Thompson exhausted his postconviction appeals, his execution was scheduled for May 20, 1999.¹⁶ Only weeks before that date, an investigator discovered the LaGarde blood report.¹⁷ This report revealed that the blood on Jay's pants did not match Thompson's blood type.¹⁸ Harry Connick, the Orleans Parish District Attorney, moved to stay Thompson's execution and vacate his robbery conviction.¹⁹ The Louisiana Court of Appeals later reversed Thompson's murder conviction, finding that he had been unconstitutionally deprived of the right to testify in his own defense at trial.²⁰ The District Attorney's Office retried Thompson for Liuzza's murder in 2003.²¹ Thompson testified in his own defense and presented previously undisclosed evidence.²² The jury acquitted him of all charges.²³

⁷ *Thompson v. Connick*, 553 F.3d 836, 843 (5th Cir. 2008).

⁸ *Id.*

⁹ *Id.* at 843-44.

¹⁰ *Id.* at 844.

¹¹ *Id.* at 844-45.

¹² *Id.* at 844.

¹³ *Id.*

¹⁴ See *Thompson v. Connick*, No. Civ.A.03-2045, 2005 WL 3541035, at *1 (E.D. La. Nov. 15, 2005).

¹⁵ *Connick*, 131 S. Ct. at 1355.

¹⁶ *Id.* at 1356.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*; *Thompson v. Connick*, 553 F.3d 836, 845 (5th Cir. 2008).

²⁰ *Connick*, 131 S. Ct. at 1356-57 (citing *State v. Thompson*, 825 So. 2d 552 (La. Ct. App. 2002)).

²¹ *Id.*

²² *Connick*, 553 F.3d at 846.

²³ *Id.*

On July 16, 2003, Thompson sued the Orleans Parish District Attorney's Office (OPDA), Harry Connick, and others, all in their official capacities, as well as Harry Connick in his individual capacity.²⁴ Ultimately, all of Thompson's claims were dismissed or rejected except for his claim under § 1983 alleging municipal liability on the grounds that the wrongful suppression of exculpatory evidence at his armed robbery trial had been "caused by Connick's deliberate indifference to an obvious need to train the prosecutors in his office."²⁵

In a summary judgment motion, Connick asserted that he could be deemed "deliberately indifferent" only if he had been alerted to the need for training by a previous pattern of similar *Brady* violations.²⁶ The judge denied this motion, holding that "deliberate indifference" could be demonstrated by the available evidence that "the DA's office knew to a moral certainty that assistant[] [district attorneys] would acquire *Brady* material, that without training it is not always obvious what *Brady* requires, and that withholding *Brady* material will virtually always lead to a substantial violation of constitutional rights."²⁷ The jury ultimately found Connick liable under § 1983.²⁸

The Fifth Circuit affirmed.²⁹ Writing for the panel, Judge Prado held that a reasonable jury could have found Connick "deliberately indifferent to the need to train."³⁰ The court rejected Connick's argument that only a pattern of similar violations could evince "deliberate indifference" and cited precedent recognizing single-incident municipal liability where the need for training is "obvious" and where the violation of rights is a "highly predictable consequence" of failure to train.³¹ Surveying evidence that "attorneys, often fresh out of law school, would undoubtedly be required to confront *Brady* issues while at the DA's Office, that erroneous decisions regarding *Brady* evidence would result in serious constitutional violations, that resolution of *Brady* issues was often unclear, and that training in *Brady* would have been helpful," the court described Connick's awareness of these facts as proof that no pattern was necessary to "put [him] on notice" of the need for training.³²

²⁴ *Id.*

²⁵ *Connick*, 131 S. Ct. at 1357; *see Connick*, 553 F.3d at 846.

²⁶ *See Thompson v. Connick*, No. Civ.A.03-2045, 2005 WL 3541035, at *12 (E.D. La. Nov. 15, 2005).

²⁷ *Id.* at *13.

²⁸ *Thompson v. Connick*, 578 F.3d 293, 297 (5th Cir. 2009) (en banc) (Clement, J., writing to reverse).

²⁹ *Thompson v. Connick*, 553 F.3d 836, 843 (5th Cir. 2008). The Fifth Circuit affirmed the finding of § 1983 liability but reversed and remanded with instructions to remove from the judgment several defendants that it found to be not liable. *See id.*

³⁰ *Id.* at 851–54. Judge Prado was joined by Judges King and Stewart.

³¹ *Id.* at 852–53 (internal quotation marks omitted).

³² *Id.* at 854. The court also held that a reasonable juror could believe that confusion over *Brady* in ODPDA caused Thompson's injury. *See id.* at 855–56.

On rehearing en banc, the Fifth Circuit affirmed by an equally divided court.³³ Chief Judge Jones wrote in support of reversal, urging that the Supreme Court's recent grant of absolute immunity to chief prosecutors for failure to train or supervise staff ought to extend to the municipal liability of prosecutors' offices.³⁴ Judge Clement also wrote in support of reversal, concluding that the evidence presented at trial was insufficient as a matter of law to prove either "deliberate indifference" or substantial causation.³⁵ Judge Prado wrote in support of affirmance and adopted his panel opinion's reasoning.³⁶

The Supreme Court reversed.³⁷ Writing for the Court, Justice Thomas³⁸ held that Thompson had failed to prove Connick's deliberate indifference to the need for *Brady* training.³⁹ Noting that culpability is "at its most tenuous where a claim turns on a failure to train," the Court held that Thompson had not proved a pattern of violations that would have alerted Connick to the need for training.⁴⁰

Turning to the theory of single-incident liability "hypothesized" in *Canton v. Harris*,⁴¹ which "sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations," the Court held that failure to train prosecutors in *Brady* obligations does not fall within *Canton*'s "narrow range."⁴² Analogizing to a hypothetical scenario identified by *Canton* that *would* support single-incident liability — "a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force"⁴³ — the Court identified numerous differences between prosecutors and armed police officers that distinguished this case.⁴⁴ For

³³ *Connick*, 578 F.3d at 293 (per curiam). Judge Jolly concurred briefly to note his preference both for Judge Clement's reasoning and for affirmance without opinions in the event of an equally divided en banc court. *Id.* at 295 (Jolly, J., specially concurring).

³⁴ See *id.* at 293–95 (Jones, C.J., writing to reverse) (arguing that the reasoning of *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), ought to dictate the outcome in this case).

³⁵ *Id.* at 301–08 (Clement, J., writing to reverse). Judge Clement was joined by Chief Judge Jones and Judges Jolly, Smith, Garza, and Owen.

³⁶ *Id.* at 311–14 (Prado, J., writing to affirm). Judge Prado was joined by Judges King, Stewart, Wiener, and Elrod.

³⁷ *Connick*, 131 S. Ct. at 1356.

³⁸ Justice Thomas was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito.

³⁹ *Connick*, 131 S. Ct. at 1365.

⁴⁰ *Id.* at 1359–60; see *id.* at 1360 (noting that four prior OPDA convictions overturned due to *Brady* violations did not put Connick on notice because "[n]one of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind").

⁴¹ 489 U.S. 378 (1989).

⁴² *Connick*, 131 S. Ct. at 1361.

⁴³ *Id.* (citing *Canton*, 489 U.S. at 390 n.10).

⁴⁴ See *id.* at 1361–63.

example, whereas police must make split-second decisions and lack legal training, prosecutors are “trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment.”⁴⁵ Specifically, prosecutors attend law school, pass bar exams, receive continuing legal education, meet character and fitness standards, and are sworn to seek justice.⁴⁶

Connick was thus “entitled” to assume that his staff’s training was adequate to prevent constitutional violations in the absence of a specific reason to believe otherwise, such as a “pattern of violations.”⁴⁷ Thompson’s claim that Connick’s prosecutors had not received *enough* training thus failed *Canton*’s demanding standard. Although the Court clarified that it did not “assume that prosecutors will always make correct *Brady* decisions or that guidance regarding specific *Brady* questions would not assist prosecutors,” it emphasized that § 1983 “does not provide plaintiffs or courts *carte blanche* to micromanage local governments throughout the United States.”⁴⁸

Justice Scalia concurred⁴⁹ to rebut several points made by the dissent. First, he argued that the dissent failed to address adequately the standard imposed by *Canton*, which sought to prevent “failure to train” from becoming a “talismanic incantation producing municipal liability.”⁵⁰ Second, he insisted that the dissent mischaracterized Connick’s alleged acquiescence in Thompson’s theory of liability.⁵¹ Third, he explained that Thompson could not demonstrate the requisite causal link between Connick’s alleged failure to train and Thompson’s constitutional injury because the *Brady* violation resulted from a single prosecutor’s willful malfeasance.⁵² Fourth, Justice Scalia added that no legally accurate training could have prevented this *Brady* violation even if it had occurred in good faith because the blood report was not known to be exculpatory at the time of the violation.⁵³ Finally, he suggested that “[t]here was probably no *Brady* violation at all” because “Connick could not possibly have been on notice decades ago that he was required to instruct his prosecutors to respect a right to untested evidence that we had not (*and still have not*) recognized.”⁵⁴

⁴⁵ *Id.* at 1361.

⁴⁶ *See id.* at 1361–63.

⁴⁷ *Id.* at 1363.

⁴⁸ *Id.*

⁴⁹ Justice Scalia was joined by Justice Alito.

⁵⁰ *Connick*, 131 S. Ct. at 1367 (Scalia, J., concurring) (internal quotation marks omitted).

⁵¹ *See id.* at 1367–68.

⁵² *See id.* at 1368.

⁵³ *See id.* at 1368–69.

⁵⁴ *Id.* at 1369.

Justice Ginsburg dissented,⁵⁵ charging that “[w]hat happened here . . . was no momentary oversight, no single incident of a lone officer’s misconduct.”⁵⁶ Rather, she argued, it was the result of “persistent, deliberately indifferent conduct for which the District Attorney’s Office bears responsibility under § 1983” and that will be repeated unless municipal agencies are compelled through liability to “adequately convey[] what *Brady* requires.”⁵⁷ After a detailed recitation of the facts surrounding the numerous errors that led to Thompson’s wrongful conviction, Justice Ginsburg concluded that “[a]bundant evidence supported the jury’s finding that additional *Brady* training was obviously necessary to ensure that *Brady* violations would not occur.”⁵⁸ She then challenged the Court’s conclusion that the need for training was not “obvious” here, observing that the *Brady* violations at issue “were just what one would expect given the attitude toward *Brady* pervasive in the District Attorney’s Office.”⁵⁹

Justice Ginsburg also assailed the Court’s reliance on legal education as a safeguard against *Brady* errors, noting that “[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. . . . [T]he buck stops with him.”⁶⁰ Specifically, she noted that most law schools “[do] not make criminal procedure a required course,”⁶¹ bar examinations typically do not require a “showing of even passing knowledge of criminal law and procedure,”⁶² and general familiarity with law is inadequate because “understanding and complying with *Brady* obligations are not easy tasks, and the appropriate way to resolve *Brady* issues is not always self-evident.”⁶³ Justice Ginsburg concluded by observing that Connick had “created a tinderbox in Orleans Parish in which *Brady* violations were nigh inevitable” and was not “‘entitled to rely on prosecutors’ professional training’ . . . for [he] should have been the principal insurer of that training.”⁶⁴

Connick further narrows an already stingy jurisprudence of remedies for constitutional torts committed by municipalities. When the Court first held that local governments could be held liable under

⁵⁵ Justice Ginsburg was joined by Justices Breyer, Sotomayor, and Kagan.

⁵⁶ *Connick*, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).

⁵⁷ *Id.*

⁵⁸ *Id.* at 1378.

⁵⁹ *Id.* at 1384.

⁶⁰ *Id.* at 1387.

⁶¹ *Id.* at 1385.

⁶² *Id.* at 1386.

⁶³ *Id.* (quoting Brief for Former Federal Civil Rights Officials and Prosecutors as Amici Curiae at 6, *Connick*, 131 S. Ct. 1350 (No. 09-571)) (internal quotation marks omitted).

⁶⁴ *Id.* at 1387.

§ 1983, it limited this doctrine to “actions pursuant to official municipal policy” and left full elaboration of its contours “to another day.”⁶⁵ Since then, the Court has articulated a “conglomeration of standards [that] is idiosyncratically protective of the municipal pocketbook.”⁶⁶ *Connick* continues this trend by adopting an unduly narrow view of “failure to train” liability as described in *Canton*. Even on its own limited terms, the Court’s reasoning is thus unpersuasive. But more importantly, by pursuing an increasingly constricted view of municipal liability, the Court acts against core purposes of § 1983 and against constitutional norms favoring the attachment of remedies to rights.

Connick’s flawed reasoning becomes clear when contrasted with *Canton*, the logic of which the Court struggled to distinguish. Just like the police chief in *Canton*, who sent armed police to pursue a fleeing felon,⁶⁷ *Connick* knew “to a moral certainty” that prosecutors in his office would make difficult *Brady* decisions and that misinformed choices could lead to constitutional violations. Further, in both cases the need for training was “obvious” only as a matter of probability: the absence of training substantially increased the risk of a constitutional injury. And in both cases, the municipality could point with superficial plausibility to *some* kind of formal or informal training — police academy or law school, on-the-job training, supervisors who may serve as role models — to deny any “official policy” of indifference.

Following *Canton*, the question whether a need for training is “obvious” thus involves probabilistic reasoning about the likelihood of injury given repeated iterations of certain scenarios — fleeing felon, potentially material exculpatory evidence — and the likelihood that officials will abide by constitutional requirements absent specific guidance. On this view, *Connick* is flawed in two respects. First, it depends on the factual premise that legal training is sufficient to justify a presumption of adequacy for all prosecutors. This claim, which purports to distinguish police from prosecutors with respect to the probability of a violation, does not withstand Justice Ginsburg’s dissent. Second, by discounting the probative value of a single discovered violation, holding that recently proven violations of the same right do not provide notice unless the right was violated in a similar manner, and treating even cursory training as presumptively adequate, *Connick*

⁶⁵ *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691, 695 (1978).

⁶⁶ David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 *FORDHAM L. REV.* 2183, 2191 (2005).

⁶⁷ See *Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989) (“For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be ‘so obvious,’ that failure to do so could properly be characterized as ‘deliberate indifference’ to constitutional rights.” (citation omitted)).

erects a much higher barrier to recovery than *Canton* contemplates for violations resulting from municipal decisions not to train.

The Court's decision to constrict municipal liability more than precedent requires is particularly imprudent in light of § 1983's purposes. *Connick* displays an unalloyed emphasis on federalism and government efficiency, but these are not the only principles that animate § 1983, the basic objective of which is to create remedies to effectuate rights, like *Brady*, that might otherwise be left vulnerable to abuse. The *Connick* Court's failure even to discuss compensation and deterrence — core implicit purposes of § 1983⁶⁸ — thus constitutes both a flaw in its statutory analysis and a doctrinal sign of the times.

Section 1983 authorizes damages to redress constitutional injuries and thus serves an important compensatory function.⁶⁹ Although cash payments are an imperfect method of compensation, such damages are "better than nothing" and can help restore a victim's socioeconomic opportunities, dignity, and sense of membership in the political community after an abuse of government power.⁷⁰ *Connick*, without even considering this function of municipal liability, shut down one of the few vehicles for monetary redress of *Brady* injuries inflicted by prosecutors.⁷¹ *Connick* thus erred in failing to recognize the denial of compensation to men and women wrongly imprisoned due to prosecutorial malfeasance as a statutory consideration militating against further narrowing of municipal liability doctrine.

Connick also weakens the deterrence power of municipal liability by confining liability to those rare cases where the victim can prove a pattern of *Brady* violations. Before *Connick*, the possibility of litigation and damages for a *Brady* violation attributable to inadequate training constituted one of the few liability-based threats hanging over district attorneys who otherwise might not have been adequately incentivized to invest resources in training. Such incentives are badly needed: even though *Brady* rights are a crucial safeguard against wrongful convictions and are known to be frequently violated,⁷² dis-

⁶⁸ See *Hardin v. Straub*, 490 U.S. 536, 539 (1989); *Burnett v. Grattan*, 468 U.S. 42, 53 (1984); Thomas A. Eaton, *Foreword*, 35 GA. L. REV. 837, 838 n.4 (2001) (collecting cases discussing deterrence as a purpose of § 1983).

⁶⁹ See John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 84 (1989).

⁷⁰ Bernard P. Dauenhauer & Michael L. Wells, *Corrective Justice and Constitutional Torts*, 35 GA. L. REV. 903, 927 (2001).

⁷¹ Although some states statutorily provide for compensation in cases of actual innocence, twenty-three states lack such laws, and others impose sharp limits on access to redress. See *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Compensating_The_Wrongly_Convicted.php (last visited Oct. 2, 2011).

⁷² See, e.g., Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 11, 1999, available at <http://www.chicagotribune.com/news/watchdog/chi-020103trial1,0,479347.story> (reporting that 381 homicide convictions have been reversed since 1963 due to *Brady* violations).

cipline for violations remains virtually nonexistent, and calls for improved training abound in scholarly commentary.⁷³ Fear of municipal liability, or at least of litigation involving such a claim, may have helped deter misconduct and promote the articulation of policies and training regimes protective of rights like *Brady*.

Indeed, although the regulatory value of municipal liability ultimately remains an unresolved empirical question, there are good reasons in the *Brady* context to believe that it can promote reform.⁷⁴ As prosecutors' offices have increased in size and developed more elaborate management systems, head prosecutors have come to play "important roles in shaping and communicating office culture and socializing line prosecutors into that culture."⁷⁵ District attorneys are thus well positioned to implement *Brady*-protective best practices and training regimes.⁷⁶ District attorneys are also elected officials prominent in their local governments and, for that reason, may be especially responsive to the potential for intrusive publicity and intense political pressure attendant upon high-profile § 1983 litigation.⁷⁷ Although office policies do not create enforceable rights, improved training can create potent safeguards. *Connick* makes such institutional redesign less likely.

The *Connick* Court's inattention to the compensatory and deterrent functions of municipal liability contributes to a deeper trend of limiting the use of civil liability as a mechanism of prosecutorial accountability. Over the past few decades, the Court has granted prosecutors absolute immunity against civil suits arising from their governmental duties,⁷⁸ rendered racially discriminatory enforcement of criminal laws functionally unprovable,⁷⁹ and bestowed complete immunity upon chief prosecutors against claims alleging failure to train or supervise staff.⁸⁰ Modern prosecutors thus "exercise vast, almost limitless, dis-

⁷³ See, e.g., Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 731–36 (1987); Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1948–59 (2010).

⁷⁴ For a more skeptical view, see Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

⁷⁵ Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 997 (2009).

⁷⁶ See *id.* at 996.

⁷⁷ Professor Myriam E. Gilles accordingly notes that publicity and information about office practice revealed by discovery can "translate into the political currency that moves political actors." Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 861 (2001); see also *id.* at 861–65.

⁷⁸ *Imbler v. Pachtman*, 424 U.S. 409, 424–29 (1976).

⁷⁹ See *United States v. Armstrong*, 517 U.S. 456, 470 (1996).

⁸⁰ *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 862–64 (2009).

cretion, and the Supreme Court consistently has protected that discretion and shielded them from meaningful scrutiny.”⁸¹

Scholars have sounded alarms concerning the inadequacy of safeguards against abuse in light of these ever-expanding prosecutorial immunities. Professional discipline and judicial sanctions are rarely employed as penalties, even when a prosecutor has clearly exceeded a constitutional limit.⁸² A combination of informational barriers, limits on participation rights, and “tough on crime” politics has rendered public controls largely ineffective.⁸³ And studies focused on legislative interventions,⁸⁴ appellate review,⁸⁵ and criminal sanctions⁸⁶ all reflect similar themes of high aspiration and disappointed expectation.

Decisions like *Connick* that expand civil immunities around prosecutors thus segregate rights from remedies in a regulatory field lacking alternative mechanisms to render prosecutors legally, politically, or professionally accountable for the infliction of constitutional injuries. Although rights and remedies are rarely perfectly congruent, this sustained contraction in judicial remedies functionally shrinks the scope of protections promised to the public.⁸⁷ That is particularly true where, as here, the imperiled right is itself frequently defined more narrowly in the offensive context of civil litigation than when asserted defensively in criminal trials — a result of institutional pressures on judges that creates a civil/criminal divide.⁸⁸

By straining doctrine to further limit municipal liability, and doing so in the uniquely deregulated prosecutorial context, *Connick* runs afoul of a deep constitutional norm favoring the attachment of reme-

⁸¹ Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 276 (2007).

⁸² See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 908 (2009). See generally Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).

⁸³ See Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 923–31 (2006).

⁸⁴ See, e.g., Bibas, *supra* note 75, at 966 (discounting the likelihood of legislative reform).

⁸⁵ See, e.g., Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 715 (2006) (noting that appellate courts rarely reverse for failure to disclose).

⁸⁶ See Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. TEX. L. REV. 801, 826–27 (2006).

⁸⁷ See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (“Rights are dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence.”).

⁸⁸ See Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1006–07 (2010) (noting that “nominally identical criminal procedure rights take on different contours in the criminal and civil realms,” as judges dealing with *Miranda*, *Brady*, and suggestive identification claims “limit[] the availability of civil relief for what would unquestionably be deemed a constitutional violation in the criminal context,” *id.* at 1006).

dies to rights. As Professor Richard H. Fallon, Jr., writes, even though “*Marbury*’s promise of a remedy for every rights violation is better viewed as a flexible normative principle than as an unbending rule,” modern law governing remedies recognizes a “quasi-managerial social interest in maintaining mechanisms of judicial oversight that are adequate to keep government generally, albeit not perfectly, within the bounds of law.”⁸⁹ *Connick* thus continues a dangerous trend — and abrogates norms of constitutional remedy — by even more radically segregating rights from remedies in the context of *Brady* violations.

Rather than read *Canton* so narrowly, the Court should instead have recognized that precedent, statutory purpose, and constitutional norms all favored a finding of liability against *Connick*. The rhetoric of its opinion, which barely mentions that an admitted constitutional violation led to the tragedy of a wrongful conviction, reveals the Court’s apparent indifference to the potential for miscarriages of justice inherent in its aggressively limited jurisprudence. Rather, the moral it takes from John Thompson’s story is one of civil liability gone too far. Yet perhaps the real story — or at least the most important one — involves abdication of the judicial duty to remedy and prevent the sorts of abuses that might someday cost an innocent man his life.

B. Freedom of Information Act

Personnel Exemption. — The Freedom of Information Act¹ (FOIA) requires federal agencies to make information public upon request,² but FOIA also provides nine categorical exemptions to this requirement in order to prevent harmful releases of information.³ Strangely, though, none of the exemptions explicitly protect the public safety. Courts have long worked around this problem by reading Exemption 2, which pertains “to matters that are . . . related solely to the internal personnel rules and practices of an agency,”⁴ to include disclosures that would facilitate lawbreaking. Last Term, in *Milner v. Department of the Navy*,⁵ the Supreme Court held that this construction is not permissible⁶ and that Exemption 2 does not apply to “data and maps used to help store explosives at a naval base in Washington State.”⁷ Although the Court perfunctorily suggested that other exemptions might guard the data and maps sought in *Milner*, the practical effect of its

⁸⁹ Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 338 (1993).

¹ 5 U.S.C. § 552 (2006 & Supp. IV 2010).

² *Id.* § 552(a)(3).

³ *Id.* § 552(b).

⁴ *Id.* § 552(b)(2).

⁵ 131 S. Ct. 1259 (2011).

⁶ *Id.* at 1266.

⁷ *Id.* at 1262.