

2012

Panel on Prosecutorial Immunity: Deconstructing Connick v. Thompson

Dane Ciolino

Gary Clements

Bennett L. Gershman

Adam M. Gershowitz

William & Mary Law School, amgershowitz@wm.edu

Kathleen Ridolfi

See next page for additional authors

Repository Citation

Ciolino, Dane; Clements, Gary; Gershman, Bennett L.; Gershowitz, Adam M.; Ridolfi, Kathleen; Wiseman, Samuel R.; and Singer, Stephen, "Panel on Prosecutorial Immunity: Deconstructing Connick v. Thompson" (2012). *Faculty Publications*. 1550.
<https://scholarship.law.wm.edu/facpubs/1550>

Authors

Dane Ciolino, Gary Clements, Bennett L. Gershman, Adam M. Gershowitz, Kathleen Ridolfi, Samuel R. Wiseman, and Stephen Singer

**PANEL ON PROSECUTORIAL IMMUNITY:
DECONSTRUCTING *CONNICK V. THOMPSON***

In November 2011, the Journal hosted a symposium on prosecutorial immunity at Loyola University New Orleans College of Law. The symposium included an in-depth analysis of Connick v. Thompson. As part of the symposium, the Journal organized a Panel, the transcript of which follows. This transcript consists of the speakers' remarks along with audience participation and questions. The Journal has attempted to preserve the character and substance of the discussion. While this is not a traditional article, the Journal felt that it would be fitting to include it in its spring volume.

PROFESSOR DANE CIOLINO, LOYOLA UNIVERSITY NEW ORLEANS COLLEGE OF LAW (MODERATOR): Okay. Let's get started. We'll get started with the 2:40 panel. We've done a number of speakers. This discussion is on prosecutorial misconduct. And given the amount of time we have, I'll cut short the introductions. The bios of the speakers are in your program. What I'd like to do is give each of the panel members 5 or 6 or 7, up to 10 minutes to talk. And then after everyone's basic thoughts, we'll have panel discussion. Let's start with Gary Clements,¹ do you mind going first? Gary, your thoughts on prosecutorial misconduct.

GARY CLEMENTS: Part of me wants to respond to the prior speakers. It's a little unfair; they're not here to have a rebuttal to me. But I wanted to add some points. As a side line observer to Mr. Thompson's case, I worked in the office of the resource counsel to JT's case.² It's really interesting to hear prosecutors both in the newspapers and here today talk about the battle days. What happened to John Thompson was a terrible thing. You can't beat it. It was wrong. It was dirty it was horrible, illegal, blah blah blah. But they still hide stuff now. And the reason it's still something they have difficulty with. Next Tuesday, John Smith is one of our clients in the capital post-conviction office,

1. Gary Clements is director of the New Orleans Capital Post-Conviction Project.

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

another Orleans Parish case from a trial in 1995, it's going up on oral arguments, a very cut and dry *Brady* violation. Basically a single eyewitness came and told police three different times, "I didn't really see the face of the person that came in and did all this shooting where five people ended up dead." But on the stand, it was clear as day. "He was the one. I got him right there." And they didn't turn over that paper to the defense attorneys at trial, and they fought like hell from turning it over now, later. Way after the trial, they still fought it. And it was an interesting comment by one of the speakers that the *Brady* post-conviction was "intriguing." I don't know what legal standard that is. I couldn't find it in Black's to tell me where "intriguing" fell on the aspect of burden of proof or whatever. But the fact is, that office, to this day, and next Tuesday is gonna argue that this stuff that I'm telling you about an eyewitness was not *Brady*. And that's got all sorts of reasons why they say this is so. But they didn't turn it over. And even after the judge ordered them to turn it over, they continued to argue that they shouldn't have turned it over. And that's just in one of the two cases that Mr. Smith has, and he's a parallel to Mr. Thompson in that Mr. Smith had a trial where he got a life sentence and he also has a subsequent death penalty case in which they used his conviction, his life sentence conviction, for first-degree murder in a death penalty case. If you think there's a pattern in that, I don't know, but it sounds familiar to me. I don't know if that would rise to the level of causality, proximate cause, but believe me, I don't think it's an odd idea for prosecutors to think "if we shut a guy up here, he'll never get on the stand to testify on his behalf later." There's a lot of guys that want to get up on the stand. But there are ways in which people are asked not to do it. I want to go to a couple of other specific points. I believe the attorney, Jerry Glass's name was mentioned. He was the assistant prosecutor in Mr. Connick's office at the time. And just so you understand, it wasn't just the actual pants and another item where blood was found. They did the blood test. And conveniently, it was really the "stupid defense lawyer's" fault for not going and checking out this thing. But that doesn't absolve the prosecution whether you have a smart or stupid defense attorney; they [the prosecution] have to come in and show them the goods. When they had this information that the blood test showed it wasn't John Thompson's blood and went to trial anyway and said this is the man that tried to car jack these Tulane students, they knew, when they did that, that it was a damn lie. I'm tired of hearing people tell us things about

specifics and saying, “it’s really the stupid defense lawyer’s fault for not asking for it.” They have obligations. I’m scared to think if the totality of their training program is when a new prosecutor comes in, they get a list of three cases to study—and there’s gonna be a fourth one coming up soon—all I can say is it takes more than that. Any attorney here knows that CLE—nothing to disparage this wonderful symposium today—is not sufficient to instill an understanding of how things work in a day-to-day world and—nothing to disparage my fine alma mater here—you don’t learn it in the law school classroom. You can get in clinics, but you have to get it where your employer is. So just these points and the other thing too is the reason why I think previous speakers said that Jerry Glass was upset, Jerry Glass and I co-counseled a case of another guy on death row. We negotiated a life sentence for the guy. He came—he told me, because I asked, “you never really have told me the story of what happened back there.” And he summarized it for me and I’ll presume that I have his permission because it’s repeated in his testimony in 2007. He got wind of the fact—when the defense attorneys found out, it wasn’t just the piece of pants. There was a five page police report post-conviction. Under the Louisiana public records act, our office and Mr. Thompson’s attorneys will always go to every agency and say, “you have to give us every file,” not work product from the attorney, but everything else. Mr. Cannizaro’s office argued that police reports constitute work product. If you think I’m joking, you can read it in the paper. They take this position that police reports are work product. There is no such thing. It’s an attorney thing; it’s not a cop thing. And the five page police report was never turned around in its totality. It’s the first four pages. And it says, page one of five, et cetera. And every time they go back, they would say, “where’s page 5?” And they said “we don’t know.” Only Lisa was the investigator who two weeks before John Thompson’s execution date went to the police department one final time and asked an on duty police department records department worker and said, “can I get another copy of that police report?” And she got the five pages and on the fifth page was the blood test answer. And they hid that for a good 14 years. Now, they hid that after the trial, after the appeal, into his post-conviction. He was a hair’s breath away from being executed. He had more than one execution date and the fact of the matter is, it’s a lot more sordid. And I’ll stand on this principle today that they don’t seem to grasp what the concept of Brady versus Maryland is at Tulane and Broad and it’s

not restricted to there. And we get a lot of paper from every office that we work against when working in post-conviction and under the public records act. I'm fighting battles that last—month in Baton Rouge another case where I have three hundred thousand documents collected so far, we found out there were three computer hard drives with data that were pertinent to the case investigation. And it was told to us in January, "you'll get a copy of those hard drives." And in August, we paid for them. In September, they put a motion to restrict us from being able to access the contents of this. And the trial judge, the district court judge, upheld, well, granted the order to preclude us [from accessing them] after testimony that those hard drives probably equal 8 million pages of information. And we're not—

MODERATOR: I have to slow you down here.

CLEMENTS: Shut me up. I won't say another word.

MODERATOR: We've just got a lot of people. Next up, Professor Bennett Gershman³ from the Pace Law School.

PROFESSOR GERSHMAN: Thank you for arranging this very important program. Just to share some thoughts on prosecutorial misconduct; I think it's pretty clear from everything I've studied, and I think Barry Scheck made the point that *Brady* seems to be the most pervasive form of prosecutorial misconduct in the U.S. today and for many years. One of the problems with *Brady* is that we don't know how much *Brady* evidence is hidden. There are so many defendants who were probably innocent sitting in jail maybe for a long time, and there's a lot of *Brady* evidence that might show they're innocent, but it's never going to be known. If it's hidden, how do you find stuff that's hidden? Where do you look? And John Thompson's case⁴, Curtis Kyles' case⁵, the Martin case, these cases are outrageous, but they're not all that unique. These are horrendous situations that I have to say are fairly common from everything I've studied. Also, we didn't talk about this but, [at] John Thompson's murder trial, the prosecutor hid critical evidence to show that he wasn't guilty. This was based on an eyewitness who said the killer was short; John Thompson is six feet tall. The witness said the hair was wild, and

3. Professor Bennett Gershman is a faculty member at Pace Law School and has taught as a visiting professor at Cornell Law School and Syracuse Law School.

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

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

he had an “Afro”. And this whole issue of eyewitness identification—the Supreme Court heard a case yesterday⁶ and I think from hearing Barry tell me it was depressing, the court didn’t seem to have a clue that eyewitnesses constitute the greatest source of miscarriage of justice, three times as many errors as any other kind of error.⁷ And something that Mr. Martin said this morning concerned me. He said we deliberate before we give a case to a jury whether we can get a conviction. And then he did say juries make mistakes. If you have a one-witness identification case, do you think maybe that’s gonna trouble you? Because you don’t know. The witness says “I’m positive,” but we know that witnesses who are positive make mistakes. From the DNA exonerations, 80 percent are from eyewitness misidentifications.⁸ So if you know that witnesses are [going to] make mistakes—but you know that once a witness gets on the stand and [says] that witness points to the defendant and that’s the person who did it, that’s going to have a powerful impact on the jury. And maybe the witness is making a mistake. How do you deal with that? The prosecutor has to be a gatekeeper here. They have to study the research on eyewitness identification. They have to know that confidence doesn’t equate with accuracy. They should be looking for corroborating evidence. I don’t know if they should go ahead with the case if they don’t have corroborating evidence. And then the prosecutor may be hiding evidence that the witness is unreliable. And I want to ask also, what is the standard the prosecutor should use before bringing a case to a jury. How certain should the prosecutor be of the defendant’s guilt? If I were the D.A., first of all, I would institute a *Brady* training program. I have written about this for the Loyola Public Interest Journal.⁹ I think my discussion is

6. *Smith v. Cain*, 132 S. Ct. 627 (2012).

7. While the exact number or rate of wrongful convictions based on eyewitness identification is difficult to pinpoint, numerous analyses have shown that mistaken eyewitness identification is the single largest source of wrongful convictions. Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research And Legal Policy On Lineups*, 1 PSYCHOL. PUB. POL’Y & L. 765, 765 (1995).

8. INNOCENCE PROJECT, REEVALUATING LINEUPS: WHY WITNESSES MAKE MISTAKES AND HOW TO REDUCE THE CHANCE OF A MISIDENTIFICATION 3-4 (2009) (noting that of the first 230 cases in the U.S. where the defendant was exonerated through DNA evidence, 75% of those wrongful convictions involved eyewitness misidentification, and in 50% of those cases eyewitness testimony was the central evidence in the prosecution).

9. Bennett L. Gershman, *Educating Prosecutors and Supreme Court Justices About Brady v. Maryland*, 13 LOY. J. PUB. INT. LAW 517 (2012).

pretty good, by the way. And I've got *Brady* hypoteses in there and it deals with work product and that is—police reports are not work product for sure, positive. Work product¹⁰ deals with opinions and impressions. It has nothing to do with reports that document facts. If I were the D.A., I'd make sure all D.A.s were diligent about *Brady*. Because it's a top down [issue]. If the D.A. doesn't care about *Brady*, no one will care about *Brady*. Your supervisors have to care about *Brady*. I was a prosecutor for ten years. We did have training sessions. We worked together as a group, and we brainstormed *Brady* issues together. And we cared about our constitutional duty. When I was a prosecutor, I didn't care whether the person I was hiring knew explicitly about *Brady*. I would give them ethics issues and see how they answered those questions before I hired them. I would have an ethics person in my office. The Department of Justice is doing that now. Every U.S. attorney's office has an ethics person you can come to with problems.¹¹ But it symbolizes how much we care about ethics. That's all I have to say, thank you.

MODERATOR: Professor Adam Gershowitz¹²?

PROFESSOR GERSHOWITZ: I'm going to disagree with Bennett. Before I disagree with him, I'm going to agree with Barry Scheck that it's important in this context not to vilify prosecutors. I'm married to a prosecutor, so I have a different set of incentives. She's a long time D.A. in Harris County, Texas. The other interesting thing about teaching in Texas, people from Texas appear to view it as its own country and they don't actually leave. I have an interesting aspect with my students [. . .]. You see them in class. Then they come to your home for

10. Under the Federal Rules of Criminal Procedure, reports, memoranda, or other internal documents created by a government attorney in connection with investigating or prosecuting a case are exempt from disclosure. FED. R. CRIM. P. 16(a)(2). Such materials reflecting an attorney's "mental impressions" constitute the "work product" of the attorney, and their confidentiality is considered necessary to an attorney's ability to prepare effectively for trial. *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947). These materials are therefore shielded from discovery. *Id.* at 514.

11. The Office of Professional Responsibility is charged with investigating allegations of misconduct involving attorneys for the Department of Justice. The Office falls under the auspices of the Department of Justice and reports directly to the Attorney General. USDOJ: OFFICE OF PROFESSIONAL RESPONSIBILITY: ABOUT THE OFFICE, JUSTICE.GOV, <http://www.justice.gov/opr/about-opr.html> (last updated Dec. 2010).

12. Professor Adam Gershowitz is a professor of law at the University of Houston Law Center.

trick-or-treating. It's a bad collision of your world. It does make for very interesting stories, so I thought I would tell one story that's overlooked by academics. A couple of years ago, I was supervising a few "baby" D.A.s there. And one, we'll call him "Junior." And Junior was working on this misdemeanor case and worked up the file, and there's an open file system in Harris County.¹³ Here's one example, prosecutors run the criminal history of all their witnesses, and they don't print that out. They'll know lots of information. Turns out one of the key witnesses had committed a serious felony about honesty. And my wife said, "did you give that to the defendant?" And he was like, "why does that matter?" And it turns out that the baby prosecutor had no understanding that that was a *Brady* violation. I thought maybe they had never taken criminal procedure, but I know he did because he was in my class. In other words, the point I'd like to make is an enormous amount of *Brady* violations are accidental. And no one knows about them because the baby D.A.s are not properly trained to deal with these scenarios. Why do the accidents happen? Lack of training and enormous caseloads. So a felony prosecutor in the Harris County D.A.'s office is in possession of up to a thousand felony cases per year.¹⁴ And they're just not in a position to have done their homework properly on these cases.

So then of course the question comes to the last point, what do you do about it? I'm in agreement with Gary, Mr. Martin gave a nice talk and the plan is to print out cases and have them read. It's hard to create a worse plan than that. Printing out cases and reading them is what professors like to do not what litigators like to do. I'm pretty sure that they went unread and didn't clearly internalize them. You have to have a much more significant approach to encourage people and not in the law school context. That has to be in the supervisor context and shaming individuals who commit this conduct.

MODERATOR: Maybe you don't learn stuff by reading the cases and listening, even in your criminal procedure class. Maybe the proper training method is where you bring all the young

13. Press Release, Office of District Attorney, Harris County, Tex., DA Begins New Discovery Agreement (Mar. 2, 2009), *available at* <http://app.dao.hctx.net/News.aspx?id=65>.

14. In 2010, 540,828 new cases were filed in Harris County, a rate of more than one new filing per minute. PATRICIA R. LYKOS, OFFICE OF DISTRICT ATTORNEY, HARRIS COUNTRY, TEX., 2010 YEAR IN REVIEW 3 (2010).

prosecutors in and you give them documents and you say, “where is the *Brady* in this file?” And you see who brings out the *Brady* material instead of lecturing at them. To make them experience the file review, experience coming across this in the file. That’s the only way in my view that you can learn this stuff. And that may be on Bennett’s list of ways to train prosecutors.

Next up Cookie Ridolfi.¹⁵ And she’s got a slideshow (slideshow is not reproduced here).

PROFESSOR RIDOLFI: I know this is intriguing to be looking at “dirty little secret.” It has nothing to do with my talk. (joking) Prosecutorial misconduct has been the dirty little secret cause of wrongful conviction for a long time. It’s not so much anymore. In 2003 the term prosecutorial misconduct—actually how do you make these things change? Oh, okay. Sorry. I’m from the Silicon Valley too. (Laughing) In 2003, the term prosecutorial misconduct appeared in 37 news articles in California. And you see there that just in 2010, we looked at how many times it appeared, and it was 292 times. And that’s 7 or 8 times more than just a few years ago. So that says that we collectively are making a difference in California and in these states. And the sessions are incredibly important. In 2004, the California Senate created this California commission on the fair administration of justice. As a member of that commission, I served with prosecutors, law enforcement, members of the defense bar, and judges, and our mandate was to examine the extent to which known causes of wrongful conviction might be problems in California. So as a commission, we met; we talked about it; we decided easily that we were going to look at mistaken eyewitness identification, problems with false confessions, use of jailhouse informant testimony. But when it was suggested that we talk about prosecutorial misconduct, the conversation shifted. We could not get a consensus that prosecutorial misconduct was a problem barely anywhere, certainly not in California, and an errant prosecutor might do something wrong. So we had no data to inform the discussion. I had not thought about it before. We had nothing to go with, and the commission wouldn’t go forward. So I get with the chair of the Van de Kamp, I asked John, I said, “I’d like to take this issue and study it myself and come back to the

15. Kathleen Ridolfi is a professor of law at Santa Clara University School of Law and the director of the northern California Innocence Project. See SANTA CLARA LAW, <http://law.scu.edu/faculty/profile/ridolfi-kathleen.cfm> (last visited Mar. 11, 2012).

commission with whatever I find,” and he agreed. That’s what I did. So in 2006, I published—I actually reported what I had found in California. My slides are off from that. But what I reported was that we had looked at 10 years of misconduct cases and found 444 cases where prosecutors had been found by appellate courts to have committed misconduct. We also went through a lot of trouble to identify the prosecutors by name, and we found that 30 of the prosecutors were repeat offenders, meaning they committed misconduct multiple times and sometimes the same type of misconduct without being disciplined or addressed in between. We also found that prior to the start of the commission study, only one prosecutor had been publicly disciplined for misconduct despite that there were hundreds of prosecutorial misconduct cases revealed by our study. Then, when the commission ended—I’m the director of northern California Innocence Project, when the commission ended, I decided to make prosecutorial misconduct the top issue. We established the Veritas Initiative¹⁶, which is a national program focused on understanding and addressing prosecutorial misconduct. Most of the work we’ve done is in California but we also assisted in a study here done with the Innocence Project New Orleans and around the John Thompson case. And we are—Barry talked about the campaign, we are partners to the campaign with the Innocence Project in New York, and we’ll study Texas, Arizona, and Pennsylvania. So we are moving forward.

Key findings: In 2010, we established this Veritas Initiative. And in October of that year, we published our first Veritas Report. In that report, we included all the data we collected and in April of the following year, we published what we had for 2010. So the data here reflects 14 years of cases. And we found 816 findings of prosecutorial misconduct. We found hideous repeat offenders. 107 prosecutors were responsible for 251 of the cases where there was misconduct. And obviously when I started this I thought there was misconduct but I had no idea we had problems like this. After the commission started, we—you’ll see the one in

16. The Veritas Initiative is an extension of the Northern California Innocence Project (NCIP) that seeks to illuminate the serious problem of prosecutorial misconduct in the criminal justice system today. The organization lauds itself as “NCIP’s investigative watchdog organization devoted to advancing integrity of our justice system through research and data-driven reform, using the work of our preeminent experts in the field.” THE VERITAS INITIATIVE, <http://www.veritasinitiative.org/about/mission-statement/> (last visited Mar. 6, 2012).

the blue was the one prosecutor disciplined. One of the first things I did was to go to the California bar and to ask for their assistance, and they were cooperative. Once we got involved, we started seeing an increase. In the first 8 years, we have one. And the 6 years since, we have 6 more cases where prosecutors were prosecuted, publicly disciplined. In one case the prosecutor had his license suspended for four years. We are making a difference and it's certainly not just in California; I looked at the news articles nationally and you can see in the same year, 2003, there were 394 articles. And by 2010, we had 1444 articles. There is other important work going on, USA Today published a study where they looked at federal prosecutors addressing many of the same issues we did, and they came up with the exact same finding. There are no consequences. There's nothing in place to deter misconduct, and the problem with that is that—and I say that a minority of prosecutors are responsible for most of the misconduct and most prosecutors are trying to do their jobs with integrity and honor—but you have the minority of prosecutors and there is no deterrence, no incentive, it's kind of worth the risk. If you're a prosecutor who really wants to win the case, it's worth the risk because you're probably not going to be found out. And if you are found out, what's gonna happen? Nothing. Which explains why we have some prosecutors who have committed misconduct in 6 different cases. Part of the work we're doing as part of the Veritas Initiative is looking at this and meeting around the country to figure out what to do. In our two reports, we recommended reforms. Today I'll talk about training and education because that is our current campaign. If you want to know more about the other ones, you have to buy my book. I don't have a book (Laughing) but you can—well, we have a book, but you don't have to buy it. You can get it free if you download it from the veritas initiative. So again, [Bennett] Gershman talked about the need for training. I heard the same thing again from Adam [Gershowitz] and I totally agree with you and I'm thinking along the same lines. We haven't discussed this, but the education initiative has to be a key priority. When you think about the education initiative, what do you think about? What are the problems? What are we teaching? What are the gaps between what are the problems and what we are teaching? And how do we bridge them? When we talk about what the problems are, *Brady* is a huge problem, serious problem. But when we did our study, we also collected information so that we in the end could determine what types of misconduct had been committed in

all those types of cases. So we have some sense of what the problems are. And in our research, we found that it ranges from improper argument, improper examination, presenting false evidence, of course, *Brady* is a significant problem, and we have actually more breakdowns, but I didn't include it here. But we have to tell you what kinds of improper arguments are being made over and over again that are found to be misconduct. And you know that if the court found an argument to be misconduct, it's a pretty bad argument. So we know something about the problems and we are now in the process of finding out what we're teaching. At least in California. We started in California. And we know there are 20 ABA accredited law schools in California and there are another 20 that are not ABA accredited. There are a ton of schools in California. We went through the curriculum, and we found of the 20 ABA schools, that there were 3 that had a course in criminal ethics, that 7 had criminal trial advocacy. And they touched on the issue. Seven schools touch on that issue, there were no prosecutorial ethics classes and that's focused on the MPRE, the model rule 3.8. And the problems we found, certainly the MPRE, we're going to go in and interview those faculty teaching those courses. We have a survey going out to find out what readings are being assigned so we can compare those to the problems and see where the gaps are. What are the gaps and how do we bridge them? And that's where we are now. And I think that the idea is that when we come up with a report, we have something specific, we can take that and we can go to law schools and we can go to ABA meetings and we can go around the country and say, "here are the problems. Here's what we're teaching. There's a disconnect. We need to do more." We're meeting with educators who are interested in this issue to talk about what we should do. What kind of modules do we create? Ben is creating hypos, and we need to look at each problem and see how we address them. That's what we're doing now. I think that's it.

Just one more thing. I want to point out that what excites me most about this project is it has huge potential. I teach a seminar that's called Righting Wrongful Convictions. It's become more about prosecutorial misconduct, and I teach it with a prosecutor. So the thought is if we can come up with an effective curriculum that does the job and it's offered one time each year as a seminar, we have 20 students in that seminar. Most of the kids who go to these classes want to be prosecutors. It's an opportunity to work with people and really explore these issues and talk

about their importance. Much of it is inadvertent but much is not. So that's where we are.

MODERATOR: Sam Wiseman¹⁷ from the University of Tulsa College of Law.

PROFESSOR WISEMAN: Thank you. I'll try to be brief. I wanted to talk specifically about *Brady*¹⁸ and the Court's recent treatment of it, because I think that among many things that struck me about *Connick v. Thompson*,¹⁹ is that it is the latest in the Court's recent trend of scaling back *Brady*.²⁰ If you look at *Van de Kamp*,²¹ *Connick* further restricts liability for failure to train for *Brady* violations.²² The Supreme Court's decision, involving the serious application of *Brady* to the plea bargain process and the pretrial period, raises a central question: Why is the Court committed to narrowing *Brady*? I teach Criminal Procedure, and there is a common narrative arc in Criminal Procedure that the Court rolled back in this decision; it's important for my students to understand why the Court is doing this. The exclusionary rule, which the Court has similarly narrowed, has a cost to society.²³ Even the Fourth Amendment itself is a balance between privacy and security.²⁴ Maybe we shouldn't have the Fourth Amendment. Maybe we would be

17. At the time of this symposium, Samuel R. Wiseman was an Assistant Professor at The University of Tulsa College of Law. In 2012, he joined the faculty of Florida State University College of Law as Assistant Professor.

18. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

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

20. *Id.* at 1356 (holding that a district attorney's office may not be held liable under § 1983 for failure to train based on a single *Brady* violation).

21. *Van de Kamp v. Goldstein*, 555 U.S. 335, 339-40 (2009) (holding that the prosecutors were immune from claims arising from § 1983 for fear that the threat of suit could affect prosecutors' trial-related decisions and the danger of liability for honest mistakes).

22. *Connick*, 131 S. Ct. at 1356.

23. See Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1374-78 (2008).

24. See Samuel R. Wiseman, *Brady, Trust, and Error*, LOY. J. PUB. INT. L. (forthcoming 2012) (citing to Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1464 (observing that "the Court views, and has viewed for the past several decades Fourth Amendment disputes as a tension-filled clash between public interests, such as law enforcement, and individual interests, such as privacy and autonomy" but disputing the validity of this view)).

safer. But *Brady*, the way the Court has defined it over the years, is restricted to cases in which we really think—and tell me if I’m being too technical (joking)—there is a pretty good chance the guy is actually innocent. So that is something that most people will get behind.

PROFESSOR WISEMAN: As a general principle in the Supreme Court, what is driving the Court’s scaling back? The answer is that it is complicated. But let me suggest one simple answer or trend, and that is *Brady* and the way it’s enforced: among other ways, §1983²⁵ and federal habeas,²⁶ which are Warren Court doctrines born out of a deep skepticism of the workings of the criminal justice system, particularly in the American South. And there are very solid reasons for the Court in that era to be skeptical of the American criminal justice system. I’ve seen a gradual decline and then a falling off the cliff in the Court’s level of skepticism in the motivations of prosecutors, and other participants in the criminal prosecution: the word “deterrence” is in Justice Thomas’s opinion,²⁷ and he is wary of deterring prosecutors. In *Van de Kamp*, Justice Breyer does discuss the effect of *Brady* liability as a potential supervisory liability for prosecutors, which would be to influence their decision-making and to have fewer *Brady* violations.²⁸ But this is an argument against liability, and why is that? I think one partial answer is that the Court thinks that we’re a more just society. So the cost to *Brady* in terms of litigation expenses, et cetera, are less justified because there is less need to deter prosecutorial misconduct because there is less of it. We don’t have the deeply entrenched racial problems; at least I think that’s what they’re saying. And viewed in its own terms, it’s understandable. But what I think is deeply unfortunate about

25. 42 U.S.C. § 1983 (2006).

26. 28 U.S.C. § 2254 (2006); see, e.g., *Townsend v. Sain*, 372 U.S. 293, 322 (1963) (requiring a federal habeas hearing); see CHARLES DOYLE, CONG. RESEARCH SERV., RL 33391, *FEDERAL HABEAS CORPUS: A BRIEF LEGAL REVIEW* (2006) (stating that federal habeas corpus is a procedure whereby an individual can petition a federal court to review the legality of an individual’s incarceration).

27. *Connick*, 131 S. Ct. at 1376 (Justice Thomas stating, “Undeterred by his assistants’ disregard of Thompson’s rights, Connick retried him for the Liuzza murder.”).

28. *Van de Kamp*, 555 U.S. at 341-42 (internal citations omitted) (Justice Breyer stating, “The ‘public trust of the prosecutor would suffer’ were the prosecutor to have in mind his ‘own potential’ damages ‘liability’ when making prosecutorial decisions – as he might well be subject to § 1983 liability.”).

the decisions that we've heard from all the speakers today is that prosecutors rarely believe that they're acting unjustly, yet they are. Recent scholarship has shown that cognitive biases and other factors contribute to serious prosecutorial errors.

The prosecutors don't sign up to do injustice. But for a variety of reasons, they end up suppressing evidence in the pursuit of justice. And the way to combat that—changing of the office by providing concrete guidance and separating the investigative and charging decisions in a prosecutor's office—would be to encourage this in judicial review of prosecutorial actions. The terrible thing about *Connick* is—if I've correctly identified its central underlying premise—that it takes away a key incentive for prosecutors' offices to adopt these obviously necessary reforms.

MODERATOR: Thank you, Sam. And last but not least, our own Steve Singer²⁹ from the Loyola law clinic.

PROFESSOR SINGER: I'm glad I went last since this is my home turf. I have a few brief comments. I think there are essentially two basic problems, one legal and one structural. We have seen that the Court is, in fact, cutting back on *Brady* instead of expanding *Brady*.³⁰ It goes to *Brady's* roots, and the Court's decision in *Bagley*,³¹ where the Court incorporated the material to the outcome test into *Brady*.³² Normally, in legal doctrines, we separate out error and prejudice. First, we decide if there was an error, either one made by judges or by the lawyers. Then, the appellate courts look at whether the error was harmless or not. *Brady* is one of the unique areas where the error analysis and prejudice analysis are folded into one. As Graymond Martin³³

29. Professor Stephen Singer is an Assistant Clinical Professor of Law at Loyola University New Orleans College of Law in New Orleans, Louisiana, where he supervises the criminal defense clinic and also teaches Criminal Procedure.

30. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

31. *United States v. Bagley*, 473 U.S. 667, 682 (1985) (holding that for *Brady* purposes, "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

32. *Id.*

33. Mr. Graymond Martin is the First Assistant District Attorney for the Orleans Parish District Attorney's Office. See ORLEANS PARISH DISTRICT ATTORNEY, CITY OF NEW ORLEANS, NEWS (Jan. 12, 2009), <http://www.nola.gov/en/PRESS/Orleans-Parish->

himself pointed out, almost in a complaining way, that the problem he has is that it makes *Brady* complicated. Because, how do you decide what's material? And of course, the problem is compounded by the fact that this comes from the United States Supreme Court, which is of course an appellate court, and the harmless error doctrine³⁴ really is an appellate standard. Trial lawyers may agree or disagree and many are fairly skeptical on a jury's ability to read a transcript. What is harmful and what is harmless? One thing that courts always find harmful is jury instructions. If the jury instructions are wrong, the presumption is that the jury followed the instructions. However, trial lawyers will tell you they do not put a lot of weight on jurors listening to instructions and following the instructions. They go more on the evidence they see and their gut feelings. But it is one thing to have an appellate court decide whether something was important to the outcome or not. Looking at a transcript to the trial, it is quite another thing to ask a trial lawyer, pretrial, to decide whether a particular piece of evidence is important or unimportant and have to make that decision. As one court, that I think I am familiar with, aptly put it, "no one has the gift of prophecy."³⁵ How can an individual trial lawyer know in advance what is going to be important and what is not going to be important before you have ever seen a trial? It is an impossible standard to meet. But that is intentional. The court wants an "out" for prosecutors. And that is the main "out" that the Orleans Parish District Attorney's office uses, which is what most district attorneys' offices use, is arguing that the evidence was not material. So in fact they were the biggest proponents of keeping the materiality standard,³⁶ although it makes things complicated. Things could be made much simpler if all that an individual prosecutor had to decide was "is this favorable to the defense?" I would teach an "ouch" test, in other words, would you rather this attorney not have this? If you would rather not have them have

District-Attorney/All-articles/Cannizzaro-Names-First-Assistant.

Mr. Martin presented earlier in the symposium program.

34. "All 50 States have harmless-error statutes or rules, and the United States, long ago through its Congress, established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.'" *Chapman v. California*, 386 U.S. 18, 22 (1967). The statute provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (2006).

35. *Lewis v. United States*, 408 A.2d 303, 307 (D.C. 1979).

36. See, e.g., *Brady*, 373 U.S. at 87; *Bagley*, 473 U.S. at 675-76.

it, you have to turn it over. I think that is intentional. Also, I think there is that legal problem where things could be simplified, but the Supreme Court has made it worse and not better in that respect.

The second problem really is structural. Here is where I beg to differ with a lot of what we have heard. I do not hold out a lot of hope. I know Mr. Aaron³⁷ described either criminal prosecutions or bar discipline; I am just skeptical. In criminal prosecutions—the Supreme Court has rejected civil liability.³⁸ If no one is going to even allow civil liability, the idea that you'll have criminal liability, even for prosecutors, is ridiculous. So you will have prosecutors prosecuting other prosecutors. I am skeptical that that will work. As Kathleen³⁹ pointed out in her slides, bar discipline has a pathetic history.⁴⁰ The Louisiana statistics are not any better than the California statistics. And I can think of two decisions where prosecutors, one involving an Orleans Parish D.A., and the Shareef Cousin case, and the second, I think there actually is one other.⁴¹ Michelle⁴² is saying no. But, in *Connick v. Thompson*, there were four trial prosecutors but there was a fifth, Mike Riehlmann who is discussed.⁴³ Of these five prosecutors, there was only one who received bar discipline and that person was the one prosecutor

37. Mr. William Aaron is the managing shareholder of Aaron, PLC. Mr. Aaron has over thirty-four years of general and specialized legal experience in the public and private sectors and is licensed to practice law in Louisiana, Texas, and the District of Columbia. See WILLIAM D. AARON, JR., <http://www.aaronfirm.com/aaron.html> (last visited Mar. 11, 2012). Mr. Aaron presented earlier in the symposium program.

38. *Connick v. Thompson*, 131 S.Ct. 1350 (2011) (holding that a district attorney's office may not be held liable under §1983 for failure to train based on a single *Brady* violation); *Van de Kamp v. Goldstein*, 555 U.S. 335, 338 (2009) (holding that absolute immunity extends to claims that the prosecution failed to turn over impeachment materials).

39. *Supra* note 15.

40. David Keenan et. al, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, YALE L. J. ONLINE 7, <http://yalelawjournal.org/images/pdfs/1018.pdf>.

41. *Cousin v. Lensing*, 310 F.3d 843 (5th Cir. 2002) (holding that claims of actual innocence do not justify "equitable tolling of the limitations period").

42. Michelle R. Ghetti is the Louisiana Outside Counsel Professor of Law at Southern University Law Center. See SOUTHERN UNIVERSITY LAW CENTER, <http://www.sulc.edu/faculty/ghetti.htm> (last visited Mar. 11, 2012).

43. See Keenan, *supra* note 39, at 4.

who became a defense lawyer and disclosed the misconduct.⁴⁴ So the only prosecutor ever disciplined in *Connick v. Thompson* was the one who actually disclosed it and blew it open.⁴⁵

So that history, given the number of *Brady* cases that there are in Louisiana and throughout the country, does not bode well for relying on bar discipline. I think it is a structural problem. It goes to the roots and foundation of our government. Our system is based on checks and balances that we don't trust government officials. *Brady* is a case that imposes on the prosecutor the responsibility for disclosing, but they are their own policemen. And it is fundamentally not going to work. The prosecutor's office is a political entity, that is elected, you have to run on your record, and it serves as a stepping-stone for other offices, to becoming a judge, or other higher offices. You are in a competitive enterprise. The prosecutors are going to be trying to win. Unless you can take that incentive structure out, I think it is a little better on a federal level, a little less political. But I just do not see it. Not at the state level. And I have had these conversations with my good friend, Emily Maw.⁴⁶ I think until you go to a system that is similar to JAG corps or the English system where lawyers do both, even today is a reflection of what goes on. We had red state/blue state observations going on. You had the prosecutors talk in one group and the defense lawyers talk in one group. There's no mixing. It's like watching MSNBC and FOX News, they're both just talking at each other and not listening. As I see it, if you're a prosecutor but you may be on the defense side in the next case, you're more likely to internalize the culture. And what you do to others may then happen to you. And you have to flip sides all the time, you get at a way of sort of depoliticizing *Brady* violations. Until you do that, I think training and these other ethical things are nice, but they are pretty superficial, and they are not going to fundamentally change things.

MODERATOR: Thanks, Steve. And thanks to all the panelists. Cookie?

PROFESSOR RIDOLFI: One thing, I think I must have been

44. See *In re Riehlmann*, 891 So. 2d 1239, 1245 (La. 2005).

45. *Id.*

46. Emily Maw is the Director of The Innocence Project New Orleans. See INNOCENCE PROJECT NEW ORLEANS, <http://ip-no.org/about-us/staff> (last visited Mar. 12, 2012).

unclear in my presentation. I don't know about Louisiana, but in California, we've seen a huge change in attitude, concern. We've published the prosecutor's names on the website. We did this in this case and people are talking about it all over the place and we've seen bar action in cases where they're taking full public hearings. And the new chair of the bar came to my offices and said "what do you want?" If we push, in some states at least we're going to get some results.