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Municipal Liability? Not So Fast: What *Connick v. Thompson* Means For Future Prosecutorial Misconduct

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I. INTRODUCTION

In *Connick v. Thompson*,[1] the United States Supreme Court held that, under section 1983 of title 42 of the United States Code,[2] the Orleans Parish District Attorney's actions failed to rise to the level of deliberate indifference required for municipal liability.[3] The Court affirmed the possibility of "single-incident" municipal liability hypothesized in *City of Canton v. Harris*[4] as an exception to the ordinary requirement of a pattern of similar violations necessary to prove the stringent standard of deliberate indifference to a known or obvious consequence.[5] Despite upholding the validity of the exception, the Court found that Thompson's case did not fall within this narrow scope of single-incident liability

1. 131 S. Ct. 1350 (2011).
2. 42 U.S.C. § 1983 (2006).
3. *Connick*, 131 S. Ct. at 1366.
4. 489 U.S. 378, 390 & n.10 (1989).
5. *Connick*, 131 S. Ct. at 1366 (internal quotation marks omitted).

theorized in *Canton*.[6] The challenge after *Connick* will be in determining how wide this latitude of prosecutorial misconduct may stretch before running up against the narrow set of circumstances established in *Canton*.

II. FACTUAL BACKGROUND

In 1985, John Thompson was charged with the murder of Raymond T. Luizza, Jr., after a highly-publicized investigation.[7] As a result of the publicity surrounding the murder investigation, Orleans Parish prosecutors were able to link Thompson to a separate and unrelated subsequent armed robbery when the father of one of the robbery victims showed a photo of Thompson in the newspaper to his children.[8] During the robbery crime scene investigation, a piece of blood-soaked fabric was taken from one of the victims' pants. The potentially exculpatory blood testing results of these materials were delivered to the prosecutor's office two days before the trial, but the report was never disclosed to Thompson's counsel or the trial court.[9]

Equipped with the indictment in both the murder and the robbery cases, the prosecutors decided to try the robbery case before the murder, principally to discourage Thompson from testifying in his own defense during the murder trial. The district attorney's office reasoned that a prior conviction for armed robbery could be used to damage Thompson's credibility on the stand in the murder trial, if he did decide to testify.[10] Thompson was convicted of attempted armed robbery without the prosecutor's office revealing the potentially exculpatory test results or even the existence of the tested piece of clothing.[11] This robbery conviction was then used to elevate the murder to a death penalty case.[12] In the subsequent murder trial, prosecutors concealed further evidence: information that the initial description of the assailant was wholly inconsistent with Thompson's profile.[13] Thompson was convicted of the Liuzza murder after he chose not to testify in his own defense because of the armed robbery conviction.[14]

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6. *Id.*
7. Connick v. Thompson, 131 S. Ct. 1350, 1356 (2011).
8. *Id.* at 1356, 1372.
9. *Id.* at 1356.
10. *Id.* at 1372 (Ginsburg, J., dissenting).
11. *Id.* at 1356 (majority opinion).
12. *See id.* at 1372 (Ginsburg, J., dissenting).
13. *Id.* at 1371.
14. *Id.* at 1356 (majority opinion).

In 1999, weeks before his scheduled execution, Thompson's private investigator found the evidence that may have cleared him at his initial robbery trial.[15] On immediate appeal to stay the execution, the Louisiana Court of Appeals reversed the murder conviction on the grounds that the armed robbery conviction "unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial."[16] Thompson's robbery case was vacated outright, without the need for a retrial.[17] In 2003, the district attorney's office tried Thompson again for the vacated Liuzza murder.[18] With only tenuous evidence remaining, the jury returned a verdict of not guilty, clearing Thompson on all charges.[19]

Following his acquittal, Thompson brought a civil action alleging liability under 42 U.S.C. § 1983[20] against the district attorney, Harry Connick, for failing to train his prosecutors about their legal obligation to turn over exculpatory evidence to the defense, known as "*Brady* violation[s]."[21] Before trial, Connick admitted to the *Brady* violation, which left the district court to determine the only issue in the case: whether this failure to train rose to a level of municipal liability. At trial, the jury found Connick liable under this failure-to-train theory and awarded Thompson $14 million in damages, $1 million for every year Thompson wrongfully spent on death row. A panel for the United States Court of Appeals for the Fifth Circuit affirmed on the grounds that Connick was on notice of an obvious need for *Brady* training. The court of appeals, sitting en banc, affirmed the lower court's ruling by default when it split evenly after vacating the panel decision and granting a rehearing.[22]

In a fiercely contested 5-4 split decision in which the dissent read from the bench, the United States Supreme Court held that Connick's failure to train his subordinate prosecutors did not rise to the requisite deliberate indifference for municipal liability under 42 U.S.C. § 1983, thereby reversing the lower courts.[23]

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15. *Id.*
16. *Id.* at 1356-57.
17. *See id.* at 1355, 1357.
18. *Id.* at 1357.
19. *Id.*
20. 42 U.S.C. § 1983 (2006).
21. *Connick*, 131 S. Ct. at 1357. Such failures to disclose information are commonly referred to as "*Brady* violations" after the 1963 case concerning suppression of material evidence by the prosecution. *See generally* Brady v. Maryland, 373 U.S. 83 (1963).
22. *Connick*, 131 S. Ct. at 1357-58.
23. *Id.* at 1366.

III. LEGAL BACKGROUND

A. *Deprivation of Rights: § 1983 and* Brady *Violations*

In 1871, Congress enacted 42 U.S.C. § 1983[24] to provide a civil remedy against the deprivation of rights secured by the United States Constitution and federal laws.[25] Section 1983 provides in relevant part: "Every person who . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ."[26] Although the language itself only refers to individuals, the United States Supreme Court has since clarified that the scope of liability includes local governments, which may be liable under § 1983 where the municipality itself deprives a person of their rights or causes such persons to be the subject of such deprivation.[27]

The Supreme Court clarified the bounds of a prosecutor's constitutional obligations regarding these civil rights of due process in the 1963 case of *Brady v. Maryland*.[28] In *Brady*, the Court held that suppression of material evidence that might be favorable to the defense after a request for disclosure resulted in a deprivation of the due process rights of the defendant.[29] Specifically, "*Brady* evidence" included evidence that was material to either the defendant's guilt or potential punishment.[30] *Brady* laid the groundwork for the scope of the prosecution's duty in disclosure to both the court and opposing council.[31] Subsequent cases have established that violation of this constitutional responsibility may provide a basis for civil liability under 42 U.S.C. § 1983.[32]

B. *A Shift in "Person":* Monell v. New York City

For the century following the passage of 42 U.S.C. § 1983, the Supreme Court held that local governments were immune from suit

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24. 42 U.S.C. § 1983 (2006).
25. *Id.*
26. *Id.*
27. Monell v. Dep't of Soc. Servs. of New York, 436 U.S. 658, 692 (1978).
28. 373 U.S. 83 (1963).
29. *Id.* at 87.
30. *Id.*
31. *See id.*
32. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 388-89 (1989); Pembaur v, City of Cincinnati, 475 U.S. 469, 481 (1986); *Monell*, 436 U.S. at 694.

under § 1983.[33] This policy of immunity shifted in the 1978 case of *Monell v. Department of Social Services of New York,*[34] where the Court overruled the previously narrow definition of "person," from the statute itself, as applying only to individuals.[35] The Court cited original congressional intent in holding that a municipality was included under the meaning of a person subject to § 1983 liability.[36] While the Court extended the scope of § 1983, it was quick to limit the application of municipal liability to those local governments that deliberately acted as the "moving force" behind the alleged deprivation of federal rights.[37] Under this rigorous standard, traditional notions of respondeat superior would be insufficient to establish municipal liability.[38]

The Court held that an act of a municipal agent will be insufficient for liability unless the execution of government policy or custom both amounts to official policy and actually inflicts the alleged injury under § 1983.[39] This "official policy" condition in *Monell* was established to clarify the limited circumstances of liability for municipalities by distinguishing individual actions by employees with those official acts set by the local government itself.[40] The result of *Monell*, which continues to be clarified by its progeny of cases, was a broadening of the scope of § 1983 with limitations on the specific circumstances for municipality liability.

C. Proving the Causal Link: Deliberate Indifference

The line of cases following the shift in liability in *Monell* established that, at the core of every § 1983 action against a local government, a plaintiff must show a direct causal link between the official policy of the municipality and the deprivation of federal rights.[41] As claims alleging liability under § 1983 evolved, the Court drew a distinction between cases that present no difficult questions of causation and fault with cases that are more complex.[42] In *Canton v. Harris*,[43] the Court addressed the latter of these situations where a claim did not involve an allegation

33. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961), *overruled by Monell*, 436 U.S. at 694, 700.
34. 436 U.S. 658 (1978).
35. *Id.* at 694, 700.
36. *Id.* at 690.
37. *Id.* at 694-95.
38. *Id.* at 691.
39. *Id.* at 694.
40. *Pembaur*, 475 U.S. at 479-80 & n.8 (citing *Monell*, 436 U.S. at 694).
41. *Id.* at 481.
42. *See id.*
43. 489 U.S. 378 (1989).

of a municipality directly depriving rights.[44] The claim in *Canton* was based on alleged inadequate training that resulted in one of the trained employees violating § 1983.[45] The Court held that a more rigorous standard of culpability and causation must be found to amount to a level of deliberate indifference to the rights of persons with which the untrained employees would come into contact.[46] Only when this higher standard has been met can such a deficiency rise to the level actionable under § 1983.[47]

Applying this principle in *Board of Commissioners v. Brown*,[48] the Supreme Court reasoned that deliberate indifference is "a stringent standard of fault" that requires proof not merely of negligence, but of a conscious disregard of a patent consequence.[49] This knowledge component, added in *Brown*, meant that once policymakers had actual or constructive notice of a particular deficiency in one of their training programs, the city could be found deliberately indifferent if they choose to retain the flawed program.[50] As Justice O'Connor explained in *Canton*, this "policy of inaction" following notice is effectively the same as the municipality itself violating the statute.[51] As a result, the requisite standard of deliberate indifference for municipal liability under 42 U.S.C. § 1983 provides culpability where the official policy and alleged harm have a tenuous link through various actions, including training programs.[52]

D. A Single Exception: The Canton *Hypothetical*

The Supreme Court has consistently reiterated, in the cases following *Monell*, that in the interest of avoiding a "collaps[e] into *respondeat superior*," a rigorous standard of fault must be overcome to establish that a municipality caused a violation by failing to train its employees.[53] Initially, the Court made clear that to meet the heightened requirement of deliberate indifference it is "ordinarily necessary" to prove a pattern of similar constitutional violations by the ill-trained employees.[54]

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44. *Id.* at 380.
45. *Id.*
46. *Id.* at 388.
47. *Id.* at 389.
48. 520 U.S. 397, 404 (1997).
49. *Id.* at 410.
50. *Id.* at 407.
51. *Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part) (internal quotation marks omitted).
52. *Id.* at 389 (majority opinion).
53. *Brown*, 520 U.S. at 410; *see Canton*, 489 U.S. at 391-92.
54. *Brown*, 520 U.S. at 409.

Under this pattern requirement, establishing the "conscious disregard for the consequences" needed to produce municipal liability requires a plaintiff to show a pattern through the actions of the policymaker's continued adherence to a flawed approach, which it knew or had reason to know had failed to prevent violations by trainees.[55]

In an attempt to explain the extent of limited circumstances in which deliberate indifference may be proven, the Court in *Canton* employed a hypothetical, now oft-cited, where single-incident liability might serve as an adequate substitute for the pattern requirement.[56] The *Canton* court noted that where the need for training alone is "so obvious" that the lack of training would be "so likely" to cause constitutional violations by employees, the failure to train alone would be sufficient for municipal liability without the ordinarily required pattern of similar violations.[57] The *Canton* hypothetical concerned the known need for training regarding constitutional limitations of arrests for police officers because it is "so obvious" that a failure to train would be highly likely to result in constitutional violations by the ill-prepared officers.[58] The Court stated that such a failure to train the officers would effectively amount to the requisite deliberate indifference under § 1983.[59]

In *Canton*, the Court did not dilute the rigorous standard of municipal liability by deliberate indifference, but rather hypothesized a narrow range of circumstances in which violation of § 1983 is so highly predictable that a failure to train could serve as the basis for legal responsibility.[60] Thus, the Court opened the possibility that a pattern may not be required in such an obvious situation.[61] The enumeration of a specific set of circumstances in *Canton* and *Brown* built upon the foundations of *Monell* by clarifying the requirements for "official policy" that can trigger municipal liability under 42 U.S.C. § 1983.

IV. COURT'S RATIONALE

A. *The Majority: Close, but No Cigar*

Justice Thomas's majority opinion in *Connick v. Thompson*[62] affirmed the precedent, explained its rationale, and ultimately rejected the

55. *Id.* at 407.
56. *Canton*, 489 U.S. at 390 & n.10.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Brown*, 520 U.S. at 409 (citing *Canton*, 489 U.S. at 390 & n.10).
61. *Id.*
62. 131 S. Ct. 1350 (2011).

application of, what was in his estimate, a narrow exception laid out in the *City of Canton v. Harris*[63] hypothetical.[64] Since the *Brady*[65] violation was conceded by the prosecutor's office at trial, the Court began by explaining the parameters of the required burdens of proof, under § 1983,[66] for Thompson's failure-to-train theory of municipal liability.[67] Thompson was required to prove not only that Connick was deliberately indifferent to the need for training of his assistant district attorneys' responsibilities under likely *Brady* situations, but also that the lack of *Brady* training was the actual cause of the § 1983 violation in Thompson's case.[68]

The Court explained its previous holdings in the *Monell* line of cases by expressly affirming the "deliberate indifference" standard.[69] Connick's policy of inaction, acting in his role as the official policymaker for the local government, could serve as the requisite municipal policy that gives rise to establishing deliberate indifference.[70] Following the Court's "ordinarily necessary" requirement of a pattern in *Board of County Commissioners v. Brown*,[71] the Court held that Thompson's actions in this case could not establish such a pattern because the previous *Brady* violations committed by the office were of a different type than the alleged injuries in the case at bar.[72]

Next, the Court addressed the merit of the *Canton* hypothetical, since Thompson's § 1983 claim was based not upon a pattern, but on the single-incident liability exception.[73] After affirming the validity of this exception, the Court forcefully rejected the comparison of Thompson's situation to that of the *Canton* hypothetical on several grounds.[74] First, the obvious need for training, which existed in the police training hypothetical from *Canton*, does not exist in the same way with *Brady* training for attorneys.[75] In fact, the very nature of an attorney's preparation through previous training is what sets the profession apart

63. 489 U.S. 378 (1989).
64. *Connick*, 131 S. Ct. at 1366.
65. Brady v. Maryland, 373 U.S. 83 (1963).
66. 42 U.S.C. § 1983 (2006).
67. *Connick*, 131 S. Ct. at 1358.
68. *Id.*
69. *Id.* at 1359-60.
70. *Id.* at 1360.
71. 520 U.S. 397 (1997).
72. *Connick*, 131 S. Ct. at 1360.
73. *Id.* at 1360-61.
74. *Id.* at 1361-63.
75. *Id.* at 1361. Justice Thomas cited to the unique legal training attorney receive during their education in law school where they are at a minimum exposed to *Brady* responsibilities. *Id.*

from the instructional needs of other public employees.[76] Second, there is a unique ethical obligation for attorneys to adhere to *Brady* guidelines that does not exist for the type of employees trained in *Canton*.[77]

As a result of this unique training that the legal profession receives, "[a] district attorney is entitled to rely on [previous instruction] in the absence of specific reason, such as a pattern of violations . . . ."[78] Therefore, the Court held that the *Canton* hypothetical is inapplicable because, unlike police officers, trained attorneys are "equipped with the tools to find, interpret, and apply legal principles."[79] The Court reiterated that the district court and court of appeals panel applied the wrong standard for deliberate indifference in allowing Thompson's showing of "obviousness" to prove the constitutional violation under § 1983.[80] Instead, the Supreme Court held that Thompson failed to prove that the violation was "*so* predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants' *Brady* rights."[81]

B. Justice Scalia's Concurrence: Attacking a Delusional Dissent

Justice Scalia concurred fully with the majority, writing separately in order to specifically address the dissent's allegations.[82] In particular, Justice Scalia reiterated the majority's belief that the only issue present in the case was a legal one and complained about the dissent's focus on the nuances of the extensive trial record.[83] Justice Scalia concluded that there was in fact no *Brady* violation in the case.[84] However, even in the event that there was such violation, the requisite causation for municipal liability was still lacking.[85] No amount of training on the part of Connick would have made a difference because the district

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76. *Id.*

77. *Id.* at 1362-63; *see also* MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2010) ("The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . . .").

78. *Connick*, 131 S. Ct. at 1363.

79. *Id.* at 1364.

80. *Id.* at 1365 (internal quotation marks omitted).

81. *Id.*

82. *Id.* at 1366 (Scalia, J., concurring).

83. *Id.*

84. *Id.* at 1368, 1370. Justice Scalia reasoned that the failure to train was not the problem. *Id.* at 1368. Even with the proper training, the deliberate and willful misconduct by an individual prosecutor involved was the actual problem. *Id.*

85. *Id.* at 1368.

attorneys are acting alone in their willful suppression of *Brady* material.[86] Therefore, according to Justice Scalia, Connick failed to meet the scrupulous standard of causation required for municipal liability under § 1983 because of the autonomy of his subordinates in their individual violations.[87]

C. A Culture of Inattention is Sufficient: Justice Ginsburg's Dissent

Justice Ginsburg authored and read from the bench a passionate dissent focusing on the pervasive nature of the "culture of inattention," which the dissent reasoned was sufficient to demonstrate the deliberate indifference required for liability under § 1983.[88] The dissent would affirm the lower court's holding as reasonable to conclude that the *Brady* violations were the result of standard operating procedure amounting to official policy from the district attorney's office, which fit into the *Canton* hypothetical.[89] Justice Ginsburg projected a grim forecast that such constitutional violations for concealment of evidence will continue unless municipalities are held liable under § 1983.[90]

Next, Justice Ginsburg walked through an in-depth treatment of the trial evidence to bolster her finding that a "culture of inattention" was present in Connick's office.[91] Although the dissent and majority worked from the same baseline test of "deliberate indifference" giving rise to municipal liability, the dissent's conclusion from the evidence was that the jury, as the trier of fact, should be affirmed in the absence of a legitimate contention of error.[92] The dissent found that the evidence supports the jury's finding in three ways: (1) Connick failed to ensure the prosecutors under his direct control knew their constitutional *Brady* obligations, (2) there was an obvious need for *Brady* training, and (3) Connick's approach amounted to a "culture of inattention" to *Brady* material.[93]

Finally, Justice Ginsburg rejected the notion of a narrowly-tailored view of single-incident liability offered by the majority.[94] Such a tapered scope of the pattern exception is not backed by the statutory language of § 1983 nor case precedent.[95] The dissent instead insisted

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86. *Id.*
87. *Id.*
88. *Id.* at 1370, 1382 (Ginsburg, J., dissenting).
89. *Id.* at 1370.
90. *Id.*
91. *Id.* at 1371-82.
92. *Id.* at 1377.
93. *Id.* at 1381-82.
94. *Id.* at 1386.
95. *Id.*

that deliberate indifference may be proven in many different ways outside of the ordinarily required pattern of similar violations.[96] For all of these reasons, Justice Ginsburg and the three other justices who joined her in the dissent would affirm the lower courts upholding the jury verdict for Thompson.[97]

V. IMPLICATIONS

A. *Prosecutorial Duties Moving Forward*

In the wake of the United States Supreme Court's decision last March, much has been made about where the bounds of prosecutorial liability now lie under § 1983.[98] At first blush, a strict reading of Justice Thomas's majority opinion seems to raise the burden of proof for municipal liability to an almost unattainable level for an injured party. As a result, there is a prevailing fear that this ruling no longer leaves an effective means for monitoring prosecutorial compliance with *Brady*[99] violations. In fact, in addressing the implications of *Connick v. Thompson*[100] at a recent national criminal law conference, one keynote speaker stated that "[u]nless municipal agencies bear responsibility for adequately conveying what *Brady* requires and for monitoring staff compliance, these sort of violations and damages are bound to be repeated."[101]

What remains to be answered is whether, inside of a district attorney's office, a supervisor is able to now effectively turn a blind eye to known *Brady* violations occurring in the office under his watch. In fact, does this decision *encourage* supervisors to turn a blind eye knowing that a "pattern" must be shown in order for their office to be liable? This impact will largely depend on how the precise issue addressed in this case is interpreted by future courts.[102] The majority's position that Justice Ginsburg's focus on the overall egregious acts was irrelevant to

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96. *Id.*

97. *Id.* at 1387.

98. *See* Elkan Abramowitz & Barry A. Bohrer, *'Brady' Obligations In the Twenty-First Century*, N.Y.L.J., May 2011.

99. Brady v. Maryland, 373 U.S. 83 (1963).

100. 131 S. Ct. 1350 (2011).

101. Rory K. Little, *Annual Review of the Supreme Court's Term, Criminal Cases* (AM. BAR ASS'N Toronto, Can.), Aug. 2011, at 15 (quoting Connick v. Thompson, 131 S. Ct. 1350, 1370 (2011) (Ginsburg, J., dissenting)).

102. A narrow reading of the issue in *Connick* holds that, in determining municipal liability for similar constitutional violations of employees under a failure-to-train theory, a single *Brady* violation, no matter how flagrant, will not support liability for a district attorney's office's failure to train their employees.

this case[103] supports this narrow interpretation because any preceding violations by the office, in unrelated matters, bring no bearing on the precise legal question at bar. The dissent looks at this *Brady* violation with a view beyond the specific and narrow question that the majority addresses.[104] Initially, it appears that courts have seen the decision in *Connick* as precluding single-incident liability for failure-to-train claims in regards to *Brady* violations, but not necessarily for other failure-to-train claims that the *City of Canton v. Harris*[105] hypothetical might encompass.[106]

B. Making a Defendant Whole Again: The Larger Concern

As much as *Connick* has left legal scholars and lower courts scratching their heads over the ramifications of prosecutorial liability, the underlying issue remaining is how our legal system should best attempt to make a defendant whole again. Searching for an answer in this area works from a presumption that making a defendant victim whole again is actually possible. Sadly, there is the possibility that this notion is nothing more than a legal fiction, as it would truly be impossible for the injured party to be put back in the same position they were before the misconduct. *Connick* has made clear, at some level, the improper route for recuperation for victims of prosecutorial misconduct. However, the Court did not sufficiently address what the *proper* channel to vindicate these rights should be. While the prosecutors in the *Connick* case did face the possibility of sanctions, the Court effectively left no outlet for even an attempt at making Mr. Thompson whole again. In the end, this lack of direction in liability might have the most lasting impact on the recuperation in the lives of those most directly affected in similar *Brady* violation cases.

C. The Canton *Hypothetical: What Was Said and, More Importantly, Not Said?*

After the much maligned *Canton* police training hypothetical became one of the central issues in the *Connick* decision, its survival will be a pressing issue for future courts to determine. More important than what

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103. *Connick*, 131 S. Ct. at 1364 n.11.

104. The dissent focuses more on the broad implications of a district attorney's office being able to escape liability for a history of unrelated egregious actions. *See Connick*, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).

105. 489 U.S. 378, 390 & n.10 (1989).

106. *See* George v. Sonoma Cnty. Sheriff's Dep't, No. C–08–2675 EDL, 2011 WL 2975850, at *4-8 (N.D. Cal. July 22, 2011).

the Court did say about the *Canton* hypothetical is what they stopped short of saying. Justice Thomas, writing for the majority in *Connick*, held that "[f]ailure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability."[107] It is imperative to note that the Court stopped short of cutting off all of the legs to this long-standing, controversial hypothetical in *Canton*. When Justice Thomas excluded *Brady* violations he further limited the "narrow range" of the hypothetical, but did not eliminate it all together. Therefore, under still undefined circumstances, the "single-incident" theory still stands after *Connick*; albeit limping a bit.

Contrasting the *Canton* police hypothetical to the attorney training concerning Mr. Connick, the Court first pointed out that there is not an obvious need for training under *Brady* violations because lawyers presumably have previous training on the topic.[108] At a theoretical level, this rationale by the Court seems to make sense. However, at a practical level the dots simply do not connect. Justice Thomas's reasoning is built upon the presumption that every law student is sufficiently trained in *Brady* obligations during their legal education. This supposition does not hold for every attorney working in every district attorney's office. The reality for some law students, maybe even a majority, is that the extent of their *Brady* "training" is the limited requisite exposure during Bar Exam preparation. When this basic tenant of the Court's reasoning fails, we are left with an "obvious" need for training, in line with the principle behind the police training of the *Canton* hypothetical.

In an attempt to further substantiate the position that attorneys are distinct from police officers, Justice Thomas points to lawyers' professional obligations.[109] The majority relies on such passages as Rule 3.8(d) of the Model Rules of Professional Conduct[110] to demonstrate that attorneys have a unique duty outside of job training through character and fitness standards.[111] This "outside obligations" distinction with the police in *Canton* is flawed as it is based on the presumptive effectiveness of the Model Rules. While courts may frequently consider

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107. *Connick*, 131 S. Ct. at 1361.

108. *Id.* Unlike the obvious need to train the police about constitutional violations, "[a] district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient." *Id.* at 1363.

109. *Id.* at 1362-63.

110. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2010).

111. *Connick*, 131 S. Ct. at 1362-63. Rule 3.8(d) requires the production of exculpatory evidence and is regarded as requiring more of a prosecutor regarding the constitutional obligations established by *Brady*. *Id.*; MODEL RULES OF PROF'L CONDUCT R. 3.8(d).

violations under *Brady*, there is rarely any action taken against violations of this particular Model Rule.[112] This lack of enforcement results in Rule 3.8(d) being practically ineffective. Therefore, the functional consequence following *Connick* is that there will be "little to hold prosecutors accountable for their conduct."[113] In reality, however, these sanctions might have always been all that was on the line for prosecutors, no matter the outcome of *Connick*.[114]

Despite the majority's assertion that the prosecutors in the case were undisputedly familiar with *Brady* requirements in general and that specific training might or might not have been beneficial, the driving force behind the majority's opinion is a fear that courts will begin to "micromanage local governments throughout the United States."[115] What the Court is truly afraid of can simply be described by the age-old "floodgates" argument. The Court is acting as the gatekeeper for federal courts by filtering potential cases that it finds might lead to an uncontrollable amount of litigation. Moving forward, the Court is afraid that if a district attorney's office is held liable for individual actions of "autonomous prosecutors" then the standard for municipal liability under § 1983 will be watered down to a level of vicarious liability. However, a recent article in the *New York Law Journal* seems to refute the assumed existence of underlying civil action claims for prosecutorial misconduct waiting to bust open these floodgates into federal courts.[116]

D. How Subsequent Cases Have Treated Connick

Following the decision of the Supreme Court in March, there have been a large number of cases attempting to determine the shadow that the *Connick* decision now casts on potential single-incident claims of municipal liability under § 1983. At least one court has held that the scope of *Connick* extends beyond the narrow set of failure-to-train cases, which it expressly addresses.[117] Single-violation liability, as discussed in *Connick*, is still possible where the violation is a "highly predictable

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112. *See* Abramowitz & Bohrer, *supra* note 98.

113. *Id.*

114. If *Connick* were decided in favor of Mr. Thompson, it would have been the municipality, not the individual prosecutor, paying the fine for the *Brady* violation.

115. *Connick*, 131 S. Ct. at 1363.

116. *See* Abramowitz & Bohrer, *supra* note 98.

117. *See* Price v. Tunica Cnty., Miss., No. 2:08cv262–P–A, 2011 WL 3426182, at *2 (N.D. Miss. Aug. 5, 2011) (finding that *Connick's* standard for "'substantially' similar violations" can be applied beyond just failure-to-train *Brady* violation cases).

consequence of the failure to train."[118] Further, it has been found that merely distributing a manual, and nothing more, could serve as the functional equivalent of no training at all in light of the *Connick* decision.[119]

One district court in Michigan has implemented Justice Scalia's concurrence, emphasizing the causal link between training and misconduct.[120] In *Connick*, Justice Scalia opined that the failure to train was not the problem, in that, even if there would have been training, the deliberate and willful misconduct by the individual prosecutors involved was the actual problem.[121] Justice Scalia thought a plaintiff must be able to "demonstrate a direct causal link between the municipal action and the deprivation of federal rights."[122] In a May 2011 decision, a few months after *Connick* was decided, the United States District Court for the Eastern District of Michigan relied on Justice Scalia's concurrence to find that a plaintiff's claim for injuries flowing from a municipality's actions will be precluded if the plaintiff is not able to display any other incident relating to the same type of claim.[123] The district court determined that "[l]acking this requisite causal link, even if Plaintiff had demonstrated the existence of an unconstitutional policy, [the plaintiff's] Section 1983 claim against the [defendant] fails."[124]

VI. CONCLUSION

In *Connick v. Thompson*,[125] the United States Supreme Court held that Harry Connick's failure to train a prosecutor did not rise to the level of deliberate indifference required for municipal liability when applying a single-incident theory under 42 U.S.C. § 1983.[126] As a

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118. Ramirez v. Ferguson, No. 08–cv–5038, 2011 WL 1157997, at *25-26 (W.D. Ark. Mar. 29, 2011) (internal quotation marks omitted) (finding sheriff and captain supervisors of correctional officers liable for a "woeful" failure to train on the handling of inmates with mental health needs).

119. Meogrossi v. Aubrey, No. 3:09cv–00301–JDM, 2011 WL 1235063, at *13 (W.D. Ky. Mar. 31, 2011).

120. Freeman v. City of Detroit, No. 09–CV–13184, 2011 WL 1869434, at *5 (E.D. Mich. May 16, 2011) (finding grounds for dismissal for failure to state a § 1983 claim for lack of causation).

121. *Connick*, 131 S.Ct. at 1368 (Scalia, J., concurring).

122. *Id.* (quoting Bd. of Comm'rs of Bryan Cty. v. Brown, 520 U.S. 397, 404 (1997)) (internal quotation marks omitted).

123. *Freeman*, 2011 WL 1869434 at *5.

124. *Id.*

125. 131 S. Ct. 1350 (2011).

126. *Id.* at 1366; 42 U.S.C. § 1983 (2006).

result of this decision, the scope of municipal liability in employee training programs has been narrowed significantly in the absence of a pattern of similar violations. In the end, courts should view the decision in *Connick* as precluding single incident liability for failure-to-train claims in regards to *Brady* violations, but not necessarily for other failure-to-train claims using the *Canton* hypothetical.

T. OWEN FARIST