Qualifying Prosecutorial Immunity Through *Brady* Claims

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ABSTRACT: This Article considers the soundness of the doctrine of absolute immunity as it relates to Brady *violations. While absolute immunity serves to protect prosecutors from civil liability for good-faith efforts to act appropriately in their official capacity, current immunity doctrine also creates a potentially large class of injury victims—those who are subjected to wrongful imprisonment due to* Brady *violations—with no access to justice. Moreover, by removing prosecutors from the incentive-shaping forces of the tort system that are thought in other contexts to promote safety, absolute immunity doctrine may under-incentivize prosecutorial compliance with constitutional and statutory requirements and increase criminal justice system error.*

The Article seeks to identify ways to use the civil justice system to promote prosecutorial compliance with Brady*, while recognizing the need to provide appropriate civil protections to enable prosecutors to fulfill their unique role within the criminal justice system. After developing a novel taxonomy of* Brady *cases, evaluating such cases against basic tort principles, and considering the prosecutorial community's views regarding appropriate* Brady *remedies, it proposes a statutory modification of absolute immunity that might better regulate and incentivize prosecutor behavior, reduce wrongful convictions, and improve access to justice.*

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I. INTRODUCTION

Although innocent, Juan Roberto Melendez was convicted of murder and sentenced to death in 1984.[1] Melendez was convicted of shooting Delbert Baker, the owner of a cosmetology school, three times and slashing Baker's throat.[2] The case against Melendez hinged on the word of David Falcon, who

1. Alexandra Gross, *Juan Roberto Melendez: Other Florida Cases with Perjury or False Accusations*, NAT'L REGISTRY OF EXONERATIONS (June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3465 [https://perma.cc/KJX7-8E5F].

2. Melendez v. State, 498 So. 2d 1258, 1259 (Fla. 1986).

told police that Melendez had confessed that he and another individual had killed Baker. Falcon's story, however, was inconsistent with several facts of the case, and conflicted with the words of another witness who said he saw two men with Baker before the murder. The police did not pursue that lead, instead focusing on Falcon's words.

A few months after Baker's death, investigators ultimately zeroed in on Melendez and John Berrien, the other man mentioned by Falcon. Berrien gave conflicting accounts about his involvement to investigators while being interrogated. He was offered a deal to testify against Melendez as the killer: he ultimately pled no contest to being an accessory after the fact, and received two years of house arrest as part of the deal.

Despite the fact that there was no physical evidence linking him to the crime, Melendez was convicted at trial. The prosecution's case rested on the testimony of Falcon and Berrien. Although Melendez put forth an alibi supported by four witnesses, he was still found guilty. A witness named Vernon James—who had confessed to Melendez' attorney that two other men had killed Baker—refused to testify at trial, invoking the privilege against self-incrimination.

Nearly two decades after the conviction, Melendez' investigator discovered records showing that James had incriminated himself in statements made to prosecutors. Although Melendez' attorney had specifically queried the prosecutor about James, the prosecutor had withheld crucial parts of his story. The prosecutor also failed to disclose information about Falcon and Berrien—the prosecution's key witnesses—that would have called their credibility into question. Such disclosures are a Constitutional requirement.[3] Based on this evidence, a transcript containing James' confession to Baker's murder, and the testimony of multiple witnesses who said James confessed the same to them, Melendez' conviction was vacated in 2001.[4] Melendez left prison with $100 and a pair of pants.

Eric Robinson was also convicted of murder after the shooting of Edward Fuentes; he was sentenced to life in prison in 1994.[5] To convict Robinson, Los Angeles County prosecutors presented eyewitnesses who identified Robinson as one of Fuentes' shooters. In 2006, after spending 13 years in prison, Robinson retrieved the police department file on his case, which showed he *had been excluded as a suspect within days of his arrest.* That evidence had been concealed by a police sergeant who had determined the real identity of the shooter months after the shooting. The gunman, Reggie Lucas, had been killed only two days after Fuentes' death. In 2007, the Los Angeles District Attorney's Office dismissed the charges against Robinson, and he was released.

3. Giglio v. United States, 405 U.S. 150, 153–54 (1972).

4. State v. Melendez, No. CF-84-1016A2 (Fla. 10th Cir. Ct. Dec. 2001).

5. Maurice Possley, *Eric Robinson: Other California DNA Exonerations*, NAT'L REGISTRY OF EXONERATIONS (June 2012), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3587 [https://perma.cc/W7EA-L6KK].

Robinson filed a wrongful conviction suit against the city of Los Angeles and the police officers involved in the investigation, ultimately receiving a $1.75 million settlement.[6]

Although these wrongful prosecutions seemingly have much in common—both involved innocent men accused of murder, where there was unreliable eyewitness testimony, little to no physical evidence, and officials who actually knew the identity of the true perpetrator but nonetheless allowed the wrongful prosecution to move forward—they differed in the end result. Because key exculpatory evidence was suppressed by a police officer in Robinson's case, he was able to pursue a § 1983 lawsuit for damages arising from his ordeal, ultimately receiving a sizeable settlement designed to help make him whole.[7] Juan Roberto Melendez, in contrast, cannot obtain damages for what happened to him, because in his case, the exculpatory evidence (the incriminating statements of the actual killer) was withheld by a prosecutor.

The courts have created this inequity. Because police officers and investigators receive qualified immunity, the aggrieved have a legal recourse. However, prosecutors stand behind a shield of absolute immunity, which blocks tort recovery from any activity considered adversarial in nature, like the decision to withhold evidence.

This is puzzling. If someone falsely imprisons another against their will, a run of the mill false imprisonment claim could follow. Or if a company, knowing that its goods contained defects but representing their qualities as safe had sold them to a customer anyway, only to see them promptly break and cause significant harm, a products liability claim would be available. In these scenarios, the harmed can bring the other party to court. But not for prosecutors.

The application of first principles to stories like the above has a way of crystallizing imperfections and refocusing priorities, especially in law. Applying first principles of tort law to the doctrine immunizing prosecutorial misconduct after *Brady* violations[8] is no exception. Currently, absolute immunity shields prosecutors from liability for such violations,[9] which happen too frequently.[10] This is particularly troublesome given that *Brady* violations

6. Robinson v. City of Los Angeles, No. 2:07-CV-06209 (C.D. Cal. Aug. 29, 2008).

7. Of course, monetary compensation cannot ever make a wrongfully convicted person completely whole given the priceless value of liberty and a good name.

8. That is, prosecutors' failures to disclose exculpatory material to the defense, as required under Brady v. Maryland, 373 U.S. 83, 87 (1963).

9. *See* Imbler v. Pachtman, 424 U.S. 409, 420–24 (1976) (impliedly covers *Brady*); Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for* Brady *Violations*, PACE U. 8 (Jan. 13, 2010), https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1635&context=lawfaculty [https://perma.cc/9QYA-GHMH].

10. *See* United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("There is an epidemic of *Brady* violations abroad in the land."); NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2016, at 6–7 (2017), http://www.law.umich.edu/special/exoneration/

can result in the imprisonment of innocent persons. In addition to unjustified liberty deprivations, they also can contribute to the stigma one encounters by virtue of being unlawfully convicted.[11]

The shielding of *Brady* violations from *any* liability is a serious problem for two reasons: first, the doctrine automatically creates a large class of injured victims—those who are subjected to wrongful imprisonment as a result of conviction—with no legal recompense, a result foreign to the everyday tort system. Second, the doctrine's scope seems to remove prosecutors from the incentive-based forces that permeate the tort system, which are designed to promote safety, minimize near misses, and compensate wronged individuals. Ignoring these realities results in harms that the tort system would consider grossly serious: the loss of life or liberty.

In all of the situations mentioned above, the wrongdoer and the prosecutor intentionally committed a tortious act (with a common law, statutory, or constitutional basis), either to pursue a particular result or, at least aware of certain foreseeable harms, leading to harmful consequences for another party. In every situation, the potential harm is severe. The causal connection is clear. Further, none of the traditional common law defenses to intentional torts, such as consent, self-defense, necessity, insanity, or the justified defense of property apply.

But despite their seeming comparability, these cases differ in one important way: the victim of prosecutorial misconduct due to non-compliance with *Brady* obligations cannot bring a claim.[12] Through the tort system, wrongdoers are likely to be forced to compensate the victims of their conduct. At the very least, the liability of most wrongdoers will be litigated. And the fact that they face potential liability will incentivize them to avoid behavior that could harm others. But despite inflicting an arguably greater harm—severe loss of liberty—absolute immunity shields the prosecutor from suffering legal repercussions.[13] Melendez not only suffered through years of wrongful incarceration and the public shame that comes with a criminal conviction, he also cannot be made whole or compensated in any way.

Documents/Exonerations_in_2016.pdf [https://perma.cc/LU48-K5QT] (noting that, in 2016, official misconduct—of which Brady violations are one species—was a factor in 42% of exonerations); Elizabeth Napier Dewar, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1454 (2006); Ken Armstrong & Maurice Possley, *Part 1: The Verdict: Dishonor*, CHI. TRIB. (Jan. 11, 1999, 2:00 AM), https://www.chicagotribune.com/investigations/chi-020103trial1-story.html [https://perma.cc/5RXU-A5TB] (summarizing the results of the reporters' nationwide study of prosecutorial misconduct in homicide cases).

11. Kimberley A. Clow & Amy-May Leach, *Stigma and Wrongful Conviction: All Exonerees Are Not Perceived Equal*, 21 PSYCH., CRIME & L. 172, 173–74 (2015).

12. *See* Connick v. Thompson, 563 U.S. 51, 54, 61 (2011).

13. Yarris v. County of Delaware, 465 F.3d 129, 141 (3d Cir. 2006) (noting how a failure to comply with *Brady*—through concealment of evidence—was not *investigative* conduct, and therefore was covered by absolute immunity).

This state of affairs becomes even more puzzling when one considers that it is not simply like cases that are treated differently. In situations where tort doctrines would assign greater liability, a prosecutor paradoxically faces less. A private individual who negligently injures another is subject to tort liability; a prosecutor who willfully causes an innocent person to spend years behind bars does not. We assign liability to a product manufacturer because they are better situated to prevent harm from product misuse than others; that a prosecutor is often the only party with information needed to prevent a wrongful conviction matters not at all. Individuals or companies engaging in inherently dangerous activities face stricter than normal forms of liability, yet we routinely indemnify prosecutors for *Brady* violations in death penalty cases,[14] where the consequence is the worst possible harm—a wrongful killing—and the error rate is above 1 in 25.[15]

If the tort system should incentivize cautious behavior—especially in inherently dangerous situations—can the background principles of tort liability justify the continued absolute immunity of the prosecutor for *Brady* violations?[16] If not, and the Court's own stated historical and pragmatic reasons for immunity fail to do so, isn't it time to revisit prosecutorial immunity?

Absolute immunity, created by the Supreme Court in *Imbler v. Pachtman*,[17] and grafted onto 42 U.S.C. § 1983[18] since, is largely considered bereft of a solid textual, historical, and public policy basis. But while scholars have focused ample attention on the Court's misreading of history and the common law at the time Congress enacted § 1983,[19] or argued that its public policy no longer holds,[20] none have taken the Court's challenge, as presented in *Imbler*, to read § 1983 against the *full* background principles of tort liability.[21] To be fair, others, including lower courts, have addressed the applicability of

14. *See supra* note 12 and accompanying text.

15. Samuel R. Gross, Barbara O'Brien, Chen Hu & Edward H. Kennedy, *Rate of False Conviction of Criminal Defendants Who are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCIS. U.S. 7230, 7233 fig.2 (2014).

16. Put more frankly by Daniel Woislaw:

> If property owners and parents were prevented from suing factory owners for their expulsion of hazardous materials that devalued their estates and irritated the lungs of their children, the factory owners would have no reason to stop or curb their hazardous activities. In fact, without fear of litigation, they might increase these activities, or put less effort into preventing the negligent operation of their facilities.

Daniel Woislaw, Comment *Absolute Immunity: Applying New Standards for Prosecutorial Accountability*, 26 GEO. MASON U. CIV. RTS. L.J. 349, 364–65 (2016).

17. Imbler v. Pachtman, 424 U.S. 409, 427 (1976).

18. 42 U.S.C. § 1983 (2018).

19. *See generally* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53 (arguing that the policy reasons behind absolute prosecutorial immunity are untenable).

20. *Id.* at 81; Gershman, *supra* note 9, at 30–32.

21. *See Imbler*, 424 U.S. at 433 (White, J., concurring) (citing Monroe v. Pape, 365 U.S. 167, 172 (1961)).

specific torts principles to *particular* cases of prosecutorial misconduct.[22] But a comprehensive analysis is warranted given how the doctrine fails to deter significant misbehavior.[23]

By examining the doctrine as applied in situations of misconduct against several common first principles of tort liability, this Article hopes to reframe discussions around the need for remedies relating to *Brady* misconduct by prosecutors. The first contention is that absolute immunity doctrine ultimately turns several basic torts principles on their head, such as the role of intentionality, cognizance of the magnitude of the harm, principles related to cost avoidance, and proximate causation. The inversion of these principles occurs without significant justification and is the result of arbitrary line-setting within case precedent.

That said, the inversion mentioned above can be corrected by revamping the scope of current immunity doctrine. While past commentators have argued for qualified immunity, we highlight an alternative path given that qualified immunity doctrine has also come under increasing criticism,[24] and has functioned inadequately to prevent constitutional abuses in the domains in which it has been applied.[25] Instead, this Article proposes a statutory solution that creates a carefully circumscribed tort cause of action against prosecutors whose actions produce wrongful convictions.

To construct the statute, we canvas the current landscape of *Brady* violations through an original empirical exercise, compiling a generous sample of substantiated *Brady* violations via a systematic search of existing cases. After coding the characteristics of these cases, we demonstrate empirically that *Brady* violations encompass a range of actors, mindsets, and injuries. We identify a specific subset of cases within this taxonomy which furnish the strongest basis for liability under generally accepted principles of tort. Our proposed statutory language reflects these distinctions—the statute hones in on the particular types of cases in which a tort remedy would be most strongly justified, and we offer specific examples of how the statute, if enacted, might be applied in real cases. An important takeaway of this analysis is that the proposed statute should not sweep in cases where prosecutors made reasoned judgment calls that turned out to be mistaken. Nor is there any reason to expect that it would lead to a flood of litigation that would chill

22. Fields v. Wharrie, 740 F.3d 1107, 1114 (7th Cir. 2014).

23. *See infra* Part IV (describing cases we studied that involve various types of prosecutorial misconduct).

24. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018) (arguing that qualified immunity has no basis in common law or the Constitution); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018) (arguing that qualified immunity has no support historically, conceptually, or doctrinally).

25. *See* Alexander A. Reinert, *Does Qualified Immunity Matter?*, 8 U. ST. THOMAS L.J. 477, 492–93 (2011); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 893–95 (2014).

appropriate prosecutorial activity, which has long been the strongest justification for absolute immunity offered by its defenders.[26]

Thus, we offer a middle ground for both sides of the absolute immunity debate by structuring reform around *Brady* violations, an already recognized constitutional norm with a strong foundation in existing case law. Our solution comes from the ground up, marrying the realities of *Brady* violations as they have occurred and been recognized by courts with the aspirations and hopes of a constitutional protection like *Brady*. Prosecutors are, in theory, already behaving in response to court decisions delineating the contours of *Brady*. The parameters of those same decisions also preclude a deluge of litigation from swamping the exercise of prosecutorial discretion and pursuing justice in the future. In short, this Article responds to the social reality of the types of *Brady* violations to delicately balance the interests at stake in reforming absolute immunity doctrine. As such, it allows prosecutors to do their job in good faith while protecting innocent victims of constitutional violations.

The proposed statute is not in tension with other modes of reform, but can operate in tandem with them. Litigation to address the Court's mistaken reading of the history of absolute immunity is warranted, but the courts have proven an inhospitable terrain for challenges to absolute immunity. Moving from absolute to qualified immunity would be an improvement, but qualified immunity presents its own difficulties.[27] A statutory solution offers a way to address some of the deficiencies of current case law without going through the courts, and it avoids putting the new wine of a tort remedy into the old bottles of qualified immunity. And by generating the statute from *Brady* realities as recognized by courts, and with the input of prosecutors, our solution allows all three branches of government to coalesce around a solution that pursues justice.

The Article progresses as follows. Part II details why victims who are on the receiving end of *Brady* violations essentially have a right without a remedy. Absolute immunity doctrine insulates prosecutors almost entirely, criminal liability is rarely pursued, and professional responsibility norms have failed to deter violations and provide relief. Additionally, some continue to doubt that *Brady* violations are significant or widespread, thereby impairing political will for reform.

Part III identifies the basic torts principles that are worth a second look when it comes to remedying *Brady* violations. Viewing absolute immunity doctrine through lenses common to the torts universe indicates that some

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26. *See Imbler*, 424 U.S. at 423–25.

27. *See generally* Schwartz, *supra* note 24 (describing how qualified immunity doctrine has little basis in the common law, does not achieve its alleged policy goals, and undermines the promise of redressing constitutional torts); Baude, *supra* note 24 (criticizing qualified immunity doctrine as inconsistent with conventional principles of statutory interpretation and common law principles as originally understood).

Brady violations map well onto basic torts principles underlying liability, whereas others do not. Focusing on how intentionality, least cost avoidance, the magnitude of the harm, and causation principles relate to liability could help to sort which *Brady* violations seem ripe for reconsideration to be separated from the absolute immunity edifice. And those are just a few aspects of the tort system that inform the discussion. This Section lays the groundwork for sorting cases into two camps: those where liability seems warranted and those where existing shields from liability make sense.

Part IV outlines our attempt to grasp the facts on the ground to determine whether these tort principles show up in cases involving *Brady* violations. We began by selecting a random subset of every reported case deciding the merits of an alleged *Brady* violation at the federal and state level from 2008 to 2012. We then coded the data for specific factors relating to *Brady* doctrine itself, as well as against the basic principles underlying liability in the everyday tort system. We presented our findings to prosecutors and defense attorneys for feedback on whether our coding matched their experienced reality with *Brady* issues. This led to remarkable impressions about the *types* of *Brady* violations that are happening on the ground, how they are perceived, and why they seem to be recognized by courts. We found a mix of egregious and seemingly de minimis violations (depending on who you ask). We ultimately constructed a taxonomy of *Brady* violations to try to identify *which* violations are most frequent and serious to determine where typical tort principles would suggest liability makes sense.[28]

Finally, and recognizing that any reform effort likely requires statutory change given existing doctrine under § 1983, we propose a statute that reflects the taxonomy juxtaposed with the normative principles of torts identified in Part III, and then illustrate how that statute would sort through cases with *Brady* violations. This statute provides a cause of action against a prosecutor who believes that evidence or information is exculpatory and material to the guilt or innocence or punishment of a defendant or who unreasonably determines evidence or information to be not exculpatory or immaterial and then purposely, knowingly, or recklessly withholds that information from the defense, either through an affirmative act or omission. The act of withholding must cause a criminal conviction in order for the prosecutor to incur liability. The statute, following *Brady* precedent, extends liability to prosecutors where law enforcement is aware of the *Brady* material. However, liability for failures to disclose information known to law enforcement but not the prosecutor is limited to situations where the failure to obtain said information meets a recklessness standard. This statute sensibly strikes a balance, allowing prosecutors to freely pursue justice within the

28. An analogy might be to cancer classification. Although there are a variety of individual cancers, physicians typically use a staging system to group like cancers for the purposes of assigning and assessing treatment.

parameters set by *Brady*. It threads the constitutional needle, allowing prosecutors to do their jobs while making real the promises of *Brady* for aggrieved individuals.

II. LEGAL DIFFICULTIES IN ENFORCING *BRADY*

Brady imposes on prosecutors an affirmative obligation to disclose materially exculpatory evidence to the defense. Its status as a constitutional obligation is not in doubt and there is no question that most prosecutors take the obligation seriously; however, sanctioning failures to comply with *Brady* has proven difficult given the nature of the doctrine itself, as well as other legal rules structures that would govern prosecutorial behavior.

This inability to regulate *Brady* violations carries important practical consequences, as demonstrated by numerous existing studies that demonstrate that such violations remain widespread. For example, in an analysis of 4,578 death sentences imposed between 1973 and 1995 that reached final review on direct appeal by a state high court, James Liebman, Jeffrey Fagan, Valerie West, and Jonathan Lloyd found that 41 percent were reversed due to serious error[29] and that 16 percent of those reversals occurred due to prosecutorial suppression of evidence.[30] Similarly, Kathleen Ridolfi, Tiffany Joslyn, and Todd Fries found that prosecutors failed to disclose favorable information in 145 of 620 cases they reviewed that raised *Brady* claims.[31] More recently, Samuel Gross, Maurice Possley, and Klara Stephens found in a study of 762 murder exonerations that *Brady* violations occurred in just over half of the cases.[32] And in decrying "an epidemic of *Brady* violations," Judge Alex Kozinski cited 29 cases as examples of the problem.[33]

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29. James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1846–47 (2000).

30. *Id.* at 1850.

31. KATHLEEN "COOKIE" RIDOLFI, TIFFANY M. JOSLYN & TODD H. FRIES, NAT'L ASS'N OF CRIM. DEF. LAWS., MATERIAL INDIFFERENCE: HOW COURTS ARE IMPEDING FAIR DISCLOSURE IN CRIMINAL CASES, at xi (2014), https://www.nacdl.org/getattachment/d344e8af-8528-463c-bba4-02e80dfcedoo/material-indifference-how-courts-are-impeding-fair-disclosure-in-criminal-cases.pdf [https://perma.cc/VBU4-LEC6].

32. NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES 1, 5–6 (Samuel R. Gross ed., 2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/KV5Q-FRLZ].

33. United States v. Olsen, 737 F.3d 625, 626, 631–32 (9th Cir. 2013) (Kozinski, C.J., dissenting). For an alternative view that *Brady* violations are not particularly widespread, see Stephanos Bibas, *The Story of* Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?* 14 (U. Pa. L. Sch., Pub. L. Working Paper No. 06-08, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=763864 [https://perma.cc/PE98-2X3H]. However, it is notable that even with the self-proclaimed "jaundice[]" of an ex-prosecutor, Bibas was able to identify 27 cases in which he was persuaded of the likely innocence of the defendant in question by the *Brady* material. *Id.*

A. *CIVIL LIABILITY AND ABSOLUTE IMMUNITY DOCTRINE*

In theory, prosecutors could face liability under 42 U.S.C. § 1983 for failing to comply with *Brady* given that it could amount to a deprivation of a legal right under color of law. But that potentiality has been almost certainly foreclosed by absolute immunity doctrine, which shields all sorts of decisions and acts by prosecutors relating to a particular prosecution. While the Supreme Court has never *explicitly* ruled on the application of absolute immunity doctrine to *all* types of *Brady* violations, *Imbler*'s majority opinion, Justice White's concurring opinion, and subsequent case law suggest it is likely covered by the defense. This is the general scholarly consensus as well.

Section 1983 was enacted by Congress to counteract intentional deprivations of civil rights. The absolute immunity possessed by prosecutors is not a product of legislative creation. Rather, the doctrine is the product of judicial ingenuity.[34] The Supreme Court created the doctrine in *Imbler*, which involved false testimony put into evidence by a prosecutor.[35] Notably, the counts against the prosecutor included suppression of evidence by the police, claiming that the prosecutor was vicariously responsible for that suppression.[36] While the extent of the prosecutor's knowledge regarding the falsity of the testimony was unknown, the evidence was crucial to the conviction.[37] Noting Congressional silence in the text of the statute, *Imbler* ultimately held that § 1983 assumed absolute immunity for prosecutors for three reasons: (1) historically, some government officials were immune from suit, including prosecutors; (2) immunizing prosecutors would allow them to make difficult decisions free of impaired judgment; and (3) qualified immunity did not provide enough protection for prosecutors.[38] *Imbler* foreshadowed later doctrinal

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34. The Court conceded that the statute was silent on the issue. Imbler v. Pachtman, 424 U.S. 409, 417 (1976) ("The statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that it should be applied as stringently as it reads."). Despite the context in which § 1983 was passed, the Supreme Court found immunity in several contexts. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (for executives); Pierson v. Ray, 386 U.S. 547, 553–54 (1967) (for judges). As Erwin Chemerinsky has said:

> This is a distinction courts continue to apply and struggle with, though the *Imbler* Court found the use of testimony at trial, even perjured testimony, was prosecutorial in nature. It is also important to realize this distinction does not come from statutes or from common law; it was created by the Supreme Court and remains a holding with which lower courts struggle.

Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 TOURO L. REV. 473, 477 (2008) (footnotes omitted).

35. *Imbler*, 424 U.S. at 413.

36. *Id.* at 416.

37. *Id.* at 414–15.

38. *Imbler* cites *Griffith v. Slinkard*, 44 N.E. 1001 (1896), as basis for immunity for malicious prosecution. *Id.* at 421–22. Several other lower courts had adopted a similar rule. *Id.* at 422 n.19. But the Court had, 40 years earlier, affirmed a lower court opinion that found immunity for prosecutors on functionality grounds. Yaselli v. Goff, 275 U.S. 503, 503 (1927) (per curiam). *Imbler* reiterated that rationale. *Imbler*, 424 U.S. at 421 ("The function of a prosecutor that most

developments by emphasizing that any rule regarding prosecutorial immunity had to allow prosecutors to function on an everyday basis given "the 'quasi-judicial'" nature of the role.[39]

Functionality is now the linchpin of absolute immunity doctrine.[40] The nature of the prosecutorial role plus the chilling effect of exposure to liability forms the basis for the rule.[41] Allowing suit for actions intimately related with the prosecutor's advocative rule during the judicial process would result in duplicative judicial activities because "[t]he presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury."[42] Such litigation would impair "independence of judgment required by [the] public trust."[43] More practically, the prosecutor's ability to present difficult cases to the fact-finder would be made more difficult.[44]

The Court has drawn a line between investigative and advocative activities, with absolute immunity applying to the latter. As prosecutors act more like advocates, they receive more protection because that is where prosecutorial independence is most necessary.[45] Courts are supposed to look to "the nature of the function performed, not the identity of the actor who performed it."[46] Put simply, actions on the investigative side receive qualified immunity whereas advocative actions are absolutely protected.[47]

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often invites a common-law tort action is his decision to initiate a prosecution, as this may lead to a suit for malicious prosecution if the State's case misfires.").

39. *Imbler*, 424 U.S. at 420, 424–26.

40. Buckley v. Fitzsimmons, 509 U.S. 259, 268–69 (1993) ("[S]ome officials perform 'special functions' which, because of their similarity to functions that would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability.") (quoting Butz v. Economou, 438 U.S. 478, 508 (1978)).

41. *Imbler* mentions the Court's "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties." *Imbler*, 424 U.S. at 423.

42. *Id.* at 425.

43. *Id.* at 423. The Court adds: "The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id.* at 424–25.

44. *Id.* at 426 ("If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.").

45. *Id.* at 430–31 (protecting "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate").

46. Forrester v. White, 484 U.S. 219, 229 (1988).

47. It is important to remember that at the time *Imbler* was decided, qualified immunity doctrine insulated officials *less* than current doctrine.

Activities that are "intimately associated with the judicial phase of the criminal process" are considered advocative.[48] Filing charges,[49] presenting evidence before a grand jury,[50] requesting a search warrant,[51] advocating during a preliminary hearing,[52] accepting a bargain,[53] and arguing for increased bail all fit the bill.[54] Investigative conduct includes giving advice to police officers,[55] false statements at a press conference or locating an expert witness,[56] false statements to certify facts in support of an arrest warrant,[57] coaching witnesses,[58] or engaging in purely administrative duties.[59] In theory, preparation for trial that is purely administrative is *not* entitled to absolute immunity.[60] The benefit of a verdict does not allow prosecutors to retroactively categorize non-advocative actions as advocative by virtue of their link to the ultimate result.

But the line has not always been easy to decipher. The Court seems to place significant emphasis, for purposes of distinguishing functions, on the periods *after arrest*.[61] But *Imbler* suggested and *Buckley* reiterated that a prosecutor might be acting as an advocate even before the initiation of a

48. *Imbler*, 424 U.S. at 430; *see also* Burns v. Reed, 500 U.S. 478, 495 (1991) ("[W]e inquire whether the prosecutor's actions are closely associated with the judicial process.").

49. *Cf.* Pinaud v. County of Suffolk, 52 F.3d 1139, 1151–52 (2d Cir. 1995) ("Keeping a person in state custody *after* the termination of all charges against him has nothing to do with conducting a prosecution for the state.").

50. *See Burns*, 500 U.S. at 485; Hill v. City of New York, 45 F.3d 653, 661–62 (2d Cir. 1995).

51. *Burns*, 500 U.S. at 491–92.

52. *Id.* at 492.

53. Taylor v. Kavanagh, 640 F.2d 450, 453 (2d Cir. 1981).

54. *Pinaud*, 52 F.3d. at 1149.

55. *Burns*, 500 U.S. at 492–96.

56. Buckley v. Fitzsimmons, 509 U.S. 259, 278 (1993) ("The conduct of a press conference does not involve the initiation of a prosecution, the presentation of the State's case in court, or actions preparatory for these functions.").

57. Kalina v. Fletcher, 522 U.S. 118, 130–31 (1997). "[O]btaining the arrest warrant was protected by absolute immunity, but filling out the declaration in *support of the arrest warrant* was only protected by qualified immunity." Chemerinsky, *supra* note 34, at 481 (emphasis added).

58. Genzler v. Longanbach, 410 F.3d 630, 639 (9th Cir. 2005).

59. *Buckley*, 509 U.S. at 273 ("A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity. . . . [W]hen a prosecutor 'functions as an administrator rather than as an officer of the court' he is entitled only to qualified immunity." (quoting Imbler v. Pachtman, 424 U.S. 409, 431 n.33 (1976)) (citation omitted).

60. *Id.* at 276 ("A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial . . . .").

61. *See* Burns v. Reed, 500 U.S. 478, 492 (1991) (placing significant emphasis, for the purpose of distinguishing between prosecutorial functions, on the fact that a hearing occurred after arrest).

prosecution.[62] That led some to ask whether some activities that would traditionally be labeled administrative *become* advocative via "bootstrapping." And that is where the Court and lower courts have struggled. Per *Buckley*, "[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity."[63] That suggests that advocative acts occur *after* evidence has been collected, not while it is being collected. Juxtaposed with *Imbler*, which referenced "presenting the state's case" as the line,[64] it becomes unclear *when exactly* a prosecutor's preparation *before* trial becomes advocative.[65]

Nonetheless, gray area remains, mapping perfectly onto the gray area built into *Brady* doctrine: materiality determinations and how they relate "to guilt or to punishment,"[66] and the fact that investigations are fluid and ongoing. Is there a magic moment after which the prosecutor can be labeled an advocate? Given that *Imbler* seemed to implicitly allow absolute immunity for suppression of evidence, and later cases suggest actions that affect trial strategy are advocative, it is not hard to imagine how this line would impact a prosecutor's approach to *Brady* disclosure. Whether the act of disclosure is administrative or advocative blends into issues relating to materiality determinations and trial strategy, the timing of the investigation (whether an arrest has occurred or the timeline of the collection of evidence), ongoing communications with investigators, and when trial preparation is occurring. Taking this into account, the Third Circuit has said that the failure to comply with *Brady* obligations (concealment) is advocative rather than investigative, but that the destruction of evidence is investigative.[67] In *Van de Kamp v. Goldstein*,[68] the Supreme Court ruled similarly after prosecutors withheld information regarding the testimony of a jailhouse informant.[69] In particular, the failure of senior officials to develop a system for retrieving such information was labeled advocative as it related to the exercise of discretion of lawyers before the court.[70] Justice Breyer, writing for the majority, stated:

62. *Imbler*, 424 U.S. at 431 n.33 ("[T]he duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom."); *Buckley*, 509 U.S. at 272–73.

63. *Buckley*, 509 U.S. at 273 (citing *Burns*, 500 U.S. at 494–96).

64. *Imbler*, 424 U.S. at 431.

65. Indeed, this was *the issue* in *McGhee v. Pottawattamie County*, which asked whether preparing physical evidence and witnesses in advance of prosecution amounted to actions taken in preparation for trial. McGhee v. Pottawattamie County, 547 F.3d 922, 933 (8th Cir. 2008). That case was settled once it reached the Supreme Court. *See* Pottawattamie County v. McGhee, 558 U.S. 1103, 1103 (2010).

66. Brady v. Maryland, 373 U.S. 83, 87 (1963).

67. Yarris v. County of Delaware, 465 F.3d 129, 136, 141 (3d Cir. 2006).

68. Van de Kamp v. Goldstein, 555 U.S. 335, 338–39 (2009).

69. *Id.* at 340.

70. *Id.* at 346.

"a prosecutor's management of a trial-related information system . . . enjoys absolute immunity just as would the prosecutor who handled the particular trial itself."[71]

Thus, the Court's repeated attempts to draw a line between investigative and adjudicative functions in order to determine the scope of immunity is likely overprotective of prosecutors. At the very least, the lack of clarity works to the advantage of prosecutors making *Brady* determinations. The consequences are stark for compliance with *Brady* and the integrity of the judicial process.

To be fair, there has been judicial criticism of absolute immunity doctrine. Justice White foresaw these issues in his concurring opinion in *Imbler*, where he criticized the majority opinion for implicitly affording absolute immunity to the withholding of *Brady* material.[72] Unlike the need for absolute immunity for other advocative conduct, withholding *undermines* the judicial process by removing information from the truth-finding process. Justice White charged the Court with a gross act of judicial activism that disrupted the separation of powers by subverting legislative will to hold executive officials accountable.[73] Further, Justice White's criticism of the Court's broad rule that foolishly did not distinguish between states of culpability fits with the findings of this Article. *Imbler* was concerned with the risk of personal liability for prosecutors in situations involving difficult decisions that might result in unintentional harm to the defendant.[74] However, the rule announced by the Court left room for immunizing deliberate violations, which of course directly counteracted the point of enacting § 1983.[75] Justice White argued that, at best, common law bases for immunity justified its existence in order to protect decision making that occurred *by virtue of the office*, not by other, non-official decisions (such as trial strategy, preparation, or withholding evidence).[76] This is why Justice White found it absurd that the Court would hold that Congress extended absolute immunity to blatantly unconstitutional actions.[77] More recently, Justice Antonin Scalia noted how centering absolute immunity doctrine on functionality resulted in contortions of the common law as it existed when § 1983 was passed by Congress.[78]

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71. *Id.* at 349.

72. Imbler v. Pachtman, 424 U.S. 409, 441–45 (1976) (White, J., concurring).

73. *See id.* at 432–33.

74. *Id.* at 427 n.25 (majority opinion).

75. *Id.* at 432–33 (White, J., concurring) (noting how extension of absolute immunity to situations *involving willfulness* involves a "broader [extension] than that to which he was entitled at common law; broader than is necessary to decide this case; and broader than is necessary to protect the judicial process").

76. *Id.* at 441.

77. *Id.* at 442–43.

78. Kalina v. Fletcher, 522 U.S. 118, 132 (1997) (Scalia, J., concurring).

By announcing a rule that was broader than the terms of the case, the Court had subverted congressional will behind § 1983—holding constitutional violators accountable. Not only does that leave aggrieved parties without a remedy, it also prospectively "threaten[s] to *injure* the judicial process."[79] Justice White's position was that extending liability to some types of actions would incentivize prosecutorial integrity, thereby enhancing the judicial process.[80] The suppression of evidence required to be disclosed was in that category.[81] As such, judicial criticism relates to both the inherent coherence to the doctrine, as well as its relation to the constitutional structure and its implications for remedying constitutional violations. *Brady* violations without redress beyond the occasional overturned conviction are the logical outgrowth.

Scholars also have criticized the doctrine extensively. The historical claims made by the Court about the common law at the time of § 1983 have been refuted[82] and the purported policy basis—preserving independence of judgment—has been questioned repeatedly.[83] As Margaret Johns has noted, common law immunity for prosecutors was by far the exception rather than the rule, especially in light of the historical fact that public prosecutor offices did not exist in most jurisdictions at the time § 1983 was enacted. Additionally, common law immunities were defenses against common law causes of action, not statutorily imposed liability.[84]

Critics have also emphasized how the Court's alleged safety valves—the rules of professional responsibility and statutory causes of action—have failed to deter prosecutors from misconduct.[85] Although federal law in theory provides criminal liability for government officials who violate constitutional protections, there has been only one conviction since 1866.[86] And the

79. *Imbler*, 424 U.S. at 433 (White, J., concurring).

80. *Id.* at 443 ("*Denial* of immunity for unconstitutional withholding of evidence would encourage such disclosure. A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But, this will hardly injure the judicial process.")

81. *Id.* at 441–42 ("I disagree with any implication that the absolute immunity extends to suits charging unconstitutional suppression of evidence.").

82. Johns, *supra* note 19, at 107–22. "[F]ar from being a 'well-settled' doctrine in 1871, there is not one single case adopting any form of prosecutorial immunity until many years later." *Id.* at 114 (footnote omitted).

83. J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 898–900 (debunking the history behind common law immunities).

84. Pierson v. Ray, 386 U.S. 547, 563–64 (1967) (Douglas, J., dissenting).

85. Johns, *supra* note 19, at 60 (noting how in 2000 cases of misconduct discussed in HARMFUL ERROR, "prosecutors were disciplined in only forty-four cases and were never *criminally* prosecuted") (footnote omitted) (emphasis added).

86. *In re* Brophy, 442 N.Y.S.2d 818, 819 (App. Div. 1981). Six prosecutors in the entire twentieth century faced criminal charges. Maurice Possley & Ken Armstrong, *Prosecution on Trial in Du Page*, CHI. TRIB., Jan. 12, 1999, at 1, https://www.chicagotribune.com/news/ct-xpm-1999-01-12-9901120171-story.html [https://perma.cc/2WRZ-FUCA].

procedural rights of defendants are not swords against prosecutorial misconduct.[87] The right to counsel is bereft with resource problems, so defense counsel is hamstrung. Judges are reluctant to intervene due to relationships with the bar and prosecutors.[88] Appellate review is a dull instrument: the harmless error standard is a tough hill to climb.[89] For example, in a *Brady* action, the defendant must show "that there is a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed."[90] Collateral attack is encumbered by procedural hurdles, irrespective of federal court deference to state court convictions.[91] In short, absolute immunity doctrine, as forged by the Court, leaves little room, if any, for remedial action in the wake of prosecutorial misconduct.

B. PROFESSIONAL RESPONSIBILITY SANCTIONS

The rules of professional responsibility do not fill the void. Rule 3.8(d) of the Model Rules of Professional Conduct requires "timely disclosure . . . of all evidence or information known to the prosecutor that tends to negate the guilt of the accused."[92] Model Rule 3.8(g) requires prosecutors to disclose "credible and material evidence [that] creat[es] a reasonable likelihood that a convicted defendant did not commit [the] offense."[93] These rules have informed the rules in state jurisdictions. But the reach of these rules has been interpreted differently by courts. Some courts see the disclosure obligations in those Rules as co-extensive with *Brady* obligations, thereby importing all of the gray areas built into *Brady*.[94] Other courts view Rule 3.8 as a separate

87. *See* Johns, *supra* note 19, at 65 ("Although numerous procedural protections (including jury trials, appellate review, and habeas corpus proceedings) are designed to protect the criminal defendant's rights, they neither prevent nor correct prosecutorial misconduct.").

88. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2111–14 (2000).

89. It would require a showing that the prosecutor engaged in misconduct and that prejudice occurred. *See* Kotteakos v. United States, 328 U.S. 750, 763–65 (1946).

90. Gantt v. Roe, 389 F.3d 908, 913 (9th Cir. 2004) (citing Strickler v. Greene, 527 U.S. 263, 281–82 (1999)).

91. Johns, *supra* note 19, at 69–70.

92. MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020).

93. *Id.* at 3.8(g).

94. *See, e.g.*, *In re* Att'y C, 47 P.3d 1167, 1171 (Colo. 2002) ("Hence, the language of Crim. P. 16(I)(a)(2), Rule 3.8(d), and ABA Standard 3–3.11(a) is substantially identical. We have explicitly adopted a materiality standard with respect to our procedural rules, and we are disinclined to impose inconsistent obligations upon prosecutors. We therefore also adopt a materiality standard as to the latter, such that we read Rule 3.8(d) as containing a requirement that a prosecutor disclose exculpatory, outcome-determinative evidence that tends to negate the guilt or mitigate the punishment of the accused."); Disciplinary Couns. v. Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010) ("We decline to construe DR 7-103(B) as requiring a greater scope of disclosure than *Brady* and Crim.R. 16 require. Relator's broad interpretation of DR 7-103(B) would threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does *not* require disclosure. This holding would in effect expand the scope of discovery currently required of prosecutors in criminal cases."); State *ex rel* Okla. Bar Ass'n v.

obligation from that imposed by the Constitution.[95] Further, the Comments to the Rule itself provide a good faith, reasonableness defense to non-compliance with the affirmative obligations of the Rule in situations involving the discovery of new evidence.[96] Coupled with the fact that each state has its own code for professional responsibility, ambiguity rather than clarity is the norm.

More tellingly, between 1970 and 2000, there were only 44 instances of disciplinary action in 2000 cases of alleged prosecutorial misconduct, a rate of approximately two percent.[97] Complaints go unnoticed, and those that reach state bar associations tend not to result in disciplinary action.[98] When prosecutors do run afoul of the rules, few are mentioned by name.[99] As such, prosecutors remain largely undeterred.

Recently, some courts have taken to reminding prosecutors of their *Brady* obligations to incentivize compliance. For example, the New York Court of Appeals issued a rule that reminds prosecutors to make timely disclosure under *Brady*.[100] The purpose of the rule is to ensure that inexperienced prosecutors are at least mindful of their obligations, and that experienced prosecutors are reminded of what they need to do. While the rule in theory

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Ward, 353 P.3d 509, 520–22 (Okla. 2015) (interpreting their Rule 3.8(d) "in a manner consistent with the scope of disclosure required by applicable law").

95. *See, e.g.*, United States v. Walker, No. 17-cr-00570-EMC-1, 2018 WL 3023518, at *1 (N.D. Cal. June 18, 2018) ("In November 2017, a new California rule of professional conduct went into effect which goes beyond *Brady*."); United States v. Wells, No. 13-cr-00008-RRB, 2013 WL 4851009, at *4 (D. Alaska Sept. 11, 2013) ("Rule 3.8(b) is more demanding than the constitutional case law. The rule requires disclosure of evidence or information favorable to the defense without regard to anticipated impact of the evidence or information on the trial's outcome."); *In re* Kline, 113 A.3d 202, 210 (D.C. 2015) ("Thus, to the extent the Rule 3.8 commentary suggests a materiality test, we reject it. We see no logical reason to base our interpretation about the scope of a prosecutor's ethical duties on an ad hoc, after the fact, case by case review of particular criminal convictions.").

96. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 9 ("A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does not constitute a violation of this Rule.").

97. Parker Yesko, *Why Don't Prosecutors Get Disciplined*, APM REPS. (Sept. 18, 2018), https://www.apmreports.org/story/2018/09/18/why-dont-prosecutors-get-disciplined [https://perma.cc/3YCX-YVGF].

98. Radley Balko, *In Louisiana Prosecutor Offices, a Toxic Culture of Death and Invincibility*, WASH. POST (Apr. 6, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/04/06/in-louisiana-prosecutor-offices-a-toxic-culture-of-death-and-invincibility [https://perma.cc/2HAC-GZ3J]; Bidish Sarma, *Private: After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors?*, AM. CONST. SOC'Y (July 19, 2016), https://www.acslaw.org/expertforum/after-40-years-is-it-time-to-reconsider-absolute-immunity-for-prosecutors [https://perma.cc/P336-6Y6J].

99. Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 830–31 (1999).

100. Beth Schwartzapfel, *New York Courts Say: Hand It Over*, MARSHALL PROJECT (Nov. 8, 2017, 4:20 PM), https://www.themarshallproject.org/2017/11/08/new-york-courts-say-hand-it-over [https://perma.cc/28C3-QLYL].

allows for sanctioning prosecutors via contempt, a charge is reserved for "willful and deliberate" non-disclosure.[101] The details of the meaning of that phrase—which seemingly sets an incredibly high bar—remain to be sorted out. But it does nothing to recompense an aggrieved party who suffers a conviction.

Thus, even if prosecutors faced sanctions under the rules of professional responsibility, the aggrieved party would remain without a remedy. Penalties for violating ethics codes come in separate actions where the harmed party is, at best, a witness. While serious enforcement of the ethics code might lead to general deterrence, and minimize prosecutorial misconduct, it does not have the capacity to make whole those who are harmed by such conduct.

C. *RULES AND INCENTIVES*

The above-mentioned structure (or lack thereof) to regulate prosecutorial behavior leads to a perverse set of incentives for prosecutors in practice. First, it does nothing to disturb the win-at-all costs mentality that pervades some prosecutor offices.[102] Without the risk of accountability, winning remains the star upon which prosecutors may permissibly fix their gaze, regardless of the collateral damage. More practically, the blurry line between investigative and advocative conduct incentivizes prosecutors to collect evidence to support a theory of the case in order that actions that otherwise would be labeled investigative or administrative fall into the advocative category.[103] This allows investigative misconduct to remain in the shadows. Finally, the functionality distinction oddly allows activity closer to the ultimate harm to be perceived as less harmful. So, the more knee deep a prosecutor gets, with the harm in sight, the more that prosecutor gets protected. This is the bootstrapping problem, which a case like *Buckley II* insulates at the moment. Allegedly non-harmful conduct—because it does not violate a particular right or is not harmful on its own—is permissible by a prosecutor "as long as . . . the fruits of those actions [appear] at trial."[104] Indeed, there is a budding circuit split on this very issue.[105]

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101. Press Release, New York State Unified Court System, Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases (Nov. 8, 2017), http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/PR17_17.pdf [https://perma.cc/LT9S-L3VA].

102. Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 17 (2009); *see* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 542 (1996).

103. Brink, *supra* note 102, at 34 ("The conflating of the prosecutorial and investigative roles creates a situation peculiarly ripe for misconduct. The investigative prosecutor has a powerful motive to ensure that he collects evidence solely supporting his theory of the case, while the lack of an independent evidentiary review ensures that no investigative misconduct will come to light.").

104. Woislaw, *supra* note 16, at 361.

105. *Compare* Fields v. Wharrie, 740 F.3d 1107, 1115–16 (7th Cir. 2014) (holding a prosecutor was not immune from suit arising from of pre-trial misconduct), McGhee v. Pottawattamie County,

Applied to *Brady* violations, this means that prosecutors can credibly argue that *Brady* determinations fall on the side of the functionality line that provides absolute protection. This, despite the fact that the conduct leading to a *Brady* determination—the gathering of evidence—is purely investigative. And the *Brady* determination itself at least retains some investigative quality because it can determine whether the prosecution or the police pursue additional investigatory leads. The materiality determination relates to investigating the defendant's guilt or innocence. Finally, the sheer act of disclosure itself is purely ministerial once the materiality determination has been made.

Gazing upon this set of circumstances in light of basic torts principles, one might immediately notice two problems. First, the collateral effect of absolute immunity doctrine is to offer a large class of injured victims no recourse if a prosecutor withholds *Brady* information that should have been disclosed. Second, the lack of accountability and ambiguity within the doctrine means that prosecutors lack an incentive to minimize their engagement in risky behaviors or to refine their materiality determinations even when such efforts would improve the system as a whole. In other words, the doctrine throws caution to the wind, and in our view, without justification given basic torts principles. Those principles are discussed next, before further explanation of that conclusion in light of the dataset that we utilized to identify the nature of *Brady* violations.

III. THE TORT BACKDROP

Viewing the shortcomings of absolute immunity doctrine, as well as the experience of *Brady* violations, against a backdrop of common torts principles[106] exposes a moral hazard problem[107] that incentivizes poor behavior. Several torts concepts bring this into focus: (1) the notion that intentional torts are particularly serious and worthy of redress and the definition of "intent"; (2) proximate causation principles; (3) duties of care for those with special responsibilities or skill sets; (4) cognizance of the magnitude of the harm and the extent of the injuries at stake; and (5) least cost avoidance.

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547 F.3d 922, 933 (8th Cir. 2008) (same), Zahrey v. Coffey, 221 F.3d 342, 344 (2d Cir. 2000) (same), *and* Masters v. Gilmore, 663 F. Supp. 2d 1027, 1039–40 (D. Colo. 2009) (same), *with* Michaels v. New Jersey, 50 F. Supp. 2d 353, 363 (D.N.J. 1999) (holding a prosecutor was immune from claims arising from investigatory activities leading up to trial), *aff'd*, 222 F.3d 118 (3d Cir. 2000).

106. The principles of tort outlined here are based on a widely-held theoretical assumption that the liability rules embodied in the tort system incentivize actors to engage in particular behaviors. Although not our view, some have argued that prosecutors will not actually be incentivized by monetary judgments. *See* Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 128 (2010).

107. Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 238 (1996). "What moral hazard means is that, if you cushion the consequences of bad behavior, then you encourage that bad behavior." *Id.* (quoting James K. Glassman, *Drop Budget Fight, Shift to Welfare*, ST. LOUIS POST-DISPATCH, Feb. 11, 1996, at B3).

A. THE CONCEPT OF INTENTIONALITY AND THE PROSECUTORIAL MINDSET

When Congress legislated § 1983, it sought to counteract intentional torts committed under the color of law. Remedying intentional deprivations of constitutional or statutory rights was the desired object.[108] There are two doctrines relating to intentional torts that seem particularly relevant to this discussion. First, intentional torts are generally believed to be worthy of higher liability. They also are a prerequisite to punitive damages. Second, the meaning of "intent" is broader than one might think, containing the purposeful and knowing activities of tortfeasors, whether they had the desire for a specific outcome or just awareness of a likely result. As will be shown in Part IV, the definition of "intent" is particularly relevant in the context of *Brady* violations because prosecutors tend to distinguish intended and knowingly withholding *Brady* material as involving different levels of blameworthiness.

Generally speaking, intentional torts are considered the most serious torts because they were desired rather than accidents that could have been avoided. The intentional infliction of harm conveys a degree of blameworthiness that exceeds even the most easily avoidable accidents. Put simply, intentional torts involve a guilty mind inflicting private harm. The intentional causing of harm is worthy of a remedy. This is why intentionality is often a prerequisite for punitive damages.

Second, as will be shown below, many prosecutors conceive whether liability is justified or not by pointing to whether the prosecutor acted intentionally. Prosecutors often say, "I didn't intend for the non-disclosure to cause that result," so therefore responsibility should not follow. They might also say that they did not know that information existed, and therefore could not intend a particular result. This defense stems from historical ambiguity in the meaning of the word "intent," whether it applies to the act of withholding or the result of withholding (or both), as well as existing absolute immunity doctrine that reifies a narrow definition of intent that focuses on purposeful action.

After all, we might label the decision to withhold evidence as "intentional" for different reasons. First, it could be intentional in the pure sense of the act of withholding, irrespective of any materiality determination. This idea tethers "intent" to the willfulness of the act, rather than pursuit of a result. The focus is the mindset as to the act of disclosure (or non-disclosure) rather than as to the *effect* of the disclosure.

In contrast, the Restatement (Second) of Torts defines intent as consisting of either purposeful *or* knowing action, cognizant of the result. As § 8A states, "intent" exists where "the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."[109] This means that intentionality, under the Restatement's formulation,

108. Mitchum v. Foster, 407 U.S. 225, 239–42 (1972).

109. RESTATEMENT (SECOND) OF TORTS § 8A (AM. L. INST. 1965).

means aiming to cause consequences of an act or knowing that the consequences are substantially certain to result from the act. Notice how it is not act-centric.

How is this relevant to decisions about whether to disclose *Brady* information? The first part of the definition would allow coverage of the prosecutor who affirmatively decides not to disclose in an effort to convict or obtain a sentence. This seems like the archetypical case that almost everyone wishes to avoid because it involves the most culpable mental state in light of constitutional obligations. The prosecutor acts to pursue a conviction or particular sentence by virtue of the non-disclosure.

The second definition would seem to cover decisions not to disclose where the prosecutor, on balance, *knew* the act of withholding was substantially certain to result in a conviction. It illustrates the hypothetical space that contains defensible materiality determinations accompanied by a culpable mens rea with respect to the effect of the act of disclosure.

A glance at the definitions offered by the Restatement in the context of intentional torts provides further illustration of this concept of intent. Section 16(1), when describing the type of intent necessary in the battery context, notes how an intention to inflict offensive bodily contact, instead of a harmful bodily contact, does not prevent liability if such harmful bodily contact is caused by the act.[110] Section 20 holds similarly.[111] This is similar to the knowledge-based definition described in Section 8A.[112]

In other words, the latter part of the definition of "intent" elides the traditional distinctions between purpose, knowledge, and recklessness. This understandably scares prosecutors because it is a lower standard than intent traditionally understood as "purpose." Given that prosecutors enforce criminal codes[113] that slice the salami of mens rea terminology on a daily basis, and link "intent" with purposeful pursuit of a desired result, this is unsatisfactory. Of course, that fear fails to acknowledge the additional elements in any cause of action, including causation. Just because the prosecutor may have known a result was substantially likely to occur after withholding potentially material evidence does not mean the prosecutor caused that result with the action. Simply put, mens rea determinations are only *one* element necessary to find liability.

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110. *Id.* § 16(1) ("If an act is done with the intention of inflicting upon another an offensive but not a harmful bodily contact, or of putting another in apprehension of either a harmful or offensive bodily contact, and such act causes a bodily contact to the other, the actor is liable to the other for a battery although the act was not done with the intention of bringing about the resulting bodily harm.").

111. *Id.* § 20(1).

112. *Compare id.* § 20(1) (discussing character of intent), *with id.* § 8A (defining intent).

113. For example, the Model Penal Code, which many states follow, divides culpability terms into four states, in contrast to the common law. At common law, "intent" meant either purpose or knowledge as to the result. Under the MPC, intent is synonymous with purpose, but not knowledge. *See* MODEL PENAL CODE § 1.13(12) (AM. L. INST. 2021).

In short, a definition of intent that more accurately reflects those found in the Restatement and at common law would potentially broaden liability for prosecutorial actions, but not guarantee it. This reflects the spirit of § 1983 and common law definitions of intent. Moreover, a broader definition of intent comports with *Brady* doctrine itself, which covers intentional and unintentional non-disclosure.

B. PROXIMATE CAUSATION

As mentioned above, the application of absolute immunity hinges, for the most part, on the function or role of the prosecutor in a particular moment. Conduct that is closer to the actual adjudication, or judicial process, receives absolute immunity, whereas investigatory conduct, further removed, does not. This formulation built from the functionality distinction inverts traditional principles of proximate cause, which locate increased liability as the actor gets "closer"[114] to the harm caused.

Except in the case of intentional torts,[115] where causation is rarely in issue (even for unexpected results), foreseeability is the linchpin of proximate cause analysis. When a result is foreseeable in the wake of an action, that act might be said to be the proximate cause, absent some type of intervening event that severs the link between the act and the result. In the unintended harm context, the Restatement uses the "substantial factor" test to delineate when a cause contributed sufficiently to harm in order to assign responsibility.[116]

There are several considerations that are important to determining whether conduct is a substantial factor.[117] First, courts look to whether other factors played a role in producing the harm. A second inquiry involves whether the questionable conduct set into motion a series of forces connected to the ultimate harm. Finally, the time that has lapsed is relevant. Notably, the actor's inability to perceive the foreseeable harm is irrelevant to the causation inquiry[118] (of course, it is still relevant to whether fault exists).

Causation is not present when there is an intervening cause. Intervening causes are typically unforeseeable events.[119] The nature of intervention is that the event in question was unexpected, such that its interjection severs the connection between the actor and the harm, thereby undermining the rationale for liability.[120] "Where the . . . conduct of the actor creates or increases

114. We do not mean this in a physically proximate sense; rather, we mean to suggest that if the ultimate harm is linkable to the conduct in a foreseeable sense, causation is usually not a barrier to liability, absent some exceptional, intervening cause.

115. RESTATEMENT (SECOND) OF TORTS § 435A (AM. L. INST. 1965).

116. *Id.* § 431.

117. *Id.* § 433.

118. *Id.* § 435.

119. *See id.* § 440.

120. *Id.* § 442 (referencing extraordinary, unanticipated harms, the actions of third parties, or the intervening force is wholly independent of the actor's conduct).

the foreseeable risk of harm through" an additional force, that additional force does not sever the link.[121]

To summarize, under traditional tort doctrines, the case for liability is strongest when there are obvious indices of proximate cause, such as an injury close in temporal or physical proximity to the tortious act or an injury that will foreseeably arise as a result of the tortious act. Current absolute immunity doctrine, in contrast, provides the most protection from liability to prosecutors at trial or when they are acting in an "advocative" fashion, precisely when they are acting in closest proximity to the conviction.

The functionality distinction contained in current absolute immunity doctrine aptly illustrates the doctrine's incompatibility with proximate cause principles. To see this, note that the functionality distinction—which makes the line between investigative and advocative conduct make all the difference—essentially treats the transition from investigator to advocate as an intervening cause. But the transition from the investigatory function to the advocative occurs almost always in a criminal case. That suggests that the function of the prosecutor—or the role played at a particular time—is not unforeseeable, in the sense that traditional causation analysis would consider. What that means is that the functionality distinction disregards the foreseeable harm analysis usually present when it comes to proximate causation. While not explicitly decided by the Supreme Court, the act of *Brady* disclosure is easily characterized as advocative under current doctrine. Given that *Brady* disclosure is a constitutional command, the decision to withhold or disclose is foreseeable, and the range of possible harms of a failure to disclose material information is also foreseeable.[122] If the transition from investigator to advocate is *always foreseeable*, how can it sever the link between the initial act of non-disclosure and the harm?

Of course, proximate cause analysis considers foreseeability with respect to the result. As such, an analysis grounded in the traditional doctrines of proximate cause would ask whether withholding *Brady* material foreseeably affects the result of the case. As Judge Richard Posner put it in a case involving prosecutorial misconduct during the so-called investigative stage: "He who creates the defect is responsible for the injury that the defect foreseeably

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121. *Id.* § 442A.

122. A similar point was made by J. Posner in *Fields v. Wharrie*, relating to fabricating evidence and perjured testimony obtained during the investigation and later introduced at trial:

> It may seem difficult to understand why a prosecutor who, acting in an investigative role before judicial proceedings against a criminal defendant began, coerced a witness or fabricated testimony, intending that it be used against the defendant and knowing that it *would* be used against him, should be excused from liability just because the defendant was not harmed until the witness testified and, as a result, the defendant was convicted and sentenced. He who creates the defect is responsible for the injury that the defect foreseeably causes later.

Fields v. Wharrie, 740 F.3d 1107, 1111–12 (7th Cir. 2014).

causes later."[123] Withholding *Brady* material can create a range of foreseeable outcomes, but the final analysis would be context-specific. For example, the withholding of material exculpatory information in a case where overwhelming inculpatory evidence also exists would raise questions about the ultimate harm caused. The same might be said for the effect of the activities of other parties involved with the case, such as defense counsel or evidentiary rulings by a judge. At the same time, a prosecutor who improperly withholds and sends defense counsel barking up a different, irrelevant tree arguably sets into a motion a chain of causes where the harm is ultimately foreseeable. But rather than conducting the nuanced, context-specific inquiries that traditional proximate causation principles would require, current doctrine in effect labels wide swaths of prosecutorial behavior immaterial as to the end result, no matter how closely tied it is to the outcome of conviction.

C. *Special Caretaker Responsibilities and Respondeat Superior*

Another set of principles that helps crystallize what is at stake relates to heightened standards of care for individuals who undertake to avoid harm or alleviate harmful circumstances. Individuals with special skill sets who find themselves in situations where those skills are useful or who render assistance where harm can be mitigated can be held to a higher standard of care. That is an exception to the general rule against a duty to assist third persons found in the Restatement (Second) of Torts.[124] Special duties of care arise in some well-known contexts, like where someone with a heightened skill set undertakes to render assistance, or in certain types of relationships between parties. A few sections of the Restatement suggest parallels with the role of the prosecutor.

For example, Section 321 of the Restatement outlines when a duty to act can arise when prior conduct, initially thought to be benign, is later found to be dangerous: "If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect."[125]

Or take Section 326, relating to preventing assistance from a third party: "One who intentionally prevents a third person from giving to another aid necessary to prevent physical harm to him, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving."[126]

Finally, consider the doctrine of respondeat superior, which holds a party responsible for the acts of the party's agents. It is essentially a theory of

123. *Id.*
124. RESTATEMENT (SECOND) OF TORTS § 314.
125. *Id.* § 321(1).
126. *Id.* § 326.

vicarious liability in tort. A common example involves an employee-driver who has an accident with another vehicle. A person injured in the accident may be able to bring an action against the employee's employer under this doctrine.

While prosecutors will be the first to admit that they do not fully control law enforcement investigations, prosecutors can, in some circumstances, direct law enforcement to engage in additional investigation. Some of those directives could relate to material covered by *Brady*. And if law enforcement fails to turn over *Brady* material or prosecutors turn a blind eye to its existence after directing law enforcement to conduct such investigation, vicarious liability seems more plausible.

The Restatement provisions are by no means perfect fits given the multifarious roles of the prosecutor and the myriad ways in which prosecutors might act in particular cases. Although the system was not designed this way, the reality is that law enforcement personnel and prosecutors are *the primary decision-makers* in the modern criminal justice system.[127] Policing, in all of its facets, has remarkable effects on the processing of a case. Investigation predicated on scarce resources can have catastrophic effects on outcomes, especially if those approaches become normed. Prosecutors, by making charging determinations, can control much of the outcome of a case, including the punishment determination. Thus, there is no question that both actors are knee deep in criminal adjudication, immersed in situations in which their failures can inflict serious harm. The prosecutor's control over the dissemination of evidence (potentially harmful or capable of mitigating harm to a defendant) is analogous to the actor who is capable of assisting in the mitigation of harm. Prosecutors can enlist investigators or stunt investigation. Investigations are fluid, and while their *Brady* determinations can change, prosecutors have a vantage point that nobody else in a case has. They can impede disclosure by other parties, intentionally or negligently.[128] This notion of heightened duty is of course in line with *Brady* itself, which located the duty to disclose in the prosecutor's unique role as the architect of the adjudicatory process.

D. MAGNITUDE OF HARM

Cognizant of society's interest in preventing large-scale harms, tort law is also willing to relax standards of liability in inherently dangerous situations or actions. The most obvious example of this tendency can be found in strict liability doctrines, which impose tort liability on actors regardless of their

127. *See generally* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009) (discussing possible ways to limit the power of prosecutors); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015) (discussing the negative impacts an arrest can have on an individual outside of the criminal justice context); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012) (discussing harmful effects that poling practices can have).

128. Section 327 mirrors section 326, except it substitutes "negligently" as the mens rea term. RESTATEMENT (SECOND) OF TORTS § 327.

mental state or degree of care. Igniting firecrackers near human beings, while found in classic cartoons,[129] is one of the paradigmatic examples that justifies strict liability. Strict liability based on the magnitude of the harm tends to exist in one of three situations: (1) the keeping of wild animals;[130] (2) engaging in abnormally dangerous activities;[131] and (3) certain products liability situations. The second is worth a second look in the *Brady* context.

An activity tends to be classified as abnormally dangerous if it necessarily involves a risk of serious harm to the person, land, or property of another and that risk cannot be eliminated by the utmost care.[132] The activity itself does not have to be rare. The fact that the activity can lead to a substantial risk of harm regardless of the degree of care exercised forms the rationale for why responsibility exists.

In establishing the doctrine of absolute immunity, *Imbler* focused the inquiry *solely* on the conduct of the prosecutor, eschewing any consideration of the potential harm that the conduct causes.[133] In the *Brady* context, cognizance of the magnitude of the harm would require attention to the fact that while prosecution is not an abnormal activity, a failure to disclose material information could risk serious harm to the defendant, not to mention the system as a whole.

There is one sense in which current *Brady* doctrine does recognize the magnitude of harm principle—that of the materiality determination. Consider, for example, a case with no physical evidence that relies on testimony of only a single eyewitness, where the prosecution withholds information that the witness gave contradictory information.[134] In the absence of other evidence, it seems more likely that the withholding would meet *Brady's* materiality bar.[135] The problem, of course, is that even though the risk of harm is particularly high when a *Brady* violation taints the single piece of evidence available in a case, prosecutors face no greater tort liability under such circumstances.

Moreover, when held up against this tort principle, the current doctrine's focus on distinguishing investigative and advocative conduct for the purposes of establishing liability seems misplaced. Withholding *Brady* material involves a substantial risk of harm regardless of the degree of care exercised by the prosecutor *after the withholding*. To be clear, this is not an argument for strict liability for prosecutors. Rather, it calls into focus how correlating the

129. *The Old Grey Hare*, IMDB, https://www.imdb.com/title/tt0037147 [https://perma.cc/GK9Q-8UKH].

130. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM §§ 22–24 (AM. L. INST. 2010).

131. *Id.* § 20.

132. 57A AM. JUR. 2D *Negligence* § 386 (2006).

133. *See supra* Part II.

134. *See, e.g.*, Smith v. Cain, 565 U.S. 73, 74–75 (2012).

135. *See, e.g.*, *id.* at 75–76.

magnitude of the harm with potential for liability is embedded in the field of torts, especially in abnormal situations. *Brady* violations involve activity that contradicts constitutional requirements, thus making them abnormal situations. And given that *Brady* non-disclosure risks serious deprivations of liberty, it is worth considering how the remedies in response to *Brady* violations can more accurately reflect the magnitude of the harm concept.

E. LEAST COST AVOIDANCE

The principle of least cost avoidance in tort liability holds that the party who can prevent the accident at the lowest cost should act to do so.[136] Courts sometime refer to this principle as "who was in the best position to avoid the accident"[137] or the most efficient cost avoider.[138] Emphasis is often placed on assigning liability to the best-informed party.[139]

Who suffers the fewest costs to disclose *Brady* material? The prosecutor has a view of the evidentiary picture from the highest altitude. Placing the onus on defense counsel, law enforcement, or judges would require serious changes to the existing adversarial system that are unlikely to materialize. The reality is that prosecutors, in addition to being lawyers, are repositories of all of the available evidence. And their legal training best equips them to assess the content in the repositories they possess. Simply put, prosecutors are in the best position to ensure compliance under *Brady* because they have the most comprehensive view of the evidence in any particular case pre-adjudication (however one-sided their view of the evidence might be).

F. SUMMARY

As will be discussed in Part IV, these tort principles map onto certain trends that we've identified in the examined *Brady* cases: (1) which party is responsible for the non-disclosure; (2) the mindset accompanying the non-disclosure; (3) the accuracy of the materiality judgment; (4) the nature of the evidence withheld; (5) the reason proffered for withholding; (6) what preceded non-disclosure, such as defense request or court-ordered disclosure; and (7) the nature of the crime underlying the case.

In Part V, how the connections between these principles and *Brady* realities will become clearer, culminating in our recommendation for a statute that threads the needle between allowing prosecutors to do their job while remaining tethered to sound principles of tort. We now turn to *Brady*

136. Oren Bar-Gill & Omri Ben-Shahar, *The Uneasy Case for Comparative Negligence*, 5 AM. L. & ECON. REV. 433, 437 (2003).

137. Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1060–63 (1972).

138. Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585, 603 n.43 (1985).

139. *See* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 987 (1984).

realities on the ground before synthesizing them with the torts principles discussed above.

IV. A TAXONOMY OF *BRADY* VIOLATIONS

One of our intentions in pursuing this project was to tailor a response directly to the realities of *Brady* violations rather than simply hypothesizing or assuming the parameters of failures to disclose exculpatory evidence. Our approach was informed by our belief that the vast majority of prosecutors make *Brady* determinations in good faith, and in environments developing in real time, with some factors beyond their control. Thus, we approached the topic as empirical scholars, seeking to create a taxonomy of established *Brady* violations from court cases so that we had a better, more accurate understanding of how and why nondisclosure occurs.

A. METHODOLOGY

The methodology entailed identifying a subset of cases and then constructing a taxonomy that captured the nature of *Brady* violations. These are discussed in detail below.

1. Identifying the Cases

We began by casting a wide net of potential *Brady* cases, employing a Lexis search of cases from January 1, 2000 forward in which either federal or state courts followed *Brady v. Maryland* "positively" (according to Lexis' filter). That search produced more than 1600 published cases. To make this group manageable, we then randomly selected a set of 500 such cases from a five-year period—January 1, 2008 to December 31, 2012—so that our research team would have a reasonable number to review individually. A team of four research assistants then read each case to identify those in which the court had truly found a *Brady* violation. This review narrowed the available cases to approximately 50, at which point the principal researchers reviewed each case to verify those judgments. Ultimately, we included 38 cases in the analysis.

To be sure, we do not claim that these cases are entirely representative of all proven *Brady* violations or even those that occurred in 2008-2012, the years from which we selected. But that was not our point. Given the natural time and resource constraints of research, our goal was to maximize the likelihood that the set of cases we ultimately analyzed had captured a range of circumstances in which *Brady* claims may arise while also hewing closely to the standards of social science research. In using a systematic method of selection and randomly choosing cases by year, we are confident that the cases in our database achieve those benchmarks and are broadly representative of known *Brady* violations. It is also notable that our dataset includes cases from state jurisdictions across the country, in addition to those occurring in the federal courts.

2. Creating the Taxonomy

In the next phase, researchers coded cases across multiple variables to a create a taxonomy of factual and legal issues that appear in the cases. The goal was to create a means for categorizing *Brady* claims and to construct common groupings that can be considered in reference to immunity doctrine. In constructing the taxonomy, we were concerned with identifying the scope of the problem (what kinds of errors are occurring) and providing a means for identifying "comparable" cases in terms of the nature of their underlying *Brady* claims.

To code the cases, each of the principal researchers was responsible for one-third of the cases, although the coding criteria as a whole were decided by the entire team and difficult assessments were shared between all members to reach collective decisions. Among the variables coded, seven are central to understanding the factual and legal issues that occur in *Brady* cases. These included:

1. The party primarily responsible for nondisclosure (e.g., law enforcement or prosecutors).
2. The mindset involved in failing to disclose (e.g., intentionality, etc.).
3. The extent to which state officials withheld evidence because they believed it immaterial.
4. The type of evidence withheld.
5. The primary reason for nondisclosure.
6. Whether the defense had specifically requested the evidence or the court had ordered its disclosure.
7. The nature of the crime involved.

Addressing these criteria, it was essential, first, to appreciate who is primarily responsible for *Brady* violations. Although prosecutors are ultimately responsible for the failure to disclose exculpatory evidence, one can imagine different statutory approaches based on whether prosecutors are receiving all of the relevant exculpatory evidence from law enforcement or not.

Similarly, it is one issue if police or prosecutors fail to appreciate that they have material, exculpatory evidence in their possession and another problem entirely if they consciously assess the evidence and choose not to share exculpatory material with the defense. For this reason, we coded cases according to the mindset of state officials in the failure to disclose. We also sought to distinguish mistakes by police or prosecutors in evaluating the materiality of evidence. Although these decisions are necessarily intentional, in the sense that they involve a purposeful attempt to delineate what must be disclosed, the judgments behind them may reflect an honest but incorrect judgment rather than a malicious or malevolent act.

We included the type of evidence withheld to look for patterns in the kinds of situations that typically lend themselves to nondisclosure, just as we sought to understand the reasons that law enforcement officers or prosecutors would fail to turn over exculpatory material. Recognizing that we were limited to the fact patterns as reported by courts in these cases, we do not claim to have deduced exactly why state officials withheld evidence—or what their precise mindset was at the time, either. It is possible that we might have reached a different decision than the courts if we had direct access to the parties involved, and it is also plausible that police and prosecutors had other motives that would not be apparent to a third party questioning them or reviewing the record. Thus, in recording the reason and mindset for withholding, we are careful to note that our coding is based on the findings *of the courts* who heard these cases.

The sixth variable measured prior requests or demands for the exculpatory evidence. We recognize that a *Brady* violation may exist irrespective of the defense's request for disclosure,[140] although we think it arguable that the violation is more serious—if only in showing a reckless disregard for the state's duty—if the prosecution fails to turn over evidence specifically requested by the defense or previously ordered by the court. Again, in creating a taxonomy of *Brady* violations, we sought to understand the circumstances that confront the parties, their likely thinking at the time of discovery, and the full nature of potential damages in the failure to disclose.

Finally, we noted the type of crime involved in the cases. Originally, we did so as a means to identify patterns in nondisclosure, but ultimately the differences spoke more to the kinds of *Brady* claims that prove successful with the courts. We address these patterns in a later Section.

B. DATASET

In an appendix, we provide a dataset of the 38 cases and the coded variables. For purposes of a taxonomy, however, we focus on six key findings. These conclusions offer a comprehensive interpretation of the circumstances behind *Brady* violations—how they occur, how they are viewed, and what makes them sufficiently egregious to be sanctioned by the court.

1. Responsibility

As the data in Table One indicate, responsibility for *Brady* violations is split evenly—and almost exclusively—between police and prosecutors, with few cases shared. Even if prosecutors hold ultimate legal responsibility to ensure disclosure of exculpatory material, the findings from the cases indicate that police officers were just as likely to keep evidence from prosecutors as prosecutors were to withhold information from the defense.

140. *See* United States v. Bagley, 473 U.S. 667, 672–74 (1985).

Table One – Responsible Party

Entity	Frequency
Prosecutors	45%
Police	42%
Prosecutors and Police	8%
Other/Unknown	5%

2. Mindset

We coded nondisclosure across three categories of mindset—intentionality, recklessness, and negligence—which we defined according to tort law principles. Although several instances were unclear, there was a distinct difference in decision-making by police and prosecutors. Prosecutors were more likely to act intentionally, and not at all negligently, whereas police failures were more likely to be negligent.

Table Two – Mindset

Entity	Intentional	Reckless	Negligent	Other/Unclear
Prosecutors	53 %	18 %	0 %	29 %
Police	25 %	12 %	44 %	19 %

3. Materiality

Brady, of course, requires disclosure only when exculpatory evidence is material to the defendant's claim of innocence. As such, we also assessed nondisclosure to determine how often officials acted on the belief that the evidence in question was immaterial. Given that the courts found each of these cases to have violated *Brady*, the evidence involved was necessarily material, but it helps in building a taxonomy to appreciate what police and prosecutors were considering as part of their decisions to disclose or not. Because our coding was based on court records, we could not always be certain of these judgments, but as Table Three indicates, police and prosecutors were no more likely than the other to have misjudged the materiality of exculpatory evidence.

Table Three – Misjudged Materiality

Responsible Party	Misjudged Materiality	Possibly Misjudged Materiality	Did Not Misjudge Materiality
Prosecutors	18 %	18 %	64 %
Police	6 %	31 %	63 %

4. Type of Evidence

Police and prosecutors tended to withhold different kinds of evidence based on their roles in the trajectory of a case. It is not surprising that police would be most likely to withhold investigative notes, those records created early in the history of a case and likely under their control. By contrast, prosecutors were most likely to withhold favors they offered to witnesses, which were typically dispensations they extended in plea bargains so that witnesses would testify. For other types of exculpatory evidence, police and prosecutors' rates of withholding were relatively similar. Table Four lists the top five categories of withheld evidence.

Table Four – Type of Evidence Withheld

Entity	Witness Statement	Favors for Witness	Investigative Notes	Witness History	Alternative Suspect
Prosecutors	29 %	41 %	6%	6 %	6 %
Police	25 %	19 %	38 %	12 %	6 %

5. Reason

As in our coding of mindset and materiality, we faced challenges in determining the likely reason for withholding. However, where the reasons were clear, there were stark differences between police and prosecutors. Prosecutors were much more likely than police to hold onto evidence that might create reasonable doubt in the state's case. In this respect, prosecutors might be considered to have engaged in "defensive withholding," that is, failing to disclose evidence that would poke holes into their theory or allow the defense to impeach state witnesses. Police withholding, by contrast, was more likely the result of poor recordkeeping or communication within their agencies or with prosecutors. In several instances, documents were inadvertently misfiled or did not get passed along through the usual chain of custody. These findings are consistent with the results in Table Two, where much of police withholding was negligent. Whether one assigns such error to sloppiness or overwork, the result nonetheless was that exculpatory evidence was mislaid.

That said, one out of every eight *Brady* violations reflected police or prosecutors unwilling to pursue leads or investigate alternative suspects or evidence when there was a real chance that the results would exonerate an innocent suspect. More troubling still, in another 12 percent of *Brady* failures by the police, officers refused to disclose evidence because they were convinced the defendant was guilty. We are careful *not* to say that these decisions were necessarily in bad faith, as for example would be the case if a detective destroyed exculpatory evidence even when he suspected the defendant was innocent.[141] But, in each of these instances there were reasons

141. *See* Arizona v. Youngblood, 488 U.S. 51, 54 (1988).

to question the defendant's guilt, and, at the very least, officers were so affected by tunnel vision[142] that they could not see that they were sitting on potentially exculpatory evidence that needed to be disclosed to the defense.

Table Five – Reason for Withholding Evidence

Entity	Weaken Case	Convict Defendant	Lack of Effort	Prevent Impeachment	Recordkeeping/ Communication	Unclear
Prosecutors	41 %	0 %	12 %	29 %	0 %	18 %
Police	12 %	12 %	12 %	0 %	19 %	44 %

6. Evidence Requested or Ordered

As Table Six indicates, nearly a majority of *Brady* evidence had been requested by the defense or ordered by the court, a finding that should be alarming because police and prosecutors were already on notice that the evidence was sought. These patterns were relatively similar for police and prosecutors, suggesting a broad concern across the criminal justice system as state officials failed to dig deep enough to locate exculpatory material when requested.

Table Six – Evidence Requested by the Defense or Ordered by the Court

Responsible Entity	Evidence Requested or Ordered	Not Requested or Ordered	Unclear
Prosecutors	44%	19%	37%
Police	50%	38%	12%

C. *PRACTITIONER FEEDBACK*

As a check against our coding, we shared the results above with approximately 20 prosecutors and defense lawyers to solicit their feedback. This was a convenient sample, drawn from advocates identified by their colleagues as experienced and respected. We met with them at professional meetings, spoke with them by phone, and visited their offices to talk at length. Their feedback was instrumental in refining the taxonomy.

The primary issue to arise was prosecutors' (and some defense lawyers') concerns about our coding of materiality judgments as intentional. Although they acknowledged that the decision to withhold evidence as immaterial was,

142. Tunnel vision, or cognitive biases, may "impair[] the prosecutor's ability to identify material, exculpatory evidence to which the defense is entitled under *Brady v. Maryland*, as selective information processing will cause the prosecutor to overestimate the strength of her case without the evidence at issue and to underestimate the evidence's potential exculpatory value." Samuel R. Wiseman, Brady, *Trust, and Error*, 13 LOY. J. PUB. INT. L. 447, 466 (2012).

at least, a knowing judgment by state officials, they were concerned that we distinguish between good faith and malicious intentional actions. As they said, there is a substantial difference in motive between a prosecutor who makes an honest but mistaken materiality judgment and one who withholds evidence he knows to be both material and exculpatory. The act of withholding might be classified as intentional, but the mens rea as to the effect of the materiality determination is not as clear. As we explain later, we accounted for this concern in our proposed statute, providing a defense for prosecutors who make a reasonable mistake in assessing the materiality of evidence.

Prosecutors were surprised, too, by the number of instances we coded as intentional, even accounting for materiality judgments. According to these respondents, there are few cases in which police or prosecutors know they have exculpatory evidence and affirmatively choose not to disclose it. They pointed to one case in our sample, in which a police investigator had interviewed a witness who provided inconsistent statements. The defense then deposed the investigator and, learning of his earlier interrogation of the witness, petitioned the court to order the release of police files that included those statements. In the end, neither the police nor prosecutors provided the evidence as ordered.

We coded the case as intentional nondisclosure because police detectives knew they were in possession of contradictory statements by a witness, knew they had been ordered by the court to release them, and failed to disclose. But, some of the prosecutors we interviewed said there may have been other reasons for the failure to disclose: detectives may have forgotten they had the statements, the statements may have been mislaid in transfer from police to prosecutors' offices, or the investigating detective may have concluded that the initial statement was not credible because the witness was lying and then mentally filed it away as immaterial. As discussed above, this last possibility should still count as an intentional (although perhaps good faith) decision, but we certainly appreciate that the other two scenarios were possible. As a result, we returned to this case—and to other cases in which we had coded the nondisclosure as intentional—to check for overinclusion. In the end, we made one adjustment to the coding of intentionality, which is already subsumed in the results that appear in Table Two.

Prosecutors wondered, too, if we were too forgiving of police officers in not ascribing them responsibility more often for the failure to disclose. In this respect, they felt that "police are more likely to see [material exculpatory evidence] as irrelevant because they're not lawyers, and they're making [inappropriate] credibility judgments about witnesses."[143] Indeed, it was interesting how often prosecutors described police as potentially nefarious in failing to turn over evidence to the prosecution. We do not doubt that prosecutors are concerned about the failure of police to share exculpatory

143. Conversation with anonymous prosecutor.

evidence, especially since prosecutors are ultimately responsible under *Brady* for the nondisclosure of law enforcement. But having checked our coding once again, we are confident in the division of responsibility found in Table One.

Pointing in the opposite direction, defense lawyers and even some prosecutors suggested that we code for whether prosecutors made a direct request for police files, which they said should be standard protocol in prosecutors' offices. If the prosecutor did not ask for files, we were advised to code the prosecutor as at least partially responsible for nondisclosure, since prosecutors should know to make the request. Defense lawyers, in particular, were interested in learning more about communication between police and prosecutors, suggesting that we track who asked for information from whom, who represented what evidence was available, and the like. Although our coding for responsibility turned on many of these questions, the available facts were not sufficient to determine whether prosecutors had specifically requested police files in all cases. Were such information accessible, we agree that it would be useful in refining the coding of responsibility. The fact that the feedback we received identified such a request as standard protocol suggests that a failure to furnish such a request might be labeled reckless —another trait we built into the statute.

Finally, defense lawyers and prosecutors expressed varying interest in additional data that we did not collect or code—such as prosecutors' years of experience, partisanship of the jurisdiction, and whether offices were in urban, rural, or suburban areas. Many of these issues went to the demographics or base rates of *Brady* violations, which, while interesting, were not the subject of this study. We leave those to future research.

D. LIMITATIONS

The purpose of our coding and the creation of a taxonomy as evidenced in Tables One to Six was to provide a more nuanced understanding of the circumstances under which *Brady* violations commonly occur. We do not claim to have discovered *the* path of *Brady* errors or that our findings are perfectly representative of confirmed *Brady* violations, let alone cases in which police and prosecutors fail to turn over potentially exculpatory evidence. Rather, our goal was to better model the realities of *Brady* violations rather than simply hypothesize or assume the parameters of nondisclosure in considering how to respond to known failures to disclose. By casting a wide net across five years of confirmed *Brady* violations and then randomly selecting among cases, we have been careful not to cherry pick examples. Further, by carefully reviewing cases, using experienced scholars as coders, and cross-checking our assessments with practitioners, we have maximized the reliability of the taxonomy.

Still, we readily acknowledge the limitations of the underlying research. With a dataset of only 38 cases, it is possible that some of the collected fact

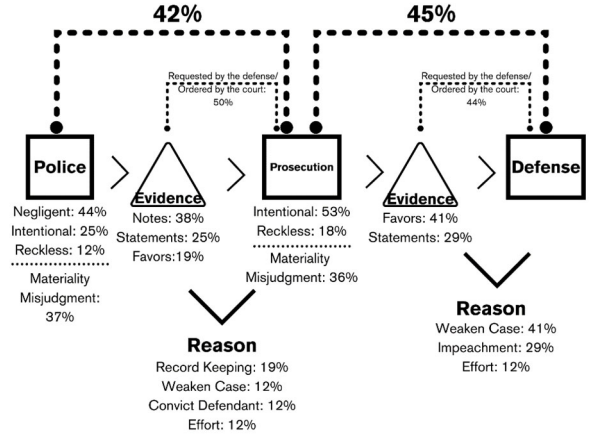
patterns are relatively uncommon across the larger universe of *Brady* violations. It is also theoretically possible that the time period selected was exceptional—either in the acts of nondisclosure or court rulings on *Brady*—although we believe that unlikely. We have already mentioned that coding was done by three individuals, and although each is an experienced researcher and consulted with the others, we acknowledge that there could be either individual or systematic errors in our coding scheme.

Finally, we note that almost all of the *Brady* cases in our sample involved a crime of murder or sexual assault. It is important to remember how *Brady* violations are typically litigated—post-conviction, where defendants facing the most serious charges are usually those most likely to obtain a talented and dedicated attorney. On one hand, these results limit the generalizability of our findings, because, assuredly, not all failures to disclose occur in murder or sexual assault cases. However, if such cases are the most likely to gain the court's attention and, with it, a judicial finding of fault, then our findings are applicable to the broad swath of confirmed *Brady* violations.

E. SUMMARY

In the end, the taxonomy offers a holistic, empirical understanding of the nature of *Brady* violations—one that is certainly better than anecdotal or assumed accounts. In Figure One below, we summarize the conclusions of the taxonomy in a manner that tracks the path of potentially exculpatory evidence from police to prosecutor to defense.

Figure 1. Tracking *Brady* Violations.



Starting from the upper left, the diagram indicates that police were responsible for 42 percent of *Brady* violations whereas prosecutors were primarily responsible for 45 percent of the cases. Of these, looking again to the left, police were primarily negligent (44 percent) in their failures to turn over

evidence, with 37 percent of their errors the result of a mistaken materiality judgment. Generally, they failed to disclose investigator notes (38 percent) or witness statements (25 percent), the reasons for which varied from poor recordkeeping (19 percent) to a lack of effort, desire to convict the defendant or fear of weakening the case (all at 12 percent). In half of police nondisclosure, either the defense had specifically requested the information or the court had ordered disclosure.

By contrast, prosecutors' nondisclosure was primarily intentional (53 percent), although they made erroneous materiality judgments at the same rate (36 percent) as police. Prosecutors were most likely to withhold favors bestowed on witnesses (43 percent), although they also withheld witness statements at a rate similar to the police (29 percent). Like the police, almost half of the evidence withheld by prosecutors (44 percent) had been requested by the defense or ordered disclosed by the court, however the reasons for prosecutors' nondisclosure were different. Prosecutors were most concerned with weakening their case (41 percent) or the impeachment of witnesses (29 percent), even if, like the police, in a small number of cases (12 percent) they failed to dig deep enough to locate exculpatory material when requested.

Together, then, the taxonomy and figure offer a more precise understanding of the nature of prosecutorial withholding of exculpatory evidence. Although nearly half of *Brady* violations appear to be the work of police, prosecutors do, themselves, fail to turn over exculpatory evidence, and when they do, the act is likely to be intentional to bolster their case and prevent the defense from impeaching witnesses. That said, about one-third of prosecutorial withholding reflects erroneous judgements about the materiality of exculpatory evidence. We are unable to say from this analysis whether those determinations were made in good faith, but as we explain later, a tort remedy for prosecutorial withholding is capable of distinguishing between the two.

V. CONSTRUCTING A STATUTORY REMEDY

The preceding Sections demonstrate how existing immunity doctrine neglects well-established principles of tort law, in that it bars victim recovery even in cases in which the harm from a wrongful conviction is great, there is a direct and clear causal nexus between the constitutional violations of the prosecutor and the injury, the prosecutor is best situated to prevent a violation, and the prosecutor acts specifically intending the forbidden result. How could we begin to remedy some of the problematic incentives and results created by absolute immunity doctrine, while respecting the on-the-ground realities facing prosecutors? As the empirical analysis of *Brady* violations in actual cases reveals, there are many varieties of *Brady* violations, and examples where prosecutor conduct was unambiguously intentional and meets the other criteria set forth above are perhaps the expectation rather than the rule.

Of course, our empirical analysis in Part IV revealed that a substantial fraction (42 percent) of *Brady* violations involved suppression of evidence by police rather than prosecutors. Although prosecutors have an affirmative constitutional duty to obtain and share all exculpatory information, *Brady* violations by law enforcement are situated differently with regards to tort law, because police enjoy only qualified rather than absolute immunity. Thus, exonerees harmed by police suppression of exculpatory information can sometimes obtain a recovery through a § 1983 claim.

The proposed statute below provides a cause of action for the remaining set of cases—representing at least 45 percent of the cases we reviewed above—in which *prosecutors were solely responsible* for the *Brady* violation, and therefore absolute immunity doctrines represent a significant and often insurmountable barrier to tort recovery. The statute creates some liability for prosecutors, but carefully cabins it to those situations where a remedy is most justified based on the tort principles discussed above.

A. THE STATUTE

The following model statute offers an alternative to absolute immunity that strikes a better balance between the need—embodied in current immunity doctrine—to allow prosecutors to pursue their work unencumbered by fears of non-meritorious lawsuits with important social goals of compensating individuals who have suffered substantial injuries and deterring socially harmful behavior.

Cause of Action for *Brady* Violations

Section _____. Every prosecutor who subjects, or causes to be subjected, a person within the jurisdiction of any State or the United States to a criminal conviction by intentionally withholding from the defense evidence or information that is exculpatory and material to guilt or punishment and known to the prosecutor shall be liable to the injured party for monetary damages.

(a) For purposes of this Section, "intentionally withholding" can mean one of the following:

(1) Acting with the purpose or conscious objective of withholding the evidence; or

(2) Acting knowing that withholding of evidence is substantially certain to result; or

(3) Acting with conscious disregard of a substantial and unjustifiable risk of circumstances that will result in withholding of evidence. The risk must be of such a nature and degree that its disregard involves a gross deviation from the standard of

conduct that a law-abiding prosecutor would observe in a comparable situation.

(b) For purposes of provisions (a)(1)–(3), "acting" includes an affirmative act or an omission.

(c) For purposes of this Section, "evidence or information known to the prosecutor" includes, but is not limited to, any information that is exculpatory and material to guilt or punishment that is held by any law enforcement authority involved in the prosecution of a case.

(d) For purposes of this Section, a reasonable mistake as to the materiality of the evidence or information in question is a defense to the statute.

(e) For purposes of this Section, "criminal conviction" means any final adjudication resulting in a finding of guilt, whether achieved at the conclusion of a trial by jury or judge, or by a plea.

The core purpose of the statute is to create a tort cause of action against prosecutors for a particularized set of *Brady* violations. In referencing "evidence or information that is exculpatory and material to guilt or punishment and known to the prosecutor," it reproduces the constitutional standard elucidated in *Brady*. By providing some possibility of financial compensation for exonerees harmed by intentional *Brady* violations, it would increase access to justice for a group of individuals currently foreclosed from seeking compensation under absolute immunity doctrine. As such, it represents a notable departure from current practice. Moreover, although circumscribed in important ways, the tort liability created by the statute could also incentivize prosecutors to implement practices that reduce the likelihood of *Brady* violations, as § 1983 lawsuits have for police.[144] The statute also follows current *Brady* doctrine in including material held by law enforcement within its ambit, albeit with some important limitations.

An obvious potential criticism of this statutory approach is that it undermines the very policy concern articulated by the Court in *Imbler*, namely that prosecutors need to be free to make difficult decisions without the impairment of judgment that would result from exposure to liability. However, the proposed statute contains important protective features that would likely prevent prosecutors from being inundated with non-meritorious litigation.

First, the proposed statute limits the cause of action to situations in which the violation affected the guilt/innocence determination. Our analysis of

144. *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1555–58 (2017); Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 888 (2012).

Brady violations revealed examples where violations affected sentencing rather than conviction; however, such examples would not fall within the ambit of the statute. In limiting the statutory remedy to situations where innocent people have been wrongly convicted, we focus the remedy on cases where harm is arguably the greatest, in that there is a dual injury arising from both: (1) the psychological and reputational harm that comes from being erroneously labeled as someone who has violated the law; and (2) the harm arising from the punishment itself, which in many cases involves years or even decades of confinement.

A second protective factor for prosecutors is the causation requirement. Whereas the *Brady* standard already encompasses a materiality assessment —meaning that a violation has only occurred when the withheld evidence is found to be "material" to guilt or punishment, or there is "reasonable probability that . . . the result of the [case] would have been different"[145] —the statute layers on the further requirement of traditional causation familiar from tort law. Although these two requirements may operate in tandem in many real-world situations, the causation requirement could serve to restrict liability in cases where there is a sufficient likelihood of a different result to satisfy materiality, but a proximate causation test may nonetheless fail, due, for example, to the existence of other evidence suggestive of guilt.

The statute also includes two important provisions outlining the mental states necessary to trigger liability. Whereas in other contexts negligence or even less is sufficient to attach tort liability, the statute requires a heightened form of awareness in order for liability to attach, recognizing the need for prosecutors to make complex decisions without fear of having their judgment second-guessed in later tort litigation. The statute would provide for liability when a prosecutor purposely or knowingly[146] withholds *Brady* material. Where prosecutors are consciously abrogating their constitutional duties, there is a particularly compelling case for tort liability, akin to the justification for punitive damages that exists in more traditional tort settings.

Section (a)(3) of the statute also creates liability in one category of behavior where a prosecutor does not act so as to directly produce a *Brady* violation, but instead engages in highly reckless behavior that demonstrates a disregard for the rights of those they accuse. To qualify as reckless under the statute, the prosecutor must act so as to create a risk of a *Brady* violation, and in doing so act in a manner that grossly deviates from the level of care that a reasonable prosecutor would employ.

The proposed definition of recklessness is of particular import in light of the large fraction of real-world *Brady* violations documented above that

145. Strickland v. Washington, 466 U.S. 668, 694 (1984).

146. A knowing violation might occur if, for example, a prosecutor intentionally fails to inquire about *Brady* material to members of the prosecutorial team, suspecting that doing so might reveal evidence that would undermine a case that might then need to be turned over to the defense.

involve failure to disclose information held by law enforcement, that should have been known to the prosecutor but in some cases was not. Prosecutors might argue—with some justification—that even though prosecutors have an affirmative duty to obtain and disclose all exculpatory evidence held by the state,[147] creating tort liability in situations where the prosecutors themselves may have been completely unaware of the exculpatory material in question is a step too far.

However, under the standard articulated in the statute, prosecutors would not have tort liability for mere negligent failure to obtain necessary information from law enforcement—despite the fact that such failure represents a breach of professional duty, and negligence is sufficient to attach tort liability in other contexts. Instead, liability is reserved for situations in which a violation arises after a prosecutor assumes a risk that other prosecutors would not. For example, imagine that a state requires all prosecutors to receive *Brady* training;[148] a particular prosecutor disregards the requirement and as a result is unaware of their obligation to secure exculpatory evidence from police in a particular case, resulting in a wrongful conviction. Although the prosecutor in question may have been unaware of the *Brady* material, they might face liability under the statute based on the fact that they recklessly assumed a risk other prosecutors would not—failing to take the statutorily required training and thus accepting the gamble that they might misunderstand their constitutional obligations. Thus, although not completely foreclosing liability when prosecutors are unaware of material held by law enforcement, the statute limits it to situations where the unawareness arises due to actions that other prosecutors would avoid.

In eschewing the monolithic approach of absolute immunity and instead tethering liability for *Brady* violations to the mental state of the prosecutor, the statute better recognizes the distinctions made in other areas of tort law. Moreover, the statute more clearly responds to the empirical realities of *Brady* violations. In the cases considered above in Part IV, 53 percent of *Brady* violations involving prosecutors were generated intentionally, and 18 percent of violations were generated recklessly. Those numbers accord broadly with the findings of Jerry P. Coleman and Jordan Lockey, who analyzed the 29 *Brady* cases cited by Judge Kozinski[149] and found that 45 percent involved intentional withholding and a further 14 percent of cases involved reckless behavior by prosecutors.[150] Importantly, those numbers indicate that the statute would likely meaningfully improve access to justice—as around half of *Brady* violations appear intentional in both data sets—but also, and equally

147. Kyles v. Whitley, 514 U.S. 419, 432 (1995).

148. *See, e.g.*, TEX. GOV'T CODE ANN. § 41.111 (West 2019).

149. *See* note 33 and accompanying text.

150. Jerry P. Coleman & Jordan Lockey, Brady *"Epidemic" Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It*, 50 U.S.F. L. REV. 199, 207 (2016).

important, that the statute would protect prosecutors from civil liability in the sizeable minority of cases in which they acted negligently or without a sufficient degree of recklessness.

A final protective element is found in Section (d) of the statute, which articulates a defense related to materiality. One of the thorniest issues that arises in applying *Brady* is the requirement that prosecutors judge whether a particular piece of evidence is material. Although there are strong arguments against including materiality as part of the *Brady* standard due to non-administrability,[151] materiality determinations seem likely to remain an important component of criminal discovery practice for the foreseeable future. Our discussions with prosecutors surfaced concerns that the statute would be problematic if good-faith efforts to honestly assess materiality that were ultimately judged differently by a later court gave rise to liability. Section (d) defuses this argument against tort liability by specifically allowing a defense based on a good-faith mistake in assessing materiality.

The empirical analysis in Part IV demonstrates that a materiality defense may be important, because mistaken materiality judgments affected 18–36 percent of cases. However, in most (64 percent) of the cases we evaluated, there was no materiality mistake, suggesting that the defense would not overly constrain access to justice, as it would not apply to the majority of cases.

To summarize, in order to find for the plaintiff in an action under the statute above, the factfinder would have to determine that: (1) a constitutional *Brady* violation occurred, (2) that this caused the wrongful conviction, and (3) that the violation occurred in conjunction with a heightened degree of awareness on the part of the prosecutor—for example, intent, knowledge, or a degree of recklessness beyond what would be accepted by other reasonable prosecutors—and not merely due to a mistaken inference regarding materiality. This is a high bar. Yet our catalogue of *Brady* cases provides examples of cases that would seemingly qualify for compensation under this statute, while simultaneously not opening the floodgates for litigation.

B. THE STATUTE APPLIED

To illustrate how the statute might be applied in actual practice, we discuss examples drawn from the pool of substantiated *Brady* violations discussed above.

One of the first limiting features of the proposed statute, which tracks the magnitude of harm principle outlined above, is that it applies only to situations in which a *Brady* violation generates a conviction. Consider, for example, *United States v. Chapman*,[152] a case involving the prosecution of three

151. *See, e.g.*, Alafair Burke, Commentary, Brady*'s Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575, 576–77 (2007); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 488–500 (2009); Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1555–57 (2010).

152. United States v. Chapman, 524 F.3d 1073, 1077 (9th Cir. 2008).

defendants in an alleged securities trading scheme. The federal prosecutor repeatedly assured defense attorneys and the court that all *Brady* material had been disclosed to the defense.[153] However, it became apparent at trial that there had been many non-disclosures when the government revealed information during direct examination of some of its witnesses about prior criminal records and other impeachment material that had not been shared with the defense. After the AUSA released 650 pages of undisclosed *Brady* material in the middle of the trial, the trial judge upheld a defense motion to dismiss the indictment, "finding that the [prosecutor] had acted 'flagrantly, willfully, and in bad faith.'"[154] In upholding the dismissal, the Ninth Circuit analyzed the mindset of the prosecutor and concluded that the omissions were at best extremely reckless.[155] Nevertheless, despite seemingly satisfying the other criteria laid forth in the statute, this situation would not create a cause of action under the statute because the defendants did not suffer the harm of an actual conviction.

As discussed above, various traditional tort mechanisms differentiate intentional and unintentional actions, and a key feature of the proposed statute is that it distinguishes mental states of the prosecutor, only assigning liability in situations where there is purposeful, knowing, or extremely reckless conduct. Below we contrast two cases to consider how such a distinction might operate in actual practice.

In *People v. Uribe*[156], Agustin Uribe was convicted of sexually assaulting his granddaughter and sentenced to consecutive terms of eight years and 30 years to life.[157] The primary evidence in the case was the granddaughter's testimonial evidence, which was somewhat contradictory, and testimony from a sexual assault examiner who examined the alleged victim at a local medical center.[158] After Uribe was convicted, Uribe's attorneys learned of the existence of a videotape of an examination of the alleged victim conducted at a local hospital by a sexual assault response team ("SART").[159] Whether the prosecutor was aware of the video is a question of some dispute; there was evidence that similar videos had been generated in other cases, but the hospital had a policy of not producing such tapes absent a court order, and DAs consulting such videos in other cases believed that they were of negligible usefulness due to their low quality.[160] Moreover, the DA's office argued at the

153. *Id.* at 1078.

154. *Id.* at 1080.

155. *Id.* at 1085, 1090.

156. People v. Uribe, 76 Cal. Rptr. 3d 829, 832 (Ct. App. 2008).

157. *Id.*

158. People v. Uribe, H030630, at *2–5, *9–11 (Cal. Ct. App. May 19, 2008), https://casetext.com/case/people-v-uribe-61 [https://perma.cc/6YFF-374K].

159. *Id.* at *14.

160. *In re* Benson, No. 08-O-12538-PEM, at *7–8 (State Bar Ct. Cal. Jan. 17, 2013), http://members.calbar.ca.gov/courtDocs/08-O-12538-2.pdf [https://perma.cc/MM3Q-H2YS].

time of the case that SART examiners were not part of the prosecution team, and therefore any information they produced not available to the prosecutor was not subject to *Brady*.[161]

After evaluating the newly discovered tape, the trial court sided with the prosecutor, concluding that the contents of the tape were not material, and that the SART was not part of the prosecution team.[162] An appeals court later reversed Uribe's conviction on the basis that the withholding of the tape was a *Brady* violation.[163]

Although a tort action against the prosecutor in this case might survive a motion to dismiss, the prosecutor would likely have a strong defense under the statute. The fact that the trial judge agreed with the prosecutor's *Brady* analysis suggest that any materiality judgment was reasonable, which would provide a defense under Section (d). Beyond that, the prosecutor here seems unlikely to satisfy the mental state required by the statute—an unknowing failure to collect relevant evidence is negligence. Indeed, in a later disciplinary investigation lodged against the prosecutor for his actions in the case, the disciplinary judge upheld the existence of a *Brady* violation, but concluded that the prosecutor in question acted "unknowingly"[164] and "negligently"[165], and in a "reasonable but not excusable" manner.[166] Thus, despite the fact that the prosecutor's actions caused a serious miscarriage of justice, because the prosecutor here lacked the level of intentionality found in the most egregious cases of misconduct, they would be protected from tort liability under the statute.

Antrone Johnson[167] was also accused of sexually assaulting a minor, in this case a 13-year-old girl whom he allegedly assaulted at the high school they both attended.[168] The prosecutor in the case offered Johnson a plea deal of ten years of deferred adjudication—meaning that Johnson would essentially be on probation for ten years—against the alternative of going to trial and facing a minimum of 25 years in prison if convicted.[169] Five days prior to the plea, a prosecution investigator interviewed school officials who claimed that

161. *Id.*

162. *Id.* at *15.

163. *Id.* at *1.

164. *Id.* at *25.

165. *Id.* at *15.

166. *Id.* Consistent with the arguments advanced by past critics of absolute immunity that prosecutors who violate *Brady* face no real consequences, the disciplinary court failed to take meaningful action against the prosecutor despite substantiating the *Brady* violation. As of this writing the prosecutor in question continues to practice in Santa Clara County.

167. *Ex parte* Johnson, No. AP-76,153, 2009 WL 1396807, at *1 (Tex. Crim. App. May 20, 2009).

168. *Id.*; *Former Prosecutor Angered by DA's Office Action Seeking to Overturn Sex Assault Conviction*, WFAA (Oct. 16, 2009, 11:20 AM), https://www.wfaa.com/article/news/local/former-prosecutor-angered-by-das-office-action-seeking-to-overturn-sex-assault-conviction/287-411423228 [https://perma.cc/6HUE-8ZK4].

169. *Johnson*, 2009 WL 1396807, at *1.

the complainant was a convincing liar.[170] On the day before the plea was entered, the complainant met with the prosecutor and claimed that no sexual contact had occurred, instead stating that she and Johnson had met in a restroom, she had refused to engage in sexual contact with him, and then she had left.[171] The prosecutor did not disclose either the investigator's notes or her conversation with the only witness in the case to the defense, instead allowing Johnson to enter a plea the next day.[172]

Shortly after Johnson's plea, he was charged with a separate misdemeanor.[173] The judge presiding over Johnson's deferred adjudication revoked his probation and sentenced him to life imprisonment on the original offense.[174] After Johnson had spent over 12 years in prison, his case was re-investigated by the Dallas Conviction Integrity Unit, which identified the *Brady* violation, and moved to have Johnson's sentence vacated and the charges against him dismissed.[175]

A straightforward application of the statutory language would suggest that the prosecutor in the Johnson case would face civil liability. The actions of the prosecutor generated a wrongful conviction.[176] There was no ambiguity that the prosecutor possessed the *Brady* material—it was recorded in the prosecutor's own notes on the case[177]— nor is there any reasonable dispute regarding materiality, given that the information in question was the recantation of the only piece of evidence available in the case: the allegation of the complainant. That there were two pieces of exculpatory evidence produced at different points in time that were both withheld only strengthens the evidence of purposeful withholding, and it is clear that the prosecutor could have revealed the exculpatory information to the defense at the plea hearing. The only possible zone of dispute might be over causation, given that the defendant entered a guilty plea,[178] but Johnson's trial counsel explicitly

170. *Id.* (Cochran, J., concurring).

171. WFAA, *supra* note 168.

172. *Id.*; *Johnson*, 2009 WL 1396807, at *3 (Cochran, J., concurring).

173. Maurice Possley, *Antrone Johnson*, NAT'L REGISTRY OF EXONERATIONS (June 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3829 [https://perma.cc/XUE8-UJWS].

174. Johnson v. State, No. 05-96-00754-CR, 1997 WL 627618, at *1 (Tex. Ct. App. Oct. 13, 1997).

175. WFAA, *supra* note 168.

176. In fact, there were two wrongful convictions. The prosecution also included another high-school student, James Blackshire, who was convicted on the same complaint, offered the same deal, and ultimately sentenced to 40 years after failing to keep current in his probation fees. Blackshire also served 13 years before being exonerated. Maurice Possley, *James Blackshire*, NAT'L REGISTRY OF EXONERATIONS (July 2, 2012), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3934 [https://perma.cc/2AF9-PAQ3].

177. *Johnson*, 2009 WL 1396807, at *1 (Cochran, J., concurring).

178. One might argue that given the enormous stakes of going to trial, with a loss guaranteeing at least a 25-year sentence, Johnson would likely have plead guilty in any case.

said that he would have taken the case to trial had the recantation been known to him.[179]

The *Uribe* and *Johnson* cases illustrate the distinction in mental states drawn in the statute. In *Uribe*, the prosecutor seemingly made a good faith judgment that some evidence was immaterial, which was upheld by the trial judge but reversed on appeal.[180] In the *Johnson* case, the prosecutor intentionally withheld clear evidence of innocence in order to secure a conviction that ultimately cost an innocent person over a decade of his life.[181] While it seems obvious that these situations are not equivalent, absolute immunity doctrine treats them as though they are.

The juxtaposition of the cases also raises an important question—what is the public policy rationale for protecting behavior such as that in the *Johnson* case? After all, this is behavior that other prosecutors would not endorse, that was repudiated by the office in which it occurred, that wasted hundreds of thousands of taxpayer dollars on needless incarceration, and that, when brought to light, produced public condemnation of the office.[182] In drawing a distinction between intentional or grossly reckless behavior and behavior with lesser mental culpability, the statute separates out conduct that no honest prosecutor would find desirable and targets the remedy there.

Another example of a case that would likely generate liability under the statute is that of David DeSimone.[183] DeSimone was accused of sexually assaulting a 17-year-old girl at a party at his home; the complainant, who indicated she was intoxicated during the incident, reported the alleged assault a few hours after it occurred.[184] A rape kit and a search of DeSimone's home did not reveal DNA or other biological evidence consistent with the complainant's account of the assault, but prosecutors nonetheless charged DeSimone and proceeded to trial on the basis of the complainant's testimony.[185] A key piece of evidence used by the prosecution to establish the credibility of the complainant was another witness, Nicole, who claimed to have encountered the complainant on the street as she fled the scene of the alleged rape, just as the complainant had reported to police.[186] The jury ultimately found these witnesses' testimony compelling, and they convicted

179. WFAA, *supra* note 168.

180. People v. Uribe, 76 Cal. Rptr. 3d 829, 832 (Ct. App. 2008).

181. *Johnson*, 2009 WL 1396807, at *1.

182. *See* Brady *Violation May Lead to Next Dallas Exoneration*, GRITS FOR BREAKFAST (Nov. 17, 2008), https://gritsforbreakfast.blogspot.com/2008/11/brady-violation-may-lead-to-next-dallas.html [https://perma.cc/X3DR-TZMM].

183. DeSimone v. State, 803 N.W.2d 97, 99 (Iowa 2011); Maurice Possley, *David DeSimone*, NAT'L REGISTRY OF EXONERATIONS (Oct. 1, 2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4336 [https://perma.cc/R498-QM8B].

184. *DeSimone*, 803 N.W.2d at 99–100.

185. *Id.* at 100.

186. *Id.* at 101.

DeSimone of third-degree sexual assault.[187] DeSimone was sentenced to 15 years.[188]

During post-conviction proceedings, DeSimone's attorney learned that Nicole's employer had provided a time card to the prosecutor in the case that demonstrated that she was working at a local restaurant during the time period when she allegedly encountered the complainant on the street, and therefore could not possibly have seen her shortly after the crime.[189] Despite having evidence in his possession that demonstrated a key witness was not being truthful, the prosecutor nonetheless allowed her to testify and failed to provide the exculpatory evidence to the defense.[190] There is little question the suppressed evidence was material—there would have been no reason to introduce Nicole as a witness at all, since she was not a direct witness to the crime—unless the prosecutor felt it was important to bolster the credibility of the complainant's testimony.[191] The Iowa Supreme Court reversed the conviction on the basis of the *Brady* violation,[192] and DeSimone was retried and acquitted in 2012.[193] He spent seven years in prison before being exonerated.[194]

Like *Johnson*, DeSimone's case seemingly meets all the criteria for liability under the statute: the suppression of evidence produced a conviction, the harm of seven years' wrongful incarceration was significant, and there is no question that the illegal suppression of evidence played a causal role in the outcome given that a retrial without the benefit of false testimony enabled by the suppressed evidence generated a different outcome. Moreover, the prosecutor in question possessed the clearly exculpatory information and chose not to disclose it—presumably to avoid undermining the case—so the statute's intent requirement is satisfied. And as in the *Johnson* case, the behavior here seems a far cry from the sort of good-faith legal judgment calls that merit protection to ensure prosecutors can do their jobs without undue interference.[195]

Of course, not all cases will be as clear as those of Uribe, Johnson, and DeSimone in terms of whether the statute's mental state requirement was met. Consider, for example, *Cox v. Curtin*[196], a case also involving prosecution for a sexual assault of a seventeen-year-old, but one in which there was no ambiguity

187. *Id.* at 99.

188. *Id.*

189. *Id.* at 101–04.

190. *Id.* at 103–04.

191. *Id.* at 105–06.

192. *Id.* at 106.

193. Charlene Bielema, *Outburst in Courtroom as DeSimone Acquitted*, CLINTON HERALD (Mar. 29, 2012), https://www.clintonherald.com/news/local_news/outburst-in-courtroom-as-desimone-acquitted/article_2d7957b3-6354-5b96-bdc2-609366c2ba76.html [https://perma.cc/7A2S-L9GG].

194. Possley, *supra* note 183.

195. As in the Johnson case, as of this writing the prosecutor in question continues to practice as an Assistant County Attorney in Iowa.

196. Cox v. Curtin, 698 F. Supp. 2d 918, 918 (W.D. Mich. 2010).

whether sexual contact occurred.[197] The defendant instead argued that the contact was consensual, and therefore his conduct did not satisfy the statutory requirement that his alleged crime involve a perpetrator who knew the victim was "mentally incapable."[198] The prosecution argued during both opening and closing statements that the alleged victim had only the mental capacity of a child and therefore was incapable of consent, and Cox was convicted on the strength of their arguments and evidence regarding mental incapacity.[199]

In post-conviction proceedings, Cox's attorneys learned that while Cox's case was ongoing, the alleged victim in the case had been charged in a separate case with felony larceny stemming from a store theft that occurred only a couple of weeks after the alleged assault.[200] Prior to the resolution of Cox's case, the district attorney accepted a plea deal from the victim in which he admitted to the larceny—a specific intent crime—and voluntarily waived his trial rights in return for a lighter sentence.[201] The separate proceedings put the prosecution in the contradictory position of claiming in one case that the victim had sufficient mental capacity to commit a specific intent crime and accept a plea, but in another case that he had only a child's mental capacity. Cox's conviction was ultimately overturned when the separate prosecution of the victim came to light in post-conviction proceedings.[202]

Whether this situation would qualify for a tort recovery under the statute turns on an analysis of the mindset of the prosecutor. It is unclear from the appellate record whether the prosecutor in Cox's case was even aware of the separate prosecution of the victim. If he was aware and chose not to disclose, his behavior would seem to meet the statute's requirement of purposeful withholding, although even here a prosecutor might try to raise a materiality defense.

If the prosecutor was unaware of the separate case, the analysis would then hinge on whether his lack of awareness was reckless according to the standards employed by an ordinary law-abiding prosecutor. The defense specifically requested information on any other criminal proceedings involving the alleged victim,[203] as he was a key witness, and so a failure to diligently inquire suggests some degree of recklessness. Moreover, it is fairly commonplace to furnish such information about witnesses as a part of the discovery process, and many offices have adopted protocols to facilitate such information sharing. On the other hand, given that the criminal proceeding involving the victim started after Cox's case was already in process,[204] a jury might also determine that there was mere negligent failure on the part of the

197. *Id.* at 927.
198. MICH. COMP. LAWS § 750.520d(1)(c) (2013).
199. *Cox*, 698 F. Supp. 2d at 922.
200. *Id.* at 927–28.
201. *Id.*
202. *Id.* at 927.
203. *Id.* at 921–22.
204. *Id.* at 927.

prosecutor to continuously inquire about possible changes in the criminal history, which wouldn't be compensable under the statute. So, ultimately, the outcome of a suit challenging a *Brady* violation such as that demonstrated in Cox's case would seem to turn on how the jury evaluated mindset based on the specific facts of the case. That places the difficult decisions in the hands of a jury rather than arbitrarily excluding them on the basis of absolute immunity doctrine.

The empirical analysis from Part IV suggests some case characteristics that may provide useful texture for juries in evaluating prosecutorial mindset when this is ambiguous. For example, Table Six above demonstrates that among the cases in which prosecutors withheld evidence and a determination could be made, roughly 70 percent involved situations where there were specific orders or requests for the suppressed information versus 30 percent of cases where no such requests existed. The former situation suggests a more culpable mindset. On the other hand, we also identified twelve percent of cases in which withholding apparently occurred due to lack of prosecutorial effort (Table Five), which could be a marker for negligence or perhaps recklessness rather than purposeful or knowing behavior. Information about the type of evidence withheld or its relationship to the overall body of evidence in the case might also be useful for juries asked to evaluate prosecutorial mindset.

To summarize, the statute would operate in actual practice to filter out cases where harms were less acute, where it is unclear whether the prosecutor's actions created the harm, where the prosecutor acted out of negligence, or where the prosecutor made a good faith, mistaken materiality judgment. The above examples of cases that would arguably survive suggest a common theme—these are not cases in which well-meaning prosecutors were just doing their job and made a mistake. Moreover, they do not seem to represent the normal exercise of reasonable prosecutorial judgement that the Court was seeking to defend in the *Imbler* decision. Instead, they demonstrate that among prosecutors, as in all other professions, there are rare examples of individuals who transgress the bounds of professional behavior, and harm others in the process. Completely insulating such acts from all liability serves neither victims nor the interests of the prosecutorial profession as a whole, and the statute offers a tailored approach to address the current imbalance.

VI. CONCLUSION

The time is ripe to better remedy the damage caused by *Brady* violations committed by prosecutors. The Article argues that any such remedy must deftly navigate three realities: (1) the difficult decisions that prosecutors face when carrying out their functions; (2) the tort principles that normally govern redressing harm; and (3) the fact that *Brady* violations are not all the same. Our hope is that we have produced a workable remedy that carefully accounts for all three.

Prosecutors have difficult decisions to make throughout the course of a criminal case. There is no denying that. But they also have constitutional obligations that are designed to protect the truth-finding function of the criminal justice system. Absolute immunity doctrine, when applied to *Brady* violations, currently prioritizes the function of the prosecutor and leaves the victims of prosecutorial misconduct with no recourse. It paints with too broad a brush, insulates prosecutors, and fails to deter future violations.

With that said, a one-size, fits-all approach for a remedy is also not feasible. Painting too broadly in the other direction risks subjecting prosecutors to constant second-guessing, chilling their ability to carry out their functions on a daily basis. Any cause of action must be carefully calibrated to the realities of *Brady* violations and be designed from the ground up, wedding common principles of tort with the forces characterizing prosecutorial non-compliance with *Brady*.

APPENDIX OF *BRADY* CASES

Case	Citation
Ex Parte Miles	359 S.W.3d 647
In re Bacigalupo	283 P.3d 613
Lapointe v. Comm'r of Corr.	138 Conn. App. 454
People v. Maldonado	2012 WL 3165412
Adams v. Comm'r of Corr.	17 A.3d 479
Aguilera v. State	807 N.W.2d 249
DeSimone v. State	803 N.W.2d 97
Drumgold v. Callahan	806 F. Supp. 2d 405
Gillispie v. Timmerman-Cooper	835 F. Supp. 2d 482
LaCaze v. Warden La. Corrtl. Ins. For Women	645 F.3d 728
Lambert v. Beard	633 F.3d 126
Pena v. State	353 S.W.3d 797
People v. Morillo	2011 WL 7726359
Bell v. Howes	757 F. Supp. 2d 720
Cox v. Curtin	698 F. Supp. 2d 918
Guzman v. Sec'y Dep't of Corr.	698 F. Supp. 2d 1317
Maxwell v. Roe	628 F.3d 486
People v. Bellamy	2010 WL 143462
Robinson v. Mills	592 F.3d 730
State ex rel. Engel v. Dormire	304 S.W.3d 120
Sivak v. Hardison	658 F.3d 898

Case	Citation
Sivak v. Hardison	658 F.3d 898
State ex rel. Griffin v. Denney	347 S.W.3d 73
State ex rel. Koster v. McElwain	340 S.W.3d 221
State v. Ferguson	335 S.W.3d 692
State v. Russell	2011 WL 334184
United States v. Kohring	637 F.3d 895
Wolfe v. Clarke	819 F. Supp. 2d 538
Espinal v. Bennett	588 F. Supp. 2d 388
Mahler v. Kaylo	537 F.3d 494
People v. Beaman	890 N.E.2d 500
People v. Uribe	162 Cal. App. 4th 1457
Sanders v. State	285 S.W.3d 630
State v. Williams	669 S.E.2d 290
Tassin v. Cain	517 F.3d 770
Taylor v. State 2	262 S.W.3d 231
Tennison v. San Francisco	548 F.3d 1293
United States v. Chapman	524 F.3d 1073
United States v. Quinn	537 F. Supp. 2d 99

The statute we propose is designed with this expectation. Its motivation is to compensate for harms that can be avoided and that are undeniably egregious, coupled with mindsets that do not live up to the promise of Brady. It attempts to provide a sword for those aggrieved in the wake of Brady violations, without denying prosecutors the benefit of a shield to defend themselves in those cases where the nature of the violation and the harm caused are less clear. Thus, we hope to have provided a remedy that allows for redress without fundamentally altering the ability of prosecutors to their duty as ministers of justice.