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# Connick v. Thompson: Sacrificing Deterrence and Reparations in the Name of Avoiding Respondeat Superior Liability

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**CONNICK V. THOMPSON:  
SACRIFICING DETERRENCE AND  
REPARATIONS IN THE NAME OF AVOIDING  
RESPONDEAT SUPERIOR LIABILITY**

*Allison Chan\**

*Death is the ultimate punishment because of its finality; once it is carried out, it can never be revoked. John Thompson came close to this ultimate punishment because a prosecutor failed to turn over exculpatory evidence under the principles that the U.S. Supreme Court enunciated in Brady v. Maryland. In Connick v. Thompson, the Court overturned Thompson's \$14 million award for spending eighteen years in prison (fourteen of those on death row) because previous Brady violations by the Orleans District Attorney's Office were not enough to put the district attorney on notice regarding the need for further training on Brady's principles and because the need for training was not so obvious that the district attorney's office could be held liable under the failure-to-train theory. The Court's holding is detrimental because an entire district attorney's office may now be shielded from civil liability in the event of a Brady violation and because individuals like Thompson will have no recourse for spending time in prison due to prosecutorial misconduct. The Court's holding discourages prosecutors from turning over exculpatory evidence, thus reducing prosecutorial accountability, and runs counter to the deeply rooted American principle that every person has the right to a fair trial.*

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“[I]t would take a miracle to avoid this execution.”<sup>1</sup>

## I. INTRODUCTION

After Louisiana death row inmate John Thompson successfully delayed six previous execution dates, the state set his seventh execution date for May 20, 1999.<sup>2</sup> Thompson’s attorneys flew in from Philadelphia to deliver the news in person, rather than have him hear it from prison officials.<sup>3</sup>

But in late April 1999, with less than one month to go until execution, Thompson got his miracle. A private investigator whom Thompson’s lawyers had hired discovered an exculpatory crime lab report in the depths of the New Orleans Police Crime Laboratory.<sup>4</sup> After eighteen years in prison, fourteen of which were on death row,<sup>5</sup> Thompson succeeded in overturning his convictions<sup>6</sup> because the district attorney who tried the case “intentionally suppressed blood evidence . . . that in some way exculpated [Thompson].”<sup>7</sup>

Thompson thereafter brought an action against the Orleans Parish District Attorney’s Office under 42 U.S.C. § 1983.<sup>8</sup> After granting certiorari on the issue of whether a district attorney’s office may be held liable under § 1983 for failure to train<sup>9</sup> based on a single *Brady* violation,<sup>10</sup> the U.S. Supreme Court held in *Connick v. Thompson*<sup>11</sup> that four prior unrelated *Brady* violations by prosecutors in the district attorney’s office<sup>12</sup> did not put the office on notice of the need to further train.<sup>13</sup> Further, the Court held that Thompson

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1. John Thompson, Op-Ed., *The Prosecution Rests, but I Can’t*, N.Y. TIMES, Apr. 10, 2011, at WK11.

2. *Id.*

3. *Id.*

4. *Connick v. Thompson*, 131 S. Ct. 1350, 1356 (2011).

5. *Id.* at 1355.

6. *Id.* at 1356–57.

7. *Id.* at 1356 n.1 (internal quotation marks omitted) (referencing exhibits entered into evidence).

8. *Id.* at 1357.

9. The failure-to-train theory reflects a local government’s decision to not train employees about the legal duty to avoid violating a citizen’s constitutional rights. *Id.* at 1359.

10. *Id.* at 1356; see *infra* note 40.

11. 131 S. Ct. 1350 (2011).

12. Louisiana courts, in the years prior to Thompson’s legal proceedings, had overturned four convictions due to *Brady* violations by prosecutors in the Orleans Parish District Attorney’s Office. *Id.* at 1360.

13. *Id.*

could not recover under a “single-incident” liability theory because the nondisclosure of blood evidence that had resulted in his wrongful conviction did not render the need to train sufficiently “obvious.”<sup>14</sup>

*Connick* is significant because it changes the scope of civil liability with respect to *Brady* violations. Before *Connick*, the Court shielded only individual prosecutors from liability.<sup>15</sup> However, after *Connick*, arguably an entire district attorney’s office may be shielded from liability.

The purpose of this Comment is to highlight the hazards that *Connick* invites by showing that, with the Court’s holding, there is no prosecutorial accountability with respect to *Brady* violations. Part II of this Comment discusses *Connick*’s facts, and Part III examines the Court’s reasoning. Part IV proposes a restorative approach, which serves to honor values that both the majority’s and the dissent’s opinions promoted and also to maintain principles from the core test that *City of Canton, Ohio v. Harris*<sup>16</sup> set forth. Part IV also argues that, in light of this test, the restorative approach<sup>17</sup> will allow for a fairer outcome in cases that are similar to *Connick*.

## II. STATEMENT OF THE CASE

In 1985, the Orleans Parish District Attorney’s office charged John Thompson with murder.<sup>18</sup> Media coverage of the murder charge led victims of an unrelated armed robbery to identify Thompson as their attacker.<sup>19</sup> The district attorney subsequently charged Thompson with armed robbery as well.<sup>20</sup>

During the course of the robbery investigation, a crime scene technician removed from a robbery victim’s pants a swatch of fabric that was stained with the robber’s blood.<sup>21</sup> The technician submitted the swatch to the lab one week prior to the start of Thompson’s armed robbery trial.<sup>22</sup> When the lab report came back two days

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14. *Id.* at 1360–65.

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

16. 489 U.S. 378 (1989).

17. The Author developed the restorative approach specifically to address *Connick*’s outcome.

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

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

before the trial, its results revealed that the robber had type-B blood.<sup>23</sup> Thompson's trial counsel never learned of this report, and there is no evidence that investigators ever tested Thompson's blood.<sup>24</sup>

On the first day of the armed robbery trial, Assistant District Attorney Gerry Deegan checked all of the case's physical evidence—including the stained swatch of clothing—out of the police property room.<sup>25</sup> When Deegan later checked all of the evidence back into the courthouse property room, the stained swatch was nowhere to be found.<sup>26</sup> Neither Deegan nor his fellow prosecutor, James Williams, ever mentioned the stained swatch or the crime lab report at trial.<sup>27</sup> A few weeks after the jury convicted Thompson of attempted armed robbery, Thompson chose not to testify in his own defense during his murder trial because of the armed robbery conviction.<sup>28</sup> The jury convicted Thompson of murder and then sentenced him to death.<sup>29</sup>

Thompson unsuccessfully pursued appeals and postconviction relief for fourteen years; state and federal courts reviewed and denied his numerous challenges to the murder conviction and to the sentence.<sup>30</sup> In late April 1999, with less than one month to go before the scheduled execution date, a private investigator discovered the crime lab report that detailed the findings of the test that had been done on the stained swatch of clothing from the armed robbery investigation.<sup>31</sup> Thompson's attorneys quickly tested Thompson's blood and discovered that he had type-O blood, meaning that the blood on the swatch of clothing was not his.<sup>32</sup> After news of this lab report came to light, former Assistant District Attorney Michael Riehlmann came forward, saying "Deegan had confessed to him in 1994 that he had intentionally suppressed blood evidence in the

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

armed robbery trial of John Thompson that in some way exculpated the defendant.”<sup>33</sup>

In light of this new evidence, the district attorney moved to stay the execution date and to vacate Thompson’s armed robbery conviction.<sup>34</sup> Shortly thereafter, the Louisiana Court of Appeals reversed the murder conviction, concluding that the armed robbery conviction had unconstitutionally deprived Thompson of his right to testify in his own defense during his murder trial.<sup>35</sup> The district attorney retried the murder case against Thompson in 2003.<sup>36</sup> The jury found him not guilty.<sup>37</sup>

Following his acquittal on the murder charge, Thompson brought a claim under 42 U.S.C. § 1983,<sup>38</sup> alleging that the district attorney’s office, Orleans Parish District Attorney Harry Connick, Williams, and others caused him to be “convicted wrongfully of two crimes, sentenced to death, nearly executed, and incarcerated for over eighteen years before being exonerated of both crimes.”<sup>39</sup> The § 1983 claim asked whether the district attorney’s office violated principles that the Court had outlined in *Brady v. Maryland*<sup>40</sup> by failing to disclose the crime lab report from the armed robbery investigation.<sup>41</sup> The case proceeded to trial<sup>42</sup> and the jury found the district attorney’s office liable for failing to train its prosecutors on

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33. *Id.* at 1356 n.1 (internal quotation marks omitted). Although Deegan passed away from colon cancer in July 1994 without having done anything to remedy the situation, Riehlmann also neglected to bring Deegan’s misconduct to the attention of the district attorney’s office or the court until after Thompson’s private investigator discovered the lab report. *In re Riehlmann*, 891 So. 2d 1239, 1241–42 (La. 2005). The Louisiana Supreme Court ordered that Riehlmann be publicly reprimanded for his role in the ordeal. *Id.* at 1249–50.

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

35. *Id.* at 1356–57.

36. *Id.* at 1357.

37. *Id.*

38. Thompson’s original complaint against the Orleans Parish District Attorney’s Office included claims for malicious prosecution, intentional infliction of emotional distress, 42 U.S.C. § 1983, civil conspiracy, and direct action pursuant to section 22:655 of Louisiana Revised Statutes. Complaint at 24–31, *Thompson v. Connick*, No. 03-2045, 2005 WL 3541035 (E.D. La. 2005). The 42 U.S.C. § 1983 claim is the only claim that advanced to trial. *Connick*, 131 S. Ct. at 1357.

39. Complaint, *supra* note 38, at 1–2.

40. 373 U.S. 83 (1963). In *Brady*, the Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 87.

41. *Connick*, 131 S. Ct. at 1357.

42. *Id.*

principles that *Brady* promulgated.<sup>43</sup> The jury awarded Thompson \$14 million and the district court added \$1 million in fees and costs.<sup>44</sup>

A Fifth Circuit panel affirmed the jury's finding.<sup>45</sup> The panel held that, while Thompson failed to present a pattern of similar *Brady* violations within the Orleans Parish District Attorney's office, he did not need to prove such a pattern.<sup>46</sup> The panel found that

Thompson demonstrated that Connick was on notice of an obvious need for *Brady* training by presenting evidence "that attorneys, often fresh out of law school, would undoubtedly be required to confront *Brady* issues while at the DA's Office, that erroneous decisions regarding *Brady* evidence would result in serious constitutional violations, that resolution of *Brady* issues was often unclear, and that training in *Brady* would have been helpful."<sup>47</sup>

The Fifth Circuit, sitting en banc, vacated the panel's decision and granted a rehearing.<sup>48</sup> The en banc court then divided evenly, thereby affirming the district court.<sup>49</sup> At issue within the four opinions of the divided en banc court was "whether Thompson could establish municipal liability for [a] failure to train the prosecutors based on the single *Brady* violation without proving a prior pattern of similar violations, and, if so, what evidence would make that showing."<sup>50</sup> On March 22, 2010, the Supreme Court granted certiorari.<sup>51</sup>

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43. *Id.*

44. *Id.*

45. *Id.* at 1358.

46. *Id.*

47. *Id.* (quoting *Thompson v. Connick*, 553 F.3d 836, 854 (5th Cir. 2008), *rev'd*, 131 S. Ct. 1350 (2011)).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Connick v. Thompson*, 130 S. Ct. 1880, 1880 (2010) (granting petition for writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit), *rev'd*, 131 S. Ct. 1350 (2011).

### III. REASONING OF THE COURT

#### A. *The Majority Opinion*

Justice Thomas delivered the opinion of the Court and was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Alito.<sup>52</sup> The Court addressed “whether a district attorney’s office may be held liable under § 1983 for failure to train based on a single *Brady* violation.”<sup>53</sup> In holding that a district attorney’s office *may not* be held liable, the Court used various tests that address a municipality’s liability under § 1983.<sup>54</sup>

The Court first outlined 42 U.S.C. § 1983. The text of § 1983 provides a private right of action when an individual who is acting under color of law deprives another individual of his or her constitutional rights.<sup>55</sup> Then, the Court addressed four main topics: (1) municipal liability; (2) the requisite standard of fault; (3) patterns of constitutional violations; and (4) single-incident liability. The Court considered each topic in evaluating the constitutionality of Thompson’s § 1983 claim.

#### 1. Municipal Liability

First, the Court defined how a municipality may be held liable under § 1983. It stated that “[a] municipality or other local government may be liable under [§ 1983] if the governmental body itself ‘subjects’ a person to a deprivation of rights or ‘causes’ a person ‘to be subjected’ to such deprivation.”<sup>56</sup> The Court placed a limitation on this, however, by stating that, “under § 1983, local governments are responsible only for ‘their *own* illegal acts.’”<sup>57</sup> The Court also stated that local governments are “not vicariously liable under § 1983 for their employees’ actions.”<sup>58</sup>

Next, Justice Thomas wrote that an “action pursuant to official municipal policy” must have caused the plaintiff’s injury in order for

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52. *Connick*, 131 S. Ct. at 1355.

53. *Id.* at 1356.

54. *Id.* at 1358–66 (emphasis added).

55. 42 U.S.C. § 1983 (2006).

56. *Connick*, 131 S. Ct. at 1359 (quoting *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 692 (1978)).

57. *Id.* (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986)).

58. *Id.*



a local government to be liable under § 1983.<sup>59</sup> Such actions under municipal policy include “the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law.”<sup>60</sup> The Court acknowledged that there may be limited circumstances in which a local government’s decision not to train employees about the legal duty to avoid violating a citizen’s constitutional rights may qualify as an official government policy for § 1983 purposes.<sup>61</sup> In addition, the Court pointed out that municipal culpability for deprivation of rights is “most tenuous where a claim turns on a failure to train.”<sup>62</sup>

## 2. “Deliberate Indifference” Standard of Fault

In addressing the “deliberate indifference” standard of fault, the Court referenced *Canton*. The Court stated that, in order to satisfy § 1983, “a municipality’s failure to train its employees . . . must amount to ‘deliberate indifference to the rights of persons with whom the untrained employees come into contact.’”<sup>63</sup>

The “deliberate indifference” standard of fault is a stringent standard because it requires proof “that a municipal actor disregarded a known or obvious consequence of his action.”<sup>64</sup> Thus, city policymakers must be on actual or constructive notice that a certain oversight in a training program results in city employees violating citizens’ constitutional rights.<sup>65</sup> If policymakers thereafter choose to retain and maintain the defective program, then the city may be deemed “deliberately indifferent.”<sup>66</sup> The Court further qualified its definition of this standard of fault by stating that, if a city has notice that its program will result or does result in constitutional violations, and it then adopts a “policy of inaction” regarding that program, then the city functionally violates the U.S. Constitution.<sup>67</sup> But without any

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59. *Id.* (quoting *Monell*, 436 U.S. at 691).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1359 (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989)) (internal brackets omitted).

64. *Id.* at 1360 (citing *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 410 (1997)).

65. *Id.*

66. *Id.*

67. *Id.*

notice that training programs are deficient in certain respects, decision makers cannot be pegged as having deliberately chosen certain programs that resulted in constitutional violations.<sup>68</sup>

The Court declined to adopt any standard of fault that is less stringent than the “deliberate indifference” standard is on the asserted basis that anything less would result in municipalities being held responsible under the respondeat superior liability theory.<sup>69</sup> Respondeat superior liability, a tort doctrine, holds an employer responsible for the wrongful acts of an employee or agent if the acts occur within the scope of employment.<sup>70</sup>

### 3. Patterns of Constitutional Violations

The next section of the Court’s analysis addressed patterns of constitutional violations. To demonstrate deliberate indifference based on a failure to train employees, there must be a pattern of similar constitutional violations by inadequately trained employees.<sup>71</sup> The core of this analysis involves policymakers’ actions: if policymakers continue to adhere to an approach that they know leads to constitutional violations, then there is deliberate indifference that establishes municipal liability.<sup>72</sup>

The Court acknowledged that, in the ten years preceding Thompson’s armed robbery trial, Louisiana courts overturned four convictions due to *Brady* violations that Connick’s prosecutors had committed.<sup>73</sup> The Court stated that these four cases<sup>74</sup> did not put Connick on notice of a deficient training program because the incidents at issue were not similar to the one that was at issue in

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68. *Id.*

69. *Id.*

70. Cornell Univ. Law Sch., *Respondeat Superior Overview*, LEGAL INFORMATION INSTITUTE (Aug. 19, 2010, 5:23 PM), [http://topics.law.cornell.edu/wex/respondeat\\_superior](http://topics.law.cornell.edu/wex/respondeat_superior).

71. *Connick*, 131 S. Ct. at 1360.

72. *Id.*

73. *Id.*

74. Thompson’s original complaint points to several prior instances where *Brady* violations committed by Connick’s office resulted in convictions being overturned, and to several instances of alleged *Brady* violations. Complaint, *supra* note 38, at 21–24. Connick asserted that none of the four overturned convictions involved intentional suppression of evidence. *Thompson v. Connick*, 578 F.3d 293, 303 n.50 (5th Cir. 2009), *rev’d*, 131 S. Ct. 1350 (2011). The trial court ruled in favor of the state in all four cases, but the Louisiana Supreme Court overruled each of the trial court’s rulings. *Id.* The subsequent appellate and U.S. Supreme Court opinions are unclear as to exactly what type of *Brady* violations occurred. *Id.* at 305–06.

Thompson's case.<sup>75</sup> Because none of those incidences involved a failure to disclose blood evidence, a crime lab report, or any kind of scientific evidence,<sup>76</sup> Connick could not have known that specific training was necessary to avoid a constitutional violation similar to the one that Thompson experienced.<sup>77</sup>

#### 4. Single-Incident Liability

Justice Thomas pointed out that Thompson relied on the single-incident liability test from *Canton* instead of establishing a case based on a pattern of similar violations.<sup>78</sup> The *Canton* Court wanted to maintain the possibility that unconstitutional consequences of the failure to train employees may be "so patently obvious" that a plaintiff need not prove a pattern of violations for a court to hold a city liable under § 1983.<sup>79</sup> To do so, the *Canton* Court posed a hypothetical in a footnote: if city policymakers know to a moral certainty that police officers will have to arrest fleeing suspects, and the city has armed its officers with firearms to accomplish this task, then the need to train police officers with respect to constitutional limits on the use of deadly force is obvious.<sup>80</sup> It follows then, that if the city fails to train the police officers, the failure constitutes a deliberate indifference to constitutional rights.<sup>81</sup> Thus, according to this hypothetical, a plaintiff does not necessarily need to prove a pattern of violations in order to bring a successful § 1983 claim.

The Court stated that Thompson's case did not fall within such a narrow scope of single-incident liability.<sup>82</sup> The Court distinguished *Canton*'s hypothetical by stating that police officers need a level of legal training that they would not acquire other than through a city's training program.<sup>83</sup> This situation differs from that in the legal world, where, in order to graduate from law school and pass the state bar examination, attorneys-to-be must know how to find, apply, and

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75. *Connick*, 131 S. Ct. at 1360.

76. *Id.*

77. *Id.*

78. *Id.* at 1360–61.

79. *Id.* at 1361.

80. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 n.10 (1989).

81. *Id.*

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

83. *Id.*

understand legal rules, a type of training that differentiates them from average public employees.<sup>84</sup> Thus, the majority reasoned, any recurring constitutional violations cannot be an “obvious consequence” of a failure to provide prosecutors in the district attorney’s office with training regarding how to obey the law.<sup>85</sup> Licensed attorneys simply do not present the same constitutional danger that was inherent in *Canton*’s untrained hypothetical police officers.<sup>86</sup>

The Court then addressed a second difference between the prosecutors in Thompson’s case and the officers in *Canton*—the nuance of the necessary training.<sup>87</sup> The Court stated that Connick’s prosecutors did have general knowledge about *Brady*.<sup>88</sup> Thus, Thompson must have asserted that Connick failed to train his prosecutors on the *particular Brady* issue related to his case.<sup>89</sup> But, because “deliberate indifference” does not acknowledge this type of nuance,<sup>90</sup> and because a plaintiff will always be able to point to something that a city could have done,<sup>91</sup> Thompson’s claim did not rise to the level that would prompt municipal liability.<sup>92</sup>

Because Thompson’s claims did not fall within the range of *Canton*’s single-incident liability that would provide an exception to the requirement that a plaintiff show a pattern of violations to prove deliberate indifference,<sup>93</sup> the Court reversed the Fifth Circuit’s judgment and found Connick and the Orleans Parish District Attorney’s Office not liable for § 1983 constitutional violations.

### B. The Concurrence

Justice Scalia delivered the only concurrence in the case, and Justice Alito joined him.<sup>94</sup> Although Justice Scalia joined the majority opinion in full, his concurrence also addressed causation.<sup>95</sup>

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84. *Id.* at 1361–63.

85. *Id.* at 1363.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 1366.

94. *Id.* (Scalia, J., concurring).

95. *Id.* at 1368.

Justice Scalia stated that a plaintiff must meet a rigorous causation standard in order to recover from a municipality under § 1983.<sup>96</sup> According to Justice Scalia, Thompson was unable to demonstrate the “direct causal link between the municipal action and the deprivation of federal rights.”<sup>97</sup> Riehlmann’s suppression of the crime lab report precipitated the deprivation of Thompson’s constitutional rights, not Connick’s failure to train the district attorneys.<sup>98</sup> Because Deegan’s violation was his and his alone, Connick could not have been on notice that he needed to instruct his prosecutors on turning over evidence whose inculpatory or exculpatory character was unknown.<sup>99</sup>

### C. *The Dissent*

Justice Ginsburg delivered the dissent, and Justices Breyer, Sotomayor, and Kagan joined her.<sup>100</sup> Justice Ginsburg performed a thorough examination of the record to determine that Connick and members of the Orleans Parish District Attorney’s Office did not understand *Brady*’s scope and thus were inadequately educated about *Brady*’s disclosure obligations.<sup>101</sup> The dissent argued that the evidence demonstrated that the district attorney’s office bore responsibility under § 1983.<sup>102</sup>

The dissent first addressed the numerous *Brady* violations that occurred throughout Thompson’s trials.<sup>103</sup> First, initial eyewitness reports described the assailant as a six-foot-tall African American with close-cut hair.<sup>104</sup> Thompson was five-feet-eight-inches tall and styled his hair in a large Afro at the time of the murder.<sup>105</sup> The police reports that detailed the witnesses’ identifications were never disclosed to the court or to Thompson.<sup>106</sup> Second, the crime lab’s test on the swatch of clothing from the armed robbery trial revealed that

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96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 1369.

100. *Id.* at 1370 (Ginsburg, J., dissenting).

101. *Id.*

102. *Id.*

103. *Id.* at 1371.

104. *Id.*

105. *Id.*

106. *Id.*

the perpetrator had type-B blood.<sup>107</sup> However, no one forwarded the results to the court, and later tests showed that Thompson had type-O blood.<sup>108</sup> Third, Richard Perkins, the man whose testimony helped to convict Thompson of murder, came forward only after the victim's family offered him a reward.<sup>109</sup> After receiving assurances that the family wanted to try to "help" him,<sup>110</sup> Perkins said that Thompson was involved in the murder.<sup>111</sup> The recordings that detailed Perkins's exchange with the family "did not come to light until long after Thompson's trials."<sup>112</sup> Finally, the dissent pointed out that, in preparation for the armed robbery trial, Thompson's counsel requested "access to all materials and information 'favorable to the defendant' and 'material and relevant to the issue of guilt or punishment,' as well as 'any results or reports' of 'scientific tests or experiments.'"<sup>113</sup> Not even Connick disputed that the failure to disclose the swatch and the crime lab report fell short of compliance with *Brady*<sup>114</sup> and with the discovery request.

Next, the dissent focused on Deegan's actions that prevented defense counsel from having access to the evidence.<sup>115</sup> Not only did defense counsel never find out about the swatch or its removal from the property room, the swatch was never returned to the property room after trial.<sup>116</sup> To this day, it has never been recovered.<sup>117</sup>

The dissent stated that, because of the order-of-trial strategy (first robbery trial, then murder trial), the district attorney's office constrained Thompson's options with respect to testifying in his own defense at his murder trial.<sup>118</sup> As a result, the testimony of witnesses adverse to Thompson "gained force" and the lack of evidence that

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* The police documented on tape that Perkins stated to the victim's family that he did not mind helping them catch the perpetrator, but that he would like the family to help him. *Id.* The family told Perkins that they wanted to help him. *Id.* Only then did Perkins name Thompson. *Id.*

111. *Id.*

112. *Id.* at 1371 n.2.

113. *Id.* at 1372 (referencing exhibits entered into evidence).

114. *Id.* at 1372 n.4.

115. *Id.* at 1372-73.

116. *Id.* at 1373.

117. *Id.*

118. *Id.* Thompson's decision to not testify was a strategic decision. If Thompson had testified in his murder trial, the district attorney could have impeached his testimony with the armed robbery conviction. *Id.*

was available to the defense to impeach those witnesses<sup>119</sup> helped to seal Thompson's conviction.<sup>120</sup>

All of this, the dissent stated, amounted to a clear showing of deliberate indifference as *Canton* specified.<sup>121</sup> Justice Ginsburg concluded that Thompson had presented convincing evidence that both satisfied *Canton*'s standard<sup>122</sup> and showed that *Brady* training was absolutely necessary for Connick's prosecutors because

(1) Connick, the Office's sole policymaker, misunderstood *Brady*. (2) Other leaders in the Office, who bore direct responsibility for training less experienced prosecutors, were similarly uninformed about *Brady*. (3) Prosecutors in the Office received no *Brady* training. (4) The Office shirked its responsibility to keep prosecutors abreast of relevant legal developments concerning *Brady* requirements.<sup>123</sup>

Given these shortcomings, the dissent believed that it was hardly surprising that *Brady* violations occurred and that the integrity of Thompson's trials was seriously undermined.<sup>124</sup> Furthermore, respondeat superior liability does not equal deliberate indifference liability.<sup>125</sup> The dissent asserted that Connick was not directly responsible because he hired prosecutors who violated *Brady*;<sup>126</sup> he was directly responsible because of his own deliberate indifference to providing crucial training.<sup>127</sup>

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119. The police not only failed to turn over police reports with initial descriptions that did not match Thompson but prosecutors also failed to produce the tapes that recorded Perkins's conversation with the victim's family in the murder case. *Id.* at 1374. As a result, defense counsel could not cast doubt on Perkins's credibility. *Id.* In addition, the prosecution failed to disclose a police report that contained Perkins's account of what he learned from Thompson's codefendant in the case. *Id.* The police report revealed that the codefendant's testimony on the stand was "materially inconsistent" with previously relayed information. *Id.*

120. *Id.*

121. *Id.* at 1376.

122. *Id.* at 1377.

123. *Id.* at 1378.

124. *Id.*

125. *Id.* at 1387 n.28.

126. *Id.*

127. *Id.* The dissent went on to state that "the buck stops with him." *Id.* at 1387.

## IV. ANALYSIS

Before *Connick*, only individual prosecutors had absolute immunity from liability under § 1983;<sup>128</sup> unfortunately, it now appears that entire district attorney offices and the district attorney himself will be immune from *Brady* claim lawsuits. The harm from this ruling is that Thompson spent more than eighteen years in prison, fourteen of them on death row, before he was exonerated for the armed robbery and murder convictions. This harm must be addressed.

The majority's instinct to avoid imposing respondeat superior liability was the correct instinct. Respondeat superior liability would implicate state budgets at a time when budgets are already stretched thin. But, the majority opinion failed to capture the spirit of § 1983 because it did not acknowledge the need to redress Thompson's harm—and the harm that would stem from any future *Brady* violations. Providing a constitutional right to a remedy is the only way to redress this harm.<sup>129</sup>

The majority and dissent failed to engage in a true debate and, consequently, there was no real resolution of the issues. The two opinions together appear to promote three main values: the need to avoid respondeat superior liability, the need for deterrence, and the need for reparations. Justice Thomas's decision focused on rejecting

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128. *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009) (holding that “the immunity that the law grants prosecutors is ‘absolute’”).

129. The federal government, the District of Columbia, and twenty-seven states have enacted some form of legislation that addresses wrongful convictions or wrongful imprisonment. *Compensating the Wrongly Convicted*, THE INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/Compensating\\_The\\_Wrongly\\_Convicted.php](http://www.innocenceproject.org/Content/Compensating_The_Wrongly_Convicted.php) (last visited Aug. 21, 2011); *see, e.g.*, 28 U.S.C. § 2513 (2006); ALA. CODE § 29-2-150 (2011); CAL. PENAL CODE §§ 4900–4906 (West 2011); CONN. GEN. STAT. § 54-102uu (2011); D.C. CODE § 2-423 (2011); FLA. STAT. § 961.06 (2011); 705 ILL. COMP. STAT. 505/8(c) (2011); IOWA CODE § 663A.1 (2011); LA. REV. STAT. ANN. § 15:572.8 (2011); ME. REV. STAT. ANN. tit. 14, §§ 8241–8244 (2011); MD. CODE ANN., STATE FIN. & PROC. § 10-501 (West 2011); MASS. GEN. LAWS ch. 258D, § 5(A) (2011); MISS. CODE ANN. § 11-44-7 (2011); MO. REV. STAT. § 650.055(9) (2011); MONT. CODE ANN. § 53-1-214 (2011); NEB. REV. STAT. §§ 29-4601 to -4608 (2011); N.H. REV. STAT. ANN. § 541-B:14 (2011); N.J. STAT. ANN. § 52:4C1-5 (West 2011); N.Y. CT. CL. ACT § 8-b (McKinney 2011); N.C. GEN. STAT. §§ 148-82 to -84 (2011); OHIO REV. CODE ANN. §§ 2305.02, 2305.49, 2743.48 (West 2011); OKLA. STAT. tit. 51, § 154 (2011); TENN. CODE ANN. § 9-8-108(a)(7) (2011); TEX. CIV. PRAC. & REM. CODE ANN. § 103.001 (Vernon 2011); UTAH CODE ANN. § 78B-9-405 (2011); VT. STAT. ANN. tit. 13 § 5572 (2009); VA. CODE ANN. § 8.01-195.11 (2011); W. VA. CODE § 14-2-13a (2011); WIS. STAT. § 775.05 (2011). No matter how inadequate the respective compensation may seem, receiving some compensation is better than receiving none at all. If the Louisiana statute (which was enacted in 2005) had been in place at the time when Thompson brought his claims, this lawsuit likely never would have happened.



respondeat superior liability. In contrast, Justice Ginsburg's decision highlighted the need for deterrence and reparations, with the idea that, as a society, we should compensate an individual who spends fourteen years on death row and more than eighteen years total in prison.

A court that applies a restorative approach will be more effective in taking both Justice Thomas's and Justice Ginsburg's concerns into consideration, while at the same time honoring the three values of deterrence, reparations, and avoidance of respondeat superior liability. By focusing on the core principles of *Canton* and having a more "totality of the circumstances" and restorative approach (instead of concentrating on deliberate indifference), a court will be able to have a much more holistic understanding of the facts of a given case, and the outcome will be more commensurate with what a plaintiff deserves. Additionally, district attorneys' offices will be forced to adhere to a higher standard of accountability.

The *Canton* test has several prongs. The test asks whether (1) "there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation[;]"<sup>130</sup> (2) "the [municipality's] failure to train amounts to a deliberate indifference toward the rights" of its inhabitants;<sup>131</sup> (3) "[the] inadequate training [may] justifiably be said to represent 'city policy[;]'"<sup>132</sup> and (4) "the . . . deficiency in a city's training program must be closely related to the [plaintiff's] injury."<sup>133</sup> By taking all of these elements into consideration, a court will be able to appropriately redress harm under § 1983.

*A. Prong 1:  
A Causal Link*

Sometimes it might be difficult to connect the street-level actor with the municipality because there is a spatial disconnect between the person who implements the policy and the municipal body.<sup>134</sup> So, for a municipality to be held liable, a plaintiff must be able to

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130. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 385 (1989).

131. *Id.* at 388.

132. *Id.* at 390.

133. *Id.* at 391.

134. Teresa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 169–70 (2011).

attribute the harm to an act performed by a person who is authorized to act on the municipality's behalf.<sup>135</sup> A court must also be willing to attribute the plaintiff's injury to that municipal actor.<sup>136</sup> A more direct connection between the deprivation of the plaintiff's constitutional rights and the municipal policy comes from the idea that a municipality "acted" by adopting its chosen policy or by neglecting to adopt a policy at all (rather than a new or different one).<sup>137</sup> A new or different policy would have prevented the lower-level municipal actor—like a prosecutor—from engaging in unconstitutional conduct.<sup>138</sup>

Applying this to Thompson's case, a new or different policy regarding *Brady* training would have prevented Connick's lower-level prosecutor from suppressing evidence and engaging in unconstitutional behavior. With new or different training, Connick's prosecutors might have been more aware of their moral, constitutional, and ethical responsibility to disclose the exculpatory materials.<sup>139</sup> Thus, there was a causal link between the harm that Thompson suffered and Connick's prosecutor who was authorized to act on behalf of the district attorney's office.

*B. Prong 2:  
Deliberate Indifference*

Staying true to *Canton*'s language, a court should next consider that a failure-to-train claim must amount to deliberate indifference to be a city "policy or custom" that is actionable under § 1983.<sup>140</sup> That is, the failure to train must be a deliberate or conscious choice made from various alternatives.<sup>141</sup> To determine if the policymaker—such

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135. *Id.* at 170.

136. *Id.*

137. *Id.* at 170–71.

138. *Id.*

139. Prosecutors have a moral, ethical, and professional responsibility to disclose exculpatory material. See Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2093–95 (2010). In his concurrence, Justice Scalia argued that Thompson could not meet the causation standard because the suppression of evidence arose from Deegan's willful actions to keep the evidence out, not from the failure to train by the district attorney's office. *Connick v. Thompson*, 131 S. Ct. 1350, 1368 (2011) (Scalia, J., concurring). However, this willful suppression could very well have been a result of the lack of training. Perhaps training would have dissuaded Deegan from willfully suppressing the exculpatory evidence.

140. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989).

141. *Id.*

as Connick—made a choice not to train (and, thus, not to supervise) based on alternatives, a court must look back to the course of the policymaker's actions.

As the dissent pointed out, Connick demonstrated that he knew of the need to educate his prosecutors on *Brady* when he testified in the trial that “he relied on [his] supervisors . . . to ensure prosecutors were familiar with their *Brady* obligations.”<sup>142</sup> Then, his testimony revealed that he indeed made a choice among alternatives because “[he] did not inquire whether the supervisors themselves understood the importance of teaching newer prosecutors about *Brady*.”<sup>143</sup>

Not only did Connick not inquire into whether his supervisors knew about the importance of *Brady* (even though he relied on them to teach *Brady* to his newer prosecutors), he did not keep himself abreast of new opinions and legal rules. He acknowledged during the trial that “he had stopped reading law books . . . and looking at opinions when he was first elected District Attorney in 1974.”<sup>144</sup> Making a decision to not read law books and recent legal opinions is a choice among alternatives—one may either continue to actively engage in continuing legal education or may instead decide to cease continuing legal education. Thus, Connick, as the policymaker and district attorney for the Orleans Parish District Attorney's Office, made a “deliberate or conscious choice” to not educate himself or his fellow prosecutors on constantly evolving *Brady* principles. This is enough to establish deliberate indifference to the constitutional rights that *Brady* promulgated.

### C. Prong 3: Inadequate Training as City Policy

The *Canton* Court acknowledged that it might seem counterintuitive to think that a municipality would have a policy of failing to train its employees.<sup>145</sup> However, the Court stated that it may be that, “in light of the duties assigned to specific . . . employees the need for more or different training is so obvious” that policymakers were deliberately indifferent to a need for training.<sup>146</sup>

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142. *Connick*, 131 S. Ct. at 1380 (Ginsburg, J., dissenting).

143. *Id.*

144. *Id.* (alteration in original) (internal quotation marks omitted).

145. *Canton*, 489 U.S. at 390.

146. *Id.*

And, in the event that a city or municipality failed to provide training when its need was “so obvious,” the failure to train may represent a policy that the city is responsible for.<sup>147</sup> Furthermore, the city may be held liable if the failure to train actually causes injury.<sup>148</sup>

By applying this language directly to the facts of Thompson’s case, a court would be able to determine that Connick had a policy of no training at all. But, given the circumstances, and in light of a prosecutor’s importance in the criminal justice process, the need for training on principles that ensure due process<sup>149</sup> is “obvious.” The majority even pointed out that “[p]rosecutors have a special duty to seek justice, not merely to convict”<sup>150</sup> and that they also have “unique ethical obligations” that include a duty to turn over *Brady* evidence to the defense.<sup>151</sup> Considering that *Brady* evidence involves a “special duty” and “unique ethical obligations,”<sup>152</sup> prosecutors must be trained in *Brady* principles in order to fulfill their roles in seeking justice.<sup>153</sup> Thus, according to *Canton*, since Connick and the district attorney’s office did not provide this “obviously necessary” training, the failure to train is a policy that the district attorney was responsible for. The responsibility is only bolstered by the fact that Thompson indeed suffered injury due to the failure-to-train policy—an injury that spanned more than eighteen years in prison.

*D. Prong 4: The Relationship  
Between the Deficiency and the Injury*

Finally, a court will have to evaluate whether the deficient program was closely related to the plaintiff’s injury.<sup>154</sup> The *Canton* Court asked whether the injury would have been avoided if the employee had been trained in a program that was not deficient in the

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147. *Id.*

148. *Id.*

149. For a recent example of how *Brady* protects due process, see *Cone v. Bell*, 129 S. Ct. 1769, 1772 (2009) (stating that the Court held in *Brady* that “when a State suppresses evidence favorable to an accused that is material to guilt or to punishment, the State violates the defendant’s right to due process, ‘irrespective of the good faith or bad faith of the prosecution’” (quoting *Brady v. Maryland*, 373 U.S. 83, 87 (1963))).

150. *Connick v. Thompson*, 131 S. Ct. 1350, 1362 (2011) (internal quotation marks omitted).

151. *Id.*

152. *Id.*

153. *Id.* at 1365 (“The role of a prosecutor is to see that justice is done.” (citing *Berger v. United States*, 295 U.S. 78, 88 (1935))).

154. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 391 (1989).

identified manner.<sup>155</sup> *Canton* acknowledged that predicting an employee's actions would be difficult since matters of judgment may be involved,<sup>156</sup> but the Court had confidence that a judge and a jury would be able to adequately evaluate the situation.<sup>157</sup>

Here, it arguably is difficult to know what the prosecutor would have done with the swatch of clothing if he had been properly trained in *Brady*. However, it would not be unreasonable for a judge and a jury to find that, if Deegan, the district attorney, had been trained in *Brady*, he would have known better than to intentionally suppress the crime lab report that indicated that the perpetrator had type-B blood. This type of finding would be more than sufficient to qualify under *Canton*'s guidelines.

#### V. CONCLUSION

By applying each prong of *Canton*'s test to the facts of a case and by using a restorative approach, a court will be able to consider the totality of the circumstances in deciding whether a § 1983 plaintiff may succeed in his claim. The *Connick* majority erred by being too restrictive on the deliberate indifference prong, and the dissent erred by not explaining how its analysis fit into the larger picture of what *Canton* means and stands for.

Going back to *Canton*'s roots with this restorative approach gives the truest and fairest outcome for a case like Thompson's. Admittedly, this approach is more simplistic than the majority's approach. However, sometimes simplicity is necessary. Evaluating a case by going step by step through the restorative approach will keep a court's analysis consistent and predictable. Consistency and predictability are important because the consequences that stem from *Connick* are widespread. If district attorneys know that they are not going to be held financially accountable for withholding *Brady* evidence, they will have an incentive to continue withholding the evidence in order to win cases. This is a situation that the justice system cannot allow because it will lead to executions in cases where miracles like John Thompson's will not happen.

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155. *Id.*

156. *Id.*

157. *Id.*