Seattle Journal for Social Justice

Volume 19
Issue 1 *Fall 2020*

Article 14

12-31-2020

When the Home Team Calls Their Own Balls and Strikes: The Problem of Brady Violations, Accountability, and Making the Case for a Washington State Commission on Prosecutorial Conduct

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When the Home Team Calls Their Own Balls and Strikes: The Problem of *Brady* Violations, Accountability, and Making the Case for a Washington State Commission on Prosecutorial Conduct

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"The United States wins its point whenever justice is done its citizens in the courts." Frederick William Lehmann, 13th Solicitor General of the United States[1]

I. INTRODUCTION

A. The Brady *Problem*

In 1984, the daughter of Clyde Ray Spencer, a police officer in Washington state, allegedly accused him of molesting her.[2] After an investigation, Spencer was charged with molesting his daughter and two other children.[3] Spencer entered an Alford plea[4] after learning that his

* J.D., Seattle University School of Law. The author would like to thank the SJSJ team for extremely helpful feedback and edits; Andrea D. Lyon, who first inspired the author's interest in *Brady*; Michael Russo, who assisted with the author's inquiry into possible solutions; and Frederick F. Cohn, who first inspired the author's love of the law.

[1] This quote is attributed, but not specifically cite sourced, to Frederick William Lehmann, 13th solicitor general under President Taft. The inscription decks the panels at the Department of Justice in Washington, D.C. and is quoted within the *Brady v. Maryland* opinion, there attributed to a paraphrase delivered by Judge Simon E. Sobeloff. Rafael Alberto Madan, *The Sign and Seal of Justice*, 7 AVE MARIA L. REV. 123, 194–96 (2008); *see also infra* note 58.

[2] *See* NAT'L REGISTRY OF EXONERATIONS (2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3657 [https://perma.cc/YVA9-3UHY] [hereinafter SPENCER MISCONDUCT].

[3] *Id.*

defense counsel had not prepared to defend his case.[5] After serving ten years of his sentence in prison, Spencer hired a new attorney who determined that *Brady* violations had occurred during the lead up to his initial trial.[6] Spencer was later informed that during the first trial, the State withheld the results of medical exams that demonstrated no physical abuse had occurred.[7] The prosecutor also withheld the fact that Spencer's wife was having an affair with the police detective who was supervising the investigation.[8] During the course of discovery, none of these facts were disclosed to the defense.[9] Furthermore, two of the three children eventually recanted their testimony, claiming they had been coerced into making statements against Spencer.[10] In 2009, Spencer's plea was vacated, based on the *Brady* violations and recantations by his children.[11] One year later, he withdrew his plea and prosecutors dropped the charges against him.[12] The details illuminated in the aftermath of Spencer's trial demonstrated suppression of evidence[13] that would have been favorable to Spencer[14] and that would have been material to his case.[15] This is often what a *Brady* violation looks like.

With no systematic, successful accountability mechanisms in place, many prosecutors are deeply entrenched in the practice of withholding

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[4] *Id.*; *see also* Bryan H. Ward*, A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea,* 68 MO. L. REV. 913 (2003). An Alford plea allows a defendant to plead guilty while contemporaneously asserting their own innocence.
[5] SPENCER MISCONDUCT, *supra* note 2.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 895 (2015).
[14] SPENCER MISCONDUCT, *supra* note 2.
[15] Sullivan & Possley*, supra* note 13.

exculpatory evidence from criminal defendants during the course of criminal proceedings.[16] This practice, known as a *Brady* violation, can occur whether a prosecutor withholds evidence knowingly or unknowingly.[17] Prosecutors who commit *Brady* violations reinforce a culture that places more emphasis on convicting *any* person than convicting the *right* person.[18] This behavior, and the culture that propagates it, creates myriad negative impacts, including wrongful convictions, traumatization for victims and victims' families, and high costs for taxpayers.[19]

Most prosecutors who commit *Brady* violations are shielded from accountability due to the absolute immunity afforded to them[20] and the gaps in accountability left by current corrective structures.[21] To decrease *Brady* violations and their resulting wrongful convictions, Washington state should influence prosecutorial conduct by teaching students and new prosecutors methods for meeting *Brady* obligations and by passing legislation to enact a Commission on Prosecutorial Conduct.

When law students are afforded experiential and clinical experiences, they are better able to develop professional judgment that prepares them for their legal careers.[22] When prosecutors experience an "ethical

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[16] *Id*. at 914.

[17] Although guidance for a *Brady* violation resulted from the *Brady* case, several subsequent cases have finessed how the rule in *Brady* is applied. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); Kyles v. Whitley, 514 U.S. 419, 437–38 (1995); *see infra* Section II.

[18] Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 412 (2011). The author discusses case load pressure as a motivation for prosecutorial strategy: "It is also true that many prosecutors carry staggering caseloads, creating pressure to dispose of cases in an assembly line fashion that can result in oversights or omissions that later lead to allegations of misconduct."

[19] Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 515–16 (2011).

[20] *Id*. at 526.

[21] *Id*. at 511; *see also infra* Sections II, III, IV.

[22] Bazelon, *supra* note 18, at 407.

atmosphere"[23] in their workplace, it is more likely they will choose to act ethically.[24] If the proposed legislation and resulting Commission are enacted, the shield of immunity and the culture that has normalized *Brady* violations will be disrupted. These efforts will foster positive outcomes related to judicial efficiency, ethical conduct for attorneys, a reduction in wrongful convictions, and a reduction in trauma for crime victims and family members of individuals that are wrongfully convicted.[25]

B. Roadmap

Section II of this article provides a brief history of prosecutorial immunity, which sets the backdrop for exploring why and how *Brady* violations proliferate. Section III introduces *Brady* violations and the evolution of case law, explores what the *Brady* rule was likely intended to accomplish, and highlights where it has fallen short of protecting criminal defendants' constitutional rights. Section IV discusses prosecutorial accountability mechanisms and offers a critique for why current structures neither adequately curb *Brady* violations nor adequately hold prosecutors accountable. Section V proposes solutions, including training opportunities at the law school and municipal levels and a Washington State Commission on Prosecutorial Conduct. Section VI addresses possible criticisms and responds to those criticisms.

II. ROOTS OF PROSECUTORIAL IMMUNITY

Prosecutors are granted absolute immunity from civil damages in lawsuits based upon their conduct when the conduct was undertaken in pursuance of their prosecutorial functions.[26] While this immunity is rooted in common law, it was solidified by the Supreme Court in *Imbler v.*

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[23] Sullivan & Possley, *supra* note 13, at 926.
[24] *Id.*
[25] *Infra* note 181.
[26] Sullivan & Possley, *supra* note 13, at 923.

Pachtman in 1976: "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties."[27]

The roots of the protection offered to prosecutors date back more than one hundred years.[28] In 1871, the post-Civil War Congress enacted United States Code 42 U.S.C. § 1983, also known as the Ku Klux Klan Act.[29] The Act was passed with the intent to prevent unjust prosecutions of federal officials who were assisting newly freed slaves with civil rights claims.[30] These officials were often victim to malicious prosecution in states that opposed Reconstruction efforts.[31] At its inception, drafters of § 1983 intended to use the federal statute to hold prosecutors civilly liable for malicious prosecution. In essence, Congress enacted § 1983 during Reconstruction to help enforce compliance with the Fourteenth Amendment and protect officials from frivolous tort actions at the hands of Anti-Reconstruction prosecutors.[32]

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[27] Imbler v. Pachtman, 424 U.S. 409, 422–23 (1976).

[28] Johns, *supra* note 19, at 524.

[29] At time of original statute, it read, in part:

> An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes.
>
> Be it enacted… That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the [Civil Rights Act of 1866], and the other remedial laws of the United States which are in their nature applicable in such cases.

Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871) (codified at 42 U.S.C. § 1983).

[30] Johns, *supra* note 19, at 510.

[31] *Id.* at 526.

[32] David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional*

While § 1983 protected various categories of federal officials, prosecutors were not specifically protected as a class until twenty-five years after the statute was first adopted.[33] In 1896, the Supreme Court of Indiana held in *Griffith v. Slinkard* that, despite known malice committed by the prosecution, the action should be dismissed based on absolute prosecutorial immunity.[34] *Griffith v. Slinkard* granted total exemption to the prosecutor, disregarding the alleged motivation behind the conduct.[35] In *Griffith*, the prosecutor maliciously indicted a defendant even though the grand jury had found no evidence or probable cause.[36] The court found the prosecutor's actions to be undertaken as a judicial officer, although not as a judge of a court.[37] Further, the *Griffith* court quoted a prominent treatise from the time:

> Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action for the motives which influence him and the manner in which said duties are performed. If corrupt, he may be impeached or indicted; but he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done. No public officer is responsible in a civil suit for a judicial determination, however erroneous it may be, and however malicious the motive which produced it.[38]

Over time, *Griffith* grew to become the majority rule on the issue,[39] and nearly a century after *Griffith*, the Court solidified immunity for prosecutors

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Responsibility Measures Cannot Protect Against Prosecutorial Misconduct, 121 YALE L.J. F. 203, 214 (2012).

[33] Johns, *supra* note 19, at 526.

[34] Griffith v. Slinkard, 44 N.E. 1001, 1002 (1896).

[35] *Id.*; *see also* Johns, *supra* note 19, at 526.

[36] *Griffith,* 44 N.E. at 1001.

[37] *Id.*

[38] *Id.* (quoting JOHN TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER & LIBEL (3d Ed.), § 227, pp. 395–396.)

[39] Imbler v. Pachtman, 424 U.S. 409, 422 (1976).

in *Imbler*.[40] Paul Imbler spent years in the California courts appealing a death sentence for a murder he did not commit.[41] After ten years of litigation, Imbler was a free man, which set the stage for his civil suit against the prosecutor in his case, among other governmental officials.[42] Even though Imbler's conviction was vacated on the basis of egregious state misconduct,[43] his resulting civil suit did not provide him with relief.[44] Instead, the United States Supreme Court summarized their position on absolute immunity by quoting Judge Learned Hand:

> As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.[45]

The Supreme Court's analysis was based on the premise that common law immunity was "well settled."[46] The Court went on to ask the question of "whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983."[47] They held that it did.[48] The progression demonstrates how a common law misnomer was invoked and clung to by the judiciary as a whole in order to make absolute immunity for prosecutors a majority rule.[49]

The trajectory of the federal statute demonstrates that its original intent was flipped on its head as § 1983 was first adopted in 1871 to protect officials who were helping to ensure that individual civil rights were

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[40] *Id.*
[41] *Id.* at 415.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 431.
[45] *Id.* at 428 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
[46] *Id.*
[47] *Id.* at 424.
[48] *Id.*
[49] Johns, *supra* note 19, at 526–7.

protected during Reconstruction.[50] However, a handful of state courts began to interpret this statute as a method to provide absolute immunity to prosecutors,[51] and this slow divergence in the use of the statute leads us to present day. A statute first enacted to protect individuals' civil rights is now being used to provide prosecutors with absolute immunity from civil liability.[52] Scholar and immunity expert Margaret Johns summarized the disingenuous way in which § 1983 evolved:

> [A]nd it certainly did not intend to insulate prosecutors from liability for malicious prosecutions, since that was one of the tactics of southern defiance to Reconstruction that the Ku Klux Klan Act was intended to remedy. To the extent that the doctrine of absolute prosecutorial immunity purportedly rests on historical understandings, it is insupportable.[53]

III. *BRADY* AND ITS IMPACTS

A. The Evolution of Brady

Under the shield of absolute immunity, prosecutors are largely free to engage in acts of misconduct, including *Brady* violations.[54] A *Brady* violation occurs when a prosecutor or anyone working in support of the State's case withholds exculpatory evidence from the defense.[55] The United States Supreme Court summarized this due process violation in 1963.[56] The Court held in *Brady v. Maryland* that "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

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[50] *Id.* at 510.
[51] *Id*. at 526.
[52] *Id.* at 526–7.
[53] *Id*.
[54] *See* Keenan et al., *supra* note 32, at 204.
[55] Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 305–06 (2019).
[56] Brady v. Maryland, 373 U.S. 83, 87 (1963).

good faith or bad faith of the prosecution."[57] Further, the Court in *Brady* contextualized the need for justice:

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . .[58]

The key elements of the resulting rule are suppression, favorability, and materiality.[59] A *Brady* violation occurs if the prosecution suppresses evidence that is deemed favorable to the defense, and that evidence is relevant and significant to the facts of the case.[60] While most practitioners in, and scholars of, the legal profession are well versed in the term "*Brady* violation," the scope of obligations laid out in *Brady* has been distinctly nuanced by at least three additional United States Supreme Court cases: *United States v. Agurs*, *United States v. Bagley*, and *Kyles v. Whitley*.[61] Each of these cases articulates how *Brady* places decision-making about the rules in the hands of prosecutors—the very cadre of attorneys for whom the rules were created.[62]

In 1976, the Court in *United States v. Agurs* held that a *Brady* violation is implicated when undisclosed evidence demonstrates perjured testimony that

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[57] *Id.*

[58] *Id.* at 87–88. Within this eloquent part of the opinion, the *Brady* court quoted Frederick William Lehmann, who was appointed solicitor general by President Taft in 1910. *See also* Jeremy L. Carlson, *The Professional Duty of Prosecutors to Disclose Exculpatory Evidence to the Defense: Implications of Rule 3.8(D) of the Model Rules of Professional Conduct*, 28 J. LEGAL PRO. 125, 126 (2004); U.S. DEP'T OF JUST., OFF. OF SOLIC. GEN., SOLIC. GEN. FREDERICK WILLIAM LEHMANN (2019) https://www.justice.gov/osg/bio/frederick-w-lehmann [https://perma.cc/KHC2-6VH9].

[59] Sullivan & Possley, *supra* note 13, at 914.

[60] *Id.*

[61] United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); *see also* Keenan et al., *supra* note 32, at 207.

[62] Sullivan & Possley, *supra* note 13, at 914.

the prosecutor knew about, or should have known about.[63] In 1985, the Court in *United States v. Bagley* held that "evidence at issue is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[64] In 1995, the Court in *Kyles v. Whitley* held the following:

> [The] individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation… the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.[65]

From 1963 to 1995, an evolution occurred from *Brady*, where the Court required that a defendant make a request for evidence, to *Kyles*, where the Court placed responsibility on the prosecution to disclose known, favorable evidence.[66] In *Agurs* and *Bagley*, the Court set standards for perjured evidence and materiality.[67] While these subsequent cases helped clarify prosecutors' *Brady* obligations, many prosecutors still knowingly and unknowingly conduct themselves in ways that violate *Brady*.[68]

Scholars and defense attorneys critique the elements of *Brady* for leaving too much decision-making power in the hands of prosecutors.[69] For example, the materiality element articulated by *Bagley* places decision-making about possible case outcomes in the hands of the prosecutor.[70] On its surface, this evaluation sounds similar to the harmless error doctrine:

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[63] 427 U.S. at 103; *see also* Keenan et al., *supra* note 32, at 208.
[64] 473 U.S. at 668; *see also* Sullivan & Possley, *supra* note 13, at 886.
[65] 514 U.S. at 437–38.
[66] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); *Kyles*, 514 U.S. at 437–38.
[67] *See* 427 U.S. at 104; 473 U.S. at 680.
[68] *See* Keenan et al., *supra* note 32, at 209–11.
[69] Sullivan & Possley, *supra* note 13, at 914.
[70] SAMUEL R. GROSS, MAURICE J. POSSLEY, KAITLIN JACKSON ROLL & KLARA HUBER STEPHENS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 76 (2020),

> [a] judgment that sometimes a constitutional violation does not require reversal of a conviction because the outcome of the case would have been the same without the violation. But it's not. If the evidence is "immaterial" there is no obligation to disclose it; failure to do so is not a forgivable violation of the constitution rule but, no violation at all.[71]

The inquiry into harmless error requires a judge to determine whether there was an error, and whether the error was harmless .[72] Within a *Brady* inquiry, however, instead of a judge making that determination, the prosecutor makes the determination during the course of pre-trial and trial proceedings.[73]

Similarly, the issue of favorability requires that prosecutors make value judgements on whether a particular piece of evidence would be considered valuable to the defense.[74] Maurice Possley, a journalist with prosecutorial expertise, and Thomas Sullivan, who has practiced law for more than sixty years, made a particularly keen analogy that illustrates the problematic discretion afforded to prosecutors:[75] "Imagine a professional sporting event in which one of the contestants is permitted to make the close calls—whether it was a ball or strike, whether the tennis ball was in or out, whether the tackle was offside, etc.—without oversight by an independent umpire."[76] The prosecutors charged with making tough calls on the use of evidence are often torn between two divergent goals: a passionate representation of the United States government and its people and a strong desire to actualize a criminal conviction only when appropriate.[77]

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https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [https://perma.cc/Q333-3GWY] [hereinafter GOVERNMENT MISCONDUCT].

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] Sullivan & Possley, *supra* note 13, at 914.

[75] *Id.* at 914–15.

[76] *Id*. at 915 n.131.

[77] *Id.*

Nonetheless, they call their own balls and strikes, often times prioritizing a win over engaging fairly with the system.

A prosecutor cannot know every investigative puzzle piece that a defense attorney may have cultivated,[78] leaving them guessing as to whether something should be considered favorable or not. Defense attorneys are much better poised to determine what evidence will best support their client.[79] Practicing attorneys also critique the element of materiality for being subjective, at least at the stage that informs prosecutors' decisions related to disclosure of evidence.[80] Although materiality is considered an "after the fact" test"[81] because it is evaluated at the appellate stage, defense attorneys and scholars argue that prosecutors who feel they have a strong case will ignore disclosure, feeling confident that non-disclosed evidence would not impact the outcome of the case anyway.[82] These considerations can lead prosecutors to feel that their *Brady* obligations can be ignored. As one *Brady* scholar, Alafair Burke, stated:

> Much of the blame for *Brady*'s failure to protect the innocent has been laid at the doors of the prosecutors charged with the doctrine's effectuation . . . *Brady* has become a "paper tiger," frequently and blatantly disregarded by prosecutors who have come to realize that they can suppress exculpatory evidence with few repercussions other than higher rates of conviction.[83]

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[78] *Id.*
[79] *Id.*
[80] *Id.* at 917.
[81] *Id.*
[82] *Id.* at 916.
[83] Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 482 (2009). Although a full critique of *Brady* elements is outside the scope of this article, it is contextually important to share Burke's harsh critique of the materiality element:

> Although the word "material" might at first blush seem so immaterial in the original *Brady* opinion, surrounded as it was by such sweeping and ambitious rhetoric, that single word has since proven a significant restriction on a prosecutor's constitutional duty to disclose exculpatory evidence. *Brady*'s progeny have made clear that prosecutors are not constitutionally obligated to disclose all exculpatory evidence, or even all relevant exculpatory evidence. In

In *Brady*, the Supreme Court dictated that when prosecutors withhold exculpatory evidence, justice is not served.[84] The Court further tailored the rules in subsequent cases,[85] but prosecutors still have broad discretion[86] and are often challenged to act within the confines of competing values: pursuing a conviction and appropriate outcomes for a criminal defendant for whom they hold deep beliefs regarding guilt while evaluating ethical considerations and less tangible notions regarding "fair play."[87]

B. Brady*'s Impacts*

Prosecutors' disregard for *Brady* results in myriad negative impacts that are felt by wrongfully convicted individuals, crime victims, their families, and taxpayers.[88] Wrongful convictions ruin the lives of the innocent individuals, many of whom will never regain their freedom.[89] Rather, they are taken from their families and experience detrimental effects on their physical and mental health.[90] Additionally, wrongful convictions allow individuals who actually commit crimes to remain free, causing safety risks to communities and society as a whole.[91] When the wrong individual sits in prison, the actual perpetrator of a crime is free to commit additional

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fact, the definition of "material" exculpatory evidence is so restrictive that it is probably best articulated not as a duty of the prosecutor to disclose, but as a narrow exception to a prosecutor's general right to withhold evidence from the defense. Under *Brady*'s progeny, a prosecutor can constitutionally withhold all evidence, except for exculpatory evidence that "creates a reasonable doubt that did not otherwise exist."

[84] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

[85] *See* United States v. Agurs, 427 U.S. 97 (1976); United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995); *see also* Keenan et al., *supra* note 32, at 207.

[86] Sullivan & Possley, *supra* note 13, at 914.

[87] Bazelon, *supra* note 18, at 411.

[88] *See* Johns, *supra* note 19, at 514–15.

[89] *Id.*

[90] *Id.* at 515.

[91] Sullivan & Possley, *supra* note 13, at 884 n.5.

crimes.[92] This injustice creates substantial negative impacts for victims and victims' families, in particular those who begin to understand that the person who sits in prison is not the person who harmed them or their loved one.[93]

There are also high taxpayer costs incurred when a person is wrongfully convicted.[94] The courts must administer a trial (and often multiple resulting appellate proceedings) for an innocent person.[95] Offices of prosecution and public defense incur costs during these proceedings.[96] Wrongful convictions incur incarceration costs.[97] Federally, the cost for incarcerating one inmate in fiscal year 2018 was between approximately $34,000 and $38,000, depending on the facility.[98] In Washington state, the cost for incarceration in fiscal year 2018, per inmate, ranged from $32,000 to $40,000, depending on the facility.[99] Current taxpayers are paying court and prison costs for individuals who do not belong there.[100] Because statistics about wrongful convictions are generally lacking,[101] it is difficult to create a savings formula based on these annual averages. The lack of data also limits how states can respond to *Brady* violations.[102]

It is difficult to find specific data on *Brady* violations nationally or at the statewide level.[103] There is no state registry or data collection currently

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92 Johns, *supra* note 19, at 516.
93 *Id.* at 515.
94 Sullivan & Possley, *supra* note 13, at 884.
95 *Id.*
96 Johns, *supra* note 19, at 516.
97 *Id.*
98 NAT'L ARCHIVES, FED. REG., ANN. DETERMINATION OF AVERAGE COST OF INCARCERATION FEE (COIF) (2019), https://www.federalregister.gov/documents/2019/11/19/2019-24942/annual-determination-of-average-cost-of-incarceration-fee-coif [https://perma.cc/RS3J-V883] [hereinafter INCARCERATION FEE].
99 *Id.*
100 Johns, *supra* note 19, at 515–16.
101 Keenan et al., *supra* note 32, at 239.
102 *Id.*
103 *Id.*

available.[104] Prosecutors are not named in appellate opinions that involve *Brady* violations[105] and because there is very little accountability by way of professional standards mechanisms, the organizations that manage those professional standards are not a good data source for tracking known violations.[106]

However, the National Registry of Exonerations provides data on exonerations that can be filtered by multiple factors, including by state.[107] Official misconduct, which can and does include *Brady* violations, is one of the elements relayed in the data. For example, since 1989, the National Registry of Exonerations has documented fifty-two exonerations in Washington state.[108] The Registry provides that twenty of those exonerations (nearly 40%) involved official misconduct.[109] At the time of writing, the data does not specifically call out *Brady* violations, but these violations would be classified as official misconduct.[110] Further research is needed in order to claim, with confidence, a percentage of Washington state's exonerations that are due in part or in whole to a *Brady* violation.[111] The lack of empirical data is a real barrier in effectuating productive *Brady* accountability, because like any social problem, identification of the issue is a first-step to solving the problem.

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[104] *Id.*
[105] Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1062 (2008).
[106] Keenan et al., *supra* note 32, at 213; *see also* Johns, *supra* note 19, at 520.
[107] *See* NAT'L REGISTRY OF EXONERATIONS, INTERACTIVE DATA DISPLAY (2019), http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx [https://perma.cc/HLC4-8F25] [hereinafter EXONERATION DATA].
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*

IV. *BRADY* ACCOUNTABILITY (OR LACK THEREOF)

The issue of accountability for prosecutorial misconduct in the legal profession is multifaceted. This section will explore five specific flaws within our criminal justice system: (1) the weakness of appellate processes as accountability mechanisms; [112] (2) the near limitless civil protections that § 1983 provides to prosecutors;[113] (3) the inexistence of criminal prosecutions against prosecutors who violate *Brady*; [114] (4) the lack of enforcement of professional conduct within both state and federal government; [115] and (5) the lack of both state and federal legislation to enforce *Brady* accountability.[116]

In appellate processes, courts will only overturn and/or vacate on a *Brady* violation if the appellant can meet a very high bar, showing all three elements of the rule: suppression, favorability, and materiality.[117] While suppression and favorability are often easier to prove, the materiality requirement demands there be a reasonable probability that the evidence would have changed the outcome of the case.[118] Further, the bar for proving that a prosecutor acted under excessive liability is so high that it disincentivizes plaintiffs from filing for an appeal.[119]

Judges evaluate *Brady* violations using the harmless error doctrine. When a judge finds that a violation occurred, the violation will only lead to an overturned conviction if the appellant can prove that they suffered

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[112] Gershowitz, *supra* note 105, at 1066.
[113] Johns, *supra* note 19, at 522.
[114] Keenan et al., *supra* note 32, at 213; *see also* Gershowitz, *supra* note 105, at 1086; Johns, *supra* note 19, at 520.
[115] Keenan et al., *supra* note 32, at 218.
[116] Dan M. Clark, *NY State DAs Move to Block Creation of Prosecutorial Conduct Watchdog*, N.Y. L.J. (April 1, 2019), https://www.law.com/newyorklawjournal/2019/04/01/ny-state-das-move-to-block-creation-of-prosecutorial-conduct-watchdog/ [https://perma.cc/36WH-75VQ].
[117] Gershowitz, *supra* note 105, at 1075.
[118] *Id.*; *see also* Burke, *supra* note 83.
[119] Johns, *supra* note 19, at 522.

identifiable prejudice, based on the *Brady* violation.[120] Even when judges do discuss *Brady* violations within appellate opinions, they often times go out of their way to avoid identifying prosecutors that are implicated in those violations.[121] Some appellate judges may believe that when they reverse a case based on misconduct, they are finding fault of a prosecutor for the first time.[122] It is possible that an appellate judge believes they are acting out of compassion, believing that the reversal itself will admonish the prosecutor's bad behavior.[123]

Yet this very practice offers intentional or unintentional shield to those with serial misbehavior.[124] For example, the Florida Supreme Court and California Supreme Court both heard cases in the late 1990s with findings of serious prosecutorial misconduct. In both sets of circumstances, lower courts had already admonished bad behavior when authoring appellate decisions, but always with the overt decision to use "Assistant United States Attorney" (or AUSA) in their written decisions instead of personally naming the prosecutorial offender.[125] In California, the prosecutor engaged in misconduct during a death penalty case many years after she was first admonished (but never by name within appellate decisions).[126] The California Supreme Court only became aware of the two prior admonishing decisions because of research conducted and submitted by the appellant's

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[120] Gershowitz, *supra* note 105, at 1066.

[121] *Id.* at 1068. In discussing a specific case to illustrate this problem, the author notes:

> Despite… egregious misconduct, the Court never identified the prosecutors involved. Instead, in the introduction and factual history section of its opinion, the Court referred forty-two times to "the State" and "the prosecutors." In many of these instances and other references throughout the body of the opinion, it would have made more sense grammatically to use the prosecutors' actual names.

[122] *Id.* at 1071.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 1071–74.

[126] *Id.* at 1074.

attorneys.[127] In both the California and the Florida examples, the prosecutors resigned, which prevented future misconduct from occurring.[128] While these examples are by no means standalone,[129] it is more rare than not for prosecutors to be named in appellate decisions.[130] Thus, even when an appellant overcomes *Brady*, it is not likely that the prosecutor who committed the violation is held accountable by way of the appellate process.[131]

Accountability by way of civil suit also proves a difficult endeavor, in part by creating confusion and relying on common law misnomers.[132] Although § 1983 itself did not promise immunity when first enacted in 1871, states and the courts have worked progressively over time to interpret it as such.[133] As highlighted in Section II, the concept of personal tort liability under § 1983 has been rejected by the United States Supreme Court.[134] Municipal tort liability (civil liability imposed upon the municipality) was sometimes used with success for plaintiffs[135] until 2011, when the United States Supreme Court held in *Connick v. Thompson* that "plaintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury."[136] Justice Ruther Bader Ginsberg dissented in the case:

> [a] district attorney's deliberate indifference might be shown in several ways… [District Attorney] Connick created a tinderbox in Orleans Parish in which *Brady* violations were nigh inevitable. And when they did occur, Connick insisted there was no need to change anything, and opposed efforts to hold prosecutors

[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] Johns, *supra* note 19, at 510–11.
[133] *Id.* at 522.
[134] Keenan et al., *supra* note 32, at 213.
[135] *Id.*
[136] Connick v. Thompson, 563 U.S. 51, 60 (2011).

> accountable on the ground that doing so would make his job more difficult.[137]

As discussed in Section II, personal tort liability has long been a dead end for achieving justice and accountability, and with *Connick*, municipal tort liability has joined that path, leaving one fewer mechanism for accountability.[138]

The United States Supreme Court offered criminal proceedings against a prosecutor as a possible remedy in 1976 when it reinforced absolute immunity in *Imbler*,[139] but it failed to cite even one occurrence where criminal proceedings had been successfully pursued.[140] Prosecutors are rarely, if ever, held accountable by way of criminal proceedings.[141] In Section III, the relaxed enforcement of prosecutorial discretion was analogized to a sporting event, where one team's own members would be expected or required to take action that is in direct opposition to their ability to win the game.[142] Similarly, if criminal proceedings were to be initiated for prosecutors, other attorneys—often times their own colleagues—would be required to take the first step by filing charges.[143] Although the American Bar Association's Model Rules of Professional Conduct requires that an attorney report behavior of another attorney,[144] one study of 1,000 Boston attorneys found that less than 7% of those surveyed would report on a colleague who had engaged in flagrant behavior.[145] If attorneys will not come forward to ethics boards, it is unrealistic to believe that they would actually file charges against their colleagues in a court of law.

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[137] *Id.* at 108.
[138] Keenan et al., *supra* note 32, at 213.
[139] Imbler v. Pachtman, 424 U.S. 409 (1976).
[140] Johns, *supra* note 19, at 520.
[141] Keenan et al., *supra* note 32, at 213; *see also* Gershowitz, *supra* note 105, at 1086; Johns, *supra* note 19, at 520.
[142] Sullivan & Possley, *supra* note 13, at 914.
[143] Gershowitz, *supra* note 105, at 1086.
[144] MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N 1983).
[145] Gershowitz, *supra* note 105, at 1086.

Prosecutions of prosecutors for misconduct are nearly nonexistent.[146] At the federal level, prosecutors can be criminally prosecuted for violating constitutional protections under 18 U.S.C. § 242.[147] However, this avenue proves more theoretical than practical, and it is rarely used.[148] At the state level, it is difficult to know how many prosecutors have faced criminal liability for misconduct.[149] A comprehensive report put out by the National Registry of Exonerations cites only two known prosecutions.[150] In both of these cases, the prosecutors who became the defendants received nominal sentences.[151] First, in 2007, Michael Nifong, the former District Attorney of Durham County, North Carolina, was convicted of criminal contempt for concealing exculpatory evidence in a prosecution of three members of the Duke University Lacrosse team who were falsely accused of rape.[152] Nifong

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[146] GOVERNMENT MISCONDUCT, *supra* note 70, at 102.

[147] Johns, *supra* note 19, at 520. The code, titled Deprivation of Rights Under Color of Law, reads:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 242 (1996).

[148] Johns, *supra* note 19, at 520.

[149] Keenan et al., *supra* note 32, at 218.

[150] GOVERNMENT MISCONDUCT, *supra* note 70, at 102.

[151] *Id.* at 120.

[152] *Id.*

spent one day in jail.[153] The attention this case received resulted in an additional exoneration for someone previously tried by Nifong in 1991.[154] Next, in 2013, former Williamson County, Texas District Attorney, Ken Anderson, was convicted of contempt after concealing exculpatory evidence that would have prevented a wrongful conviction for a man who spent twenty-four years in prison before his exoneration.[155] Although prosecutors Nifong and Anderson spent only five days in jail between them, they were both eventually disbarred and lost their jobs.[156] To date, the National Registry of Exonerations names these two as "the only two American prosecutors who have ever been convicted of criminal contempt for lying in court."[157]

The number of criminal prosecutions for prosecutors is likely so low due to a societal perception that criminal liability is too harsh for someone who made a technical error in the course of their demanding and stressful work.[158] The legal community may prefer alternate avenues of accountability, reserving criminal proceedings for those practice errors considered most egregious.[159] Within this current environment, the prosecutor may make a technical error and cause an innocent person to lose their freedom, but never be judged under the same criminal justice system. If this is the accepted norm, it should give us pause. With civil liability and criminal proceedings largely unavailable, few avenues remain to provide justice and accountability for those whose constitutional rights have been infringed upon as the result of a *Brady* violation.

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[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.* at 102.
[158] Keenan et al., *supra* note 32, at 218.
[159] *Id.*

As mentioned above, professional responsibility measures are highly underutilized and largely ineffective.[160] Ethical obligations of prosecutors are outlined in the American Bar Association (ABA) Model Rule for Professional Conduct 3.8,[161] also adopted in Washington state.[162] Washington State Rule for Professional Conduct 3.8(d) provides guidance specific to prosecutors about disclosure of favorable evidence:

> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . .[163]

Rule 3.8 is the only rule that guides ethical duties specific to prosecutors,[164] and the rule is unique in that the majority of model rules do not distinguish between private and public attorneys.[165] The rule provides more strict parameters than *Brady* initially obligated.[166] It requires known favorable evidence to be disclosed in a timely manner, regardless of a defendant's request.[167] This is a positive step that should help deter *Brady* violations.

Yet a rule is only effective when enforced.[168] Yale scholars identified multiple breakdowns in professional responsibility measures .[169] The

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[160] *Id.* at 213.
[161] *Id.* at 221.
[162] WASH. ST. CT. R.P.C. 3.8.
[163] *Id.*
[164] Keenan et al., *supra* note 32, at 222.
[165] *Id.*
[166] *Id.* at 224.
[167] *Id.*
[168] Robert Granfield & Thomas Koenig, *It's Hard to Be a Human Being and a Lawyer: Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 502 (2003). The authors offer examples of professional development organizations using ethics guidelines as a mechanism not for enforcement, but as a "smoke screen" to offer appearances of accountability in what can be deemed self-

findings included a failure for ethical rules to define prosecutorial misconduct (arguing a weakness of Rule 3.8 highlighted above), a lack of appropriate rights for complainants, an overbroad discretion of administrators making decisions, reporting failures among those who have knowledge of misconduct, and confusion about disciplinary authorities, based on overlapping policy avenues.[170] A troubling illustration of unsanctioned complaints is present in the Washington state data. For example, the most recent ABA Survey on Lawyer Discipline System results from 2017[171] demonstrates that less than 5% of complaints filed with the ABA in Washington state resulted in sanctions for attorneys.[172] This figure includes all complaints of misconduct, not just those regarding alleged *Brady* violations.[173] In Washington state the decision-making boards are mostly populated by attorneys.[174] In 2017, only 29% of the board members were non-attorneys,[175] leaving little outside attention and guidance towards this accountability mechanism. As discussed above, attorneys are not likely to report the unethical or illegal behavior of their own colleagues, and therefore, the majority-attorney composition of these state boards is problematic.

There is no federally mandated accountability mechanism in place that systematically and specifically addresses *Brady* violations and other forms of prosecutorial misconduct.[176] Individual states are also lacking.[177] The

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monitored professions. Statistics derived from the ABA (*see, e.g. infra* note 171) validate this assertion as far as Washington State is concerned.

[169] Keenan et al., *supra* note 32, at 221.

[170] *Id.*

[171] STANDING COMM. ON PRO. REGUL. OF THE AM. BAR ASS'N CTR. FOR PRO. RESP., 2017 SURVEY ON LAWYER DISCIPLINE SYSTEMS (2019), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2017sold-results.pdf [https://perma.cc/ER4Q-VDEM].

[172] *Id.* at chart I pt.A, chart III pt.A, chart III pt.B.

[173] *Id.* at chart I pt.A.

[174] *See id.* at chart IX pt.A.

[175] *Id*.

[176] *See generally* Johns, *supra* note 19.

state of New York recently passed legislation to institute a commission on prosecutorial conduct, the first state to do so.[178] This legislation is currently ensnared in legal challenges from district attorneys in that state, discussed in Section V below.[179]

As demonstrated above, each possible avenue to provide accountability for *Brady* violations proves problematic. Appellate, civil, criminal, professional conduct, federal, and state mechanisms each lack strong hooks for prosecutors, or provide such hooks with nearly no realistic enforcement. This leaves prosecutors free to engage in behaviors they undertake under the guise of "passionately" enforcing justice,[180] while innocent, wrongfully convicted members of society continue to suffer injustices.

V. CREATING THE WASHINGTON STATE COMMISSION ON PROSECUTORIAL CONDUCT

To decrease *Brady* violations and their resulting wrongful convictions, Washington state should draft and pass legislation to create a Commission on Prosecutorial Conduct. The Commission can help deter prosecutorial misconduct, including *Brady* violations, in three ways: (1) the Commission should process, track, evaluate, and offer findings on complaints of prosecutorial misconduct, including *Brady* violations; (2) the Commission should build a professional development program, which can work with each county prosecuting attorney's office to offer training specific to prosecutorial conduct and *Brady* violations; and (3) the Commission should partner with the three law schools in Washington state to offer curricular content and co-curricular training on the topic of prosecutorial ethics and *Brady* violations. Through accountability, training, and teaching, the Commission on Prosecutorial Conduct will reduce *Brady* violations and

[177] *See* Clark, *supra* note 116.
[178] S.B. 2412D, 2017–2018 Leg., 202nd Sess. (N.Y. 2018).
[179] Clark, *supra* note 116.
[180] *See* Gershowitz, *supra* note 105, at 1065.

provide a mechanism for correcting the harm felt in the wake of their occurrence.[181]

A. Building the Commission on Prosecutorial Conduct

In order for the Washington State Legislature to create realistic legislation that can be passed, members of the Legislature should scan the environment and research benefits and challenges of current models. Legislators can address federal immunity guidelines[182] and learn from New York's passed legislation and its forthcoming Commission.[183] They can also learn from Washington state's own Commission on Judicial Conduct,[184] as well as King County's *Brady* Committee.[185] Once legislators have drafted measures that will ensure accountability for *Brady* violations and other

[181] To the author's knowledge, there is no empirical evidence, specific to *Brady* violations, to support the claim that heightened accountability regarding prosecutorial conduct will deter misconduct. This is likely due to a near non-existence of accountability mechanisms for prosecutorial conduct. In essence, there cannot be a measurement of effectiveness of an action/initiative/mechanism when no such action/initiative/mechanism has been implemented or enforced. For a discussion of a general need for prosecutorial conduct accountability mechanisms, see, e.g., Sullivan & Possley, supra note 13, at 896. *See also* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science*; Robert Steinbauer, Robert W. Renn, Robert R. Taylor & Phil K. Njoroge, *Ethical Leadership and Followers' Moral Judgment: The Role of Followers' Perceived Accountability and Self-Leadership*, 120 J. BUS. ETHICS 381, 383-84 (2014).

[182] 42 U.S.C. § 1983 (1996).

[183] *See* Clark, *supra* note 116.

[184] STATE OF WASH. COMM'N ON JUD. CONDUCT (2019), https://www.cjc.state.wa.us/index.php?page=about [https://perma.cc/7LPC-ATCN] [hereinafter WA COMMISSION JUD. CONDUCT].

[185] Email from Dan Clark, Assistant Chief Deputy, Crim. Division, King Cnty. Prosecuting Att'y's Off., to E. Kate Cohn, author (Nov. 7, 2019, 09:15 PST) (on file with author). Within this email communication, Mr. Clark provided a copy of King County's *Brady* Committee Protocol. *See* KING CNTY. PROSECUTING ATT'Y'S OFF. *BRADY* COMM. PROTOCOL (2015), https://fairandjustprosecution.org/wp-content/uploads/2017/09/King-County-Brady-Policy-revised-11-06-15.pdf [https://perma.cc/X867-9LMH] [hereinafter KC BRADY PROTOCOL] (Part of the decision to write to Mr. Clark was to validate that the version available at this non-profit website was accurate and up to date. The PDF provided by Mr. Clark validated this assumption).

forms of prosecutorial misconduct, they should also make recommendations for how the Commission can collaborate with municipalities and law schools to train and teach students and new attorneys on ethics topics.

1. Addressing Federal Immunity Within the Model

To start the process of building a Commission on Prosecutorial Conduct, state legislators should consider the problematic federal parameters regarding civil rights violations.[186] As discussed in Section II, the current § 1983 statute, also known as the Ku Klux Klan Act of 1871, was passed in an effort to protect public officials, who were working to ensure the rights of former slaves, from being swept up into frivolous lawsuits by anti-Reconstructionist government officials.[187] In drafting the bill to enact the Commission on Prosecutorial Conduct, legislators should work within legal parameters to justly interpret the United States Supreme Court's rulings on absolute immunity. Even though it is a federal statute, a critique of § 1983's unsupported historical common law underpinnings[188] should guide Washington state's own Commission guidelines. Although Washington state is limited by *Imbler*,[189] the Washington State Supreme Court may choose how to interpret the rules related to absolute immunity set forth in the case. The United States Supreme Court in *Imbler* clearly indicated that when a prosecutor is initiating and presenting the State's case, the prosecutor acts under the shield of absolute immunity.[190] Yet, the Court reserved on what type of immunity should be extended when the prosecutor is acting as an administrator or investigator.[191] Many attorneys and scholars

[186] *See supra* Section II.
[187] Johns, *supra* note 19, at 510.
[188] *See supra* Section II.
[189] Kate McClelland, "*Somebody Help Me Understand This": The Supreme Court's Interpretation of Prosecutorial Immunity and Liability under § 1983*, 102 J. CRIM. L. & CRIMINOLOGY 1323, 1331 (2012).
[190] *Id.*
[191] *Id.*

criticize the functional test provided in *Imbler*.[192] Washington state may choose to interpret the rules that guide § 1983 claims in a manner that allows for accountability when, during the course of preparing for and presenting a case, a prosecutor engages in a *Brady* violation.[193] It is shocking to uncover that the roots of what is now applied as absolute immunity for prosecutors actually rests in the bedrock of Reconstruction efforts to hold prosecutors civilly liable for malicious prosecution.[194] The current application completely contradicts the original intent.[195] It will be a strong "bend in the arc" towards moral justice if jurisdictions and legal professionals radically reinterpret § 1983 and use its guidance in a manner more closely aligned with its intention at the time of the 1871 Congress.[196]

2. New York as a Model

To date, only New York state has passed legislation regarding a Commission on Prosecutorial Conduct.[197] New York Senate Bill S2412D was passed by the New York State Legislature and signed by Governor Andrew Cuomo on August 20, 2018.[198] According to the bill, the New York Commission, when appointed,[199] will consist of eleven members appointed from the three branches of government (i.e., governor, President of Senate, chief judge of court of appeals, among others).[200] The Commission will have functions of conducting hearings and investigations, oaths, affirmations, subpoenas, and other related activities needed to make decisions and offer findings.[201] The Commission will be able to confer

[192] *Id.* at 1339.
[193] *See* Johns, *supra* note 19, at 510.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] Clark, *supra* note 116.
[198] *Id.*
[199] *Id.*
[200] S.B. 2412D, 2017–2018 Leg., 202nd Sess. (N.Y. 2018).
[201] *Id.*

immunity[202] and will be able to implement recommended penalties.[203] Washington state's Commission should maintain many of the same elements as the New York legislation[204] and build off this model's strengths.

3. Washington State's Commission on Judicial Conduct

Another model that legislators can use as an example is Washington state's own Commission on Judicial Conduct. The Commission on Judicial Conduct was created by a 1980 voter passed amendment to the state constitution.[205] Goals of the Commission on Judicial Conduct include the following:

> … [to] maintain confidence and integrity in the judicial system; provide the public with a fair and reasonable process to address judicial misconduct or disability; preserve judicial independence; provide public accountability; protect the rights of the public while safeguarding the reputations of judges from unfounded accusations.[206]

The listed goals highlight a balance between a desire for public accountability and a protection for judicial reputation.[207] Legislators should use these goals to inform their work. They should also look to the Commission on Judicial Conduct for models of how to manage complaints, investigations, and findings.[208]

For example, the Washington State Commission on Judicial Conduct uses an open records process but maintains confidentiality until the

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[202] *Id.*
[203] *Id.*
[204] *See* Columbia Law School Center for the Advancement of Public Integrity, *The New York State Commission on Prosecutorial Conduct: What Comes Next?* (Nov. 8, 2018), https://www.law.columbia.edu/public-integrity/what-comes-next-prosecutorial-conduct-commission [https://perma.cc/EL52-GX8B].
[205] WA COMM'N JUD. CONDUCT, *supra* note 184.
[206] *Id.*
[207] *Id.*
[208] *Id*

Commission finds probable cause or reasonable grounds on a complaint.[209] After probable cause on a violation is found, a statement of charges is filed as a public record.[210] From there, fact-finding hearings and records that form the basis of the findings are filed within the hearing record.[211] Any member of the public may search the Commission's website to research findings of any Washington state judge.[212] In a process that likely assuages judges' concerns regarding their own reputations, the Commission must first have probable cause of a violation before records are made public.[213] Similarly, before making a public record, the Commission on Prosecutorial Conduct should conduct a thorough investigation,[214] and only make complaints public once probable cause has been established. This approach will promote transparency in the process, which will both enhance the accountability mechanism and promote public trust in the process.

The Commission on Judicial Conduct may also serve as a model in regard to appointees, which is a top constitutional concern in the forthcoming New York Commission on Prosecutorial Conduct.[215] In Washington state, the Commission on Judicial Conduct is housed within the judicial branch,[216] yet the Commission takes appointments from both the judicial branch and the governor—whose position is in the executive branch.[217] It appears that the Commission on Judicial Conduct includes cross branch appointments that were not determined to violate the Washington State Constitution.[218] Further, it makes sense for the Washington State Commission on Prosecutorial Conduct to be housed

[209] *Id.*
[210] *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] Clark, *supra* note 116.
[216] WA COMM'N JUD. CONDUCT, *supra* note 184.
[217] *Id.*
[218] *Id.*

under the judicial branch. This way, the commission could make findings and recommendations and deliver them to the Washington State Supreme Court. Like the powers enumerated in regard to licensure and disbarment,[219] the Court is best suited to deliver any findings of the Commission. Looking for guidance from the Washington State Commission on Judicial Conduct illustrates that, even if New York state stands as the only current legislated model related to prosecutorial conduct,[220] other models of accountability can inform the legislation drafting process.

4. King County's *Brady* Committee

An additional model exists within county systems that are working to curb *Brady* violations. For example, Washington state's King County formed a *Brady* Committee in 2007.[221] The committee and its resultant *Brady* protocol was "the first of its kind in the state and was adopted, with some changes, by the Washington Association of Prosecuting Attorneys (WAPA) soon after."[222] The protocol seeks to ensure the King County Prosecuting Attorney's Office meets its *Brady* obligations during the administration of investigations and criminal proceedings.[223] The protocol covers reports of officer dishonesty, false witness statements, and crime lab dishonesty.[224] Further, the protocol provides methods for disclosure of *Brady* material that has been collected by the *Brady* Committee.[225] Since the inception of the Committee, the King County Prosecuting Attorney's office has modified the protocol as needed and is, as of 2020, working on another revision.[226] King County's *Brady* Committee may not provide an

[219] WASH. CT. R. 13.
[220] Clark, *supra* note 116.
[221] Clark, *supra* note 185.
[222] *Id.*
[223] KC BRADY PROTOCOL, *supra* note 185.
[224] *Id.*
[225] *Id.*
[226] *Id.*

accountability mechanism in regard to discipline, but it does help track known offenders.[227]

As discussed in Section II, the naming of *Brady* offenders is a topic rife with controversy, with judges often going out of their way to exclude the names of prosecutorial bad actors within appeals.[228] King County's *Brady* Committee does not speak directly to naming prosecutors because its goal is to assist prosecutors in proactively meeting their *Brady* obligations.[229] Nevertheless, it creates a structure that should make future accountability mechanisms easier to establish. Further, King County's *Brady* Committee, in collaboration with the proposed Washington State Commission on Prosecutorial Conduct, will be able to guide training and teaching components, helping to shift the culture regarding disclosure of information. This collaboration will positively benefit both prosecutors and individuals facing criminal convictions.

B. Professional Development and Teaching

The ultimate goal of the Washington State Commission on Prosecutorial Conduct will be to provide an accountability mechanism for prosecutorial misconduct. The Commission's function in this regard will be reactive and responsive to complaints received. In addition, the Commission has a unique opportunity to provide proactive support for new attorneys within county and municipal settings. Law students would benefit from being trained and taught prosecutorial ethics and the complexities involved in *Brady* obligations and violations. This proactive approach will assist in preventing new prosecutors from committing violations. Early training is woefully missing from teaching and new professional environments.[230]

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[227] *Id.*
[228] Gershowitz, *supra* note 105, at 1062.
[229] KC BRADY PROTOCOL, *supra* note 185.
[230] Gershowitz, *supra* note 105, at 1061; *see also* Connick v. Thompson, 563 U.S. 51, 60 (2011). Justice Ginsburg's dissent discusses the breakdown in training and guidance

The current landscape of ethics education in law schools is critiqued as being underdeveloped.[231] A study published in the early 1990s stated that less than 2% of the pages of law school casebooks consisted of ethics based content or discussion.[232] Further, some critics offer that the teaching of ethics has been cordoned off to one Professional Responsibility course.[233] Professional Responsibility is often taught in such a formal manner that true ethical quandaries are not introduced for discussion.[234]

Law schools should spend more time in the classroom discussing ethics within the legal profession and specifically address *Brady* violations. These discussions can be delivered through the curriculum, in courses covering Evidence, Professional Responsibility, and Trial Advocacy, to name a few. Outside the classroom, students interested in becoming prosecutors should host trainings on how to meet *Brady* obligations and avoid engaging in *Brady* violations. Students interested in criminal defense should host trainings on how to be aware of pitfalls within *Brady* obligations; how to recognize signs of possible *Brady* violations; and how to seek exculpatory evidence from the prosecution (requests, motions, investigation, and interpersonal communications with the other side). Education both in and out of the classroom will better prepare new attorneys to grapple with issues presented when *Brady* obligations are at stake.[235]

Offices of prosecution should develop trainings and Continuing Legal Education opportunities that will assist prosecutors in their understanding of how to meet obligations, avoid violations, and engage in discussions about the ethics of reporting. These trainings can create culture shifts and allow for prosecutors to align ethics with practice. The Misconduct Report from

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provided to new attorneys, which creates an environment ripe for *Brady* issues and other types of prosecutorial misconduct.

[231] Granfield & Koenig, *supra* note 168, at 499.

[232] *Id.* at 500.

[233] *Id.*

[234] *Id.*

[235] Sullivan & Possley, *supra* note 13, at 941.

the National Registry of Exonerations perfectly summarizes how a prosecutor *can* wield their power to prevent *Brady* violations:

> A prosecutor has the power to attack official misconduct in criminal cases by several means. She can order her deputies not to . . . [conceal] exculpatory evidence . . . or direct them to follow protocols that make that misconduct impossible, such as open file discovery. She can discipline or discharge deputies who violate those orders . . . She can dismiss charges in cases that are tainted by misconduct by her own deputies or by other law enforcement officials . . . She can prosecute . . . any official who commits or procures perjury, or obstructs justice. She can reinvestigate past cases to see if misconduct was committed or miscarriages of justice occurred, and exonerate any innocent defendants she identifies.[236]

The prosecutor *can* do these things if the prosecutor is empowered to do so. Creating a direct line between the proposed Commission on Prosecutorial Conduct and professional development opportunities will incentivize new prosecutors to meet their own *Brady* obligations. Prosecutors who coordinate with the Commission for teaching and training opportunities will come to understand the role the Commission can play in their work—who they can turn to if they need to make a report and who they may face if they become the subject of a complaint.

Teaching and training costs at the law school level will be fairly low if they are integrated into already existing classes and supported by way of student clubs and organizations. Costs in early professional development should be appropriated from the (eventual) cost savings based on prosecuting the right person, the first time. For reasons of legal ethics, it can be assumed that Commission appointees will fill non-salaried positions, so if the training and teaching components are included as part of their duties, costs will remain quite low for law school and county prosecutor offices. If further funds are needed to support these programs, perhaps the Innocence

[236] GOVERNMENT MISCONDUCT, *supra* note 70, at 168.

Projects and the National Registry of Exonerations can develop grant opportunities. After all, the work of organizations like these becomes easier if there are fewer *Brady* violations, and therefore fewer wrongful convictions, within the criminal justice system.

VI. CRITIQUES AND RESPONSES

Currently, there is no definitive roadmap to developing and implementing accountability mechanisms for prosecutorial misconduct. As discussed in Section IV, most possible mechanisms are underutilized or unenforced.[237] In looking at models for guidance, the best example lies within New York state's Senate Bill S2412D legislation.[238] There are many aspects to the New York model that can inform Washington state's work to develop a Commission on Prosecutorial Conduct. Perhaps even more important than a legislative review is the need to understand criticisms of the New York legislation. Immediately upon the passage of Senate Bill S2412D, it was met with legal challenges from groups of prosecutors who claimed their immunity was challenged.[239] According to a lead representative for the District Attorneys Association of New York (DAASNY), the organization offered to engage in legislation drafting with state legislators but the request was not entertained by them.[240] Instead, an amended version of the bill was revealed—allegedly without providing for corrections to the constitutional issues that DAASNY had noted throughout the drafting of the legislation.[241] Seven distinct arguments are included in the complaint,[242] many of which should inform how Washington state drafts its own legislation for a Commission.

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[237] *Supra* Section IV.
[238] S.B. 2412D, 2017–2018 Leg, 202nd Sess. (N.Y. 2018).
[239] Clark, *supra* note 116.
[240] *Id.*
[241] *Id.*
[242] The complaint specifically states, at its outset:

The complaint filed on behalf of DAASNY challenges the legislature's interference with the core functions of the District Attorney's Office, which is established by the New York State Constitution.[243] The complaint also alleges a violation of the separation of powers doctrine within the New York State Constitution.[244] The complaint alleges that the appointment of commission members from multiple branches of state government would result in cross branch discipline for prosecuting attorneys, who are considered part of the executive branch.[245] The Association has argued that prosecutors will be less likely to pursue difficult cases while acting with the knowledge that they can be scrutinized by a commission that receives appointments from all branches of government.[246] The complaint also raises Due Process and Equal Protection violations,[247] and alleges that the bill did not name standards by which the Commission will make decisions on the

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> Article 15-A is riddled with fatal constitutional defects, as the Governor and State Attorney General's Office have both concluded. Specifically, the statute: (1) impermissibly interferes with the constitutionally protected independence and core functions of elected District Attorneys by granting the CPC general oversight and disciplinary authority over the exercise of prosecutorial discretion; (2) violates basic separation-of-powers principles by vesting oversight of an executive function in a hybrid disciplinary body, most of whose members are appointed by the Legislature, and by authorizing the Court of Appeals to suspend District Attorneys; (3) impermissibly expands the powers and jurisdiction of the Court of Appeals and the Chief Judge; (4) unlawfully compels judges to perform non-judicial tasks; (5) impermissibly intrudes upon the exclusive jurisdiction of the Appellate Division over matters of attorney discipline; (6) unlawfully subjects prosecutors to discipline without any governing standards, in contravention of their due process and equal protection rights; and (7) impermissibly creates a commission with administrative and executive duties that operates outside the clear confines of the Constitution's civil department system.

Complaint at 2, Soares v. State of New York, (No. 906409-18), 2018 WL 6169368 (N.Y. Sup. Ct. Oct. 17, 2018).

[243] Columbia, *supra* note 204.

[244] Clark, *supra* note 116.

[245] *Id.*

[246] *Id.*

[247] Columbia, *supra* note 204.

initiation of investigations, the sustaining of complaints, and the determination of disciplinary sanctions.[248]

Within the complaints described above, the constitutional issues raised by DAASNY allege an imbalance of power that will leave prosecutors vulnerable and disempower them from doing their jobs.[249] However, in the current legislation, nearly every appointed panel member will come from the legal community, with more than half of the appointees creating a balance of seasoned prosecutors and defense attorneys.[250] Further amendments, which would have placed more appointment power with the governor, and hence within the executive branch, did not move forward.[251]

Since the filing of these complaints, several opposing parties have also filed briefs, in part to counter arguments made within the initial complaint.[252] Among them are groups who feel a Commission is needed to hold prosecutors who engage in misconduct accountable for their actions.[253] The Innocence Project, a national organization that works to exonerate wrongfully convicted individuals, filed briefs on behalf of several men in New York who have been wrongfully convicted.[254] The Innocence Project argues that a lack of oversight for prosecutorial conduct has very consequential outcomes for innocent individuals.[255] Governor Cuomo of New York knowingly signed into law legislation that he admitted was rife with legal challenges, naming the importance of moving forward this

[248] *Id.*
[249] Clark, *supra* note 116.
[250] Columbia, *supra* note 204.
[251] *Id.*
[252] Brendan Lyons, *Innocence Project Joins Fight for Prosecutorial Conduct Board*, TIMES UNION (Oct. 15, 2019), https://www.timesunion.com/news/article/Innocence-Project-joins-fight-for-prosecutorial-14520060.php [https://perma.cc/WM4Q-848W].
[253] *Id.*
[254] *Id.*
[255] *Id.*

initiative.[256] He agreed not to activate the Commission until these legal challenges are resolved.[257]

In January 2020, a New York Supreme Court justice ruled the Commission on Prosecutorial Conduct unconstitutional.[258] This was considered a win for DAASNY and places the proposed Commission at risk of failure. That said, illuminating why the legislation faces legal challenges, and what arguments are presented on both sides of the legal challenges, allows for Washington state to build stronger legislation with fewer opportunities for constitutional legal challenges. Washington state should learn from the criticism of how the New York bill was drafted and work to call upon prosecutors' organizations and prosecutors' offices in various municipalities across the state to help draft the bill that will enact the Commission on Prosecutorial Conduct. If a collaborative approach is taken to ensure the Commission does not impede on prosecutors' duties and their own constitutional rights, it may prevent immediate legal challenges as the process moves forward. Learning from New York's challenges is one way to clear a path for Washington state.

VII. CONCLUSION

The culture of non-disclosure and *Brady* violations in criminal proceedings create a myriad of negative impacts for society including wrongful convictions and taxpayer burden. Presently, there are no highly successful, or even slightly successful, avenues for accountability. A common law misnomer that is unsupported by history has resulted in immunity for prosecutors, essentially barring individuals from civil remedy. At the state and federal level, prosecutors are rarely prosecuted criminally

[256] *Id.*
[257] *Id.*
[258] Andrew Hursh, *New York Court Strikes Down Prosecutorial Conduct Commission*, JURIST (Jan. 30, 2020), https://www.jurist.org/news/2020/01/new-york-court-strikes-down-prosecutorial-conduct-commission/ [https://perma.cc/7N8K-LZ5F].

for committing a *Brady* violation.[259] Professional standards seemingly have no teeth, and there have been no federal or state mandates across the board to provide accountability mechanisms. New York state has started to forge a model, passing a bill to enact a Commission on Prosecutorial Conduct. The New York bill may or may not survive the current legal challenges and the recent New York Supreme Court holding celebrated by prosecutors, who feel, generally, that their own constitutional rights are being trampled upon. As a model, New York offers helpful guidance, and also several large hurdles to overcome.

Washington state can use the New York model to legislate and implement its own Commission on Prosecutorial Conduct. The Commission can process, track, evaluate, and offer findings on complaints of prosecutorial misconduct, as well as make recommendations to the Washington State Supreme Court in regard to sanctions. Further, the Commission can collaborate with county prosecutors' offices and with law schools, institutions with demonstrated gaps in ethics teaching and trainings.

Washington state can influence prosecutorial conduct by way of these three distinct touch points. We can work to reduce the systematic and heartbreaking ramifications that result from *Brady* violations. We can teach ethics. We can teach procedure to meet obligation. We can hold individuals accountable when they act in ways that inappropriately strip other individuals of their freedom. As we do, we will move away from the current practice of shielding prosecutors from accountability. We will stop allowing the home team to call their own balls and strikes.

A reduction in the occurrence of *Brady* violations will result in fewer wrongful convictions, less trauma for victims and their families, and less waste of taxpayer money. In the end, we need to teach attorneys how to do the right thing and hold them accountable when they do not meet their

[259] Johns, *supra* note 19, at 520.

obligations. When we do, society will benefit. At its core, is that not what we hope systems of justice will achieve in the first place? When these systems meet that achievement, justice is done its citizens in the courts, and the United States truly wins its point.[260]

[260] Madan, *supra* note 1.