Feb 15 (Class 4): Prosecutorial Misconduct and Accountability

Prosecutors have broad authority to decide when and which criminal charges to bring. In a system in which over 95 percent of cases are resolved without trial, these charging decisions are almost always determinative of case outcomes. Given their broad power, prosecutors are required under Brady v. Maryland to provide the defense with any exculpatory evidence that would materially impact the case. But what happens with prosecutors fail to fulfill their constitutional obligations? This week, we will examine the forms and consequences of prosecutorial misconduct and evaluate the mechanisms of accountability that exist, both inside and outside the courts.

Guest Lecturer: Laura Fernandez

Prosecutorial Power


Prosecutorial Accountability

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

Connick v. Thompson, 563 U.S. 51 (2011)


Gary Hines, Acting Caddo DA Dale Cox will not run in fall election, KTBS (July 14, 2015)

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1978

Torture and Plea Bargaining

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In this essay I shall address the modern American system of plea bargaining from a perspective that must appear bizarre, although I hope to persuade you that it is illuminating. I am going to contrast plea bargaining with the medieval European law of torture. My thesis is that there are remarkable parallels in origin, in function, and even in specific points of doctrine, between the law of torture and the law of plea bargaining. I shall suggest that these parallels expose some important truths about how criminal justice systems respond when their trial procedures fall into deep disorder.

I. THE LAW OF TORTURE

For about half a millennium, from the middle of the thirteenth century to the middle of the eighteenth, a system of judicial torture lay at the heart of Continental criminal procedure. In our own day the very word "torture" is, gladly enough, a debased term. It has come to mean anything unpleasant, and we hear people speak of a tortured interpretation of a poem, or the torture of a dull dinner party. In discussions of contemporary criminal procedure we hear the word applied to describe illegal police practices or crowded prison conditions. But torture as the medieval European lawyers understood it had nothing to do with official misconduct or with criminal sanctions. Rather, the application of torture was a routine and judicially supervised feature of European criminal procedure. Under certain circumstances the law permitted the criminal courts to employ physical coercion against suspected criminals in order to induce them to confess. The law went to great lengths to limit this technique of extorting confessions to cases in which it was thought that the accused was highly likely to be guilty, and to surround the use of torture with other safeguards that I shall discuss shortly.

This astonishing body of law grew up on the Continent as an adjunct to the law of proof—what we would call the system of
trial—in cases of serious crime (for which the sanction was either death or severe physical maiming). The medieval law of proof was designed in the thirteenth century to replace an earlier system of proof, the ordeals, which the Roman Church effectively destroyed in the year 1215. The ordeals purported to achieve absolute certainty in criminal adjudication through the happy expedient of having the judgments rendered by God, who could not err. The replacement system of the thirteenth century aspired to achieve the same level of safeguard—absolute certainty—for human adjudication.

Although human judges were to replace God in the judgment seat, they would be governed by a law of proof so objective that it would make that dramatic substitution unobjectionable—a law of proof that would eliminate human discretion from the determination of guilt or innocence. Accordingly, the Italian Glossators who designed the system developed and entrenched the rule that conviction had to be based upon the testimony of two unimpeachable eyewitnesses to the gravamen of the crime—evidence that was, in the famous phrase, “clear as the noonday sun.” Without these two eyewitnesses, a criminal court could not convict an accused who contested the charges against him. Only if the accused voluntarily confessed the offense could the court convict him without the eyewitness testimony.

Another way to appreciate the purpose of these rules is to understand their corollary: conviction could not be based upon circumstantial evidence, because circumstantial evidence depends for its efficacy upon the subjective persuasion of the trier who decides whether to draw the inference of guilt from the evidence of circumstance. Thus, for example, it would not have mattered in this system that the suspect was seen running away from the murdered man’s house and that the bloody dagger and the stolen loot were found in his possession. Since no eyewitness saw him actually plunge the weapon into the victim, the court could not convict him of the crime.

In the history of Western culture no legal system has ever made a more valiant effort to perfect its safeguards and thereby to exclude completely the possibility of mistaken conviction. But the Europeans learned in due course the inevitable lesson. They had set the level of safeguard too high. They had constructed a system of proof

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2 The use of imprisonment as a sanction for serious crime was a development of the Renaissance and later times. Langbein, The Historical Origins of the Sanction of Imprisonment for Serious Crime, 5 J. LEGAL STUD. 35 (1976), substantially reproduced in J. LANGBEIN, supra note 1, at 27-44, 151-64.

3 J. LANGBEIN, supra note 1, at 5-7.
that could as a practical matter be effective only in cases involving overt crime or repentant criminals. Because society cannot long tolerate a legal system that lacks the capacity to convict unrepentant persons who commit clandestine crimes, something had to be done to extend the system to those cases. The two-eyewitness rule was hard to compromise or evade, but the confession rule seemed to invite the "subterfuge" that in fact resulted. To go from accepting a voluntary confession to coercing a confession from someone against whom there was already strong suspicion was a step that began increasingly to be taken. The law of torture grew up to regulate this process of generating confessions.

The spirit of safeguard that had inspired the unworkable formal law of proof also permeated the subterfuge. The largest chapter of the European law of torture concerned the prerequisites for examination under torture. The European jurists devised what Anglo-American lawyers would today call a rule of probable cause, designed to assure that only persons highly likely to be guilty would be examined under torture. Thus, torture was permitted only when a so-called "half proof" had been established against the suspect. That meant either one eyewitness, or circumstantial evidence of sufficient gravity, according to a fairly elaborate tariff. In the example where a suspect was caught with the dagger and the loot, each of those indicia would be a quarter proof. Together they cumulated to a half proof, which was sufficient to permit the authorities to dispatch the suspect for a session in the local torture chamber.

In this way the prohibition against using circumstantial evidence was overcome. The law of torture found a place for circumstantial evidence, but a nominally subsidiary place. Circumstantial evidence was not consulted directly on the ultimate question, guilt or innocence, but on a question of interlocutory procedure—whether or not to examine the accused under torture. Even there the law attempted to limit judicial discretion by promulgating predetermined, ostensibly objective criteria for evaluating the indicia and assigning them numerical values (quarter proofs, half proofs, and the like). Vast legal treatises were compiled on this jurisprudence of torture to guide the examining magistrate in determining whether there was probable cause for torture.

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2. J. Langbein, supra note 1, at 14.
3. These works are canvassed in 1 & 2 P. Fiorelli, La tortura giudiziaria nel diritto comune (1953-54).
This woodcut from a leading sixteenth-century European criminal procedure manual shows the accused being examined under torture in the presence of the court, clerk, and court functionaries. The illustration, from Joost Damhouder’s *Praxis Rerum Criminalium* 91 (Antwerp ed. 1562), appears in chapter 38, which discusses the rules for repeating the infliction of torture on an accused who has previously resisted confession despite examination under torture. (Reproduced with permission from the rare book collection of The University of Chicago Law Library.)
In order to achieve a verbal or technical reconciliation with the requirement of the formal law of proof that the confession be voluntary, the medieval lawyers treated a confession extracted under torture as involuntary, hence ineffective, unless the accused repeated it free from torture at a hearing that was held a day or so later. Often enough the accused who had confessed under torture did recant when asked to confirm his confession. But seldom to avail: the examination under torture could thereupon be repeated. An accused who confessed under torture, recanted, and then found himself tortured anew, learned quickly enough that only a "voluntary" confession at the ratification hearing would save him from further agony in the torture chamber.  

Fortunately, more substantial safeguards were devised to govern the actual application of torture. These were rules designed to enhance the reliability of the resulting confession. Torture was not supposed to be used to elicit an abject, unsubstantiated confession of guilt. Rather, torture was supposed to be employed in such a way that the accused would disclose the factual detail of the crime—information which, in the words of a celebrated German statute, "no innocent person can know." The examining magistrate was forbidden to engage in so-called suggestive questioning, in which the examiner supplied the accused with the detail he wanted to hear from him. Moreover, the information admitted under torture was supposed to be investigated and verified to the extent feasible. If the accused confessed to the slaying, he was supposed to be asked where he put the dagger. If he said he buried it under the old oak tree, the magistrate was supposed to send someone to dig it up.

Alas, these safeguards never proved adequate to overcome the basic flaw in the system. Because torture tests the capacity of the accused to endure pain rather than his veracity, the innocent might (as one sixteenth-century commentator put it) yield to "the pain and torment and confess things that they never did." If the examining magistrate engaged in suggestive questioning, even accidentally, his lapse could not always be detected or prevented. If the accused knew something about the crime, but was still innocent of it, what he did know might be enough to give his confession verisimilitude.

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7 J. Langbein, supra note 1, at 15-16. An accused who resisted any confession under torture was supposed to be set free (subject to rules permitting further torture if new evidence was thereafter discovered); it was said that the accused had "purged" the incriminating evidence when he endured the torture without confession. Id. at 16.


9 J. Damhouser, Practique judiciaire es causes criminelles ch. 39, at 44 (Antwerp ed. 1564) (first edition published as Praxis rerum criminalium (Louvain 1554)).
In some jurisdictions the requirement of verification was not enforced, or was enforced indifferently.

These shortcomings in the law of torture were identified even in the Middle Ages and were the subject of emphatic complaint in Renaissance and early modern times. In the eighteenth century, as the law of torture was finally about to be abolished along with the system of proof that had required it, Beccaria and Voltaire became famous as critics of judicial torture, but they were latecomers to a critical legal literature nearly as old as the law of torture itself. Judicial torture survived the centuries not because its defects had been concealed, but in spite of their having been long revealed. The two-eyewitness rule had left European criminal procedure without a tolerable alternative. Having entrenched this unattainable level of safeguard in their formal trial procedure, the Europeans found themselves obliged to evade it through a subterfuge that they knew was defective. The coerced confession had to replace proof of guilt.

II. THE LAW OF PLEA BARGAINING

I am now going to cross the centuries and cross the Atlantic in order to speak of the rise of plea bargaining in twentieth-century America.

The description of the European law of torture that I have just presented has been meant to stir among American readers an unpleasant sensation of the familiar. The parallels between the modern American plea bargaining system and the ancient system of judicial torture are many and chilling. I have lived with them for some years now, and the least that I hope to achieve in this essay is to unburden myself somewhat by sharing the disturbing vision that I think would come to any American who had spent time studying the European law of torture.

By way of preface, let me set forth briefly some of the rudiments of our plea bargaining system. Plea bargaining occurs when the prosecutor induces a criminal accused to confess guilt and to waive his right to trial in exchange for a more lenient criminal sanction than would be imposed if the accused were adjudicated guilty following trial. The prosecutor offers leniency either directly, in the form of a charge reduction, or indirectly, through the connivance of the judge, in the form of a recommendation for reduced sentence that the judge will follow. In exchange for procuring this leniency for the accused, the prosecutor is relieved of the need to prove the accused's guilt, and the court is spared having to adjudicate it. The court condemns the accused on the basis of his confession, without independent adjudication.
Plea bargaining is, therefore, a nontrial procedure for convicting and condemning people accused of serious crime. If you turn to the American Constitution in search of authority for plea bargaining, you will look in vain. Instead, you will find—in no less hallowed a place than the Bill of Rights—an opposite guarantee, a guarantee of trial. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . trial . . . by an impartial jury . . . ."10

In our day, jury trial continues to occupy its central place both in the formal law and in the mythology of the law. The constitutions have not changed, the courts pretend to enforce the defendant’s right to jury trial, and the television transmits a steady flow of dramas in which a courtroom contest for the verdict of the jury leads inexorably to the disclosure of the true culprit. In truth, criminal jury trial has largely disappeared in America. The criminal justice system now disposes of virtually all cases of serious crime through plea bargaining. Depending on the jurisdiction, as many as 99 percent of all felony convictions are by plea.11 This nontrial procedure has become the ordinary dispositive procedure of American law.

Why? Why has our formal system of proof and trial been set out of force? What has happened in the interval of less than two centuries between the constitutionalization of jury trial in 1791 and the present day to substitute this nontrial system for the trial procedure envisaged by the Framers? Scholars are only beginning to investigate the history of plea bargaining,12 but enough is known to permit us to speak with some confidence about the broad outline. In the two centuries from the mid-eighteenth to the mid-twentieth, a vast transformation overcame the Anglo-American13 institution of criminal jury trial, rendering it absolutely unworkable as an ordinary dispositive procedure and requiring the development of an alterna-

10 U.S. Const. amend. VI (emphasis added).
tive procedure, which we now recognize to be the plea bargaining system.

In eighteenth-century England jury trial was still a summary proceeding. In the Old Bailey in the 1730s we know that the court routinely processed between twelve and twenty jury trials for felony in a single day. A single jury would be impaneled and would hear evidence in numerous unrelated cases before retiring to formulate verdicts in all. Lawyers were not employed in the conduct of ordinary criminal trials, either for the prosecution or the defense. The trial judge called the witnesses (whom the local justice of the peace had bound over to appear), and the proceeding transpired as a relatively unstructured "altercation" between the witnesses and the accused. In the 1790s, when the Americans were constitutionalizing English jury trial, it was still rapid and efficient. "The trial of Hardy for high treason in 1794 was the first that ever lasted more than one day, and the court seriously considered whether it had any power to adjourn . . . ." By contrast, we may note that the trial of Patricia Hearst for bank robbery in 1976 lasted forty days and that the average felony jury trial in Los Angeles in 1968 required 7.2 days of trial time. In the eighteenth century the most characteristic (and time-consuming) features of modern jury trial, namely adversary procedure and the exclusionary rules of the law of criminal evidence, were still primitive and uncharacteristic. The accused's right to representation by retained counsel was not generalized to all felonies until the end of the eighteenth century in America and the nineteenth century in England. Appellate review was very re-

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15 See id. at 272-84. The word "altercation" is the famous term of Sir Thomas Smith. T. Smith, De Republica Anglorum 80 (London 1583).
18 The figure for Los Angeles appears in San Francisco Committee on Crime, A Report on the Criminal Courts of San Francisco, Part I: The Superior Court Backlog—Consequences and Remedies 1 (1970). (I am grateful to Professor Albert W. Alschuler for the reference.) Of course, this figure must reflect the diversion of most easy cases into non-jury-trial channels such as plea bargaining, bench trial, and conditional nonprosecution. Reliable figures for New Jersey criminal trials conducted in 1976-77 (bench and jury) are less spectacular, although they hardly detract from the contrast with eighteenth-century trial duration figures. Only five percent of the trials lasted more than five days, whereas 49 percent lasted from one to three days, 35 percent less than a day, and 11 percent from three to five days. Administrative Director of the Courts, State of New Jersey, Ann. Rep. 1976-1977, at F-2 (1978). (I owe this reference to Professor Jerome Israel.)
19 U.S. Const. amend. VI (1791); 6 & 7 Will. IV, ch. 114 (1836). For the American colonies, see the valuable compilation in the appendix to Note, An Historical Argument for
stricted into the twentieth century; counsel for indigent accused was not required until the middle of this century. The practices that so protract modern American jury trial—extended voir dire, exclusionary rules and other evidentiary barriers, motions designed to provoke and preserve issues for appeal, maneuvers and speeches of counsel—all are late growths in the long history of common law criminal procedure.

Nobody should be surprised that jury trial has undergone great changes over the last two centuries. It desperately needed reform. The level of safeguard against mistaken conviction was in several respects below what civilized peoples now require. What we will not understand until there has been research directed to the question is why the pressure for greater safeguard led in the Anglo-American procedure to the law of evidence and the lawyerization of the trial, reforms that ultimately destroyed the system in the sense that they made jury trial so complicated and time-consuming that they rendered it unworkable as the routine dispositive procedure. Similar pressures for safeguard were being felt on the Continent in the same period, but they led to reforms in nonadversarial procedure that preserved the institution of trial.

The latter portion of this paragraph is derived from Langbein, *ControllingProsecutorial Discretion in Germany*, 41 U. Chi. L. Rev. 439, 445-46 (1974).

21 In isolating the transformation of jury trial as the root cause of plea bargaining, we do not mean to imply that this procedural development is the sole cause of a practice so complex. When the history of plea bargaining is ultimately written, there will certainly be other chapters. In particular, it will be necessary to investigate the influence of the rise of professional policing and prosecution and the accompanying changes in the levels of crime reporting and detection; changes in the social composition of victim and offender groups; changes in the rates and types of crime; and the intellectual influence of the marketplace model in an age when laissez faire was not an epithet. However, these other phenomena were largely experienced in Continental countries that did not turn to plea bargaining. Anyone looking beyond the uniquely Anglo-American procedural development that we have emphasized needs to explain why plea bargaining has characterized lands with such disparate social composition as the United States and England, but not Germany, France, or the other major European states.

In the middle of the 19th century, when German criminal procedure was being given its modern shape, German scholars routinely studied English procedure as a reform model. They found much to admire and to borrow (including the principle of lay participation in adjudication and the requirement that trials be conducted orally and in public), but they were unanimous in rejecting the guilty plea. It was wrong for a court to sentence on "mere confession" without satisfying itself of the guilt of the accused. See, e.g., von Arnold, *Geständniss statt des Verdicts, 7 Gerichtssaal* pt. 1, 265, 275 (1855); Walther, *Ueber die processualische Wirkung des Geständnisses im Schwurgerichtsverfahren, 1851 Archiv des Criminalrechts (Neue Folge) 225; *Das Schwurgericht: Geständniss und Verdikt und Kollision zwischen beiden, 18 Goltzimmers Archiv 530 (1870).

This paragraph (with note 21) is derived from Langbein, *supra* note 12.
III. The Parallels

Let me now turn to my main theme—the parallels in function and doctrine between the medieval European system of judicial torture and our plea bargaining system. The starting point, which will be obvious from what I have thus far said, is that each of these substitute procedural systems arose in response to the breakdown of the formal system of trial that it subverted. Both the medieval European law of proof and the modern Anglo-American law of jury trial set out to safeguard the accused by circumscribing the discretion of the trier in criminal adjudication. The medieval Europeans were trying to eliminate the discretion of the professional judge by requiring him to adhere to objective criteria of proof. The Anglo-American trial system has been caught up over the last two centuries in an effort to protect the accused against the dangers of the jury system, in which laymen ignorant of the law return a one- or two-word verdict that they do not explain or justify. Each system found itself unable to recant directly on the unrealistic level of safeguard to which it had committed itself, and each then concentrated on inducing the accused to tender a confession that would waive his right to the safeguards.

The European law of torture preserved the medieval law of proof undisturbed for those easy cases in which there were two eye-witnesses or voluntary confession. But in the more difficult cases (where, I might add, safeguard was more important), the law of torture worked an absolutely fundamental change within the system of proof: it largely eliminated the adjudicative function. Once probable cause had been determined, the accused was made to concede his guilt rather than his accusers to prove it.

In twentieth-century America we have duplicated the central experience of medieval European criminal procedure: we have moved from an adjudicatory to a concessionary system. We coerce the accused against whom we find probable cause to confess his guilt. To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries who did employ those machines, we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right and is thereafter convicted. This sentencing differential is what makes plea bargaining coercive. There is, of course, a difference between having your

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23 This difference is related to differences in the sanctions that characterize the medieval and the modern worlds. The law of torture served legal systems whose only sanctions for
limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.24 Like the serious crime were severe physical maiming and death. The torture victim was coerced into a confession that condemned him to the most severe of punishments, whereas the plea bargain rewards the accused with a lesser sanction, typically some form of imprisonment, in exchange for his confession. Obviously, the greater the severity of the sanction that the accused's confession will bring down upon himself, the greater the coercion that must be brought to bear upon him to wring out the confession. Plea bargaining is as coercive as it has to be for the modern system of sanctions.

Defenders of plea bargaining sometimes try to minimize the force of this point with a reductio-ad-absurdum argument: granted that plea bargaining is coercive, so is virtually every exercise of criminal jurisdiction, since few criminal defendants are genuine volunteers. I think that the answer to this argument is straightforward. The accused is made a criminal defendant against his wishes, but not contrary to his rights. The Constitution does not grant citizens any immunity from criminal prosecution, but it does grant them the safeguard of trial. Coercion authorized by law is different from coercion meant to overcome the guarantees of law. Coercing people to stand trial is different from coercing them to waive trial and to bring upon themselves sanctions that should only be imposed after impartial adjudication.

Sometimes, as I have mentioned in the text, a rather opposite argument is made in behalf of plea bargaining—not that everything is coercive, but that a mere sentencing differential is not serious enough to be reckoned as coercion. One can test this point simply by imagining a differential so great (e.g., death versus a fifty-cent fine) that any reasonable defendant would waive even the strongest defenses. Like torture, the sentencing differential in plea bargaining elicits confessions of guilt that would not be freely tendered. It is, therefore, coercive in the same sense as torture, although not in the same degree.

The question whether significant numbers of innocent people do plead guilty is not, of course, susceptible to empirical testing. It is known that many of those who plead guilty claim that they are innocent. See A. Blumberg, Criminal Justice 89-92 (1970). See also text at note 29 infra (discussing North Carolina v. Alford). Alschuler thinks that "the greatest pressures to plead are brought to bear on defendants who may be innocent." Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50, 60 (1968). See id. at 59-62 for evidence that the threatened "sentence differential between guilty-plea and trial defendants increases in direct proportion to the likelihood of acquittal." Id. at 60. Alschuler reports one case that resembles the hypothetical choice between death penalty and fifty-cent fine:

San Francisco defense attorney Benjamin M. Davis recently represented a man charged with kidnapping and forcible rape. The defendant was innocent, Davis says, and after investigating the case Davis was confident of an acquittal. The prosecutor, who seems to have shared the defense attorney's opinion on this point, offered to permit a guilty plea to simple battery. Conviction on this charge would not have led to a greater sentence than thirty days' imprisonment, and there was every likelihood that the defendant would be granted probation. When Davis informed his client of this offer, he emphasized that conviction at trial seemed highly improbable. The defendant's reply was simple: "I can't take the chance."

Id. at 61.

I do not think that great numbers of American defendants plead guilty to offenses committed by strangers. (The law of torture was also not supposed to apply in circumstances where the accused could explain away the evidence that might otherwise have given cause to examine him under torture. See J. Langbein, supra note 8, at 183.) I do believe that plea bargaining is used to coerce the waiver of tenable defenses, as in Attorney Davis's example, supra, or when the offense has a complicated conceptual basis, as in tax and other white collar crimes.

The objection is sometimes voiced that if an accused is innocent, it stands to reason that
medieval Europeans, the Americans are now operating a procedural system that engages in condemnation without adjudication. The maxim of the medieval Glossators, no longer applicable to European law, now aptly describes American law: *confessio est regina probationum*, confession is the queen of proof.

I have said that European law attempted to devise safeguards for the use of torture that proved illusory; these measures bear an eerie resemblance to the supposed safeguards of the American law of plea bargaining. Foremost among the illusory safeguards of both systems is the doctrinal preoccupation with characterizing the induced waivers as voluntary. The Europeans made the torture victim repeat his confession "voluntarily," but under the threat of being tortured anew if he recanted. The American counterpart is Rule 11(d) of the Federal Rules of Criminal Procedure, which forbids the court from accepting a guilty plea without first "addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." Of course, the plea agreement is the source of the coercion and already embodies the involuntariness.

The architects of the European law of torture sought to enhance the reliability of a torture-induced confession with other safeguards designed to substantiate its factual basis. We have said that they required a probable cause determination for investigation under torture and that they directed the court to take steps to verify the accuracy of the confession by investigating some of its detail. We have explained why these measures were inadequate to protect many innocent suspects from torture, confession, and condemnation. Probable cause is not the same as guilt, and verification, even

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he will press his defense at trial; if an innocent accused does plead guilty, he must necessarily be calculating that there is a significant probability that the trier will fail to recognize his innocence despite the great safeguards of trial designed to prevent such error. If trials were perfectly accurate, plea bargaining would be perfectly accurate, since no innocent person would have an incentive to accuse himself. Ironically, therefore, anyone who would denigrate plea bargaining because it infringes the right to trial must also assume that the trial itself is to some extent recognized to be mistake-prone. The response, of course, is that paradox is not contradiction. So long as human judgment is fallible, no workable trial procedure can do more than minimize error. The social cost of a rule of absolute certainty—massive release of the culpable—would be intolerable. This was the lesson of the medieval European law, and it explains why the standard of our law is not "beyond doubt" but "beyond reasonable doubt."

"A plea of guilty . . . is itself a conviction . . . . More is not required; the court has nothing to do but give judgment and sentence." Kercheval v. United States, 274 U.S. 220, 223 (1927).


Fed. R. CRIM. P. 11(d) (emphasis added).
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if undertaken in good faith, could easily fail as a safeguard, either because the matters confessed were not susceptible of physical or testimonial corroboration, or because the accused might know enough about the crime to lend verisimilitude to his confession even though he was not in fact the culprit.

The American law of plea bargaining has pursued a similar chimera: the requirement of "adequate factual basis for the plea." Federal Rule 11(f) provides that "the court should not enter judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." As with the tortured confession, so with the negotiated plea: any case that has resisted dismissal for want of probable cause at the preliminary hearing will rest upon enough inculpating evidence to cast suspicion upon the accused. The function of trial, which plea bargaining eliminates, is to require the court to adjudicate whether the facts proven support an inference of guilt beyond a reasonable doubt. Consider, however, the case of North Carolina v. Alford, decided in this decade, in which the U.S. Supreme Court found it permissible to condemn without trial a defendant who had told the sentencing court: "I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man . . . . I just pleaded guilty because they said if I didn't they would gas me for it . . . . I'm not guilty but I plead guilty." I invite you to compare Alford's statement with the explanation of one Johannes Julius, seventeenth-century burgomaster of Bamberg, who wrote from his dungeon cell where he was awaiting execution, in order to tell his daughter why he had confessed to witchcraft "for which I must die. It is all falsehood and invention, so help me God . . . . They never cease to torture until one says something.

The tortured confession is, of course, markedly less reliable than the negotiated plea, because the degree of coercion is greater. An accused is more likely to bear false witness against himself in order to escape further hours on the rack than to avoid risking a longer prison term. But the resulting moral quandary is the same.

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21 Id. 11(f).
23 Id. at 28 n.2.
24 Quoted in H.R. Trevor-Roper, The European Witch-Craze of the 16th and 17th Centuries 84 (1969) (Pelican ed.).
25 Some of those who have favored me with prepublication critiques of this paper have resisted this point—largely, I think, because they do not give adequate weight to the seriousness with which the law of torture undertook to separate the guilty from the innocent. My critics suggest that plea bargaining is in theory meant to have a differential impact upon the guilty and the innocent, whereas torture was not. They contend that the plea bargaining
Judge Levin of Michigan was speaking of the negotiated guilty plea, but he could as well have been describing the tortured confession when he said, “there is no way of knowing whether a particular guilty plea was given because the accused believed he was guilty, or because of the promised concession.” Beccaria might as well have been speaking of the coercion of plea bargaining when he said of the violence of torture that it “confounds and obliterates those minute differences between things which enable us at times to know truth from falsehood.” The doctrine of adequate factual basis for the plea is no better substitute for proof beyond reasonable doubt than was the analogous doctrine in the law of torture.

The factual unreliability of the negotiated plea has further consequences, quite apart from the increased danger of condemning an innocent man. In the plea bargaining that takes the form of charge bargaining (as opposed to sentence bargaining), the culprit is convicted not for what he did, but for something less opprobrious. When people who have murdered are said to be convicted of wounding, or when those caught stealing are nominally convicted of attempt or possession, cynicism about the processes of criminal justice is inevitably reinforced. This wilful mislabelling plays havoc with
our crime statistics, which explains in part why Americans—uniquely among Western peoples—attach so much importance to arrest records rather than to records of conviction. I think that the unreliability of the plea, the mislabelling of the offense, and the underlying want of adjudication all combine to weaken the moral force of the criminal law, and to increase the public's unease about the administration of criminal justice. The case of James Earl Ray is perhaps the best example of public dissatisfaction over the intrinsic failure of the plea bargaining system to establish the facts about crime and guilt in the forum of a public trial. It is interesting to remember that in Europe in the age of Beccaria and Voltaire, the want of adjudication and the unreliability of the law of torture had bred a strangely similar cynicism towards that criminal justice system.

Our law of plea bargaining has not only recapitulated much of the doctrinal folly of the law of torture, complete with the pathetic plea bargaining system by expanding the potential differential between sentence following trial and sentence pursuant to plea bargain.

In the nineteenth and twentieth centuries, when the Europeans were ameliorating their sentences, we were not. It is tempting to wonder whether the requirements of the plea bargaining system have been somewhat responsible.

Of course, plea bargaining is not responsible for all of the downcharging and resultant mislabelling in which modern American prosecutors engage. If the prosecutor views the statutorily prescribed minimum sentence for an offense as too severe, he can downcharge without exacting a concessionary quid pro quo from the accused.

* * * Of course, not every trial resolves the question of guilt of innocence to public satisfaction. The Sacco-Vanzetti and the Rosenberg cases continue to be relitigated in the forum of popular opinion. However, plea bargaining leaves the public with what I believe to be a more pronounced sense of unease about the justness of results, by avoiding the open ventilation of evidence that characterizes public trial. Just this concern appears to have motivated the government in the plea-bargained bribery case of Vice-President Agnew to take such extraordinary steps to assure the disclosure of the substance of the prosecution case. See N.Y. Times, Oct. 11, 1973, § 1, at 35-38.

The public's hostility to plea bargaining should suggest why some of my colleagues in the law-and-economics fraternity are mistaken in their complacent assimilation of plea bargaining to the model of the negotiated settlement of civil disputes. However great the operational similarity, there is a profound difference in purpose between civil and criminal sanctions. Henry Hart was surely correct that "[t]he core of the difference" between a confined mental patient and an imprisoned convict is "that the patient has not incurred the moral condemnation of his community, whereas the convict has." Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401, 406 (1958). The moral force of the criminal sanction depends for part of its efficacy on the sanction having been imposed after rational inquiry into the facts, culminating in an adjudication of guilt. To assert the equivalency of waiver and adjudication is to overlook the distinctive characteristic of the criminal law.

It is for the same reason that the sentence differentials required by plea bargaining are so repugnant to any tenable theory of sentencing. Nothing in the theory of deterrence, reformation, or retribution justifies the enormous differentials needed to sustain plea bargaining. Those differentials exist without a moral basis. On their extent, see, e.g., H. Zeisel, supra note 11; Alschuler, supra note 11, at 1082-87.
safeguards of voluntariness and factual basis that I have just discussed, but it has also repeated the main institutional blunder of the law of torture. Plea bargaining concentrates effective control of criminal procedure in the hands of a single officer. Our formal law of trial envisages a division of responsibility. We expect the prosecutor to make the charging decision, the judge and especially the jury to adjudicate, and the judge to set the sentence. Plea bargaining merges these accusatory, determinative, and sanctional phases of the procedure in the hands of the prosecutor. Students of the history of the law of torture are reminded that the great psychological fallacy of the European inquisitorial procedure of that time was that it concentrated in the investigating magistrate the powers of accusation, investigation, torture, and condemnation. The single inquisitor who wielded those powers needed to have what one recent historian has called "superhuman capabilities [in order to] . . . keep himself in his decisional function free from the predisposing influences of his own instigating and investigating activity."37

The dominant version of American plea bargaining makes similar demands: it requires the prosecutor to usurp the determinative and sentencing functions, hence to make himself judge in his own cause. I cannot emphasize too strongly how dangerous this concentration of prosecutorial power can be. The modern public prosecutor commands the vast resources of the state for gathering and generating accusing evidence. We allowed him this power in large part because the criminal trial interposed the safeguard of adjudication against the danger that he might bring those resources to bear against an innocent citizen—whether on account of honest error, arbitrariness, or worse.38 But the plea bargaining system has largely dissolved that safeguard.

While on the subject of institutional factors, I have one last comparison to advance. The point has been made, most recently by the Attorney-General of Alaska,39 that preparing and taking cases to trial is much harder work than plea bargaining—for police, prosecutors, judges, and defense counsel. In short, convenience—or

37 1 E. SCHMIDT, LEHRKOMMENTAR ZUR STRAFFPROZESSORDNUNG UND ZUM GERICHTSVERFASSUNGSGESETZ 197 (2d ed. 1964).
38 One need not necessarily accept Jimmy Hoffa's view that Robert Kennedy was conducting a personal and political vendetta against him in order to appreciate the danger that he might have been. The power to prosecute as we know it contains within itself the power to persecute. Hoffa contended "that special investigators from the Justice Dept. and hundreds of agents from the Federal Bureau of Investigation were used to satisfy 'a personal hate' of Robert Kennedy." BUS. WEEK, Feb. 13, 1965, at 48.
worse, sloth—is a factor that sustains plea bargaining. We suppose that this factor had a little to do with torture as well. As someone in India remarked to Sir James Fitzjames Stephen in 1872 about the proclivity of the native policemen for torturing suspects, “It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil’s eyes than to go about in the sun hunting up evidence.” If we were to generalize about this point, we might say that concessionary criminal procedural systems like the plea bargaining system and the system of judicial torture may develop their own bureaucracies and constituencies. Here as elsewhere the old adage may apply that if necessity is the mother of invention, laziness is the father.

IV. THE JURISPRUDENCE OF CONCESSIONARY CRIMINAL PROCEDURE

Having developed these parallels between torture and plea bargaining, I want to draw some conclusions about what I regard as the lessons of the exercise. The most important is this: a legal system will do almost anything, tolerate almost anything, before it will admit the need for reform in its system of proof and trial. The law of torture endured for half a millennium although its dangers and defects had been understood virtually from the outset; and plea bargaining lives on although its evils are quite familiar to us all. What makes such shoddy subterfuges so tenacious is that they shield their legal systems from having to face up to the fact of breakdown in the formal law of proof and trial.

Why is it so hard for a legal system to reform a decadent system of proof? I think that there are two main reasons. One is in a sense practical: nothing is quite so imbedded in a legal system as the procedures for proof and trial, because most of what a legal system does is to decide matters of proof—what we call fact-finding. (Was the traffic light green or red, was this accused the man who fired the shot or robbed the bank?) Blackstone emphasized this point in speaking of civil litigation, and it is even more true of criminal litigation. He said: “experience will abundantly shew, that above a hundred of our lawsuits arise from disputed facts, for one where the law is doubted of.” Every institution of the legal system is geared to the system of proof; forthright reconstruction would disturb, at one level or another, virtually every vested interest.

The inertia, the resistance to change that is associated with

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1 J.F. Stephen, A History of the Criminal Law of England 442 n.1 (1883). Stephen’s forceful quotation has been cited for this point elsewhere; McNabb v. United States, 318 U.S. 332, 344 n.8 (1943); J. Langbein, supra note 1, at 147 n.14; Alschuler, supra note 11, at 1103 n.137.

such deep-seated interests, is inevitably reinforced by the powerful ideological component that underlies a system of proof and trial. Adjudication, especially criminal adjudication, involves a profound intrusion into the lives of affected citizens. Consequently, in any society the adjudicative power must be rested on a theoretical basis that makes it palatable to the populace. Because the theory of proof purports to govern and explain the application of the adjudicative power, it plays a central role in legitimating the entire legal system. The medieval European law of proof assured people that the legal system would achieve certainty. The Anglo-American jury system invoked the inscrutable wisdom of the folk to justify its results. Each of these theories was ultimately untenable—the European theory virtually from its inception, the Anglo-American theory after a centuries-long transformation of jury procedure. Yet the ideological importance of these theories prevented either legal system from recanting upon them. For example, I have elsewhere pointed out how in the nineteenth century the ideological attachment to the jury retarded experimentation with juryless trial—that is, what we now call bench trial—while the plea bargaining system of juryless nontrial procedure was taking shape out of public sight. Like the medieval European lawyers before us, we have been unable to admit that our theory of proof has resulted in a level of procedural complexity and safeguard that renders our trial procedure unworkable in all but exceptional cases. We have responded to the breakdown of our formal system of proof by taking steps to perpetuate the ideology of the failed system, steps that closely resemble those taken by the architects of the law of torture. Like the medieval Europeans, we have preserved an unworkable trial procedure in form, we have devised a substitute nontrial procedure to subvert the formal procedure, and we have arranged to place defendants under fierce pressure to "choose" the substitute.

That this script could have been played out in a pair of legal cultures so remote from each other in time and place invites some suggestions about the adaptive processes of criminal procedural systems. First, there are intrinsic limits to the level of complexity and safeguard that even a civilized people can tolerate. If those limits are exceeded and the repressive capacity of the criminal justice system is thereby endangered, the system will respond by developing subterfuges that overcome the formal law. But subterfuges are intrinsically overbroad, precisely because they are not framed in a

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\[42\] See T.F.T. Plucknett, Edward I and Criminal Law 74-75 (1960).

\[43\] Langbein, supra note 12.
careful, explicit, and principled manner directed to achieving a proper balance between repression and safeguard. The upshot is that the criminal justice system is saddled with a lower level of safeguard than it could and would have achieved if it had not pretended to retain the unworkable formal system.

The medieval Europeans insisted on two eyewitnesses and wound up with a law of torture that allowed condemnation with no witnesses at all. American plea bargaining, in like fashion, sacrifices just those values that the unworkable system of adversary jury trial is meant to serve: lay participation in criminal adjudication, the presumption of innocence, the prosecutorial burden of proof beyond reasonable doubt, the right to confront and cross-examine accusers, the privilege against self-incrimination. Especially in its handling of the privilege against self-incrimination does American criminal procedure reach the outer bounds of incoherence. In cases like Griffin v. California we have exaggerated the privilege to senseless lengths in formal doctrine, while in the plea bargaining system—which is our routine procedure for processing cases of serious crime—we have eliminated practically every trace of the privilege.

Furthermore, the sacrifice of our fundamental values through plea bargaining is needless. In its sad plea bargaining opinions of the 1970s, the Supreme Court has effectively admitted that for reasons of expediency American criminal justice cannot honor its promise of routine adversary criminal trial, but the Court has simply assumed that the present nontrial plea bargaining procedure is the inevitable alternative. There is, however, a middle path between the impossible system of routine adversary jury trial and the disgraceful nontrial system of plea bargaining. That path is a streamlined nonadversarial trial procedure.

The contemporary nonadversarial criminal justice systems of countries like West Germany have long demonstrated that advanced industrial societies can institute efficient criminal procedures that nevertheless provide for lay participation and for full adjudication in every case of serious crime. I have described the German system in detail elsewhere, and I have made no secret of my admiration for the brilliant balance that it strikes between safeguard and procedural effectiveness. Not the least of its achieve-

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44 In Santobello v. New York, 404 U.S. 257 (1971), Chief Justice Burger explained that plea bargaining “is to be encouraged” because “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.” Id. at 260.

ments is that in cases of serious crime it functions with no plea bargaining whatsoever. Confessions are still tendered in many cases (41 percent in one sample), but they are not and cannot be bargained for; nor does a confession excuse the trial court from hearing sufficient evidence for conviction on what amounts to a beyond-reasonable-doubt standard of proof. In a trial procedure shorn of all the excesses of adversary procedure and the law of evidence, the time difference between trial without confession and trial with confession is not all that great. Because an accused will be put to trial whether he confesses or not, he cannot inflict significant costs upon the prosecution by contesting an overwhelming case. Confessions are tendered at trial not because they are rewarded, but because there is no advantage to be wrung from the procedural system by withholding them.

I hope that over the coming decades we who still live under criminal justice systems that engage in condemnation without adjudication will face up to the failure of adversary criminal procedure. I believe that we will find in modern Continental criminal procedure an irresistible model for reform. That, however, is a theme about which I can say no more if I am to remain within the proper sphere of the Crosskey Lecture in Legal History.

Thus, I am brought to conclude with a paradox. Today in lands where the law of torture once governed, peoples who live in contentment with their criminal justice systems look out across the sea in disbelief to the spectacle of plea bargaining in America, while American tourists come by the thousands each year to gawk in disbelief at the decaying torture chambers of medieval castles.

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48 Casper & Zeisel, supra note 26, at 146-47, 150-51.
50 See id. at 77; Casper & Zeisel, supra note 26, at 150.
51 See Langbein, supra note 20, at 457 n.44 (1974):
Plea bargaining is all but incomprehensible to the Germans, whose ordinary dispositive procedure is workable without such evasions. In the German press the judicial procedure surrounding the resignation of Vice President Agnew was viewed with the sort of wonder normally inspired by reports of the customs of primitive tribes. "The resignation occurred as part of a 'cow-trade,' as it can only in the United States be imagined." Badische Zeitung, Oct. 12, 1973, at 3, col. 2.
The question in this case is whether the Due Process Clause of the Fourteenth Amendment is violated when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged.

The respondent, Paul Lewis Hayes, was indicted by a Fayette County, Ky., grand jury on a charge of uttering a forged instrument in the amount of $88.30, an offense then punishable by a term of 2 to 10 years in prison. After arraignment, Hayes, his retained counsel, and the Commonwealth’s Attorney met in the presence of the Clerk of the Court to discuss a possible plea agreement. During these conferences the prosecutor offered to recommend a sentence of five years in prison if Hayes would plead guilty to the indictment. He also said that if Hayes did not plead guilty and “save[d] the court the inconvenience and necessity of a trial,” he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act, which would subject Hayes to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. Hayes chose not to plead guilty, and the prosecutor did obtain an indictment charging him under the Habitual Criminal Act.

A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. As required by the habitual offender statute, he was sentenced to a life term in the penitentiary.

We have recently had occasion to observe: “[W]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system. Properly administered, they can benefit all concerned.” The open acknowledgment of
this previously clandestine practice has led this Court to recognize the importance of counsel during plea negotiations, the need for a public record indicating that a plea was knowingly and voluntarily made, and the requirement that a prosecutor’s plea-bargaining promise must be kept. * * *

IV

This Court held in *North Carolina v. Pearce* that the Due Process Clause of the Fourteenth Amendment “requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.” The same principle was later applied to prohibit a prosecutor from reindicting a convicted misdemeanant on a felony charge after the defendant had invoked an appellate remedy, since in this situation there was also a “realistic likelihood of ‘vindictiveness.’”

In those cases the Court was dealing with the State’s unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right to attack his original conviction—a situation “very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.” * * *

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person’s reliance on his legal rights is “patently unconstitutional.” But in the “give-and-take” of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.

Plea bargaining flows from “the mutuality of advantage” to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. * * *

While confronting a defendant with the risk of more severe punishment clearly may have a “discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable”—and permissible—“attribute of any legitimate system which tolerates and encourages the negotiation of pleas.” It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

It is not disputed here that Hayes was properly chargeable under the recidivist statute, since he had in fact been convicted of two previous felonies. In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature’s constitutionally valid definition of chargeable offenses, “the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation” so long as “the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” To hold that the prosecutor’s desire to induce a guilty plea is an “unjustifiable standard,” which, like race or
religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself. Moreover, a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.

There is no doubt that the breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

Accordingly, the judgment of the Court of Appeals is

Reversed.

Mr. Justice BLACKMUN, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

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In Pearce, as indeed the Court notes, it was held that “vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.” Accordingly, if on the new trial, the sentence the defendant receives from the court is greater than that imposed after the first trial, it must be explained by reasons “based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding,” other than his having pursued the appeal or collateral remedy. On the other hand, if the sentence is imposed by the court and not by the jury, if the jury is not aware of the original sentence, and if the second sentence is not otherwise shown to be a product of vindictiveness, Pearce has no application.

Then later, in Perry, the Court applied the same principle to prosecutorial conduct where there was a “realistic likelihood of ‘vindictiveness.’” It held that the requirement of Fourteenth Amendment due process prevented a prosecutor’s reindictment of a convicted misdemeanant on a felony charge after the defendant had exercised his right to appeal the misdemeanor conviction and thus to obtain a trial de novo. It noted the prosecution’s “considerable stake” in discouraging the appeal.

The Court now says, however, that this concern with vindictiveness is of no import in the present case, despite the difference between five years in prison and a life sentence, because we are here concerned with plea bargaining where there is give-and-take negotiation, and where, it is said, “there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.” Yet in this case vindictiveness is present to the same extent as it was thought to be in Pearce and in Perry; the prosecutor here admitted, that the sole reason for the new indictment was to discourage the respondent from exercising his right to a trial. Even had such an admission not been made, when plea negotiations, conducted in the face of the less serious charges under the first indictment, fail, charging by a second indictment a more serious crime for the same conduct creates “a strong inference” of vindictiveness. * * * I therefore do not understand why, as in Pearce, due process does
not require that the prosecution justify its action on some basis other than discouraging respondent from the exercise of his right to a trial.

Prosecutorial vindictiveness, it seems to me, in the present narrow context, is the fact against which the Due Process Clause ought to protect. I perceive little difference between vindictiveness after what the Court describes, as the exercise of a “legal right to attack his original conviction,” and vindictiveness in the “give-and-take negotiation common in plea bargaining.” Prosecutorial vindictiveness in any context is still prosecutorial vindictiveness. The Due Process Clause should protect an accused against it, however it asserts itself. The Court of Appeals rightly so held, and I would affirm the judgment.

It might be argued that it really makes little difference how this case, now that it is here, is decided. The Court’s holding gives plea bargaining full sway despite vindictiveness. A contrary result, however, merely would prompt the aggressive prosecutor to bring the greater charge initially in every case, and only thereafter to bargain. The consequences to the accused would still be adverse, for then he would bargain against a greater charge, face the likelihood of increased bail, and run the risk that the court would be less inclined to accept a bargained plea. Nonetheless, it is far preferable to hold the prosecution to the charge it was originally content to bring and to justify in the eyes of its public.

Mr. Justice POWELL, dissenting.

Although I agree with much of the Court’s opinion, I am not satisfied that the result in this case is just or that the conduct of the plea bargaining met the requirements of due process.

Respondent was charged with the uttering of a single forged check in the amount of $88.30. Under Kentucky law, this offense was punishable by a prison term of from 2 to 10 years, apparently without regard to the amount of the forgery. During the course of plea bargaining, the prosecutor offered respondent a sentence of five years in consideration of a guilty plea. I observe, at this point, that five years in prison for the offense charged hardly could be characterized as a generous offer. Apparently respondent viewed the offer in this light and declined to accept it; he protested that he was innocent and insisted on going to trial. Respondent adhered to this position even when the prosecutor advised that he would seek a new indictment under the State’s Habitual Criminal Act which would subject respondent, if convicted, to a mandatory life sentence because of two prior felony convictions.

The prosecutor’s initial assessment of respondent’s case led him to forgo an indictment under the habitual criminal statute. The circumstances of respondent’s prior convictions are relevant to this assessment and to my view of the case. Respondent was 17 years old when he committed his first offense. He was charged with rape but pleaded guilty to the lesser included offense of “detaining a female.” One of the other participants in the incident was sentenced to life imprisonment. Respondent was sent not to prison but to a reformatory where he served five years. Respondent’s second offense was robbery. This time he was found guilty by a jury and was sentenced to five years in prison, but he was placed on probation and served no time. Although respondent’s prior convictions brought him within the terms of the Habitual Criminal Act, the offenses themselves did not result in imprisonment; yet the addition of a conviction on a charge involving $88.30 subjected respondent to a mandatory sentence of imprisonment for life. Persons convicted of rape and murder often are not punished so severely.
No explanation appears in the record for the prosecutor’s decision to escalate the charge against respondent other than respondent’s refusal to plead guilty. The prosecutor has conceded that his purpose was to discourage respondent’s assertion of constitutional rights, and the majority accepts this characterization of events.

It seems to me that the question to be asked under the circumstances is whether the prosecutor reasonably might have charged respondent under the Habitual Criminal Act in the first place. The deference that courts properly accord the exercise of a prosecutor’s discretion perhaps would foreclose judicial criticism if the prosecutor originally had sought an indictment under that Act, as unreasonable as it would have seemed. But here the prosecutor evidently made a reasonable, responsible judgment not to subject an individual to a mandatory life sentence when his only new offense had societal implications as limited as those accompanying the uttering of a single $88 forged check and when the circumstances of his prior convictions confirmed the inappropriateness of applying the habitual criminal statute. I think it may be inferred that the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment.

There may be situations in which a prosecutor would be fully justified in seeking a fresh indictment for a more serious offense. The most plausible justification might be that it would have been reasonable and in the public interest initially to have charged the defendant with the greater offense. In most cases a court could not know why the harsher indictment was sought, and an inquiry into the prosecutor’s motive would neither be indicated nor likely to be fruitful. In those cases, I would agree with the majority that the situation would not differ materially from one in which the higher charge was brought at the outset.

But this is not such a case. Here, any inquiry into the prosecutor’s purpose is made unnecessary by his candid acknowledgment that he threatened to procure and in fact procured the habitual criminal indictment because of respondent’s insistence on exercising his constitutional rights. We have stated in unequivocal terms, that “Jackson and Pearce are clear and subsequent cases have not dulled their force: if the only objective of a state practice is to discourage the assertion of constitutional rights it is ‘patently unconstitutional.’ ” And in Brady v. Maryland, we drew a distinction between the situation there approved and the “situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty.”

The plea-bargaining process, as recognized by this Court, is essential to the functioning of the criminal-justice system. It normally affords genuine benefits to defendants as well as to society. And if the system is to work effectively, prosecutors must be accorded the widest discretion, within constitutional limits, in conducting bargaining. This is especially true when a defendant is represented by counsel and presumably is fully advised of his rights. Only in the most exceptional case should a court conclude that the scales of the bargaining are so unevenly balanced as to arouse suspicion. In this case, the prosecutor’s actions denied respondent due process because their admitted purpose was to discourage and then to penalize with unique severity his exercise of constitutional rights. Implementation of a strategy calculated solely to deter the exercise of constitutional rights is not a constitutionally permissible exercise of discretion. I would affirm the opinion of the Court of Appeals on the facts of this case.
In this case, we consider the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race. We conclude that respondents failed to satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races.

In April 1992, respondents were indicted in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack) and conspiring to distribute the same, in violation of 21 U.S.C. §§ 841 and 846, and federal firearms offenses. For three months prior to the indictment, agents of the Federal Bureau of Alcohol, Tobacco, and Firearms and the Narcotics Division of the Inglewood, California, Police Department had infiltrated a suspected crack distribution ring by using three confidential informants. On seven separate occasions during this period, the informants had bought a total of 124.3 grams of crack from respondents and witnessed respondents carrying firearms during the sales. The agents searched the hotel room in which the sales were transacted, arrested respondents Armstrong and Hampton in the room, and found more crack and a loaded gun. The agents later arrested the other respondents as part of the ring.

In response to the indictment, respondents filed a motion for discovery or for dismissal of the indictment, alleging that they were selected for federal prosecution because they are black. In support of their motion, they offered only an affidavit by a “Paralegal Specialist,” employed by the Office of the Federal Public Defender representing one of the respondents. The only allegation in the affidavit was that, in every one of the 24 § 841 or § 846 cases closed by the office during 1991, the defendant was black. Accompanying the affidavit was a “study” listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case.¹

The Government opposed the discovery motion, arguing, among other things, that there was no evidence or allegation “that the Government has acted unfairly or has prosecuted non-black defendants or failed to prosecute them.” The District Court granted the motion. It ordered the Government (1) to provide a list of all cases
from the last three years in which the Government charged both cocaine and firearms offenses, (2) to identify the race of the defendants in those cases, (3) to identify what levels of law enforcement were involved in the investigations of those cases, and (4) to explain its criteria for deciding to prosecute those defendants for federal cocaine offenses.

The Government moved for reconsideration of the District Court’s discovery order. * * * The federal and local agents participating in the case alleged in affidavits that race played no role in their investigation. An Assistant United States Attorney explained in an affidavit that the decision to prosecute met the general criteria for prosecution, because

“there was over 100 grams of cocaine base involved, over twice the threshold necessary for a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a fairly substantial crack cocaine ring; ... there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence in the case was extremely strong, including audio and videotapes of defendants; ... and several of the defendants had criminal histories including narcotics and firearms violations.”

The Government also submitted sections of a published 1989 Drug Enforcement Administration report which concluded that “[l]arge-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack.”

In response, one of respondents’ attorneys submitted an affidavit alleging that an intake coordinator at a drug treatment center had told her that there are “an equal number of caucasian users and dealers to minority users and dealers.” Respondents also submitted an affidavit from a criminal defense attorney alleging that in his experience many nonblacks are prosecuted in state court for crack offenses, and a newspaper article reporting that federal “crack criminals ... are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black.”

The District Court denied the motion for reconsideration. When the Government indicated it would not comply with the court’s discovery order, the court dismissed the case. 2

A divided three-judge panel of the Court of Appeals for the Ninth Circuit reversed, holding that, because of the proof requirements for a selective-prosecution claim, defendants must “provide a colorable basis for believing that ‘others similarly situated have not been prosecuted’ ” to obtain discovery. * * * [An] en banc panel affirmed the District Court’s order of dismissal, holding that “a defendant is not required to demonstrate that the government has failed to prosecute others who are similarly situated.” We granted certiorari to determine the appropriate standard for discovery for a selective-prosecution claim.

Neither the District Court nor the Court of Appeals mentioned Federal Rule of Criminal Procedure 16, which by its terms governs discovery in criminal cases. Both parties now discuss the Rule in their briefs, and respondents contend that it supports the result reached by the Court of Appeals. Rule 16 provides, in pertinent part:

“Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant’s defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the

Respondents argue that documents “within the possession ... of the government” that discuss the Government’s prosecution strategy for cocaine cases are “material” to respondents’ selective-prosecution claim. Respondents argue that the Rule applies because any claim that “results in nonconviction” if successful is a “defense” for the Rule’s purposes, and a successful selective-prosecution claim has that effect.

We reject this argument, because we conclude that in the context of Rule 16 “the defendant’s defense” means the defendant’s response to the Government’s case in chief. While it might be argued that as a general matter, the concept of a “defense” includes any claim that is a “sword,” challenging the prosecution’s conduct of the case, the term may encompass only the narrower class of “shield” claims, which refute the Government’s arguments that the defendant committed the crime charged. Rule 16(a)(1)(C) tends to support the “shield-only” reading. If “defense” means an argument in response to the prosecution’s case in chief, there is a perceptible symmetry between documents “material to the preparation of the defendant’s defense,” and, in the very next phrase, documents “intended for use by the government as evidence in chief at the trial.”

If this symmetry were not persuasive enough, subdivision (a)(2) of Rule 16 establishes beyond peradventure that “defense” in subdivision (a)(1)(C) can refer only to defenses in response to the Government’s case in chief. Rule 16(a)(2), as relevant here, exempts from defense inspection “reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case.”

Under Rule 16(a)(1)(C), a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product in connection with his case. If a selective-prosecution claim is a “defense,” Rule 16(a)(1)(C) gives the defendant the right to examine Government work product in every prosecution except his own. Because respondents’ construction of “defense” creates the anomaly of a defendant’s being able to examine all Government work product except the most pertinent, we find their construction implausible. We hold that Rule 16(a)(1)(C) authorizes defendants to examine Government documents material to the preparation of their defense against the Government’s case in chief, but not to the preparation of selective-prosecution claims.

In Wade v. United States, (1992), we considered whether a federal court may review a Government decision not to file a motion to reduce a defendant’s sentence for substantial assistance to the prosecution, to determine whether the Government based its decision on the defendant’s race or religion. In holding that such a decision was reviewable, we assumed that discovery would be available if the defendant could make the appropriate threshold showing, although we concluded that the defendant in that case did not make such a showing. We proceed on a like assumption here.

A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one. These cases afford a “background presumption” that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims.

A selective-prosecution claim asks a court to
exercise judicial power over a “special province” of the Executive. The Attorney General and United States Attorneys retain “‘broad discretion’ ” to enforce the Nation’s criminal laws. They have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to “take Care that the Laws be faithfully executed.” As a result, “[t]he presumption of regularity supports” their prosecutorial decisions and, “in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.” In the ordinary case, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”

Of course, a prosecutor’s discretion is “subject to constitutional constraints.” One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment, is that the decision whether to prosecute may not be based on “an unjustifiable standard such as race, religion, or other arbitrary classification.” A defendant may demonstrate that the administration of a criminal law is “directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive” that the system of prosecution amounts to “a practical denial” of equal protection of the law.

In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present “clear evidence to the contrary.” We explained in Wayte why courts are “properly hesitant to examine the decision whether to prosecute.” Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. “Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.” It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. “Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.”

The requirements for a selective-prosecution claim draw on “ordinary equal protection standards.” The claimant must demonstrate that the federal prosecutorial policy “had a discriminatory effect and that it was motivated by a discriminatory purpose.” To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. This requirement has been established in our case law since Ah Sin v. Wittman, 198 U.S. 500 (1905). Ah Sin, a subject of China, petitioned a California state court for a writ of habeas corpus, seeking discharge from imprisonment under a San Francisco County ordinance prohibiting persons from setting up gambling tables in rooms barricaded to stop police from entering. He alleged in his habeas petition “that the ordinance is enforced ‘solely and exclusively against persons of the Chinese race and not otherwise.’ ” We rejected his contention that this averment made out a claim under the Equal Protection Clause, because it did not allege “that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced.”

The similarly situated requirement does not
make a selective-prosecution claim impossible to prove. Twenty years before *Ah Sin*, we invalidated an ordinance, also adopted by San Francisco, that prohibited the operation of laundries in wooden buildings. The plaintiff in error successfully demonstrated that the ordinance was applied against Chinese nationals but not against other laundry-shop operators. The authorities had denied the applications of 200 Chinese subjects for permits to operate shops in wooden buildings, but granted the applications of 80 individuals who were not Chinese subjects to operate laundries in wooden buildings “under similar conditions.” We explained in *Ah Sin* why the similarly situated requirement is necessary:

“No latitude of intention should be indulged in a case like this. There should be certainty to every intent. Plaintiff in error seeks to set aside a criminal law of the State, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the ordinance was which was passed on in the *Yick Wo* case, but that it was made so by the manner of its administration. This is a matter of proof, and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a State.”

Although *Ah Sin* involved federal review of a state conviction, we think a similar rule applies where the power of a federal court is invoked to challenge an exercise of one of the core powers of the Executive Branch of the Federal Government, the power to prosecute.

* * *

Having reviewed the requirements to prove a selective-prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant’s claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors’ resources and may disclose the Government’s prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

The parties, and the Courts of Appeals which have considered the requisite showing to establish entitlement to discovery, describe this showing with a variety of phrases, like “colorable basis,” “substantial threshold showing,” “substantial and concrete basis,” or “reasonable likelihood.” However, the many labels for this showing conceal the degree of consensus about the evidence necessary to meet it. The Courts of Appeals “require some evidence tending to show the existence of the essential elements of the defense,” discriminatory effect and discriminatory intent.

In this case we consider what evidence constitutes “some evidence tending to show the existence” of the discriminatory effect element. The Court of Appeals held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant. We think it was mistaken in this view. The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law. As the three-judge panel explained, “‘[s]elective prosecution’ implies that a selection has taken place.”

The Court of Appeals reached its decision in part because it started “with the presumption that people of all races commit all types of
criminals—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group.” It cited no authority for this proposition, which seems contradicted by the most recent statistics of the United States Sentencing Commission. Those statistics show: More than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black; 93.4% of convicted LSD dealers were white; and 91% of those convicted for pornography or prostitution were white. Presumptions at war with presumably reliable statistics have no proper place in the analysis of this issue.

The Court of Appeals also expressed concern about the “evidentiary obstacles defendants face.” But all of its sister Circuits that have confronted the issue have required that defendants produce some evidence of differential treatment of similarly situated members of other races or protected classes. In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents. For instance, respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court. We think the required threshold—a credible showing of different treatment of similarly situated persons—adequately balances the Government’s interest in vigorous prosecution and the defendant’s interest in avoiding selective prosecution.

In the case before us, respondents’ “study” did not constitute “some evidence tending to show the existence of the essential elements of” a selective-prosecution claim. The study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. This omission was not remedied by respondents’ evidence in opposition to the Government’s motion for reconsideration. The newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. Respondents’ affidavits, which recounted one attorney’s conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Justice SOUTER, concurring.

I join the Court’s opinion, but in its discussion of Federal Rule of Criminal Procedure 16 only to the extent of its application to the issue in this case.

Justice GINSBURG, concurring.

I do not understand the Court to have created a “major limitation” on the scope of discovery available under Federal Rule of Criminal Procedure 16. As I see it, the Court has decided a precise issue: whether the phrase “defendant’s defense,” as used in Rule 16(a)(1)(C), encompasses allegations of selective prosecution. I agree with the Court, for reasons the opinion states, that subdivision (a)(1)(C) does not apply to selective prosecution claims. The Court was not called upon to decide here whether Rule 16(a)(1)(C) applies in any other context, for example, to affirmative defenses unrelated to the merits. With the caveat that I do not read today’s opinion as precedent foreclosing issues not tendered for review, I join
the Court’s opinion.

Justice Breyer, concurring in part and concurring in the judgment.

I write separately because, in my view, Federal Rule of Criminal Procedure 16 does not limit a defendant’s discovery rights to documents related to the Government’s case in chief. The Rule says that “the government shall permit the defendant to inspect and copy” certain physical items (I shall summarily call them “documents”) “which are material to the preparation of the defendant’s defense.” Fed. Rule Crim. Proc. 16(a)(1)(C). A “defendant’s defense” can take many forms, including (1) a simple response to the Government’s case in chief, (2) an affirmative defense unrelated to the merits (such as a Speedy Trial Act claim), (3) an unrelated claim of constitutional right, (4) a foreseeable surrebuttal to a likely Government rebuttal, and others. The Rule’s language does not limit its scope to the first item on this list. To interpret the Rule in this limited way creates a legal distinction that, from a discovery perspective, is arbitrary. It threatens to create two full parallel sets of criminal discovery principles. And, as far as I can tell, the interpretation lacks legal support.

* * * *

In sum, neither the alleged “symmetry” in the structure of Rule 16(a)(1)(C), nor the work-product exception of Rule 16(a)(2), supports the majority’s limitation of discovery under Rule 16(a)(1)(C) to documents related to the Government’s “case in chief.” Rather, the language and legislative history make clear that the Rule’s drafters meant it to provide a broad authorization for defendants’ discovery, to be supplemented if necessary in an appropriate case. Whether or not one can also find a basis for this kind of discovery in other sources of law, Rule 16(a)(1)(C) provides one such source, and we should consider whether the defendants’ discovery request satisfied the Rule’s requirement that the discovery be “material to the preparation of the defendant’s defense.”

I believe that the defendants’ request did not satisfy this threshold. Were the “selective prosecution” defense valid in this case—i.e., were there “clear evidence” that the Federal Government’s prosecutorial policy “had a discriminatory effect and ... was motivated by a discriminatory purpose,” it should have been fairly easy for the defendants to find, not only instances in which the Federal Government prosecuted African-Americans, but also some instances in which the Federal Government did not prosecute similarly situated caucasians. The defendants’ failure to do so, for the reasons the Court sets forth, amounts to a failure to make the necessary threshold showing in respect to materiality.

Justice Stevens, dissenting.

Federal prosecutors are respected members of a respected profession. Despite an occasional misstep, the excellence of their work abundantly justifies the presumption that “they have properly discharged their official duties.” Nevertheless, the possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored. For that reason, it has long been settled that the prosecutor’s broad discretion to determine when criminal charges should be filed is not completely unbridled. As the Court notes, however, the scope of judicial review of particular exercises of that discretion is not fully defined.

The United States Attorney for the Central District of California is a member and an officer of the bar of that District Court. As such, she has a duty to the judges of that Court to maintain the standards of the profession in the performance of her official functions. If a
District Judge has reason to suspect that she, or a member of her staff, has singled out particular defendants for prosecution on the basis of their race, it is surely appropriate for the judge to determine whether there is a factual basis for such a concern. I agree with the Court that Rule 16 of the Federal Rules of Criminal Procedure is not the source of the District Court’s power to make the necessary inquiry. I disagree, however, with its implicit assumption that a different, relatively rigid rule needs to be crafted to regulate the use of this seldom-exercised inherent judicial power.

The Court correctly concludes that in this case the facts presented to the District Court in support of respondents’ claim that they had been singled out for prosecution because of their race were not sufficient to prove that defense. Moreover, I agree with the Court that their showing was not strong enough to give them a right to discovery, either under Rule 16 or under the District Court’s inherent power to order discovery in appropriate circumstances. Like Chief Judge Wallace of the Court of Appeals, however, I am persuaded that the District Judge did not abuse her discretion when she concluded that the factual showing was sufficiently disturbing to require some response from the United States Attorney’s Office. Perhaps the discovery order was broader than necessary, but I cannot agree with the Court’s apparent conclusion that no inquiry was permissible.

The District Judge’s order should be evaluated in light of three circumstances that underscore the need for judicial vigilance over certain types of drug prosecutions. First, the Anti–Drug Abuse Act of 1986 and subsequent legislation established a regime of extremely high penalties for the possession and distribution of so-called “crack” cocaine. Those provisions treat one gram of crack as the equivalent of 100 grams of powder cocaine. The distribution of 50 grams of crack is thus punishable by the same mandatory minimum sentence of 10 years in prison that applies to the distribution of 5,000 grams of powder cocaine. The Sentencing Guidelines extend this ratio to penalty levels above the mandatory minimums: For any given quantity of crack, the guideline range is the same as if the offense had involved 100 times that amount in powder cocaine. These penalties result in sentences for crack offenders that average three to eight times longer than sentences for comparable powder offenders.

Second, the disparity between the treatment of crack cocaine and powder cocaine is matched by the disparity between the severity of the punishment imposed by federal law and that imposed by state law for the same conduct. For a variety of reasons, often including the absence of mandatory minimums, the existence of parole, and lower baseline penalties, terms of imprisonment for drug offenses tend to be substantially lower in state systems than in the federal system. The difference is especially marked in the case of crack offenses. The majority of States draw no distinction between types of cocaine in their penalty schemes; of those that do, none has established as stark a differential as the Federal Government. For example, if respondent Hampton is found guilty, his federal sentence might be as long as a mandatory life term. Had he been tried in state court, his sentence could have been as short as 12 years, less worktime credits of half that amount.

Finally, it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black. During the first 18 months of full guideline implementation, the sentencing disparity between black and white defendants grew from preguideline levels: Blacks on average received sentences over 40% longer than whites. Those figures represent a
major threat to the integrity of federal sentencing reform, whose main purpose was the elimination of disparity (especially racial) in sentencing. The Sentencing Commission acknowledges that the heightened crack penalties are a “primary cause of the growing disparity between sentences for Black and White federal defendants.”

The extraordinary severity of the imposed penalties and the troubling racial patterns of enforcement give rise to a special concern about the fairness of charging practices for crack offenses. Evidence tending to prove that black defendants charged with distribution of crack in the Central District of California are prosecuted in federal court, whereas members of other races charged with similar offenses are prosecuted in state court, warrants close scrutiny by the federal judges in that district. In my view, the District Judge, who has sat on both the federal and the state benches in Los Angeles, acted well within her discretion to call for the development of facts that would demonstrate what standards, if any, governed the choice of forum where similarly situated offenders are prosecuted.

Respondents submitted a study showing that of all cases involving crack offenses that were closed by the Federal Public Defender’s Office in 1991, 24 out of 24 involved black defendants. To supplement this evidence, they submitted affidavits from two of the attorneys in the defense team. The first reported a statement from an intake coordinator at a local drug treatment center that, in his experience, an equal number of crack users and dealers were caucasian as belonged to minorities. The second was from David R. Reed, counsel for respondent Armstrong. Reed was both an active court-appointed attorney in the Central District of California and one of the directors of the leading association of criminal defense lawyers who practice before the Los Angeles County courts. Reed stated that he did not recall “ever handling a [crack] cocaine case involving non-black defendants” in federal court, nor had he even heard of one. He further stated that “[t]here are many crack cocaine sales cases prosecuted in state court that do involve racial groups other than blacks.”

The majority discounts the probative value of the affidavits, claiming that they recounted “hearsay” and reported “personal conclusions based on anecdotal evidence.” But the Reed affidavit plainly contained more than mere hearsay; Reed offered information based on his own extensive experience in both federal and state courts. Given the breadth of his background, he was well qualified to compare the practices of federal and state prosecutors. In any event, the Government never objected to the admission of either affidavit on hearsay or any other grounds. It was certainly within the District Court’s discretion to credit the affidavits of two members of the bar of that Court, at least one of whom had presumably acquired a reputation by his frequent appearances there, and both of whose statements were made on pains of perjury.

The criticism that the affidavits were based on “anecdotal evidence” is also unpersuasive. I thought it was agreed that defendants do not need to prepare sophisticated statistical studies in order to receive mere discovery in cases like this one. Certainly evidence based on a drug counselor’s personal observations or on an attorney’s practice in two sets of courts, state and federal, can “‘ten[d] to show the existence’ ” of a selective prosecution.

Even if respondents failed to carry their burden of showing that there were individuals who were not black but who could have been prosecuted in federal court for the same offenses, it does not follow that the District Court abused its discretion in ordering discovery. There can be no doubt that such individuals exist, and indeed the Government has never denied the same. In those
circumstances, I fail to see why the District Court was unable to take judicial notice of this obvious fact and demand information from the Government’s files to support or refute respondents’ evidence. The presumption that some whites are prosecuted in state court is not “contradicted” by the statistics the majority cites, which show only that high percentages of blacks are convicted of certain federal crimes, while high percentages of whites are convicted of other federal crimes. Those figures are entirely consistent with the allegation of selective prosecution. The relevant comparison, rather, would be with the percentages of blacks and whites who commit those crimes. But, as discussed above, in the case of crack far greater numbers of whites are believed guilty of using the substance. The District Court, therefore, was entitled to find the evidence before it significant and to require some explanation from the Government.

In sum, I agree with the Sentencing Commission that “[w]hile the exercise of discretion by prosecutors and investigators has an impact on sentences in almost all cases to some extent, because of the 100–to–1 quantity ratio and federal mandatory minimum penalties, discretionary decisions in cocaine cases often have dramatic effects.” The severity of the penalty heightens both the danger of arbitrary enforcement and the need for careful scrutiny of any colorable claim of discriminatory enforcement. In this case, the evidence was sufficiently disturbing to persuade the District Judge to order discovery that might help explain the conspicuous racial pattern of cases before her court. I cannot accept the majority’s conclusion that the District Judge either exceeded her power or abused her discretion when she did so. I therefore respectfully dissent.
Petitioner [Brady] and a companion, Boblit, were found guilty of murder in the first degree and were sentenced to death, their convictions being affirmed by the Court of Appeals of Maryland. Their trials were separate, petitioner being tried first. At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady’s counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict ‘without capital punishment.’ Prior to the trial petitioner’s counsel had requested the prosecution to allow him to examine Boblit’s extrajudicial statements. Several of those statements were shown to him; but one dated July 9, 1958, in which Boblit admitted the actual homicide, was withheld by the prosecution and did not come to petitioner’s notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed.

* * * [O]n appeal the [Maryland] Court of Appeals held that suppression of the evidence by the prosecution denied petitioner due process of law and remanded the case for a retrial of the question of punishment, not the question of guilt. The case is here on certiorari.

The crime in question was murder committed in the perpetration of a robbery. Punishment for that crime in Maryland is life imprisonment or death, the jury being empowered to restrict the punishment to life by addition of the words ‘without capital punishment.’ In Maryland, by reason of the state constitution, the jury in a criminal case are ‘the Judges of Law, as well as of fact.’ The question presented is whether petitioner was denied a federal right when the Court of Appeals restricted the new trial to the question of punishment.

We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. * * *

This ruling is an extension of Mooney v. Holohan, 294 U.S. 103, where the Court ruled on what nondisclosure by a prosecutor violates due process:

‘It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.’

In Pyle v. Kansas, 317 U.S. 213, we phrased the rule in broader terms:

‘Petitioner’s papers are
inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody.'

The Third Circuit * * * [has] construed that statement in *Pyle* to mean that the ‘suppression of evidence favorable’ to the accused was itself sufficient to amount to a denial of due process. * * *[W]e extended the test formulated in *Mooney* when we said [in a subsequent opinion]: ‘The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.’

We now hold 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.

The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: ‘The United States wins its point whenever justice is done its citizens in the courts.’ 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, even though, as in the present case, his action is not ‘the result of guile,’ to use the words of the Court of Appeals.

* * * *

Affirmed.

Separate opinion of Mr. Justice WHITE.

1. The Maryland Court of Appeals declared, ‘The suppression or withholding by the State of material evidence exculpatory to an accused is a violation of due process’ without citing the United States Constitution or the Maryland Constitution which also has a due process clause. We therefore cannot be sure which Constitution was invoked by the court below and thus whether the State, the only party aggrieved by this portion of the judgment, could even bring the issue here if it desired to do so. But in any event, there is no cross-petition by the State, nor has it challenged the correctness of the ruling below that a new trial on punishment was called for by the requirements of due process. In my view, therefore, the Court should not reach the due process question which it decides. * * * *

* * * *

2. * * *[T]he Court’s due process advice goes substantially beyond the holding below. I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery. Instead, I would leave this task, at least for new, to the rule-making or legislative process after full consideration by legislators, bench, and bar.

* * * *
THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion, in which ALITO, J., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

Opinion

Justice THOMAS delivered the opinion of the Court.

The Orleans Parish District Attorney’s Office now concedes that, in prosecuting respondent John Thompson for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over to the defense under Brady v. Maryland, 373 U.S. 83 (1963). Thompson was convicted. Because of that conviction Thompson elected not to testify in his own defense in his later trial for murder, and he was again convicted. Thompson spent 18 years in prison, including 14 years on death row. One month before Thompson's scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory, and both of Thompson’s convictions were vacated.

After his release from prison, Thompson sued petitioner Harry Connick, in his official capacity as the Orleans Parish District Attorney, for damages under Rev. Stat. § 1979, 42 U.S.C. § 1983. Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure in Thompson’s robbery case. The jury awarded Thompson $14 million, and the Court of Appeals for the Fifth Circuit affirmed by an evenly divided en banc court. We granted certiorari to decide whether a district attorney’s office may be held liable under § 1983 for failure to train based on a single Brady violation. We hold that it cannot.

In early 1985, John Thompson was charged with the murder of Raymond T. Liuzza, Jr. in New Orleans. Publicity following the murder charge led the victims of an unrelated armed robbery to identify Thompson as their attacker. The district attorney charged Thompson with attempted armed robbery.

As part of the robbery investigation, a crime scene technician took from one of the victims’ pants a swatch of fabric stained with the robber’s blood. Approximately one week before Thompson’s armed robbery trial, the swatch was sent to the crime laboratory. Two days before the trial, assistant district attorney Bruce Whittaker received the crime lab’s report, which stated that the perpetrator had blood type B. There is no evidence that the prosecutors ever had Thompson’s blood tested or that they knew what his blood type was. Whittaker claimed he placed the report on assistant district attorney James Williams’ desk, but Williams denied seeing it. The report was never disclosed to Thompson’s counsel.

Williams tried the armed robbery case with assistant district attorney Gerry Deegan. On the first day of trial, Deegan checked all of the physical evidence in the case out of the police property room, including the blood-stained swatch. Deegan then checked all of the evidence but the swatch into the courthouse property room. The prosecutors did not mention the swatch or the crime lab report at trial, and the jury convicted Thompson of attempted armed robbery.

A few weeks later, Williams and special prosecutor Eric Dubelier tried Thompson for the Liuzza murder. Because of the armed robbery conviction, Thompson chose not to testify in his own defense. He was convicted and sentenced to death. In the 14 years following Thompson’s murder conviction, state and federal courts reviewed and denied his challenges to the conviction and sentence.

In late April 1999, Thompson’s private investigator discovered the crime lab report from the armed robbery investigation in the files of the New Orleans Police Crime Laboratory. Thompson was tested and found to have blood type O, proving that the blood on the swatch was not his. Thompson’s attorneys presented this evidence to the district attorney’s office, which, in turn, moved to stay the execution and vacate Thompson’s armed robbery conviction. The Louisiana Court of Appeals then reversed Thompson’s murder conviction, concluding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the
murder trial. In 2003, the district attorney’s office retried Thompson for Liuza’s murder. The jury found him not guilty.

B

Thompson then brought this action against the district attorney’s office, Connick, Williams, and others, alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed. The only claim that proceeded to trial was Thompson’s claim under § 1983 that the district attorney’s office had violated Brady by failing to disclose the crime lab report in his armed robbery trial. Thompson alleged liability under two theories: (1) the Brady violation was caused by an unconstitutional policy of the district attorney’s office; and (2) the violation was caused by Connick’s deliberate indifference to an obvious need to train the prosecutors in his office in order to avoid such constitutional violations.

Before trial, Connick conceded that the failure to produce the crime lab report constituted a Brady violation. Accordingly, the District Court instructed the jury that the “only issue” was whether the nondisclosure was caused by either a policy, practice, or custom of the district attorney’s office or a deliberately indifferent failure to train the office’s prosecutors.

Although no prosecutor remembered any specific training session regarding Brady prior to 1985, it was undisputed at trial that the prosecutors were familiar with the general Brady requirement that the State disclose to the defense evidence in its possession that is favorable to the accused. Prosecutors testified that office policy was to turn crime lab reports and other scientific evidence over to the defense. They also testified that, after the discovery of the undisclosed crime lab report in 1999, prosecutors disagreed about whether it had to be disclosed under Brady absent knowledge of Thompson’s blood type.

The jury rejected Thompson’s claim that an unconstitutional office policy caused the Brady violation, but found the district attorney’s office liable for failing to train the prosecutors. The jury awarded Thompson $14 million in damages, and the District Court added more than $1 million in attorney’s fees and costs.

After the verdict, Connick renewed his objection—which he had raised on summary judgment—that he could not have been deliberately indifferent to an obvious need for more or different Brady training because there was no evidence that he was aware of a pattern of similar Brady violations. The District Court rejected this argument for the reasons that it had given in the summary judgment order. In that order, the court had concluded that a pattern of violations is not necessary to prove deliberate indifference when the need for training is “so obvious.” Relying on Canton v. Harris, 489 U.S. 378 (1989), the court had held that Thompson could demonstrate deliberate indifference by proving that “the DA’s office knew to a moral certainty that assistant[t] [district attorneys] would acquire Brady material, that without training it is not always obvious what Brady requires, and that withholding Brady material will virtually always lead to a substantial violation of constitutional rights.”

A panel of the Court of Appeals for the Fifth Circuit affirmed. The panel acknowledged that Thompson did not present evidence of a pattern of similar Brady violations, but held that Thompson did not need to prove a pattern. According to the panel, 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.”

The Court of Appeals sitting en banc vacated the panel opinion, granted rehearing, and divided evenly, thereby affirming the District Court. In four opinions, the divided en banc court disputed whether Thompson could establish municipal liability for 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. We granted certiorari.

II

The Brady violation conceded in this case occurred when one or more of the four prosecutors involved with Thompson’s armed robbery prosecution failed to disclose the crime lab report to Thompson’s counsel. Under Thompson’s failure-to-train theory, he bore the burden of proving both (1) that Connick, the policymaker for the district attorney’s office, was deliberately indifferent to the need to train the prosecutors about their Brady disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the Brady violation in this case. Connick argues that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different Brady training. We agree.
Title 42 U.S.C. § 1983 provides in relevant part:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....”

A municipality or other local government may be liable under this section if the governmental body itself “subjects” a person to a deprivation of rights or “causes” a person “to be subjected” to such deprivation. But, under § 1983, local governments are responsible only for “their own illegal acts.” They are not vicariously liable under § 1983 for their employees’ actions.

Plaintiffs who seek to impose liability on local governments under § 1983 must prove that “action pursuant to official municipal policy” caused their injury. Official municipal policy includes 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. These are “action[s] for which the municipality is actually responsible.”

In limited circumstances, a local government’s decision not to train certain employees about their legal duty to avoid violating citizens’ rights may rise to the level of an official government policy for purposes of § 1983. A municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. To satisfy the statute, a municipality’s failure to train its employees in a relevant respect must amount to “deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.” Canton, Only then “can such a shortcoming be properly thought of as a city ‘policy or custom’ that is actionable under § 1983.”

“ ‘[D]eliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens’ constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. The city’s “policy of inaction” in light of notice that its program will cause constitutional violations “is the functional equivalent of a decision by the city itself to violate the Constitution.” A less stringent standard of fault for a failure-to-train claim “would result in de facto respondeat superior liability on municipalities ....”

B

A pattern of similar constitutional violations by untrained employees is “ordinarily necessary” to demonstrate deliberate indifference for purposes of failure to train. Policymakers’ “continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the ‘deliberate indifference’—necessary to trigger municipal liability.” Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Although Thompson does not contend that he proved a pattern of similar Brady violations, he points out that, during the ten years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of Brady violations by prosecutors in Connick’s office. Those four reversals could not have put Connick on notice that the office’s Brady training was inadequate with respect to the sort of Brady violation at issue here. None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.

C

Instead of relying on a pattern of similar Brady violations, Thompson relies on the “single-incident” liability that this Court hypothesized in Canton. He contends that the Brady violation in his case was the “obvious” consequence of failing to provide specific Brady training, and that this showing of “obviousness” can substitute for the pattern of violations ordinarily necessary to establish municipal culpability.

In Canton, the Court left open the possibility that, “in a narrow range of circumstances,” a pattern of similar violations might not be necessary to show deliberate indifference. The Court posed the hypothetical example of
a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. Given the known frequency with which police attempt to arrest fleeing felons and the “predictability that an officer lacking specific tools to handle that situation will violate citizens’ rights,” the Court theorized that a city’s decision not to train the officers about constitutional limits on the use of deadly force could reflect the city’s deliberate indifference to the “highly predictable consequence,” namely, violations of constitutional rights. The Court sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations.

Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of *Canton*'s hypothesized single-incident liability. The obvious need for specific legal training that was present in the *Canton* scenario is absent here. Armed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force. And, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training. In stark contrast, legal “[t]raining is what differentiates attorneys from average public employees.”

Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both. These threshold requirements are designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules. Nor does professional training end at graduation. Most jurisdictions require attorneys to satisfy continuing-education requirements. Even those few jurisdictions that do not impose mandatory continuing-education requirements mandate that attorneys represent their clients competently and encourage attorneys to engage in continuing study and education. Before Louisiana adopted continuing-education requirements, it imposed similar general competency requirements on its state bar.

Attorneys who practice with other attorneys, such as in district attorney’s offices, also train on the job as they learn from more experienced attorneys. For instance, here in the Orleans Parish District Attorney’s Office, junior prosecutors were trained by senior prosecutors who supervised them as they worked together to prepare cases for trial, and trial chiefs oversaw the preparation of the cases. Senior attorneys also circulated court decisions and instructional memoranda to keep the prosecutors abreast of relevant legal developments.

In addition, attorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession’s standards. Trial lawyers have a “duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Strickland v. Washington* (1984). Prosecutors have a special “duty to seek justice, not merely to convict.” Among prosecutors’ unique ethical obligations is the duty to produce *Brady* evidence to the defense. An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.

In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the “obvious consequence” of failing to provide prosecutors with formal in-house training about how to obey the law. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors’ professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in “the usual and recurring situations with which [the prosecutors] must deal.” A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same “highly predictable” constitutional danger as *Canton*'s untrained officer.

A second significant difference between this case and the example in *Canton* is the nuance of the allegedly necessary training. The *Canton* hypothetical assumes that the armed police officers have no knowledge at all of the constitutional limits on the use of deadly force. But it is undisputed here that the prosecutors in Connick’s office were familiar with the general *Brady* rule. Thompson’s complaint therefore cannot rely on the utter lack of an ability to cope with constitutional situations that underlies the *Canton* hypothetical, but rather must assert that prosecutors were not trained about particular *Brady* evidence or the specific scenario related to the violation in his case. That sort of nuance simply cannot support an inference of deliberate indifference here. As the Court said in *Canton*, “[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city ‘could have done’ to prevent the
unfortunate incident.”

Thompson suggests that the absence of any formal training sessions about Brady is equivalent to the complete absence of legal training that the Court imagined in Canton. But failure-to-train liability is concerned with the substance of the training, not the particular instructional format. The statute does not provide plaintiffs or courts carte blanche to micromanage local governments throughout the United States.

We do not assume that prosecutors will always make correct Brady decisions or that guidance regarding specific Brady questions would not assist prosecutors. But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability. * * *

2

The dissent rejects our holding that Canton’s hypothesized single-incident liability does not, as a legal matter, encompass failure to train prosecutors in their Brady obligation. It would instead apply the Canton hypothetical to this case, and thus devotes almost all of its opinion to explaining why the evidence supports liability under that theory. But the dissent’s attempt to address our holding—by pointing out that not all prosecutors will necessarily have enrolled in criminal procedure class—misses the point. The reason why the Canton hypothetical is inapplicable is that attorneys, unlike police officers, are equipped with the tools to find, interpret, and apply legal principles.

By the end of its opinion, however, the dissent finally reveals that its real disagreement is not with our holding today, but with this Court’s precedent. The dissent does not see “any reason,” post, at 1386, for the Court’s conclusion in Bryan County that a pattern of violations is “ordinarily necessary” to demonstrate deliberate indifference for purposes of failure to train. As our precedent makes clear, proving that a municipality itself actually caused a constitutional violation by failing to train the offending employee presents “difficult problems of proof,” and we must adhere to a “stringent standard of fault,” lest municipal liability under § 1983 collapse into respondeat superior.

3

The District Court and the Court of Appeals panel erroneously believed that Thompson had proved deliberate indifference by showing the “obviousness” of a need for additional training. They based this conclusion on Connick’s awareness that (1) prosecutors would confront Brady issues while at the district attorney’s office; (2) inexperienced prosecutors were expected to understand Brady’s requirements; (3) Brady has gray areas that make for difficult choices; and (4) erroneous decisions regarding Brady evidence would result in constitutional violations. This is insufficient.

It does not follow that, because Brady has gray areas and some Brady decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to “a decision by the city itself to violate the Constitution.” To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was “highly predictable” that the prosecutors in his office would be confounded by those gray areas and make incorrect Brady decisions as a result. In fact, Thompson had to show that it was so predictable that failing to train the prosecutors amounted to conscious disregard for defendants’ Brady rights. He did not do so.

III

role of a prosecutor is to see that justice is done. “It is as much [a prosecutor’s] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Ibid. By their own admission, the prosecutors who tried Thompson’s armed robbery case failed to carry out that responsibility. But the only issue before us is whether Connick, as the policymaker for the district attorney’s office, was deliberately indifferent to the need to train the attorneys under his authority.

We conclude that this case does not fall within the narrow range of “single-incident” liability hypothesized in Canton as a possible exception to the pattern of violations necessary to prove deliberate indifference in § 1983 actions alleging failure to train. The District Court should have granted Connick judgment as a matter of law on the failure-to-train claim because Thompson did not prove a pattern of similar violations that would “establish that the ‘policy of inaction’ [was] the functional equivalent of a decision by the city itself to violate the Constitution.”

The judgment of the United States Court of Appeals for the Fifth Circuit is reversed.

It is so ordered.
Justice SCALIA, with whom Justice ALITO joins, concurring.

I join the Court’s opinion in full. I write separately only to address several aspects of the dissent.

1. The dissent’s lengthy excavation of the trial record is a puzzling exertion. The question presented for our review is whether a municipality is liable for a single Brady violation by one of its prosecutors, even though no pattern or practice of prior violations put the municipality on notice of a need for specific training that would have prevented it. That question is a legal one: whether a Brady violation presents one of those rare circumstances we hypothesized in Canton’s footnote 10, in which the need for training in constitutional requirements is so obvious ex ante that the municipality’s failure to provide that training amounts to deliberate indifference to constitutional violations.

The dissent defers consideration of this question until page 1382 of its opinion. It first devotes considerable space to allegations that Connick’s prosecutors misunderstood Brady when asked about it at trial, and to supposed gaps in the Brady guidance provided by Connick’s office to prosecutors, including deficiencies (unrelated to the specific Brady violation at issue in this case) in a policy manual published by Connick’s office three years after Thompson’s trial. None of that is relevant. Thompson’s failure-to-train theory at trial was not based on a pervasive culture of indifference to Brady, but rather on the inevitability of mistakes over enough iterations of criminal trials. The District Court instructed the jury it could find Connick deliberately indifferent if:

“First: The District Attorney was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the constitution to be provided to an accused[;]

“Second: The situation involved a difficult choice, or one that prosecutors had a history of mishandling, such that additional training, supervision, or monitoring was clearly needed[; and]

“Third: The wrong choice by a prosecutor in that situation will frequently cause a deprivation of an accused’s constitutional rights.”

That theory of deliberate indifference would repeal the law of Monell in favor of the Law of Large Numbers. Brady mistakes are inevitable. So are all species of error routinely confronted by prosecutors: authorizing a bad warrant; losing a Batson claim; crossing the line in closing argument; or eliciting hearsay that violates the Confrontation Clause. Nevertheless, we do not have “de facto respondeat superior” liability,” for each such violation under the rubric of failure-to-train simply because the municipality does not have a professional educational program covering the specific violation in sufficient depth.” Were Thompson’s theory the law, there would have been no need for Canton’s footnote to confine its hypothetical to the extreme circumstance of arming police officers with guns without telling them about the constitutional limitations upon shooting fleeing felons; the District Court’s instructions cover every recurring situation in which citizens’ rights can be violated.

That result cannot be squared with our admonition that failure-to-train liability is available only in “limited circumstances,” and that a pattern of constitutional violations is “ordinarily necessary to establish municipal culpability and causation”. These restrictions are indispensable because without them, “failure to train” would become a talismanic incantation producing municipal liability “[virtually every instance where a person has had his or her constitutional rights violated by a city employee”—which is what Monell rejects. Worse, it would “engage the federal courts in an endless exercise of second-guessing municipal employee-training programs,” thereby diminishing the autonomy of state and local governments.

2. Perhaps for that reason, the dissent does not seriously contend that Thompson’s theory of recovery was proper. Rather, it accuses Connick of acquiescing in that theory at trial. The accusation is false. Connick’s central claim was and is that failure-to-train liability for a Brady violation cannot be premised on a single incident, but requires a pattern or practice of previous violations. He pressed that argument at the summary judgment stage but was rebuffed. At trial, when Connick offered a jury instruction to the same effect, the trial judge effectively told him to stop bringing up the subject:

“[Connick’s counsel]: Also, as part of that definition in that same location, Your Honor, we would like to include language that says that deliberate indifference to training requires a pattern of similar violations and proof of deliberate indifference requires more than a single isolated act.

“[Thompson’s counsel]: That’s not the law, Your Honor.

“THE COURT: No, I’m not giving that. That was in your motion for summary judgment that I denied.” Tr. 1013.

3. But in any event, to recover from a municipality under 42 U.S.C. § 1983, a plaintiff must satisfy a “rigorous” standard of causation; he must “demonstrate a direct causal link between the municipal action and the deprivation of federal rights.” Thompson cannot meet that standard. The withholding of evidence in his case was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan’s willful suppression of evidence he believed to be exculpatory. I have no reason to disbelieve that account, particularly since Riehlmann’s testimony hardly paints a flattering picture of himself: Riehlmann kept silent about Deegan’s misconduct for another five years, as a result of which he incurred professional sanctions. And if Riehlmann’s story is true, then the “moving force” behind the suppression of evidence was Deegan, not a failure of continuing legal education.

4. The dissent suspends disbelief about this, insisting that with proper Brady training, “surely at least one” of the prosecutors in Thompson’s trial would have turned over the lab report and blood swatch. But training must consist of more than mere broad encomiums of Brady: We have made clear that “the identified deficiency in a city’s training program [must be] closely related to the ultimate injury.” So even indulging the dissent’s assumption that Thompson’s prosecutors failed to disclose the lab report in good faith—in a way that could be prevented by training—what sort of training would have prevented the good-faith nondisclosure of a blood report not known to be exculpatory?

Perhaps a better question to ask is what legally accurate training would have prevented it. The dissent’s suggestion is to instruct prosecutors to ignore the portion of Brady limiting prosecutors’ disclosure obligations to evidence that is “favorable to an accused.” Instead, the dissent proposes that “Connick could have communicated to Orleans Parish prosecutors, in no uncertain terms, that, ‘[i]f you have physical evidence that, if tested, can establish the innocence of the person who is charged, you have to turn it over.’ ” Though labeled a training suggestion, the dissent’s proposal is better described as a sub silentio expansion of the substantive law of Brady. If any of our cases establishes such an obligation, I have never read it, and the dissent does not cite it.

Since Thompson’s trial, however, we have decided a case that appears to say just the opposite of the training the dissent would require: In Arizona v. Youngblood, 488 U.S. 51, 58 (1988), we held that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” We acknowledged that “Brady ... makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence,” but concluded that “the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” Perhaps one day we will recognize a distinction between good-faith failures to preserve from destruction evidence whose inculpatory or exculpatory character is unknown, and good-faith failures to turn such evidence over to the defense. But until we do so, a failure to train prosecutors to observe that distinction cannot constitute deliberate indifference.

5. By now the reader has doubtless guessed the best-kept secret of this case: There was probably no Brady violation at all—except for Deegan’s (which, since it was a bad-faith, knowing violation, could not possibly be attributed to lack of training). The dissent surely knows this, which is why it leans heavily on the fact that Connick conceded that Brady was violated. I can honor that concession in my analysis of the case because even if it extends beyond Deegan’s deliberate actions, it remains irrelevant to Connick’s training obligations. For any Brady violation apart from Deegan’s was surely on the very frontier of our jurisprudence; Connick could not possibly have been on notice decades ago that he was required to instruct his prosecutors to respect a right to untested evidence that we had not (and still have not) recognized. As a consequence, even if I accepted the dissent’s conclusion that failure-to-train liability could be premised on a single Brady error, I could not agree that the lack of an accurate training regimen caused the violation Connick has conceded.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), this Court held that due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment. That obligation, the parties have stipulated, was dishonored in this case; consequently, John Thompson spent 18 years in prison, 14 of them
isolated on death row, before the truth came to light: He was innocent of the charge of attempted armed robbery, and his subsequent trial on a murder charge, by prosecutorial design, was fundamentally unfair.

The Court holds that the Orleans Parish District Attorney’s Office (District Attorney’s Office or Office) cannot be held liable, in a civil rights action under 42 U.S.C. § 1983, for the grave injustice Thompson suffered. That is so, the Court tells us, because Thompson has shown only an aberrant Brady violation, not a routine practice of giving short shrift to Brady’s requirements. The evidence presented to the jury that awarded compensation to Thompson, however, points distinctly away from the Court’s assessment. As the trial record in the § 1983 action reveals, the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.

From the top down, the evidence showed, members of the District Attorney’s Office, including the District Attorney himself, misperceived Brady’s compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutors’ conduct relating to Thompson’s trials, a fact trier could reasonably conclude that inattention to Brady was standard operating procedure at the District Attorney’s Office.

What happened here, the Court’s opinion obscures, was no momentary oversight, no single incident of a lone officer’s misconduct. Instead, the evidence demonstrated that misperception and disregard of Brady’s disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the District Attorney’s Office bears responsibility under § 1983.

I dissent from the Court’s judgment mindful that Brady violations, as this case illustrates, are not easily detected. But for a chance discovery made by a defense team investigator weeks before Thompson’s scheduled execution, the evidence that led to his exoneration might have remained under wraps. The prosecutorial concealment Thompson encountered, however, is bound to be repeated unless municipal agencies bear responsibility—made tangible by § 1983 liability—for adequately conveying what Brady requires and for monitoring staff compliance. Failure to train, this Court has said, can give rise to municipal liability under § 1983 “where the failure ... amounts to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.” That standard is well met in this case.

I turn first to a contextual account of the Brady violations that infected Thompson’s trials.

A

In the early morning hours of December 6, 1984, an assailant shot and killed Raymond T. Liuzza, Jr., son of a prominent New Orleans business executive, on the street fronting the victim’s home. Only one witness saw the assailant. As recorded in two contemporaneous police reports, that eyewitness initially described the assailant as African–American, six feet tall, with “close cut hair.” Thompson is five feet eight inches tall and, at the time of the murder, styled his hair in a large “Afro.” The police reports of the witness’ immediate identification were not disclosed to Thompson or to the court.

While engaged in the murder investigation, the Orleans Parish prosecutors linked Thompson to another violent crime committed three weeks later. On December 28, an assailant attempted to rob three siblings at gunpoint. During the struggle, the perpetrator’s blood stained the oldest child’s pant leg. That blood, preserved on a swatch of fabric cut from the pant leg by a crime scene analyst, was eventually tested. The test conclusively established that the perpetrator’s blood was type B. Thompson’s blood is type O. His prosecutors failed to disclose the existence of the swatch or the test results.

B

One month after the Liuzza murder, Richard Perkins, a man who knew Thompson, approached the Liuzza family. Perkins did so after the family’s announcement of a $15,000 reward for information leading to the murderer’s conviction. Police officers surreptitiously recorded the Perkins–Liuzza conversations. As documented on tape, Perkins told the family, “I don't mind helping [you] catch [the perpetrator], ... but I would like [you] to help me and, you know, I’ll help [you].” Once the family assured Perkins, “we’re on your side, we want to try and help
you,” Perkins intimated that Thompson and another man, Kevin Freeman, had been involved in Liuzza’s murder. Perkins thereafter told the police what he had learned from Freeman about the murder, and that information was recorded in a police report. Based on Perkins’ account, Thompson and Freeman were arrested on murder charges.

Freeman was six feet tall and went by the name “Kojak” because he kept his hair so closely trimmed that his scalp was visible. Unlike Thompson, Freeman fit the eyewitness’ initial description of the Liuzza assailant’s height and hair style. As the Court notes, Freeman became the key witness for the prosecution at Thompson’s trial for the murder of Liuzza.

After Thompson’s arrest for the Liuzza murder, the father of the armed robbery victims saw a newspaper photo of Thompson with a large Afro hairstyle and showed it to his children. He reported to the District Attorney’s Office that the children had identified Thompson as their attacker, and the children then picked that same photo out of a “photographic lineup.” Indicting Thompson on the basis of these questionable identifications, the District Attorney’s Office did not pause to test the pant leg swatch dyed by the perpetrator’s blood. This lapse ignored or overlooked a prosecutor’s notation that the Office “may wish to do [a] blood test.”

The murder trial was scheduled to begin in mid-March 1985. Armed with the later indictment against Thompson for robbery, however, the prosecutors made a strategic choice: They switched the order of the two trials, proceeding first on the robbery indictment. Their aim was twofold. A robbery conviction gained first would serve to inhibit Thompson from testifying in his own defense at the murder trial, for the prior conviction could be used to impeach his credibility. In addition, an armed robbery conviction could be invoked at the penalty phase of the murder trial in support of the prosecution’s plea for the death penalty.

Recognizing the need for an effective prosecution team, petitioner Harry F. Connick, District Attorney for the Parish of Orleans, appointed his third-in-command, Eric Dubelier, as special prosecutor in both cases. Dubelier enlisted Jim Williams to try the armed robbery case and to assist him in the murder case. Gerry Deegan assisted Williams in the armed robbery case. Bruce Whittaker, the fourth prosecutor involved in the cases, had approved Thompson’s armed robbery indictment.

During pretrial proceedings in the armed robbery case, Thompson filed a motion requesting 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.” Prosecutorial responses to this motion fell far short of Brady compliance.

First, prosecutors blocked defense counsel’s inspection of the pant leg swatch stained by the robber’s blood. Although Dubelier’s April 3 response stated, “Inspection to be permitted,” the swatch was signed out from the property room at 10:05 a.m. the next day, and was not returned until noon on April 10, the day before trial. Thompson’s attorney inspected the evidence made available to him and found no blood evidence. No one told defense counsel about the swatch and its recent removal from the property room.

Second, Dubelier or Whittaker ordered the crime laboratory to rush a pretrial test of the swatch. Whittaker received the lab report, addressed to his attention, two days before trial commenced. Immediately thereafter, he placed the lab report on Williams’ desk. Although the lab report conclusively identified the perpetrator’s blood type, the District Attorney’s Office never revealed the report to the defense.

Third, Deegan checked the swatch out of the property room on the morning of the first day of trial, but the prosecution did not produce the swatch at trial. Deegan did not return the swatch to the property room after trial, and the swatch has never been found.

“[B]ased solely on the descriptions” provided by the three victims, the jury convicted Thompson of attempted armed robbery. The court sentenced him to 49.5 years without possibility of parole—the maximum available sentence.

Prosecutors continued to disregard Brady during the murder trial, held in May 1985, at which the prosecution’s order-of-trial strategy achieved its aim. By prosecuting Thompson for armed robbery first—and withholding blood evidence that might have exonerated Thompson of that charge—the District Attorney’s Office disabled Thompson from testifying in his own defense at the murder trial. As earlier observed, impeaching use of the prior conviction would have severely undermined Thompson’s credibility. And because Thompson was effectively stopped from testifying in his own defense, the testimony of the witnesses against him gained force. The prosecution’s failure to reveal evidence that could have
impeached those witnesses helped to seal Thompson’s fate.

First, the prosecution undermined Thompson’s efforts to impeach Perkins. Perkins testified that he volunteered information to the police with no knowledge of reward money. Because prosecutors had not produced the audiotapes of Perkins’ conversations with the Liuzza family (or a police summary of the tapes), Thompson’s attorneys could do little to cast doubt on Perkins’ credibility. In closing argument, the prosecution emphasized that Thompson presented no “direct evidence” that reward money had motivated any of the witnesses.

Second, the prosecution impeded Thompson’s impeachment of key witness Kevin Freeman. It did so by failing to disclose a police report containing Perkins’ account of what he had learned from Freeman about the murder. Freeman’s trial testimony was materially inconsistent with that report. Lacking any knowledge of the police report, Thompson could not point to the inconsistencies.

Third, and most vital, the eyewitness’ initial description of the assailant’s hair, was of prime relevance, for it suggested that Freeman, not Thompson, murdered Liuzza. The materiality of the eyewitness’ contemporaneous description of the murderer should have been altogether apparent to the prosecution. Failure to produce the police reports setting out what the eyewitness first said not only undermined efforts to impeach that witness and the police officer who initially interviewed him. The omission left defense counsel without knowledge that the prosecutors were restyling the killer’s “close cut hair” into an “Afro.”

Prosecutors finessed the discrepancy between the eyewitness’ initial description and Thompson’s appearance. They asked leading questions prompting the eyewitness to agree on the stand that the perpetrator’s hair was “afro type,” yet “straight back.” Corroboratively, the police officer—after refreshing his recollection by reviewing material at the prosecution’s table—gave artful testimony. He characterized the witness’ initial description of the perpetrator’s hair as “black and short, afro style.” As prosecutors well knew, nothing in the withheld police reports, which described the murderer’s hair simply as “close cut,” portrayed a perpetrator with an Afro or Afro-style hair.

The jury found Thompson guilty of first-degree murder. Having prevented Thompson from testifying that Freeman was the killer, the prosecution delivered its ultimate argument. Because Thompson was already serving a near-life sentence for attempted armed robbery, the prosecution urged, the only way to punish him for murder was to execute him. The strategy worked as planned; Thompson was sentenced to death.

E

Thompson discovered the prosecutors’ misconduct through a serendipitous series of events. In 1994, nine years after Thompson’s convictions, Deegan, the assistant prosecutor in the armed robbery trial, learned he was terminally ill. Soon thereafter, Deegan confessed to his friend Michael Riehlmann that he had suppressed blood evidence in the armed robbery case. Deegan did not heed Riehlmann’s counsel to reveal what he had done. For five years, Riehlmann, himself a former Orleans Parish prosecutor, kept Deegan’s confession to himself.

On April 16, 1999, the State of Louisiana scheduled Thompson’s execution. In an eleventh-hour effort to save his life, Thompson’s attorneys hired a private investigator. Deep in the crime lab archives, the investigator unearthed a microfiche copy of the lab report identifying the robber’s blood type. The copy showed that the report had been addressed to Whittaker. Thompson’s attorneys contacted Whittaker, who informed Riehlmann that the lab report had been found. Riehlmann thereupon told Whittaker that Deegan “had failed to turn over stuff that might have been exculpatory.” Riehlmann prepared an affidavit describing Deegan’s disclosure “that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson.”

Thompson’s lawyers presented to the trial court the crime lab report showing that the robber’s blood type was B, and a report identifying Thompson’s blood type as O. This evidence proved Thompson innocent of the robbery. The court immediately stayed Thompson’s execution, and commenced proceedings to assess the newly discovered evidence.

Connick sought an abbreviated hearing. A full hearing was unnecessary, he urged, because the Office had confessed error and had moved to dismiss the armed robbery charges. The court insisted on a public hearing. Given “the history of this case,” the court said, it “was not willing to accept the representations that [Connick] and [his] office made [in their motion to dismiss].” After a full day’s hearing, the court vacated Thompson’s attempted armed robbery conviction and dismissed the charges. Before doing so, the court admonished:

“[A]ll day long there have been a number of young Assistant D. A.’s ... sitting in this courtroom watching this, and I hope they take home ... and take to heart the
message that this kind of conduct cannot go on in this Parish if this Criminal Justice System is going to work."

The District Attorney’s Office then initiated grand jury proceedings against the prosecutors who had withheld the lab report. Connick terminated the grand jury after just one day. He maintained that the lab report would not be Brady material if prosecutors did not know Thompson’s blood type. And he told the investigating prosecutor that the grand jury “w[ould] make [his] job more difficult.” In protest, that prosecutor tendered his resignation.

Thereafter, the Louisiana Court of Appeal reversed Thompson’s murder conviction. The unlawfully procured robbery conviction, the court held, had violated Thompson’s right to testify and thus fully present his defense in the murder trial. The merits of several Brady claims arising out of the murder trial, the court observed, had therefore become “moot.”

Undeterred by his assistants’ disregard of Thompson’s rights, Connick retried him for the Liuzza murder. Thompson’s defense was bolstered by evidence earlier unavailable to him: ten exhibits the prosecution had not disclosed when Thompson was first tried. The newly produced items included police reports describing the assailant in the murder case as having “close cut” hair, the police report recounting Perkins’ meetings with the Liuzza family, see supra, at 1371 – 1372, audio recordings of those meetings, and a 35-page supplemental police report. After deliberating for only 35 minutes, the jury found Thompson not guilty.

On May 9, 2003, having served more than 18 years in prison for crimes he did not commit, Thompson was released.

II

On July 16, 2003, Thompson commenced a civil action under 42 U.S.C. § 1983 alleging that Connick, other officials of the Orleans Parish District Attorney’s Office, and the Office itself, had violated his constitutional rights by wrongfully withholding Brady evidence. Thompson sought to hold Connick and the District Attorney’s Office liable for failure adequately to train prosecutors concerning their Brady obligations. Such liability attaches, I agree with the Court, only when the failure “amount[s] to ‘deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.’ ” I disagree, however, with the Court’s conclusion that Thompson failed to prove deliberate indifference.

Having weighed all the evidence, the jury in the § 1983 case found for Thompson, concluding that the District Attorney’s Office had been deliberately indifferent to Thompson’s Brady rights and to the need for training and supervision to safeguard those rights. “Viewing the evidence in the light most favorable to [Thompson], as appropriate in light of the verdict [t] rendered by the jury,” I see no cause to upset the District Court’s determination, affirmed by the Fifth Circuit, that “ample evidence ... adduced at trial” supported the jury’s verdict. Record 1917.

Over 20 years ago, we observed that a municipality’s failure to provide training may be so egregious that, even without notice of prior constitutional violations, the failure “could properly be characterized as ‘deliberate indifference’ to constitutional rights.” “[I]n light of the duties assigned to specific officers or employees,” Canton recognized, “it may happen that ... the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers ... can reasonably be said to have been deliberately indifferent to the need.” Thompson presented convincing evidence to satisfy this standard.

A

Thompson’s § 1983 suit proceeded to a jury trial on two theories of liability: First, the Orleans Parish Office’s official Brady policy was unconstitutional; and second, Connick was deliberately indifferent to an obvious need to train his prosecutors about their Brady obligations. Connick’s Brady policy directed prosecutors to “turn over what was required by state and federal law, but no more.” The jury thus understandably rejected Thompson’s claim that the official policy itself was unconstitutional.

The jury found, however, that Connick was deliberately indifferent to the need to train prosecutors about Brady’s command. On the special verdict form, the jury answered yes to the following question:

“Was the Brady violation in the armed robbery case or any infringements of John Thompson’s rights in the murder trial substantially caused by [Connick’s] failure, through deliberate indifference, to establish policies and procedures to protect one accused of a
crime from these constitutional violations?” Record 1585.

Consistent with the question put to the jury, and without objection, the court instructed the jurors: “[Y]ou are not limited to the nonproduced blood evidence and the resulting infringement of Mr. Thompson’s right to testify at the murder trial. You may consider all of the evidence presented during this trial.” That evidence included a stipulation that in his retrial for the Liuzza murder, Thompson had introduced ten exhibits containing relevant information withheld by the prosecution in 1985.

Abundant evidence supported the jury’s finding that additional Brady training was obviously necessary to ensure that Brady violations would not occur: (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. As a result of these multiple shortfalls, it was hardly surprising that Brady violations in fact occurred, severely undermining the integrity of Thompson’s trials.

Connick was the Office’s sole policymaker, and his testimony exposed a flawed understanding of a prosecutor’s Brady obligations. First, Connick admitted to the jury that his earlier understanding of Brady, conveyed in prior sworn testimony, had been too narrow. Second, Connick confessed to having withheld a crime lab report “one time as a prosecutor and I got indicted by the U.S. Attorney over here for doing it.” Third, even at trial Connick persisted in misstating Brady’s requirements. For example, Connick urged that there could be no Brady violation arising out of “the inadvertent conduct of [an] assistant under pressure with a lot of case load.” The court, however, correctly instructed the jury that, in determining whether there has been a Brady violation, the “good or bad faith of the prosecution does not matter.”

The testimony of other leaders in the District Attorney’s Office revealed similar misunderstandings. Those misunderstandings, the jury could find, were in large part responsible for the gross disregard of Brady rights Thompson experienced. Dubelier admitted that he never reviewed police files, but simply relied on the police to flag any potential Brady information. The court, however, instructed the jury that an individual prosecutor has a “duty ... to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police.” Williams was asked whether Brady material includes documents in the possession of the district attorney that could be used to impeach a witness, to show that he’s lying”; he responded simply, and mistakenly, “No.” The testimony of “high-ranking individuals in the Orleans Parish District Attorney’s Office,” Thompson’s expert explained, exposed “complete errors ... as to what Brady required [prosecutors] to do.” “Dubelier had no understanding of his obligations under Brady whatsoever,” the expert observed, and Williams “is still not sure what his obligations were under Brady.”

The jury could attribute the violations of Thompson’s rights directly to prosecutors’ misapprehension of Brady. The prosecution had no obligation to produce the “close-cut hair” police reports, Williams maintained, because newspaper reports had suggested that witness descriptions were not consistent with Thompson’s appearance. Therefore, Williams urged, the defense already “had everything.” Dubelier tendered an alternative explanation for the nondisclosure. In Dubelier’s view, the descriptions were not “inconsistent with [Thompson’s] appearance,” as portrayed in a police photograph showing Thompson’s hair extending at least three inches above his forehead. Williams insisted that he had discharged the prosecution’s duty to disclose the blood evidence by mentioning, in a motion hearing, that the prosecution intended to obtain a blood sample from Thompson. During the armed robbery trial, Williams told one of the victims that the results of the blood test made on the swatch had been “inconclusive.” And he testified in the § 1983 action that the lab report was not Brady material “because I didn’t know what the blood type of Mr. Thompson was.”

Connick should have comprehended that Orleans Parish prosecutors lacked essential guidance on Brady and its application. In fact, Connick has effectively conceded that Brady training in his Office was inadequate. Connick explained to the jury that prosecutors’ offices must “make ... very clear to [new prosecutors] what their responsibility [is]” under Brady and must not “give[e] them a lot of leeway.” But the jury heard ample evidence that Connick’s Office gave prosecutors no Brady guidance, and had installed no procedures to monitor
Brady compliance.

In 1985, Connick acknowledged, many of his prosecutors “were coming fresh out of law school,” and the Office’s “[h]uge turnover” allowed attorneys with little experience to advance quickly to supervisory positions. By 1985, Dubelier and Williams were two of the highest ranking attorneys in the Office, yet neither man had even five years of experience as a prosecutor.

Dubelier and Williams learned the prosecutorial craft in Connick’s Office, and, as earlier observed, their testimony manifested a woefully deficient understanding of Brady. Dubelier and Williams told the jury that they did not recall any Brady training in the Office.

Connick testified that he relied on supervisors, including Dubelier and Williams, to ensure prosecutors were familiar with their Brady obligations. Yet Connick did not inquire whether the supervisors themselves understood the importance of teaching newer prosecutors about Brady. Riehlmann could not “recall that [he] was ever trained or instructed by anybody about [his] Brady obligations,” on the job or otherwise. Whittaker agreed it was possible for “inexperienced lawyers, just a few weeks out of law school with no training,” to bear responsibility for “decisions on ... whether material was Brady material and had to be produced.”

Thompson’s expert characterized Connick’s supervision regarding Brady as “the blind leading the blind.” For example, in 1985 trial attorneys “sometimes ... went to Mr. Connick” with Brady questions, “and he would tell them” how to proceed. But Connick acknowledged that he had “stopped reading law books ... and looking at opinions” when he was first elected District Attorney in 1974.

As part of their training, prosecutors purportedly attended a pretrial conference with the Office’s chief of trials before taking a case to trial. Connick intended the practice to provide both training and accountability. But it achieved neither aim in Thompson’s prosecutions, for Dubelier and Williams, as senior prosecutors in the Office, were free to take cases to trial without pretrying them, and that is just how they proceeded in Thompson’s prosecutions.

Prosecutors confirmed that training in the District Attorney’s Office, overall, was deficient. Soon after Connick retired, a survey of assistant district attorneys in the Office revealed that more than half felt that they had not received the training they needed to do their jobs.

Thompson, it bears emphasis, is not complaining about the absence of formal training sessions. His complaint does not demand that Brady compliance be enforced in any particular way. He asks only that Brady obligations be communicated accurately and genuinely enforced. Because that did not happen in the District Attorney’s Office, it was inevitable that prosecutors would misapprehend Brady. Had Brady’s importance been brought home to prosecutors, surely at least one of the four officers who knew of the swatch and lab report would have revealed their existence to defense counsel and the court.

Louisiana did not require continuing legal education at the time of Thompson’s trials. Primary responsibility for keeping prosecutors au courant with developments in the law, therefore, resided in the District Attorney’s Office. Over the course of Connick’s tenure as District Attorney, the jury learned, the Office’s chief of appeals circulated memoranda when appellate courts issued important opinions.

The 1987 Office policy manual was a compilation of memoranda on criminal law and practice circulated to prosecutors from 1974, when Connick became District Attorney, through 1987. The manual contained four sentences, nothing more, on Brady. This slim instruction, the jury learned, was notably inaccurate, incomplete, and dated. For example, the manual did not acknowledge what Giglio v. United States, 405 U.S. 150, 92 (1972), made plain: Impeachment evidence is Brady material prosecutors are obligated to disclose.

In sum, the evidence permitted the jury to reach the following conclusions. First, Connick did not ensure that prosecutors in his Office knew their Brady obligations; he neither confirmed their familiarity with Brady when he hired them, nor saw to it that training took place on his watch. Second, the need for Brady training and monitoring was obvious to Connick. Indeed he so testified. Third, Connick’s cavalier approach to his staff’s knowledge and observation of Brady requirements contributed to a culture of inattention to Brady in Orleans Parish.

As earlier noted, Connick resisted an effort to hold prosecutors accountable for Brady compliance because he felt the effort would “make [his] job more difficult.” Tr. 978. He never disciplined or fired a single prosecutor for violating Brady. The jury was told of this Court’s decision in Kyles v. Whitley, 514 U.S. 419 (1995), a capital case prosecuted by Connick’s Office that garnered attention because it featured “so many instances of the state’s
failure to disclose exculpatory evidence.” When questioned about Kyles, Connick told the jury he was satisfied with his Office’s practices and saw no need, occasioned by Kyles, to make any changes. In both quantity and quality, then, the evidence canvassed here was more than sufficient to warrant a jury determination that Connick and the prosecutors who served under him were not merely negligent regarding Brady. Rather, they were deliberately indifferent to what the law requires.

B

In Canton, this Court spoke of circumstances in which the need for training may be “so obvious,” and the lack of training “so likely” to result in constitutional violations, that policymakers who do not provide for the requisite training “can reasonably be said to have been deliberately indifferent to the need” for such training. This case, I am convinced, belongs in the category Canton marked out.

Canton offered an often-cited illustration. “[C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons.” Ibid., n. 10. Those policymakers, Canton observed, equip police officers with firearms to facilitate such arrests. Ibid. The need to instruct armed officers about “constitutional limitations on the use of deadly force,” Canton said, is “‘so obvious,’ that failure to [train the officers] could properly be characterized as ‘deliberate indifference’ to constitutional rights.”

The District Court, tracking Canton’s language, instructed the jury that Thompson could prevail on his “deliberate indifference” claim only if the evidence persuaded the jury on three points. First, Connick “was certain that prosecutors would confront the situation where they would have to decide which evidence was required by the Constitution to be provided to the accused.” Tr. 1099. Second, “the situation involved a difficult choice[,] or one that prosecutors had a history of mishandling, such that additional training, supervision or monitoring was clearly needed.” Ibid. Third, “the wrong choice by a prosecutor in that situation would frequently cause a deprivation of an accused’s constitutional rights.”

Petitioners used this formulation of the failure to train standard in pretrial and post-trial submissions, and in their own proposed jury instruction on deliberate indifference. Nor do petitioners dispute that Connick “knew to a moral certainty that” his prosecutors would regularly face Brady decisions.

The jury, furthermore, could reasonably find that Brady rights may involve choices so difficult that Connick obviously knew or should have known prosecutors needed more than perfunctory training to make the correct choices. As demonstrated earlier, even at trial prosecutors failed to give an accurate account of their Brady obligations. And, again as emphasized earlier, the evidence permitted the jury to conclude that Connick should have known Brady training in his office bordered on “zero.” Moreover, Connick understood that newer prosecutors needed “very clear” guidance and should not be left to grapple with Brady on their own. It was thus “obvious” to him, the jury could find, that constitutional rights would be in jeopardy if prosecutors received slim to no Brady training.

Based on the evidence presented, the jury could conclude that Brady errors by untrained prosecutors would frequently cause deprivations of defendants’ constitutional rights. The jury learned of several Brady oversights in Thompson’s trials and heard testimony that Connick’s Office had one of the worst Brady records in the country. Because prosecutors faced considerable pressure to get convictions, and were instructed to “turn over what was required by state and federal law, but no more,” Brief for Petitioners 6–7, the risk was all too real that they would err by withholding rather than revealing information favorable to the defense.

In sum, despite Justice SCALIA’s protestations to the contrary, ante, at 1366, 1368, the Brady violations in Thompson’s prosecutions were not singular and they were not aberrational. They were just what one would expect given the attitude toward Brady pervasive in the District Attorney’s Office. Thompson demonstrated that no fewer than five prosecutors—the four trial prosecutors and Riehlmann—disregarded his Brady rights. He established that they kept from him, year upon year, evidence vital to his defense. Their conduct, he showed with equal force, was a foreseeable consequence of lax training in, and absence of monitoring of, a legal requirement fundamental to a fair trial. 20

C

Unquestionably, a municipality that leaves police officers untrained in constitutional limits on the use of deadly weapons places lives in jeopardy. But as this case so vividly shows, a municipality that empowers prosecutors to press for a death sentence without ensuring that those prosecutors know and honor Brady rights may be no less “deliberately indifferent” to the risk to innocent lives.

Brady, this Court has long recognized, is among the most basic safeguards brigading a criminal defendant’s fair trial
right. Vigilance in superintending prosecutors’ attention to Brady’s requirement is all the more important for this reason: A Brady violation, by its nature, causes suppression of evidence beyond the defendant’s capacity to ferret out. Because the absence of the withheld evidence may result in the conviction of an innocent defendant, it is unconscionable not to impose reasonable controls impelling prosecutors to bring the information to light.

The Court nevertheless holds Canton’s example inapposite. It maintains that professional obligations, ethics rules, and training—including on-the-job training—set attorneys apart from other municipal employees, including rookie police officers. Connick “had every incentive at trial to attempt to establish” that he could reasonably rely on the professional education and status of his staff. But the jury heard and rejected his argument to that effect.

The Court advances Connick’s argument with greater clarity, but with no greater support. On what basis can one be confident that law schools acquaint students with prosecutors’ unique obligation under Brady? Whittaker told the jury he did not recall covering Brady in his criminal procedure class in law school. Dubelier’s alma mater, like most other law faculties, does not make criminal procedure a required course. Connick suggested that the bar examination ensures that new attorneys will know what Brady demands. Tr. 835. Research indicates, however, that from 1980 to the present, Brady questions have not accounted for even 10% of the total points in the criminal law and procedure section of any administration of the Louisiana Bar Examination. A person sitting for the Louisiana Bar Examination, moreover, need pass only five of the exam’s nine sections. One can qualify for admission to the profession with no showing of even passing knowledge of criminal law and procedure.

The majority’s suggestion that lawyers do not need Brady training because they “are equipped with the tools to find, interpret, and apply legal principles,” ante, at 1364, “blinks reality” and is belied by the facts of this case. See Brief for Former Federal Civil Rights Officials and Prosecutors as Amici Curiae 6. “Brady compliance,” therefore, “is too much at risk, and too fundamental to the fairness of our criminal justice system, to be taken for granted,” and “training remains critical.” Id., at 3, 7.

The majority further suggests that a prior pattern of similar violations is necessary to show deliberate indifference to defendants’ Brady rights. The text of § 1983 contains no such limitation. Nor is there any reason to imply such a limitation. A district attorney’s deliberate indifference might be shown in several ways short of a prior pattern. This case is one such instance. Connick, who himself had been indicted for suppression of evidence, 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 accountable on the ground that doing so would make his job more difficult.

A District Attorney aware of his office’s high turnover rate, who recruits prosecutors fresh out of law school and promotes them rapidly through the ranks, bears responsibility for ensuring that on-the-job training takes place. In short, the buck stops with him. As the Court recognizes, “the duty to produce Brady evidence to the defense” is “[a]mong prosecutors’ unique ethical obligations.” The evidence in this case presents overwhelming support for the conclusion that the Orleans Parish Office slighted its responsibility to the profession and to the State’s system of justice by providing no on-the-job Brady training. Connick was not “entitled to rely on prosecutors’ professional training,” for Connick himself should have been the principal insurer of that training.

* * *

For the reasons stated, I would affirm the judgment of the U.S. Court of Appeals for the Fifth Circuit. Like that court and, before it, the District Court, I would uphold the jury’s verdict awarding damages to Thompson for the gross, deliberately indifferent, and long-continuing violation of his fair trial right.
This Essay takes the Supreme Court’s recent decision in Connick v. Thompson as a point of departure for examining the efficacy of professional responsibility measures in combating prosecutorial misconduct. John Thompson, the plaintiff in Connick, spent fourteen years on death row because prosecutors concealed exculpatory blood evidence from his defense attorneys. In rejecting Thompson’s attempt to hold the New Orleans District Attorney’s Office civilly liable for failing to train its prosecutors in proper disclosure procedures, the Connick Court substantially narrowed one of the few remaining avenues for deterring prosecutorial misconduct. Implicit in the Court’s reasoning was a belief that district attorneys’ offices should be entitled to reasonably rely on professional responsibility measures to prevent prosecutorial misconduct. This Essay subjects that premise to a searching critique by surveying all fifty states’ lawyer disciplinary practices. Our study demonstrates that professional responsibility measures as they are currently composed do a poor job of policing prosecutorial misconduct. However, we also take seriously the Supreme Court’s insistence that those measures should function as the primary means of deterring misconduct. Accordingly, in addition to noting the deficiencies of professional responsibility measures, we offer a series of recommendations for enhancing their effectiveness.

INTRODUCTION

On March 29, 2011, the Supreme Court—by a vote of five to four—overturned a $14 million jury verdict in favor of John Thompson, a Louisiana man who spent fourteen years on death row because prosecutors withheld exculpatory blood evidence from his defense attorneys. Thompson had sued the Orleans Parish District Attorney’s Office based on a failure-to-train theory, arguing that the office had denied him due process of law through its deliberate indifference toward the need to train its attorneys in proper disclosure procedures. Thompson’s failure-to-train theory relied on Brady v. Maryland, a 1963 Supreme Court decision that requires prosecutors to share evidence with defendants in criminal cases when that evidence is “material either to guilt or to punishment.” The Connick Court, in an opinion authored by Justice Thomas, disagreed with Thompson’s argument. According to Justice Thomas’s majority opinion, a single Brady violation—i.e., a one-time failure to disclose “material” evidence—is insufficient to establish liability on a failure-to-train theory.

While seemingly narrow in its holding, Connick is significant because it forecloses one of the few remaining avenues for holding prosecutors civilly liable for official misconduct. The likelihood that a plaintiff will be able to prove the pattern of recurrent misconduct necessary to sustain a § 1983 action is remote. In the wake of Connick, then, advocates of enhanced prosecutorial accountability must look beyond civil liability in search of alternative mechanisms for combating misconduct.

One alternative is readily apparent from the Court’s Connick decision itself: state professional disciplinary procedures. In holding that district attorneys are reasonably entitled to rely on the “professional training and ethical obligations” of their subordinates, the Court noted that “[a]n attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.” Implicit in the Court’s reasoning is a belief that disciplinary procedures effectively deter prosecutorial misconduct. This position echoes the Court’s earlier holding in Imbler v. Pachtman, in which Justice Powell noted that “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”

In reality, prosecutors have rarely been subjected to disciplinary action by state bar authorities. This Essay asks why that is so and what may be done to make bar associations more responsive to allegations against prosecutors. Our findings, based on an investigation into the professional conduct rules and attorney discipline procedures of all fifty states, suggest that disciplinary systems as they are currently constituted do a poor job of policing prosecutors. Nonetheless, we argue that with a few modest reforms, grievance procedures can function as an effective deterrent to prosecutorial misconduct. In Part I, we briefly review the Connick decision, and in Part II we discuss the widespread problem of prosecutorial...
misconduct in the United States and the limited capacity of the civil and criminal justice systems to hold prosecutors accountable for their misdeeds. In Part III, we examine the current state of ethics rules and disciplinary procedures. We then conclude in Part IV with recommendations for enhancing disciplinary procedures with the aim of constructing an efficacious check on prosecutorial misconduct.

CONNICK V. THOMPSON

John Thompson’s execution date was only weeks away when an investigator working for his defense team found an exculpatory blood-evidence report in an obscure file buried in the New Orleans Police Crime Laboratory. By then, Thompson had already spent fourteen years on death row. When Thompson was first tried in 1985, prosecutors in the Orleans Parish District Attorney’s Office had strategically pursued the attempted robbery charge prior to the murder charge, to dissuade Thompson from testifying at his murder trial for fear of his criminal record being introduced to the jury. Prosecutors also neglected to inform Thompson’s public defender that the perpetrator of the robbery had left his blood on the pants leg of one of the victims. A test performed on a swatch of fabric taken from the pants conclusively established that the perpetrator’s blood was type B; Thompson’s blood, which prosecutors never tested, is type O. Years later, when Thompson was finally cleared of the robbery charge and free to testify on his own behalf, the jury at his retrial for murder acquitted him after only thirty-five minutes of deliberation.

Five prosecutors were implicated in the failure to turn over the exculpatory blood evidence. In 1994, nearly ten years after the misconduct occurred, Gerry Deegan, an assistant district attorney on the armed robbery case, confessed to a friend and former prosecutor, Michael Riehlmann, that he had “intentionally suppressed blood evidence.” Three other prosecutors--Bruce Whittaker, James Williams, and Eric Dubelier, all of whom worked with Deegan--knew of the blood evidence and failed to turn it over to Thompson’s attorneys.

Prior to trial, Thompson’s attorneys made a motion to inspect all material evidence and scientific reports and all materials favorable to the defendant. In her dissent from the majority opinion in Connick, Justice Ginsburg outlined three ways in which the prosecution’s response to Thompson’s motion “fell far short of Brady compliance.” First, Dubelier’s response stated that “[i]nspection [was] to be permitted,” but the swatch was signed out of the property room the next day and was not returned until a week later, one day before Thompson’s robbery trial. The swatch itself, however, was never produced at trial or returned to the evidence room. To this day, it has never been recovered; Thompson’s investigator could only locate a microfiche of the lab report. Finally, either Dubelier or Whittaker ordered a pretrial test of the swatch to be rushed; Whittaker received the results, addressed to him, and immediately put them on Williams’s desk. Though the test conclusively established the perpetrator’s blood type, the prosecution never turned it over to the defense.

After the discovery of the exculpatory evidence and his subsequent acquittal, Thompson sued Harry Connick, Sr., the District Attorney of Orleans Parish, alleging that Connick’s deliberate indifference to an obvious need to train the prosecutors in his office caused the prosecutors’ failure to turn over exculpatory evidence in Thompson’s case. It became apparent from evidence presented at trial that Connick’s office offered no formal training to its prosecutors regarding Brady evidence. Connick himself misstated Brady’s requirements in his testimony, as did the other prosecutors questioned. Connick also conceded that he stopped reading legal opinions after he came to office in 1974 and was therefore unaware of important Supreme Court rulings concerning the scope of Brady obligations. Shortly after Connick’s retirement, “a survey of assistant district attorneys in the Office revealed that more than half felt they had not received the training they needed to do their jobs.” Based on this evidence, a jury in the Eastern District of Louisiana awarded Thompson $14 million in damages. The verdict was affirmed by the Fifth Circuit, then reheard and reaffirmed by an equally divided en banc court.

In overturning the Fifth Circuit, the Supreme Court put its full faith in the efficacy of professional standards and disciplinary procedures. Notably, the Supreme Court recognized that Connick knew both that prosecutors in his office encountered Brady issues frequently and that “erroneous decisions regarding Brady evidence would result in constitutional violations.” But a “licensed attorney making legal judgments, in his capacity as a prosecutor,” the Court asserted, “simply does not present ... [a] ‘highly predictable’ constitutional danger.” In reaching this conclusion, the Court determined that professional training provided an adequate safeguard against constitutional violations. Justice Thomas, writing for the majority, specifically referenced lawyers’ education in law school, their completion of the bar exam, continuing education requirements, character and fitness standards, on-the-job training from more experienced attorneys, and the potential imposition of professional discipline as reasons for rejecting single instance failure-to-train liability.
Although Connick purported to answer a narrow question—“whether a district attorney’s office may be held liable under § 1983 for failure to train based on a single Brady violation”—the holding has great significance for those who hoped to see a move toward accountability for prosecutors and their offices, as well as for those who favor prosecutors’ relative freedom from traditional disciplinary measures. In rejecting Thompson’s jury award, the Supreme Court reaffirmed its commitment to prosecutorial immunity, sharply limiting one of the few remaining avenues of redress for prosecutorial misconduct. In the next Part, we provide a broader overview of the problem of prosecutorial misconduct in the United States and the troubling lack of accountability for such misconduct. The history of prosecutorial immunity in particular demonstrates that, in the wake of Connick, state bar disciplinary procedures stand as one of the few—and perhaps the only—means of holding prosecutors accountable for gross misconduct.

II. PROSECUTORIAL MISCONDUCT AND IMMUNITY IN THE UNITED STATES

A. Prosecutorial Misconduct: The Scope of the Problem

Several empirical problems hamper efforts to provide an accurate assessment of prosecutorial misconduct in the United States. First, prosecutors who engage in willful misconduct presumably do not want to be discovered and therefore take steps to conceal their misdeeds. Even a scrupulous prosecutor who witnesses a colleague engage in misconduct may nevertheless fail to report it for fear of professional repercussions.

Second, prosecutors’ offices enjoy considerable autonomy in shaping their internal policies. Although judicial oversight should theoretically check this autonomy, courts are generally loath to interfere with the inner workings of a coordinate branch of government. Likewise, individual prosecutors exercise almost unlimited discretion over whom to prosecute and which offenses to charge. Pretrial hearings ostensibly exist to cabin these powers but in practice rarely operate as an effective safeguard. The lack of any external oversight of prosecutors’ offices creates an environment in which misconduct can go undetected and undeterred.

Third, the vast majority of known instances of prosecutorial misconduct come to light only during the course of a drawn-out trial or appellate proceeding. John Thompson’s ordeal is illustrative: the blood evidence that ultimately exculpated Thompson was obtained at the eleventh hour through the “chance discovery” of a lone investigator hired by his defense team. But most criminal cases in the United States result in plea bargains, which are rarely the subject of extensive investigation or judicial review, creating a heightened risk of undetected prosecutorial misconduct in the plea bargaining context.

Finally, those in the best position to report misconduct—namely judges, other prosecutors, and defense attorneys and their clients—are often disincentivized from doing so for both strategic and political reasons. From the defendant’s perspective, there is little to gain from filing a bar complaint and much to lose. As one state judge has written:

It flies in the face of reason to expect a defendant to risk a prosecutor’s actual or imagined displeasure by instituting proceedings that cannot directly benefit him. The defendant may not unreasonably believe such action will adversely affect his case in subsequent proceedings ... or his later chances for parole.

In other words, a bar complaint could itself negatively impact the outcome of ongoing litigation, if the prosecutor’s need to defend against disciplinary proceedings, or simple resentment at being reported to the authorities, results in less favorable treatment of the defendant. From the defense attorney’s perspective, there is little time for bar complaints when trying a case or handling an appeal. These attorneys are also understandably reluctant to turn in their colleagues, especially given their ongoing professional relationships.

What little evidence we do have indicates that prosecutorial misconduct is a serious problem. A 2003 study by the Center for Public Integrity, for instance, found over two thousand appellate cases since 1970 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals. Another study of all American capital convictions between 1973 and 1995 revealed that state post-conviction courts found “prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty” in one in six cases where the conviction was reversed. Other scholars and journalists have also documented widespread prosecutorial misconduct throughout the United States.

Available statistics significantly underreport the extent of prosecutorial misconduct, not only because of the empirical challenges discussed above, but also because courts have embraced a “harmless error” standard when reviewing criminal convictions. In order to win a reversal, a defendant must not only prove misconduct, but
must also show that the misconduct substantially prejudiced the outcome of his or her trial. Courts can therefore avoid making a finding of misconduct altogether by finding that the alleged error, even if proven, was harmless. By reducing the likelihood of reversal, the harmless error standard substantially weakens one of the primary deterrents to prosecutorial misconduct. Knowing that “minor” misconduct is unlikely to jeopardize a conviction on appeal, prosecutors may be more likely to bend the rules in the pursuit of victory.

There is an obvious need for an effective check on prosecutorial misconduct. Yet, as this Essay will show, no such check currently exists. The next Section reviews five potential means of providing accountability for prosecutorial misconduct and explains how each has been rejected by the courts, left unutilized, or diluted to the point of total ineffectiveness.

B. Prosecutorial Immunity and the Decline of Accountability

In the United States, five main avenues have been explored as potential mechanisms to punish the official misbehavior of prosecutors. As this Section explains, two of these—common-law personal tort liability and personal tort liability under 42 U.S.C. § 1983—have been explicitly rejected by the Supreme Court. The third form of civil liability—municipal liability under § 1983—was, prior to Connick, generally recognized as a viable mechanism for keeping prosecutors’ offices in check. The potential for such liability was thought necessary in part because criminal punishment for prosecutorial misconduct, the fourth avenue, is almost never been utilized in practice. And, as we shall demonstrate, the final avenue—professional responsibility measures—is almost always ineffective in the prosecutorial misconduct context. This is precisely why Connick’s narrowing of municipal liability is so troubling. Indeed, it calls for reform of professional discipline systems to enable them to hold prosecutors accountable in a way that weakened civil remedies cannot.

Since the nineteenth century, American courts have recognized that prosecutors are immune from tort liability for actions performed in the line of duty. After decades of general adherence to this principle by state courts, the Supreme Court recognized prosecutors’ common-law tort immunity from suits for malicious prosecution in 1927, affirming per curiam a decision of the Court of Appeals for the Second Circuit which held that “[t]he immunity is absolute, and is grounded on principles of public policy.” The purposes underlying prosecutorial immunity, as stated by the Supreme Court, are “concern that harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.”

While general tort liability for official misconduct by prosecutors has been regarded as unwise as a matter of policy, the specific issue of prosecutorial liability under 42 U.S.C. § 1983 has a more dynamic, contentious, and recent history. Congress enacted § 1983 during Reconstruction as part of an effort to permit federal courts to supervise compliance with the Fourteenth Amendment, particularly in former Confederate states. The statute creates a cause of action for damages or equitable relief against “[e]very person who, under color of” state law, “subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.” As Justice Douglas wryly noted in his dissent from the Court’s opinion in Pierson v. Ray, in which the majority held that state judges are absolutely immune from damage suits under § 1983, “[t]o most, ‘every person’ would mean every person, not every person except judges.” Yet the Supreme Court extended Pierson’s absolute judicial immunity to state prosecutors in Imbler v. Pachtman. Despite the objections of commentators who note that § 1983’s very purpose was to provide an otherwise unavailable tort remedy for federal constitutional violations committed through the ultra vires abuse of state law power, the Court held that § 1983 “is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.” Thus, the Court applied the longstanding policy of prosecutorial immunity to § 1983 interpretation. The Imbler Court expressly held that prosecutors are absolutely immune from § 1983 damage suits alleging Brady violations.

Perhaps the lack of a personal civil remedy against misbehaving prosecutors would be less consequential if other effective remedies were available. Municipal liability—the avenue for relief advanced by Thompson in Connick—has been considered one such alternative. The Supreme Court’s decision in Monell v. Department of Social Services overturned part of a previous decision, Monroe v. Pape, which had held that Congress did not intend for § 1983 to create liability for constitutional violations on the part of municipalities. In Monell, the Court delved deeply into the history of the statute and concluded:

Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for
monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 “person,” by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental “custom” even though such a custom has not received formal approval through the body’s official decisionmaking channels.

Municipal defendants enjoy neither absolute nor qualified immunity, and--while they cannot be sued under a respondeat superior theory--they are liable when a municipal policy or custom causes a constitutional injury. Before Connick, it appeared that municipal liability could exist where a supervising prosecutor had failed to train line prosecutors regarding their constitutional obligations. However, Connick suggests that plaintiffs will have great difficulty proving that a supervising prosecutor acted as a policymaker in failing to train subordinates--the showing necessary to obtain a remedy under § 1983. Because civil rights plaintiffs must establish that their rights were violated as a result of an official policy or custom, Connick’s holding that a failure-to-train showing can only be made by demonstrating a pattern of violations--information that might be difficult for individual plaintiffs to access--will make such suits exceedingly difficult to win. Moreover, the Court appeared to signal in Connick that a pattern of extremely specific violations, rather than overall misconduct, would be necessary to establish municipal liability. Thus, the class of facts potentially giving rise to municipal liability in prosecutorial misconduct cases is significantly narrowed after Connick.

Alternatives to civil liability have proven no more successful. In the course of upholding official immunity, the Supreme Court in Imbler wrote that prosecutorial misconduct “is reprehensible, warranting criminal prosecution as well as disbarment,” rather than civil damages. Unfortunately, history has not borne out the notion that criminal sanctions or bar discipline are effective tools for deterring and punishing prosecutorial misconduct. In the popular imagination, the idea of criminal liability sometimes appears as a kind of poetically just punishment for unethical prosecutors. As John Thompson wrote in an op-ed published shortly after the Supreme Court’s decision: “I don’t care about the money. I just want to know why the prosecutors who hid evidence, sent me to prison for something I didn’t do and nearly had me killed are not in jail themselves.” However, criminal sanctions for prosecutors who violate Brady are exceedingly rare. The 1999 Illinois trial of the so-called “DuPage Seven,” police officers and prosecutors accused of perjury and obstruction of justice for allegedly framing an innocent defendant in a capital murder case, appears to be the first time in American history that a felony prosecution of former prosecutors for misconduct reached the verdict stage. All of the defendants, however, were acquitted. Although it is difficult to comprehensively determine exactly how many prosecutors have been subject to criminal sanctions for official misconduct throughout U.S. history, the number is surely extremely low. Criminal sanctions are most likely rare because they are seen as an overly harsh punishment for “technical” errors made by people with demanding and stressful jobs. Moreover, the federal criminal statute that allows for punishment of prosecutorial misconduct that violates a defendant’s civil rights--18 U.S.C. § 242--requires that the misconduct be willful, rendering the government’s burden in pursuing criminal punishment for unethical prosecutors under the law daunting and making criminal sanctions available only for a small fraction of instances of misconduct.

Similarly, bar discipline procedures have not proved a fruitful sanction for deterring prosecutorial misconduct. Many state bar disciplinary systems barely seem to contemplate prosecutorial misconduct as a cognizable complaint, focusing instead on fee disputes and failure to diligently pursue a client’s claim. Indeed, only one of the five prosecutors responsible for violating John Thompson’s constitutional rights has ever been disciplined by the attorney grievance system in place in Louisiana. Ironically, that prosecutor is Michael Riehlmann, the only one of the five who was not directly involved in prosecuting Thompson’s case or implicated in any of the Brady violations that occurred and the only attorney to ever report the violations to Louisiana’s Office of Disciplinary Counsel (ODC). Five years after Gerry Deegan had confessed to him about suppressing the blood evidence, Riehlmann reported his conversation with Deegan to ODC after Thompson’s attorneys inquired about his knowledge of the newly discovered crime lab report. The Louisiana Attorney Discipline Board subsequently recommended that Riehlmann’s law license be suspended for six months because he failed to report Deegan’s confession within a “reasonable time” and this failure was “prejudicial to the administration of justice.”
The Supreme Court of Louisiana, however, determined that Riehlmann’s behavior was “merely negligent” and that a public reprimand was the appropriate sanction.

The lack of action taken in Thompson’s case is emblematic of the broader failure of state bar disciplinary procedures to punish those directly engaged in prosecutorial misconduct. The following Part first reviews the ethics rules and disciplinary procedures of all fifty states, highlighting the pervasive flaws in those rules and procedures; and, second, explains how the existing disciplinary regime is ineffective at addressing prosecutorial misconduct.

III. DISCIPLINING PROSECUTORS?

Given the Supreme Court’s repeated endorsement of professional discipline as the appropriate vehicle for addressing allegations of prosecutorial misconduct, one might suppose that state bar agencies frequently sanction prosecutors. In fact, prosecutors are rarely held accountable for violating ethics rules. In 1999, Chicago Tribune reporters Maurice Possley and Ken Armstrong identified 381 homicide cases nationally in which Brady violations produced conviction reversals. Not a single prosecutor in those cases was publicly sanctioned. Four years later, a study by the Center for Public Integrity found 2012 appellate cases between 1970 and 2003 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals. Yet prosecutors faced disciplinary action in only forty-four of those cases, and seven of these actions were eventually dismissed. The most recent study indicates that depressingly little has changed since 2003, at least in California. The Northern California Innocence Project identified 707 cases between 1997 and 2009 in which courts made explicit findings of prosecutorial misconduct, 159 of which were deemed harmful. The Project’s review of the public disciplinary actions reported in the California State Bar Journal, however, revealed a mere six—out of a total of 4741—that involved prosecutorial misconduct.

As these studies indicate, infrequent punishment of prosecutors cannot be blamed on a paucity of discoverable violations. Even when judicial findings of misconduct result in conviction reversals, disciplinary sanctions are almost never imposed against the offending prosecutor. This Part endeavors to explain why prosecutors are rarely sanctioned by state bar authorities.

Our conclusions derive from a comprehensive survey of the ethical rules and disciplinary practices of all fifty states. As part of the survey, we compiled comparative data on each state’s rules of professional conduct and rules of disciplinary procedure. In addition, we consulted all fifty discipline agency websites and conducted telephone interviews with bar personnel to glean additional information about the complaint process. We further supplemented our research with statistical data compiled by the American Bar Association as part of its 2009 Survey on Lawyer Discipline Systems.

The data from our survey suggest four broad causes for the breakdown in attorney discipline systems with respect to prosecutors. First, the ethical rules that govern prosecutorial behavior fail to proscribe most forms of prosecutorial misconduct. Second, the procedures governing attorney discipline systems afford complainants too few rights and administrators too much discretion. Third, those who are in the best position to discover prosecutorial misconduct—judges, prosecutors, and defense attorneys—routinely fail to report it. Fourth, overlapping policing mechanisms create confusion about the appropriate locus of disciplinary authority.

A. Model Rule 3.8: A Weak Check on Prosecutorial Misconduct

Ethics rules create legally enforceable obligations that can shape norms of behavior. Accordingly, this Part begins by discussing the ethical obligations of prosecutors as defined by Rule 3.8 of the American Bar Association’s Model Rules of Professional Conduct. In the next Section, we consider the degree to which individual states have deviated from this Model Rule in enacting their own rules of professional conduct. In the final Section, we examine the existing disciplinary mechanisms used by states to enforce their rules of professional conduct.

For over one hundred years, states have looked to the ABA for guidance when constructing their local rules for attorney discipline. The Model Rules of Professional Conduct, first promulgated in 1983 and substantially revised in 2002, have proven especially influential. Every state save California has adopted attorney ethics codes that substantially mirror the Model Rules.

The Model Rules generally do not distinguish between private attorneys and prosecutors. All lawyers are expected to conduct themselves in accordance with its general provisions. Model Rule 3.8 is exceptional, however, in that it defines certain “special” ethical duties unique to prosecutors, including the obligation not to pursue charges against an individual in the absence of probable cause and the affirmative responsibility to disclose exculpatory evidence in a timely fashion. While other Model Rule provisions apply equally to prosecutors and private attorneys, Rule 3.8 is the only rule that directly addresses the prosecutorial function. Consequently, its provisions serve as a baseline for
measuring prosecutorial misconduct.

Rule 3.8 embodies Justice Sutherland’s general admonition in *Berger v. United States* that “while [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones.” Commentary on the Rule underscores this admonition by noting that a prosecutor’s role is to be a “minister of justice and not simply ... an advocate.” Accordingly, the Rule places both negative and affirmative responsibilities on prosecutors. A prosecutor shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(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 unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

1. the information sought is not protected from disclosure by any applicable privilege;

2. the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

3. there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

1. promptly disclose that evidence to an appropriate court or authority, and

2. if the conviction was obtained in the prosecutor’s jurisdiction,

   i. promptly disclose that evidence to the defendant unless a court authorizes delay, and

ii. undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

On its face, Rule 3.8 appears to justify the Supreme Court’s confident assertion that a “well-developed and pervasive mechanism” exists for policing prosecutorial misconduct. The Rule addresses many of the prosecutor’s most important ethical duties, including those related to his charging discretion in (a), discovery obligations in (d), subpoena power in (e), duty to inform the public in (f), and review of wrongful conviction claims in (g) and (h). Moreover, in some cases the Rule imposes obligations on prosecutors broader than those required by constitutional case law or rules of criminal procedure. For instance, under *Brady* a prosecutor is only required to produce evidence “upon request” that he determines is “material either to guilt or to punishment.” Rule 16 of the Federal Rules of Criminal Procedure similarly confines a federal prosecutor’s discovery obligations to the production of *Brady or Giglio* evidence “upon a defendant’s request.” By contrast, Rule 3.8(d) obligates prosecutors to voluntarily turn over all favorable evidence and to do so in a timely manner. In this way, Rule 3.8(d) is more rigorous than *Brady*’s material standard by requiring disclosure of exculpatory or mitigating evidence regardless of whether the favorable evidence is dispositive of the ultimate issue of guilt. As the ABA noted in a formal advisory opinion interpreting Rule 3.8, section (d) “requires prosecutors to steer clear of the constitutional line, erring on the side of caution.”
While Rule 3.8 might expose prosecutors to a heightened standard of conduct in theory, the Rule’s vague terminology undermines its efficacy and enforceability in practice. Rule 3.8(d) exemplifies this problem. Neither the text of that provision nor the accompanying commentary explains the proper standard for determining whether evidence is “favorable” to an accused. Likewise, the rule provides little guidance regarding the knowledge and timeliness requirements. In its formal advisory opinion, the ABA interpreted evidence that is “known to the prosecutor” to mean evidence of which the prosecutor has actual, rather than constructive, knowledge. Consequently, according to the ABA’s interpretation, “Rule 3.8(d) does not establish a duty to undertake an investigation in search of exculpatory evidence.” This interpretation greatly limits the Rule’s prophylactic potential and actually imposes an ethical standard below the constitutional minimum. As the Supreme Court explained in Kyles v. Whitley, under Brady, “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 the ABA’s interpretation would permit a prosecutor to pursue a conviction without having familiarized himself with the most basic aspects of the case, such as an arresting officer’s police report and witness statements. Even if a prosecutor did read these materials and in doing so discovered certain inconsistencies, it is not clear under the ABA’s interpretation of the Rule that he would be ethically bound to undertake further investigation.

Rule 3.8’s prescriptive force is also greatly diminished by its failure to address many important aspects of the prosecutorial function. Over ninety percent of federal criminal prosecutions result in guilty pleas, yet the Model Rule nowhere explains how prosecutors should conduct themselves in plea negotiations. Rule 3.8(a) obliquely addresses the issue of charging discretion by urging that a prosecutor should “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.” But the probable cause determination is a minimal standard that is typically decided by the grand jury; a body that, as the popular saying goes, could be convinced to indict a ham sandwich. Furthermore, the ethics rules do not prohibit a prosecutor who wishes to gain leverage in plea negotiations from filing a charge that he has no intention of bringing to trial.

Returning to the hypothetical posited above, suppose a prosecutor does undertake an investigation into inconsistent witness statements and learns of information unquestionably favorable to the defense, such as a disagreement between two primary witnesses over the defendant’s race. Under the Model Rules, a prosecutor who is nonetheless convinced of the defendant’s guilt is arguably under no obligation to present this information to the grand jury. Nor is he necessarily obligated to disclose the information to defense counsel during plea negotiations. Although in its formal opinion the ABA interprets “timely” to mean “as soon as reasonably practical,” that is not enforceable. A prosecutor looking to obtain a tactical advantage during plea negotiations may make a calculated decision to interpret “timely” as meaning any time prior to trial.

In sum, Model Rule 3.8 promises on its face more than it delivers in practice. While there are many instances of prosecutorial misconduct that clearly fall within its ambit, the Rule fails to address some of the more significant aspects of the prosecutor’s justice-seeking role. As one commentator has aptly noted, “there is no principled reason for a disciplinary code to include only the particular provisions now included in Model Rule 3.8.” By failing to cover the full scope of prosecutorial misconduct, Model Rule 3.8 offers states a flawed template upon which to base their own ethics rules.

B. Diluting Rule 3.8 at the State Level

State disciplinary authorities have the potential to rein in unethical behavior by prosecutors. They can only perform this function, however, if states adopt ethics rules with bite. This Section describes the inconsistent and incomplete implementation of Rule 3.8 or other similar provisions by local disciplinary authorities. The failure of many states to adequately define the special role of a prosecutor in their rules casts doubt on the Supreme Court’s optimism about professional discipline’s potential to check prosecutorial misconduct.

While every state save California has adopted a version of Model Rule 3.8, our research shows that few have gone beyond its minimal standards. Many states, in fact, have compounded Rule 3.8’s weaknesses by adopting watered-down versions of the Rule that omit or materially alter its most substantive provisions. States have also been slow historically in adopting strengthening amendments to the Rule. This trend has continued with the two most recent amendments promulgated in 2008, provisions (g) and (h), both of which focus much-needed attention on the steps a prosecutor must take when confronted with credible evidence of a convicted person’s innocence. The failure of many states to ratify these and other amendments in a timely fashion, together with the substantive deviations mentioned above, has resulted in a patchwork of ethics rules that lacks rhyme or reason.

The table below offers a visual depiction of the degree to which states have adopted Model Rule 3.8’s various provisions. The data paint a decidedly mixed picture of state compliance. Only one state, Idaho, has adopted
Model Rule 3.8 in its entirety. While specific provisions garner nearly unanimous approval, others have proven less popular. Rule 3.8(g) and (h), which both deal with wrongful convictions, were approved by the ABA’s House of Delegates in February of 2008. However, as explained below, the slow pace of states’ adoption of those provisions is itself indicative of a ratification process that is dysfunctional.

As Figure 1 demonstrates, every state that follows the Model Rules has adopted some version of sections (a) and (d). This reflects the fact that (a) and (d) comprised the entirety of Rule 3.8 as first promulgated in 1969 in the predecessor to the Model Rules. States’ modifications to these provisions, however, have not followed a consistent pattern. Divergence between North Dakota and South Dakota in their respective adoptions of Rule 3.8(d) illustrates the point. North Dakota, on the other hand, kept the Model Rule’s vague timeliness requirement and replaced its emphasis on broader disclosure with Brady’s considerably less demanding standard.

Figure 1.

STATE ADOPTION OF MODEL RULE 3.8 PROVISIONS

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
Provisions (b) and (c), two of the first amendments to the Rule, have also been widely adopted. Yet, such widespread adoption may be of little consequence, as the importance of these provisions has been questioned by commentators. Rule 3.8(b) requires a prosecutor to “make reasonable efforts” to ensure a defendant is advised of his right to counsel, and 3.8(c) prohibits a prosecutor from seeking a waiver of that defendant’s pretrial rights, including the right to a preliminary hearing. Defendants, however, are normally advised of these rights during their first appearance before a judge. Neither provision is therefore likely to arise during the ordinary course of a prosecutor’s work. One state—Wisconsin—has, in fact, adopted versions of provisions (b) and (c) that impose a far more substantive standard on prosecutors by requiring that they identify their “role and interest in the matter” when questioning a defendant in addition to apprising him of his right to counsel. However, unless the ABA opts to update its rule to reflect these modifications, other states are unlikely to follow Wisconsin’s lead.

Rule 3.8(e), which concerns intrusions into the lawyer-client relationship through the use of lawyer subpoenas, has only been adopted in full or modified form by thirty-two states. Since its introduction in 1990, Rule 3.8(e) has stirred substantial controversy. The Justice Department, whose attorneys’ aggressive use of the subpoena power prompted the provision in the first place, immediately expressed its disagreement with 3.8(e) by seeking court rulings exempting federal prosecutors from its reach. After the Third Circuit issued a decision endorsing the Justice Department’s position, the ABA’s House of Delegates voted to remove a clause from 3.8(e) that required prosecutors to obtain a judicial order before issuing a subpoena. Even with this amendment, many states have opted to forego the new rule.

Finally, provisions (g) and (h) have only been adopted by five states since their introduction in 2008. These important provisions extend a prosecutor’s Brady obligations to evidence of non-guilt that comes to light after trial. The story of their enactment by the ABA and subsequent implementation by individual states is simultaneously encouraging and troubling. On the positive side, Rule 3.8(g) and (h) originated from a proposal made by the Bar of the City of New York to the New York State Bar. This grassroots approach stands in stark contrast to the normal mechanism by which Rule 3.8 is amended. Ordinarily, revisions are made by an ethics committee whose members boast no particular expertise in criminal justice matters. For instance, in preparation for the new millennium, the ABA instituted a major reform initiative called Ethics 2000, the object of which was to encourage state uniformity in rule adoption as well as to update those rules to better reflect the pace of technological change. Despite a report identifying Rule 3.8’s shortcomings, however, the Ethics Commission made only one minor alteration—one that arguably weakened the Rule. The Ethics 2000 reforms did have the salutary effect, however, of causing state bar associations to revisit their ethics rules. When the New York State Bar turned its attention to that task in 2005, its members found themselves troubled by a spate of wrongful convictions uncovered by the Innocence Project.

The process of Rule 3.8(g) and (h)’s adoption, however, should also serve as a cautionary tale. To begin with, New York never adopted the rule that its own bar agency
proposed. This is because state bar associations only have the power to propose rules; each state’s highest court possesses the ultimate authority to issue rules governing attorney behavior. In the abstract, there may be both substantive and symbolic reasons that justify this separation; however, in actuality, New York’s highest court chose to reject the proposed changes without offering a single reason for its decision.

The slow pace of Rule 3.8(g) and (h)’s adoption offers a second cause for concern. To date, only five states have adopted the provisions in full or modified form. Eleven other states are currently considering amending their versions of Rule 3.8. The remainder, thirty-four states in total, have taken no action. The lesson appears to be that piecemeal ethics reforms are unlikely to garner significant attention from state bar associations. Indeed, the only reason the newest amendments have received as much attention as they have is because some states are still in the process of implementing the Ethics 2000 reforms. The poor track record of amendment adoptions prior to Ethics 2000 is further evidence that rulemaking inertia may be the biggest stumbling block to meaningful reform efforts.

C. Disciplinary Systems

The corollary to the ethics rules are the disciplinary systems established to enforce those rules. Without consistent enforcement by the bodies charged with overseeing attorney discipline, ethics rules are little more than empty promises. This Section therefore catalogs the various features of all fifty state disciplinary systems in an effort to explain the lax enforcement of prosecutorial ethics rules. In examining these systems to better understand why they fail to discipline prosecutors, we highlight the wide divergence between state disciplinary systems in terms of their transparency and responsiveness. Many states actively discourage potential grievance filers by erecting procedural barriers like statutes of limitations, notarized document requirements, or mandatory referral programs. Moreover, disciplinary agencies rarely initiate investigations sua sponte, preferring instead to rely on those personally affected by lawyer misconduct to bring claims to the agency’s attention. While these deficiencies in state disciplinary systems are not peculiar to matters involving prosecutorial misconduct, their significance is heightened in that context given the potential liberty interests involved.

Like state ethics rules, most state disciplinary systems follow a model code developed by the ABA. The current version of the code, the Model Rules for Lawyer Disciplinary Enforcement, was adopted in 1989 and last amended in 2002. Under this model, complaints are received by a central intake office, which determines whether the complaint states a colorable claim that merits further investigation. Statistics show that, in most jurisdictions, the majority of complaints are dismissed at this stage. Those that remain open are forwarded to an administrator for further review. The attorney named in the complaint is then afforded an opportunity to respond before the disciplinary agency decides whether to file a formal complaint. At this stage, many states offer attorneys accused of minor offenses the opportunity to participate in diversion programs or accept a private reprimand in lieu of further action. Should an attorney accept either option, the investigation will remain confidential. Once the administrator or hearing board files a formal complaint, however, the proceedings are made public. Because most disciplinary agencies do not publish statistics concerning the number of prosecutorial misconduct claims they receive, there is no method to determine how many claims of that nature result in private sanctions. If a formal complaint is filed, adversarial hearings are scheduled to review the allegations and solicit testimony from the parties involved. The hearing committee will subsequently issue findings of fact and recommend one of several possible dispositions: dismissal, reprimand, censure, probation, suspension, or disbarment. Each state’s court of last instance, under whose authority bar organizations operate, acts as an appellate body and retains final review over the imposition of any sanctions.

While the ABA aspires to offer a “simple and direct procedure for making a complaint,” even this modest aim has proven elusive. Only four states, for example, offer complainants the opportunity to submit their complaints online. Most other states offer a complaint form that can be downloaded and mailed, but twelve states do not. Complainants in the latter must either file their complaints over the telephone, request that a form be mailed to them, or enter into mandatory consumer assistance programs. Although no state charges a filing fee, both Kentucky and New Hampshire require complaints to be notarized.

Some states actively discourage complainants from filing allegations of misconduct. Mississippi’s bar association, for instance, goes to great lengths to warn complainants of the serious consequences that can result from filing a complaint. The bar association’s website begins its appeal by reminding potential filers that “lawyers are human.” The website continues, “The lawyer [complained against] inevitably suffers from the accusation, regardless of whether any misconduct is ultimately found. But, if you believe the complaint is well-founded, by all means make it! A complaint cannot be withdrawn once it has been received in this office.” Georgia discourages complaints in a different way by requiring prospective filers to go
through a mediation program before deciding whether to pursue a formal complaint. The mediation program reflects a disciplinary system whose primary focus is private disputes between attorneys and their clients. In designing its disciplinary system, Georgia’s bar officials apparently did not envision complaints concerning prosecutorial misconduct, which ordinarily would not be amenable to mediation.

Filing a complaint is only a minor hurdle compared to the subsequent steps that must be taken before a complaint is finally resolved. Primarily, the problem is that complaints must work their way through a byzantine structure of state disciplinary systems. Compounding the problem is confusion over where the authority of the court ends and the disciplinary system begins. In the context of prosecutorial misconduct in particular, disciplinary system administrators may be wary of inserting themselves into ongoing court proceedings. The complexity of the procedure also results in substantial delay in resolving complaints. Data compiled by the ABA reveal that the amount of time between the filing of a complaint and the imposition of a public sanction in some states can take more than one thousand days. This lag time is likely to disincentivize those who might have a legitimate grievance from pursuing a disciplinary remedy.

Statutes of limitation pose a further barrier to potential claimants that can be especially problematic in the context of prosecutorial misconduct because such violations often come to light only years after their occurrence. At least twenty-one states impose some kind of statute of limitations on grievance filers. These range in length from as little as two years from the occurrence of the incident giving rise to the misconduct, to as many as ten years after its discovery. These statutes of limitations pose barriers to grievance filers and are fundamentally at odds with the ABA’s Model Rules, which caution that such statutes are “wholly inappropriate in lawyer disciplinary proceedings.”

Although states that have statutes of limitations in place will generally toll them if the misconduct was not discovered due to fraud or concealment, time limitations can be a major impediment to holding prosecutors responsible for misconduct, as a recent case in North Carolina demonstrates. In 2005, the State Bar of North Carolina brought a series of charges against two district attorneys, Scott Brewer and Kenneth Honeycutt. The complaint charged the attorneys with violating a host of ethics rules for failing to report an immunity deal given to a witness in exchange for his testimony in a capital murder trial. The North Carolina State Bar, however, requires that all grievances be filed within six years of the offense, exempting only actions involving felonious criminal conduct. Because they were concerned about the potential negative impact of a bar complaint on their client’s trial, the defendant’s attorneys chose to wait before filing. Consequently, the State Bar Disciplinary Hearing Commission held that the complaint was time-barred. The Commission also invalidated the felonious criminal conduct exception because the North Carolina Supreme Court had failed to publish the rule as required by statute, effectively precluding any possible ethical sanctions against the prosecutors. In upholding the Commission’s decision, a panel for the North Carolina Court of Appeals wrote that it was “cognizant” that its decision would “leave the State Bar unable to act if an aggrieved party learns of concealed misconduct by an attorney but does not report it to the State Bar.” Nonetheless, the court felt bound by traditional canons of statutory interpretation to affirm the Commission’s ruling.

State disciplinary authorities, which are comprised almost entirely of lawyers, also exercise nearly unbridled discretion in deciding whether to pursue individual complaints. While every state will dismiss a complaint for failing to state a colorable claim, it does not follow that every colorable claim is fully investigated. Instead, a disciplinary authority may decide not to pursue a complaint as a matter of resource allocation or because a reviewing attorney merely suspects that it lacks merit. In some states, like Florida, an investigation may be closed even where ethics violations are shown to have occurred, under the theory that “[t]he investigation of a complaint frequently has deterrent value in and of itself.” Furthermore, disciplinary authorities often conduct their proceedings in secret and require strict confidentiality from complainants. They may also decide to dispose of a case by issuing a private reprimand to the attorney involved. The lack of laypersons on hearing boards and review panels compounds the problem by creating the appearance of bias toward lawyers.

Measuring state disciplinary systems’ responsiveness to prosecutorial misconduct in particular is hampered by a paucity of available statistics. Only one state, Illinois, publishes data on the number of complaints of prosecutorial misconduct received and investigated on an annual basis. But if that data are indicative of the way most states handle such claims, they paint a bleak picture. The statistics show that, in 2010, charges against 4016 attorneys were docketed by the Illinois Attorney Registration and Disciplinary Commission, of which ninety-nine involved charges of prosecutorial misconduct. Only one of these ninety-nine cases, however, actually reached a formal hearing. In other words, the Illinois disciplinary commission held as many formal hearings involving charges of prosecutorial misconduct as it did charges of “bad faith avoidance of a student loan.”

To make matters worse, the grievance process in many
states does not provide complainants with the opportunity to appeal the dismissal of their complaint unless it has reached the hearing stage. As Florida explains to prospective filers in its bar consumer pamphlet: “Your role in a disciplinary complaint is that of the complaining witness, similar to the role of a victim in a criminal proceeding. As such, you are not a party to the adjustment proceeding in that the Bar counsel does not represent you as your lawyer.” Twenty-three states provide no recourse for complainants wishing to appeal a disciplinary staff attorney’s decision to dismiss their complaint, while several other states provide for redress in only limited circumstances.

In light of the foregoing shortcomings in state disciplinary procedures, the Supreme Court’s faith in the ability of those procedures to adequately check prosecutorial misconduct seems misplaced. Yet, rather than simply lamenting Connick as another barrier to holding prosecutors accountable for their misdeeds, scholars and advocates alike should take seriously the Court’s insistence that bar disciplinary procedures are the appropriate mechanism for policing misconduct. Accordingly, in the next Part, we offer suggestions for strengthening ethics rules and disciplinary procedures to achieve a regime of greater accountability for prosecutors.

IV. RECOMMENDATIONS

There are many important steps that prosecutors’ offices, state judiciaries, and bar associations should take to ensure an environment in which proper incentives and adequate training enable prosecutors to seek justice. Our recommendations here reflect our findings and focus on the responsibilities of the state courts of last instance, as well as on the role of state attorney grievance procedures, in building mechanisms that inform the responsibilities of prosecutors and that live up to the U.S. Supreme Court’s expectations regarding the efficacy of lawyer discipline.

Prosecutors have different professional and ethical obligations than private attorneys. Grievance mechanisms should be strong enough to hold prosecutors to these heightened obligations. To better protect the rights of the accused and to ensure a just system that adequately checks prosecutorial misconduct, state supreme courts and state bar associations should take the following actions to ensure that the rules governing prosecutorial conduct are adequate and that lawyer discipline procedures ensure the efficacy of the rules.

A. Rules of Professional Conduct

The starting point for improving state attorney grievance mechanisms is the promulgation of an effective rule defining the ethical obligations of prosecutors. The ABA should begin a dialogue with states and the Department of Justice about expanding Rule 3.8 to more completely address the unique ethical challenges that face prosecutors. Important areas of prosecutorial function include investigating crimes, negotiating pleas, and exercising discretion in charging crimes. These responsibilities are not adequately addressed in the Model Rules, an oversight that leaves much of the prosecutorial function outside the scope of ethical regulation or guidance.

First, states should expedite the review and adoption of sections (g) and (h), which create new ethical obligations for a prosecutor who becomes aware of evidence suggesting or establishing the non-guilt of a convicted defendant. Since sections (g) and (h) were added to Model Rule 3.8 in February 2008, only one state--Idaho--has adopted the modified rule in its entirety. Three more--Colorado, Tennessee, and Wisconsin--have adopted section (h) and modified versions of section (g), and one further state--Delaware--has adopted a hybrid version of (g) and (h). The Criminal Justice Section of the ABA emphasized the importance of these additions, noting that “[t]he obligation to avoid and rectify convictions of innocent people, to which the proposed provisions give expression, is the most fundamental professional obligation of criminal prosecutors.”

Second, states can influence the ABA and the Department of Justice in the design of Model Rule 3.8. By promulgating tougher rules in their state codes, states can pressure the ABA to address the deficiencies in the Model Rule. Proactively defining the scope of the ethical obligations that should govern prosecutorial conduct can inform the ABA’s own deliberation and amendment of its rules.

B. State Grievance Procedures

Attorney grievance procedures must inspire confidence in the regulatory system governing attorney behavior. As such, bar associations and state supreme courts should take pains to avoid the pitfalls of a system that relies on self-regulation. State supreme courts should assume full and independent control over disciplinary processes. Elected bar officials governing the disciplinary process create the impression of self-regulation that can lead to suspicion of bias in the proceedings. Laypersons should have an active and substantial role in the grievance process. Non-lawyers comprise a third of the grievance boards (i.e., appellate review) of nine states (Arizona, Connecticut, Delaware, Idaho, Louisiana, Massachusetts, Oregon, New Jersey, and New Mexico). Two states
(Kansas and California) do not have any non-lawyers participating in grievance process, at the committee (i.e., trial) or board level. In other states, disciplinary organizations are overwhelmingly controlled by the bar; South Dakota’s disciplinary board, for instance, consists of six bar members appointed by the President of the State Bar Association and only one layperson appointed by the Chief Justice. A more balanced distribution of influence between the judiciary and the bar would signal that disciplinary bodies take seriously the dangers of self-policing. Legitimacy and the perception of fairness decrease when self-regulation is the chosen method for governing attorney conduct.

Grievance procedures should be simple and accessible so that potential claimants are incentivized to file colorable claims of misconduct. Structural disincentives may dissuade potential claimants from using bar grievance mechanisms. As our findings show, procedures for bringing a grievance complaint vary greatly in their accessibility and form from state to state. Any interested party—including third parties, such as advocacy organizations, law school clinics, and the general public—should be able to bring a grievance alleging prosecutorial misconduct. States should also lengthen or abolish statutes of limitations and explicitly provide for tolling where misconduct has been concealed or where equitable factors, such as the pursuit of a criminal appeal, have impeded parties from pursuing an ethics complaint. Furthermore, providing access to easy-to-use complaint forms in courthouses and online would facilitate filings. Many state supreme court and bar association websites are discouragingly difficult to navigate. State grievance procedures and infrastructure, as administered by state judiciaries and bar associations, should invite claims of prosecutorial misconduct by ensuring that both the public and interested parties can easily file a claim.

Procedures to investigate and sanction prosecutorial misconduct should also encourage adjudication of colorable claims. Because of infrequent adjudication and the opacity of most bar systems, the standards Rule 3.8 imposes on prosecutorial conduct are neither clearly defined nor given substance by precedential case law. State grievance agencies need to be properly resourced, both financially and with experienced investigators knowledgeable in the intricacies of criminal justice and the role of prosecutors. Further, disciplinary committees should institute automatic filing of ethics complaints, triggered whenever a court finds (whether on direct appeal, collateral review, or otherwise) that a prosecutor has behaved unethically. Judges in particular should be compelled to flag an instance of misconduct for review by the grievance committee. Automatic filing will trigger investigation and take the process of submitting a formal complaint out of the hands of busy or disincentivized attorneys and court officials. All states should enforce rules requiring attorneys who are aware of prosecutorial misconduct to report it promptly; the entire profession should be held responsible for the administration of justice. Increased adjudication of ethics complaints would better inform both bar investigators and prosecutors of the obligations and standards of prosecutorial behavior.

State grievance committees should undertake regular and randomized auditing of cases in their jurisdictions to increase the likelihood that prosecutorial misconduct will be discovered and remedied. A grievance investigator could be tasked with reviewing a randomly selected sample of cases and undertaking an investigation to ascertain whether professional and ethical rules are being followed. If the investigation uncovers errors, a state bar committee could—in addition to the regular grievance process in place—work directly with the prosecutor’s office to explain the errors, thus demonstrating the professional rules specifically applicable to prosecutors. Such a system of audits would contribute to prosecutors’ incentives to understand and comply with their legal and ethical obligations and serve a pedagogical role in educating prosecutors about the scope of those duties.

Finally, transparency of process is important both to legitimize the grievance process and to inform laypersons and prosecutors alike of the appropriate standards of conduct. To varying degrees in the states surveyed, bar disciplinary investigations are largely confidential. When a grievance committee dismisses charges before a public hearing, there is no record or published opinion. An increased practice of issuing written and public findings in disciplinary cases that do not result in sanctions by the state supreme court would increase transparency and legitimacy. Written opinions are, of course, routine in the context of dismissed civil lawsuits and criminal cases. Making all grievance decisions available to the public and easily searchable on an online database would serve to inform interested parties of the grievance’s disposition and would educate prosecutors about their ethical and professional responsibilities.

Further, complainants and interested parties should be able to discern the path their complaint will take once filed. The grievance procedures of many states make adjudicating a claim unnecessarily complex. A quick and efficient system with as few steps as possible between complaint and investigation is important to prevent colorable claims from falling through the cracks.

CONCLUSION

The Connick decision reflects the Supreme Court’s
historical reliance on ethics rules and state disciplinary procedures to regulate prosecutorial behavior. Irrespective of the wisdom of the Court’s reasoning, the ethics rules governing prosecutorial behavior need to be expanded and strengthened, and the disciplinary procedures tasked with enforcing them reformed, if our legal system is to justifiably rely on professional sanctions to deter prosecutorial misconduct. The job of a prosecutor is to do justice; the structure in which the prosecutor works should, at a minimum, enable and encourage ethical behavior in this pursuit.
CRIMINAL LAW 2.0

HON. ALEX KOZINSKI

I

Although we pretend otherwise, much of what we do in the law is guesswork. For example, we like to boast that our criminal justice system is heavily tilted in favor of criminal defendants because we’d rather that ten guilty men go free than an innocent man be convicted. There is reason to doubt it, because very few criminal defendants actually go free after trial. Does this mean that many guilty men are never charged because the prosecution is daunted by its heavy burden of proof? Or is it because jurors almost always start with a strong presumption that someone wouldn’t be charged with a crime unless the police and the prosecutor were firmly convinced of his guilt? We tell ourselves and the public that it’s the former and not the latter, but we have no way of knowing. They say that any prosecutor worth his salt can get a grand jury to indict a ham sandwich. It may be that a decent prosecutor could get a petit jury to convict a eunuch of rape.

The “ten guilty men” aphorism is just one of many tropes we assimilate long before we become lawyers. How many of us, the author included, were inspired to go to law school after watching Juror #8 turn his colleagues around by sheer force of reason and careful dissection of the evidence? “If that’s what the law’s about, then I want to be a lawyer!” I thought to myself. But is it? We know very little about this because very few judges, lawyers and law professors have spent significant time as jurors. In fact, much of the so-called wisdom that has been handed down to us about the workings of the legal system, and the criminal process in particular, has been undermined by experience, legal scholarship and common sense. Here are just a few examples:

1. Eyewitnesses are highly reliable. This belief is so much part of our culture that one often hears talk of a “mere” circumstantial case as contrasted to a solid case based on eyewitness testimony. In fact, research shows that eyewitness identifications are highly unreliable, especially where the witness and the perpetrator are of different races. Eyewitness reliability is further compromised when the identification occurs under the stress of a violent crime, an accident or catastrophic event—which

1. The author is a judge on the Ninth Circuit. He wishes to acknowledge the extraordinary help provided by his law clerk, Joanna Zhang. © 2015, Alex Kozinski.
2. Actually, as Sasha Volokh points out, the number of guilty men we are willing to free to save an innocent one is somewhat indeterminate. See Alexander “Sasha” Volokh, n Guilty Men, 146 U. Pa. L. Rev. 173, 187-92 (1997).
4. 12 ANGRY MEN (United Artists 1956).
5. I’ve done it twice, and I can’t say I know much more about the process. One case was so clear-cut that only one verdict was possible. The other one was closer and resulted in a hung jury, but doubtless would have resulted in a swift conviction but for my participation.
pretty much covers all situations where identity is in dispute at trial. In fact, mistaken eyewitness testimony was a factor in more than a third of wrongful conviction cases. Yet, courts have been slow in allowing defendants to present expert evidence on the fallibility of eyewitnesses; many courts still don’t allow it. Few, if any, courts instruct juries on the pitfalls of eyewitness identification or caution them to be skeptical of eyewitness testimony.

2. Fingerprint evidence is foolproof. Not so. Identifying prints that are taken by police using fingerprinting equipment and proper technique may be a relatively simple process, but latent prints left in the field are often smudged and incomplete, and the identification process becomes more art than science. When tested by rigorous scientific methods, fingerprint examiners turn out to have a significant error rate. Perhaps the best-known example of such an error occurred in 2004 when the FBI announced that a latent print found on a plastic bag near a Madrid terrorist bombing was “a 100 percent match” to Oregon attorney Brandon Mayfield. The FBI eventually conceded error when Spanish investigators linked the print to someone else.

3. Other types of forensic evidence are scientifically proven and therefore infallible. With the exception of DNA evidence (which has its own issues), what goes for fingerprints goes double and triple for other types of forensic evidence:

- Spectrographic voice identification error rates are as high as 63%, depending on the type of voice sample tested. Handwriting error rates average around 40% and...
sometimes approach 100%. False-positive error rates for bite marks run as high as 64%. Those for microscopic hair comparisons are about 12% (using results of mtDNA testing as the criterion).  

Other fields of forensic expertise, long accepted by the courts as largely infallible, such as bloodstain pattern identification, foot and tire print identification and ballistics have been the subject of considerable doubt. Judge Nancy Gertner, for example, has expressed skepticism about admitting expert testimony on handwriting, canines, ballistics and arson. She has lamented that while “the Daubert-Kumho standard [for admitting expert witness testimony] does not require the illusory perfection of a television show (CSI, this wasn’t), when liberty hangs in the balance—and, in the case of the defendants facing the death penalty, life itself—the standards should be higher . . . than [those that] have been imposed across the country.”

Some fields of forensic expertise are built on nothing but guesswork and false common sense. Many defendants have been convicted and spent countless years in prison based on evidence by arson experts who were later shown to be little better than witch doctors. Cameron Todd Willingham may have lost his life over it.

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14. Id. at 895 (internal citations omitted); see United States v. Starcevich, 880 F. Supp. 1027, 1038 (S.D.N.Y. 1995) (McKenna, J.) (“the testimony at the Daubert hearing firmly established that forensic document examination, despite the existence of a certification program, professional journals and other trappings of science, cannot, after document examination, despite the existence of a certification program, professional journals and other trappings of science, cannot, after Daubert, be regarded as scientific . . . knowledge”) (internal quotation marks omitted); see also Radley Balko, How the Flawed “Science” of Bite Mark Analysis Has Sent Innocent People to Prison, Wash. Post (Feb. 13, 2015), http://www.washingtonpost.com/news/the-watch/wp/2015/02/13/how-the-flawed-science-of-bite-mark-analysis-has-sent-innocent-people-to-jail/ (4-part series criticizing the failure of courts to accept the consensus in the scientific community that “bite mark matching isn’t reliable and has no scientific foundation for its underlying premises, and that until and unless further testing indicates otherwise, it shouldn’t be used in the courtroom”).


16. Hines, 55 F. Supp. 2d at 69-71 (ruling that a handwriting expert may not give an ultimate conclusion on the author of a robbery note, and remarking that “[t]here is no academic field known as handwriting analysis,” as “[t]his is a ‘field’ that has little efficacy outside of a courtroom”).


19. Hebschie, 754 F. Supp. at 114-15 (summarizing recent “public and professional literature reflecting increasing scrutiny of arson evidence by experts in both the scientific and legal fields as well as by the public at large,” and expressing concerns about arson expert testimony rooted in “bad science” and “unreliable methodologies”).


23. See Robert Tanner, Science Casts Doubt on Arson Convictions, Wash. Post (Dec. 9, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/12/09/AR2006120900357.html; David Grann,
4. DNA evidence is infallible. This is true to a point. DNA comparison, when properly conducted by an honest, trained professional will invariably reach the correct result. But the integrity of the result depends on a variety of factors that are, unfortunately, not nearly so foolproof: the evidence must be gathered and preserved so as to avoid contamination; the testing itself must be conducted so that the two samples being compared do not contaminate each other; the examiner must be competent and honest. As numerous scandals involving DNA testing labs have shown, these conditions cannot be taken for granted, and DNA evidence is only as good as the weakest link in the chain.

5. Human memories are reliable. Much of what we do in the courtroom relies on human memory. When a witness is asked to testify about past events, the accuracy of his account depends not only on his initial perception, but on the way the memories are recorded, stored and retrieved. For a very long time, it was believed that stored memories were much like video tape or film—an accurate copy of real-word experience that might fade with the passage of time or other factors, but could not be distorted or embellished.

Science now tells us that this view of human memory is fundamentally flawed. The mind not only distorts and embellishes memories, but a variety of external factors can affect how memories are retrieved and described. In an early study by cognitive psychologist Elizabeth Loftus, people were shown videos of car accidents and then questioned about what they saw. The group asked how fast the cars were going when they “smashed” into each other estimated 6.5 mph faster than the group asked how fast the cars were going when they “hit” each other. A week later, almost a third of those who were asked about the “smash” recalled seeing broken glass, even though there was none.


27. Id. at 586, Table 1.

28. Id. at 587, Table 2. Professor Loftus has shown it is even possible to manufacture false memories. See, e.g., Elizabeth F. Loftus & Jacqueline E. Pickrell, The Formation of False Memories, 25 Psychiatric Annals 720-25 (1995), https://webfiles.uci.edu/eloftus/Loftus_Pickrell_PA_95.pdf. For example, she gave students each a packet describing three real childhood memories and a false one, and told the students that all four memories were real and took place with a close family member. In follow-up interviews asking the students to describe their memories, 7 of 24 students remembered the false event in their packet and some added their own details to that false memory. Id. at 722. Loftus was also able to convince participants in another experiment that they’d experienced traumatic events that never hap-
This finding has troubling implications for criminal trials where witnesses are questioned long and hard by police and prosecutors before the defense gets to do so—if ever. There is thus plenty of opportunity to shape and augment a witness’s memory to bring it into line with the prosecutor’s theory of what happened. Yet with rare exceptions, courts do not permit expert testimony on human memory. For example, the district judge in the Scooter Libby case denied a defense motion for a memory expert, even though the key issue at trial was whose recollection of a 4-year-old telephone conversation should be believed. At least one member of the jury that convicted Libby lamented the lack of expert testimony on the subject. And a key witness in that case recently suggested in her memoirs that her memory may have been distorted by the prosecutor’s crafty questioning.

Given the malleability of human memory, it should come as no surprise that many wrongful convictions have been the result of faulty witness memories, often manipulated by the police or the prosecution.

6. Confessions are infallible because innocent people never confess. We now know that this is not true. Innocent people do confess with surprising regularity. Harsh interrogation tactics, a variant of Stockholm syndrome, the desire to end the ordeal, emotional and financial exhaustion, family considerations and the youth or feeble-mindedness of the suspect can result in remarkably detailed confessions that are later shown to be utterly false.

See supra n.10, and accompanying text (discussing how a 12-year-old boy accused the wrong man of a murder after the police fed the boy details of the crime); The National Registry of Exonerations, George Franklin, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3221 (George Franklin was convicted on the basis of his daughter’s testimony—20 years after the crime took place—that she had seen him commit the murder. He was released after it was revealed that the daughter had recalled the memory through hypnosis); Jim Dwyer, Witness Accounts in Midtown Hammer Attack Show the Power of False Memory, N.Y. TIMES (May 14, 2015), http://www.nytimes.com/2015/05/15/nyregion/witness-accounts-in-midtown-hammer-attack-show-the-power-of-false-memory.html?

See infra n.51-52 and accompanying text (discussing how a 12-year-old boy accused the wrong man of a murder after the police fed the boy details of the crime); The National Registry of Exonerations, George Franklin, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3221 (George Franklin was convicted on the basis of his daughter’s testimony—20 years after the crime took place—that she had seen him commit the murder. He was released after it was revealed that the daughter had recalled the memory through hypnosis); Jim Dwyer, Witness Accounts in Midtown Hammer Attack Show the Power of False Memory, N.Y. TIMES (May 14, 2015), http://www.nytimes.com/2015/05/15/nyregion/witness-accounts-in-midtown-hammer-attack-show-the-power-of-false-memory.html?

See infra n.113.

See supra n.10, and accompanying text (discussing how a 12-year-old boy accused the wrong man of a murder after the police fed the boy details of the crime); The National Registry of Exonerations, George Franklin, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3221 (George Franklin was convicted on the basis of his daughter’s testimony—20 years after the crime took place—that she had seen him commit the murder. He was released after it was revealed that the daughter had recalled the memory through hypnosis); Jim Dwyer, Witness Accounts in Midtown Hammer Attack Show the Power of False Memory, N.Y. TIMES (May 14, 2015), http://www.nytimes.com/2015/05/15/nyregion/witness-accounts-in-midtown-hammer-attack-show-the-power-of-false-memory.html?

See infra n.113.
7. Juries follow instructions. This is a presumption—actually more of a guess—that we've elevated to a rule of law.\(^\text{35}\) It is, of course, necessary that we do so because it links the jury's fact-finding process to the law. In fact, however, we know very little about what juries actually do when they decide cases.\(^\text{36}\) Do they consider the instructions at all? Do they consider all of the instructions or focus on only some? Do they understand the instructions or are they confused? We don't really know. We get occasional glimpses into the operations of juries when they send out questions or someone discloses juror misconduct, and even then the information we get is limited. But we have no convincing reason to believe that jury instructions in fact constrain jury behavior in all or even most cases\(^\text{37}\). And, because the information we get from inside the jury room is so limited and sporadic, experience does little to improve our knowledge. Looking at 100 black boxes is no more informative than looking at one.

8. Prosecutors play fair. The Supreme Court has told us in no uncertain terms that a prosecutor's duty is to do justice, not merely to obtain a conviction.\(^\text{38}\) It has also laid down some specific rules about how prosecutors, and the people who work for them, must behave—principal among them that the prosecution turn over to the defense exculpatory evidence in the possession of the prosecution and the police.\(^\text{39}\) There is reason to doubt that prosecutors comply with these obligations fully. The U.S. Justice Department, for example, takes the position that exculpatory evidence must be produced only if it is material.\(^\text{40}\) This puts prosecutors in the position of deciding whether tidbits that could be helpful to the defense are significant enough that a reviewing court will find it to be material, which runs contrary to the philosophy of the Brady/Giglio line of cases and increases the risk that highly exculpatory evidence will be suppressed. Beyond that, we have what I have described elsewhere as an “epidemic of Brady violations abroad in the land,”\(^\text{41}\) a phrase that has caused much controversy but brought about little change in the way prosecutors

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\(^{36}\) See id.; Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . , all practicing lawyers know to be unmitigated fiction.”).

\(^{37}\) See Berger v. United States, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”).

\(^{38}\) See Brady v. Maryland, 373 U.S. 83, 87 (1963) (“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”); United States v. Giglio, 405 U.S. 150, 154 (1972) (the Brady rule includes evidence that could be used to impeach a witness); see also Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) (extending the state’s obligation under Brady to evidence in the possession of the police).


\(^{40}\) United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc); see People v. Velasco-Palaciosa, F068833, 2015 WL 1746238 (Cal. Ct. App. Feb. 24, 2015) (noting that a prosecutor inserted a false confession into the transcript of the defendant’s police interrogation); Denis Slattery, Exclusive: Bronx Prosecutor Bashed and Barred from Courtroom for Misconduct, N.Y. DAILY NEWS (Apr. 4, 2014), http://www.nydailynews.com/new-york/bronz-prosecutor-barred-courtroom-article-1.1746238 (noting that a Bronx prosecutor failed to present evidence that would have freed a man held at Rikers Island on bogus rape charges).
operate in the United States.42

9. The prosecution is at a substantial disadvantage because it must prove its case beyond a reasonable doubt. Juries are routinely instructed that the defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt, but we don’t really know whether either of these instructions has an effect on the average juror. Do jurors understand the concept of a presumption? If so, do they understand how a presumption is supposed to operate? Do they assume that the presumption remains in place until it is overcome by persuasive evidence or do they believe it disappears as soon as any actual evidence is presented? We don’t really know.

Nor do we know whether juries really draw a distinction between proof by a preponderance, proof by clear and convincing evidence and proof beyond a reasonable doubt. These levels of proof, which lawyers and judges assume to be hermetically sealed categories, may mean nothing at all in the jury room. My own experience as a juror certainly did nothing to convince me that my fellow jurors understood and appreciated the difference. The issue, rather, seemed to be quite simply: Am I convinced that the defendant is guilty?

Even more troubling are doubts raised by psychological research showing that “whoever makes the first assertion about something has a large advantage over everyone who denies it later.”43 The tendency is more pronounced for older people than for younger ones, and increases the longer the time-lapse between assertion and denial. So is it better to stand mute rather than deny an accusation? Apparently not, because “when accusations or assertions are met with silence, they are more likely to feel true.”44

To the extent this psychological research is applicable to trials, it tends to refute the notion that the prosecution pulls the heavy oar in criminal cases. We believe that it does because we assume juries go about deciding cases by accurately remembering all the testimony and weighing each piece of evidence in a linear fashion, selecting which to believe based on assessment of its credibility or plausibility. The reality may be quite different. It may be that jurors start forming a mental picture of the events in question as soon as they first hear about them from the prosecution witnesses. Later-introduced evidence, even if pointing in the opposite direction, may not be capable of fundamentally altering that picture and may, in fact, reinforce it.45 And the effect may be worse the longer the prosecution’s case lasts and, thus, the longer it takes to bring the contrary evidence before the jury. Trials in general, and longer trials

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43. Shankar Vedantam, Persistence of Myths Could Alter Public Policy Approach, Wash. Post (Sept. 4, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/09/03/AR2007090300933.html (discussing the results of a 2007 study by psychologist Norbert Schwarz); see Norbert Schwarz et al., Metacognitive Experiences and the Intricacies of Setting People Straight: Implications for Debiasing and Public Information Campaigns, 39 Advances in Experimental Soc. Psychol. 127, 152 (2007) (“[o]nce a statement is accepted as true, people are likely to attribute it to a credible source—which, ironically, may often be the source that attempted to discredit it—lending the statement additional credibility when conveyed to others”) (citation omitted).

44. Vedantam, supra n.43 (quoting the statement of Peter Kim, an organizational psychologist who published a study in the journal of Applied Psychology); see Donald L. Ferrin et al., Silence Speaks Volumes: The Effectiveness of Reticence in Comparison to Apology and Denial for Responding to Integrity- and Competence-Based Trust Violations, 92(4) J. Applied Psychol. 893-908 (2007).

45. See Norbert Schwarz et al., Metacognitive Experiences and the Intricacies of Setting People Straight: Implications for Debiasing and Public Information Campaigns, 39 Advances in Experimental Soc. Psychol. 127, 152 (2007); Elliot G. Disner, Some Thoughts About Opening Statements: Another Opening, Another Show, Prac. Litigator, Jan. 2004, at 61 (“there is substantial evidence that juries normally make up their minds long before closing argument”).
in particular, may be heavily loaded in favor of whichever party gets to present its case first—the prosecution in a criminal case and the plaintiff in a civil case. If this is so, it substantially undermines the notion that we seldom convict an innocent man because guilt must be proven to a sufficient certainty. It may well be that, contrary to instructions, and contrary to their own best intentions, jurors are persuaded of whatever version of events is first presented to them and change their minds only if they are given very strong reasons to the contrary.

10. Police are objective in their investigations. In many ways, this is the bedrock assumption of our criminal justice process. Police investigators have vast discretion about what leads to pursue, which witnesses to interview, what forensic tests to conduct and countless other aspects of the investigation. Police also have a unique opportunity to manufacture or destroy evidence, influence witnesses, extract confessions and otherwise direct the investigation so as to stack the deck against people they believe should be convicted. And not just small-town police in Podunk or Timbuktu. Just the other day, “[t]he Justice Department and [FBI] formally acknowledged that nearly every examiner in an elite FBI forensic unit gave flawed testimony in almost all [of the 268] trials in which they offered evidence against criminal defendants over more than a two-decade period before 2000.” Do they offer a class at Quantico called “Fudging Your Results To Get A Conviction” or “Lying On The Stand 101”? How can you trust the professionalism and objectivity of police anywhere after an admission like that?

There are countless documented cases where innocent people have spent decades behind bars because the police manipulated or concealed evidence, but two examples will suffice:

46. One example is the case of Mark Prentice, who pleaded guilty to assault and robbery only after a New York State Police trooper, David Harding, reported that he had found fingerprints matching Prentice in the victim’s house. A subsequent investigation revealed that New York State Police troopers, including Harding, had falsified fingerprint evidence in at least 30 cases, and Harding admitted to planting evidence in Prentice’s case. Prentice was acquitted after spending six years in prison. Harding was then sentenced to 4.5 years in prison for fabricating evidence. See The National Registry of Exonerations, Mark Prentice, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4540. In addition to the cases recorded by the National Registry of Exonerations, researchers became aware of more than 1,100 cases in which convictions were overturned due to just 13 police corruption scandals, the majority of which involved planting drugs or guns on innocent individuals. See Chris Seward, Researchers: More than 2,000 False Convictions in Past 23 Years, NBC News (May 21, 2012), http://usnews.nbcnews.com/_news/2012/05/21/11756575-researchers-more-than-2000-false-convictions-in-past-23-years?lite; Sean Gardiner, Brooklyn District Attorney Kenneth Thompson Takes on Wrongful Convictions, WALL ST. J. (Aug. 8, 2014), http://www.wsj.com/articles/brooklyn-district-attorney-kenneth-thompson-takes-on-wrongful-convictions-1407547937. (Brooklyn DA Kenneth Thompson’s conviction integrity unit has ordered the review of more than 100 prior convictions, 70 of which involved accusations that former Brooklyn Detective Louis Scarcella coerced confessions and tampered with witness statements).

47. See supra n.34 (discussing Rivera’s coerced confession at the hands of the Lake County police); Spencer Ackerman, “I Sat In That Place for Three Days, Man”: Chicagoans Detail Abusive Confinement Inside Police “Black Site”, THE GUARDIAN (Feb. 27, 2015), http://www.theguardian.com/us-news/2015/feb/27/chicago-abusive-confinement-homan-square (four African-Americans describe being detained for several days inside a police warehouse, where they were “shackled and interrogated,” denied access to counsel and forbidden from notifying anyone of their whereabouts); see also Miriam S. Gohara, A Lie For a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques, 33 FORDHAM U.B. J. 791, 794-95 (2006); Laure Magid, Deceptive Police Interrogation Techniques: How Far is Too Far?, 99 MICH. L. REV. 1168, 1168 (2001).

48. 92 percent of arrest warrants obtained by the Ferguson, Missouri Police Department were issued against African Americans, who as a group were 68 percent less likely than others to have their charges dismissed. See UNITED STATES DEPARTMENT OF JUSTICE-CIVIL RIGHTS DIVISION, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, (Mar. 4, 2015), available at http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

49. See Hsu, supra n.21.
In 2013, Debra Milke was released after 23 years on Arizona’s death row based entirely on a supposed oral confession she had made to one Detective Saldate who was much later shown to be a serial liar.50 And then there is the case of Ricky Jackson, who spent 39 years behind bars based entirely on the eyewitness identification of a 12-year-old boy who saw the crime from a distance and failed to pick Jackson out of a lineup.51 At that point, “the officers began to feed him information: the number of assailants, the weapon used, the make and model of the getaway car.”52 39 years!

For some victims of police misconduct, exoneration comes too late: Mark Collin Sodersten died in prison while maintaining his innocence.53 After his death, a California appellate court determined that Sodersten had been denied a fair trial because police had failed to turn over exculpatory witness tapes.54 It posthumously set aside the conviction, which no doubt reduced Sodersten’s time in purgatory.

11. Guilty pleas are conclusive proof of guilt. Many people, including judges, take comfort in knowing that an overwhelming number of criminal cases are resolved by guilty plea rather than trial.55 Whatever imperfections there may be in the trial and criminal charging process, they believe, are washed away by the fact that the defendant ultimately consents to a conviction. But this fails to take into account the trend of bringing multiple counts for a single incident—thereby vastly increasing the risk of a life-shattering sentence in case of conviction56—as well as the creativity of prosecutors in hatching up criminal cases where no crime exists57 and the overcriminalization of virtually every aspect of American life.58 It also ignores that

52. Laura Ernde, Accused Murderer Cleared Seven Months After Prison Death, DAILY J. (Jan. 18, 2007).
53. Judge Morris Hoffman, for example, cites to the fact that “almost all criminal defendants plead guilty” as support for the proposition that “the actual rate of wrongful convictions in the United States is vanishingly small.” See Morris B. Hoffman, The “Innocence” Myth, WALL ST. J., Apr. 26, 2007, at A19. But see Rakoff, supra n.34 (strongly objecting to the tendency to equate guilty pleas with actual guilt, noting that the current “prosecutor-dictated plea bargain system, by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of defendants to plead guilty to crimes they never actually committed”). As to the meaning of a 1 percent error rate, see infra pp. xiv-xv.
57. See, e.g., Arthur Andersen LLP v. United States, 544 U.S. 696, 706 (2005) (reversing Arthur Andersen’s conviction of obstruction of justice under 18 U.S.C. §§ 1512(b)(2)(A) and (B), where the jury instructions, consistent with the government’s reading of the vaguely-worded statute, had all but erased a culpability requirement); United States v. Newman, 773 F.3d 438, 442, 448 (2d Cir. 2014) (pointing out “the doctrinal novelty of [the government’s] recent insider trading prosecutions” and reversing with prejudice two hedge fund managers’ convictions for securities fraud because the government “presented no evidence that [the managers] knew that they were trading on information obtained from insiders in violation of those insiders’ fiduciary duties”); United States v. Goyal, 629 F.3d 912, 921 (2010) (reversing a chief financial officer’s convictions of 15 counts of securities fraud and making false statements where “the government’s case suffered from a total failure of proof”) (internal quotation marks omitted); id. at 922 (Kozinski, C.J., concurring) (“[Goyal] is just one of a string of recent cases in which courts have found that federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds. This is not the way criminal law is supposed to work.”) (citations omitted).
58. Justice Scalia criticized the overcriminalization of federal law in his dissent from denial of certiorari in Sorich v. United States, 555 U.S. 1204 (2009), a case in which the Seventh Circuit affirmed
many defendants cannot, as a practical matter, tell their side of the story at trial because they fear being impeached with prior convictions or other misconduct. And, of course, if the trial process is perceived as highly uncertain, or even stacked in favor of the prosecution, the incentive to plead guilty to some charge that will allow the defendant to salvage a portion of his life, becomes immense. If the prosecution offers a take-it-or-leave-it plea bargain before disclosing exculpatory evidence, the defendant may cave to the pressure, throwing away a good chance of an acquittal.

12. Long sentences deter crime. In the United States, we have over 2.2 million people behind bars. Our rate of approximately 716 prisoners per 100,000 people is the highest in the world, over 5 times higher than that of other industrialized nations like Canada, England, Germany and Australia. Sentences for individual crimes are also far longer than in other developed countries. For example, an individual convicted of burglary in the United States serves an average of 16 months in prison, compared with 5 months in Canada and 7 months in England. And the average prison sentence for assault in the United States is 60 months, compared to under 20 months in England, Australia and Finland.

Incarceration is an immensely expensive enterprise. It is expensive for the taxpayers, as the average cost of housing a single prisoner for one year is approximately $30,000. A 20-year sentence runs into something like $600,000 in prison costs alone. Long sentences are also immensely hard on prisoners and cruel to their

Chicago city employees’ convictions under the honest services mail fraud statute. The statute criminalizes the use of the mail or wire services to carry out a “scheme... to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346. In urging the Court to construe the statute more narrowly, Justice Scalia pointed out that the mail fraud statute “has been invoked to impose criminal penalties upon a staggeringly broad swath of behavior, including misconduct not only by public officials and employees but also by private employees and corporate fiduciaries”—for example, the convictions of “a local housing official who failed to disclose a conflict of interest,” “students who schemed with their professors to turn in plagiarized work” and “lawyers who made side-payments to insurance adjusters in exchange for the expedited processing of their clients’ pending claims.” Sorich, 555 U.S. at 1204 (Scalia, J., dissenting from denial of certiorari) (internal quotation marks omitted); see Harvey A. Silverglate, Three Felonies a Day: How the Feds Target the Innocent (2009) (illustrating the shady practices prosecutors have used in order to convict individuals under vaguely worded federal statutes for conduct no rational person would view as criminal); Alex Kozinski & Misha Tseytlin, You’re (Probably) a Federal Criminal, in In the Name of Justice 43-56 (Timothy Lynch ed., Cato Institute 2009); Glenn Harlan Reynolds, Ham Sandwich Nation: Due Process When Everything Is a Crime, 113 COLUM. L. REV. Sidebar 102 (2013); George F. Will, When Everything Is a Crime, Wash. Post (Apr. 8, 2015), http://www.washingtonpost.com/opinions/when-everything-is-a-crime/2015/04/08/1929ab88-dd43-11e4-be40-566e2653afe5_story.html.


60. See John H. Blume & Rebecca K. Helm, The Unexonerated: Factually Innocent Defendants Who Plead Guilty, 100 CORNELL L. REV. 157 (2014); Bennett L. Gershman, Threats and Bullying by Prosecutors, 46 LOY. U. CHI. L.J. 327 (2014); see also infra n.73.


62. Id. (Canada’s rate is 118 per 100,000; England’s is 148 per 100,000; Germany’s is 79 per 100,000; and Australia’s is 130 per 100,000).


families, as it’s usually very difficult for a prisoner to re-integrate into his family and community after very long prison sentences.66

We are committed to a system of harsh sentencing because we believe that long sentences deter crime and, in any event, incapacitate criminals from victimizing the general population while they are in prison. And, indeed, the United States is enjoying an all-time low in violent crime rates, which would seem to support this intuition.67 But crime rates have been dropping steadily since the 1990s, and not merely in the United States but throughout the industrialized world.68 Our intuition about harsh sentences deterring crime may thus be misguided.69 We may be spending scarce taxpayer dollars maintaining the largest prison population in the industrialized world, shattering countless lives and families, for no good reason. As with much else in the law, the connection between punishment and deterrence remains mysterious.70

We make our decisions based on faith.

II

What I have listed above are some of the reasons to doubt that our criminal justice system is fundamentally just.71 This is not meant to be an exhaustive list, nor is it clear that all of these uncertainties would, on closer examination, be resolved against the current system. But there are enough doubts on a broad range of subjects touching intimately on the integrity of the system that we should be concerned. The National Registry of Exonerations has recorded 1576 exonerations in the United States since 1989.72 The year 2014 alone saw a record high of 125 exonerations, up from 91 the

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66. See generally Jalila Jefferson-Bullock, The Time is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences, 83 UMKC L. Rev. 73 (2014).


69. Nor does putting more people behind bars necessarily lead to less crime. A recent report by the Brennan Center reveals that “incarceration has been decreasingly effective” as a crime fighting tactic since at least 1980,” as increased incarceration has had “no observable effect” on the nationwide decline in violent crimes in the 1990s and 2000s. See Dr. Oliver Roeder et al., What Caused the Crime Decline?, Brennan Center for Just., 22-23 (Feb. 12, 2015), available at https://www.brennancenter.org/publication/what-caused-crime-decline. A recent study points to “prosecutors—more than cops, judges, or legislators—as the principal drivers of the increase in the prison population,” explaining that “[t]he real change is in the chances that a felony arrest by the police turns into a felony case brought by prosecutors.” See Jeffrey Toobin, The Milwaukee Experiment: What Can One Prosecutor Do About The Mass Incarceration of African-Americans?, The New Yorker (May 11, 2015), http://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment.


71. There are similar reasons to doubt that our civil justice system is fundamentally just, but that’s a topic for another day.

72. The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/
A week after his son turned one, Rodricus Crawford woke up a few minutes before 7 A.M. on the left side of his bed. His son was sleeping on the right side, facing the door. Crawford, who was twenty-three, reached over to wake him up, but the baby didn’t move. He put his ear on his son’s stomach and then began yelling for his mother. “Look at the baby!” he shouted.

Crawford was lanky, with delicate features, high cheekbones, and a patchy goatee. He lived in a small three-bedroom house with his mother, grandmother, uncle, sister, and a younger brother in Mooretown, a neighborhood in Shreveport, Louisiana, bordered by a stretch of factories and next to the airport. His mother, Abbie, a housekeeper at the Quality Inn, rushed into the room and picked up the baby, who was named Roderius, after his father. He looked as if he were asleep, but his forehead felt cool.

Crawford’s uncle called 911, and an operator instructed him to try CPR while they waited for an ambulance. Crawford’s mother and sister took turns pumping the baby’s chest.

“I’m doing it, Ma’am, but he ain’t doing nothing!” Abbie said, out of breath.

The ambulance seemed to be taking too long, so Crawford’s younger brother called 911 on another line. “The baby’s not talking, not breathing, not saying anything,” he said. “Can you get an ambulance?”

They were used to waiting a long time for city services; the alarm could go off at their pastor’s church and ring all night, and the fire department would never come. There was a saying in the neighborhood that the police were never there when you needed them, only when you didn’t. The community was populated almost entirely by black families, many of whom had grown up together. After a few more minutes, Crawford’s brother called 911 again. “We need an ambulance, Ma’am,” he said. “It’s been twenty minutes!”

Not long afterward, another 911 operator called a dispatcher and asked what was
happening at the address. “They probably slept on the damn baby,” the dispatcher said. “There’s a hundred folks in that damn house.”

When the ambulance arrived, moments later, Crawford ran out of the house with the baby in his arms. The paramedics put a breathing mask over Roderius’s face, and Crawford thought he saw his son’s eyes open. He tried to climb into the back of the ambulance, but the paramedics shut the doors and told him to stay outside. They couldn’t find a pulse. Roderius’s jaw was stiff and his eyes were milky, a sign that he had been dead for more than an hour. They decided to wait in the ambulance until the police arrived before telling the family.

Meanwhile, the baby’s mother, Lakendra Lott, and her family had arrived. They lived on the same street, five houses away. Lott and Crawford had known each other since they were children and had been close since middle school. He was hyper, affectionate, and fondly known as a clown. She was quiet and withdrawn; she had “been to the tenth floor,” a phrase used in the neighborhood to describe the psychiatric ward of the closest hospital. There had been rumors that someone else might be Roderius’s father—Crawford and Lott both had daughters from other relationships—but when Crawford held Roderius at the hospital he was sure that the newborn was his. The baby usually slept at Lott’s house, but Crawford visited him almost every day. He was a gifted dancer—in high school he had been in the marching band and started a dance troupe called the Black Boys—and he liked to entertain the baby by setting his feet on the floor and making him dance like a marionette.

The families began knocking on the windows of the ambulance, asking the driver why he hadn’t left for the hospital. The paramedics reported to their dispatcher that they were surrounded by a mob; they worried that there was going to be some sort of riot. “If the crowd gets bad, we don’t have anything—there’s no protection,” one paramedic said later. “We had to leave for our safety.” The ambulance drove away with its sirens and lights on, but switched them off as soon as it turned the corner.

The police arrived at the Crawfords’ house shortly after. Crawford was with his cousins, who lived across the street. When an officer asked for him, his mother admitted that he was afraid of the police, because “he’s got a little charge going on, and he’s worried about that.” He had an open warrant for marijuana possession. In the past, he’d been arrested for battery, after fights with girlfriends, and for minor infractions, like driving with his headlights off and not wearing a seat belt. Crawford came home a few seconds later and tried to hug his mother, who was standing at the foot of their driveway, but the officer told him to sit in the police car. He slid into the back seat, held his head in his hands, and began rocking back and forth and crying.

After a few minutes, he looked out the back window and saw Lott, who seemed
disoriented. He motioned her over, and as soon as she opened the car door he wrapped his arms around her and buried his head in the back of her neck. When she told him that she knew the baby must have died, even though the cops wouldn’t answer the family’s questions, he pulled away. “What is wrong with you?” he said. “Don’t do that to me. He’s all right.”

The police wouldn’t let Lott or Crawford go to the hospital. Instead, they drove them to the police station. An officer asked Crawford why the baby had bruises on his head and his lip, and Crawford explained that the day before the baby had been standing on the bathroom floor when he slipped and fell between the toilet and the bathtub, hitting his head and cutting his lip. “I gave him an ice cube and put it in his mouth and wiped the blood off his lip, and he was straight,” Crawford said.

When detectives interviewed Lott, she was reticent and leaden. In emotional situations, she was known to retreat by staring at her phone.

“Have you ever seen him lose his cool?” they asked her, referring to Crawford.

“No, sir,” she said. “Until today.”

“What happened today?”

“He was just upset,” she said.

She told the officers that Roderius “had a little cold,” so she’d stopped by Crawford’s house the day before to drop off a nasal aspirator. While she was there, Crawford had told her about the baby’s fall, and she’d looked at his injuries. “There was a bruise right there,” she said, pointing above her right eye. “And his mouth—he had bust his lip. But he was still happy and everything.”

That morning, a forensic pathologist performed an autopsy and determined that the bruises on Roderius’s lips were the marks of smothering. Later, when he reviewed slides of Roderius’s lung tissue, he discovered that the baby also had pneumonia, but he decided that the illness was a coincidence.

The detectives interviewed Crawford for the second time that day, and told him that the pathologist had found bruises on the baby’s bottom, indicating that he had suffered from “chronic child abuse.”

“Chronic child abuse,” Crawford repeated, as if testing a new phrase. “I don’t know if he’s ever been beaten at his mom’s house, but at my house he’s never been beaten by me,” he said. “He’s a baby. He’s a one-year-old. What could he do to me to make me beat him?”

“We see it all the time,” the detective said. “We can’t answer that.”
“I told you—he fell. That’s the only thing that ever happened to him. He fell in the bathroom. But me beating him? No!”

Then the detective said, “There are certain fluids in your one-year-old son’s lungs that tell us that he was suffocated before he died.”

“He was suffocated?” Crawford said. “What do you mean by suffocated? Like somebody held him down?”

“The cause of death is asphyxiation with acute suffocation.”

“No. When I woke up this morning—I’ll tell you again, sir—when I woke up this morning . . .” His voice began wavering, and he trailed off. “That’s too much,” he said.

“Did you wake up on top of your son?”

“No, sir. No, sir!”

“If that’s what happened, that’s what you need to say. It’s important.”

“I know it’s important. I’m telling you I didn’t wake up on my son. I didn’t wake up suffocating him—nothing. That’s some real talk.”

The autopsy report was sent to the office of Dale Cox, the first assistant district attorney of Caddo Parish, which includes Shreveport. After reading the police reports, he decided to seek the death penalty. Cox told me that in the past forty years he had never prosecuted a man between the ages of seventeen and twenty-six who grew up in a nuclear family. “Not one,” he said. He believes that the “destruction of the nuclear family and a tremendously high illegitimate birth rate” have brought about an “epidemic of child-killings” in the parish.

At the time that he learned of Crawford’s case, he was prosecuting another young black man accused of killing his infant. After the man was sentenced to life without parole, rather than death, Cox told a local TV station, “I take it as a failure that I was unable to convince the jury to kill him.”

The only structure on the front lawn of the Caddo Parish courthouse, in downtown Shreveport, is a monument to the Confederacy, which includes the busts of four Confederate generals. A large stone slab on the ground is inscribed with the Confederate flag and a tribute to the “deeds and valor of the men who so gallantly, nobly, and conscientiously defended the
cause.”

In the decades after the Civil War, Caddo Parish—home to the last capital of the Confederacy—had more lynchings than all but one county in the South. Several men were lynched in front of the courthouse. In 1914, when some Louisiana newspapers called for the abolition of the death penalty, an editorial in the Shreveport Times warned that without capital punishment the number of lynchings would rise: black criminals wouldn’t be able to reach the jail before they were overwhelmed by the “vengeance of an outraged citizenship.”

Juries in Caddo Parish, which has a population of two hundred and fifty thousand, now sentence more people to death per capita than juries in any other county in America. Seventy-seven per cent of those sentenced to death in the past forty years have been black, and nearly half were convicted of killing white victims. A white person has never been sentenced to death for killing a black person.

Since 2011, Dale Cox, a jowly sixty-seven-year-old man with thinning white hair, has been responsible for more than a third of the death sentences in Louisiana. When I met him at his office, which overlooks the courthouse, I asked him if he worried about the possibility that the parish’s fraught racial history and its approach to capital punishment were related, but he said that he didn’t see the connection. “People have played the race card in this country for so long, and at some point we really need to stop and say, ‘O.K., that was a long, long, long time ago. It’s different now.’ ” He said, “Yeah, a lot of terrible things have happened in the world everywhere. And in some places it gets better, like here. And in some places it doesn’t, like Africa or Kosovo.” He told me, “I don’t get this discrimination business, I really don’t.”

Cox, who is Catholic and went to a Jesuit school, was opposed to the death penalty at the start of his career, and in 1983, after working in the district attorney’s office for six years, he left, because he didn’t feel comfortable pursuing capital cases. He believed that it was God’s decision when to end someone’s life. He joined a civil firm while working part time as a special prosecutor. By 2011, when he returned to the office full time, he said that his thinking had evolved. After constant exposure to violence, he began to reinterpret the Bible. He thought about passages in which Christ was judgmental and unforgiving—Christ’s belief that it would be better if Judas Iscariot had never been born, for instance—and saw Him as retaliatory in ways that he hadn’t appreciated before. After the Church’s pedophilia scandals, Cox no longer felt obliged to follow its teachings precisely. He told me that “we just exclusively use the Old Testament over here,” and that he had ripped the New Testament out of all the Bibles. He quickly added, “That’s a joke!”

Last March, a former colleague of Cox’s published a letter in the Shreveport Times apologizing for causing an innocent black man to spend thirty years on death row. “We are simply incapable of devising a system that can fairly and impartially impose a sentence of death,” he wrote. When a journalist with the paper, Maya
Lau, asked Cox for his response, he said that he thought courts should be imposing the death penalty more, not less. “I think we need to kill more people,” he told her. “We’re not considered a society anymore—we’re a jungle.”

Cox does not believe that the death penalty works as a deterrent, but he says that it is justified as revenge. He told me that revenge was a revitalizing force that “brings to us a visceral satisfaction.” He felt that the public’s aversion to the notion had to do with the word itself. “It’s a hard word—it’s like the word ‘hate,’ the word ‘despot,’ the word ‘blood.’ ” He said, “Over time, I have come to the position that revenge is important for society as a whole. We have certain rules that you are expected to abide by, and when you don’t abide by them you have forfeited your right to live among us.”

Mooretown, the neighborhood where Crawford’s family lives, was developed early in the twentieth century by Giles Moore, a black schoolteacher who intended to create a “colored town.” He owned a farm west of Shreveport that he divided into plots and sold to black people. A follower of the black-unification leader Marcus Garvey, he wanted people to own their own property and be free of discrimination by white people. The social experiment thrived for a few decades, but the town, which didn’t have its own utility infrastructure, was never self-sufficient. In 1958, it was annexed to Shreveport.

In the next three decades, many people with aspirations moved away, leaving vacant lots and discarded cars, which led to problems with stray dogs, rats, and snakes. Community leaders led campaigns to clean up the neighborhood, but its schools floundered; like nearly forty per cent of his classmates, Crawford didn’t finish high school. He could find only sporadic jobs, installing air-conditioners and mowing lawns. Shortly before Roderius died, he had arranged to work at his church as a spiritual mime, using dance and gestures to share the Gospel. His pastor, John Dent, described him as “a vibrant kid who loved cracking jokes—that was his thing.” The first time that Dent saw Crawford pushing a stroller, he told him, “No way. No way that you already have a kid.” He said that Crawford responded, proudly, “No, man, this is my boy. This is my little one.”

At a preliminary hearing a month after Roderius’s death, Lott told the judge that she had never seen Crawford mistreat their son. “Why would he kill his baby, as bad as he wanted a little boy?” she said.

On her Twitter feed that fall, she posted a picture of Crawford and wrote, “Free my hot boi,” with four hearts and a smiley face with hearts in its eyes. She visited him in jail every few weeks, usually catching a ride with Crawford’s family. “She was the type who would call our house every day, no matter who Rodricus was going with,” Crawford’s mother, Abbie, said. “She just wouldn’t let Rodricus go.”

Lott was the only one in her family who testified that Crawford was innocent.
After an initial period of confusion, her family had accepted Cox’s version of events. Investigators from the D.A.’s office told them that the medical evidence proved that the baby had been killed. “They know what happened because the autopsy came back,” a family member told me.

Abbie Crawford seemed as distressed by the Lotts’ position as she was by the charges against her son. “We went through all our lives together,” she told me. “We ate together, raised our children together. We had get-togethers for Mother’s Day. We were family.”

Dent, who had presided over Roderius’s wake, tried to get the families to reconcile, but the Lotts stopped answering their door when he knocked. “That they could go from embracing one another at the funeral and praying for each other to not even speaking was crushing,” he said. “I believe the prosecution forced ideas into their heads.”

From jail, Crawford urged his family to talk to Lott’s mother, Sharon. One day, his aunt Latosha, who owned a hair salon and assumed the role of family matriarch, saw Sharon sitting alone at the courthouse. She sat beside her and said, “You know good and well that Rodricus would never hurt his baby.” She said that Sharon responded, “Well, what do you think happened? That my daughter did something to the baby?” The Crawfords wondered if the Lotts felt that someone would inevitably be prosecuted: if it wasn’t the Crawfords’ child, perhaps it would be theirs. Latosha said, “I think the prosecutor had the mind-set that ‘I don’t have to kill the village, because I’ll just turn the villagers against each other and they’ll kill themselves.’”

“Kryptonite isn’t my only problem, O.K.?” Crawford was represented by a Shreveport attorney named Daryl Gold, who had argued in court against Cox in the late seventies and remembered him as “one of the nicest people I had ever known.” By the time Crawford was tried, Gold wondered if Cox had “a brain tumor or something.” Other Shreveport lawyers were similarly confused. When Henry Walker, the former president of the state’s criminal-defense bar, heard that Cox had screamed “God damn it!” in court, he e-mailed the bar’s Listserv to express concern that Cox had “developed a state of mental imbalance and may need help very badly.” He wrote, “I remember a very different Dale Cox, a person of unquestioned integrity, whose demeanor was always very professional and courteous,” adding, “Of course, he may have, by always masking his true volatility, become over time so tightly wound that an explosion was inevitable.” A few lawyers guessed that Cox’s divorce and a personal bankruptcy, in 2005, had made him bitter. (Cox dismissed the idea.) Others thought that he had become too immersed in the culture of the D.A.’s office; it was the sort of institution where a longtime assistant district attorney felt
comfortable hanging a large portrait of Nathan Bedford Forrest, a Confederate general and an early leader of the Ku Klux Klan, on the wall. “Nobody there is that far from turning into a savage,” Walker told me. “If somebody releases the chain, they’ll be off and running.”

The week before Crawford’s trial, in November, 2013, Gold asked Cox to dismiss the case. He had just received a report from his medical expert, Daniel Spitz, a forensic pathologist from Michigan, who co-authored a pathology textbook that is widely used in medical schools. Spitz found that Roderius’s blood had tested positive for sepsis, and he concluded that he had died of pneumonia. Spitz told me that after reviewing the case he thought that there “wasn’t enough evidence to even put this before a jury. You didn’t have anybody who thought this guy committed murder except for one pathologist who decided that it was homicide on what seemed like a whim.”

Cox told me that the new medical report “gave me pause.” But after meeting again with the first pathologist, James Traylor, he felt confident about the theory of smothering. In court, Traylor testified as cross-sections of the baby’s bruised bottom were displayed for the jury. Traylor said that the baby’s pneumonia couldn’t have been severe, because family members hadn’t reported a fever or rapid heartbeat. “I’m the guy that did the autopsy,” Traylor told the jury. “There is no one else that can speak for the victim other than myself.”

Traylor said that his finding of suffocation was based entirely on the bruises on Roderius’s lips, but he never sampled the tissue to date the injury, a basic test that would have revealed whether the bruises came from the earlier fall in the bathroom, an explanation that he ignored. He misstated medical science, telling the jury that Roderius’s brain had swelled as a result of suffocation. Swelling does not occur in cases of smothering, because the person dies rapidly, and the brain can’t swell if blood has stopped circulating. The brain can swell, though, in cases of pneumonia with sepsis.

When Spitz testified, he explained that sepsis in young children can be fatal within a few hours, with early symptoms passing unnoticed. But his testimony was eclipsed by a cross-examination that lasted twice as long as the direct testimony. Cox interrogated him about a mistake he’d made in an autopsy in Michigan, where he had overlooked a bullet wound in a decomposed body. “You are overextended,” Cox told him. “You are overworked.” The judge later wrote of Spitz that “any veracity that he had was destroyed.”

Crawford’s mother, Abbie, felt uneasy as soon as the jury, composed of nine white people and three black ones, returned to the courtroom. “All I remember hearing is ‘Guilty, guilty, guilty,’” she told me. “Rodricus looked at me, and I looked at him, and I just tried to hold it all in.”

The defense team hadn’t prepared for the penalty phase of the trial, which
began the next morning. “We were too attached to ‘not guilty,’” J. Antonio Florence, a lawyer who worked on the case, told me. He described Cox as “probably the greatest trial lawyer I’ve gone up against,” adding that by “great” he meant that “he is very effective, like Darth Vader.”

Florence, who is black, said that he fantasizes about all the defense lawyers in the country banding together and refusing to work on capital cases, so that no trials can proceed. After the Supreme Court effectively suspended the death penalty in 1972, arguing that the punishment was unconstitutional in part because it was disproportionately imposed on “minorities whose numbers are few, who are outcasts of society, and who are unpopular,” Louisiana, like thirty-four other states, rewrote its statute. As Florence saw it, little had changed. Proof of the penalty’s arbitrariness, he said, was the fact that “you have people like Dale Cox making the decisions about who should face death.”

The next morning, Jessica Williams, the mother of Crawford’s first child, Khasiah, who was six years old, told the jury that if he was executed it would “kill” her daughter, too. “She talks about him, asks about him, cries about him, dreams about him, everything,” she said. “She asks when her daddy is coming home. ‘Mama, where’s my daddy at?’ ‘Call my daddy.’ ‘Can you call him?’ ”

When Jessica told a story about shopping for diapers with Crawford, Cox asked her where he got the money.

“I’m not sure,” she said.

“Was he working at the time?”

“No.”

“During the one year of Roderius’s life, did Rodricus Crawford ever work?”

“No.”

Cox continued, “Did you know that he was a habitual user of marijuana?”

“Yes.”

“Did it bother you that Khasiah would be around someone who used marijuana all the time?”

“No, because even with him being a habitual user, it didn’t take upon his character and how he would be around his child,” she said.

When Ramone, one of Crawford’s younger brothers, took the witness stand, Cox asked if he thought that smoking marijuana was wrong.
“No,” Ramone responded.

“Did they tell in your classes at school that you could go to jail for using marijuana?”

“Yes, sir.”

“So then you did know it was a crime.”

Ramone, who was crying, didn't answer.

“But even though you knew it was a crime, you didn't think it was wrong for your brother to do it?”

“No, sir.”

“And why didn't you think it was wrong for your brother to do it even though you knew it to be a crime?”

“I don’t know,” he said.

He asked Ramone to estimate how many weeks of the year Crawford worked. After determining that there was “no real pattern to how often he worked,” Cox asked if Crawford had a physical disability. “Or a mental disability, something wrong with his mind?”

“No, sir,” Ramone said.

“What would he do all day?” he asked. “On the days that he didn't work.”

“I don't know, just live a normal life,” Ramone said.

When Abbie Crawford took the witness stand, Cox asked again if Crawford was disabled. “Why didn't he work?” he pressed.

“He looked for work,” his mother responded, crying.

“What did he do to ‘look’ for it?”

“He asked around for work.”

Later, Cox returned to the subject: “But he never worked on a regular basis.”

“Not on a regular basis.”

“Did you ever ask him to go to work?”

“He looked for work all the time.”
Cox turned again to Crawford’s marijuana use, asking her how much Rodricus smoked each day. When she said she didn’t know, he asked, “Have you ever smelled marijuana before?”

When the cross-examination was over, Florence approached the witness stand and said, “Ms. Abbie, was this just another black boy, worth nothing, at your house?”

Cox objected, and the judge accused Florence of inserting race into the proceedings. “It was something that welled up in me,” Florence told me later. “If we’re going to talk about it, let’s talk about it, because that’s what you’re doing. You’re just leaving out the word ‘nigger.’ But the jury can see past the code.”

In Cox’s closing statements, he said that Jesus Christ commanded the death penalty for those who killed a child, a point he had made the month before, in a trial where he won a death verdict against another young black man. “Now, this is Jesus Christ of the New Testament,” he said: “‘It would be better if you were never born. You shall have a millstone cast around your neck, and you will be thrown into the sea.’” Crawford was sentenced to death that evening.

A month after Crawford was formally sentenced, Dale Cox wrote a memo to the state’s probation department, which compiles reports on defendants sentenced to death. “I am sorry that Louisiana has adopted lethal injection as the form of implementing the death penalty,” he wrote. “Mr. Crawford deserves as much physical suffering as it is humanly possible to endure before he dies.”

The Lott family refused to speak with the probation officers who came to their house for a victim statement. A year later, when I knocked on their door, Lakendra’s mother, Sharon, spoke to me from behind the screen door; the interior of the house was so dark that I couldn’t see her. When I explained that I had talked with many people and wanted to include her voice, she told me, “I don’t have a voice. You can say whatever you feel. I don’t have a voice.”

I asked if she was satisfied with the way that the trial unfolded. “No,” she said. “I don’t know what happened.” She said that she knew that Crawford’s lawyer had told him not to testify, but she still felt it was wrong not to defend himself. “Just say something,” she said.

“No A.C., but who needs it when you’ve got this kind of cross-ventilation?”
AUGUST 8, 2011
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Lott had moved out of her mother’s house and now lived a little more than a mile away, in a government-subsidized housing complex. The first time I knocked on her door, at noon, she said that she was still sleeping. The next three times, a relative answered the door and said that she couldn’t talk. Sharon told me that my visit had upset
Lakendra, and she urged me to walk down the street and speak with the Crawfords instead. “I'm not saying nothing bad about Rodricus,” she said. “If he didn't do it and he gets out, that's fine.” She pointed to the Crawfords' house and said, “They shouldn't be mad at us. The jury did it, not us.”

Crawford is the second-youngest man on death row at the Louisiana State Penitentiary in Angola. He said that half of the people on his tier are from Caddo Parish; he has started calling two of them his “uncles.” When he first arrived, he would sleep all day, but they convinced him that sleeping wouldn't make life any better.

Prisoners on death row are not allowed to speak with anyone who isn't family, unless they are days away from execution. When the prison's warden, Burl Cain, told me that the policy was made “out of respect to the victims’ family,” I said that the victim's next-of-kin, Lott, had testified to Crawford's innocence. “We trust the Louisiana Criminal Justice System,” he wrote in an e-mail. “Rodricus Crawford has been found guilty.”

Crawford filed a motion for a new trial, arguing that the medical testimony presented at his trial had been insufficient and misleading, but in March his request was denied, without explanation. The brief filed by his lawyers included the opinions of three doctors who had concluded independently that the original autopsy was deeply flawed. Robert Bux, the coroner of El Paso County, in Colorado, told me that “there was no scientific evidence to support the diagnosis. They called it a homicide before they knew what was going on. I was amazed—amazed in the sense that I was horrified.” Janice Ophoven, a pediatric forensic pathologist from Minnesota, told me, “To be really honest, the pathologist did not seem willing to consider the actual facts of this case.”

A month after the court's denial, the district attorney of Caddo Parish died suddenly, and Cox filled the vacancy. In October, he will ask voters to elect him as district attorney. When I met with him to talk about Crawford's case, he seemed to struggle to remember the details. He said that Lott was “yukking it up with Samuel Jordan,” a defendant in a different case. When I asked if it troubled him that there was no motive, he responded, “In baby-killing cases, almost always the defense is that the baby was crying and it got on my nerves. So I started to hit him, and I kept hitting him, and he kept screaming. So I hit him harder. And then I decided to bash his head against the wall, and then he wasn't screaming anymore, so I could sleep again.”

I mentioned that Roderius had slept through the night without crying. “Am I
like all inmates on Louisiana’s death row, Crawford is confined to his cell twenty-three hours a day. He spends most of his free hour waiting in line for the phone. Earlier this month, I went to his house and waited for his daily phone call to his family, expected at about 10 P.M. It never came. Crawford wasn’t released from his cell that day. When he asked his classification officer what had happened, she smiled and said, “You know what’s going on.” Crawford interpreted it as an effort to prevent him from speaking with me. (His calls are monitored, and his mother had arranged the call in advance.)

Abbie Crawford and I waited for her phone to ring while sitting at a card table in her driveway. Rodricus’s uncle barbecued, and his twenty-one-year-old brother, Fostravz, ate a bowl of Trix. Abbie seemed to get comfort from analyzing the case—it made her feel as if she were actively doing something for her son—and she asked Fostravz to recount the last night of the baby’s life. “This ain’t no play,” Fostravz told her. “I’m not going to keep practicing this over and over.”

He and his family had recently posted flyers around Shreveport with a picture of Crawford and a note that said, “There is an injustice taking place in a city near you right now. It may seem unreal but believe it is all so real. . . . Rodricus C. Crawford could be YOU!” They hoped to get some media attention—the Shreveport papers had written only a few brief summaries of the trial—but no one responded.

Fostravz had his own theory of why his brother was in prison. A few months before the baby’s death, the police had arrested Crawford for marijuana possession and then released him on the condition that he inform on people who lived five blocks away. After they let him go, he refused to follow through.

“I knew they were going to do something to get Rodricus in jail, because he wasn’t snitching like they told him to,” Fostravz said.

“It was revenge,” his uncle, who had served time for drugs, said. “He didn’t do what they said, so they charged him with the other thing.”

“And that’s why they kept saying, ‘You don’t do anything but smoke marijuana all day,’ ” Abbie said, though she didn’t seem entirely convinced by the theory.

She appeared to have internalized Cox’s criticisms of her son; she now talked about his unemployment as if it were the actual crime. She was eighteen and single when she first became a mother, and now she felt that she hadn’t been strategic enough in raising her children, three boys and two girls. “I figured I could raise the boys just like the girls, but I’m not a man—maybe he needed a man,” she said. “Now I know that you have to have your child get into something positive in the daytime. You’ve got to work and get a paycheck and go to church every Sunday, or every other Sunday. On Saturdays, you can socialize or whatever, but that’s all.”
Cox’s judgments had become so central to her thinking that she worried about the D.A.’s age and his health and the fact that he could die before her son’s innocence was proved. “Since the day that Cox sentenced my child, I’ve been praying. ‘Father, please don’t let Mr. Cox die until he knows that Rodricus is going to be all right,’ ” she said.

In April, Crawford’s lawyers filed their first appeal with the Louisiana Supreme Court, which almost never overturns a verdict in capital cases. The brief described the “racial and geographic arbitrariness of the death penalty in Louisiana—confined predominantly to African-American men prosecuted in Caddo Parish”—and said that “Crawford’s fate depended far more on where he was prosecuted than his ultimate moral culpability.”

The Crawfords are so upbeat about each brief submitted to the court that their lawyers have to discourage them from unrealistic expectations. Crawford says that when he is free he intends to get married and to move away from Mooretown. “Rodricus doesn’t want to be part of the same old world that he was in,” Abbie Crawford said. “He tells me, ‘Keep praying, Mama, because the Father is dealing with us. The Father is getting us ready. I know he’s getting me ready to be a young man.’”

Rachel Aviv is a staff writer.
Acting Caddo DA Dale Cox will not run in fall election

SHREVEPORT, La. -
Interim Caddo District Attorney Dale Cox said Tuesday (July 14) he will not run for election this fall, saying ongoing controversy over his comments on the death penalty have caused too much of a distraction.

Cox has been the subject of unflattering national media stories in the wake of his comments that the death penalty should be sought in more cases.

"I have come to believe that my position on the death penalty is a minority position among the members of this community and would continue to be a source of controversy," Cox said in an e-mail. "Our community needs healing and not more controversy."

Cox, who became interim district attorney after the death of Charles Scott[2] this past spring, said media reports about his views on the death penalty have left the incorrect perception that his position is racially motivated. He also cited the demands of the job as a factor in his decision not to run.

"Both the local media and the national media have leveled harsh personal criticism of me as an evil racist because of my position on the death penalty," Cox said in his statement. "These attacks have been personal, savage, false and slanderous. These attacks are more and more directed at the office, not just me."

Cox was presenting evidence to a grand jury this morning and was not immediately available for comment.

The controversy began in April after comments Cox made to The Times of Shreveport.

"I think we need to kill more people. … I think the death penalty should be used more often," Cox told The Times. "It has come to the place in our society where it is used less often and I think crime in our
society has expanded so expeditiously ... that we're going the wrong way with the death penalty that we
need it more than ever and we're using it less now.

“I'm a believer that the death penalty serves society’s interest in revenge. I know it’s a hard word to say
and people run from it but I don't run from it because I think there is a very strong societal interest as a
people. I think (revenge) is the only reason for it.”

Links

In this Madison Lecture, Judge Stephen Reinhardt tells the story of the case of Thomas Thompson, a man without a prior criminal record who was executed in California in July of 1998 despite substantial doubt about his guilt of capital murder and an unrebutted decision by the en banc court of the Ninth Circuit that his trial was blatantly unconstitutional. The Ninth Circuit’s decision was based on egregious conduct of the prosecution and ineffective assistance of Thompson’s counsel. The district judge previously had reversed Thompson’s capital sentence on the latter ground.

Judge Reinhardt provides a firsthand account of the unusual events that took place within the Ninth Circuit, including the passing of the deadline within which a judge could request an en banc rehearing; the extraordinary rejection by three judges of a request by colleagues for an extension of time within which to vote on rehearing; a good faith effort, that backfired, by a majority of the Ninth Circuit to comply with the Supreme Court’s arcane procedural rules; and, ultimately, a dramatic en banc rehearing in which the Ninth Circuit ruled in Thompson’s favor. The story then turns to the United States Supreme Court, which, in a wholly unprecedented action, held that the Ninth Circuit’s en banc hearing was invalid because it came too late and offended purported principles of comity and finality, abstract concerns that increasingly predominate over substantive rights in the jurisprudence of the Rehnquist Court.

By telling the story from start to finish, including a report on the factual errors made by the Supreme Court, Judge Reinhardt illustrates the dramatic consequences of the current Court’s elevation of procedural rules over substantive justice and the dictates of the Constitution, particularly in death penalty cases. In Judge Reinhardt’s opinion, the Court’s philosophy in this instance cost Thomas Thompson his life and in its general application seriously tarnishes the integrity and reputation of the American justice system.

[R]eversal by a higher court is not proof that justice is thereby better done.

The year I graduated from law school, the Warren Court decided Brown v. Board of Education. Brown, perhaps the most important Supreme Court decision in history, introduced a new judicial era, an era in which the courts became the protectors of the rights of the poor, the disenfranchised, and the underprivileged. The Warren Court—the Warren-Brennan era—will be remembered for that legacy. The Court’s decisions were guided by a broad, humanitarian vision of the role of the judiciary and of the Constitution as a living document. The Warren Court expanded concepts of equality, due process, and individual liberty, handing down decisions that redefined notions of justice and fairness.

In the area of civil rights, the Warren Court helped usher in revolutionary and irreversible changes in race relations. It also issued landmark First Amendment decisions such as New York Times Co. v. Sullivan and Engel v. Vitale, expanding the protections afforded the free press and strengthening freedom from state-sponsored religion. It implemented “one person, one vote” in Reynolds v. Sims, changing our entire political system. And in its criminal justice decisions, the Warren Court established groundbreaking rules in cases such as Gideon v. Wainwright, Miranda v. Arizona, and Mapp v. Ohio, for the first time implementing some of the Bill of Rights’s most fundamental promises and giving life to the Fourth, Fifth, and Sixth Amendments. The rules were as elementary as the one holding that everyone charged with a crime has the right to be defended by counsel. And although Earl Warren had left the Court by 1969, the Warren-Brennan era continued long enough to give us Roe v. Wade, which afforded women the most basic of rights, and Furman v. Georgia, which for a brief period held the death penalty unconstitutional. At the time, we thought that there was no turning back, that the Supreme Court’s transformation of the role of the judiciary would guarantee a new era in constitutional law, an era in which progress would be the rule, forward would be the direction, and the interests and welfare of the people would be dominant.

Today, we face a very different Court, one that has also had a major impact, and one that will be remembered for its own legacy. The Rehnquist Court will be remembered for its stark reversal of the Warren-Brennan Court’s expansion of individual rights and protections and for elevating procedural rules over substantive values and limiting rights generally, especially those of racial minorities. It will be remembered for erecting technical
barriers that foreclose relief to persons with meritorious constitutional claims. It will be known for reducing access to the federal courts and for placing the interests of the state ahead of those of its citizens. Without formally overruling the liberties and freedoms recognized by the Warren Court, the Rehnquist Court has rendered many of them virtually unenforceable, the exceptions being property rights and, to the surprise of most observers, free speech.

The Rehnquist Court has drawn the line regarding substantive due process, refusing to recognize any new, unenumerated rights—a principle which would have left us without the critical protections of privacy recognized in decisions such as Griswold v. Connecticut and Roe v. Wade. And one can only contemplate with dread the answer the current Court would have given had it been asked to overrule Plessy v. Ferguson.

The Rehnquist Court has placed its greatest emphasis on the expansion of nonconstitutional doctrines such as mootness, ripeness, standing, procedural default, nonretroactivity, independent state grounds, and abuse of the writ. It also emphasizes at every opportunity nostrums such as comity and finality. Under the Rehnquist Court’s jurisprudence, these rules regularly prove decisive in limiting the ability of lower federal courts to redress constitutional violations, in shutting the doors of the courthouse to ordinary people. The Court’s constriction of rights has been most notable in the criminal justice area: in particular, through assaults on what was once known as “The Great Writ,” the writ of habeas corpus—much of it in the name of federalism or, as it used to be known, states’ rights. The Rehnquist Court has rendered a number of decisions that prohibit habeas petitioners from bringing claims they did not “properly” raise in state court or in earlier habeas petitions, unless they can overcome an increasingly strict cause and prejudice test or meet an almost impossible “miscarriage of justice” standard. At the same time, the Court has made it easier for states to claim that their courts relied on independent state grounds to reach their decisions and thus to avoid any federal judicial review of their unconstitutional actions. The Court’s decisions have also inflated the harmless error and plain error standards beyond recognition, thereby encouraging future violations of constitutional rights. Finally, the adoption of the anomalous Teague v. Lane doctrine has foreclosed relief to most habeas petitioners unless they are able to demonstrate that courts generally recognized the particular violation they suffered before their convictions became final. In other words, after Teague, habeas petitioners are not entitled to raise claims on the basis of what the Court defines as “new rules.”

Today, this maze of procedural barriers compels federal judges to spend up to ninety percent of our time in capital cases and other habeas proceedings trying to determine whether a defendant’s rights have unwittingly been forfeited and trying to apply the Supreme Court’s arcane and almost impenetrable procedural rules. Unless we conclude that the defendant has somehow surmounted all of the Court-created artificial constructs, we cannot even reach what is now usually the easier question: whether the defendant was deprived of his constitutional rights. In recent years, it has become increasingly unlikely that the federal courts can correct constitutional violations occurring in state prosecutions. Frequently, all that is left to a defendant is a claim of ineffective assistance of counsel, which is, of course, one of the most pervasive problems in capital cases. But even a claim of ineffective assistance is often procedurally foreclosed because in the state post-conviction proceedings the same ineffective lawyer continues to represent the defendant, or, even worse, the defendant is left without counsel at all. Either way, the ineffectiveness claim almost surely will not be raised in a timely manner and, under the rules adopted by the Rehnquist Court, will be procedurally defaulted. What has been lost in the worship of abstract procedural principles is our concern for fairness and justice—our dedication to the Bill of Rights and the Fourteenth Amendment.

The epitome of this Supreme Court’s death penalty jurisprudence is the case of Thomas Thompson, who was executed only three months ago, on July 14, 1998, by the State of California. One year earlier, in August 1997, my court, the United States Court of Appeals for the Ninth Circuit, sitting en banc, had issued an exhaustive and forceful opinion vacating Thompson’s death sentence and remanding his murder conviction. We held that he had been deprived of effective assistance of counsel on the charge that made him eligible for the death penalty and that the prosecutor’s highly improper conduct both at his trial and at the trial of his alleged accomplice violated the Due Process Clause. In short, Thompson had not received anything resembling a fair trial. In April 1998, the Supreme Court vacated our decision, and without uttering a single word of disagreement with our judgment that Thompson’s constitutional rights had been egregiously violated, declared, through a now-familiar bare majority of five Justices, that we had committed “a grave abuse of discretion” by hearing Thompson’s case en banc.

The Supreme Court’s decision that a person could be executed on the basis of a trial in which his fundamental constitutional rights were violated was, sadly, nothing new. By similar five-to-four margins, the Rehnquist Court had previously held that persons could be executed when the constitutional rules violated in their trials had not been “compelled by existing precedent.” It also had held that a man could be executed because he could not provide a good enough reason why his winning constitutional claim
had been raised in his second habeas petition rather than in his first. Similarly, the Court had ruled that a man could be executed because his lawyer had filed his notice of appeal in the state habeas proceedings three days late.

In Coleman, while overturning decades of jurisprudence, the Rehnquist Court explained, in a sentence exemplifying the quality of its concern for individual rights, that earlier Supreme Court habeas decisions were “based on a conception of federal/state relations that undervalued the importance of state procedural rules.” “We now recognize,” the Rehnquist Court announced, “the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.” In other words, the Rehnquist Court proclaimed that until the present Justices came along, the United States Supreme Court had not been sufficiently perceptive to realize that state procedural rules are more important than fairness, due process, and even justice. If only Justices Warren and Brennan, and other learned predecessors of the current Court, had been possessed of the acuity and judicial wisdom that today’s Justices enjoy, we could have devalued the Bill of Rights years earlier.

The surprising thing about the case of Thomas Thompson is that, in contrast to most of the other cases in which the Court refused to entertain the merits of petitioners’ claims, there was no contention that any state procedural rule had been violated or that any constitutional principle involved was inapplicable because it was a “new rule,” not one generally recognized before Thompson’s conviction. No, against all odds, Thompson and his lawyer had scrupulously, and successfully, wound their way through what Justice Blackmun called the “[b]yzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights.” Yet, once again, the Supreme Court majority refused even to consider whether the petitioner’s constitutional rights had been violated. The ostensible reason this time was that the judges on our court had missed a deadline, the state’s “final” judgment had become incrementally more final, and, as a result, the en banc hearing we held had been conducted too late. Our decision was null and void. The fact that Thompson would be executed on the basis of an unconstitutional trial was of no consequence to the majority of the members of the Supreme Court.

Perhaps a fuller discussion of what occurred in the Thompson case will help make clearer the sharp differences in judicial philosophy between the current Supreme Court and those who would give substance to the protections afforded all persons by the Bill of Rights and the Fourteenth Amendment. In any event, I believe it to be a tale worth recording.

I

The Trial

Thomas Thompson was convicted in 1983 in a California state court of the first-degree murder and rape of Ginger Fleischli. It was his first criminal conviction. Two years earlier, Thompson had gone out for a night of drinking with a group that included Ms. Fleischli, David Leitch, and Leitch’s ex-wife. Leitch had until recently been Ms. Fleischli’s lover, and they had lived together. After the breakup with Leitch, Ms. Fleischli decided to share living quarters with Leitch’s ex-wife. Thompson, who was new to the group, moved in with Leitch as his roommate. At the end of the evening’s carousing, Ms. Fleischli and Thompson went to the apartment in which she had lived with Leitch but which Leitch and Thompson now shared. Leitch arrived sometime later that night. By the next morning, Ms. Fleischli was dead. Her body, with multiple stab wounds to the head, was found two days later in a field ten miles away. Suspicion regarding her murder immediately focused on Leitch, because of his prior sexual relationship with her, because he had threatened her in the past, and because he had a history of violence toward women.

The state arrested and eventually indicted both Leitch and Thompson. Its theory was that Leitch wanted Ms. Fleischli dead because he hoped to resume his relationship with his ex-wife and that he recruited Thompson to join in the killing and disposal of the body. Leitch, the prosecution insisted at preliminary hearings, was “the only person . . . who ha[d] a motive” to kill the victim. At the preliminary hearing, the prosecution presented four jailhouse informants who testified in support of this version of the crime. The informants stated that Thompson had confessed that Leitch had recruited him to help kill Ms. Fleischli because she was interfering with his attempt to reconcile with his ex-wife. One of these informants testified that Thompson had told him that Thompson had engaged in consensual sex with Ms. Fleischli before Leitch returned home, and that upon Leitch’s return, they had killed her. At a subsequent hearing a few months later, the prosecution again argued, “[Leitch] is the only person . . . who has a motive”--that motive being that Ms. Fleischli was “in the way” of a successful reconciliation with his ex-wife.

The same deputy district attorney prosecuted both Leitch and Thompson. He subsequently testified that his theory of the case never varied throughout the proceedings. Indeed, he advocated the state’s principal theory--that Leitch had recruited Thompson to help kill Ms. Fleischli--at the preliminary hearing, at the hearing on the motion to set aside the charges, at Leitch’s trial, and at the post-
conviction hearings.

But when the preliminary proceedings were completed, a surprising development occurred: The prosecutor decided to try Thompson first, and at the Thompson trial he offered an entirely new and contradictory version of the facts. There the prosecutor insisted that Thompson was the sole killer and that his motive was to cover up the fact that he had raped Ms. Fleischli—a theory that was wholly inconsistent with the version he urged on every other occasion. The prosecutor now argued that Thompson “was the only person in that apartment with Miss Fleischli the night—at the time she was killed.” Thompson raped her, he told the jury, and “[b]ecause she said she was going to tell for what he did to her,” he spontaneously “killed her to prevent being caught for rape.” The prosecutor declined to call any of the four prosecution witnesses the state had presented at the preliminary hearing, all of whose stories directly contradicted the tale he presented at Thompson’s trial. Instead, he put on the stand two new and notoriously untruthful jailhouse informants, John Del Frate and the aptly named Edward Fink. The new “snitches” conveniently testified that Thompson had confessed to a version of events that corresponded with the prosecutor’s newly developed rape theory. Their testimony provided, in the prosecutor’s own words, the “dispositive” evidence that Thompson had raped Ms. Fleischli and murdered her to cover up the crime. The snitches also testified that Leitch was not involved in the murder—that he only discovered that the victim had been killed after he returned to the apartment and found her dead and that his involvement was limited to helping dispose of her body at Thompson’s urging. The prosecutor emphasized to the Thompson jury that Leitch was in no way involved in Ms. Fleischli’s actual killing, asking “[w]hat evidence do we really have that [Leitch] did anything, had any part [except in disposing of the body]? There is no evidence we have putting him in the apartment that night.” He vouched for the new jailhouse informants’ credibility: “[T]here’s no reason whatsoever they have to lie. There’s no motive to fabricate, and [Thompson] couldn’t impeach them on one single point.” By convicting Thompson of rape as well as murder, the prosecutor succeeded in making him eligible for the death penalty, which the jury and judge then imposed.

Of course, the prosecutor did not stick with this version of the events for long. After Thompson’s trial, he returned to the original theory: that Leitch recruited Thompson to help him kill Ms. Fleischli because Leitch wanted Ms. Fleischli dead. At Leitch’s trial, the prosecutor did not call the two snitches whose reliability he had vouched for during Thompson’s trial and whose testimony he had called “dispositive.” Instead, he subpoenaed the witnesses who had testified in Thompson’s defense, whose testimony he had sought to discredit at Thompson’s trial—testimony that suggested that Leitch, not Thompson, was the murderer. Now, he urged that the jury credit that testimony.

Having obtained Thompson’s conviction, the prosecutor returned to the theory he argued at all the other proceedings, that Leitch’s violent history, his past threats toward Ms. Fleischli, and his motive—his desire to remove an obstacle to reconciliation with his ex-wife—demonstrated that Leitch was the murderer. The prosecutor argued, in direct contravention of his statements to the jury in the Thompson trial, that Leitch was “the only one with any motive for [Ms. Fleischli’s] death.” And in perhaps the most blatant contradiction of all, he ridiculed the very version of events that he had presented in Thompson’s trial, asking whether it would be “reasonable” or “logical” for Thompson to kill Ms. Fleischli, wait for her former lover to return home and discover the murder, and then request his help in disposing of the body. He answered his own question: “No, it didn’t happen that way.” In short, Thompson did not do what the state told his jury he did. Thompson did not commit the acts for which the state obtained his conviction, the acts which allowed the imposition of the death penalty.

The incompatibility of the two presentations could not have been more evident. As Judge Betty Fletcher of our court later wrote, “little about the trials remained consistent other than the prosecutor’s desire to win at any cost.”

The prosecutor’s contradictory presentations were so blatantly unethical that, in a wholly unprecedented action, seven former California prosecutors with extensive death penalty experience subsequently filed an amicus brief on Thompson’s behalf in the United States Supreme Court, arguing that “this is a case where it appears that our adversarial system has not produced a fair and reliable result.” This group of top prosecutors included the individual entrusted with the decision whether to seek the death penalty in all capital-eligible cases in Los Angeles County during 1979-1991, his counterpart in Sacramento entrusted with the same decision in that county during 1989-1995, and the drafter of the California death penalty statute under which Thompson was convicted and sentenced. These highly respected prosecutors severely criticized the egregious conduct of Thompson’s prosecutor and observed that “the use of three informants to support one prosecution theory and then two new informants to support another demonstrates how easy it is to manipulate facts when the prosecutor’s goal is to win at all costs.”

In addition to facing a prosecution that made a fair trial impossible, Thompson found himself defended by an
attorney who made the inexplicable decision not to contest the assertion that Ms. Fleischli had been raped, although there was very little evidence that the intercourse had been anything but consensual, and it was the rape charge that made the murder a capital offense. Incredibly, rather than questioning the state’s physical evidence or putting on his own forensic testimony, Thompson’s defense attorney chose to argue that it was Leitch who had raped Ms. Fleischli. He thus effectively admitted, on his client’s behalf, the occurrence of a rape that in all likelihood never occurred—a “rape” which made Thompson eligible for the death sentence. Thompson’s counsel also made only minimal efforts to impeach the jailhouse informants who testified that Thompson had confessed a rape and murder to them, failing to discover that both Fink and Del Frate often had testified about purported confessions in exchange for favors from law enforcement officials and were generally regarded as extremely unreliable; that Fink’s parole hold had been released after he gave his statements implicating Thompson; that Del Frate’s testimony matched inaccurate news reports of the crime; and that even Del Frate’s own family knew him to be a “pathological liar.”

The attorney’s failure to contest the allegation that Ms. Fleischli was raped is extremely disturbing in light of Thompson’s testimony that he had engaged in consensual sex with her after returning to the apartment and the evidence that Thompson later obtained which casts substantial doubt on the theory that any rape occurred. That evidence includes both forensic testimony and Leitch’s own admissions against interest that he observed Thompson and Ms. Fleischli engaging in consensual sex on the night in question.

All in all, Thompson’s trial fell far short of minimal constitutional standards in every important respect.

II

The Federal Habeas Petition

After losing his appeals in the California state courts, in 1990 Thompson finally earned the right to present his constitutional claims to a federal court. Thompson filed his petition for writ of habeas corpus in the United States District Court for the Central District of California. The case was assigned to Judge Richard Gadbois, a former state court trial judge and an appointee of President Ronald Reagan. Judge Gadbois, who, over a five-year period, read and reread thousands of pages of trial transcripts and held an evidentiary hearing at which he heard additional direct testimony, issued a meticulous and carefully considered 101-page opinion.

Judge Gadbois ruled that Thompson’s trial attorney rendered ineffective assistance of counsel as to the rape charge by failing to contest the state’s dubious physical evidence and failing to impeach the state’s two jailhouse informants. The district court found that this deficient performance prejudiced Thompson in light of the insubstantiality of the evidence that any rape had occurred. The court did not conclude, however, that the prosecutor’s use of inconsistent theories reached the level of a constitutional violation. Judge Gadbois’s ruling meant that Thompson’s death sentence would be vacated, but his murder conviction would stand. The state appealed and so did Thompson.

On June 19, 1996, a three-judge panel of the Ninth Circuit reversed the part of the decision in Thompson’s favor. It did so on the ground that any errors made by his lawyer were not prejudicial. The decision gave short shrift to Thompson’s arguments, saying, for instance, that the panel “[could not] say that” the informants’ testimony “formed a crucial part of the case” even though the prosecutor had called their testimony “dispositive.” The panel’s essential message was contained in the first sentence of its analysis, where it chanted the Rehnquist Court’s mantra: “We are mindful of the limited role of federal courts in habeas review of state convictions.” That message of course bore no relation to what the panel actually did in Thompson’s case—which was to reexamine, reweigh, and reevaluate the evidence and reject the findings of the district judge. This task is one for which conservative jurists regularly proclaim appellate judges are ill-suited, insisting that such judgments should be left to district judges who, like Judge Gadbois, have conducted the evidentiary hearings. Nonetheless, the panel reached a conclusion contrary to the district judge’s conclusion and reinstated Thompson’s death sentence.

On August 5, 1996, Thompson filed a timely petition for rehearing and suggestion for rehearing en banc, which was circulated to the judges of our court. Toward the end of September, a judge requested that the panel provide a 5.4(b) notice. A request for such a notice, which is known by the number and letter of one of our internal rules, is ordinarily a precursor to a judge’s calling for a rehearing en banc and a signal to the court that the judge is likely to so call.

The procedure by which the full court decides whether to hear cases en banc is provided by statute. As caseloads have proliferated, en banc hearings have become increasingly important. Under our internal rules, if any active or senior judge believes that a decision by a three-judge panel of the court merits rehearing by the court sitting en banc, that judge is entitled to request a vote for rehearing by all of the active judges. If a majority of the active judges then votes for rehearing en banc, an en banc
court of eleven judges is convened, the case is argued anew, and the en banc court may then issue a decision that supersedes the three-judge panel’s decision. An en banc call—that is, a request for a vote on whether to rehear a case en banc—provides a check on unconstitutional executions and leads to reversals in capital as well as noncapital cases.

When a judge requested a 5.4(b) notice in the Thompson case, the three-judge panel became obligated to notify the full court after it had ruled on Thompson’s petition for rehearing and suggestion for rehearing en banc before the original panel—in layman’s terms, after it had considered the losing party’s objections and decided to stand by its opinion. Once a judge requests a notice, the other judges who might be concerned about the opinion ordinarily assume that the judge who made the request will take responsibility for the case and, at the appropriate time, will call for an en banc vote or notify the other members of the court that he or she has decided not to make a call, so that any other judge wishing to take up the cause will have the chance to do so.

The Thompson panel waited approximately four months, until January 17, 1997, to forward a 5.4(b) notice stating that it had voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The sending of that notice triggered a fourteen-day period in which to make the formal en banc call. The fourteen days passed, however, and somehow, for reasons we will probably never fully know, the judge who requested the notice failed to take the next step in time. It is not clear even now how or why the time that our internal rules provided for requesting an en banc hearing slipped by not only that judge—who is, in my opinion, unquestionably the ablest, hardest working, and most conscientious judge on our court—but all the rest of the judges of the court as well. It is not even clear whether the error was entirely human or mechanical, or whether the panel’s inclusion in its notice of its intent to amend the opinion played a part.

What is clear is that although more than half the members of the court thought that the issues were sufficiently troubling that an en banc hearing was required, and, although that same majority even thought that we should go to the unusual lengths of recalling the mandate in order to hear Thompson’s case en banc, none of us made the call in time. The best explanations seem to lie in our assumption that the judge who had requested the 5.4(b) notice would make the call; in the fact that we receive dozens of email messages a day, many containing brief declarations of formal actions such as the filing of notices and technical orders; in the fact that our system of transmitting such notices is mechanically imperfect; and in the overwhelming volume of the caseload all federal judges face these days, a caseload that often prevents us from being as meticulous in our tasks as we should be. In that regard, I would add only that at the time the Thompson case was before our court we were missing one-third of our authorized judges, having just nineteen of our complement of twenty-eight. The critical point, however, is the fact that at least ten of us—a majority of the active judges and the judges who ultimately voted to take the case en banc—failed to make a timely call.

On March 6, 1997, the three-judge panel released an order amending its opinion (in technical, not substantive ways) and again, superfluously, denied Thompson’s requests for further proceedings. The day after the order was published in legal newspapers, I became aware for the first time that Thompson’s suggestion for a rehearing en banc had been denied and that no judge had sought an en banc vote. I immediately sent a memorandum to the panel. In my opinion, the case necessitated further review. I presumed that if no request for a vote had been made, an error of some type had occurred, and the panel would be willing to grant an extension of time to any judge requesting one, in line with the uniform past practice within our court.

I explained to the panel that I, for one, must have made a mistake in not making the call, that it could have been due to an administrative error that occurred at the time of a change in law clerks, and that after reviewing the opinion I was worried that the panel’s decision, along with my mistake, “might lead to the execution of a person who may possibly be innocent and whose constitutional rights appear to have been violated.” I closed by asking “whether the panel might be willing to . . . permit me to make a prompt en banc call.”

The next day, the judge who had requested the 5.4(b) notice sent a memorandum to the panel, which made it clear that that judge also had not realized that the notice had been circulated. That judge wrote:

My first awareness that the petition for rehearing and en banc request in this case had been acted on was the receipt of the March 6 amended opinion and order, received yesterday.

I have just received Judge Reinhardt’s memo. I second his request . . . . I wonder whether in any event an amended opinion triggers a new 5.4(b) period?

The judge quickly followed up with another memorandum asking: “Was a 5.4(b) notice circulated? Did I miss it?” The initial question whether technical amendments to an opinion would trigger a new en banc period serves only to illustrate how complicated and ambiguous our en banc rules are. Judge Alex Kozinski
later suggested, for reasons of his own, that a call might still have been timely in view of the proposed technical amendment. The judge who requested the 5.4(b) notice and I conferred, however, and concluded that under our rules the amendment did not alter the time requirements.

On March 20, Judge Robert Beezer responded on behalf of the three-judge panel. He informed us that “[t]he panel has unanimously agreed that nothing will be done by the panel to extend the time within which an en banc call can be made. We see no reason to delay further consideration of this case by the Supreme Court.” This response was remarkable. For the first time of which I am aware, a panel of our court took the extraordinary step of refusing a request by a judge of the court for an extension of time in which to call for rehearing en banc. It refused our request even though no one questioned our explanation that the failure to make a timely en banc call was due to nothing more than human error or some other miscalculation or malfunction. Finally, it did so even though the error was one made by members of the court—not by the petitioner or his attorney—and the result would be that the full court would be deprived of the opportunity to review the panel’s decision that a person should die. I was, frankly, shocked by the cold-blooded and uncollegial response of my colleagues. I consulted with the other judge who had joined in my request. The reply came swiftly. There was nothing further we could do. From a practical standpoint, I agreed.

Thompson then, on April 21, 1997, petitioned the Supreme Court for certiorari. It was at that point that the brief of the seven former top prosecutors was filed. The Supreme Court denied Thompson’s petition on June 2, 1997. Our court received notice of the denial on June 5 and on June 11 issued the mandate to the district court, an act that subsequently took on enormous significance.

After the Supreme Court denied certiorari, I obtained a copy of the brief that the seven former prosecutors had filed. The strong law-and-order views of the signers were well known to me, as were their reputations for integrity. The brief’s description of Thompson’s prosecutor’s misconduct was startling. I discussed the case with a number of judges on our court, including the Chief Judge, Procter Hug, Jr. One of the judges I spoke with, a former prosecutor, told me that he was personally aware that one of the key jailhouse witnesses against Thompson had a penchant for testifying that he had obtained confessions from others in the jail and that his testimony was generally known to be unreliable. Finally, I spoke with Judge Jerome Farris, a highly respected senior judge who is extremely conservative on criminal justice issues. I sent him a copy of the seven prosecutors’ amicus brief. Judge Farris told me that he found the facts to be shocking, if true, and that he thought that we had an obligation to review the case through the en banc process. He was confident that the panel would now accede to a request to let the court rehear the case and that, if not, an overwhelming majority of the court would agree to do so.

Judge Farris’s optimism proved unfounded. He sent a memorandum on July 7, less than thirty days after we issued our mandate, in which he asked that he be permitted to call for an en banc vote. The panel swiftly denied his request. The Chief Judge immediately scheduled a vote by the entire court on Judge Farris’s request to recall the mandate. Judge Farris offered the following eloquent plea:

How does injustice happen, and why does it persist throughout human history, are questions that I have long pondered. I’ve concluded that its primary cause is that most of the strong have little concern for the rights of the weak. Civilization survives because from time to time some of the strong step forward and say “enough.” Those who care cannot correct all of the wrongs nor do they owe an apology for those wrongs they cannot impact. However, in my view, they must step forward when the question of appropriate action is presented. In such moments, inaction or indifference—not failure—is the deadly sin.

The debate was interrupted shortly after the panel’s denial of Judge Farris’s request when two judges, our en banc coordinator and the judge who had until recently been our death penalty coordinator, sent memoranda on July 10 and 11 respectively that temporarily put the brakes on everything--memoranda that were sent with the best of intentions but which led to a decision for which the Supreme Court would later castigate us and impugn our integrity as a court. In the first memorandum, the judge who serves as en banc coordinator informed us of a development in the case: Thompson had filed a new petition in state court and the state courts had resumed their proceedings. The judge urged us to delay any action. The memorandum said:

[C]onsistent with the [Supreme Court’s] exhaustion jurisprudence with which we must live, state and federal courts should not have the same prisoner’s life in their hands at the same time. . . . To withdraw the mandate now would appear at the very least to provoke a confrontation with California and its courts that will pull Thompson in two directions.
The judge who had been the death penalty coordinator agreed and urged us to wait until Thompson had exhausted his state court remedies on his second petition before taking any further action on the first. Chief Judge Hug consulted with those of us who had urged immediate action. Aware that the positions of the two coordinators would make it impossible to prevail if an immediate vote were held, the en banc proponents bowed to the coordinators’ suggestion. We reluctantly agreed to postpone the vote. In fact, the conflict was not what the two judges had feared. The district court had not yet taken its final action. It had not yet spread the mandate. In practical terms, Thompson’s first habeas petition remained before the federal courts. Because the district court still had jurisdiction over that petition, we could have recalled the mandate without intruding on the prerogatives of the state courts. It was in fact the state judicial system that had jumped the gun by resuming jurisdiction over Thompson’s proceedings before the federal courts’ actions on his first petition had become final. Yet, critical details frequently get lost in the rush of complex death penalty struggles within our circuit, and, as a result, the seemingly reasonable but mistaken view of the two proceduralists prevailed.

So we waited. The California Supreme Court denied Thompson’s petition on July 16. Several days later Thompson turned to our court again. He filed a motion to recall the mandate. When the panel finally denied the motion, after a six-day delay, our Chief Judge reactivated Judge Farris’s sua sponte call.

Finally, on July 29, less than a week before the scheduled execution, we were able to vote on whether to go en banc to correct the panel’s clearly erroneous decision. A majority of the active judges voted to recall the mandate and rehear the case. Oral argument was scheduled for August 1, four days later.

Let me take a moment to assure you that, despite what some Supreme Court Justices and United States Senators might think, the Ninth Circuit was not and is not a “liberal” court. At the time the majority of the court decided to recall the mandate, a majority of the judges eligible to vote on the question were appointees of Presidents Reagan or Bush, and they reflected the judicial philosophy of those Presidents. That a court composed of a majority of Republican appointees who shared the values of the Rehnquist Court could be considered a liberal body, simply because on occasion it issues a decision that shows respect for human rights or individual liberties, demonstrates just how far the judicial system has come—or gone—from the Warren-Brennan era.

In any event, on August 1, four days before Thompson’s scheduled execution, the en banc court heard oral argument. Immediately afterward, we voted seven to four to recall the mandate and reverse the three-judge panel. The opinion was assigned to Judge Fletcher, who circulated a draft the following day, August 2, and filed the final version on August 3. In that opinion, we affirmed the district court’s partial grant of Thompson’s writ—the order that had reversed Thompson’s rape conviction on the ground of ineffective assistance of counsel—and directed that that conviction be set aside. The majority also held that the prosecution’s presentation of directly contradictory theories and evidence in the two trials violated the Due Process Clause, and it returned the murder conviction to the district court for further review in light of our decision.

Our opinion noted that the authority to recall our court’s mandate had long been recognized as within our discretionary power and had been invoked in numerous other cases presenting extraordinary circumstances. Judge Fletcher wrote: “Our interest both in protecting the integrity of our processes and in preventing injustice are implicated in the case before us.” The integrity of our processes had been violated as a result of the inadvertent errors of judges, including myself, who failed to make a timely en banc call, thus allowing the three-judge panel arbitrarily to foreclose review of its opinion by the full court. The threat of injustice resulted from “fundamental errors of law” made by the three-judge panel, which made imminent the execution of a man who had unquestionably been denied a fair trial—a man who was in all likelihood innocent of the crime that made the death penalty possible, if not of all the charged criminal conduct.

Because some judges in the majority insisted that it was inadvisable to expose the details of our internal circuit disputes, the opinion left fairly general the description of the steps that various members of the court had taken in attempting to make an en banc call and the manner in which our efforts had been rebuffed and frustrated. Ultimately, it was precisely this failure to discuss the details of the procedural errors and departures from the court’s longstanding practices that enabled Judge Kozinski to put his own spin on “the facts” and to write a separate dissent purportedly describing what had occurred within our court but omitting or mischaracterizing crucial details. Judge Kozinski insisted that “nothing at all unusual happened; the process operated just as it’s supposed to.” He recounted a version of events which bore little relationship to practical reality. To him, all that had happened was that two judges had missed a routine en banc call, while thirty-five others—all of the remaining active and senior members of the court—had independently determined that the case “did not meet the rigorous standards for en banc review.”
Of course, this was neither an accurate nor a fair rendition of the practices of our court or the events that had occurred. Nothing was usual about the Thompson case; nothing worked the way it was supposed to. Thirty-five judges clearly had not made the decision Judge Kozinski attributed to them, and a panel of our court had acted in a highly atypical and uncollegial manner. Never before had a panel precluded review of its decision to end someone’s life because their colleagues had made inadvertent errors in the timing of en banc call. The action by the panel was in fact more than unusual; it was unprecedented. While misstatements made in a dissent ordinarily would be of little concern, here the circumstances were different. Judge Kozinski’s highly articulate dissents on en banc matters are frequently written with a dual purpose and appear to be aimed at particular members of the Supreme Court. That is why they are often referred to as “cert. petitions.” This time there was no doubting my able colleague’s objective.

Judge Kozinski’s dissent was disturbing for another reason. He argued that because no individual petitioner has a right to an en banc hearing, any “error can be corrected in a future case where the problem again manifests itself.” The idea that a court should not concern itself with whether it has erroneously upheld the execution of a human being who is under an unconstitutional death sentence, and who is probably innocent of at least the death-qualifying offense, is disturbing enough. The argument that we need not review en banc because we can resolve the legal issues in another case, after the condemned individual is dead, should shock the conscience of anyone who believes that the objective of our courts is to ensure fairness or justice. In my opinion, Judge Kozinski’s dissent called into question the very purpose and legitimacy of our judicial system. Unfortunately, that dissent foreshadowed the approach that the nation’s highest court would shortly employ.

Soon after we issued our opinion, the State of California filed a petition for a writ of mandamus with the Supreme Court. Although the Court was in the middle of its summer vacation, the Justices quickly determined to treat the state’s request as a petition for certiorari and granted it. The Court’s order provided that the Court would not decide whether a condemned man’s constitutional rights had been violated, but only whether the Ninth Circuit had the authority to recall its mandate. For a High Court that is supposed to consider only important questions of national concern, this was a strange and most unusual action. As Justice Souter later wrote, on behalf of the Court’s four moderate Justices, the Supreme Court took action to solve “a systemic problem that does not exist.”

### III

**The Supreme Court Decision**

Given the composition of the Rehnquist Court, the outcome of the Thompson case was undoubtedly inevitable. Still, the Court’s five to four opinion was a shock to many, both for its hostile, indeed vituperative, tone and for the unprecedented restrictions it placed on the authority of the federal courts to correct their own errors—particularly in cases in which errors result in the most drastic consequence possible. The majority opinion, authored by Justice Kennedy, echoed Judge Kozinski’s version of the events within the court of appeals, even quoting his conclusion that “[t]he process operated just as it’s supposed to.” The majority did not base its analysis upon its reading of the record of our internal correspondence or actions, or on any independent and objective knowledge of the occurrences that had preceded our recall of the mandate; the Justices had no such record before them and were possessed of no such knowledge.

Given the confusion surrounding the events, one might have thought that the Court would not reach such critical conclusions in so cavalier and irregular a manner. But it did. Justice Kennedy simply adopted the erroneous representations of a dissenting judge and incorrectly characterized the procedural errors of the Ninth Circuit as solely a “mishandled law clerk transition in one judge’s chambers, and the failure of another judge to notice the action proposed by the original panel.” That Justice Kennedy would draw such patently erroneous conclusions is especially surprising. He had served on our court himself, and, in fact, Judge Kozinski had served as his law clerk during a part of that time. Justice Kennedy certainly should have known how our court functions and how our en banc process actually works. Nonetheless, he concluded: First, the failure of two judges to make their views known on time had no practical consequences other than that the court did not receive the benefit of their views, and second, those two judges had then deliberately delayed making an en banc call until they did so just before the execution.

Being one of the two judges, I was in a unique position to know that both of Justice Kennedy’s conclusions were wholly incorrect, although I am admittedly not a disinterested or unbiased observer. Still, there are facts that are indisputable—facts that Justice Kennedy and the majority of the Supreme Court simply got wrong. The “only consequence of the oversights” was not, as Justice Kennedy put it, that the two judges failed to contribute “their views to [the] determination.” The actual consequence of the errors made by the two judges, and by the majority of the members of the court, was that the
court itself was deprived of the opportunity to convene en banc to correct a grievous constitutional error that one of its panels had committed and that a majority of the court desired to correct.

Next, Justice Kennedy’s accusation that the two judges deliberately delayed and then made an en banc call just before the execution is false. In fact, the two judges did not make an en banc call at any time. Judge Farris did. And the reason for the critical part of the delay—the part that resulted in the “adverse consequences” Justice Kennedy stressed in his opinion—was not, as Justice Kennedy charged, because the court of appeals “lay in wait,” but, ironically, because the court attempted to follow what two other judges believed to be our obligation to respect the Supreme Court’s oft-expressed concerns for comity and federalism.

Notably, Justice Kennedy also failed to acknowledge that our court gave two reasons for recalling the mandate. The first I have discussed sufficiently—the procedural errors in the implementation of our en banc process. The second and more important reason was our desire to correct the serious substantive errors our court had made in an unreviewed panel decision—a decision that would, unless recalled, result in the execution of a human being in violation of the Constitution. This reason the Supreme Court majority never even mentioned.

The Supreme Court’s opinion acknowledged the inherent power of courts of appeals to recall their mandates but nonetheless termed our decision a “grave abuse of discretion.” The Court, which had never before in its history held that a court of appeals had erred in recalling a mandate, whatever the appellate court’s reason for doing so, here ruled that we had seriously erred by taking that action in order to correct one of the most grievous errors a court could make—authorizing an unconstitutional execution. To reach this result, the Supreme Court created a new rule that a federal court of appeals cannot recall its mandate in a death penalty habeas case regardless of the egregiousness of the constitutional error unless the defendant can establish his “actual innocence,” a feat rendered nearly impossible by the stringent requirements the Court has established for meeting that test in other contexts. As Justice Kennedy acknowledged, “‘in virtually every case, the allegation of actual innocence has been summarily rejected.’” Recognizing that its opinion departed drastically from prior law, the Court distinguished the Thompson case from more “ordinary” recalls of mandates on the ground that Thompson sought relief from constitutional errors in a state criminal trial. Citing other cases in which it had severely limited the right of federal habeas petitioners to raise meritorious constitutional claims, the Supreme Court said that the state court judgment ordering Thompson’s execution must be honored because the “finality” of that judgment would deter future crimes, allow the “victims of the crime [to] move forward,” and “serve[ ] . . . to preserve the federal balance.” The Court waxed philosophical about the state’s interest in the finality of its judgments, an interest which, it said, took on an “added moral dimension” once the mandate issued. Finally, the Court asserted that “[t]his case well illustrates the extraordinary costs associated with a federal court of appeals’s recall of its mandate denying federal habeas relief.”

And what were those extraordinary costs? In the forty-eight days between the date on which our mandate left the court of appeals for further action to be taken in the district court and the date on which we recalled it—in fact in the entire 120 days that passed between the date on which we first could have taken an en banc vote and the day on which we actually voted—two things occurred: The state courts prematurely reasserted jurisdiction over Thompson’s case and denied a petition that they should not even have been considering, and the Governor of California denied Thompson clemency after a “hearing” that lasted approximately two hours. These two decisions, plus the injury to the state’s general, and the victim’s particular, interest in “finality,” constituted the extraordinary costs involved.

It was those indefinable costs, flowing from the briefest of delays, that, according to the Supreme Court, outweighed the benefit of allowing the courts of the United States to enforce the United States Constitution and correct an egregious constitutional error. In my opinion, the Supreme Court’s analysis in Thompson represents a nadir for the cost-benefit approach to decisionmaking in constitutional cases or otherwise. Most remarkable of all, in making its assessment of the costs, the United States Supreme Court never even mentioned the costs to our legal system of allowing the state’s violation of the defendant’s constitutional rights to go unremedied. It never even considered the costs to society—let alone to the defendant—of permitting a person to be executed on the basis of an unconstitutional trial or for a crime of which he might well be innocent. In short, the Supreme Court never even took into account the interest we all have in upholding the Constitution or the costs we all incur when the federal courts are precluded from performing their basic constitutional functions.

There was another major problem with the Thompson decision, a problem that ultimately would make Thompson’s execution almost inevitable. By requiring Thompson to meet an actual innocence standard before permitting the recall of the mandate, the Supreme Court imposed a nigh impossible requirement. Thompson certainly had no chance of meeting the standard because in assessing his actual innocence the Court relied for its
basic evidence on the record made at a trial in which the factfinding process was irremediably distorted. In considering that record, the Court did not mention that when the facts were developed Thompson was without the benefit of effective counsel or that the prosecutor’s evidence was fatally flawed by his unconscionable and unconstitutional conduct. Instead, the Court weighed evidence that had never been subjected to a true adversarial process, made its own subjective factual findings on the basis of tainted evidence, disregarded the contrary evidence that disproved the theory on which Thompson was convicted, and characterized physical evidence that was, at best, highly questionable, as “ample evidence” of rape. It’s no wonder the Court concluded that Thompson could not meet the actual innocence standard.

The Thompson case illustrates sharply the values, interests, and concerns weighed in death penalty habeas cases and, to some extent, in habeas cases generally. On the one hand, federal courts consider the state’s interest in finality and comity; on the other hand, they consider the interest of the defendant and the public in preserving constitutional values. The various judicial bodies that considered Thompson’s claims made dramatically different decisions about the appropriate weight to be afforded the various interests. The district court and the en banc court found Thompson’s interest, and society’s, in the preservation of life, liberty, and the right to a fair trial important enough to justify vacating an unconstitutional conviction. The original three-judge panel found the most important interest to be preserving the “limited role” of federal courts in reviewing state convictions. Justice Kennedy, on behalf of the Supreme Court majority, found the weightiest interest to be the state’s need for finality, even when that need was compromised by only a 48- or 120-day delay. These decisions, of course, were made in connection with Thompson’s first habeas petition—the first and only opportunity Thompson would ever have to vindicate his constitutional rights in the federal courts.

As we can see from the proceedings regarding Thomas Thompson, grandiloquent generalizations about values of finality and comity—grandiloquent formulations of concepts of federalism—are often not so grand when viewed in light of the facts of a particular case and its practical consequences. In Thompson’s case, did a short delay really threaten the state-federal structure? Was it really necessary to dismiss without mention the constitutional obligations of the federal courts to ensure due process of law and to adjudicate fairly the legal questions involving the guilt of a man who was in all likelihood innocent of any capital offense, and whose role in a noncapital crime remains dubious and uncertain? Is a state court in which supreme court justices—some of whom have in recent years been recalled for being too “soft” on capital punishment—are subject to popular vote really as well equipped to protect constitutional rights in death penalty cases as a federal court with life-tenured Article III judges? The answers should be apparent to anyone who places the substantive protections of the Constitution above abstract interests in finality and comity. They should be obvious to anyone who does not think that the costs of a brief delay in a court’s deliberative process outweigh the importance of human liberty and the obligation of the federal judiciary to ensure that the states comply with the United States Constitution.

IV

The Final Chapter

Given the tone and content of the Supreme Court’s decision, the end to the Thompson story would come as no surprise. Still, one final chapter remained to be played out. Because our en banc court had voted to grant Thompson’s habeas petition, we had found it unnecessary to rule on a separate motion he had filed. In that motion, Thompson had sought a new trial on the basis of newly discovered evidence that the state allegedly had withheld. The evidence consisted of admissions by Thompson’s roommate, David Leitch, that he had walked into the apartment the two men shared at approximately 3:00 a.m. the night of the murder and discovered Thompson and Ms. Fleischli engaged in consensual sex. Because the prosecution had built its case against Thompson on the theory that only Thompson had been present in the apartment with Ms. Fleischli that evening, that he had raped her, and that the “rape” had provided the motive for her murder, Leitch’s statements constituted critical evidence of Thompson’s actual innocence of at least one and possibly both of the charges against him. Leitch’s statement directly corroborated Thompson’s trial testimony, given over his counsel’s objection, that he had engaged in consensual sex with Ms. Fleischli the night she was killed.

Of course, Leitch’s statements could not be accepted at face value. His credibility and the weight to be given his information needed testing at an evidentiary hearing, particularly given the inconsistent stories that Leitch had told over the years. However, the fact that this admission was contrary to Leitch’s interest, and that it was consistent with the version of events Leitch had reported to his own lawyer at the time of his original trial, provided strong indicia of credibility. Evidence also suggested that the district attorney’s office had been aware of this information at the time of Thompson’s trial but had failed to disclose it, in violation of Thompson’s constitutional rights.
When the Supreme Court overturned our en banc decision, it became necessary for us to perform our final function in the Thomas Thompson case. We reinstated the proceedings regarding Thompson’s new trial motion and held oral argument on July 9, 1998—five days before his new execution date. Once again, a procedural barrier, this time erected by Congress and the President, threatened to limit our ability to consider the merits of Thompson’s claims.

The new obstacle was a by-product of the Oklahoma City bombing. While Thompson’s first habeas petition was under consideration by the courts, two conspirators had committed an infamous crime. They had blown up a federal building, killing 168 people. In the wake of that occurrence, the Antiterrorism and Effective Death Penalty Act (AEDPA) was adopted. The bill was enacted by Congress at the urging of President William Jefferson Clinton. In the AEDPA, Congress and the President enshrined the philosophy and habeas jurisprudence of the Rehnquist Court in statutory law, codifying stringent barriers to review of all habeas petitions, and particularly to second or successive petitions. The two branches of government each sought to appear tougher than the other in the war against terrorists, although no one bothered to explain how limiting the historic right of all state prisoners to habeas relief would help the federal government in the latest of its periodic “wars.” Nor did anyone much seem to care. There was an election on the horizon. And, furthermore, as of the time the AEDPA was adopted in 1996, President Clinton had yet to show the first glimmer of interest in curbing prosecutorial excesses that might infringe the rights of persons high or low. In fact, up to that point, President Clinton had not shown any interest in protecting the constitutional rights of any individual accused of wrongdoing.

In any event, under the new AEDPA standard Thompson could not prevail on his motion based on new evidence—whether or not the evidence had been deliberately concealed by the state—unless he could show by clear and convincing proof that no reasonable juror who heard that evidence would have found him guilty of capital murder. Merely to obtain permission to file the motion in the district court, Thompson first was required to establish in the court of appeals a prima facie case of actual innocence by showing facts which if proven would be sufficient to meet the standard.

In my judgment and that of Judge A. Wallace Tashima, a moderate Clinton appointee, Thompson’s new evidence met this rigorous prima facie requirement. There was evidence that direct eyewitness testimony existed which, if believed, would establish Thompson’s innocence of rape and his ineligibility for the death penalty—evidence that would also directly refute the prosecution’s theory of the murder. In our view, such evidence certainly warranted an evidentiary hearing, an opportunity for an objective judge to test its credibility and import using traditional methods of factfinding—especially given the constitutional violations that had tainted the previous findings of Thompson’s guilt.

However, most of the judges who had been in the majority when we issued our en banc opinion felt compelled by the Supreme Court’s decision—particularly by its unusually strong and specific language regarding the ample evidence of the alleged “rape”—to hold that Thompson could not make the required evidentiary showing of actual innocence. From a practical standpoint, their decision may have been the right one. There was little doubt in their minds or in mine that, were we to rule in Thompson’s favor, the Supreme Court would swiftly reverse us once again—and perhaps this time the five-Justice majority would order us whipped or put in the stockade. So the vote against Thompson was nine to two.

The issuance of our court’s decision on the new trial motion on July 11, 1998 meant that Thompson’s last real avenue for relief had been foreclosed. He was executed three days later. Thompson was the first death row inmate in California since capital punishment had been reinstituted to insist on his innocence through the time of his execution, and he was the first person in the nation ever to be executed on the basis of a trial that an unrefuted decision of a United States court of appeals had held to be unconstitutional.

Was Thompson guilty? While I am reluctant to make a judgment of any kind on the basis of the type of evidence adduced before the state trial court, it appears that Thompson may have helped Leitch conceal Ms. Fleischli’s body after Leitch murdered her or possibly may have participated in the murder itself. Of course, because Thompson was never tried on the theory that he helped Leitch kill Ms. Fleischli, we will never know whether a jury would have convicted him under such a theory. But even if guilty as an accessory to murder, Thompson was, in my opinion, very likely innocent of the rape charge and therefore not eligible for a death sentence under the applicable law. What the actual facts were will always be unclear. Sometimes, even after a full and fair trial, and regardless of a jury’s verdict, doubt remains. Without a fair trial and without a testing for truth through a fair adversary process, we are left only to speculate.

**Conclusion**

The Thompson case has ramifications that go far beyond the particular act of judicial disregard for fairness and
justice that led to an execution that should never have occurred. The refusal of the Ninth Circuit panel to grant the request of other judges to extend the time to call for a rehearing en banc could not help but have an effect on the future operations of our court and on the relationships among its members. The decision of Judge Kozinski to quote selectively and publicly from our internal memoranda inevitably will have a similar adverse effect on the way we do business in the future. The brutal attack by Justice Kennedy on the good faith and competence of his former colleagues on the Ninth Circuit may have revealed more about the Justice himself than anything else, but it may also have other ramifications, such as influencing the current deliberations over whether to divide our circuit or, worse, to carve it up into bureaucratic, ineffective divisional units. Most important of all, the Supreme Court decision tells us much about the lack of concern for justice and due process of law that permeates our death penalty jurisprudence.

In Thompson, the Court took one further step--its most indefensible thus far--to elevate state procedural interests over concern for human life, over due process of law, and yes, over the Constitution itself. It even went so far as to extend, implicitly, the rule holding defendants liable for procedural errors made by their lawyers to holding defendants liable for procedural errors made by their judges--a bizarre concept indeed. All in all, the Thompson case showed the criminal justice system, including both the prosecution and the judiciary, at its very worst.

Perhaps travesties are inevitable if we are to continue to enforce the death penalty. Emotions run high, even among judges. The stakes are different in kind from those in all other cases. The decision as to who deserves to die at the hands of the state is not susceptible to determination by objective, scientific, or uniformly applied rules. Chance and circumstance play the largest role in the deadly death penalty lottery. When the state is out to execute the accused at all costs, and the nation’s highest court’s primary interest is in establishing procedural rules that preclude federal courts from considering even the most egregious violations of a defendant’s constitutional rights, it is time to step back and look at what we are doing to ourselves and to our system of justice.

Although we are not in a period in which we can expect such an examination to result in immediate positive changes, it is nevertheless the duty of the academy and the legal profession to make the record that will be necessary when the pendulum swings. And the pendulum will surely swing--not only with respect to our death penalty jurisprudence, and the harsh and inflexible means by which we today limit the historic writ of habeas corpus, but also with respect to the inimical manner in which the majority of today’s judges view individual rights.

Those of us who still believe in the obligation of the courts to ensure fairness and equality for all, who share the concerns that dominated the brightly shining jurisprudence of the Warren-Brennan era, who believe that we are now in a valley in our long legal journey towards justice, may not be around to see the day when our judicial system returns to its state of glory. Obviously, this is not one of the proudest times in our nation’s history--for any of our branches of government. It will take time to recover, to undo the damage, to heal the constitutional wounds. In the case of the Supreme Court, given the nature of the appointive process and the practical realities of lifetime tenure, the period required for fundamental change is a lengthy one.

Change will not come easily. It will take hard work on the part of well-trained advocates and creative legal thinkers who refuse to accept the notion that the era of judicial progress is forever over and who will inspire those who learn from their words and deeds. Charles Black, a leading constitutional scholar for the past fifty years, recently suggested that we look to the Declaration of Independence, the Ninth Amendment, and the Privileges and Immunities Clause of the Fourteenth Amendment as sources of unenumerated rights, most particularly the right to a “decent livelihood.” Black’s ideas are promising and challenging. It may be time, for example, to reconsider the Slaughterhouse Cases, which so drastically and wrongfully limited the Fourteenth Amendment--or at least it may be time to do so when we once again have a Court that sees our Constitution as protecting the basic freedoms and liberties of the people, and not primarily as a structure for protecting the interests of the states.

If we have faith in the nature of humanity, if we believe that the course of evolution is progress, if we are truly committed to the principles of liberty, equality, and justice, I am confident that we can return to an era in which the courts serve as the guardians of the values embodied in our Constitution, to an era in which judicial protection of the rights of the poor and the disadvantaged will once again be the order of the day. If we have the will and the determination, we will ultimately prevail. Thank you.