Piercing Prosecutorial Immunity Through Brady Claims

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ABSTRACT

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

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

KEY FINDINGS

- Defendants on the receiving end of *Brady* violations essentially have a right without a remedy. Absolute immunity doctrine insulates prosecutors almost entirely, criminal liability is rarely pursued, and professional responsibility norms have failed to deter violations and provide relief.

- In our systematized evaluation of a sample of *Brady* cases, we identified specific factors relating to *Brady* doctrine and the basic principles underlying liability. We found a mix of egregious and seemingly *de minimis* violations. These factors helped us generate a taxonomy of *Brady* violations to identify which violations are most serious.

    - In our sample, police were responsible for 42% of *Brady* violations. Police were primarily negligent (44%) in their failures to turn over evidence, with 37% of their

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

  - Prosecutors were responsible for 45% of the *Brady* violations. In contrast to police, prosecutors' nondisclosure was primarily intentional (53%), although they made erroneous materiality judgments at the same rate (36%) as police. Prosecutors were most likely to withhold favors bestowed on witnesses (43%), although they also withheld witness statements at a rate similar to the police (29%). Like the police, almost half of the evidence withheld by prosecutors (44%) had been requested by the defense or ordered disclosed by the court, however the reasons for prosecutors' nondisclosure were different. Prosecutors were most concerned with weakening their case (41%) or the impeachment of witnesses (29%), even if, like the police, in a small number of cases (12%) they failed to dig deep enough to locate exculpatory material when requested.

- Given existing doctrine under Section 1983, any reform effort likely requires statutory change. We propose a statute that reflects the taxonomy juxtaposed with normative principles of torts. The statute creates a tort cause of action against prosecutors for wrongful convictions procured through *Brady* violations when the violation was intentional or the result of grossly reckless conduct. It also provides for a defense when prosecutors make reasonable but mistaken materiality judgements. We illustrate how that statute would sort through cases with *Brady* violations, focusing liability on the most serious violations.

** This white paper is a condensed version of* Qualifying Prosecutorial Immunity Through Brady Claims *which is forthcoming in* the Iowa Law Review. *Footnotes, references, additional material, and the dataset appendix can be found in the full-length article.*

I. Introduction

Although innocent, Juan Roberto Melendez was convicted of murder and sentenced to death in 1984. Despite the fact that there was no physical evidence linking him to the crime, Melendez was convicted at trial. Although Melendez put forth an alibi supported by four witnesses, he was still found guilty. A key witness who had confessed to Melendez's attorney that two other men had killed Baker—refused to testify at trial, invoking the privilege against self-incrimination.

Nearly two decades after the conviction, Melendez's investigator discovered records showing that the key witness had incriminated himself in statements made to prosecutors. Although Melendez's attorney had specifically queried the prosecutor about the witness, the prosecutor had withheld crucial parts of his story. The prosecutor also failed to disclose information about their own witnesses that would have called their credibility into question. Based on the uncovered evidence, Melendez's conviction was vacated in 2001. Melendez left prison with $100 and a pair of pants.

Eric Robinson was also convicted of murder; he was sentenced to life in prison in 1994. To convict Robinson, Los Angeles County prosecutors presented eyewitnesses who identified Robinson as one of Fuentes' shooters. In 2006, after spending thirteen years in prison, Robinson retrieved the police department file on his case, which showed he *had been excluded as a suspect within days of his arrest*. That evidence had been concealed by a police sergeant who had determined the real identity of the shooter months after the shooting. In 2007, the Los Angeles District Attorney's Office dismissed the charges against Robinson, and he was released. Robinson filed a wrongful conviction suit against the city of Los Angeles and the police officers involved in the investigation, ultimately receiving a $1.75 million settlement.

Although these wrongful prosecutions seemingly have much in common, they differed in the end result. Because key exculpatory evidence was suppressed by a police officer in Robinson's case, he was able to pursue a civil lawsuit for damages arising from his ordeal. Juan Roberto Melendez, in contrast, cannot seek damages for what happened to him because in his case, the exculpatory evidence--the incriminating statements of the actual killer-- was withheld by a prosecutor.

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

This is puzzling. If someone falsely imprisons another against their will, a run-of-the-mill false imprisonment claim could follow. Or if a company, knowing that its goods contained defects but representing their qualities as safe had sold them to a customer anyway, only to see them

promptly break and cause significant harm, a products liability claim would be available. In these scenarios, the harmed can bring the other party to court. But not for prosecutors.

Prosecutors are required to disclose exculpatory material to the defense, under *Brady v. Maryland*. 373 U.S. 83 (1963). However, under a problematic doctrine known as *absolute immunity*, prosecutors cannot be sued for monetary damages for violating *Brady*'s requirements and withholding evidence, something that happens too frequently. The shielding of *Brady* violations from *any* liability is a serious problem for two reasons: first, the doctrine automatically creates a large class of injured victims—those who are subjected to wrongful imprisonment as a result of conviction—with no legal recompense, a result foreign to the everyday tort system. Second, the doctrine's scope seems to remove prosecutors from the incentive-based forces that permeate the tort system, which are designed to promote safety, minimize near misses, and compensate wronged individuals. Ignoring these realities results in harms that the tort system would consider grossly serious: the loss of life or liberty.

Absolute immunity, created by the Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976), and grafted onto 42 U.S. Code § 1983 since, is largely considered bereft of a solid textual, historical, and public policy basis. Scholars have focused ample attention on the Court's misreading of history and the common law at the time Congress enacted § 1983, argued that its public policy no longer holds, and suggested that it should be replaced with qualified immunity, a related doctrine that does allow for tort liability under § 1983, albeit for a narrowly circumscribed set of cases.

While shifting from absolute to qualified immunity for prosecutors would be welcome, there appears to be little political appetite for such a change. We highlight an alternative path that may prove more politically feasible, because it relies on legislatures rather than the courts. This white paper proposes a statutory solution that creates a carefully circumscribed tort cause of action against prosecutors whose actions produce wrongful convictions.

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

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

II. The Legal Difficulties in Enforcing Brady

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

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

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

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

Functionality is now the linchpin of absolute immunity doctrine. The nature of the prosecutorial role plus the chilling effect of exposure to liability forms the basis for the rule. Allowing suit for actions intimately related with the prosecutor's advocative rule during the judicial process would result in duplicative judicial activities because "the presentation of such issues in § 1983 action often would require a virtual retrial of the criminal offense in a new forum and the resolution of some technical issues by the lay jury." *Imbler*, 424 U.S. at 424. Such litigation would impair "independence of judgment required by the public trust." *Id.* at 423. The Court adds: "The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id.* More practically, the prosecutor's ability to present difficult cases to the fact-finder would be made more difficult.

The Court has drawn a line between investigative and advocative activities, with absolute immunity applying to the latter. As prosecutors act more like advocates, they receive more protection because that is where prosecutorial independence is most necessary. Courts are supposed to look to the "nature of the function performed, not the identity of the actor who performed it." Put simply, actions on the investigative side receive qualified immunity whereas advocative actions are absolutely protected. It is important to remember that at the time *Imbler* was decided, qualified immunity doctrine insulated officials *less* than current doctrine.

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

But the line has not always been easy to decipher. Is there a magic moment after which the prosecutor can be labeled an advocate? Given that *Imbler* seemed to implicitly allow absolute immunity for suppression of evidence, and later cases suggest actions that affect trial strategy are advocative, it is not hard to imagine how this line would impact a prosecutor's approach to *Brady* disclosure. Whether the act of disclosure is administrative or advocative blends into issues relating to materiality determinations and trial strategy, the timing of the investigation (whether an arrest has occurred or the timeline of the collection of evidence), ongoing communications with investigators, and when trial preparation is occurring.

To be fair, there has been judicial criticism of absolute immunity doctrine. Justice White foresaw these issues in his concurring opinion in *Imbler*, where he criticized the majority opinion for implicitly affording absolute immunity to the withholding of *Brady* material. 424 U.S. at 441-42. Unlike the need for absolute immunity for other advocative conduct, withholding *undermines* the judicial process by removing information from the truth-finding process. Justice White charged the Court with a gross act of judicial activism that disrupted the separation of powers by subverting legislative will to hold executive officials accountable. Further, Justice White's criticism of the Court's broad rule that foolishly did not distinguish between states of culpability fits with the findings of this paper. *Imbler* was concerned with the risk of personal liability for prosecutors in situations involving difficult decisions that might result in unintentional harm to the defendant. 424 U.S. at 427. More recently, Justice Scalia noted how centering absolute immunity doctrine on functionality resulted in contortions of the common law as it existed when § 1983 was passed by Congress. *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring).

Scholars also have criticized the doctrine extensively. The historical claims made by the Court about the common law at the time of § 1983 have been refuted, and the purported policy basis—preserving independence of judgment—has been questioned repeatedly. As Margaret Johns has noted, common law immunity for prosecutors was by far the exception rather than the rule, especially in light of the historical fact that public prosecutor offices did not exist in most jurisdictions at the time § 1983 was enacted. Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 830-31 (1999). Additionally, common law immunities were defenses against common law causes of action, not statutorily imposed liability. *Pierson v. Ray*, 386 U.S. 547, 563–64 (1967).

Critics have also emphasized how the Court's alleged safety valves— statutory causes of action and the rules of professional responsibility—have failed to deter prosecutors from misconduct. Although federal law in theory provides criminal liability for government officials who violate constitutional protections, there has been only one conviction since 1866. *Brophy v. Comm. on Prof'l Standards*, 442 N.Y. S.2d 818 (N.Y. App. Div. 1981). Six prosecutors in the entire twentieth century faced criminal charges. Maurice Possley & Ken Armstrong, *Prosecution on Trial in Du Page*, Chi. Trib., Jan. 12, 1999, News, at 1. And the procedural rights of defendants are not swords against prosecutorial misconduct. Collateral attack is encumbered by procedural hurdles, irrespective of federal court deference to state court convictions. In short, absolute immunity doctrine, as forged by the Court, leaves little room, if any, for remedial action in the wake of prosecutorial misconduct.

The rules of professional responsibility do not fill the void. The Model Rules of Professional Conduct requires timely disclosure of "all evidence or information known to the prosecutor that tends to negate the guilt of the accused….," and prosecutors must disclose "credible and material evidence" that creates "a reasonable likelihood that a convicted defendant" did not commit the offense. Model Rule 3.8(d), (g). These rules have informed the rules in state

jurisdictions. Some courts see the disclosure obligations in those Rules as co-extensive with *Brady* obligations, thereby importing all of the gray areas built into *Brady*. Other courts view Rule 3.8 as a separate obligation from that imposed by the Constitution. Further, the Rule Comments provide a good faith, reasonableness defense to non-compliance with the affirmative obligations of the Rule in situations involving the discovery of new evidence. Model Rule 3.8, Comment 9. More tellingly, between 1970 and 2000, there were only forty-four instances of disciplinary action in 2,000 cases of alleged prosecutorial misconduct, a rate of approximately 2%. Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 830-31 (1999). Complaints go unnoticed, and those that reach state bar associations tend not to result in disciplinary action. When prosecutors do run afoul of the rules, few are mentioned by name. *Id.* at 830-31 (1999). As such, prosecutors remain largely undeterred. And, even if prosecutors faced sanctions under the rules of professional responsibility, the aggrieved party would remain without a remedy.

The above-mentioned structure (or lack thereof) to regulate prosecutorial behavior leads to a perverse set of incentives for prosecutors in practice. The blurry line between investigative and advocative conduct incentivizes prosecutors to collect evidence to support a theory of the case in order that actions that otherwise would be labeled investigative or administrative fall into the advocative category. This allows investigative misconduct to remain in the shadows. Finally, the functionality distinction oddly allows activity closer to the ultimate harm to be perceived as less harmful. So, the more knee-deep a prosecutor gets, with the harm in sight, the more that prosecutor gets protected.

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

The collateral effect of absolute immunity doctrine is that a large class of injured victims no recourse if a prosecutor withholds *Brady* information that should have been disclosed. Moreover, the lack of accountability and ambiguity within the doctrine means that prosecutors lack an incentive to minimize their engagement in risky behaviors or to refine their materiality determinations even when such efforts would improve the system as a whole.

III. A Taxonomy of Brady Violations

While prosecutors generally acknowledge that Brady violations are problematic, defenders of absolute immunity argue that they are rare, and, when they occur, usually reflect honest misjudgments regarding whether evidence is exculpatory rather than malign intent on the part of prosecutors. Allowing lawsuits following honest mistakes, they argue, would be unfair to prosecutors.

To what extent are such empirical claims accurate? One of our intentions in pursuing this project was to tailor a response directly to the realities of Brady violations rather than simply hypothesizing or assuming the parameters of failures to disclose exculpatory evidence. Thus, we approached the topic as empirical scholars, seeking to create a taxonomy of established Brady violations from court cases so that we had a better, more accurate understanding of how and why nondisclosure occurs.

A. Methodology

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

1. Identifying the Cases

We began by casting a wide net of potential Brady cases, employing a Lexis search of cases from January 1, 2000 forward in which either federal or state courts followed Brady v. Maryland "positively" (according to Lexis' filter). That search produced more than 1,600 published cases. To make this group manageable, we then randomly selected a set of 500 such cases from a five-year period—January 1, 2008, to December 31, 2012. We then identified those in which the court had truly found a Brady violation. This review narrowed the available cases to approximately fifty, at which point we reviewed each case to verify those judgments. Ultimately, we included thirty-eight cases in the analysis.

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

2. Creating the Taxonomy

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

Among the variables coded, six are central to understanding the factual and legal issues that occur in Brady cases. These included:

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

B. Results

For purposes of a taxonomy, we focus on six key findings. These conclusions offer a comprehensive interpretation of the circumstances behind Brady violations—how they occur, how they are viewed, and what makes them sufficiently egregious to be sanctioned by the court.

1. Responsibility

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

Table One – Responsible Party

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

2. Mindset

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

Table Two – Mindset

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

3. Materiality

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

Table Three – Misjudged Materiality

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

4. Type of Evidence

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

Table Four – Type of Evidence Withheld

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

5. Reason

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

was negligent. Whether one assigns such error to sloppiness or overwork, the result nonetheless was that exculpatory evidence was mislaid.

That said, one out of every eight Brady violations reflected police or prosecutors unwilling to pursue leads or investigate alternative suspects or evidence when there was a real chance that the results would exonerate an innocent suspect. More troubling still, in another twelve percent of Brady failures by the police, officers refused to disclose evidence because they were convinced the defendant was guilty. We are careful not to say that these decisions were necessarily in bad faith, as for example would be the case if a detective destroyed exculpatory evidence even when he suspected the defendant was innocent. But in each of these instances there were reasons to question the defendant's guilt, and, at the very least, officers were so affected by tunnel vision that they could not see that they were sitting on potentially exculpatory evidence that needed to be disclosed to the defense.

Table Five – Reason for Withholding Evidence

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

6. Evidence Requested or Ordered

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

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

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

C. Practitioner Feedback

As a check against our coding, we shared the results above with approximately twenty prosecutors and defense lawyers to solicit their feedback. This was a convenience sample,

drawn from advocates identified by their colleagues as experienced and respected. We met with them at professional meetings, spoke with them by phone, and visited their offices to talk at length. Their feedback was instrumental in refining the taxonomy.

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

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

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

Prosecutors wondered, too, if we were too forgiving of police officers in not ascribing them responsibility more often for the failure to disclose. In this respect, they felt that "police are more likely to see [material exculpatory evidence] as irrelevant because they're not lawyers, and they're making [inappropriate] credibility judgments about witnesses." Indeed, it was

interesting how often prosecutors described police as potentially nefarious in failing to turn over evidence to the prosecution. We do not doubt that prosecutors are concerned about the failure of police to share exculpatory evidence, especially since prosecutors are ultimately responsible under Brady for the nondisclosure of law enforcement. But having checked our coding once again, we are confident in the division of responsibility found in Table One.

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

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

D. Limitations

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

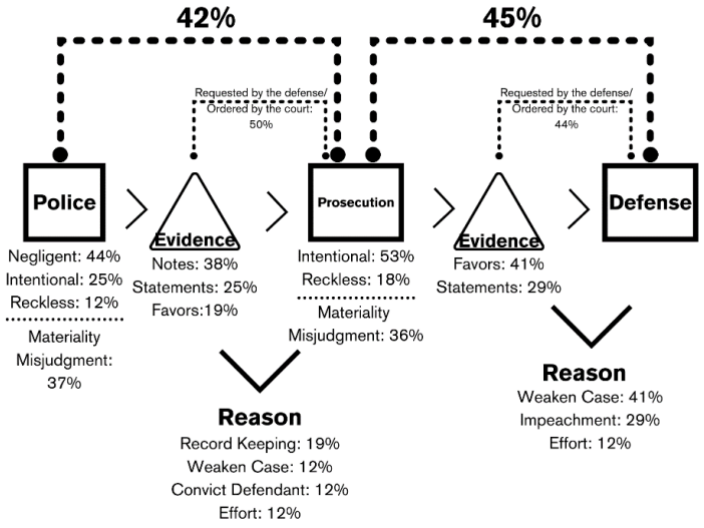
Still, we readily acknowledge the limitations of the underlying research. With a dataset of only thirty-eight cases, it is possible that some of the collected fact patterns are relatively

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

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

The taxonomy offers a holistic, empirical understanding of the nature of Brady violations. In Figure One below, we summarize the conclusions of the taxonomy in a manner that tracks the path of potentially exculpatory evidence from police to prosecutor to defense.

Figure 1. Tracking Brady Violations.



IV. A Statutory Solution

How could we begin to remedy some of the problematic incentives and results created by absolute immunity doctrine, while respecting the on-the-ground realities facing prosecutors? As the empirical analysis of Brady violations in actual cases reveals, there are many varieties of

Brady violations, and examples where prosecutor conduct was unambiguously intentional and meets the other criteria set forth above are perhaps the expectation rather than the rule.

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

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

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

Cause of Action for Brady Violations

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

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

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

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

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

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

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

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

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

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

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

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

First, the proposed statute limits the cause of action to situations in which the violation affected the guilt/innocence determination. Our analysis of Brady violations revealed examples where violations affected sentencing rather than conviction; however, such examples would not fall within the ambit of the statute. In limiting the statutory remedy to situations where innocent people have been wrongly convicted, we focus the remedy on cases where harm is arguably the greatest, in that there is a dual injury arising from both 1) the psychological and

reputational harm that comes from being erroneously labeled as someone who has violated the law; and 2) the harm arising from the punishment itself, which in many cases involves years or even decades of confinement.

A second protective factor for prosecutors is the causation requirement. Whereas the Brady standard already encompasses a materiality assessment—meaning that a violation has only occurred when the withheld evidence is found to be "material" to guilt or innocence, or there is "reasonable probability…that the result of the case would be different," *Imbler*,424 U.S. at 409—the statute layers on the further requirement of traditional causation familiar from tort law. Although these two requirements may operate in tandem in many real-world situations, the causation requirement could serve to restrict liability in cases where there is a sufficient likelihood of a different result to satisfy materiality.

The statute also includes two important provisions outlining the mental states necessary to trigger liability. Whereas in other contexts negligence or even less is sufficient to attach tort liability, the statute requires a heightened form of awareness in order for liability to attach, recognizing the need for prosecutors to make complex decisions without fear of having their judgment second-guessed in later tort litigation. The statute would provide for liability when a prosecutor purposely or knowingly withholds Brady material. A knowing violation might occur if, for example, a prosecutor intentionally fails to inquire about Brady material to members of the prosecutorial team, suspecting that doing so might reveal evidence that would undermine a case that might then need to be turned over to the defense. Where prosecutors are consciously abrogating their constitutional duties, there is a particularly compelling case for tort liability, akin to the justification for punitive damages that exists in more traditional tort settings.

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

The proposed definition of recklessness is of particular import in light of the large fraction of real-world Brady violations documented above that involve failure to disclose information held by law enforcement, that should have been known to the prosecutor but in some cases was not. Prosecutors might argue—with some justification—that even though prosecutors have an affirmative duty to obtain and disclose all exculpatory evidence held by the state, Kyles v. Whitley, 514 U.S. 419 (1995), creating tort liability in situations where the prosecutors themselves may have been completely unaware of the exculpatory material in question is a step too far.

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

In eschewing the monolithic approach of absolute immunity, the statute more clearly responds to the empirical realities of Brady violations. In the cases considered above, 53% of Brady violations involving prosecutors were generated intentionally, and 18% of violations were generated recklessly. Importantly, those numbers indicate that the statute would likely meaningfully improve access to justice--as around half of Brady violations appear intentional in both data sets--but also, and equally important, that the statute would protect prosecutors from civil liability in the sizeable minority of cases in which they acted negligently or without a sufficient degree of recklessness.

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

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

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

V. Conclusion

The time is ripe for considering how to better remedy the damage caused by Brady violations committed by prosecutors. Any such remedy must deftly navigate two realities: (1) the difficult decisions that prosecutors face when carrying out their functions; and (2) the fact that Brady violations are not all the same.

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

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

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

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