67 STAN. L. REV. ONLINE 47
September 2, 2014

THE *BRADY* COLLOQUY

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INTRODUCTION

Ensuring that prosecutors comply with their ethical and due process disclosure requirements has been a distinctly vexing problem for the criminal justice system, particularly in light of the frequency of wrongful convictions caused by prosecutorial misconduct. The problem stems from the shortcomings of the *Brady* doctrine and institutional forces that make it difficult to hold prosecutors accountable when they commit misconduct. In response to these challenges, commentators have offered numerous reforms to increase compliance with prosecutors' disclosure requirements; however, many of these proposals are complex, would impose considerable burdens on the system, and/or would require new legislation or regulations. Instead, this Essay calls for a short *Brady* colloquy during which a judge would question the prosecutor on the record about her disclosure obligations. Such a colloquy would provide judges an additional tool to enforce *Brady*, nudge prosecutors to comply with their disclosure obligations, and make it easier to punish prosecutors who commit misconduct. Most importantly, judges could implement a *Brady* colloquy today without the need for additional legislation or ethical rules.

This past March in the Bronx, an innocent man who had been jailed for over eight months awaiting trial for an alleged sexual assault was nearly convicted of a crime that he did not commit.[1] He was spared when, at the culmination of the two-week trial and after the defense gave its closing argument to the jury, the prosecution conceded that it possessed exculpatory evidence supporting the defendant's innocence.[2] The alleged victim initially told the police that she was not assaulted but rather that the alleged sexual encounter was consensual.[3] The police collected this statement from the complainant at the time they arrested the defendant, and it had been in the prosecutor's file throughout the investigation, pretrial proceedings, and trial. Following the disclosure, the pros-

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1. *See* Denis Slattery, *Bronx Prosecutor Bashed and Barred from Courtroom for Misconduct*, N.Y. DAILY NEWS (Apr. 6, 2014, 2:01 AM), http://www.nydailynews.com/new-york/bronx/bronx-prosecutor-barred-courtroom-article-1.1746238.

2. *Id.*

3. *Id.*

ecutor confessed error and dismissed the case. The defendant was immediately released, his liberty restored.[4]

In many respects, this case is atypical of the flaws that plague our criminal justice system, because the prosecutorial misconduct was revealed before the defendant was convicted and sent to serve a lengthy prison sentence. However, in other respects, the case is representative of *Brady*[5] violations that have plagued the criminal justice system.[6]

In *Brady v. Maryland*, the Supreme Court held that due process requires prosecutors to disclose favorable evidence to defendants.[7] In later cases, the Court clarified that favorable evidence includes exculpatory and impeachment evidence.[8] The Court also made clear that the failure to disclose *Brady* evidence violates due process "irrespective of the good faith or bad faith of the prosecution."[9] Finally, the Court limited *Brady*'s reach by extending it only to material evidence, which it has defined as evidence that is so favorable to the defense that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[10]

While there is ample room to critique the substance of *Brady*, there is growing recognition that *Brady* violations are rampant. Indeed, Chief Judge Alex Kozinski of the Ninth Circuit succinctly summarized the problem in a recent opinion, explaining: "There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."[11] Scholars have also long identified prosecutorial misconduct, and particularly the failure to meet *Brady* obligations, as a systemic problem that has not been effectively addressed.[12]

The inability to curb the epidemic of *Brady* violations is not due to a lack of creative ideas to address the problem. On the contrary, reformers have offered numerous proposals to increase disclosures.[13] For the most part, these re-

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4. *Id.*

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

6. *See* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 429-31 (2010) (documenting many exonerations that involved *Brady* violations).

7. *See Brady*, 373 U.S. at 87.

8. *See* United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 154-55 (1972).

9. *Brady*, 373 U.S. at 87.

10. *Bagley*, 473 U.S. at 682.

11. United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting).

12. *See, e.g.*, Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010); David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011).

13. For example, in February 2014, the *Virginia Journal of Criminal Law* hosted a symposium titled *Criminal Discovery in the Commonwealth* in which its panelists explored reforms to the disclosure requirements. *See UVA Law Symposium to Examine Criminal Discovery Rules and Practices in Virginia*, U. VA. SCH. L. (Feb. 21, 2014), http://www.law

form proposals can be separated into two categories. One category seeks to make it easier to identify past *Brady* violations and to hold prosecutors accountable for violating *Brady*. These include proposals to shame wrongdoers by including the names of offending prosecutors in judicial opinions.[14] The second category of proposals seeks to substantively change prosecutors' disclosure obligations, for example by abandoning *Brady*'s materiality requirement or by circumventing *Brady* altogether with legislation requiring open-file discovery.[15] Despite these efforts, the problem continues unabated.[16]

In the face of this complex problem, this Essay offers a decidedly low-tech, simple, and, to some, perhaps naive suggestion to address the problem of undisclosed *Brady* evidence: During pretrial hearings, and before a defendant enters a guilty plea, the court should ask the prosecutor a handful of questions on the record to investigate whether the prosecutor possesses evidence favorable to the defendant that has not been disclosed. If the court refuses to propound the questions, the defense attorney should offer an affirmation on the record about what material she requested of the prosecutor and what, if anything, she received in response. The defense attorney should then invite the prosecutor to correct any misstatements about the prosecution's response to the defendant's *Brady* request. The goal of this procedure is obvious—to nudge prosecutors to fulfill their due process disclosure obligations.[17] For many prosecutors, the simple on-the-record colloquy with the court, or the anticipation of it, will cause them to be prepared to respond by having carefully reviewed the prosecution's information.

The *Brady* colloquy proposed in this Essay is offered as an invitation to search for other easily implemented policies to address the criminal justice system's epidemic of *Brady* violations.[18] In this sense, the proposal here is offered in the spirit of one solution hospitals settled on to curb the insidious spread of

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.virginia.edu/html/news/2014_spr/crimlaw_symposium.htm. Similarly, in 2010, the Jacob Burns Ethics Center at the Benjamin N. Cardozo School of Law hosted a symposium titled *New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works? See* Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

14. *See, e.g.*, Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059 (2009).

15. *See, e.g.*, Medwed, *supra* note 12, at 1555-59 (outlining proposals for altering *Brady*'s materiality prong and advocating for open-file discovery).

16. *See Olsen*, 737 F.3d at 631 (Kozinski, C.J., dissenting) ("*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.").

17. For one discussion of the psychological efficacy of "nudging" people in order to impact their decisionmaking, see RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2009).

18. For example, several scholars have recommended the use of *Brady* checklists. *See, e.g.*, *New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1974 (2010) (outlining recommendations for the use of disclosure checklists).

infections in hospitals. What turns out to be effective in that context is not necessarily complex; well-placed reminders, thoughtful placement of sinks, and the use of short checklists significantly reduce infection rates.[19]

The remainder of this Essay outlines the questions courts should ask during a *Brady* colloquy. This Essay then identifies several implications of implementing this procedure, including how the procedure allows for an increased judicial role in disclosure calculations, nudges prosecutors to comply with *Brady*, increases the possibility that wrongdoers will be held accountable, and incentivizes well-prepared defense counsel. This Essay concludes by noting the ease with which such a *Brady* colloquy could be implemented.

I. A MODEL *BRADY* COLLOQUY

There are many potential questions judges could pose to prosecutors to increase their compliance with their disclosure obligations. Local practice, state ethical rules, and existing pretrial procedures will influence which questions should be asked. However, here are five questions judges could use in most jurisdictions. The first four questions are designed to be asked during a pretrial hearing or before accepting a guilty plea. Judges should ask the fifth question after the prosecution's case in chief or after the defense's opening statement.

1. Have you reviewed your file, and the notes and file of any prosecutors who handled this case before you, to determine if these materials include information that is favorable to the defense?
2. Have you requested and reviewed the information law enforcement possesses, including information that may not have been reduced to a formal written report, to determine if it contains information that is favorable to the defense?
3. Have you identified information that is favorable to the defense, but nonetheless elected not to disclose this information because you believe that the defense is already aware of the information or the information is not material?
4. Are you aware that this state's rules of professional conduct require you to disclose all information known to the prosecutor that tends to be fa-

19. *See, e.g.*, Tina Rosenberg, Op-Ed., *Speaking Up for Patient Safety, and Survival*, N.Y. TIMES (Apr. 28, 2011, 9:10 PM), http://opinionator.blogs.nytimes.com/2011/04/28/speaking-up-for-patient-safety-and-survival (noting that signs, adequate facilities, and a short checklist help curb the spread of infections); *see also Hand Hygiene in Healthcare Settings*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/handhygiene (last updated Mar. 26, 2014) (describing the importance of regular hand washing to curb the spread of infection).

vorable to the defense regardless of whether the material meets the *Brady* materiality standard?[20]

5. Now that you have heard the lines of cross-examination used by the defense and have a more complete understanding of the theory of defense, have you reviewed your file to determine if any additional information must be disclosed?

Finally, in addition to these questions,[21] the judge should remind prosecutors throughout the proceedings that she is prepared to conduct an in camera review of any information that the prosecutor is on the fence about disclosing.

II. INCREASING COMPLIANCE WITH DUE PROCESS DISCLOSURE OBLIGATIONS

This proposal is not offered to address all of the problems of *Brady* violations. However, there are at least four reasons why those concerned with preventing miscarriages of justice and the resulting erosion of public trust in the legitimacy of the criminal justice system should consider this proposal.[22] In short, the regular use of a *Brady* colloquy promises to: (1) give judges a more active role in policing disclosures; (2) increase the incentives for prosecutors to live up to their due process obligations; (3) make it more likely that misconduct will be punished; and (4) help ensure defense counsel is adequately prepared to challenge the prosecution's case.

A. *Judicial Intervention*

Having recognized the epidemic of *Brady* violations, Chief Judge Kozinski concluded that the judiciary was the only body that could remedy the miscon-

20. *See* Medwed, *supra* note 12, at 1539 (recognizing that most state codes of professional conduct include provisions similar to the American Bar Association Model Rule of Professional Conduct 3.8(d), which expands disclosure requirements beyond *Brady*); *see, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 3.09(d) (2014) ("The prosecutor in a criminal case shall . . . 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 . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.").

21. There are certainly other questions that judges might use during a *Brady* colloquy. For example, a judge might want to ask, "Have you altered your theory of the case, the witnesses you plan to call in your case, or your prosecution strategy in order not to trigger having to disclose certain information to the defense?"

22. *See* United States v. Olsen, 737 F.3d 625, 632 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("When a public official behaves with such casual disregard for his constitutional obligations and the rights of the accused, it erodes the public's trust in our justice system, and chips away at the foundational premises of the rule of law.").

duct.[23] Yet, while he trumpeted an active judicial role as the solution, Chief Judge Kozinski also acknowledged the role the judiciary played in allowing misconduct to flourish, concluding that "[s]ome prosecutors don't care about *Brady* because courts don't *make* them care."[24] In order to remedy the situation, Chief Judge Kozinski concluded that judges "must send prosecutors a clear message: Betray *Brady*, give short shrift to *Giglio*, and you will lose your ill-gotten conviction."[25]

A *Brady* colloquy answers Chief Judge Kozinski's challenge, giving judges a tool to more aggressively police the prosecution's due process obligations. Such a tool addresses one of the fundamental flaws of *Brady*: it provides a constitutional right to criminal defendants, but it leaves prosecutors in charge of vindicating that right by vesting the disclosure power with them.[26] Some judges who are inclined to actively encourage prosecutors to meet their due process disclosure obligations will see this proposal as a comparatively unobtrusive way to do so.[27] Indeed, when I presented a similar recommendation to Texas judges as part of the Texas Center for the Judiciary's annual judicial training conference in 2013, several judges immediately indicated a willingness to implement this procedure in their courtrooms to help ensure the fair administration of justice.

A *Brady* colloquy also enables judges to have a more active role in cases resolved through plea bargains. This is important in our current system because plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system."[28] Given its prevalence, plea bargaining is often cited as a procedure that marginalizes the role of the judiciary by replacing it with privately negotiated dispositions.[29] However, a pre-plea *Brady* dialogue is a valuable tool for judges who want to ensure that prosecutors meet their ethical and constitutional disclosure obligations. To be certain, in *United States v.*

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23. *See id.* at 626 ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."); *see also* United States v. Jones, 686 F. Supp. 2d 147, 149 (D. Mass. 2010) (expressing the district court's skepticism that prosecution-initiated training sessions, in the absence of strong judicial action, would effectively curb *Brady* violations).

24. *Olsen*, 737 F.3d at 631 (Kozinski, C.J., dissenting).

25. *Id.* at 633.

26. *See, e.g.*, DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT 38 (2012) ("The tension between a prosecutor's dual role of zealous advocate and minister of justice peaks in the context of *Brady* decisions, leaving prosecutors acutely vulnerable to cognitive bias.").

27. Notably, some trial judges perform brief, on-the-record colloquies with defense attorneys during trial regarding the defense attorney's strategic decisions in order to provide a clear record to address future claims of ineffective assistance of counsel.

28. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

29. *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 286 (2011) ("Instead of juries and trial judges deciding whether this or that defendant merits punishing, prosecutors decide who deserves a trip to the nearest penitentiary.").

Ruiz, the Supreme Court limited *Brady*'s reach in the plea bargaining context.[30] However, ethical obligations still apply, and while the holding in *Ruiz* does not require it, the implication of the Court's opinion is that prosecutors retain a due process obligation to disclose at least some exculpatory information before accepting a guilty plea.[31] Regardless, conducting a *Brady* colloquy before allowing guilty pleas would certainly help to ensure the disclosure of some evidence that is favorable to the accused.

B. *A Nudge for* Brady *Compliance*

A *Brady* colloquy has the potential to increase disclosures by altering the incentives prosecutors currently face in calculating whether to disclose information to the defense. First, it would help to realign the trial prosecutor's incentives to disclose *Brady* evidence by making the potential costs a prosecutor faces in the event of nondisclosure more tangible and immediate. As the system currently operates, if undisclosed *Brady* evidence comes to light, it is often years, and sometimes decades, after a conviction.[32] Furthermore, such revelations are often the result of detailed postconviction investigation and litigation, which occurs only in a small fraction of cases. As a result, the initial decisionmaker tasked with determining whether information should be disclosed is often unavailable at the time the nondisclosure comes to light. The trial prosecutor has often moved on, retired, died, or simply does not remember the details of the case needed to offer an explanation for the nondisclosure.

A brief *Brady* colloquy would address this by requiring the trial prosecutor to answer questions about her disclosure decisions at the time when the effects of these decisions are most poignant. A colloquy, at least in part, personalizes the decision about whether particular information should be disclosed. In this way, the proposal helps to ensure that the prosecutor recognizes the weight of her constitutional obligation at the front end of the process. It also serves as a reminder that, while there are many institutional forces that affect whether *Brady* evidence is disclosed,[33] the trial prosecutor ultimately is left to make the disclosure decision in the moment of litigation. Given the nature of the adver-

30. 536 U.S. 622, 631-32 (2002) (holding that prosecutors do not need to disclose impeachment evidence before a guilty plea is entered).

31. *See id.* at 629 (explicitly limiting the Court's holding to impeachment evidence).

32. *See, e.g.*, MICHAEL MORTON, GETTING LIFE: AN INNOCENT MAN'S 25-YEAR JOURNEY FROM PRISON TO PEACE (2014) (documenting Morton's twenty-five-year effort to prove his innocence following his conviction, which was the product of several *Brady* violations).

33. *See* United States v. Olsen, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence.").

sary system, anything that reminds the prosecution of its role to pursue justice, not just convictions, should be considered.[34]

Second, a *Brady* colloquy changes the stakes of the prosecutor's initial calculation about whether a particular item of information needs to be disclosed. Currently, a prosecutor starts from the position that her decision about disclosure, often made in private without consulting the court, defense counsel, or even another prosecutor not directly involved in the case, will have the final say on whether the Due Process Clause requires disclosure. However, if judges conduct a *Brady* colloquy, prosecutors will know that their initial disclosure decision will be at least minimally reviewed and questioned on the record by the court. While such a contemporaneous review of the prosecutor's disclosure calculation may not alter the practices of the intentional wrongdoer, it should lead to more disclosures in situations in which *Brady* evidence would have otherwise been withheld in the absence of bad faith.

Third, this proposal responds to the empirical work of Ronald F. Wright and Kay L. Levine documenting the existence of "young prosecutors' syndrome."[35] Wright and Levine explain that experienced prosecutors characterize their inexperienced selves as exceedingly adversarial, uncompromising, and overly focused on winning.[36] Such an attitude, which the prosecutors contrasted with the more balanced views they developed with experience, undoubtedly contributes to *Brady* violations. It was perhaps a factor in why the young prosecutor in the Bronx nearly failed to disclose the *Brady* material in the case discussed in this Essay's Introduction. The use of a *Brady* colloquy may help to overcome the overly aggressive posture of some young prosecutors because, as Wright and Levine found, these same young prosecutors hold judges in high regard.[37] That is, the *Brady* colloquy itself will be an effective signal to young prosecutors of the importance the judge places on enforcing a prosecutor's ethical and *Brady* obligations.

C. *Increasing Prosecutorial Accountability*

While this Essay is primarily focused on increasing the rate of *Brady* compliance on the front end, one additional benefit of this proposal is that the answers prosecutors provide during a *Brady* colloquy will make it easier to punish them if undisclosed *Brady* evidence later comes to light. There has been signif-

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34. *See* United States v. Bagley, 473 U.S. 667, 696-97 (1985) ("[F]or purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case.").

35. Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome* 3 (Emory Univ. Sch. of Law Legal Studies Research Paper Series, Research Paper No. 14-277, 2014) (internal quotation marks omitted), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405137.

36. *See id*.

37. *Id*. at 40.

icant attention given to the lack of punishment following *Brady* violations.[38] Even in cases in which the misconduct surfaces quickly, as it did in the case from the Bronx above, individual prosecutors responsible for the misdeeds are seldom punished. Indeed, the assistant district attorney in the Bronx continues to prosecute felonies there.[39]

Scholars and practitioners have offered many proposals to hold prosecutors accountable for misconduct. Some have suggested public shaming.[40] Others have called for criminal penalties, civil penalties, or professional discipline.[41] It is beyond the scope of this Essay to evaluate which, if any, of these proposals should be pursued. However, a prosecutor's answers during a *Brady* colloquy could increase the chance of both detection and punishment. Depending on the nature of the prosecutor's answers, such punishment could take the form of prosecution for perjury, judicial sanctions, or discipline from state bar associations. Admittedly, the institutions with the authority to pursue punishment must still have the institutional desire and means to pursue it. But a transcript with unequivocal assertions that no *Brady* material exists in response to precise questions from a judge would eliminate some hurdles to punishing prosecutors who fail to meet their due process obligations.

D. *Incentivizing Effective Defense Preparation*

Finally, the use of a *Brady* colloquy may have positive effects on the practice of criminal defense. At a minimum, it should encourage defense counsel to think more strategically about what categories of favorable evidence may exist and how this information may become a part of the defense theory, lead to changes in the defense theory, or provide additional avenues of investigation.[42] Of course, the prosecution's duty to disclose *Brady* evidence exists absent a request by the defendant.[43] However, a detailed request aided by a brief colloquy

38. *See, e.g.*, Angela Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 276 (2007); Medwed, *supra* note 12, at 1544-47 (summarizing studies documenting that prosecutors who commit misconduct are rarely punished).

39. *See* Slattery, *supra* note 1 (containing a link to the transcript from a hearing before Judge Wilson in which he barred the prosecutor from ever appearing before him again). The prosecutor may have been punished internally, but other than being barred from Judge Wilson's courtroom, she received no formal and public punishment.

40. *See, e.g.*, Gershowitz, *supra* note 14.

41. *See, e.g.*, Medwed, *supra* note 12, at 1550-51 (outlining the incentives of "sticks" and "carrots" that scholars have proposed to decrease *Brady* violations).

42. *See, e.g.*, Barry Scheck & Nancy Gertner, *Combatting* Brady *Violations with an 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, CHAMPION, May 2013, at 40, 41, *available at* http://www.nacdl.org/Champion.aspx?id=28478 (noting, in the context of requesting a court order regarding the prosecutor's ethical disclosure obligations, the importance of tailoring the disclosure request to the individual defense case and theory).

43. United States v. Agurs, 427 U.S. 97, 110-11 (1976).

from the trial court should trigger more disclosures than a boilerplate *Brady* motion filed as a routine matter.

CONCLUSION

Chief Judge Kozinski's dissenting opinion is just one recent example of many urgent calls to respond to a wave of *Brady* violations.[44] Regardless of whether one agrees with his characterization of the problem as one reaching epidemic proportions, it is difficult to deny that there is a problem worth addressing. In the face of this problem, a *Brady* colloquy merits consideration. It could be implemented today, without passing legislation, changing the ethical rules, or giving judges additional authority. In addition, the potential negative consequences of implementing a brief *Brady* colloquy are far from severe. Of course, some prosecutors might be insulted by having to answer these or similar questions from the court, believing that the questions themselves amount to an accusation.[45] Additionally, some defense attorneys may be reluctant to ask the court to perform a *Brady* colloquy, perhaps fearing that the request will be received poorly and might result in the prosecutor's unwillingness to offer favorable plea bargains to the attorney's future clients. And some judges may fear that asking such questions will be seen as too pro-defendant.[46] However, despite these and other potential objections, the proposal is a low-cost interven-

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44. *See, e.g.*, *In re* Special Proceedings, 825 F. Supp. 2d 203, 205-06 (D.D.C. 2011) (documenting the release of a report detailing the misconduct that led to the conviction of Alaska Senator Ted Stevens); *see also* Martha Neil, *Report Blasts Feds for 'Systemic Concealment' of Exculpatory Evidence in Alaskan Senator's Case*, A.B.A. J. (Mar. 6, 2012, 11:35 AM CDT), http://www.abajournal.com/news/article/report_blasts_feds_for_systematic_concealment_of_significant_exculpatory_ev (including a link to the full report).

45. *See* Radley Balko, *Judge Says Prosecutors Should Follow Law. Prosecutors Revolt.*, WASH. POST (Mar. 7, 2014), http://www.washingtonpost.com/news/the-watch/wp/2014/03/07/judge-says-prosecutors-should-follow-the-law-prosecutors-revolt (recounting that after the Arizona Supreme Court recommended the adoption of an ethical rule to ensure that prosecutors disclose new evidence of a potential wrongful conviction that comes to light during postconviction proceedings, the lead prosecutor in Maricopa County opposed the recommendation, in part because he was insulted by the suggestion that an ethical guideline was needed to encourage him to do what he claimed he would do as a matter of course).

46. Notably, the judge in the Bronx case described in this Essay's Introduction is now facing an investigation from the New York State Commission on Judicial Conduct as a result of his on-the-record, public chastisement of the prosecutor who committed the misconduct in that case. *See* Denis Slattery, *Bronx Judge Investigated for Barring Prosecutor from Courtroom*, N.Y. DAILY NEWS (Aug. 7, 2014, 8:28 PM), http://www.nydailynews.com/new-york/bronx/bronx-judge-investigated-barring-prosecutor-courtroom-article-1.1896016; *see also* Balko, *supra* note 45 (describing how after a South Carolina Supreme Court justice cautioned prosecutors that the judiciary was prepared to respond aggressively to prosecutorial misconduct, the vast majority of elected prosecutors and the South Carolina attorney general responded by seeking to have the justice recused from all criminal cases, citing his alleged bias against the prosecution).

tion[47] in the criminal adjudication process that can help address a vexing problem with far-reaching consequences. At a minimum, it represents an idea worth testing—a test that could be implemented today by any judge who wants to answer Chief Judge Kozinski's call to the judiciary to actively protect the rule of law by ensuring that prosecutors meet their due process and ethical obligations.

47. This is particularly true when this proposal is compared to the comparatively higher administrative costs of other reform proposals, including open-file discovery policies.