ESSAY

Disclosing Prosecutorial Misconduct

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Prosecutorial misconduct in the form of Brady *violations continues to plague the criminal justice system.* Brady *misconduct represents a fundamental breakdown in the adversarial process, denying defendants a fair trial and undermining the legitimacy of the criminal justice system. Commentators have responded by proposing a range of reforms to increase* Brady *compliance. Yet these reforms largely ignore the need to remedy the harms from past* Brady *violations. Furthermore, these proposals focus almost entirely on the harms defendants face from prosecutors'* Brady *misconduct, ignoring the harms victims, jurors, witnesses, and others endure because of* Brady *misconduct. This Article proposes a new remedy to supplement the current responses to* Brady *misconduct—the* Brady *Violation Disclosure Letter. It proposes sending a concise letter documenting the misconduct to the relevant stakeholders who participated in the initial trial that was corrupted by a* Brady *violation. This disclosure is a partial remedy for the range of harms* Brady *violations create. It also promises to increase* Brady *compliance and to promote transparency in a criminal justice system that is increasingly opaque. Importantly, this proposal can be implemented immediately without adopting new rules or statutes and without expanding* Brady*'s existing constitutional protections.*

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INTRODUCTION

Andre Hatchett was exonerated in 2016 after spending twenty-five years in prison for a murder that he did not commit.[1] He proved his innocence and regained his freedom after a reinvestigation uncovered rampant police and prosecutorial misconduct in his case. The misconduct included the prosecution's failure to disclose evidence that was favorable to Hatchett in advance of trial in violation of *Brady v. Maryland*.[2] For example, prosecutors withheld information that the

1. *See Andre Hatchett*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/andre-hatchett/ (last visited Oct. 13, 2018) [https://perma.cc/6VAQ-35DF] (describing Hatchett's wrongful conviction and exoneration).

2. 373 U.S. 83, 86 (1963).

only eyewitness to the crime initially identified someone other than Hatchett as the perpetrator.[3]

Terry Williams prevailed in his three-decade-long effort challenging his death sentence in 2017.[4] Unlike Hatchett, Williams committed the murder in his case, yet he challenged his death sentence and ultimately proved that the prosecution violated *Brady* in his case as well. In Williams's case, the prosecution concealed evidence of the extensive history of sexual abuse Williams, a juvenile at the time, suffered at the hands of the man he killed.[5] In vacating Williams's death sentence, the court recognized that the jury should have been provided the opportunity to consider this information when deciding whether Williams deserved the death penalty.

This Article explores how the criminal justice system should respond to *Brady* violations. It argues that the existing tools have proven insufficient.[6] As such, it proposes adding a new option—the *Brady* Violation Disclosure Letter. The letter is a concise, clear statement memorializing the prosecutorial misconduct and its effect on the case. To be most effective, the letter should be sent to participants in the adjudicatory process—the jurors, witnesses, judge, prosecutor, and defense attorney from the original trial; the victim of the underlying crime; and relevant criminal justice organizations, including victims' rights organizations, the public defender's office, the local prosecutor's office, and the law enforcement agency that investigated the case.[7] Publicly disclosing prosecutorial misconduct in this manner promotes *Brady* compliance, validates the interests of the range of people harmed by *Brady* misconduct, and increases transparency. It is also a flexible tool that can be implemented immediately without new laws, rules, or regulations.[8] This flexibility is thanks to individual judges possessing sufficient inherent authority to implement this reform today.

Before exploring the details of this proposal, it is helpful to return to Hatchett's and Williams's successful *Brady* claims. The paths

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3. *See* Press Release, Brooklyn Dist. Attorney's Office, Brooklyn D.A. Moves to Vacate the Wrongful Conviction of Andre Hatchett Who Was Convicted of Murdering Acquaintance in 1991 in Bed-Stuy Park (Mar. 10, 2016), http://www.brooklynda.org/2016/05/10/brooklyn-d-a-moves-to-vacate-the-wrongful-conviction-of-andre-hatchett-who-was-convicted-of-murdering-acquaintance-in-1991-in-bed-stuy-park/ [https://perma.cc/LJ3V-CSBT].

4. Commonwealth v. Williams, 168 A.3d 97, 97 (Pa. 2017) (per curiam) (vacating Williams's death sentence).

5. *Id.* at 103–05 (Donohue, J., writing in support of affirmance) (summarizing the undisclosed evidence).

6. *See infra* Part II.

7. *See infra* Section III.A.

8. *See infra* Sections III.B.4, III.B.5.

their cases weaved through the system give context as to why responding to *Brady* violations with a targeted public disclosure of the misconduct merits adoption.

The early signs of misconduct in Hatchett's case went unexplored. In the months after his conviction, a conflict forced Hatchett's first appellate attorney to withdraw from the case.[9] The conflict was that another attorney in the same defense agency represented the prosecution's chief witness against Hatchett—the purported eyewitness who claimed to see Hatchett commit the murder.[10] When the appellate attorney handed the case to new counsel, he referenced a deal the state's witness received for cooperating in Hatchett's case.[11] Hatchett's trial attorney had suspected the state's witness received a deal but was unable to uncover evidence proving this at trial.[12] The reference to a deal initially went unexplored, but it proved to be an ominous marker of what was to come.

By 2008, Hatchett secured representation from The Innocence Project, and he sought DNA testing of the physical evidence in his case.[13] Hatchett's motion for DNA testing argued that the state's chief witness was not reliable, in part because of the likelihood that he received a deal in exchange for testifying.[14] The DNA testing failed to conclusively prove Hatchett's innocence. Despite this, Hatchett persisted, focusing on investigating the possibility of a *Brady* violation. Initially, the prosecution rebuked Hatchett's request for access to the prosecutor's trial file to search for exculpatory evidence that had not been disclosed.[15]

Hatchett's prospects changed when Ken Thompson was elected Brooklyn's District Attorney in 2013. Thompson created a robust Conviction Review Unit willing to devote time and resources to reviewing the reliability of old cases.[16] With a willing party on the other

9. *See* Letter from Jonathan P. Willmott, Assoc. Appellate Counsel, Legal Aid Soc'y, to Ursula Bentele, Professor, Brooklyn Law Sch. (July 1, 1994) (on file with author).

10. *See id.*

11. *See id.*

12. *See id.*

13. The author was one of Hatchett's attorneys at The Innocence Project. *See* Memorandum of Law in Support of Motion for Post Conviction DNA Testing Pursuant to C.P.L. §440.30(1-a) at 1, People v. Hatchett, No. 3771/91, (Sup. Ct. N.Y. Kings Cty. Nov. 17, 2008) (on file with author).

14. *Id.* at 12–15.

15. *See* Laurie L. Levenson, *Searching for Injustice: The Challenge of Postconviction Discovery, Investigation, and Litigation*, 87 S. CAL. L. REV. 545, 547 (2014) ("There is generally no right to discovery at the postconviction stage.").

16. *See* Rich Schapiro & Christina Carrega-Woodby, *Man Wrongfully Convicted in '91 Murder Walks Free*, N.Y. DAILY NEWS (Mar. 10, 2016, 5:51 PM), http://www.nydailynews.com/new-york/brooklyn/man-wrongfully-convicted-91-brooklyn-murder-walk-free-article-1.2559747 [https://perma.cc/79Z5-AALG] (discussing the Conviction Review Unit).

side, Hatchett's attorneys and the Brooklyn District Attorney's Office cooperated on a thorough reinvestigation that uncovered extensive misconduct and led to a joint motion to vacate Hatchett's conviction based on his innocence.[17] Without the cooperation of the prosecution, Hatchett would likely still be fighting to prove his innocence.[18]

Williams enjoyed no such cooperation from the Philadelphia District Attorney's Office. Rather, he secured relief in spite of fierce opposition at every turn. Williams's trial prosecutor, Andrea Foulkes, had a history with Williams by the time she asked a jury to sentence him to death. Months earlier, Foulkes unsuccessfully sought the death penalty for another murder that Williams committed.[19] Notably, the jury in the first case heard testimony that the victim had a history of sexually abusing Williams, who was seventeen years old at the time of the murder.[20] Foulkes believed this was the reason Williams escaped the death penalty in the first case.[21]

Having failed to secure a death sentence in Williams's first case, Foulkes ensured that the jury in the second case did not hear that the victim in that case had also sexually abused Williams.[22] Before disclosing witness statements from the state's key witnesses, Foulkes "sanitized" the statements to omit any references to the victim's history of sexually abusing young boys.[23] Foulkes also concealed information, including "[her] own notes" documenting her knowledge of the victim's pedophilia.[24] She exacerbated her misconduct in closing arguments when, despite possessing evidence to the contrary, she argued that the

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17. *See* Order Vacating Conviction and Dismissing Indictment, People v. Hatchett, No. 3771/1991 (Sup. Ct. N.Y. Kings Cty. Mar. 10, 2016) (on file with author); *see also* Schapiro & Carrega-Woodby, *supra* note 16 (quoting the Chief of the Conviction Review Unit describing Hatchett's case as a "systemic failure, by every institution he encountered").

18. Schapiro & Carrega-Woodby, *supra* note 16 (quoting Barry Scheck, Codirector of the Innocence Project, at Hatchett's exoneration: "We are incredibly grateful to District Attorney Ken Thompson and his conviction integrity unit, without which Mr. Hatchett may never have received justice.").

19. *See generally* Marc Bookman, *When a Kid Kills His Longtime Abuser, Who's the Victim?*, MOTHER JONES (Nov. 30, 2015, 11:00 AM), https://www.motherjones.com/politics/2015/11/terry-williams-philadelphia-death-penalty-sexual-abuse/ [https://perma.cc/VC2U-BB33] (providing an account of Williams's background, crimes, and history with the Philadelphia District Attorney's Office).

20. Commonwealth v. Williams, 168 A.3d 97, 100 (Pa. 2017) (Donohue, J., writing in support of affirmance).

21. *Id.* (citing the Nov. 27, 2012 findings of Judge M. Teresa Sarmina in Williams's 2012 postconviction proceedings).

22. *Id.* (quoting the Nov. 27, 2012 findings of Judge Sarmina in Williams's 2012 postconviction proceedings as follows: "The major difference between the [first and second] cases is that evidence of a sexual relationship between the middle-aged victim and [Williams] was presented to the jury in the first, but not in the second." (second alteration in original)).

23. *Id.* at 103–04.

24. *Id.* at 104.

victim "was a 'kind' and 'innocent' man who had done nothing more than offer Williams a ride home" before Williams killed him.[25] Having not heard that Williams's victim had sexually abused him, the jury returned a death sentence.[26]

In 2012, the scope of the *Brady* misconduct started to take shape when Williams's codefendant agreed to talk to Williams's attorneys, telling them how, before trial, the prosecution shaped his testimony so as not to mention the sexual abuse Williams faced at the hands of the victim.[27] This new information caused the court to inspect the prosecution and police files, and the review confirmed the prosecution's multiyear effort to conceal evidence Williams could have used to avoid the death penalty.[28] The court found that these actions violated *Brady* and ordered a new sentencing hearing for Williams.[29]

After the initial findings of *Brady* misconduct were made in each case, Hatchett's and Williams's cases again diverged. Hatchett's prosecutors publicly began to right the wrong. They confessed error, joined Hatchett in moving to vacate his conviction, and publicly described the *Brady* violations in the case.[30] Conversely, Williams's prosecutors dug in, challenging any suggestion that they committed misconduct.[31] They asked the Pennsylvania Supreme Court to reinstate Williams's death sentence, knowing that they likely had at least one supporter on the court.[32] Chief Justice Ronald Castille was the elected prosecutor at the time of Williams's trial, and he personally approved seeking the death penalty against Williams.[33]

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25. *Id.* at 98 (quoting prosecutor Andrea Foulkes's closing arguments).

26. *Id.*

27. *See* Williams v. Pennsylvania, 136 S. Ct. 1899, 1904 (2016) (recounting that the codefendant also revealed that he had received a previously undisclosed benefit from the prosecution in exchange for his cooperation against Williams); *Williams*, 168 A.3d at 103 (Donohue, J., writing in support of affirmance) (quoting the codefendant's affidavit alleging the misconduct).

28. *See Williams*, 168 A.3d at 103–05 (Donohue, J., writing in support of affirmance) (summarizing the undisclosed evidence and its importance).

29. *Williams*, 136 S. Ct. at 1904.

30. *See* Brooklyn Dist. Attorney's Office, *supra* note 3 ("Upon reviewing the conviction, the [Conviction Review Unit] found that the defendant was deprived of his due process rights based on several issues, including Brady violations.").

31. *See generally* Laurie L. Levenson, *The Problem With Cynical Prosecutor's Syndrome: Rethinking a Prosecutor's Role in Post-Conviction Cases*, 20 BERKELEY J. CRIM. L. 335, 338 (2015) ("I have consistently witnessed senior prosecutors to be among the most resistant to believing their office made a mistake and one of their colleagues has helped convict an innocent person."); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 136–37 (2004) (discussing prosecutors' incentives for opposing postconviction claims for relief).

32. *Williams*, 136 S. Ct. at 1904.

33. *Id.* at 1903–04.

Chief Justice Castille did not disappoint. He refused to recuse himself.[34] And when the Pennsylvania Supreme Court reinstated Williams's death sentence, Chief Justice Castille issued a concurring opinion in which he concluded that it was the postconviction judge, not the assistant prosecutor, who committed intentional misconduct.[35] He failed to offer even the slightest criticism of the trial prosecutor, who, even under the most generous interpretation, misrepresented the facts to the jury by characterizing Williams's victim as a "kind" and "innocent" man despite knowing he had a history of sexually abusing Williams and other young men.[36]

Chief Justice Castille and the Pennsylvania Supreme Court did not have the last word, however. The U.S. Supreme Court rebuked Justice Castille, holding that he should have recused himself from the case.[37] The Pennsylvania Supreme Court then vacated Williams's death sentence because of the prosecution's *Brady* misconduct.[38]

Hatchett's conviction and Williams's death sentence were ultimately vacated because of the prosecutors' *Brady* misconduct. This Article asks what the criminal justice system should do to remedy *Brady* misconduct, other than merely vacating convictions and sentences. The current options for responding to *Brady* misconduct range from barring retrial, to comprehensive and independent investigations into the causes of the misconduct, to pursuing professional discipline or criminal sanctions against prosecutors who commit misconduct.[39] These responses focus almost exclusively on the harms to the defendant and the possible punishment of the prosecutor. They overlook harms to other stakeholders, including jurors, the victim of the underlying crime, and witnesses.[40] More importantly, each response has limitations. Courts are reluctant to bar retrial as a

34. *Id.* at 1904 ("Without explanation, Chief Justice Castille denied the motion for recusal and the request for its referral [to the full court].").

35. Commonwealth v. Williams, 105 A.3d 1234, 1245–46 (Pa. 2014) (Castille, J., concurring), *vacated*, 136 S. Ct. 1899 (2016). Chief Justice Castille characterized the postconviction judge's actions that uncovered the favorable evidence in the prosecutor's file as "lawless," unfair, and misinformed about the scope of due process protections. *Id.* In an ironic twist given his decision not to recuse himself from the case, Chief Justice Castille accused the postconviction judge of not remaining "neutral." *Id.* at 1245.

36. *See id.* at 1245 (dismissing Williams's prosecutorial misconduct claims as "frivolous"); *id.* at 1251 (dismissing as "slander[ous]" Williams's claim that his jury should have been aware of the victim's history of sexual abuse of Williams and other juveniles).

37. *Williams*, 136 S. Ct. at 1908 (finding that Chief Justice Castille's "significant, personal involvement in Williams' case gave rise to an unacceptable risk of actual bias").

38. Commonwealth v. Williams, 168 A.3d 97, 97 (Pa. 2017) (per curiam) (affirming Williams's sentencing-phase relief as a result of an equally divided Pennsylvania Supreme Court).

39. *See infra* Part II.

40. *See infra* Section III.B.2 (explaining how *Brady* violations harm jurors, victims, and trial witnesses).

response to *Brady* misconduct,[41] independent investigations are extremely costly,[42] and prosecutors rarely face official discipline for *Brady* misconduct.[43] This means that the customary response to a finding of *Brady* misconduct is usually limited to vacating the defendant's conviction or sentence, as was done in Hatchett's and Williams's cases.

We can do more to respond to *Brady* misconduct, particularly if we move beyond the inflexible and costly responses currently available. *Brady* Violation Disclosure Letters represent one option that can be implemented immediately. These letters promise to validate the harms victims, witnesses, and jurors face from participating in trials corrupted by *Brady* misconduct. They also increase transparency and help repair the damage *Brady* misconduct causes to the integrity of the criminal justice system. To be certain, *Brady* Violation Disclosure Letters are only a partial remedy for *Brady* misconduct and are offered as a supplement, not a replacement, for existing options. Yet they deserve sufficient consideration to ensure that *Brady* is not an underenforced constitutional right that results in tragedies like Hatchett's wrongful conviction and Williams's ill-gotten death sentence.[44]

This Article proceeds as follows. Part I outlines the scope of the *Brady* doctrine. Part II describes the current responses and remedies for *Brady* violations and discusses their limitations. In Part III, I introduce the *Brady* Violation Disclosure Letter and explain why it should be used to remedy *Brady* violations. This Part explores how the adoption of *Brady* Violation Disclosure Letters will help to increase compliance with *Brady* going forward and serve as a remedial measure to address the wide range of harms caused by *Brady* violations. Finally, Part IV addresses the likely criticisms of this proposal.

I. THE *BRADY* DOCTRINE

The *Brady* doctrine arises from a long line of cases in which the Supreme Court interpreted the Due Process Clause to ensure fair proceedings in criminal cases and to protect innocent defendants.[45] The

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41. *See infra* Section II.A.

42. *See infra* Section II.C (summarizing the scope and cost of the investigation of the prosecutorial misconduct in the prosecution of Senator Ted Stevens).

43. *See infra* Section II.B (identifying limitations of relying on professional discipline for responding to *Brady* misconduct).

44. *See* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 434 (2010) ("[T]he *Brady* disclosure duty has become one of the most unenforced constitutional mandates in the criminal justice system.").

45. *See id.* at 422–23 ("The purpose of the *Brady* rule is to ensure that the defendant receives a fair trial in which all relevant evidence of guilt and innocence is presented to enable the fact-

Court has explained that these two aims—fair process and protecting innocence—are important both to protect individual defendants facing the power of the state and to maintain society's faith in the integrity of the criminal justice system.[46]

Brady identifies the defendant's constitutional right to receive evidence or information that is favorable to the defense and material to guilt or punishment from prosecutors before trial.[47] Evidence or information is favorable if it is exculpatory or if it impeaches the

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finder to reach a fair and just verdict."); Colin P. Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 LOY. L.A. L. REV. 77, 108 fig.1 (2012) (mapping *Brady*'s "due process roots").

46. *See* Starger, *supra* note 45, at 127 (identifying the "twin justifications for the *Brady* Rule" as fairness and justice, meaning "a constitutional commitment to protecting innocence and apprehending the guilty"); *see also* Jason Kreag, *Letting Innocence Suffer: The Need for Defense Access to the Law Enforcement DNA Database*, 36 CARDOZO L. REV. 805, 831–37 (2015) (describing how these two roles grew out of the Due Process Clause).

47. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment"). Prosecutors' *Brady* obligations are part of a larger discovery regime in criminal cases. *See* Darryl K. Brown, *Discovery*, *in* 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 147, 153 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_3.pdf [https://perma.cc/HL9V-M3EF] ("Aside from constitutional duties defined by *Brady*, most disclosure law resides in statutes, procedural rules, and court orders."); *id.* at 155–58 (summarizing the various ways states impose nonconstitutional discovery rules); Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 778–79 (2017) (describing states with narrow and broad rule-based criminal discovery regimes).

In addition to *Brady*'s constitutional protections, prosecutors also must comply with discovery provisions in the rules of criminal procedure and their ethical duties. In some jurisdictions, the procedural rules and ethical obligations extend the prosecutor's disclosure obligations beyond *Brady*. *See* Cone v. Bell, 556 U.S. 449, 470, n.15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." (citing MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 1983))); Kyles v. Whitley, 514 U.S. 419, 436–37 (1995) (observing that *Brady* "requires less of the prosecution than the ABA Standards"); Schultz v. Comm'n for Lawyer Discipline of the State Bar of Tex., No. 55649, 2015 WL 9855916, at *1 (Tex. Bd. Disciplinary App. Dec. 17, 2015) (concluding that the Texas Rules of Professional Conduct are "broader than *Brady*"); ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009):

> A prosecutor's constitutional obligation extends only to favorable information that is "material," *i.e.*, evidence and information likely to lead to an acquittal. . . . Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome.;

Peter A. Joy & Kevin C. McMunigal, *The Ethics of Prosecutorial Disclosure*, 30 CRIM. JUST. 41, 41–42 (2015) (discussing how Model Rule 3.8(d) has been interpreted by some jurisdictions as requiring more than *Brady*'s constitutional rule). *But see* Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010) (imposing a *Brady*-like materiality standard on prosecutor's ethical disclosure obligations).

prosecutor's evidence.[48] *Brady* does not impose a duty on prosecutors to take investigative steps to uncover *all* evidence or information favorable to the defense. But when prosecutors and the agencies under their control possess favorable evidence or information, they are obligated to disclose that evidence or information.[49]

Evidence is material, and thus subject to disclosure, when its nondisclosure undermines confidence in the reliability of the defendant's conviction or sentence.[50] Because the prosecutor's *Brady* duty must be met before trial, *Brady*'s materiality provision requires prosecutors to make a prediction about the nature of the favorable evidence without full knowledge of the defendant's case.[51] The Supreme Court recognizes that this materiality determination is often tricky and complex in practice.[52] As such, the Court has repeatedly advised prosecutors to err on the side of disclosure.[53] Despite this advice, the Court has also made clear that *Brady* compliance does not turn on the prosecutor's intent.[54]

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48. *See* United States v. Bagley, 473 U.S. 667, 676 (1985) ("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule."); Giglio v. United States, 405 U.S. 150, 153–54 (1972) (holding that *Brady* applies to impeachment evidence).

49. *Kyles*, 514 U.S. at 437 ("[T]he 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.").

50. *See id.* at 434 (quoting *Bagley*, 473 U.S. at 678).

51. *See Bagley*, 473 U.S. at 701 (Marshall, J., dissenting) (criticizing *Brady*'s materiality prong because it requires "the prosecutor to predict what effect various pieces of evidence will have on the trial"); *In re* Kline, 113 A.3d 202, 208 (D.C. 2015) ("Retrospective analysis, while it necessarily comports with appellate review, is wholly inapplicable in pretrial prospective determinations.").

52. *See* United States v. Agurs, 427 U.S. 97, 108 (1976) (recognizing that the pretrial materiality determination is "inevitably imprecise" in part because "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete"); *see also* United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) ("Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment [on materiality] necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins . . . ."); *In re Kline*, 113 A.3d at 208 (explaining the futility of using the materiality standard in the pretrial-disclosure setting).

53. *See* Cone v. Bell, 556 U.S. 449, 470, n.15 (2009) ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *Kyles*, 514 U.S. at 439 ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."); *Agurs*, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

54. *See Agurs*, 427 U.S. at 110:

> Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence . . . of innocence is in his file, he should be presumed to recognize its significance . . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.

(internal citations and footnotes omitted).

Despite being settled law for over fifty years, noncompliance with *Brady*'s constitutional protections persists.[55] Commentators have offered several explanations for this persistence.[56] Knowledge of the actual rate of *Brady* misconduct remains elusive, however, because it is unknown how often *Brady* violations go uncovered.[57] The absence of an agreed-upon base rate for how often prosecutors violate *Brady* often leads proponents and opponents of *Brady* reform to disagree about whether *Brady* violations are an epidemic or merely episodic.[58] Regardless, *Brady* violations should command our attention because known *Brady* misconduct inflicts deep scars on the criminal justice system.

The scars from *Brady* misconduct represent wrongful convictions of innocent defendants, including innocent defendants sent to death row because of prosecutorial misconduct.[59] They represent harms endured by victims as prosecutors pursued the wrong perpetrator in trials corrupted by misconduct while the actual perpetrator remained free.[60] They represent harms jurors and witnesses faced when they realized that they unknowingly participated

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55. *See* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT viii (2d ed. 2017) ("[A]cts of misconduct by prosecutors are recurrent, pervasive, and very serious."); Jason Kreag, *The Jury's* Brady *Right*, 98 B.U. L. REV. 345, 355–58 (2018) (describing scope of *Brady* misconduct); *see also infra* notes 278–281 (explaining that the instances of known *Brady* misconduct likely underestimate the actual rate of misconduct, as some instances of misconduct are likely never uncovered).

56. *See, e.g.*, Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1609 (2006) ("The fallibility of human cognition raises especially disturbing questions about a prosecutor's ability to determine whether evidence is exculpatory."); Jones, *supra* note 44, at 433 ("Other than the unenforceable 'honor code,' there are few incentives for prosecutors to comply with *Brady* because there is no meaningful judicial oversight of the process.").

57. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT 168 (2011) ("By its nature, misconduct involving concealed evidence may remain hidden. We typically do not know what prosecutors had in their files, much less what they failed to show to the defense."); Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxiii (2015) ("Prosecutorial misconduct is a particularly difficult problem to deal with because so much of what prosecutors do is secret.").

58. *See* United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("*Brady* violations have reached epidemic proportions in recent years . . . ."). *But see infra* Section IV.B (summarizing arguments from opponents of reform that *Brady* violations are rare).

59. *See, e.g.*, BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014) (discussing Walter McMillian's exoneration from death row); Sam Roberts, *John Thompson, Cleared After 14 Years on Death Row, Dies at 55*, N.Y. TIMES (Oct. 4, 2017), https://www.nytimes.com/2017/10/04/obituaries/john-thompson-cleared-after-14-years-on-death-row-dies-at-55.html [https://perma.cc/6KBZ-46UM] (describing Thompson's exoneration and the prosecutorial misconduct that caused it).

60. *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 99 (2009) (Stevens, J., dissenting) ("Crime victims, the law enforcement profession, and society at large share a strong interest in identifying and apprehending the actual perpetrators of vicious crimes.").

in the prosecutor's misconduct.[61] They represent harms prosecutors faced when they discovered that their competitive and adversarial nature resulted in misconduct.[62] And they represent the harm resulting from the public questioning the very integrity of the criminal justice system.[63] The system should respond to all of these harms when *Brady* misconduct is uncovered. However, as the next Part explains, the current responses to *Brady* violations leave many of these harms unaddressed.

II. CURRENT RESPONSES TO *BRADY* VIOLATIONS ARE INSUFFICIENT

Uncovering a *Brady* violation in an individual case produces significant results for an individual defendant—his conviction or sentence is wiped away. Often, the extent of the misconduct and the weight of the favorable evidence uncovered render a retrial or resentencing unlikely, meaning the defendant is released and the case ends.[64]

But the impact of the *Brady* violation on the criminal justice system as a whole is usually muted, representing only a momentary blip on the public's consciousness that is quickly forgotten.[65] This is due, in part, to the limited responses currently available when *Brady* misconduct is uncovered. The responses to *Brady* violations range from doing nothing other than ordering relief for the defendant to the often prohibitively costly comprehensive, independent investigation of the prosecutors responsible for the misconduct. Options between these two extremes include barring retrial; investigations initiated by attorney disciplinary bodies; civil suits; and, in a small number of jurisdictions,

61. *See* Kreag, *supra* note 55, at 374–87 (proposing a separate *Brady*-like right in the jury to remedy harms jurors face).

62. *See, e.g.*, A.M. "Marty" Stroud III, *Lead Prosecutor Apologizes for Role in Sending Man to Death Row*, SHREVEPORT TIMES (Mar. 20, 2015), http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/ [https://perma.cc/3V9R-KWCH] (confessing to misconduct that resulted in Glenn Ford's death sentence).

63. *See* United States v. Agurs, 427 U.S. 97, 104 (1976) (recognizing that *Brady* violations "corrupt[ ] . . . the truth-seeking function of the trial process"); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("If the government becomes a lawbreaker, it breeds contempt for law . . . .").

64. *See supra* notes 1–44 and accompanying text (discussing Hatchett's exoneration). In other cases, retrial is not practical even if prosecutors remained committed to the defendant's guilt. *See* Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence*, *in* CRIMINAL PROCEDURE STORIES 129, 136–37 (Carol S. Steiker ed., 2006) [hereinafter Bibas, Brady] (describing *Brady*'s release from death row after a retrial proved impractical). And in instances of extreme misconduct, some courts bar retrial. *See infra* Section II.A.1.

65. *See* Jones, *supra* note 44, at 441 ("[T]he suppression of *Brady* evidence is treated with the triviality of a lost rag doll, when it should be treated with the exigency of an asthma attack.").

the possibility of criminal charges against the bad actors. In a given case, these responses to *Brady* misconduct may overlap; an independent investigation may lead to professional discipline. Nonetheless, the current responses each have limitations. This Part identifies those limitations. Part III then introduces the *Brady* Violation Disclosure Letter as a new and supplemental way to respond to prosecutorial misconduct.

A. Prohibiting Retrial

Although the vast majority of *Brady* violation findings result in vacating the defendant's conviction, thus leaving it to the prosecutor's discretion to determine whether to retry the case, in a small number of cases courts bar retrial altogether.[66] This response, although limited to the four corners of the defendant's case, signals the severity of the misconduct and carries the potential to influence prosecutorial behavior in other cases.

Debra Milke's capital case in Arizona is a recent example of how barring retrial can capture the attention of prosecutors and the public.[67] The court barred Milke's retrial after finding "egregious prosecutorial misconduct" in the form of extensive *Brady* violations.[68] The Maricopa County Attorney's Office responded forcefully, asking the court to depublish its order.[69] The prosecutor was not the only person who took notice. Milke's release from death row was covered internationally,[70] and the court's order barring retrial generated similar media

66. *See id.* at 446 ("Although legal scholars and jurists have proposed *Brady* reforms that strongly encourage the expanded use of dismissal as a sanction for intentional violations, those reforms have not been adopted by state and federal courts.").

67. *See generally* GARY L. STUART, ANATOMY OF A CONFESSION: THE DEBRA MILKE CASE (2016); Matthew Ashton, Note, *The* Milke *Way:* Milke v. Ryan *and the Vast Galaxy of Uncharted Exculpatory Evidence It Revealed*, 59 ARIZ. L. REV. 1061 (2017).

68. Milke v. Mroz, 339 P.3d 659, 662 (Ariz. Ct. App. 2014) (citing the "integrity of our system of justice" to bar retrial because of the "egregious prosecutorial misconduct"). The Arizona Supreme Court declined to review the ruling of the intermediate appellate court barring retrial. *See* Milke v. Ryan, 711 F.3d 998, 1019 (9th Cir. 2013) (reversing conviction based on *Brady* violations).

69. *See* Kozinski, *supra* note 57, at xxv n.129 (discussing the misconduct and the prosecutor's effort to cover up the misconduct by requesting the appellate court to depublish its opinion); Press Release, Maricopa Cty. Attorney's Office, County Attorney Comments on Arizona Supreme Court Ruling in State v. Milke (Mar. 17, 2015), https://www.maricopacountyattorney.org/CivicAlerts.aspx?AID=313 [https://perma.cc/AS7Z-GWFA] (calling the order barring Milke's retrial a "dark day for Arizona's criminal justice system").

70. *See Arizona Death Row Inmate Debra Milke Released to Await Retrial*, GUARDIAN (Sept. 7, 2013), https://www.theguardian.com/world/2013/sep/07/arizona-death-row-inmate-debra-milke [https://perma.cc/9Z53-YWB8]; Greg Botelho, *Debra Milke, Arizona Woman Who Had Murder Conviction Tossed, Is Freed*, CNN (Sept. 6, 2013, 8:14 PM), http://www.cnn.com/2013/09/06/justice/arizona-milke-release/index.html [https://perma.cc/7GAH-JBK9].

coverage.[71] As such, the attention generated by the order produced some benefits similar to *Brady* Violation Disclosure Letters.[72] Specifically, the media coverage cast a brighter light on the initial misconduct. Ironically, the prosecutor's reaction attacking the ruling likely focused even more attention on the underlying misconduct. In an increasingly private criminal justice system, particularly with respect to prosecutorial decisionmaking, media attention promotes transparency.[73] Furthermore, it is likely that some prosecutors took notice of the misconduct and fallout from it, perhaps making them more likely to comply with *Brady* when faced with similar cases. But Milke's case is not representative of the typical result of most *Brady* violations; judges are often reluctant to impose such an extreme remedy as barring retrial.[74]

Furthermore, barring retrial after *Brady* misconduct does not address some of the other benefits offered by *Brady* Violation Disclosure Letters. For example, while barring retrial responds to the defendant's interests and potentially increases deterrence by capturing the attention of prosecutors regarding the importance of complying with *Brady*, it does not address or remedy other harms. The victim, witnesses, and jurors from the initial trial likely suffered harms from participating in a corrupted process.[75] Barring retrial does not vindicate their interests.

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71. *See* Saeed Ahmed & Greg Botelho, *Debra Milke, Who Spent 22 Years on Arizona Death Row, Has Murder Case Tossed*, CNN (Mar. 24, 2015, 3:49 PM), https://www.cnn.com/2015/03/24/justice/arizona-debra-milke-death-sentence/index.html [https://perma.cc/SA9X-VL65]; *Arizona Drops Murder Charges Against Debra Milke*, BBC NEWS (Dec. 12, 2014), http://www.bbc.com/news/world-us-canada-30443351 [https://perma.cc/AHE5-QBKJ]; *No Second Murder Trial for Arizona Woman Held 22 Years in Son's Death*, CBS NEWS (Dec. 11, 2014, 11:45 PM), https://www.cbsnews.com/news/no-second-murder-trial-for-arizona-woman-debra-jean-milke-held-22-years-in-sons-death/ [https://perma.cc/5HPK-X4AM].

72. *See infra* Section III.B (discussing benefits of *Brady* Violation Disclosure Letters).

73. *See infra* Section III.B.3 (discussing the rationale for *Brady* Violation Disclosure Letters); *see also* Ashton, *supra* note 67, at 1074 (discussing options for how prosecutors should respond to misconduct finding in *Milke*'s case).

74. *See, e.g.*, D'Ambrosio v. Bagley, 688 F. Supp. 2d 709, 726 (N.D. Ohio 2010) ("[W]hile a federal court has the power to prevent the state from attempting to reprosecute a successful habeas petitioner, such power is only exercised appropriately in extraordinary circumstances."). Short of barring a retrial, in limited instances, courts have ordered a prosecutor's office recused or barred certain penalties—for example barring the pursuit of a death sentence—because of prosecutorial misconduct. *See, e.g.*, United States v. Rivera-Clemente, No. 11-499, 2012 WL 12911051, at *1 (D.P.R. Sept. 19, 2012) (precluding death penalty following prosecution's discovery violations); People v. Dekraai, 210 Cal. Rptr. 3d 523, 527–28 (Ct. App. 2016) (affirming trial court's order recusing Orange County District Attorney's Office based on extensive prosecutorial misconduct).

75. *See infra* Section III.B.2.

B. Professional Discipline

The attorney disciplinary system represents a second option for responding to *Brady* misconduct. Professional conduct rules recognize the special status of prosecutors in the criminal justice system.[76] They explain that prosecutors are "minister[s] of justice and not simply . . . advocate[s]."[77] The Supreme Court has repeatedly recognized the special role prosecutors play in the pursuit of justice.[78] And prosecutors embrace this role.[79] Accompanying this exalted role are rules of professional conduct that are unique to prosecutors, including an explicit professional conduct rule regarding prosecutors' disclosure obligations.[80] Model Rule of Professional Conduct 3.8(d) states that prosecutors "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, 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.[81]

Notably, in many jurisdictions, prosecutors' ethical disclosure obligations reach beyond the constitutional requirements demanded by *Brady*.[82] And where they do not, the ethical obligations reach at least as far as prosecutors' constitutional duties.[83] Thus, *Brady* violations are also ethical violations, rendering the attorney disciplinary process a possible avenue for responding to *Brady* misconduct.

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76. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2015) (describing the special responsibilities of a prosecutor); CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2015) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."); AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS 1 (3d ed. 2014) ("As a nation, we do not expect prosecutors to be typical advocates. We expect them to hold truth, justice, and mercy more sacred than winning.").

77. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2015).

78. *See* Bankes v. Dretke, 540 U.S. 668, 696 (2004) ("We have several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.' " (quoting Strickler v. Greene, 527 U.S. 263, 281 (1999))); *see also* People v. Hill, 17 Cal. 4th 800, 820 (1998) ("A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state.").

79. NAT'L PROSECUTION STANDARDS § 1-1.1 (NAT'L DIST. ATTORNEYS ASS'N 2009) ("The prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth.").

80. *See* MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2015).

81. *Id.*

82. *See supra* note 47.

83. *See, e.g.*, *In re* Ronald Seastrunk, 236 So. 3d 509, 510 (La. 2017) (holding that Louisiana's ethical disclosure obligations are "coextensive" with *Brady*); Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010) (imposing a *Brady*-like materiality standard on prosecutors' ethical disclosure obligations).

The Supreme Court endorses using the attorney disciplinary process as the primary means for responding to *Brady* violations.[84] For example, after John Thompson narrowly avoided execution and ultimately secured his freedom after uncovering prosecutors' *Brady* violations, he successfully sued the prosecutors for his wrongful conviction.[85] Ultimately, the Supreme Court overturned the jury's finding in favor of Thompson, vacating the $14 million it awarded him.[86] In so doing, the Court explained that it was unfair to hold the elected prosecutor liable for failure to train his assistant prosecutors because the need for training on disclosure obligations was not obvious.[87] Why was it not obvious? The Court reasoned that the elected prosecutor could rely on the fact that the assistant prosecutors were subject to professional conduct rules that required the disclosure of *Brady* evidence.[88] The clear implication was that the Court believed that prosecutors' desire to avoid professional discipline sufficiently motivates them to understand and comply with *Brady*.[89]

Despite the initial appeal and the Supreme Court's endorsement of using the attorney disciplinary process to respond to *Brady* violations, policing prosecutorial compliance with *Brady* in this manner

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84. *See* Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988) (recognizing that referral to disciplinary authorities as opposed to dismissing a criminal case was preferable where the prosecutorial misconduct did not prejudice the defendant); Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976) (arguing that the possibility of professional discipline is a sufficient alternative to civil liability to deter prosecutorial misconduct); *id.*:

> [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. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.;

see also Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 309 (2007) ("Strengthening the disciplinary process should be a top priority for reform because the United States Supreme Court has identified this process as the appropriate remedy for prosecutorial misconduct.").

85. Connick v. Thompson, 563 U.S. 51, 54 (2011) (noting that the district court jury awarded Thompson $14 million).

86. *Id.* at 72.

87. *Id.* at 67 ("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.").

88. *Id.* at 66 ("Among prosecutors' unique ethical obligations is the duty to produce *Brady* evidence to the defense.").

89. *Id.* ("An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment."); *id.* at 67 ("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 . . . .").

has proven ineffective for several reasons.[90] First, attorney disciplinary authorities often do not learn of instances of prosecutorial misconduct. Several factors contribute to this, including insufficient funding for disciplinary bodies; prosecutors, judges, and defense attorneys failing to report instances of misconduct; and reporting practices skewed against defendants whose guilt appears certain.[91] Prosecutors may choose not to report misconduct in an effort to protect colleagues.[92] Judges may fear making enemies or may simply be reluctant to initiate investigations.[93] Defense attorneys may seek to protect future clients.[94]

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90. *See, e.g.*, 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. FORUM 203, 209 (2011) (describing lack of discipline for prosecutors who violate *Brady*); Kevin C. McMunigal, *Prosecutorial Disclosure Violations: Punishments vs. Treatment*, 64 MERCER L. REV. 711, 713 (2013):

> Lack of negative consequences for violations of the disclosure obligation imposed by *Brady* and its ethics counterpart in Rule 3.8(d) of the Model Rules of Professional Conduct has long been a chronic problem in our criminal justice system. . . . [E]thics authorities generally have been reluctant to impose disciplinary sanctions on prosecutors who fail to disclose.;

Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

91. *See* Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012); Kevin C. McMunical, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 HOFSTRA L. REV. 847 (2010). *But see* Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 78–79 (2016) (recognizing that "the institutions that play a significant role in professional regulation . . . have slowly begun to expand their role in overseeing prosecutors").

92. *See* AM. BAR ASS'N, *supra* note 76, at 190:

> A strong bond often develops among those working together in criminal investigations. . . . In this environment, information about potential misconduct by an investigator or fellow prosecutor raises a significant challenge to all involved. There may be a tendency to diminish the significance of, or to demand extraordinary proof about, information concerning potential misconduct as a way to avoid its impact on the matter at hand, and on personal and institutional relationships.

93. *See, e.g.*, Oral Argument at 28:25, Baca v. Adams, 773 F.3d 1034 (9th Cir. 2015), https://www.youtube.com/watch?v=2sCUrhgXjH4 [https://perma.cc/XWC7-MK8V] (questioning by Judge Wardlow expressing that judicial elections contribute to pressure on state judges to avoid finding prosecutorial misconduct harmful); H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 82 (2013) ("Because prosecutors wield significant power and influence over local criminal justice communities, both judges and defense counsel are often concerned about the possible backlash that a report of misconduct might generate."); Peter A. Joy & Ellen Yaroshefsky, *Ethics in Criminal Advocacy*, *in* THE STATE OF CRIMINAL JUSTICE 163, 166 (2015) (recounting how after a trial court judge declared unethical the Queens County District Attorney's Office's practice of conducting pre-arraignment interviews with defendants, the "Queens District Attorney call[ed] for the judge's removal from the bench").

94. *See* Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 433 (2011) ("In opening a class discussion about defense counsel's Rule 8.3 reporting obligation, clinical instructors might begin with the empirical fact that very few defense attorneys report prosecutors who commit misconduct to the state bar or any other disciplinary authority."); Green, *supra* note 91, at 888 (recognizing "the conventional assumption

In each instance, the decision to report potential misconduct is likely undermined where the defendant's guilt seems more certain.[95]

Even when prosecutorial misconduct is reported to disciplinary authorities, prosecutors often go unpunished.[96] This is at least in part due to the difficulty in determining when prosecutorial actions breach ethical boundaries.[97] But perhaps it is more than an interpretation problem. Professor Fred C. Zacharias noted that in setting a high bar for disciplining prosecutors, disciplinary authorities might have been balancing the Sixth Amendment's demand of zealous advocacy from defense attorneys and the fact that the rules of professional conduct provide defense attorneys a wider range of acceptable behavior.[98]

Ultimately, while professional discipline remains an option for responding to *Brady* misconduct, there is good reason not to consider it a complete solution.[99] The professional disciplinary system has resulted in allowing even high-profile, intentional misconduct to go unpunished.[100] Furthermore, disciplining the prosecutor does not vindicate the harms victims, witnesses, and jurors shouldered because of their participation in trials corrupted by *Brady* misconduct.

C. Comprehensive Independent Investigations

The most comprehensive response to findings of prosecutorial misconduct is through an independent investigation administered by

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that lawyers under-report, rather than over-report, prosecutors' misconduct in order to stay in prosecutors' good graces for their own and future clients' benefit").

95. *See* J. Thomas Sullivan, Brady *Misconduct Remedies: Prior Jeopardy and Ethical Discipline of Prosecutors*, 68 ARK. L. REV. 1011, 1056 (2016) (noting that attorney disciplinary proceedings to respond to prosecutorial misconduct may be particularly fruitless "when the aggrieved party [defendant] . . . has been convicted of a heinous offense, or is otherwise not blessed with pristine character, untarnished reputation, or simply lack of recognized status within the community").

96. *See supra* note 91.

97. *See* Davis, *supra* note 84, at 284 ("[M]uch of the language of Rule 3.8 is vague and subject to interpretation, providing very little guidance to prosecutors and making it difficult to sustain complaints against prosecutors before disciplinary authorities.").

98. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 754 (2001) (noting that reluctance to discipline prosecutors may result from disciplinary authorities concluding that "aggressive defense lawyer conduct justifies reciprocation by prosecutors").

99. *But cf.* Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 155–63 (2016) (describing instances where "state courts have exercised disciplinary authority in response to instances of prosecutorial misconduct"); Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, 12 DUKE J. CONST. L. & PUB. POL'Y 1, 1 (2016) (examining disciplinary rules as a tool to regulate prosecutors' charging decisions).

100. *See* Goeke v. Dept. of Justice, 122 M.S.P.R. 69, 80–81 (2015) (vacating the suspensions imposed on Senator Stevens's prosecutors).

an experienced body with adequate resources. This was the path taken by Judge Emmet Sullivan following the exposure of multiple *Brady* violations in the prosecution of Alaska Senator Ted Stevens.[101]

In December 2008, just over two months after Senator Stevens's trial, an FBI agent involved in the case raised concerns that the case was propelled by prosecutorial misconduct.[102] This tip caused Judge Sullivan—who by that time already had good reason to question the prosecutors' compliance with *Brady*[103]—to review the prosecutors' discovery decisions. When the prosecutors failed to cooperate, Judge Sullivan held three of them in contempt.[104] The Department of Justice ("DOJ") appointed new prosecutors, and they quickly uncovered significant undisclosed *Brady* information.[105] On April 1, 2009, the DOJ asked the court to set aside the jury's verdict because of the *Brady* misconduct.[106] Judge Sullivan dismissed the prosecution with prejudice a week later.[107]

The case could have ended there. Alaska's Attorney General had already publicly confessed error and signaled the start of an internal review of the prosecutors' misconduct.[108] But Judge Sullivan was not satisfied. Rather, he appointed a prominent member of the bar to conduct a thorough investigation to determine whether prosecutors committed criminal contempt in violating *Brady*.[109] This resulted in an unprecedented two-year investigation that ended with an over five-hundred-page report summarizing the findings.[110] While the

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101. Department of Justice prosecutors charged Senator Stevens with violating federal ethics laws regarding gifts he allegedly received during a home renovation project. *See* Indictment, United States v. Stevens, 593 F. Supp. 2d 177 (D.D.C. 2009) (No. 1), 2008 WL 284791. *See generally* Emmet G. Sullivan, *Enforcing Compliance With Constitutionally-Required Disclosures: A Proposed Rule*, 2016 CARDOZO L. REV. DE NOVO 138 (discussing his response to the *Brady* misconduct).

102. Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated April 7, 2009 at 32, *In re* Special Proceedings, 825 F.Supp.2d 203 (D.D.C. Mar. 15, 2012) (No. 09–0198), 2012 WL 858523 [hereinafter Report to Hon. Emmet G. Sullivan].

103. *Id.*

104. *Id.*

105. *Id.*

106. *See* United States v. Stevens, No. 08-cr-231 (EGS) 2009 WL 6525926 (Apr. 7, 2009) (order vacating verdict and dismissing indictment with prejudice).

107. *Id.*

108. *See* Press Release, U.S. Dep't of Justice, Statement of Attorney General Eric Holder Regarding United States v. Theodore F. Stevens (Apr. 1, 2009), https://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-regarding-united-states-v-theodore-f-stevens [https://perma.cc/GZD2-JPZ6].

109. *See* Sullivan, *supra* note 101, at 140.

110. *See* Report to Hon. Emmet G. Sullivan, *supra* note 102, at 1 ("The investigation lasted two years and required the examination and analysis of well over 128,000 pages of documents, including the trial record, prosecutors' and agents' emails, FBI 302s and handwritten notes, and depositions of prosecutors, agents and others involved in the investigation and trial."). The District

investigation did not end with criminal contempt charges against the prosecutors, it concluded:

> The investigation and prosecution . . . were permeated by the systematic concealment of significant exculpatory evidence which would have independently corroborated Senator Stevens's defense and his testimony, and seriously damaged the testimony and credibility of the government's key witness.[111]

The investigation confirmed that the *Brady* misconduct was intentional.[112]

The comprehensive investigation and public release of findings provided a detailed analysis of the misconduct in the case. This would not have happened had Judge Sullivan simply vacated the jury's guilty verdict without further action. Instead, by shining a light on the details of the misconduct, the results of the investigation cast a shadow over the criminal justice system as a whole. If such blatant, intentional misconduct can occur in a case involving a powerful defendant, experienced private defense attorneys, an attentive judge, and high-level DOJ prosecutors, *Brady* noncompliance deserves our attention.

In addition to driving the public's attention to the issue of *Brady* misconduct, the detailed investigation produced some reforms. For example, despite insisting that the misconduct was "not typical"[113] and opposing external reforms,[114] the DOJ instituted several reforms after the misconduct came to light. These reforms included issuing three internal memoranda clarifying prosecutors' discovery obligations, appointing a permanent National Criminal Discovery Coordinator, updating internal training guidelines to require annual discovery training, and holding several new internal training seminars addressing prosecutors' discovery obligations.[115] It is unclear how effective these reforms have been, but there is reason for cautious optimism that they may improve *Brady* compliance.[116]

Court rejected efforts to keep the report documenting the misconduct private. *See* In re Special Proceedings, 842 F.Supp.2d 232, 235 (D.D.C. 2012) (holding that "[t]o deny the public access to Mr. Schuelke's Report . . . would be an affront to the First Amendment and a blow to the fair administration of justice").

111. Report to Hon. Emmet G. Sullivan, *supra* note 102, at 1.

112. *Id.* at 28 ("[O]ur investigation found evidence which compels the conclusion, and would prove beyond a reasonable doubt, that other *Brady* information was intentionally withheld from the attorneys for Senator Stevens . . . .").

113. *Hearing on the Special Counsel's Report on the Prosecution of Senator Ted Stevens Before S. Comm. on the Judiciary*, 112th Cong. 2 (2012) [hereinafter DOJ Statement for the Record] (statement for the record from the DOJ).

114. *Id.* at 5–7 (describing the DOJ's opposition to legislation proposed to reform discovery practices).

115. *Id.* at 2–5 (describing the DOJ's internal reforms).

116. *See* Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 269,

A comprehensive and independent investigation of *Brady* misconduct is an appealing remedy.[117] But investigations are expensive. The special prosecutor who investigated Senator Stevens's case and his firm were paid nearly $1 million alone.[118] This does not include other direct costs, including the time and resources the DOJ consumed in responding to and cooperating with the investigation. In addition, there are the opportunity costs to the court, the special prosecutor, and the DOJ. Judge Sullivan was no doubt aware of these costs when he initiated the investigation. But not all judges will make the same call as Judge Sullivan. Even judges concerned about *Brady* compliance may pursue a less costly response.

D. Civil Liability

Civil suits against prosecutors for *Brady* misconduct remain a possibility for defendants whose constitutional rights were violated; however, the Supreme Court has drastically limited the likelihood of success in these suits. This is primarily due to the immunity prosecutors enjoy. When acting in their prosecutorial capacity, prosecutors have absolute immunity from civil suits even for intentional misconduct.[119] Prosecutors retain absolute immunity from suits arising from prosecutors' administrative decisions if the decisions are "directly connected with the prosecutor's basic trial advocacy duties."[120] Thus, absolute immunity is retained in suits alleging that prosecutors failed to implement a system to meet their duty to disclose impeachment evidence.[121] If the lawsuit arises from a prosecutor performing

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270 (Leslie C. Levin & Lynn Mather eds., 2012) (noting the importance of office culture in prosecutors' pretrial disclosure decisions).

117. *See* Harry Mitchell Caldwell, *Everybody Talks About Prosecutorial Conduct but Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 2017 U. ILL. L. REV. 1455, 1482 (proposing an independent prosecutorial review panel with the power to "deliver a range of sanctions, including private reprimand, public reprimand, fines, suspensions, and disbarment").

118. Emily Heil, *Ted Stevens' Case: Probe into Prosecutors' Mistakes Cost Nearly $1 Million*, WASH. POST (Mar. 30, 2012), https://www.washingtonpost.com/blogs/in-the-loop/post/ted-stevenss-case-probe-into-prosecutors-mistakes-cost-nearly-1-million/2012/03/30/gIQALbdTlS_blog.html?utm_term=.5cfb5f70c29e [https://perma.cc/2YC4-TB3K].

119. *See* Van de Kamp v. Goldstein, 555 U.S. 335, 343 (2009) ("In the years since *Imbler*, we have held that absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding . . . ."); Imbler v. Pachtman, 424 U.S. 409, 431 (1976) ("We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.").

120. *Van de Kamp*, 555 U.S. at 346.

121. *See id.* at 349 ("[W]here a § 1983 plaintiff claims that a prosecutor's management of a trial-related information system is responsible for a constitutional error . . . the prosecutor responsible for the system enjoys absolute immunity just as would the prosecutor who handled the particular trial itself.").

investigative duties or administrative duties not closely related to prosecuting cases, however, the prosecutor retains only qualified immunity.[122]

John Thompson's case is a dramatic example of how difficult it is for defendants to use civil suits as a remedy for *Brady* misconduct. Despite the jury finding in favor of Thompson and holding the prosecutor liable for his wrongful conviction, the Supreme Court overturned the verdict.[123] Thompson sued, asserting that the Orleans Parish District Attorney's Office was liable because it failed to provide adequate training to its line prosecutors concerning their *Brady* obligations.[124] To succeed, the Supreme Court required Thompson to demonstrate the District Attorney's deliberate indifference to the need for training, a finding which implies a requirement that the District Attorney had notice of the need for training.[125] The Court concluded that Thompson did not meet this burden because (1) he did not demonstrate a pattern of *Brady* violations that would have put the District Attorney on notice of the need to train line prosecutors on *Brady*'s reach, and (2) the *Brady* violation against Thompson was not the obvious result of the District Attorney's failure to train line prosecutors because it was reasonable for the District Attorney to presume that the line prosecutors knew and understood *Brady* as a result of their legal training and professional obligations.[126]

These holdings effectively extinguish civil liability against prosecutors as a way to remedy *Brady* misconduct. In the rare case, defendants may succeed in civil claims. But even in these cases the public is often left in the dark about the extent of the *Brady* misconduct. For example, Hatchett settled his civil suit and was awarded $12 million.[127] Because of the settlement, however, the extent of the misconduct was never described in a public trial.

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122. *See id.* at 342 ("[A]bsolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in, say, investigative or administrative tasks.").

123. Connick v. Thompson, 563 U.S. 51, 54 (2011).

124. *Id.*

125. *See id.* at 61 (" 'Deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." (quoting Bd. of Comm'rs v. Brown, 520 U.S. 397, 410 (1997))).

126. *See id.* at 62 ("A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train [liability]." (quoting *Bd. of Comm'rs*, 520 U.S. at 409)); *id.* at 66 ("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." (quoting *Bd. of Comm'rs*, 520 U.S. at 409)).

127. Andrew Keshner, *Man Who Spent 25 Years in Prison After Wrongful Murder Conviction to Collect $12M from City*, N.Y. DAILY NEWS (Oct. 4, 2017), http://www.nydailynews.com/new-york/wrongful-murder-conviction-cost-city-12m-article-1.3539897 [https://perma.cc/4U7P-DY4T].

E. Criminal Prosecutions

Finally, a small number of jurisdictions have experimented with criminal sanctions for prosecutorial misconduct.[128] In 2011, North Carolina amended its discovery statute to add criminal penalties for prosecutors who willfully violate their discovery obligations.[129] Depending on the type of violation, North Carolina prosecutors could face felony or misdemeanor charges.[130] In January 2017, California also criminalized some instances of intentional prosecutorial misconduct, with a possible punishment of up to three years in prison.[131]

While the mere existence of potential criminal sanctions might have the intended effect of increasing prosecutorial compliance with North Carolina's and California's discovery rules, I have not confirmed a single case in either jurisdiction in which a prosecutor faced criminal prosecution for intentional disclosure violations. Perhaps this is not surprising given that the laws are limited to intentional misconduct[132] and charging a prosecutor under these statutes necessarily pits

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128. Notably, forty years ago the Supreme Court referenced criminal prosecutions as a way to regulate prosecutors. *See* Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976):

> We emphasize that the immunity of prosecutors from liability in suites under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs. This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law.

129. *See* N.C. GEN. STAT. ANN § 15A-903(d) (West 2018):

> Any person who willfully omits or misrepresents evidence or information required to be disclosed pursuant to subdivision (1) of subsection (a) of this section, or required to be provided to the prosecutor's office pursuant to subsection (c) of this section, shall be guilty of a Class H felony. Any person who willfully omits or misrepresents evidence or information required to be disclosed pursuant to any other provision of this section shall be guilty of a Class 1 misdemeanor.

The statute places reciprocal obligations on defense attorneys to disclose certain information to prosecutors and imposes similar penalties on defense attorneys for violations of the statute. *See id.*

130. *Id.*

131. *See* CAL. PENAL CODE § 141(c) (West 2018):

> A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.

132. *See id.* (limiting felonious misconduct to instances of intentional misconduct motivated by bad faith); N.C. GEN. STAT. ANN § 15A-903(d) (limiting the statute's reach to willful misconduct).

prosecutor against prosecutor.[133] Nonetheless, other jurisdictions may follow North Carolina and California in at least providing the possibility of criminal liability for prosecutorial misconduct. Until then, or until North Carolina or California takes a more active approach, prosecutors in most jurisdictions can remain confident that they will not face criminal penalties even for intentional *Brady* violations.

III. THE *BRADY* VIOLATION DISCLOSURE LETTER

This Article advocates a new response to *Brady* misconduct: the public disclosure of prosecutorial misconduct through a *Brady* Violation Disclosure Letter. This remedy is designed to supplement rather than replace the existing options for responding to *Brady* misconduct that are outlined in Part II. *Brady* misconduct causes a range of harms to individuals beyond the discrete harms defendants face. It also causes deep harm to the criminal justice system as a whole. Furthermore, increasing compliance with *Brady* has proven complex, challenging, and expensive. Responses to *Brady* violations should reflect the range of harms these violations cause and the complexity and challenge of altering prosecutorial behavior. The *Brady* Violation Disclosure Letter addresses the harms left untouched by the current responses to *Brady* misconduct. It is also a flexible option, easily adaptable to the range of protections *Brady* guarantees. Furthermore, this reform can be implemented today in any size jurisdiction[134] without reinterpreting the Constitution, passing new laws, changing the rules of criminal procedure, or giving judges additional authority.

This Part outlines the important components of *Brady* Violation Disclosure Letters and suggests best practices for implementation. It then examines why this reform is a promising remedial measure for defendants and others harmed by *Brady* violations, a deterrent for prosecutorial misconduct, and a force for transparency in a system that is increasingly opaque.

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133. *See* Gretel Kauffman, *Is California's New Law a Model for Curbing Prosecutorial Misconduct?*, CHRISTIAN SCI. MONITOR (Oct. 5, 2016), https://www.csmonitor.com/USA/Justice/2016/1005/Is-California-s-new-law-a-model-for-curbing-prosecutorial-misconduct [https://perma.cc/JG6Y-S57Z] (quoting Professor Bennett Gershman as saying, "You're asking prosecutors to enforce a law against prosecutors, and that's a little bit tricky. You don't know whether prosecutors will have the stomach, the will, or the interest in investigating other prosecutors.").

134. *See infra* notes 231, 234–236 and accompanying text.

A. Essential Components of Brady *Violation Disclosure Letters*

It is helpful to return to Hatchett's and Williams's cases to introduce *Brady* Violation Disclosure Letters. Upon finding police and prosecutorial misconduct during the reinvestigation of Hatchett's case, the prosecutor joined Hatchett in asking the court to vacate the conviction and dismiss the indictment. With the parties in agreement, the court signed a short, four-sentence order ending the case.[135] The court's order provided no explanation for why it vacated Hatchett's murder conviction, stating only that its decision was based on the "defendant's oral Motion to Vacate and the People's response."[136] In order for an outsider—that is, someone who was not integrally involved in the reinvestigation, including the victim's family and the witnesses and jurors from the initial, corrupted trial—to understand the extent of the misconduct, that person must have attended the hearing. Alternatively, an outsider could attempt to piece together media accounts of the exoneration or to parse the civil suit Hatchett filed after he was exonerated.[137]

In Williams's case, courts extensively discussed the *Brady* misconduct in several published opinions.[138] Collectively, the opinions explained how the prosecution concealed evidence demonstrating that the man Williams killed had sexually abused him and other young men before Williams responded with lethal force.[139] However, the discussion of the misconduct in these lengthy opinions was mixed with analysis of complex procedural rules, constitutional interpretation, and judicial

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135. Order Vacating Conviction and Dismissing Indictment, *supra* note 17.

136. *Id.* In its entirety, the order reads:

> Defendant moves to vacate his conviction pursuant to C.P.L. § 440.10.1(g). In determining this motion, the court has heard defendant's oral Motion to Vacate and the People's response.
>
> The Court grants the defendant's Motion to Vacate. Accordingly, the judgment of conviction and sentence in the above-captioned matter is vacated.
>
> Further, based on their representation that they no longer have sufficient evidence to prove defendant's guilt beyond a reasonable doubt, the People's Motion to Dismiss the indictment is granted. Accordingly, the indictment is dismissed and sealed.
>
> This constitutes the decision and order of the Court.

137. *See supra* notes 1–44 and accompanying text (summarizing Hatchett's exoneration and the misconduct that led to it); *see also* Complaint and Jury Demand, Hatchett v. New York, (E.D.N.Y. 2017) (No. 17-cv-1324), 2017 WL 6729456.

138. Williams v. Pennsylvania, 136 S. Ct. 1899, 1908 (2016), *remanded to* 168 A.3d 97; Commonwealth v. Williams, 168 A.3d 97, 107–12 (Pa. 2017); Commonwealth v. Williams, 105 A.3d 1234, 1242–45 (Pa. 2014), *vacated* 136 S Ct. 1899 (2016); *see supra* notes 1–44 and accompanying text (summarizing the misconduct in Williams's case).

139. *See supra* notes 1–44 and accompanying text (describing the *Brady* misconduct in Williams's case).

ethics regulations, all sprinkled with legal jargon.[140] Working through the opinions to understand the gist of the *Brady* misconduct would be a challenge even for attorneys skilled in complex criminal litigation. It would be overwhelming for the average person without legal training. As in Hatchett's case, an outsider could obtain some information about the prosecutorial misconduct in Williams's case by reviewing the media coverage.[141] This Section proposes an alternative to relying on media to read between the lines—as was required in Hatchett's case—or to summarize the legal jargon—as was required in Williams's case.

As envisioned here, a *Brady* Violation Disclosure Letter is a concise and clear statement explaining the *Brady* misconduct to the relevant stakeholders from the initial corrupted trial. The *Brady* Violation Disclosure Letter should offer something between the conclusory order in Hatchett's case and the detailed factual analysis in the opinions in Williams's case. And, where possible, the disclosure should avoid legal jargon, instead opting for a more accessible explanation. The court that found the misconduct should draft the letter and direct the clerk to distribute it to all stakeholders from the initial trial, including the victim, jurors, witnesses, prosecution and defense attorneys, and the law enforcement officers who investigated the crime. In addition to these individuals, the clerk should distribute the *Brady* Violation Disclosure Letter to the heads of various agencies, including the elected prosecutor, public defender, police chief, sheriff, and directors of any victims' rights organization in the community.

Substantively, there are ten essential components of a *Brady* Violation Disclosure Letter.[142] The disclosure should:

1. be an official statement, ordered and written by the court that found the misconduct and distributed to the relevant stakeholders by the clerk;
2. provide a brief summary of the trial, including the date of conviction, crime of conviction, and the role the stakeholder receiving the letter played in the trial;
3. summarize the prosecutor's constitutional obligation to provide the defendant with favorable evidence before trial and explain that this constitutional right helps ensure reliable verdicts and the fairness of the system in practice and perception;

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140. *See Williams*, 136 S. Ct. 1899; *Williams*, 168 A.3d at 97; *Williams*, 105 A.3d 1234.

141. *See* Bookman, *supra* note 19.

142. The Appendix contains a sample *Brady* Violation Disclosure Letter based on Hatchett's case.

4. state that the prosecutor violated the defendant's constitutional right[143] and identify the favorable information the prosecutor concealed, adding that the prosecutor's concealment left the court without sufficient confidence in the justness, fairness, or reliability of the conviction or sentence;
5. indicate the implications of the constitutional violation on the defendant's case—e.g., that the court vacated the defendant's conviction and/or sentence;
6. state that the prosecutor retains the power to reprosecute the defendant;
7. include an update on the defendant's custodial status—i.e., whether the defendant was released from prison or remained in custody awaiting a possible new trial;
8. state that the letter's purpose is to increase the transparency of the criminal justice system and serve as a partial remedy to stakeholders who unknowingly participated in a trial corrupted by prosecutorial misconduct and that any possible punishment for the prosecutors responsible for the misconduct may be pursued in other proceedings;
9. list the other people and institutions who received notice of the misconduct; and
10. express the court's gratitude for the recipient's participation in the initial trial and state that the letter does not obligate the recipient of the letter to take any action.

Although the benefits of *Brady* Violation Disclosure Letters are most readily achieved when the disclosure is made in an official statement distributed by the court, this proposal is designed to be flexible, recognizing that there are alternative implementation methods that still provide some benefits. That is, even if the court chose not to direct the clerk to distribute a concise letter summarizing the misconduct, other entities could step in as messenger.[144] For example, some chief prosecutors may elect to be proactive in the face of misconduct, publicly confessing error.[145] Former Attorney General Eric

143. *See supra* note 47 and accompanying text.

144. Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1097 (2009) (proposing that "law schools establish Prosecutorial Misconduct Projects that would review appellate decisions finding prosecutorial misconduct" and "identify[ ] misbehaving prosecutors that appellate judges are unwilling to name").

145. *Cf.* Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS L. REV. 1591, 1594–95 (2014) ("Although *courts* do not exclude all unconstitutionally-obtained evidence, *prosecutors* as executive officers should refrain from introducing evidence that they conclude was unconstitutionally obtained without regard to judicial admissibility—a duty of administrative suppression."); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV.

Holder did this in Senator Stevens's case when he publicly conceded misconduct and asked the court to dismiss the case.[146] In another example, the prosecutor responsible for Glen Ford's conviction and death sentence in Louisiana publicly confessed his *Brady* misconduct in a letter to the editor following Ford's exoneration and release from death row.[147] The motivations for publicly confessing error may be complex and potentially contradictory.[148] Regardless, shining light on the misconduct increases transparency and carries the possibility of influencing prosecutors' behavior and validating harms others shouldered because of the prosecutors' misconduct.[149]

The public defender's office or other criminal justice organizations could also implement a version of this reform. There are no formal constraints prohibiting these organizations from identifying the stakeholders from a trial corrupted by misconduct and sending them a concise summary of the court's finding of *Brady* misconduct. Such a letter would not carry the authority or independence of the court and thus may be discounted by the recipient. But it could nonetheless provide transparency and other therapeutic benefits that result from acknowledging the dignity of the people who unknowingly played a part in the initial, corrupted conviction. The web site, The Open File: Prosecutorial Misconduct and Accountability,[150] is an example of a private organization that publishes a version of a *Brady* Violation Disclosure Letter. The site does not directly distribute disclosure letters to interested stakeholders, but it does publish concise and jargon-free summaries of cases involving prosecutorial misconduct.[151] The site's

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125, 137–41 (2008) (describing how "the meaningful screening of cases now may be prosecutorial instead of judicial").

146. *See supra* note 108.

147. *See* Stroud, *supra* note 62:

> I apologize to Glenn Ford for all the misery I have caused him and his family. I apologize to the family of Mr. Rozeman for giving them the false hope of some closure. I apologize to the members of the jury for not having all of the story that should have been disclosed to them.

148. *Cf.* R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to 'Seek Justice,'* 82 NOTRE DAME L. REV. 635, 672 (2006) ("[A] prudent and courageous prosecutor understands that sometimes the decision not to cross-examine a witness is a sign of integrity and strength rather than weakness.").

149. *See infra* Section III.B. (discussing the potential benefits of *Brady* Violation Disclosure Letters).

150. OPEN FILE: PROSECUTORIAL MISCONDUCT & ACCOUNTABILITY, http://www.prosecutorialaccountability.com (last visited Sept. 8, 2018) [https://perma.cc/T9JT-UKQJ].

151. *See, e.g.*, Bert, *TX: CCA Agrees Avalanche of* Brady-Giglio *Violations Overwhelmed Two Convictions*, OPEN FILE: PROSECUTORIAL MISCONDUCT AND ACCOUNTABILITY (Jan. 16, 2018), http://www.prosecutorialaccountability.com/2018/01/16/tx-cca-agrees-avalanche-of-brady-giglio-violations-overwhelmed-two-convictions/ [https://perma.cc/G4WX-NYPB] (summarizing the prosecutorial misconduct that resulted in the court vacating Dennis Lee Allen's and Stanley

reach and coverage is spotty, however, and its collection of misconduct summaries has not gained the same acceptance as other data sets compiled by private criminal justice reform organizations.[152] Furthermore, when compared to a *Brady* Violation Disclosure Letter distributed by a court, some people will be skeptical of The Open File's summaries because it is an advocacy organization.[153]

In addition to judges, prosecutors, or other criminal justice organizations implementing *Brady* Violation Disclosure Letters on their own in an ad hoc manner, these disclosure letters could become routine with a tweak to criminal procedure rules. Many jurisdictions have established victims' rights provisions by statute or state constitutional protections and these provisions are often codified in the rules of criminal procedure.[154] These rights are generally designed to promote the fair treatment of victims and respect for victims' dignity.[155] The rights often include robust notice requirements to keep victims apprised of case developments.[156] These notice requirements could be amended to also require notice of *Brady* misconduct to all relevant stakeholders.[157] Admittedly, amending the rules of criminal procedure

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Mozee's murder convictions); Bert, *TX: DOJ Argues for Narrow Interpretation of* Brady *Obligations in 5th Circuit; Several Organizations Take the Other Side*, OPEN FILE: PROSECUTORIAL MISCONDUCT AND ACCOUNTABILITY (Feb. 5, 2018), http://www.prosecutorialaccountability.com/2018/02/05/tx-doj-argues-for-narrow-interpretation-of-brady-obligations-in-5th-circuit-several-organizations-take-the-other-side/ [https://perma.cc/9NCK-Q9F5] (discussing the status of George Alvarez's appeal regarding the applicability of *Brady* to the plea-bargaining process).

152. *See, e.g.*, *Featured Cases*, INNOCENCE PROJECT (last visited Sept. 1, 2018), https://www.innocenceproject.org/all-cases/ [https://perma.cc/RN2C-8CQK] (listing cases of wrongfully convicted individuals later exonerated by DNA evidence); *Browse Cases*, NAT'L REGISTRY EXONERATIONS (last visited Sept. 2, 2018), https://www.law.umich.edu/special/exoneration/Pages/browse.aspx# [https://perma.cc/7AF9-MT6C] (listing cases of wrongfully convicted individuals later exonerated).

153. *About Us*, OPEN FILE: PROSECUTORIAL MISCONDUCT AND ACCOUNTABILITY (last visited Sept. 8, 2018), http://www.prosecutorialaccountability.com/about-us/ [https://perma.cc/9LUU-HZ4T] ("We believe that too often, prosecutors—whose job it is to enforce the law—violate the laws and Constitution of the United States as well as the ethical rules of the legal profession. And too often this misconduct goes unaddressed.").

154. *See* Paul G. Cassell, *Crime Victims' Rights*, *in* 3 REFORMING CRIMINAL JUSTICE, *supra* note 47, at 227, 229–31 (describing the evolution of the victims' rights movement); *id.* at 230 ("To date, about 35 states have adopted victims' rights amendments to their own state constitutions protecting a wide range of victims' rights."); *see, e.g.*, ARIZ. R. CRIM. P. 39 ("Victims' Rights").

155. *See, e.g.*, ARIZ. R. CRIM. P. 39(b)(1) (referring to the "right to be treated with fairness, respect and dignity").

156. *See* Cassell, *supra* note 154, at 232–33 (identifying notice provisions as one of the core protections provided by victims' rights regimes); *see, e.g.*, ARIZ. R. CRIM. P. 39(g) ("Court Enforcement of Victim Notice Requirements").

157. There may be a slight tension between existing victims' rights regimes and *Brady* Violation Disclosure Letters. Generally, these rights presume the reliability of the prosecutor's charges and a conviction and designate the prosecutor as the entity to protect victims' interests. *See, e.g.*, ARIZ. R. CRIM. P. 39(b)(11)–(12) (outlining protections where defense requests information from victims); ARIZ. R. CRIM. P. 39(d)(1) ("A victim has the right to the prosecutor's assistance in

adds to the implementation costs of this proposal. However, given the overlap with the goals of existing victims' rights protections, amending the rules may not be a significant barrier.

Publicly disclosing prosecutorial misconduct with a *Brady* Violation Disclosure Letter is no panacea. I do not offer it as a comprehensive remedy for *Brady* misconduct. Rather, given the limitations of the current remedies, it should be added to the mix because of the ease with which it can be implemented and the potential benefits it offers. The next Section examines these benefits and implementation issues.

B. The Case for Publicly Disclosing Brady *Misconduct*

Developing a system that guarantees complete compliance with *Brady* is unlikely.[158] Even the most robust open-file discovery regime combined with prosecutors and law enforcement officers committed to *Brady*'s ideals would still result in some violations.[159] This is true for a number of reasons: law enforcement disciplinary records, a prime source of *Brady* material, may remain shielded from disclosure by state laws;[160] exculpatory information may not be memorialized because even well-meaning police officers or prosecutors could fail to recognize how a skilled defense attorney could use the information;[161] or prosecutors

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asserting rights enumerated in this rule or otherwise provided by law."). Nevertheless, amending victims' rights provisions to require that victims receive notice when a conviction or sentence is vacated because of prosecutors' *Brady* misconduct is consistent with current victims' rights provisions. *See* Cassell, *supra* note 154, at 242 (identifying "the right to notice of release or escape of the accused" as a core victims' right).

158. *See* Connick v. Thompson, 563 U.S. 51, 73 (2011) (Scalia, J., concurring) ("*Brady* mistakes are inevitable."); United States v. Agurs, 427 U.S. 97, 108 (1976) (recognizing that the pretrial materiality determination is guided by an "inevitably imprecise standard" and that "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete").

159. *See* Grunwald, *supra* note 47, at 807:

> As an example, from the perspective of police officers, the arrest report is "primarily an 'internal memorandum' serving the perceived needs of the police department." Its "primary function for the police is 'to justify the arrest and clear the case,' [which] can be achieved by confining reports to what is necessary to satisfy the probable cause standard, ignoring exculpatory evidence." There is also evidence that officers often fail to collect, record, or transfer exculpatory evidence to the prosecution.

(footnotes omitted).

160. *See* Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 745 (2015) ("[T]here is a critical source of *Brady* material that even well-meaning prosecutors are often unable to discover or disclose: evidence of police misconduct contained in police personnel files."); *id.* at 747 ("[C]ritical impeachment evidence is routinely and systematically suppressed as a result of state laws and local policies that limit access to the [law enforcement] personnel files.").

161. *See* United States v. Bagley, 473 U.S. 667, 698 (1985) (Marshall, J., dissenting) ("Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense,

may never actually learn of exculpatory information.[162] Furthermore, even when prosecutors recognize information as potential *Brady* evidence, their disclosure decision is often the result of a complex calculation.[163] Recognizing the persistence of *Brady* violations should not be an invitation to maintain the status quo. Rather, we should pursue reforms that offer theoretical promise, particularly if they carry little risk. Official public disclosure of *Brady* violations to targeted populations meets these conditions for several reasons.

1. Increasing *Brady* Compliance

Although in tension with the conventional wisdom that prosecutors are insulated from public opinion,[164] *Brady* Violation Disclosure Letters would likely capture prosecutors' attention because of their potential to alter the public's view of prosecutors, leading to increased compliance with *Brady* obligations. Conventional wisdom dictates that prosecutors' insulated existence preserves their power because of the informational advantages that arise in a system in which the vast majority of prosecutorial discretion is exercised privately.[165] Prosecutors exploiting the informational advantages benefit from a

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and might make the difference to the trier of fact."); *cf.* Report to Hon. Emmet G. Sullivan, *supra* note 102 (finding that one of the causes of the prosecutorial misconduct in Senator Stevens's case was the failure to ensure that "significant exculpatory information" in prosecutors' and law enforcements' "handwritten notes" were transcribed and included in official reports).

162. *See* Bibas, Brady, *supra* note 64, at 142 ("Courts have charged prosecutors with the knowledge that is in their offices and their investigative agencies, but not other jurisdictions' files. As a practical matter, however, prosecutors will never learn of much of this material, and it will never come to light." (footnote omitted)); Yaroshefsky & Green, *supra* note 116, at 280 ("Prosecutors often note the difficulty of complying with their *Brady* obligations because of the police agency's failure to disclose information to them.").

163. Yaroshefsky & Green, *supra* note 116, at 270:

> [W]hen it comes to pretrial disclosure, the principal influences on prosectors' decision making are likely to be organizational factors. Whether and how junior or "line" prosecutors comply with rules and law, and especially whether they exercise discretion wisely and fairly, is likely to be determined by the complex interplay of internal and personal considerations such as office culture and policy, office regulatory and supervisory practices, and prosecutors' own professional values.

164. *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 583 (2009) ("[P]rosecutor elections . . . do not often force an incumbent to give any public explanation at all for the priorities and practices of the office."). *But see* Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) ("Under our system of government, the primary check against prosecutorial abuse is a political one.").

165. *See* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 918 (2006) [hereinafter Bibas, *Transparency*] ("Insiders will always have more information, more power, and more practical concerns than outsiders, and the media and politicians will always exploit this gap . . . .").

feedback loop that is propelled by media coverage of high-profile crimes, consolidating even more power in prosecutors' offices.[166]

Despite conventional wisdom, prosecutors are not immune from public influence, particularly where negative publicity stems from misconduct that cuts to the core of the prosecutorial function, as *Brady* violations do.[167] Shedding light on misconduct in a targeted fashion offers promise to influence prosecutors to employ robust disclosure practices, thus heeding the Supreme Court's repeated advice to interpret *Brady* expansively.[168] The available empirical data, case studies, and theoretical studies support the conclusion that *Brady* Violation Disclosure Letters have the potential to increase *Brady* compliance.

Recent empirical work by two of the leading experts on prosecutorial decisionmaking and the constitutional and ethical rules that regulate prosecutors suggests that targeted public disclosure of *Brady* violations may have promising results.[169] Professors Ellen Yaroshefsky and Bruce Green interviewed prosecutors to determine the "environmental and organizational influences that shape individual prosecutors' decisions about the pretrial release of information to the defense."[170] Ultimately, they concluded that disclosure decisions are likely not influenced by public opinion,[171] but they conditioned this conclusion on the presumption that the public lacks information about prosecutors' disclosure practices and would likely not learn of prosecutors' compliance with disclosure laws.[172] Notably, Professors

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166. *See id.* at 946:

> The moral of the story is that outsiders cannot win enduring victories. Outsiders lack the knowledge, the power, and the enduring desire to keep monitoring low-visibility procedural decisions. Politicians and the media play entrepreneurial roles, periodically seizing on gripping (and sometimes unrepresentative) anecdotes to excite popular outrage and pressure for their own ends. Politicians simultaneously cater to insider prosecutors, playing both sides of the insider-outsider gulf. This dynamic is a spiral . . . [T]he spiral warps the system, taking a serious toll on criminal justice.

(footnote omitted).

167. *See* Wright, *supra* note 164, at 590–91 (exploring reasons to be optimistic that prosecutors may respond to public opinion).

168. *See* Cone v. Bell, 556 U.S. 449, 470 n.15 (2009) ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); Kyles v. Whitley, 514 U.S. 419, 439 (1995) ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."); United States v. Agurs, 427 U.S. 97, 108 (1976) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

169. Yaroshefsky & Green, *supra* note 116.

170. *Id.* at 270.

171. *See id.* at 275 ("Public opinion is unlikely to have a major impact on disclosure policies of a prosecutor's office and certainly not on the conduct of junior or line prosecutors.").

172. *See id.* ("The public is often only dimly aware of what prosecutors do. Policies and practices regarding pretrial disclosure are unlikely to come to the public's attention . . . .").

Yaroshefsky and Green conceded that in high-profile cases prosecutors' disclosure practices could become part of the public debate, causing prosecutors to take notice.[173] Sparking the public's attention is precisely one of the goals of *Brady* Violation Disclosure Letters.

Two chief prosecutors interviewed in the study confirmed prosecutors' sensitivity to preserving the high level of trust the public gives them.[174] They explained:

> If we don't do our jobs in a manner that is ethically appropriate, then the longer term consequence is that people don't trust you. If they don't trust you, then they won't tell you the things that you need to know in order to keep them safe. . . . If an office gets a reputation for cutting corners, it ultimately affects the perception of juries.[175]

Senior prosecutors' views shape the disclosure practices of line prosecutors.[176] Thus, if chief prosecutors are concerned about potential negative attention resulting from *Brady* misconduct, they have the ability to change the culture and practices in their offices.

In addition to responding to general public perceptions, prosecutors are particularly responsive to feedback from certain individuals. For example, judges have an outsized influence on prosecutors' disclosure practices.[177] Perhaps equally important is the influence victims and victims' rights organizations can have on prosecutorial practices.[178] Victims coming forward or being asked to share how they were harmed by *Brady* misconduct, as is likely to happen if they receive a *Brady* Violation Disclosure Letter, would certainly attract publicity and the attention of prosecutors.

Several case studies also demonstrate that targeted publication of prosecutors' *Brady* violations can influence prosecutorial behavior. Judge Sullivan's pointed public reprimand of the prosecutors during a hearing in Senator Stevens's case amounted to a version of a *Brady*

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173. *See id.* (recognizing that in "high-profile cases" prosecutors' "disclosure decisions [may] become a matter of public controversy").

174. *See id.* at 276 ("If chief prosecutors worry that line prosecutors' public failures to comply with the disclosure law will lead to public embarrassment, they may adopt open file policies or encourage line prosecutors to err on the side of disclosure.").

175. *Id.*

176. *See id.* at 279 (concluding that "office policies adopted or endorsed by the chief prosecutor or supervisory prosecutors are a significant factor in shaping prosecutors' disclosure practices").

177. *See id.* at 278 ("Local judges appear to influence prosecutors' disclosure practices, most commonly through informal expressions of concern or disapproval . . . .").

178. *See, e.g.*, Bibas, *Transparency*, *supra* note 165, at 963 (recognizing the power of victims to influence prosecutors); *id.*:

> The most potent disciplining force is likely to be victims. Victims, and to a lesser extent affected locals, are a discrete, identifiable group who already know about the crimes they have endured and are motivated to take part. Because of their background knowledge, they do not need to be brought up to speed, can speak with authority, and will not automatically defer to insiders' assessments.

Violation Disclosure Letter.[179] While his words were directed at the career prosecutors handling the case, he was concerned about the integrity of the criminal justice system, and he no doubt realized that there was a larger audience beyond those in the courtroom. And he was right; his words caught the attention of the most senior prosecutors at the DOJ, ultimately leading to a public statement from Attorney General Holder.[180] In the aftermath, the DOJ initiated several reforms designed to increase compliance with prosecutors' disclosure obligations. Admittedly, the DOJ opposed other reforms;[181] however, by publicly acknowledging the misconduct at the highest level and initiating internal reforms, the DOJ's response should promote *Brady* compliance.[182]

Michael Morton's exoneration in Texas is another example of how publicizing *Brady* violations can lead to increased compliance with *Brady*.[183] Morton spent twenty-four years in prison for murder before DNA testing confirmed his innocence and identified the actual perpetrator.[184] In the course of proving his innocence, Morton uncovered extensive prosecutorial misconduct, including *Brady* violations, that sealed his fate at trial.[185] His exoneration and the investigation of the misconduct attracted widespread attention not only in Texas but nationally as well.[186] The case also attracted the attention of voters and Texas legislature. The attention led to reforms that increased *Brady* compliance. On the local level, the District Attorney, who opposed Morton's request for postconviction DNA testing and defended the tactics of his predecessor who prosecuted Morton, lost in the next election.[187] Morton's exoneration had an equally profound influence on disclosure practices across Texas. Ultimately, the case resulted in a new

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179. *See* Jones, *supra* note 44, at 418–21 (describing Judge Sullivan's response to the *Brady* misconduct).

180. *See* Holder, *supra* note 108.

181. *See* Sullivan, *supra* note 101, at 141–46 (describing DOJ opposition to discovery reforms).

182. *See* Yaroshefsky & Green, *supra* note 116, at 282 ("Strong, effective leadership shapes and drives an office's culture. The chief prosecutor sets the tone.").

183. The author was a part of Morton's defense team and the Innocence Project. For an overview of his case, see MICHAEL MORTON, GETTING LIFE: AN INNOCENT MAN'S 25-YEAR JOURNEY FROM PRISON TO PEACE (2014). *See also* Kreag, *supra* note 55, at 346–49.

184. *Michael Morton*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/michael-morton/ (last visited Sept. 12, 2018) [https://perma.cc/CF7W-XY4Y].

185. *Id.*

186. *See, e.g.*, *60 Minutes: Evidence of Innocence: The Case of Michael Morton* (CBS television broadcast June 23, 2013).

187. *See* Pamela Colloff, *Why John Bradley Lost*, TEX. MONTHLY (Jan. 21, 2013), https://www.texasmonthly.com/politics/why-john-bradley-lost/ [https://perma.cc/XL5Y-7LBC] (characterizing the race as a "referendum on [the District Attorney's] handling of the Michael Morton case").

law named in Morton's honor that overhauled Texas's disclosure laws, creating a version of open-file discovery.[188]

Admittedly, the response to Morton's and Senator Stevens's cases may be extreme. The deep attention given to the prosecutorial misconduct in these cases might have been due to Senator Stevens's status or to the public's empathy for Morton after he established his innocence. It would be foolish to conclude that targeted public disclosure of *Brady* misconduct will always end in extensive reforms. Yet, even increasing *Brady* compliance at the margins is important, particularly if it is the result of easily implementable reforms.[189]

In addition to the empirical data and these case studies, there is another reason to expect that *Brady* Violation Disclosure Letters may influence prosecutorial behavior: shame. In short, the very nature of the public disclosure may serve to shame some prosecutors into altering their behavior. Professor Lara Bazelon recently explored shaming as a means of influencing prosecutors in a related context.[190] While her work focused on a particular type of shaming performed by judges during oral argument,[191] the theoretical foundation for her conclusions are relevant here. Professor Bazelon concluded that prosecutors are likely receptive to shaming.[192] This is in part because prosecutors' reputations for pursuing justice are necessary for success, prosecutors often appear before the same judges and defense attorneys, and prosecutors generally have the resources and confidence not to be so debilitated from the shaming that they are unable to reform their behavior.[193]

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188. Michael Morton Act, ch. 49, 2013 Tex. Gen. Laws 106 (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2017)) (instituting open file discovery in Texas); *see also* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 260 (2008) (describing how three instances of prosecutorial misconduct in North Carolina provided motivation for adopting a "statute that entitles the defense to relatively full access to both prosecution and law enforcement files").

189. *See infra* Section III.B.4.

190. Lara Bazelon, *For Shame: The Public Humiliation of Prosecutors by Judges to Correct Wrongful Convictions*, 29 GEO. J. LEGAL ETHICS 305 (2016) (exploring judicial shaming of prosecutors during oral argument); *see also* Gershowitz, *supra* note 144, at 1063–66 (advocating for publicly naming prosecutors who engage in misconduct).

191. Bazelon, *supra* note 190, at 318 ("This Article is concerned with a specific type of judicial shaming. It occurs when the court takes the prosecutor to task during an oral argument for defending grave misconduct that led to a wrongful conviction.").

192. *Id.* at 313 ("[P]rosecutors do appear to be excellent shaming candidates: high-achieving professionals who work in an insular world of repeat players for whom reputation is the central currency.").

193. *Id.* at 314 ("Practitioners of shame sanctions aim for a sweet spot: sticks that inflict a non-lethal harm, wielded against people who are susceptible to humiliation, resilient enough to recover from it, and possessed of the wherewithal to change their bad behavior so as not to experience the shaming again."); *id.* ("Shaming sanctions work because the shamed offenders pride

These characteristics of the public prosecutor render inapplicable many of the sound criticisms of shaming as a criminal punishment.[194]

Finally, *Brady* Violation Disclosure Letters may lead to increased *Brady* compliance because they overcome some of the tricky timing issues that are inherent to *Brady* compliance.[195] Scholars argue that individual prosecutors may feel empowered to commit *Brady* violations—or, at a minimum, may not be sufficiently deterred from committing violations—because they understand that the undisclosed information will likely remain hidden.[196] Furthermore, these prosecutors conclude that even if the undisclosed evidence is uncovered, they will likely escape punishment.[197] In this situation, the possibility of a potential negative consequence that occurs in the future may not seem sufficiently consequential to influence prosecutors' behavior.

For an individual prosecutor this calculation may make sense. However, from the public's perspective, prosecutorial offices speak with one voice, and the public's perception of this voice may not be sufficiently nuanced to distinguish among individual prosecutors or across time. Thus, misconduct by current or past prosecutors risks being imputed to the office as a whole. That is, even if the public disclosure of a *Brady* violation comes years after the individual prosecutor committed the misconduct, the disclosure may influence

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themselves upon a reputation they have built within a tight-knit and norm-observing community.").

194. *See, e.g.*, Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006) (arguing against using shaming punishments); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991) (same).

195. *See* United States v. Bagley, 473 U.S. 667, 701 (1985) (Marshall, J., dissenting) (criticizing *Brady*'s materiality prong because it requires "the prosecutor to predict what effect various pieces of evidence will have on the trial"); United States v. Agurs, 427 U.S. 97, 108 (1976) (recognizing that the pretrial materiality determination is "inevitably imprecise" in part because "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete"); *In re* Kline, 113 A.3d 202, 208 (D.C. 2015) ("Retrospective analysis [using the materiality standard], while it necessarily comports with appellate review, is wholly inapplicable in pretrial prospective determinations."); *see also* United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) ("Most prosecutors are neither neutral (nor should they be) nor prescient, and any such judgment [on materiality] necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins . . . .").

196. *See, e.g.*, Davis, *supra* note 84, at 280–81 ("Because prosecutors know that even if their behavior is discovered and challenged, courts will most likely find the behavior to be 'harmless error,' they may be emboldened (consciously or unconsciously) to engage in misconduct."); Jones, *supra* note 44, at 433 ("Other than the unenforceable 'honor code,' there are few incentives for prosecutors to comply with *Brady* because there is no meaningful judicial oversight of the process.").

197. *See* Bibas, Brady, *supra* note 64, at 141–42 (recognizing that "prosecutors do not fear being penalized for violating *Brady* or interpreting it very narrowly" in part because of the likelihood that courts will find nondisclosure harmless); Jones, *supra* note 44, at 434 ("[T]he *Brady* disclosure duty has become one of the most unenforced constitutional mandates in the criminal justice system.").

current prosecutors by motivating those prosecutors and their supervisors to take action to differentiate themselves from the regime responsible for the misconduct.

2. Validating Interests Beyond Defendants

Scholars often evaluate responses to *Brady* violations by focusing solely on the defendant and the prosecutor responsible for the misconduct.[198] The usual question with respect to the prosecutor is whether the response to the misconduct will punish the prosecutor as a bad actor or treat the underlying cause of his misconduct.[199] This focus usually ends with scholars discussing which is the better approach, punishment or treatment.[200] With respect to the defendant, the usual question is whether vacating the conviction or barring retrial is sufficient to respond to the harm suffered by the defendant. It is not surprising that the focus on prosecutors and defendants takes center stage after *Brady* violations.[201] After all, the prosecutor is the person who violated the Constitution,[202] and the defendant is the person who suffered the most acute harm.

But *Brady* protects interests beyond those of the defendant. *Brady* works to promote confidence in the fairness of the criminal justice system as a whole.[203] The *Brady* doctrine also validates the trial as the best method to settle charges and disputes.[204] In so doing, *Brady*

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198. *See, e.g.*, Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and* Brady *in the Balance*, 28 GEO. J. LEGAL ETHICS 1, 4 (2015) ("At the heart of the *Brady* doctrine is a debate about how to balance the role of the defendant, the prosecutor and the court in an adversarial system."); *id.* at 5 (concluding that *Brady* "weighs the integrity of the system against a desire to be fair to the defendant").

199. *See, e.g.*, McMunigal, *supra* note 90, at 713–14 (explaining punishment versus treatment perspectives); *see id.* at 721 ("The status quo regarding prosecutorial disclosure violations is unsatisfactory from both a punishment perspective and a treatment perspective.").

200. *See id.*; Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2121 (2010) ("Fault-based discourse is especially misplaced in the discussion of the disclosure of evidence to the defense . . . ."); John F. Hollway, *A Systems Approach to Error Reduction in Criminal Justice*, QUATTRONE CTR. FOR FAIR ADMIN. JUST. 20 (Feb. 2014), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1975&context=faculty_scholarship [https://perma.cc/Q3KP-85GQ] (describing the importance of moving away from a "culture of individual blame" when investigating wrongful convictions).

201. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 675 (1985) ("[The *Brady* rule's] purpose is . . . to ensure that a miscarriage of justice does not occur.").

202. *See* Kyles v. Whitley, 514 U.S. 419, 421 (1995) ("We hold that the prosecutor remains responsible for gauging [materiality] regardless of any failure by the police to bring favorable evidence to the prosecutor's attention.").

203. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("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.").

204. *See id.* at 439–40 ("And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal

emphasizes the essential role jurors play as the final arbiters of criminal conduct and serves victims by promoting reliable results. Given *Brady*'s multiple purposes, responses to *Brady* violations should at least attempt to respond to the multifaceted harms associated with the misconduct rather than focusing only on the prosecutor and defendant.

In other work, I have explored how *Brady* violations harm jurors.[205] Specifically, they block the jury's role in the adjudicative process, undermine the dignity and legitimacy of jurors, and risk turning jurors into unknowing pawns in the misconduct.[206] Importantly, these harms happen in the context of a criminal justice system that has shifted power away from jurors.[207]

One of the motivations for disclosing *Brady* misconduct to jurors is to rebalance relative power in the adjudicative process, returning at least a small amount of power to the jury. In this manner, *Brady* Violation Disclosure Letters serve similar ends to other reform proposals that have sought to return power to jurors in a modern system that too regularly processes criminal convictions through private negotiations between prosecutors and defendants.[208]

Victims are also harmed by *Brady* violations, and this harm should at least be recognized by informing victims of the misconduct. Some of the harms to victims from *Brady* misconduct are obvious. For example, a finding of misconduct at a minimum may require a retrial, at which time the victim risks being retraumatized. If the magnitude of the *Brady* violation was severe, the prosecution may elect to dismiss the case without a retrial. This may leave the victim with the stress of adjusting to a new reality, upending what she thought was a final determination. There is also the possibility that if the *Brady* violation culminated with a finding that the person convicted of the crime was actually innocent, the victim will experience extreme guilt for being a part of a process that ended with an innocent person in prison.[209] Other

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accusations."); *see also* Murray v. Carrier, 477 U.S. 478, 506 (1986) (Stevens, J., concurring) (characterizing the trial as the "main event in which the issue of guilt or innocence can be fairly resolved" (internal quotation marks omitted)).

205. *See* Kreag, *supra* note 55, at 350–51 (proposing the recognition of a separate *Brady*-like constitutional right in the jury).

206. *See id.* at 362–74.

207. *See* Bibas, *Transparency*, *supra* note 165, at 951 ("Now that juries are an endangered species, however, criminal justice is more opaque and dominated by insiders.").

208. *See, e.g.*, SUJA A. THOMAS, THE MISSING AMERICAN JURY 158–63 (2016) (advocating for increased use of grand juries to initiate criminal prosecutions); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2180–81 (2014) (summarizing proposals for specialty juries to increase "civilian input" in the system).

209. *Cf.* Jennifer Thompson, *'I Was Certain, but I Was Wrong,'* N.Y. TIMES (June 18, 2000), https://www.nytimes.com/2000/06/18/opinion/i-was-certain-but-i-was-wrong.html

harms may be less obvious. For example, a victim may feel like she no longer has an advocate in the system.[210] Of course, prosecutors represent the state, not victims, in criminal prosecutions;[211] however, it is likely that victims come to believe that the prosecutor is their champion, perhaps even their protector. Yet, when the victim learns of the prosecutor's misconduct, the victim may experience a void, perhaps questioning who if anyone had her interests at heart during the initial, tainted proceedings.[212]

To be certain, the harms victims endure as a result of prosecutorial misconduct will vary significantly given the nature of the crime, the victim's characteristics and resources, and the nature of the misconduct. Furthermore, simply disclosing to victims a notice documenting the *Brady* misconduct may offer only a very partial remedy. But such a statement could prove powerful for some victims because it at least validates the victim as someone also hurt by the misconduct.[213]

The harms caused to witnesses from a trial infected by *Brady* misconduct should also be acknowledged. It is not uncommon in cases overturned because of *Brady* violations to examine trial records only to find that prosecutors did more than fail to disclose exculpatory evidence. Rather, prosecutors often exacerbate the constitutional violation with arguments that would have been easily rebutted by the undisclosed evidence.[214] Such actions often result in unjustified attacks

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[https://perma.cc/MB8Z-LWKH] (describing her "anguish" for contributing to a wrongful conviction by identifying the wrong perpetrator).

210. *See* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 621–23 (2009) (describing the therapeutic benefits to victims that come with participation in the process).

211. *See* AM. BAR ASS'N, *supra* note 76, at 1 ("[The prosecutor's] client is the public, not victims and not the police.").

212. Ironically, prosecutors have pointed to victims' interests to oppose more robust disclosure obligations to defendants. The Department of Justice opposed reform legislation following Senator Stevens's case, arguing that the existing disclosure rules effectively "balance . . . a defendant's constitutional rights [while] . . . safeguarding the equally important public interests in a criminal trial process that reaches timely and just results, safeguards victims and witnesses from retaliation or intimidation, [and] does not unnecessarily intrude on victims' and witnesses' personal privacy . . . ." Statement for the Record, *supra* note 113, at 5; *see* Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012) (proposing to require prosecutors to disclose favorable information to criminal defendants); *see also* Sonja N.Y. Kawasaki, Comment, *Uncle Ted Teaches a Lesson: The Fairness in Disclosure of Evidence Act Challenges a Flawed Exculpatory Evidence Disclosure System*, 39 U. DAYTON L. REV. 413 (2015) (analyzing the proposed Fairness in Disclosure of Evidence Act).

213. *See* Cassell, *supra* note 154, at 229 (describing the victims' rights movement as a response to a criminal justice system that seemed to have overlooked victims' interests).

214. *See* Commonwealth v. Williams, 168 A.3d 97, 98 (Pa. 2017) (Donohue, J., writing in support of affirmance) (describing Williams's prosecutor taking advantage of the concealed evidence during closing argument).

on the credibility of defense witnesses. For example, prosecutors may directly attack the credibility of defense witnesses despite suppressing evidence that would have supported the witnesses' credibility. Relatedly, they may indirectly attack the credibility of defense witnesses by arguing that prosecution witnesses were more reliable despite undisclosed evidence that would have impeached the prosecution witnesses.

Even prosecution witnesses may be harmed by prosecutors' *Brady* misconduct. A witness who is initially reluctant to cooperate at trial—perhaps because of potential doubts about the reliability of the prosecution's case—may be moved by an appeal from the prosecutor about the importance of the witness's testimony and the prosecution's confidence in the accuracy of his case. Yet when the case unravels because of the prosecution's failure to disclose exculpatory evidence, that same witness may feel used by the prosecutor. She may experience guilt about becoming an unwitting assistant in the prosecutor's misdeeds. Sending a notice to witnesses about the prosecutor's misconduct may not be a complete remedy for these witnesses. However, official disclosure of misconduct at least validates witnesses as persons impacted by the misconduct.

Given the harm jurors, victims, and witnesses face from *Brady* violations, notifying these individuals of the misconduct as a partial remedy is justified in its own right even if nothing else comes of the notification. But there is reason to expect that this remedy may produce important salutary outcomes as well. The encounter with official misconduct may turn some of these individuals into advocates.[215] At a minimum, the media may ask them to comment on the misconduct. This attention alone could serve as a reminder of the wide range of harms caused by convictions obtained through *Brady* misconduct. Furthermore, prosecutors will likely take note of these comments, as jurors, victims, and witnesses will command attention from the public.[216]

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215. *See* Kreag, *supra* note 55, at 371–73 (describing a juror reacting to the prosecutorial misconduct by becoming an advocate for the defendant).

216. *See* Bibas, *supra* note 165, at 963:

> The most potent disciplining force is likely to be victims. Victims, and to a lesser extent affected locals, are a discrete identifiable group who already know about the crimes they have endured and are motivated to take part. Because of their background knowledge, they do not need to be brought up to speed, can speak with authority, and will not automatically defer to insiders' assessments.

3. Promoting Transparency

The result of every *Brady* violation, intentional or otherwise, is that relevant probative evidence remains hidden, unexamined by the adjudicative process.[217] The secretive nature inherent in the misconduct is compounded because the misconduct itself often goes unnoticed.[218] Investigating *Brady* compliance is even more difficult because prosecutors are reluctant to share their internal guidelines.[219] As such, *Brady* misconduct contributes to our modern system of adjudication that is opaque to all but a few active participants.[220] One of the benefits of *Brady* Violation Disclosure Letters is that they partially counter the lack of transparency in the system, giving the public important information about how prosecutors exercise their power.[221]

Many factors have contributed to the current lack of transparency that often leaves prosecutorial decisions insulated from external regulation.[222] Courts are reluctant to invade prosecutors' charging practices.[223] Lawmakers have expanded substantive criminal

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217. *See* Connick v. Thompson, 563 U.S. 51, 106 (2011) (Ginsburg, J., dissenting) ("A *Brady* violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out.").

218. *See* McMunigal, *supra* note 90, at 713 ("For a variety of reasons, including the nature of disclosure violations, the infrequency of imposition of disciplinary sanctions, and the prevalence of negotiated guilty pleas, prosecutorial disclosure violations remain largely hidden from view.").

219. *See* Yaroshefsky & Green, *supra* note 116, at 279 ("The few offices with written disclosure policies do not make them public and would not provide them to us."); Mike Scarcella, *Part of DOJ's Criminal Discovery 'Blue Book' Unsealed for First Time*, NAT'L L.J. (Jan. 17, 2018, 12:56 PM), https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/17/part-of-dojs-criminal-discovery-blue-book-unsealed-for-first-time/?slreturn=20180512180206 [https://perma.cc/3C4U-LKGY] (discussing the DOJ's resistance to disclosing its criminal discovery guide).

220. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 983 (2009) ("[T]he public suffers from chronic misperceptions about how the criminal justice system actually works."); Bibas, *supra* note 165, at 923 ("Much of the criminal justice system is hidden from [the public's] view.").

221. *See* Bibas, *supra* note 220, at 960 ("No government official in America has as much unreviewable power and discretion as the prosecutor."); Attorney General Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940) ("The prosecutor has more control over life, liberty, and reputation than any other person in America.").

222. *See* Ronald F. Wright, *Prosecutor Institutions and Incentives*, *in* 3 REFORMING CRIMINAL JUSTICE, *supra* note 47, at 49, 50 ("Compared to many other government officials, prosecutors operate within a legal framework that leaves them free to choose office priorities that they—and they alone—believe are appropriate."); Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 796–98 (2017) (examining the limited external oversight and regulation of prosecutorial decisionmaking).

223. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) ("[T]he decision to prosecute is particularly ill-suited to judicial review."). Even when reviewing alleged race-based charging practices, the Supreme Court has adopted a standard providing prosecutors wide discretion. *Compare* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (recognizing the prohibition of charging decisions "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification"), *with* McCleskey v. Kemp, 481 U.S. 279, 311 (1987) ("McCleskey's

prohibitions, leaving prosecutors with greater discretion in deciding who to prosecute and what charges to bring.[224] Plea bargaining is ubiquitous and subject to very little oversight.[225] Scholars have responded to the lack of transparency by proposing a variety of reforms to increase the public's ability to understand and engage with the criminal justice system.[226] *Brady* Violation Disclosure Letters serve this purpose.

Advocating for increased transparency of the prosecutorial function is far from a radical request. The power prosecutors hold and their status as representatives of the people provide sufficient independent justification for greater transparency even if prosecutors' actions do not involve misconduct.[227] Where misconduct is involved,

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argument that the Constitution condemns the discretion allowed decisionmakers in the Georgia capital sentencing system is antithetical to the fundamental role of discretion in our criminal justice system.").

224. *See* Douglas Husak, *Overcriminalization*, *in* 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 25 (Erik Luna ed., 2017), http://academyforjustice.org/wp-content/uploads/2017/10/Reforming-Criminal-Justice_Vol_1.pdf [https://perma.cc/AT3Z-NRGR] (exploring the importance of drafting criminal statutes that are sufficiently limited to "impose liability only on those who are deserving"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) ("As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long.").

225. *See* Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials."); Missouri v. Frye, 556 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); SUJA A. THOMAS, THE MISSING AMERICAN JURY 44 (2016) ("Plea bargaining is the most prominent example of this shift in power from the jury to the [prosecutor]."); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 927 (1994) (concluding that with the decline of jury trials, "prosecutors are [now] the judges of law and fact.").

226. *See, e.g.*, John E. Pfaff, *Prosecutorial Guidelines*, *in* 3 REFORMING CRIMINAL JUSTICE, *supra* note 47, at 101, 103 (proposing that states "adopt charging and plea-bargaining guidelines that are legally binding on county prosecutors"); Wright, *supra* note 222, at 61–71 (reviewing reform proposals that are designed to "give prosecutors more information about their communities and about their own work, and give the public more-specific information about prosecutor performance"); Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731 (2010) (advocating for "changing the guilty plea procedure to make it more trial-like in form . . . by including the jury"); Kreag, *supra* note 222, at 792–804 (arguing for increased information collection and analysis to increase transparency); Michael S. McGinniss, *Sending the Message: Using Technology to Support Judicial Reporting of Lawyer Misconduct to State Disciplinary Agencies*, J. PROF. LAW., 2013, at 37, 37 (proposing "that state and federal court systems create electronic databases . . . to receive and store judicial reports of litigation-related lawyer misconduct."); Simonson, *supra* note 208, 2176–77 (promoting "the ability of citizens to participate in democracy and to hold the criminal justice system accountable" through the concept of public criminal adjudication).

227. *See* Bibas, *Transparency*, *supra* note 165, at 961 ("Greater transparency and public information, however, is more likely to discipline elected insiders [such as prosecutors]. Even if they are uncertain how many people are paying attention, insiders may fear that an electoral opponent will seize on this information, swaying swing voters at the next election.").

there is an even greater need for transparency to ensure that the public has the information needed to evaluate its agent.[228]

Elsewhere I have argued for collecting, analyzing, and disclosing data about prosecutors' decisions as a means of increasing transparency.[229] I still endorse that endeavor. But we should pursue *Brady* Violation Disclosure Letters as well. They offer a targeted response to those most harmed by *Brady* misconduct. Furthermore, over time, they could form the bases for their own database of *Brady* misconduct cases.[230]

4. Adaptability and Flexibility in Implementation

Two additional virtues of *Brady* Violation Disclosure Letters are the ease with which they can be implemented and their flexibility, making them a possible remedy for *Brady* misconduct regardless of the size of the jurisdiction.[231] Some reforms designed to increase *Brady* compliance contain significant implementation hurdles. For example, many commentators have proposed deleting *Brady*'s materiality prong.[232] Others have proposed new laws or amendments to criminal procedure or professional conduct rules to expand discovery obligations beyond what *Brady* requires.[233] These proposals involve significant implementation costs. The Supreme Court has demonstrated no appetite for abandoning *Brady*'s materiality prong. And passing new laws or rules requires significant resources. By contrast, judges already

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228. *Cf.* Abel, *supra* note 160, at 789–90 ("[Police o]fficers are public officials serving in positions of great public trust. Official documentation of their misconduct should be accessible to the public . . . .").

229. *See* Kreag, *supra* note 222, at 792–804 (proposing a data-driven analytical framework).

230. *Cf.* Jason Tashea, *Databases Create Access to Police Misconduct Cases and Offer a Handy Tool for Defense Lawyers*, A.B.A. J. (Feb. 2016), http://www.abajournal.com/magazine/article/databases_create_access_to_police_misconduct_cases_and_offer_a_handy_tool_f [https://perma.cc/59RB-CZHK] (discussing databases in New York and Chicago that track police misconduct).

231. *See* Ronald F. Wright & Kay L Levine, *Place Matters in Prosecution Research*, 14 OHIO ST. J. CRIM. L. 675, 677 (2017) (recognizing the importance of considering how prosecutors' offices differ when proposing reforms).

232. *See* United States v. Bagley, 473 U.S. 667, 701 (1985) (Marshall, J., dissenting) (criticizing the materiality prong); *In re* Kline, 113 A.3d 202, 208 (D.C. 2015) (characterizing *Brady* analysis as a retrospective evaluation ill-suited for the pretrial context); *see also* Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1555–57 (2010) (discussing the advantages of reforming or eliminating the materiality prong).

233. *See, e.g.*, Michael Morton Act, ch. 49, 2013 Tex. Gen. Laws 106 (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2017)); Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. § 2 (2012) (proposing enhanced disclosure requirements in criminal prosecutions); Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59, 78–93 (2017) (discussing the use of local rules to strengthen prosecutorial disclosure obligations); *supra* Section II.E (discussing statutes criminalizing prosecutorial misconduct).

possess the inherent authority to order clerks to send *Brady* Violation Disclosure Letters.

Furthermore, *Brady* Violation Disclosure Letters offer the flexibility to be used regardless of the size of the jurisdiction. This cannot be said of some of the other proposals. Not all jurisdictions have the infrastructure or resources to implement open-file discovery policies. Similarly, many jurisdictions do not have adequate resources to use existing attorney disciplinary regimes to police *Brady* compliance.[234] Consequently, these jurisdictions would not have resources to create independent commissions to investigate prosecutorial misconduct.[235] And it is certainly the rare jurisdiction with the resources to conduct robust, independent investigations of prosecutorial misconduct as was done in Senator Stevens's case.[236] These resource limitations do not constrain *Brady* Violation Disclosure Letters. Individual judges can adopt this reform on an ad hoc basis.

5. Providing the Judiciary Another Tool for Policing *Brady*

To the extent judges are inclined to enforce *Brady*'s protections, *Brady* Violation Disclosure Letters represent an additional tool judges can employ immediately, without waiting for new statutes, new constitutional interpretations, or changes to criminal procedure rules. Although the *Brady* doctrine is largely implemented by prosecutors with little, if any, input from judges,[237] judges are uniquely situated to oversee prosecutors' *Brady* compliance and alter prosecutorial practices. Many judges have already used their inherent power to reinforce prosecutors' constitutional disclosure obligations. For example, following the misconduct in Senator Stevens's prosecution, Judge Emmet Sullivan began issuing a standing order in every criminal case clearly identifying and describing prosecutors' *Brady* obligations.[238] Other trial courts have followed Judge Sullivan's lead by

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234. *See* Zacharias, *supra* note 98, at 756 ("Disciplinary authorities have limited resources to prosecute violations of the professional rules. They must determine how to allocate those resources so as to punish misconduct most effectively . . . .").

235. *See* Caldwell, *supra* note 117, at 1484–85 (considering the costs of implementing a Prosecutorial Review Panel); *cf.* Kozinski, *supra* note 57, at iii, xxxii (calling for independent prosecutorial oversight agencies).

236. *See supra* Section II.C (describing the extensive investigation of Senator. Stevens's prosecutors and their misconduct).

237. *See* Jones, *supra* note 44, at 433 ("Other than the unenforceable 'honor code,' there are few incentives for prosecutors to comply with *Brady* because there is no meaningful judicial oversight of the process.").

238. *See* Sullivan, *supra* note 101, at 149 ("Following the *Stevens* case, I have issued a standing *Brady* Order for each criminal case on my docket, updating it in reaction to developments in the law.").

adopting local rules that codify *Brady*.[239] Judges can also conduct brief on-the-record colloquies with prosecutors to nudge *Brady* compliance.[240] And they can employ shaming techniques by writing detailed orders and opinions that include the names of the prosecutors responsible for the *Brady* violations[241] or by using questioning during oral argument to shine light on prosecutors' misconduct.[242]

Judges who have employed these techniques will likely find *Brady* Violation Disclosure Letters appealing. But this reform is also designed to appeal to judges who have not taken steps to increase *Brady* compliance. Some of these judges may be moved by the harms victims, jurors, and witnesses face from prosecutorial misconduct. *Brady* Violation Disclosure Letters are not a complete remedy for these harms but they at least recognize them. This recognition alone may cause some judges to pay more attention to *Brady*'s protections.

6. Uncovering Patterns of Misconduct

Brady Violation Disclosure Letters carry the added benefit of potentially uncovering patterns of misconduct. As they are publicized, prosecutors, defense attorneys, convicted offenders, scholars, and journalists will no doubt review them and investigate whether the misconduct was an isolated event.[243] This investigation could lead to the

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239. *See* McConkie, *supra* note 233, at 111 (explaining that the expansion of local criminal discovery rules "invigorate[s] *Brady* enforcement by allowing trial judges to actively manage discovery throughout the pretrial stage of the case"); Sullivan, *supra* note 101, at 147 ("Approximately twenty-eight of the ninety-four federal district courts nationwide have promulgated rules regarding the disclosure obligations of prosecutors who appear in those courts, and eight more districts have issued standing orders governing those obligations." (footnotes omitted)); Press Release, New York State Unified Court System, Chief Judge DiFiore Announces Implementation of New Measure Aimed at Enhancing the Delivery of Justice in Criminal Cases (Nov. 8, 2017) (on file with author) (announcing and discussing the statewide adoption of New York's standing *Brady* order).

240. *See* United States v. Garcia, No. CR 15-4275 JB, 2017 WL 2290963, at *30–32 (D.N.M. May 2, 2017) (discussing but ultimately electing not to utilize a *Brady* colloquy); Kozinski, *supra* note 57, at xxxiv (endorsing pretrial *Brady* colloquies); Jason Kreag, *The* Brady *Colloquy*, 67 STAN. L. REV. ONLINE 47, 49 (2014) (same).

241. *See* Gershowitz, *supra* note 144, at 1090 ("The obvious approach to shaming misbehaving prosecutors among their peer group is not to use newspapers that would reach a general audience, but, instead, judicial opinions that would be read by judges and other lawyers.").

242. *See* Bazelon, *supra* note 190, at 328 ("[A]ppellate judges [may] use oral arguments as a forum to express their condemnation of prosecutors who defend misconduct-related convictions . . . .").

243. *See* Stephanos Bibas et al., *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 2007–10 (2010) (discussing the use of audits to regulate compliance with *Brady*); *id.* at 2012 (recommending that "[p]rosecutors' offices should adopt prospective auditing mechanisms that provide a mechanism of routine oversight of disclosure obligations"); *cf.* Levenson, *supra* note 31, at 393 ("Experienced prosecutors understand that an admission in one case can affect the outcomes of other pending

discovery of additional miscarriages of justice and potentially form the basis for training tools if patterns emerge.[244]

The recent experience of the Brooklyn District Attorney's Office's handling of several unrelated cases infected by the misconduct of one police officer is illustrative. Louis Scarcella was once a revered homicide detective, yet his reputation started to crumble after one of his murder investigations unraveled in 2013, ending in the exoneration of David Ranta.[245] The prosecution's reinvestigation revealed that Scarcella fabricated an identification and offered benefits to key witnesses in exchange for help in the investigation without disclosing this to the defense.[246] Other convicted offenders and defense attorneys who suspected that Scarcella committed misconduct in their cases took note.[247] Three months later, the Brooklyn District Attorney announced an independent panel to investigate dozens of Scarcella's investigations.[248] Ultimately, the reinvestigation that began with Ranta's exoneration expanded to more than seventy of Scarcella's cases and led to courts overturning at least ten murder convictions.[249]

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petitions. Yet, this impact should not influence prosecutors to withhold discovery or admission of error.").

244. *See* MODEL RULES OF PROF'L CONDUCT r. 8.3(a) cmt. 1 (AM. BAR ASS'N 2015) ("An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense."); *cf.* Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525 (2018) (advocating a formal process requiring prosecutors to notify police officers if cases are dismissed after arrest).

245. Michael Powell & Sharon Otterman, *Jailed Unjustly in the Death of a Rabbi, Man Nears Freedom*, N.Y. TIMES (Mar. 20, 2013), https://www.nytimes.com/2013/03/20/nyregion/brooklyn-prosecutor-to-seek-freedom-of-man-convicted-in-1990-killing-of-rabbi.html [https://perma.cc/84KC-T3CN].

246. *Id.* For a detailed description of David Ranta's wrongful conviction and Scarcella's misconduct, see *David Ranta*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4127 (last visited Sept. 7, 2018) [https://perma.cc/BUU9-P5LS].

247. Frances Robles & N. R. Kleinfield, *Review of 50 Brooklyn Murder Cases Ordered*, N.Y. TIMES (May 11, 2013), https://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunt-50-murder-cases.html [https://perma.cc/AC88-CRZS].

248. *Id.*; Press Release, Office of the Dist. Attorney, Kings Cty., Kings Cty. Dist. Attorney Charles J. Hynes Names 12-Member, Indep. Panel to Review Trial Convictions Involving Detective Louis Scarella (July 1, 2013) (on file with author).

249. Alan Feuer, *Another Brooklyn Murder Conviction Linked to Scarcella Is Reversed*, N.Y. TIMES (Jan. 11, 2018), https://www.nytimes.com/2018/01/11/nyregion/scarcella-murder-conviction-reversed.html [https://perma.cc/7BFG-X8SR]. Included in the first ten murder cases overturned were seven in which prosecutors supported defense counsels' requests to vacate the conviction and three convictions that were vacated over prosecutors' objections. Alan Feuer, *Despite 7 Scrapped Convictions, Prosecutors Say Ex-Detective Broke No Laws*, N.Y. TIMES (May 25, 2017), https://www.nytimes.com/2017/05/25/nyregion/louis-scarcella-murder-dismissals.html [https://perma.cc/9KMZ-HC9E]. While I offer the Brooklyn District Attorney's investigation of Scarcella's cases as a model for uncovering patterns, the investigation is partially disappointing because it has not included investigating prosecutors who may have known about or condoned Scarcella's misconduct. *See* Alan Feuer, *Wrongful Convictions Are Set Right, but Few Fingers Get*

Beyond identifying patterns of misconduct for individual actors,[250] *Brady* Violation Disclosure Letters may eventually help form the bases for predictive models, potentially identifying factors that form the environment in which *Brady* misconduct is more likely to occur. To be clear, such models will likely not be developed soon. But the tools are available today, and the theoretical framework is developing.[251] Furthermore, even if this effort stalls or fails, collecting a database of instances of *Brady* misconduct would be a significant training resource for prosecutors.

IV. CRITIQUING *BRADY* VIOLATION DISCLOSURE LETTERS

Publicly announcing *Brady* misconduct carries some risk, and this proposal will undoubtedly face opposition from some prosecutors. This Part explores those risks and the likely opposition. While it is important to examine the risks and counterarguments, they are not sufficiently weighty to preclude *Brady* Violation Disclosure Letters as a partial remedy for prosecutorial misconduct.

A. Risks of Brady *Violation Disclosure Letters*

One of the reasons for implementing *Brady* Violation Disclosure Letters is that the attention generated from disclosing misconduct has the potential to increase compliance with *Brady* because some prosecutors will be deterred from committing misconduct.[252] In this light, *Brady* Violation Disclosure Letters are a form of punishment. However, increasing the potential punishment for *Brady* violations raises several risks.

Increasing punishment for *Brady* noncompliance risks pushing the actions of the subset of prosecutors inclined to engage in misconduct

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Pointed, N.Y. TIMES (Aug. 8, 2017), https://www.nytimes.com/2017/08/08/nyregion/wrongful-convictions-are-set-right-but-no-fingers-get-pointed.html [https://perma.cc/JC2T-WAH6] (exploring the failure to examine prosecutors' potential role in Scarcella's misconduct); Joaquin Sapien, *Watching the Detectives: Will Probe of Cop's Cases Extend to Prosecutors?*, PROPUBLICA (June 21, 2013, 9:52 AM), https://www.propublica.org/article/watching-the-detectives-will-probe-of-cops-cases-extend-to-prosecutors [https://perma.cc/ZD6P-8P9D] (same).

250. *See* FAIR PUNISHMENT PROJECT, THE RECIDIVISTS: NEW REPORT ON RATES OF PROSECUTORIAL MISCONDUCT (2017), http://fairpunishment.org/new-report-on-rates-of-prosecutorial-misconduct/ [https://perma.cc/FUD3-VH57] (documenting patterns of prosecutorial misconduct in four jurisdictions).

251. *See* Wright, *supra* note 222, at 69–70 (identifying reforms seeking to compel prosecutors to collect and disseminate information about their decisions to allow for increased analysis and comparison); *see also* Kreag, *supra* note 222, at 818–20 (exploring the possible use of analytics to predict prosecutorial misconduct).

252. *See supra* Part III (arguing that *Brady* Violation Disclosure Letters would spur prosecutorial compliance by exposing their misdeeds to the public).

deeper into the shadows. Under the current regime, prosecutors willing to violate *Brady* can take comfort in the fact that their misconduct likely will never be exposed.[253] Furthermore, they can predict that even if their misconduct comes to light, they will likely face few, if any, negative consequences.[254] The current regime is not a credible deterrent. For prosecutors inclined to commit intentional misconduct, the calculation may be slightly different if judges begin issuing *Brady* Violation Disclosure Letters. Such announcements will deter some prosecutors, leading them to comply with *Brady*.[255] However, other prosecutors may respond by becoming more effective at committing misconduct, which means taking steps to ensure that their misconduct remains hidden. For example, they may make conscious choices not to reduce witness interviews to writing or record other interactions that carry the possibility of creating exculpatory information.[256] Or they may actively destroy or alter certain exculpatory evidence, ensuring that it will never come to light.[257]

There is a second reason why additional punishment for *Brady* misconduct risks pushing misconduct further into the shadows. The *Brady* misconduct in Hatchett's case only came to light when current prosecutors agreed to review old files from his case. Without cooperation, it is unlikely that Hatchett would have obtained the files

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253. *See supra* notes 57, 217 (bemoaning the hidden nature of many *Brady* violations due to prosecutorial discretion and power).

254. *See supra* Part II (portraying the penalties associated with *Brady* misconduct as minimal).

255. *See supra* Section III.B.1 (describing the power of *Brady* Violation Disclosure Letters to galvanize public sentiment against prosecutorial misconduct).

256. *Cf.* John G. Douglass, *Confronting the Reluctant Accomplice*, 101 COLUM. L. REV. 1797, 1836 (2001) (recognizing that some prosecutors' witness interview practices are designed to avoid creating discoverable material); Grunwald, *supra* note 47, at 776 ("Increased disclosure, for example, may discourage some police officers from collecting or recording exculpatory evidence or from engaging in investigative activities likely to produce it."); Grunwald, *supra* note 47, at 807:

> [F]rom the perspective of police officers, the arrest report is "primarily an 'internal memorandum' serving the perceived needs of the police department." Its "primary function for the police is 'to justify the arrest and clear the case,' [which] can be achieved by confining reports to what is necessary to satisfy the probable cause standard, ignoring exculpatory evidence." There is also evidence that officers often fail to collect, record, or transfer exculpatory evidence to the prosecution.

(footnotes omitted); *see also* Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 18, 21, 30 (1993) (positing that police reports are often intentionally devoid of exculpatory facts).

257. *See, e.g.*, Pamela Colloff, *The Innocent Man, Part Two*, TEX. MONTHLY (Dec. 2012), https://www.texasmonthly.com/articles/the-innocent-man-part-two/ [https://perma.cc/E4TV-EG23] (describing efforts by Michael Morton's prosecutor to bury the exculpatory evidence before Morton's trial); *see also supra* notes 183–188 and accompanying text (describing Morton's exoneration).

needed to expose the misconduct.[258] To be certain, the current prosecutors who helped establish Hatchett's innocence received well-deserved praise for their cooperation. But not all prosecutors will make the same calculation. Some may see the possibility of a *Brady* Violation Disclosure Letter as a reason not to cooperate with postconviction attorneys reinvestigating cases for potential *Brady* violations.[259] This could not only cause some *Brady* violations to remain hidden but it could also hinder uncovering other miscarriages of justice.[260]

Relatedly, there is a risk that increasing potential punishment for *Brady* misconduct may over time change the profile and characteristics of prosecutors. Imagine if prosecutorial immunity vanished.[261] This would likely give pause to some aspiring prosecutors, perhaps causing them to forgo the job altogether. This would leave a pool of prosecutors with a higher risk tolerance. Increasing potential punishment for *Brady* misconduct with *Brady* Violation Disclosure Letters is not as drastic as ending prosecutorial immunity, but the increased possibility of punishment may push some attorneys out of the profession, leaving prosecutors' offices with more hard-charging prosecutors who are more inclined to push the boundaries and accept the risks.

To the extent *Brady* Violation Disclosure Letters are perceived as shaming, there is also a risk that the subject of the shaming—i.e., the prosecutor who committed misconduct—may not have the resources or capacity to respond to the shame and overcome it. One of the prosecutors responsible for the misconduct against Senator Stevens is a tragic example of the risk of shaming.[262] The prosecutor, a relatively junior attorney in the Public Integrity Section of the Department of

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258. *See* Levenson, *supra* note 15, at 547 (describing "significant impediments to postconviction investigations," such as the lack of a "right to discovery at the postconviction stage").

259. *See* Levenson, *supra* note 31, at 366 ("Conceding a *Brady* violation, or allowing a peek at the prosecutors' files to determine whether there has been a *Brady* violation, raises the specter that prosecutors will lose control of their files.").

260. *See* Fred. C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 175 (2005) ("[O]nce appeals are complete, the prosecutor may be the only participant in the criminal justice system in a position to rectify a wrong. Information suggesting or probative of a wrong often is in the prosecutor's exclusive possession.").

261. *See* Imbler v. Pachtman, 424 U.S. 409, 424–27 (1976) (describing risks prosecutors would face without immunity).

262. *See* Jeffrey Toobin, *Casualties of Justice*, NEW YORKER (Jan. 3, 2011), https://www.newyorker.com/magazine/2011/01/03/casualties-of-justice [https://perma.cc/33X7-L5VR] (recounting how one of the prosecutors who built the case committed suicide as the pressure of the investigation into his misconduct grew); *see also supra* Part II (discussing Senator Stevens's case).

Justice, took immense pride in being a prosecutor.[263] As the allegations grew, he questioned whether the misconduct would end his career.[264] His fears were realized when, more than a year after the case, journalists covering another high profile, but unrelated case, led a story with a reference to the prosecutor's work against Senator Stevens.[265] Months later, still waiting to learn whether he would face discipline for the misconduct in Senator Stevens's case, the prosecutor committed suicide, a decision his family attributed to the pressure he felt from the investigation.[266] This tragic result is likely an outlier, but it nonetheless serves as a note of caution because *Brady* Violation Disclosure Letters will induce shame for some prosecutors.

Brady Violation Disclosure Letters also risk retraumatizing victims, witnesses, and jurors. This is particularly relevant if the *Brady* misconduct sent an innocent person to prison.[267] Even individuals who did not participate in the misconduct may experience guilt for having been a part of the process that resulted in a wrongful conviction.[268] Furthermore, some victims, witnesses, and jurors may have moved on and may not want to be reminded of traumatic or unpleasant experiences from being part of a criminal case.

Brady Violation Disclosure Letters also create more general risks. For example, they risk masking other important questions about regulating and evaluating prosecutorial decisionmaking. After all, in most jurisdictions *Brady* does not apply to the overwhelming majority of criminal convictions because they are resolved by plea bargaining.[269] In addition, *Brady*'s protections likely have little effect on prosecutorial charging decisions, an area where prosecutors exercise significant—and

263. *See* Toobin, *supra* note 262 (quoting the prosecutor's widow as stating, "He was really passionate about the work he did at Public Integrity. . . . He felt very strongly about public-corruption cases—that people shouldn't be doing anything illegal on the public dime.").

264. *See id.* (quoting the attorney who represented the prosecutor during the investigation as stating, "He saw anything that ended with him not being a prosecutor as apocalyptically bad.").

265. *See id.* (recounting how the media coverage contributed to the prosecutor's feeling that the misconduct in Senator Stevens's case had permanently tarnished his reputation); *see also* Michael Cieply, *Former Prosecutor of Ted Stevens Pursued Polanski*, N.Y. TIMES (Sept. 29, 2009), https://mediadecoder.blogs.nytimes.com/2009/09/29/former-ted-stevens-prosecutor-pursued-polanski/ [https://perma.cc/VKY6-CKWE].

266. *See* Toobin, *supra* note 262 (quoting his widow as follows: "He took his duties and his ethical obligations very much to heart. Even thinking that his career would be over was just too much for him. The idea that someone thought he did something wrong was just too much to bear.").

267. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 959 (2004) (reporting that prosecutorial misconduct was a contributing cause in forty-two percent of wrongful convictions).

268. *See* Thompson, *supra* note 209 (describing a rape victim's anguish upon learning that she had misidentified her attacker and caused an innocent man to be imprisoned).

269. *See supra* note 225 (explaining the ubiquity of plea bargaining).

often unreviewable—discretion.[270] Nonetheless, this Article argues that publicly disclosing misconduct at least helps breach the opacity of the prosecutor's office.[271] But there are limits both to the public's capacity for monitoring public officials and to the public's attention. Given these limits, some may argue that this Article's focus on *Brady* compliance is misplaced.

B. Opposition to Brady *Violation Disclosure Letters*

This proposal will undoubtedly face opposition and resistance from some prosecutors. Opponents will likely argue: (1) *Brady* misconduct is rare and adequately addressed in the current regime, (2) *Brady* Violation Disclosure Letters do not adequately distinguish intentional from unintentional *Brady* misconduct, and (3) external regulation of prosecutors undermines prosecutorial independence and is unnecessary.

Admittedly, the rate of *Brady* misconduct is unknown, and likely unknowable.[272] But this lack of information does not lessen the harm caused by *Brady* violations when they do occur. As such, this Article proposes adding a new tool to the existing options for responding to prosecutorial misconduct. Some opponents will take a different path, asserting that *Brady* violations are rare and not deserving of additional attention.[273] Indeed, this was the Department of Justice's response to calls for discovery reform following Senator Stevens's case.[274] The DOJ argued that the misconduct did not suggest a "systemic problem,"[275] and asserted that of all the cases it filed in the prior ten years only 0.03 percent of them warranted review by the DOJ's internal attorney discipline authorities for alleged discovery violations.[276]

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270. *See* Wayte v. United States, 470 U.S. 598, 607 (1985) ("[T]he Government retains 'broad discretion' as to whom to prosecute." (quoting United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982))).

271. *See supra* Section III.B.3 (describing the transparency-promoting function of *Brady* Violation Disclosure letters).

272. *See supra* note 57 (describing the hidden nature of *Brady* misconduct and the difficulty of ascertaining violation rates).

273. *See, e.g.*, CAL. DIST. ATTORNEYS ASS'N, THE CALIFORNIA PROSECUTOR: INTEGRITY, INDEPENDENCE, LEADERSHIP 21 (2012), https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1227&context=caldocs_agencies [https://perma.cc/X6TK-KNQC] [hereinafter *The California Prosecutor*] (quoting a deputy district attorney's criticism of a report on prosecutorial misconduct in California as follows: "[The report] rails at a problem that simply does not exist.").

274. *See* DOJ Statement for the Record, *supra* note 113, at 1 ("[T]he Department [of Justice] does not believe that legislation is needed to address the problems that came to light in the *Stevens* prosecution.").

275. *Id.* at 6.

276. *Id.* at 2.

Many scholars disagree with the DOJ's rosy characterization of prosecutors' *Brady* compliance.[277] They argue that the instances of known *Brady* misconduct underestimate the scope of the problem. Scholars have offered several reasons as to why it is reasonable to conclude that the rate of misconduct is significantly higher than the rate of convictions vacated because of *Brady* violations, including: the serendipity of uncovering *Brady* misconduct,[278] the fact that prosecutors commit misconduct in high-profile cases that they know will be closely monitored,[279] the patterns of misconduct in some prosecutors' offices,[280] and the fact that experienced prosecutors routinely demonstrate that they do not understand their *Brady* obligations.[281] Regardless, this argument misses the point. Even the current rate of *Brady* misconduct undermines the legitimacy of the system and demands our attention.

Admittedly, this Article advocates for *Brady* Violation Disclosure Letters for both intentional and unintentional *Brady* misconduct. In doing so, it matches *Brady*'s reach, which extends prosecutors' constitutional duty to requiring disclosure of exculpatory

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277. *See, e.g.*, GERSHMAN, *supra* note 55, at viii ("[A]cts of misconduct by prosecutors are recurrent, pervasive, and very serious."); *id.* at xi ("A prosecutor's violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by courts, and almost never by disciplinary bodies."); Davis, *supra* note 84, at 278 ("Because it is so difficult to discover, much prosecutorial misconduct goes unchallenged, suggesting that the problem is much more widespread than the many reported cases of prosecutorial misconduct would indicate.").

278. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 87 (2011) (Ginsburg, J., dissenting) ("Thompson discovered the prosecutors' misconduct through a serendipitous series of events."); Juniper v. Zook, 876 F.3d 551, 559–60, 573 (4th Cir. 2017) (remanding for an evidentiary hearing on *Brady* claim where exculpatory evidence was only uncovered years later when the detective's exculpatory notes turned up after the detective was prosecuted for taking bribes from defendants in unrelated cases); Commonwealth v. Williams, 168 A.3d 97, 103 (Pa. 2017) (exculpatory evidence only came to light after codefendant agreed to talk because Williams's execution neared); Jones, *supra* note 44, at 433 ("In the overwhelming majority of cases, the defense learns of *Brady* evidence by pure accident."); Toobin, *supra* note 262 (outlining how the exculpatory evidence in Senator Stevens's case came to light as a result of an FBI whistleblower inquiry).

279. *See* Jones, *supra* note 44, at 420 ("If multiple intentional *Brady* violations could occur under these circumstances [in the prosecution of Senator Stevens], it is not difficult to understand how Brady violations occur in run-of-the-mill criminal cases.").

280. *See, e.g.*, *Connick*, 563 U.S. at 80 (Ginsburg, J., dissenting) ("[T]he evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish."); *Zook*, 876 F.3d at 566 n.7 ("We have repeatedly rebuked the Commonwealth's Attorney and his deputies and assistants for failing to adhere to their obligations under *Brady*.").

281. *See, e.g.*, *Connick*, 563 U.S. at 79 (Ginsburg, J., dissenting) ("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."); *Zook*, 876 F.3d at 566 ("That Petitioner's prosecutor seems to have fundamentally misunderstood his obligation under *Brady* provides further grounds to conclude that the prosecution suppressed the Roberts materials, and potentially other exculpatory or impeaching evidence.").

evidence that was never a part of the prosecutor's file.[282] Some prosecutors will argue that they should not face punishment for unintentional *Brady* misconduct. Some prosecutors have even bristled at the term "prosecutorial misconduct."[283] They argue that it mischaracterizes some constitutional violations that are the result of negligence or police misdeeds as opposed to intentional misconduct by prosecutors.[284] They add that using the term risks confusing attorney disciplinary authorities.[285] As such, prosecutors have advocated for the more benign term prosecutorial "error" to describe *Brady* violations caused by negligence.[286] Regardless of what term is used, the Supreme Court has made clear that prosecutors are responsible for *Brady* compliance and that prosecutors' mere negligence or ignorance does not negate a *Brady* claim.[287] Furthermore, the harms to victims, jurors, and witnesses are real regardless of whether prosecutors intentionally or unintentionally violate *Brady*. *Brady* remedies should respond to these harms.

Finally, prosecutors who view *Brady* Violation Disclosure Letters as an attempt at external regulation of their disclosure practices may also oppose this reform. In recent years, prosecutors have opposed several attempts at external regulation. Most notably, following the misconduct in Senator Stevens's case, several members of Congress proposed new legislation to regulate disclosure practices.[288] The DOJ opposed the law, arguing that internal reforms were

282. *See supra* Part I; *see also* United States v. Agurs, 427 U.S. 97, 110 (1976) ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").

283. *See, e.g.*, *The California Prosecutor*, *supra* note 273, at 7 (criticizing a multiyear report evaluating prosecutorial misconduct for "fail[ing] to make the distinction between error and misconduct").

284. *See id.* at 18 ("While willfully withholding exculpatory evidence constitutes *Brady* error, so does the inadvertent failure to disclose the evidence.").

285. *See* Joseph Charles Hynes, *Resolution 100B*, 2010 A.B.A. CRIM. JUST. SEC. 1, http://apps.americanbar.org/yld/annual10/100B.pdf [https://perma.cc/5GNC-T3M6] ("Nevertheless, a finding of 'prosecutorial misconduct' may be perceived as reflecting intentional wrongdoing, or even professional misconduct, even in cases where such a perception is entirely unwarranted . . . .").

286. *Id.* at 6 ("It addresses and urges trial and appellate courts reviewing the conduct of prosecutors, while assuring that a defendant's rights are fully protected, to use the term 'error' where it more accurately characterizes that conduct than the term 'prosecutorial misconduct.' ").

287. *See Agurs*, 427 U.S. at 110 ("If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").

288. *See* Fairness in Disclosure of Evidence Act, S. 2197, 112th Cong. (2012) (seeking to impose heightened disclosure requirements upon prosecutors).

sufficient.[289] This Article does not oppose internal reforms, but they are not enough. More importantly, they do not remedy the range of harms caused by past *Brady* misconduct that has yet to be uncovered.

CONCLUSION

Brady violations are a complex problem that cause multifaceted harms. These harms reach beyond defendants to include harms to victims, jurors, witnesses, and other stakeholders in the criminal justice system. To date, *Brady* remedies only partially respond to the harms to defendants and largely ignore the harms to people other than defendants. Nonetheless, some judges are willing to attempt to aggressively root out *Brady* noncompliance. These judges and others should be receptive to a flexible remedy that they can implement immediately. *Brady* Violation Disclosure Letters partially vindicate the range of harms caused by *Brady* misconduct and promise to lead to increased *Brady* compliance. They will not end *Brady* misconduct. But they are a step in the right direction. Furthermore, because they can be adopted by individual judges without formal changes to rules or statutes, even ad hoc adoption of this proposal may cause other judges to follow, much the same way that Judge Sullivan's adoption of a standing pretrial *Brady* order has spread throughout federal trial courts. When this happens, we can expect the increased attention on prosecutorial misconduct to lead to increased compliance with *Brady*.

289. *See* DOJ Statement for the Record, *supra* note 113, at 1 ("In light of these internal reforms, the Department does not believe that legislation is needed to address the problems that came to light in the *Stevens* prosecution.").

APPENDIX

SAMPLE *BRADY* DISCLOSURE LETTER FOR HATCHETT'S CASE

Kings County Supreme Court
Clerk of Court

Re: *People v. Hatchett*

Dear Juror:

In 1992 you served as a juror in *People v. Hatchett*. The jury found Hatchett guilty of murder, and the court sentenced Hatchett to a term of twenty-five years to life in prison.

Recently, the court vacated Hatchett's murder conviction because the prosecution violated his constitutional rights during the trial in which you served as a juror. Specifically, before Hatchett's trial, the prosecution had a constitutional obligation to provide Hatchett any evidence in the prosecution's possession or control that was favorable to Hatchett so long as that evidence met a certain threshold level of importance. That is, the prosecutor's constitutional duty did not extend to all evidence favorable to the defendant (including evidence of trivial weight) but only to favorable evidence of sufficient significance such that the prosecution's nondisclosure of the evidence undermines the court's confidence in the reliability of Hatchett's conviction. This constitutional obligation to disclose favorable evidence to defendants before trial is outlined in *Brady v. Maryland*, 373 U.S. 83 (1963), a case the United States Supreme Court decided in 1963. The constitutional right is designed to ensure that defendants receive a fair trial and to protect the integrity of our criminal justice system.

The prosecution's case against Hatchett heavily relied on the testimony of a man who claimed to have witnessed the murder. At trial, the prosecution presented evidence that the eyewitness identified Hatchett as the person he saw commit the crime. However, the prosecution failed to disclose to Hatchett or the jury that just days earlier the eyewitness positively identified someone other than Hatchett as the perpetrator. The prosecution also failed to disclose to Hatchett or the jury that the eyewitness smoked crack cocaine in the hours before the crime, potentially inhibiting his ability to accurately perceive the crime.

The prosecutor's omissions implicate a violation of the defendant's constitutional rights. This constitutional violation requires an erasure of Hatchett's conviction and renders void the trial in which you served as a juror. Furthermore, prosecutors have elected not to retry Hatchett for the murder. While prosecutors are permitted to retry Hatchett with a new jury that would hear the favorable evidence the prosecutors concealed at the trial in which you served as a juror, they have elected not to do so. In light of the new evidence that supports Hatchett's innocence, prosecutors concluded that there was no longer sufficient evidence supporting Hatchett's guilt to warrant an attempt to convince a jury that he committed the murder.

The Clerk of Court sent a copy of this letter to each of the jurors from Hatchett's trial. The Clerk of Court also sent a copy of this letter to the witnesses from Hatchett's trial, the police officers who investigated the crime, the victim's family members, the Brooklyn District Attorney, the Legal Aid Society, Brooklyn Defender Services, the New York Police Department, and the New York Office of Victim Services.

You are under no obligation to take any action based on receiving this letter. Rather, the letter is being sent to you solely to update you on the status of Hatchett's case. The court is grateful for your service and regrets that Hatchett's initial trial was corrupted by the prosecutor's misconduct.