I. INTRODUCTION

The fiftieth anniversary of *Brady v. Maryland* brought attention to what scholars and jurists have been describing for years as an epidemic of *Brady* violations. In an effort to curb patterns of non-disclosure, stakeholders have convened working groups, courts and bar associations have issued reports and

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recommendations, and the Department of Justice has established policies intended to increase Brady compliance and accountability. The focus of the attention paid to Brady compliance in recent years has been aimed almost exclusively at adult criminal prosecutions. There is no question that the Brady right exists in juvenile court. But in spite of the fact that approximately 1.5 million juvenile cases are processed through the courts each year, little or no attention has been given to the issue of whether the epidemic of Brady violations in adult courts is playing out in the juvenile courts as well.

There are strong reasons for believing that Brady violations occur at higher rates in juvenile proceedings and that the juvenile Brady right is under-enforced. A burgeoning innocence movement in juvenile courts suggests the possibility that wrongful convictions of juveniles are widespread. Scholars who have examined the conditions that lead to wrongful convictions of adults find that those conditions are present or exacerbated in juvenile courts. Similarly, it appears that the conditions that lead to Brady violations in criminal cases are present or exacerbated in juvenile court.


5. Ogden, supra note 3.


It would be a mistake to disregard or underestimate the impact of *Brady* violations in juvenile courts simply because of the comparatively short sentences juveniles face. The personal cost of *Brady* violations to wrongfully convicted youth is significant, as is the systemic harm that *Brady* violations pose to the juvenile system. Incarceration of children has a far more traumatizing effect than adult incarceration, and in an increasingly punitive juvenile system, the lengths of sentences sometimes exceed the permissible sentences in adult court. Like adult convictions, juvenile adjudications carry increasingly harsh collateral consequences.

Children who are adjudicated delinquent can be deported, expelled from schools, evicted from public housing, ordered to register as a sex offender for life, disqualified from educational assistance, and barred from future employment opportunities. *Brady* violations committed against juveniles therefore undermine the very purpose of the juvenile system because they weaken the ability of the juvenile system to rehabilitate—ostensibly the primary goal of the juvenile system.

Promoting *Brady* compliance in this context is not only compatible with but also critical to the rehabilitative goals of juvenile court. This symposium essay narrowly aims to begin a conversation about the intersection of the *Brady* and juvenile due process rights. The essay examines characteristics of juvenile proceedings that are conducive to higher rates of *Brady* violations, as well as the features of juvenile proceedings that lead to the under-enforcement of the *Brady* right.

II. BARRIERS TO *BRADY* COMPLIANCE AND REMEDIATION IN JUVENILE COURTS

Scholars have identified conditions that create a landscape ripe for *Brady* violations in criminal courts. Framed sometimes as causes and sometimes as conditions precedent, the factors include: pressure within prosecutors’ offices to win; sincere but incorrect assessments by prosecutors as to what is material; the prosecutor’s fear of repercussions as a top factor leading to *Brady* violations.
high prosecution caseloads and insufficient staff and resources, a failure by police to disclose information to prosecutors, a lack of any meaningful repercussions for prosecutors who deliberately withhold Brady material, an otherwise weak prosecution case, and the prosecutor’s fear of the consequences of late disclosure.

There is no reason to think that the factors listed above are less present in juvenile proceedings. On the contrary, there are specific characteristics of juvenile proceedings that contribute to a greater likelihood of Brady violations. These characteristics constrain the ability of prosecutors to comply with Brady in the first place and make it more difficult for courts and defendants to discover and remedy Brady violations. These characteristics fall into two categories: (1) structural aspects of juvenile court proceedings that result in a Brady right that is, in practice, a diminished version of the adult Brady right; and (2) conventions of juvenile practice that exacerbate these structural deficiencies.

A. Structural Aspects of Juvenile Court Proceedings that Result in a Practically Diminished Brady Right

The dilution of the Brady right in juvenile court is due in part to two characteristics of juvenile proceedings that are structural in nature, in the sense that they are grounded in juvenile code provisions, are largely consistent across jurisdictions, and are related to the structure of litigation in the juvenile setting. These structural aspects of juvenile proceedings create a poor platform for Brady litigation and make it unlikely that Brady violations will come to light.

First, the life of a juvenile case is significantly shorter than that of an adult criminal case. Most jurisdictions, operating under the principles that a quicker resolution is more conducive to rehabilitation and that extended pretrial detention undermines rehabilitative aims, set very quick statutory speedy trial deadlines. While the presumptive speedy trial timeline for adult cases is 90

14. Barkow, supra note 13, at 2092. See also Scheck, supra note 13, at 2216.
15. Barkow, supra note 13, at 2092.
16. Barkow, supra note 13, at 2093; Scheck, supra note 13 (identifying the failure of police to disclose Brady material to the prosecutor as a top factor leading to Brady violations).
17. Barkow, supra note 13, at 2093–94. See also Scheck, supra note 13, at 2019.
days for detained individuals and 180 days for defendants on release, national recommendations for juvenile case processing times range from 15 to 30 days for detained youth and 30 to 65 days for released youth. However, discovery litigation generally, and Brady litigation specifically, is a time-intensive process which cannot necessarily be completed within short timeframes. Because truncated juvenile court timelines mean fewer pretrial court hearings, both parties have fewer opportunities for discovery litigation. Despite the shortened timelines in juvenile courts, statutory pretrial procedural provisions in juvenile court—including discovery provisions—are often adopted wholesale from adult court, with little thought as to whether or not alternative provisions should be adopted to account for the expedited process. On balance, therefore, the

(1999) (20 days); KAN. STAT. ANN. § 38-2251 (West 2010) (60 days); LA. CHILD. CODE ANN. art. 877 (1999) (30 days or 60 days, depending on whether a crime of violence is involved); MD. R. JUV. CAUSES 11-114 (West 1996) (30 days); MINN. R. JUV. DEL. 15.02 (2010) (30 days); MISS. CODE ANN. § 43-21-551 (West 1980) (21 days); MO. R. JUV. P. 124.01 (West 2010) (60 days); N.H. REV. STAT. ANN. § 169-B:14 (2008) (21 days); N.J. STAT. ANN. § 2A:4A-38 (West 1995) (30 days); N.M. R. CHILD. CT. 10-343 (West 2014) (60 days); N.Y. FAM. CT. ACT § 340.1 (McKinney 1994) (60 days); N.D. CENT. CODE ANN. § 27-20-22 (West 2012) (14 days); OHIO R. JUV. P. 29 (2004) (60 days); PA. R. JUV. CT. P. 409 (West 2011) (20 days); TEX. FAM. CODE ANN. § 53.05 (West 1996) (10 days); WASH. R. JUV. CT. 7.8B(1)(c) (30 days); WIS. STAT. ANN. § 938.30 (West 2009) (30 days); W. VA. CODE ANN. § 49-5-9 (West 2007) (30 days). See also James C. Backstrom & Gary L. Walker, The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community, 32 WM. MITCHELL L. REV. 963, 968-69 (2006) (arguing that juvenile cases should be processed as quickly as possible, partly to serve the goal of deterrence).

22. AMER. BAR ASSN. ABA STANDARDS FOR CRIMINAL JUSTICE: SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES (3d ed. 2006). These presumptive timelines are “roughly similar to the speedy trial timelines of several state statutes or rules...” Commentary page 42.


25. Id. See Geraghty supra note 24, at 918 & n.119 (noting that some juvenile courts consider whether to allow any pre-adjudication procedures because of shortened time limit of juvenile cases).

26. See, e.g., COLO. R. JUV. P. 3.3 (adult discovery provisions adopted by reference); IDAHO R. JUV. 21 (same); IND. CODE ANN. § 31-32-10-1 (West, Westlaw through 2013 Second Reg. Sess.) (same); LA. CHILD. CODE ANN. art. 866 (West, Westlaw through 2013 Reg. Sess.) (same); N.J. R. CT. 3:1-1 (same); CONNECTICUT PRACTICE BOOK § 31a-16, 17 (same). See also Barry C. Feld, The Transformation of the Juvenile Court, 75 MINN. L. REV. 691, 691-92 (1991) (“[J]uvenile courts now converge procedurally and substantively with adult criminal courts.”); RANDY HERTZ, MARTIN GUGGENHEIM, & ANTHONY G. AMSTERDAM, NAT’L JUVENILE DEFENDER CTR., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES § 19.01 (2012). This process of importing adult statutory procedures wholesale into the juvenile proceedings is reflective of the courts’ approach to constitutional procedures as well: They are either adopted or rejected with little thought to developing alternative procedures specific to the juvenile context. See Mark R. Fondacaro, Christopher Slobogin & Tricia Cross, Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science, 57 HASTINGS L.J. 955, 956 (2006). Where there is less discovery in general, there is a greater likelihood of prosecutorial suppression of Brady. See Bennett L. Gershman, Reflections on Brady v. Maryland, 47 S. TEX. L. REV. 685, 725
The prosecutor in juvenile court has less time and fewer incentives to gather, review, and disclose discoverable materials; at the same time, the defense attorney has less time to investigate the case independently in order to discover that undisclosed materials exist or use the information that was disclosed by the prosecutor.27 The upshot of the juvenile respondent’s accelerated pretrial timeline, therefore, is that Brady violations may be less likely to be litigated pretrial.

Second—and critical to the litigation of Brady claims—juveniles often have no clear right to the post-conviction procedures that are necessary for uncovering and litigating Brady violations. Brady violations are by nature difficult to discover before or during trial.28 In cases where Brady violations are not discovered before sentencing, post-conviction proceedings offer the only opportunity to investigate and remedy Brady violations.29 Nearly all Brady claims require the introduction of evidence outside of the trial record. Because direct appeals offer no opportunity to introduce such evidence, appellate courts cannot make the materiality determination necessary to adjudicate a Brady claim on direct review,30 leaving that analysis to post-conviction procedures in most jurisdictions.31

For juveniles, post-conviction procedures are generally not available.32 Codes of criminal procedure are largely silent on the issue of whether juveniles

27. See Marcia Sprague & Mark Hardin, Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings, 35 U. LOUISVILLE J. FAM. L. 239, 284 n.101 (1997) (“Widespread use of discovery devices may not occur in juvenile court cases for several reasons. For example, large juvenile court caseloads, mandatory time restrictions, limited resources, and the general discouraging of interrogation of parties in juvenile court may contribute to this phenomenon.”).


29. Post-conviction proceedings are generally the only vehicle for challenging certain types of claims that almost always require introduction of additional evidence, such as ineffective assistance of counsel, claims relating to juror conduct, and Brady violations. See Hunton v. Sinclair, 732 F.3d 1124, 1130 (2013) (Fletcher, J., dissenting). With respect to Brady, violations before and during trial are often cured once the defense discovers the evidence and uses it at trial, and appellate review is limited to that which was known and in the record at trial. Post-conviction proceedings therefore offer the first and only opportunity to litigate Brady in a criminal case. See Robert Hochman, The Search for Truth in Criminal Trials, 63 U. CHI. L. REV. 1673, 1676–77 (1996).

30. See Hochman, supra note 29.

31. Like adults, juveniles plead guilty at rates of approximately 97-99%, and they may be more susceptible to false guilty pleas. Alison Redlich, The Susceptibility of Juveniles to False Confessions and False Guilty Pleas, 62 RUTGERS L. REV. 943, 944, 957 (2010). Because guilty pleas largely preclude appellate and collateral attacks on the conviction, Brady violations may be even further insulated.

can access post-conviction procedures available to adults, and most state juvenile codes contain no post-adjudication provisions. While in some jurisdictions it is unclear and perhaps unlikely that juveniles are permitted to petition for post-conviction relief, other jurisdictions expressly bar juveniles from seeking post-conviction relief or provide procedures more restrictive than those that apply to adults. Without this critical stage of litigation, juveniles have no way to challenge an adjudication that is tainted by a Brady violation that came to light only after the trial.

B. Conventions of Juvenile Practice that Exacerbate the Structural Deficiencies of the Proceedings

In addition to these structural characteristics of juvenile court, which weaken the Brady right by limiting or removing opportunities to litigate Brady violations, there are several conventions of juvenile practice that make it far less likely that these structural impairments will be compensated elsewhere. For example, in juvenile courts, the structural impediments to Brady litigation will not likely be offset by particularly diligent counsel (for either the prosecution or defense), attentive and interventionist judges, resourceful and competent clients, or public oversight.

For both the defense and prosecution, juvenile courts are often viewed as a training ground for adult criminal practice. In many offices, there is no permanent set of staff attorneys assigned to juvenile court; instead, these roles are filled by the least experienced attorneys in their respective offices. Juvenile prosecutors and defenders receive fewer investigative resources and less supervision. They are paid less than their counterparts in adult criminal court, but suffer from the same crippling caseloads that plague the adult system. Moreover, in many jurisdictions, a substantial percentage of juveniles waive their rights to counsel at the outset of the proceedings, often foreclosing their

(LexisNexis 2014) (same). Because Brady litigation generally requires that a defendant develop evidence outside the trial record, the absence of state post-conviction proceedings as a forum to present such evidence may effectively bar juveniles from obtaining federal habeas relief as well. Specifically, juveniles who raise Brady claims on direct appeal but have no state post-conviction forum that would allow them to present new evidence of a Brady violation may be barred from gathering and presenting evidence outside the trial record in federal habeas proceedings. See Cullen v. Pinholster, 131 S.Ct. 1388, 1398 (2011).

34. Tepfer & Niridir, supra note 32, at 562-63.
35. See id.
36. Birckhead, Culture Clash, supra note 9, at 973 n.69 (discussing defense resources and asserting that juvenile prosecutors tend to be “new and inexperienced prosecutors and may exercise their discretion inappropriately”) (quoting AM. PROSECUTORS RESEARCH INST., BRINGING BALANCE TO JUVENILE JUSTICE 5 (2002).
37. Id.
opportunities to litigate any legitimate issues in their cases.39

Even when juveniles have trial counsel, however, the nature and atmosphere of the proceedings often lead defense attorneys to engage in “best interests” advocacy rather than “express interests” advocacy, foregoing legitimate legal challenges because they believe that their clients would benefit from the services accessible through the juvenile system.40 Discovery motions are often discouraged by courts, and aggressive discovery litigation is perceived by judges as undercutting the rehabilitative aims of juvenile court.41 One survey indicated that only about 30 percent of juvenile defense attorneys file written motions and, of these, many submit only standard, boilerplate motions.42 A national survey published in 2009 revealed that juvenile court judges view client-centered representation as interfering with the judicial function.43 In a forum where the fact-finder is almost always the judge, judicial pressure to “conform to the nonadversarial and informal nature of juvenile proceedings” can be significant.44

On the prosecution side, because juvenile prosecutors are generally less experienced than their adult counterparts,45 they may be more likely to make honest mistakes as to whether information is material to culpability or punishment and thus subject to disclosure under Brady.46 Where juvenile


41. Drizin & Luloff, supra note 9, at 292–93. See also Tamar R. Birckhead, Delinquent by Reason of Poverty, 38 WASH. U. J.L. & Pol’y 53, 95 n.232 (2012); Puritz, supra note 9, at 578 (describing a “paternalistic culture of juvenile courts that views zealous advocacy with ridicule or hostility”).

42. Drizin & Luloff, supra note 9, at 290 (2007).


prosecutors lack staff support and other resources available to adult prosecutors, the obligation to search for Brady material in the hands of all relevant government actors raises greater challenges. Juvenile prosecutors, forced by shortened pretrial timelines and scarce resources to be hasty in their preparation, are more likely to cut corners on disclosure obligations and less likely to engage in thorough Brady investigations.47

Theoretically, the barriers to Brady compliance and remediation could be overcome by clients capable of directing their lawyers or litigating their Brady issues pro se, even in the absence of effective, well-resourced counsel and attentive judges who facilitate discovery litigation. Juvenile clients, however, are on the whole less equipped to provide accurate, complete, and relevant information to their attorneys.48 They are therefore less likely to point counsel toward potential Brady material, and far less likely to seek remedies outside their juvenile cases (whether through civil action, disciplinary complaints, or appeals to media), even where such proceedings are technically available.49

After trial, appellate review and post-conviction proceedings provide little opportunity for relief on Brady ground—even if such proceedings are formally available. Relatively few juvenile cases are appealed,50 largely because many juvenile sentences will have been completed before the conclusion of an appeal.51 While juveniles appeal few cases, they pursue even fewer post-conviction claims, either through state post-conviction collateral attacks (in the few states that allow them) or in federal habeas proceedings; this is due in large part to the lack of counsel for such proceedings, the inability of juveniles to pursue claims pro se, and the reluctance of lawyers to bring post-conviction claims when sentences are relatively short.52 As a result of all of these factors, very few juveniles challenge their adjudications after they are sentenced.53


47. See Barkow, supra note 15, at 2092. See also Blasser, supra note 3, at 2012 (“While some tasks performed by prosecutors in relation to their disclosure obligations are discrete, many are more time-intensive, more complex, and more dependent upon a prosecutor's judgment...”). A working group on best Brady practices noted that, in misdemeanor cases, prosecutors rarely even spoke to law enforcement before trial about the case because of the relatively quick timelines. Id. at 1981.


50. See Annitto, supra note 33, at 675.

51. See id. See also id. at 688–89 (discussing short sentences, deferential standard of review in juvenile appeals and the impact of high defense caseloads on likelihood of appeal).

52. See Drizin & Luloff, supra note 9, at 260. Because the collateral consequences of juvenile adjudications, such as lifetime sex offender registration or enhancement of future criminal penalties, can be quite severe, federal habeas relief may be available even where a juvenile sentence has been completed. See, e.g., D.S.A. v. Circuit Court Branch 1, 942 F.2d 1143, 1150 (7th
Finally, the confidentiality provisions of juvenile courts make it far less likely that prosecutorial misconduct will be uncovered by the media or watchdog groups.\(^5^4\) In 2003, the Center for Public Integrity released a report on prosecutorial misconduct in the adult court context. The report included a detailed history the media’s role in uncovering cases of prosecutorial misconduct that led to wrongful convictions.\(^5^5\) This type of public oversight is critical in a regime in which alternative sources of deterrence, such as civil lawsuits, professional discipline, and internal office regulation, remain largely unavailable.\(^5^6\) Where there is a general failure of bar disciplinary committees to respond to *Brady* violations in either adult or juvenile court,\(^5^7\) there is at least, in the adult context, a threat of media attention and public censure of offending prosecutors.\(^5^8\) For juveniles, there is no such scrutiny in the vast majority of cases.\(^5^9\) Juvenile prosecutors therefore have the comfort of knowing that, even if

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53. Amnito, note 31, at 684. See also Drizin & Luloff, *supra* note 9, at 294.

54. See Drizin & Luloff, *supra* note 9, at 307. In one study of wrongfully convicted youth, the majority of exonerees included in the analysis were youths tried in adult court. Tepfer & Niridir, *supra* note 9, at 898. Although the study acknowledges that wrongful convictions likely occur in juvenile courts at unduly high rates, juvenile cases were underrepresented in the data set “simply because those cases are confidential and rarely publicized, often making it impossible to obtain information about them.” *Id.*

55. CENTER FOR PUBLIC INTEGRITY, HARMFUL ERROR (June 2003).


Brady violations are discovered by lawyers or courts, there will likely be no public consequences for nondisclosure.

III. RETHINKING BRADY IN THE JUVENILE COURTS

Scholars have devoted much attention in the last several years to the inherent weaknesses of the Brady doctrine and to the critical lack of Brady enforcement and remedies. Yet this conversation has focused largely on the adult system. Where juvenile systems have fewer protections built in to facilitate Brady litigation, we can expect that the right is under-enforced in juvenile proceedings. This under-enforcement creates for juveniles a Brady right that is a diminished version of the right held by adults.

A wide range of responses to the problem of juvenile Brady enforcement is possible. Legislatures can reform juvenile discovery codes (or, in some cases, implement them in the first place) in a model that recognizes the limits created by accelerated juvenile timelines. New provisions might expand the scope of permissible discovery in order to eliminate the possibility that favorable evidence might never be discovered or disclosed by the prosecution; impose strict timelines for the prosecution to comply with discovery; and impose prophylactic measures designed to ensure Brady compliance. For example, discovery codes could require that prosecutors certify to the court that they have interviewed every member of the prosecution team, including law enforcement, and that they have obtained and reviewed all records from every member of the prosecution team. Legislatures can also grant juveniles equivalent access to post-conviction procedures and expedite post-conviction review so as not to moot out meritorious Brady claims, while also providing counsel to bring these claims. More locally, counties and municipalities can implement policies that facilitate the transmission of case information among prosecution team members, and individual offices can improve training for prosecutors, defense attorneys, and judges on both the applicability of Brady to juvenile cases and the necessity of legal-interests advocacy promoted by national standards. Finally, on the constitutional front, the juvenile due process right may have room for an


61. Id.

62. Such an investigation is required under Kyles v. Whitley, which held that “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case.” 514 U.S. 419, 437 (1995). A certification requirement, therefore, imposes little burden on the prosecution beyond what the constitutional already requires.
enhanced Brady right for juveniles, with prophylactic measures in place designed to prevent violations in a system poorly suited to remedy them.63

In the Supreme Court cases that adopt or reject various adult constitutional rights for juvenile proceedings, the Court has focused on the question of whether granting a given right to children will interfere with the rehabilitative goals of the juvenile courts and the vision of the juvenile court as a less formal and more intimate setting.64 A diminished version of the Brady right, however, serves no rehabilitative rationale. The concept of procedural justice—the theory that children are more likely to comply with the law in a procedural system they perceive to be fair—has permeated juvenile discourse since Justice Fortas noted in 1967 that “the appearance, as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.”65 And given that the juvenile Brady right is not diluted by judicial design, but rather as the unintended consequence of the structures and conventions of juvenile court, the discrepancy between Brady enforcement in the adult and juvenile contexts requires attention.

Some of the proposals listed above are modest and others, like constitutional reform, are far-reaching. This essay offers only a starting point for analyzing the intersection of Brady and the juvenile right to due process. And it encourages further attention to this important inquiry.

63. The Supreme Court has given lower courts little guidance on how to analyze the various free-standing criminal due process rights (like the Brady right) in the juvenile setting and has not clarified whether these rights are or should be different for juveniles. The full definition of juvenile due process is beyond the scope of this essay, but it suffices to say that the Supreme Court has not clarified whether the narrowly defined due process principles applicable to criminal cases—as opposed to the more flexible civil due process principles—even apply to juvenile cases. See Medina v. California, 505 U.S. 437, 445 (1992) (adopting a criminal due process test narrower than the test applicable in non-criminal cases).

64. Schall v. Martin, 467 U.S. 253, 263 (1984); McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1976); In re Winship, 397 U.S. 358, 376 (1970) (Harlan, J., concurring); In re Gault, 387 U.S. 1, 26 (1967). This concern contributed to the Court’s decision not to extend, for example, the right to a jury trial to juveniles. McKeiver, 403 U.S. at 545 (“There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.”).