

# BRADY AND THE JUVENILE COURTS

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## I. INTRODUCTION

The fiftieth anniversary of *Brady v. Maryland*<sup>1</sup> brought attention to what scholars and jurists have been describing for years as an epidemic of *Brady* violations.<sup>2</sup> In an effort to curb patterns of non-disclosure, stakeholders have convened working groups,<sup>3</sup> courts and bar associations have issued reports and

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1. 373 U.S. 83 (1963).

2. See *United States v. Olsen*, 737 F.3d 625 (9th Cir. 2013) (Kozinski, J., dissenting) (“There is an epidemic of *Brady* violations abroad in the land.”). In his *Olsen* dissent, Chief Judge Kozinski cited twenty-eight cases in support of the position that patterns of *Brady* violations had reached “epidemic proportions in recent years.” *Id.* at 631. See also *Montgomery v. Bobby*, 654 F.3d 668, 692 (6th Cir. 2011) (Merritt, J., dissenting) (describing “widespread” nature of *Brady* problem and citing extensive scholarship regarding prosecutorial misconduct in general); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 421 (2010) (describing a “nationwide epidemic of *Brady* violations”); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1148–49 (2005) (noting systemic problems with the adversarial system that lead to prosecutors withholding favorable evidence).

3. See Jennifer Blasser, Keith A. Findley, Stephanos Bibas, Ronald F. Wright, Jennifer E. Laurin & Cookie Ridolfi, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 2023 (2010); Memorandum from David W. Ogden, Deputy Att’y Gen., Dep’t of Justice, to Dep’t Prosecutors, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), available at <http://www.justice.gov/dag/discovery-guidance.html>.

recommendations,<sup>4</sup> and the Department of Justice has established policies intended to increase *Brady* compliance and accountability.<sup>5</sup> The focus of the attention paid to *Brady* compliance in recent years has been aimed almost exclusively at adult criminal prosecutions.<sup>6</sup> There is no question that the *Brady* right exists in juvenile court.<sup>7</sup> But in spite of the fact that approximately 1.5 million juvenile cases are processed through the courts each year,<sup>8</sup> 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.<sup>9</sup> Similarly, it appears that the conditions that lead to *Brady* violations in criminal cases are present or exacerbated in juvenile cases.

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4. N.Y.C. BAR, REPORT OF THE CRIMINAL COURTS COMMITTEE AND CRIMINAL JUSTICE OPERATIONS COMMITTEE RECOMMENDING THE ADOPTION OF A *BRADY* CHECKLIST (2011), available at [http://www2.nycbar.org/pdf/report/uploads/7\\_20072170ReportrecommendingtheadoptionofBradychecklist.pdf](http://www2.nycbar.org/pdf/report/uploads/7_20072170ReportrecommendingtheadoptionofBradychecklist.pdf); A.B.A., RESOLUTION 104A, available at [http://www.abajournal.com/files/104ARevised\\_2011.pdf](http://www.abajournal.com/files/104ARevised_2011.pdf); LAURAL HOOPER & SHEILA THORPE, FED. JUDICIAL CTR., *BRADY V. MARYLAND MATERIAL IN THE UNITED STATES DISTRICT COURTS: RULES, ORDERS, AND POLICIES* (2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/\\$file/bradyma2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/$file/bradyma2.pdf).

5. Ogden, *supra* note 3.

6. *See supra* notes 3–5.

7. *See, e.g.*, Matter of Evan U., 664 N.Y.S.2d 189, 192 (N.Y. App. Div. 1997) (assuming that *Brady* applies in juvenile court); Matter of C.L.W., 467 A.2d 706, 711 (D.C. 1983) (same); T.C. v. State, 364 S.W.3d 53, 63 (Ark. 2010) (same); State *ex rel.* L.V., 66 So. 3d 558, 561–62 (La. Ct. App. 2011) (same); *In re R.D.*, 44 A.3d 657, 675 (Pa. 2012) (same).

8. CRYSTALL KNOLL & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PROGRAMS, DELINQUENCY CASES IN JUVENILE COURT 2009, at 1 (2012), available at <http://www.ojjdp.gov/pubs/239081.pdf>.

9. *See* Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 260, 289–92 (2007). Drizin and Luloff focus on several conditions of juvenile court that likely increase the risk of wrongful convictions, including: children's inability to understand *Miranda* warnings and susceptibility to false confession; low-quality defense representation and high rates of waiver of counsel; absence of meaningful post-conviction remedies for juveniles; and lack of media oversight in juvenile courts. *Id.* at 265–310. *See also* Panel 3 *Juveniles in the Innocence Project: Current Cases in Practice*, 18 CARDOZO J.L. & GENDER 615 (2012) (discussing the susceptibility of juveniles to false confessions and related factors that contribute to wrongful convictions); Joshua A. Tepfer, Laura H. Niridir & Lynda M. Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887 (2010); Tamar R. Birkhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 RUTGERS L. REV. 959, 961, 970–77 (2010) [hereinafter Birkhead, *Culture Clash*] (analyzing the role of culture within juvenile courtrooms in contributing to wrongful convictions); Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943 (2010) (reviewing causes of false confessions by juveniles in the interrogation room).

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,<sup>10</sup> 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.<sup>11</sup> *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.<sup>12</sup>

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,<sup>13</sup> sincere but incorrect assessments by prosecutors as to what is material,<sup>14</sup>

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10. Marsha Levick, Jessica Feierman, Sharon Messenheimer Kelley, Naomi E. S. Goldstein & Kacey Mordecai, *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 307–08, 312 (2012).

11. Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 797–98 (2010).

12. See *In re Gault*, 387 U.S. 1, 26 (1967) (recognizing that the failure to provide meaningful procedural protections for juveniles would lead juveniles to perceive the system as unfair, and that this perception would undermine the rehabilitative goals of juvenile courts). See also Tamar R. Birkhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1471–72 (2009) (exploring the notion of procedural justice, and the impact of perceptions of fairness on future compliance with the law).

13. Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091 (2010); Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2216 (2010) (identifying the prosecutor's fear of repercussions as a top factor leading to *Brady* violations).

high prosecution caseloads and insufficient staff and resources;<sup>15</sup> a failure by police to disclose information to prosecutors;<sup>16</sup> a lack of any meaningful repercussions for prosecutors who deliberately withhold *Brady* material;<sup>17</sup> an otherwise weak prosecution case;<sup>18</sup> and the prosecutor's fear of the consequences of late disclosure.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> 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.

18. JON B. GOULD, JULIA CARRANO, RICHARD LEO & JOSEPH YOUNG, NAT'L INST. OF JUSTICE, PREDICTING ERRONEOUS CONVICTIONS: A SOCIAL SCIENCE APPROACH TO MISCARRIAGES OF JUSTICE at xix (2012). A weak prosecution case leads prosecutors to suppress exculpatory evidence where they otherwise would feel no incentive to do so. *Id.*

19. Scheck, *supra* note 13, at 2236.

20. RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY G. AMSTERDAM, NAT'L JUVENILE DEFENDER CTR., TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE DELINQUENCY CASES § 15.04(b) (2012).

21. For deadlines set in detained cases, *see, e.g.*, ALASKA R. DELINQ. 12 (West 1999) (30 days); ARIZ. R. P. JUV. CT. 29 (2001) (45 days); ARK. CODE ANN. § 9-27-327 (West 2013) (14 days); CAL. WELF. & INST. CODE § 657 (West 2014) (15 days); COLO. REV. STAT. ANN. § 19-2-708 (West 2013) (60 days); D.C. CODE § 16-2310(e)(1)(A) (2001) (30 days); GA. CODE ANN. § 15-11-39 (West) (10 days); IDAHO R. JUV. 15 (West 1997) (45 days); 705 ILL. COMP. STAT. 405 / 5-601(4)

days for detained individuals and 180 days for defendants on release,<sup>22</sup> national recommendations for juvenile case processing times range from 15 to 30 days for detained youth and 30 to 65 days for released youth.<sup>23</sup> However, discovery litigation generally, and *Brady* litigation specifically, is a time-intensive process which cannot necessarily be completed within short timeframes.<sup>24</sup> Because truncated juvenile court timelines mean fewer pretrial court hearings, both parties have fewer opportunities for discovery litigation.<sup>25</sup> 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.<sup>26</sup> On balance, therefore, the

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(West 2005) (30 days); IND. CODE ANN. § 31-37-11-2 (West 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. 7.8(b)(1)(i) (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.

23. JEFFREY A. BUTTS, U.S. Dep’t of Justice, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DELAYS IN JUVENILE COURT PROCESSING OF DELINQUENCY CASES (1997).

24. *See* Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 560-62 (2007) (detailing litigation strategies prosecutors employ, including delay, in order to subvert *Brady*); Diane Geraghty, *Juvenile Discovery: A Developing Trend and a Word of Caution*, 7 PEPP. L. REV. 897, 918 (1980).

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

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.<sup>27</sup> 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.<sup>28</sup> In cases where *Brady* violations are not discovered before sentencing, post-conviction proceedings offer the only opportunity to investigate and remedy *Brady* violations.<sup>29</sup> 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,<sup>30</sup> leaving that analysis to post-conviction procedures in most jurisdictions.<sup>31</sup>

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

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(2006).

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.”).

28. See Ellen Yaroshesky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 GEO. J. LEGAL ETHICS 913, 942 n.32 (2012) (quoting Brief for the Orleans Public Defenders as Amicus Curiae Supporting Petitioner at 6 n.3, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145)).

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.

32. See generally Joshua A. Tepfer & Laura H. Nirider, *Adjudicated Juveniles and Collateral Relief*, 64 ME. L. REV. 553 (2012) (discussing the absence of state post-conviction remedies available to juveniles). *But see* Tenn. Code Ann. § 37-1-301–322 (2013) (providing for post-conviction collateral attacks against juvenile adjudications); Ohio Rev. Code Ann. § 2953.21

can access post-conviction procedures available to adults, and most state juvenile codes contain no post-adjudication provisions.<sup>33</sup> 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.<sup>34</sup> 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<sup>35</sup>; instead, these roles are filled by the least experienced attorneys in their respective offices.<sup>36</sup> Juvenile prosecutors and defenders receive fewer investigative resources and less supervision.<sup>37</sup> They are paid less than their counterparts in adult criminal court, but suffer from the same crippling caseloads that plague the adult system.<sup>38</sup> Moreover, in many jurisdictions, a substantial percentage of juveniles waive their rights to counsel at the outset of the proceedings, often foreclosing their

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(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).

33. Megan Anitto, *Juvenile Justice Appeals*, 66 U. MIAMI L. REV. 671, 684 (2012).

34. Tepfer & Niridir, *supra* note 32, at 562–63.

35. *See id.*

36. Birkhead, *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.*

38. See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1127–28 (1991).

opportunity to litigate any legitimate issues in their cases.<sup>39</sup>

Even when juveniles have trial counsel, however, the nature and atmosphere of the proceedings too 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.<sup>40</sup> Discovery motions are often discouraged by courts, and aggressive discovery litigation is perceived by judges as undercutting the rehabilitative aims of juvenile court.<sup>41</sup> One survey indicated that only about 30 percent of juvenile defense attorneys file written motions and, of these, many submit only standard, boilerplate motions.<sup>42</sup> A national survey published in 2009 revealed that juvenile court judges view client-centered representation as interfering with the judicial function.<sup>43</sup> 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.<sup>44</sup>

On the prosecution side, because juvenile prosecutors are generally less experienced than their adult counterparts,<sup>45</sup> 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*.<sup>46</sup> Where juvenile

39. NAT'L JUVENILE DEFENDER CTR., WAIVER OF RIGHT TO COUNSEL (undated) available at [http://www.njdc.info/pdf/Waiver\\_of\\_the\\_Right\\_to\\_Counsel.pdf](http://www.njdc.info/pdf/Waiver_of_the_Right_to_Counsel.pdf). See generally Mary Berkheiser, *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 FLA. L. REV. 577, 610–22 (2002) (discussing judges' failure to inform youth they had a right to an attorney, failure to secure a valid waiver, exercise of undue pressure on respondents to waive counsel, and inability of youth to comprehend the meaning of a waiver of counsel).

40. See Bircckhead, *Culture Clash*, *supra* note 9, at 979; Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245, 247–48 (2005); Ellen Marrus, *Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime*, 62 MD. L. REV. 288, 290 (2003); Patricia Puritz, *In Defense of Children*, 42 HARV. C.R.-C.L. L. REV. 577, 578 (2007).

41. Drizin & Luloff, *supra* note 9, at 292–93. See also Tamar R. Bircckhead, *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).

43. Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, 43 LOY. U. CHI. L.J. 833, 880 (2012) (citing ROBIN WALKER STERLING, NAT'L JUVENILE DEFENDER CTR., THE ROLE OF DEFENSE COUNSEL IN DELINQUENCY COURT (2009), available at [http://www.njdc.info/pdf/role\\_of\\_juvenile\\_defense\\_counsel.pdf](http://www.njdc.info/pdf/role_of_juvenile_defense_counsel.pdf)).

44. Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655, 1673 (1996).

45. See 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, 967 (2006).

46. See Melissa Lawson Romero, *Connick v. Thompson: Forsaking Constitutional Due Process for Fear of Flooding Litigation and Loss of Municipal Autonomy*, 89 DENV. U. L. REV. 771, 789–90 (2012) (“Inexperience combined with competitive training often translates in practice into the pressure to act unethically in order to win a case.”). See also Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 545–46



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.<sup>47</sup>

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.<sup>48</sup> 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.<sup>49</sup>

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,<sup>50</sup> largely because many juvenile sentences will have been completed before the conclusion of an appeal.<sup>51</sup> 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.<sup>52</sup> As a result of all of these factors, very few juveniles challenge their adjudications after they are sentenced.<sup>53</sup>

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(2007) (explaining that inexperienced prosecutors may not press experienced law enforcement officers on *Brady*). See also Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 729–30 (1998).

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.

48. Thomas Grisso, *The Competence of Adolescents As Trial Defendants*, 3 PSYCHOL. PUB. POL’Y & L. 3, 16–17 (1997).

49. See Amy E. Webbink, *Access Denied: Incarcerated Juveniles and Their Right of Access to Courts*, 7 WM. & MARY BILL RTS. J. 613, 633–34 (1999).

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.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> Where there is a general failure of bar disciplinary committees to respond to *Brady* violations in either adult or juvenile court,<sup>57</sup> there is at least, in the adult context, a threat of media attention and public censure of offending prosecutors.<sup>58</sup> For juveniles, there is no such scrutiny in the vast majority of cases.<sup>59</sup> Juvenile prosecutors therefore have the comfort of knowing that, even if

Cir. 1991).

53. Anitto, 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).

56. *See generally* David Keenan, Deborah Jane Cooper, David Lebowitz, Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011).

57. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 731–42 (1987).

58. When the Center for Public Integrity released its report, several media outlets picked up on the story in order to report on their own local prosecutors who were cited in the report. *See, e.g.*, Jessamyn Blau, *Ex-Prosecutor in City Erred in 25 Cases, Study Says*, ST. LOUIS POST-DISPATCH, June 26, 2003, at A1; Robyn E. Blumner, *Reining in the Prosecutor Kings*, ST. PETERSBURG TIMES, July 20, 2003, at 7D; Reid J. Epstein, *Study Targets Prosecutorial Mishandling; 2 Walworth Officials Included in National Review Over 30 Years*, MILWAUKEE J. SENTINEL, June 26, 2003, at 5B; Editorial, *Abuse Pose [sic] Major Concern*, SUN-SENTINEL (Fort Lauderdale, FL), June 29, 2003, at 4F; Editorial, *Big Bad Prosecutors*, ROCKY MOUNTAIN NEWS (Denver, CO), June 27, 2003, at 46A; Editorial, *Policing Prosecutors*, ST. PETERSBURG TIMES, July 12, 2003, at 16A; Editorial, *Tougher Penalties for Abuses Can Protect the Innocent*, U.S.A. TODAY, July 14, 2003, at 10A; Gwen Filosa, *Prosecutors' Misconduct Cited; 26 Cases from N.O. Detailed in Study*, TIMES-PICAYUNE (New Orleans, LA), June 26, 2003, at Metro-1; Mike McPhee, *Prosecutor Study Cites 176 Colo. Cases*, DENVER POST, June 26, 2003, at B2; Laura Parker, *Court Cases Raise Conduct Concerns*, U.S.A. TODAY, June 26, 2003, at 3A; Jeb Phillips, *Few Ohio Prosecutorial Mistakes Found in Study*, COLUMBUS DISPATCH, June 28, 2003, at 3C; Don Plummer, *Misconduct Report Cites Georgia DAs*, ATLANTA JOURNAL-CONSTITUTION, June 28, 2003, at 3E; Peter Shinkle, *Joyce Defends City Prosecutors, Questions Report Alleging Misconduct – Legal Community is Mixed on Significance of Findings*, ST. LOUIS POST-DISPATCH, June 27, 2003, at B1; *Washington in Brief*, WASH. POST, June 26, 2003, at A8; Henry Weinstein, *Prosecutor Misconduct Probed in National Study; About 2,000 Cases Have Been Overturned, Set Aside or Retried Since '70 Because of Wrongdoing*, L.A. TIMES, June 26, 2003, at 24.

59. *See* Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155, 155–58 (1999).

*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.<sup>60</sup> Yet this conversation has focused largely on the adult system.<sup>61</sup> 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.<sup>62</sup> 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

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60. See generally Randall Grometstein & Jennifer M. Balboni, *Backing Out of A Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct Post Thompson*, 75 ALB. L. REV. 1243 (2012); Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303 (2010); George A. Weiss, *Prosecutorial Accountability After Connick v. Thompson*, 60 DRAKE L. REV. 199, 201 (2011); Ellen Yaroshevsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

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.<sup>63</sup>

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.<sup>64</sup> 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.”<sup>65</sup> 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.

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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.”).

65. *In re Gault*, 387 U.S. at 26. See also Birkhead, *supra* note 12, at 1470–83.