The Right of Access and Juvenile Delinquency Hearings: The Future of Confidentiality

I. INTRODUCTION

As the media has sought to provide greater coverage of the judicial process in recent years, the courts have been faced with the difficult task of resolving the conflict between the first amendment rights of the press[1] and the sixth amendment rights of an accused[2] to a fair trial.[3] In resolving this conflict, the Supreme Court has recognized a constitutional right of access for the public and the press to attend criminal trials that must be balanced against the constitutionally protected rights of the accused and the state's interests in closure.[4] Although the Court's holdings on these right of access cases have been narrowly framed,[5] the language of the various decisions

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[1]The first amendment provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[2]The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

[3]*See, e.g.*, Chandler v. Florida, 449 U.S. 560 (1981) (permitting television, radios, and still photography coverage of criminal trials notwithstanding the objections of the defendants); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (invalidating a court's "gag order" in a criminal trial as a prior restraint on the press); Branzburg v. Hayes, 408 U.S. 665 (1972) (defendant's right to a fair trial overrides news reporter's claim of a first amendment right to not reveal confidential sources); Sheppard v. Maxwell, 384 U.S. 333 (1966) (defendant was deprived of a fair trial because of prejudicial publicity); Irwin v. Dowd, 366 U.S. 717 (1961) (first reversal of a state conviction due to prejudicial publicity). *See generally* J. NOWAK, R. ROTUNDA & J. NELSON, CONSTITUTIONAL LAW 910-23 (2d ed. 1983).

[4]*See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion); *cf.* Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 824 (1984) (recognizing a constitutionally protected right of access to voir dire proceedings). For an in depth discussion of these cases, see *supra* notes 78-107, 46-77, 109-22 and accompanying text.

[5]Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611 n.27 (1982) ("We emphasize that our holding is a narrow one . . . ."); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558 (1980) ('The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.").

contains broad implications that the access right may not be limited to the context of criminal trials.[6]

One area to which the right of access could be extended is juvenile delinquency hearings.[7] Juvenile delinquency hearings have traditionally been confidential and closed to the public and the press in an effort to promote rehabilitation rather than punishment.[8] The development of the newly articulated constitutional right of access, however, has created a "disturbing paradox" in cases where minors are involved.[9] At present, a state is permitted to mandate the closure of all proceedings to protect a juvenile charged with rape,[10] but, a state is not permitted to mandate the closure of part of a criminal trial to protect a minor who was a victim of a rape.[11] Thus, the juvenile offender is currently afforded more protection from the adverse effects of publicity than the juvenile victim.[12] With the increase in juveniles committing acts which would be crimes if committed by adults,[13] it is likely that the press will be making an increased effort to obtain access

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[6]*See, e.g.,* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 582 (1980) (Stevens, J., concurring) ("This is a watershed case. . . . [N]ever before has [the Court] squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."); *id.* at 599 (Stewart, J., concurring) ("[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.").

[7]This Note recognizes that juvenile courts deal with many types of cases concerning delinquency, neglect, and dependency. The discussion herein, however, relates only to juvenile delinquency hearings, i.e., hearings on acts committed by a minor that would be crimes if committed by an adult. The discussion does not apply to status offenses—conduct illegal only for children, e.g., truancy or incorrigibility.

[8]*See generally* Jonas, *Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment,* 17 COLUM. J.L. & SOC. PROBS. 287, 290-92, 295-97 (1982); Note, *Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation,* 65 IOWA L. REV. 1471, 1471 (1980); Comment, *Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of "Conditional Access,"* 13 U.C.D. L. REV. 123, 126-29 (1979).

[9]*See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 612 (1982) (Burger, C.J., dissenting).

[10]*See In re* J.S., 140 Vt. 458, 438 A.2d 1125 (1981) (construing the legislative intent of VT. STAT. ANN. tit. 33, § 651(c), (d) (1981) as specifically prohibiting the media and the general public from attending juvenile hearings or reporting what transpired there); N.H. REV. STAT. § 169-C:14 (Supp. 1983).

[11]Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611 n.27 (1982); *id.* at 612 (Burger, C.J., dissenting).

[12]*See id.* In many states, juvenile offenders are also given the additional protection of confidential records. *See, e.g.,* IND. CODE § 31-6-8-1, -1.2, -1.5 (1982).

[13]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CARE 1 (1967). [hereinafter cited as TASK FORCE]. The task force called juvenile crime "the single most pressing and threatening aspect of the crime problem in the United States." *Id. See also* L. SIEGEL & J. SENNA, JUVENILE DELINQUENCY THEORY, PRACTICE, AND LAW 271 (1981); Jonas, *supra* note 8, at 305-06.

to more juvenile proceedings. This will force the courts to examine the issue of whether the public's right of access to criminal trials should be expanded to include juvenile proceedings.

Despite the juvenile justice system's philosophy that confidentiality promotes rehabilitation, there are dangers in a court of justice conducting all of its proceedings strictly in private.[14] The reasons for open criminal trials are as applicable to juvenile courts as to others.[15] The Supreme Court has acknowledged that there is little to distinguish a juvenile adjudicatory hearing from a criminal prosecution,[16] in extending most of the constitutional protections accorded criminal defendants to juvenile respondents.[17] Moreover, several studies have concluded that the present juvenile justice system has failed to achieve its dual goals of preventing juvenile crime and rehabilitating juvenile offenders.[18] Therefore, the benefits to the public of open juvenile proceedings would appear to outweigh the state's interests in closed proceedings. Thus, no compelling basis exists for treating juvenile proceedings differently than criminal trials for the purposes of the right of access.

This Note will examine the development of the public's right of access to attend criminal trials and analyze the rationale underlying this constitutional right. This rationale will then be applied to juvenile delinquency hearings to suggest that the first amendment right of access should be extended to include such hearings. The impact on the juvenile justice system if the right of access is so extended will

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[14]The right to a public trial reflects the "traditional Anglo-American distrust for secret trials." *In re* Oliver, 333 U.S. 257, 268 (1948). The distrust for secret trials arose from the notorious abuses of the Spanish Inquisition, the English Court of Star Chamber, and the French monarchy's abuse of the lette de cachet. *See id.* at 268-69. The public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.* at 270, *quoted in* Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979).

[15]Open trials enhance the integrity and quality of criminal trials and promote confidence in the legal system by "[permitting] the public to participate in and serve as a check upon the judicial process." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982). For a more detailed discussion of the benefits of public trials, see *infra* notes 56, 190-96 and accompanying text.

[16]Breed v. Jones, 421 U.S. 519, 529 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971); *In re* Winship, 397 U.S. 358, 365 (1970); *In re* Gault, 387 U.S. 1, 50 (1967).

[17]*See* Breed v. Jones, 421 U.S. 519, 541 (1975) (recognizing due process guarantees juveniles the right to protection against double jeopardy); *In re* Winship, 397 U.S. 358, 368 (1970) (recognizing due process guarantees juveniles the right to a standard of proof beyond a reasonable doubt); *In re* Gault, 387 U.S. 1, 30 (1967) (recognizing due process guarantees juveniles the right to notice of charges, the right to counsel, the right to confront and cross-examine witnesses, and the right against self-incrimination).

[18]*See generally* TASK FORCE, *supra* note 13, at 7 and sources cited therein.

be analyzed and a description of the possible effects on juvenile court procedures will be provided. Finally, this Note will examine the various statutory schemes on juvenile court access currently being used by the states and analyze how these statutes will have to be revised if the courts extend the right of access to juvenile proceedings.

II. The Development of the Right of Access

The constitutional right of access to criminal trials developed[19] to counter the limitations on the press imposed by the courts' efforts to safeguard the accused's due process right to a fair trial from the effects of prejudicial pretrial publicity.[20] In the landmark case of *Sheppard v. Maxwell*,[21] the Supreme Court held that the defendant was deprived of a fair trial because of "the massive, pervasive and prejudicial publicity that attended his prosecution."[22] The Court noted "that unfair and prejudicial news comment on pending trials [had] become increasingly prevalent"[23] and found that trial judges have an affirmative constitutional duty to ensure that the accused's right to fair trial is not jeopardized by the effects of prejudicial publicity.[24]

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[19]Some scholars suggest that the right of access had its beginnings in such cases as Zemel v. Rusk, 381 U.S. 1 (1965) (rejecting first amendment claim of right to gather information, in upholding State Department decision to deny petitioner a passport to travel to Cuba); Branzburg v. Hayes, 408 U.S. 665 (1972) (news reporter's right to gather information and protect confidential sources was limited by the sixth amendment rights of an accused); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (upholding federal prison regulation restricting access to prisons); Pell v. Procunier, 417 U.S. 817 (1974) (upholding similar regulation to state prisons). Jonas, *supra* note 8, at 334-35; J. Nowak, R. Rotunda & J. Young, *supra* note 3, at 905-22. These writers note the broad implications of the right of access in terms of gathering information about the operation of the government. This Note only deals with the right of access in the context of the right to attend judicial proceedings. Therefore, the discussion of the development of the right of access herein is focused on and limited to cases that led to the Court's recognition of the right to attend criminal trials.

[20]*See generally*, sources cited *supra* note 3.

[21]384 U.S. 333 (1966).

[22]*Id.* at 335. The following quote from the opinion of Judge Bell of the Ohio Supreme Court provides an indication of the massive publicity surrounding Sheppard's trial:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life."

Id. at 356 (quoting State v. Sheppard, 165 Ohio St. 293, 294, 135 N.E.2d 340, 342 (1956)).

[23]384 U.S. at 362.

[24]*Id.* at 362-63. The court outlined some alternative methods to protect the accused's rights to a fair trial from the effects of pretrial publicity such as continuing the case, transferring it to another county, or granting a new trial, if publicity during the trial jeopardized its fairness. *Id.* at 363.

In an attempt to prevent the prejudice at its inception, courts increased their use of protective orders banning publication of information on criminal trials at least until a jury was impanelled.[25] These efforts to prohibit what information the press could publish concerning criminal trials[26] were determined to be unconstitutional, in *Nebraska Press Association v. Stuart*,[27] as prior restraints on the press.[28] Therefore, as an alternative to protective orders, some courts began closing portions of their proceedings to the public to protect against virulent publicity.[29] This denial of public access to criminal proceedings led to the development of the right of access.[30]

Gannett Co. v. DePasquale[31] was the first case that raised the issue of whether members of the public have an independent constitutional right to insist upon access to judicial proceedings.[32] In a five to four decision,[33] the Supreme Court rejected a newspaper publisher's attack on an order barring the public and the press from a pretrial sup-

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[25]*See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 3, at 918.

[26]A slightly different issue was presented to the Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). *Cox* involved a suit by the father of a 17-year-old rape victim against a news reporter, who had learned the victim's name by examining the indictments which were public records. The reporter's television station broadcast the victim's name in violation of a Georgia statute that made such conduct a misdemeanor. GA. CODE ANN. § 26-9901 (1972). The Supreme Court held that where the press lawfully obtains information, the state cannot punish the press for publishing it. 420 U.S. at 471. *See also* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam).

[27]427 U.S. 539 (1976).

[28]*Id.* at 570. *See also* Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (Powell, Circuit Justice 1974) (staying a protective order in a criminal case because there was no showing of a threat to a fair trial or that other methods would be insufficient to protect the accused's rights).

[29]*See* J. NOWAK. R. ROTUNDA & J. YOUNG, *supra* note 3, at 920; *cf.* Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (pretrial suppression hearing closed to the public).

[30]*See generally* Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 533 (1980) (plurality opinion).

[31]443 U.S. 368 (1979).

[32]*Id.* at 370-71. Previous cases had only dealt with the publication issues of prior restraint on information already in the possession of the press, *see* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); *see supra* note 28 and accompanying text, or the chilling effect of subsequent punishment for publication of information lawfully obtained. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); *see supra* note 26. In *Gannett*, the press argued that it had a right of access to obtain information about judicial proceedings that was constitutionally protected from governmental interference. 443 U.S. at 391.

[33]443 U.S. at 368. Justices Blackmun, Brennan, Marshall, and White dissented on the merits. Justice Stewart wrote the opinion of the Court joined by Chief Justice Burger and Justices Powell, Rehnquist, and Stevens. Chief Justice Burger and Justices Powell and Rehnquist each wrote separate concurring opinions. All nine justices agreed that the case was not moot.

pression hearing. The Court held that neither the press nor the general public has any independent constitutional right to insist upon access to pretrial judicial proceedings when the accused, the prosecutor, and the trial judge all agree to a closed hearing in order to assure a fair trial.[34]

Justice Stewart wrote the opinion of the Court. His approach to the petitioner's claim that the public had an independent constitutional right to attend criminal trials was to explore the text and history behind the public trial provision of the sixth amendment as a possible source for such a right.[35] Stewart found that the sixth amendment right to a public trial is personal to the accused[36] and that nowhere in the Constitution is there any mention of a right of access to criminal trials on the part of the public.[37] Thus, he concluded that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."[38]

At the very beginning of the opinion, Justice Stewart framed the issue of this case very narrowly and limited it to pretrial judicial proceedings;[39] however, throughout the opinion he referred to the broader issue of the right of access to all portions of criminal trials.[40] Near the end of his opinion, Stewart came back to this distinction

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[34]*Id.* at 394.

[35]*Id.* at 379-91.

[36]*Id.* at 387. Justice Stewart relied on the language in *In re* Oliver, 333 U.S. 257, 270 & n.5 (1948) (e.g., public trial guarantee "is for the protection of all persons *accused* of crime" (emphasis added)), and Estes v. Texas, 381 U.S. 532, 538-39 (1965) (e.g., "The purpose of the requirement of a public trial was to guarantee that the *accused* would be fairly dealt with and not unjustly condemned." (emphasis added)), to support his the public. 443 U.S. at 380-81. Justice Stewart was careful to point out, however, that "[w]hile the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial." *Id.* at 382.

[37]443 U.S. at 379. Justice Stewart conceded that there was a strong societal interest in public trials, but found there was also "a strong societal interest in other constitutional guarantees extended" to a defendant in a criminal trial. *Id.* at 383. He pointed out that the "[r]ecognition of an independent public interest in the enforcement of Sixth Amendment guarantees is a far cry . . . from the creation of a constitutional right on the part of the public." *Id.* at 383. Just as the public cannot demand a jury trial or other sixth amendment rights when the defendant, the prosecutor, and the trial judge consent to the defendant's waiver of that right, the public cannot compel a public trial when the parties and the trial judge agree to closure. Stewart concluded that in an adversary system of criminal justice, "the public interest is protected by the participants in the litigation." *Id.* at 384.

[38]*Id.* at 391.

[39]*Id.* at 370-71.

[40]*Id.* at 379, 381, 383, 384-87, 391, 392. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 601-02 (1980) (Blackmun, J., concurring) ("No fewer than 12 times in the primary opinion in [*Gannett*], the Court (albeit in what seems now to have become clear dicta) observed that its Sixth Amendment closure ruling applied to the *trial* itself.").

and argued that even if the sixth amendment could be viewed as embodying a common law right of the public to attend criminal trials, this case involved a *pretrial* proceeding and the history of American and English common law demonstrated that the public had no such right to attend these proceedings.[41]

The *Gannett* case left many courts uncertain of how to interpret the holding on the right of access.[42] The Court had split five to four with five of the justices writing separate opinions, each taking a different approach to the question.[43] Moreover, the majority opinion did not specifically address the issue of whether the public has a right of access based in the first amendment.[44] To clear up some of the

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[41]443 U.S. at 387-91.

[42]For a list of commentators and journalists confused by the Court's decision in *Gannett*, see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 603 nn.1, 2 (1980) (Blackmun, J., concurring).

[43]Chief Justice Burger joined in the opinion of the Court, but wrote a separate concurring opinion to emphasize that the decision only applied to pretrial hearings and did not extend to criminal trials. 443 U.S. at 394-97 (Burger, C.J., concurring).

Justice Powell also wrote a separate concurring opinion to address the question that Justice Stewart reserved—whether the public had a constitutional right to attend the pretrial suppression hearing protected by the first and fourteenth amendments. Justice Powell found that the petitioner's reporter had an interest protected by the first and fourteenth amendments in being present at the pretrial hearing; however, the trial judge properly balanced this right to a fair trial and reached the correct result in this case. *Id.* at 403 (Powell, J., concurring).

Justice Rehnquist's concurring opinion emphasized his view that the public and the press have no constitutional right of access to judicial or other governmental proceedings under the sixth, first, or fourteenth amendments. *Id.* at 403-05 (Rehnquist, J., concurring).

Justice Blackmun, writing for the four dissenters, analyzed the history and development of the common law practice of public trials in England and America and focused on this history at the time of the adoption of the sixth amendment to conclude that a societal interest in public trials exists separate from, and at times in opposition to, the interests of the accused, and that this interest is protected by the sixth and fourteenth amendments. *Id.* at 432-33 (Blackmun, J., dissenting). After determining that a constitutionally protected public right to attend criminal trials existed, the dissent found that a pretrial suppression hearing is the "close equivalent [to a] trial on the merits for the purposes of applying the public-trial provision of the Sixth Amendment." *Id.* at 436. The dissent concluded that "the Sixth and Fourteenth Amendments prohibit a State from conducting a pretrial suppression hearing in private, even at the request of the accused, unless full and fair consideration is first given to the public's interest, protected by the amendments, in open trials." *Id.*

[44]443 U.S. at 392. Even after the Supreme Court's decision, in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion), recognized a first amendment public right to attend criminal trials, some state courts have continued to follow the holding in *Gannett* on the issue of the public's access to preliminary hearings. *See, e.g.*, San Jose Mercury-News v. Municipal Court, 3 Cal.3d 498, 638 P.2d 655, 179 Cal. Rptr. 772 (1982); Press-Enterprise Co. v. Superior Court, 198 Cal. Rptr. 241 (Cal. Ct. App. 1984).

questions left by *Gannett*, exactly one year later, the Court heard the case of *Richmond Newspapers, Inc. v. Virginia*.[45]

Richmond Newspapers was the first case in which the Court found a constitutionally protected right of access to criminal trials in the public.[46] The Court was in substantial agreement on the issue of whether the public right of access to attend criminal trials was protected by the Constitition;[47] however, each of the justices seemed to have his own view of the nature and scope of that right. The result was a plurality opinion with seven of the justices writing separate opinions.

Richmond Newspapers evolved from a Virginia state court's fourth attempt to try a defendant for murder.[48] Before the trial began, counsel for the defendant moved that the trial be closed to the public.[49] Relying on a statute that empowered the trial judge to exclude a public from all criminal trials at his discretion,[50] the trial judge ordered the courtroom closed. The petitioner, a local newspaper whose reporters were among those denied access to the courtroom, unsuccessfully challenged the order and was eventually granted certiorari by the United States Supreme Court.[51]

Chief Justice Burger wrote the plurality opinion for the Court. The narrow question presented by this case, in his view, was "whether the right of the public and the press to attend criminal trials is guaranteed under the United States Constitution."[52] Burger began his

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[45]448 U.S. 555 (1980) (plurality opinion).

[46]*Id.* at 580.

[47]*Id.; id.* at 582 (White, J., concurring); *id.* at 584 (Stevens, J., concurring); *id.* at 585 (Brennan, J., concurring); *id.* at 599 (Stewart, J., concurring); *id.* at 604 (Blackmun, J., concurring). Seven of the justices concurred in the judgment of the Court, but only Justices White and Stevens joined in Chief Justice Burger's plurality opinion, and each of them also wrote a separate concurring opinion. Only Justice Rehnquist dissented. Thus, the opinion was seven to one. Justice Powell did not take part in the consideration or decision of the case.

[48]The defendant's conviction after the first trial was reversed on appeal. His second trial ended in a mistrial. The third trial also ended in a mistrial "because a prospective juror had read about [the defendant's] previous trials in a newspaper and had told other prospective jurors about the case before the retrial began." 448 U.S. at 559.

[49]Presumably, the defense counsel's reason for requesting that the trial be closed was to ensure that information concerning which witnesses testified to certain facts would not be revealed to other potential witnesses by any member of the public during a recess. *See id.* at 559-60.

[50]VA. CODE § 19.2-266 (Supp. 1980) provided in part:

> In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the Court may, in its discretion, exclude from the trial any person whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

[51]448 U.S. at 560-63.

[52]*Id.* at 558.

inquiry by distinguishing the *Gannett* case as limited to pretrial suppression hearings.[53] The Chief Justice reviewed the history of open criminal trials which preceeded the adoption of the Constitution and the Bill of Rights,[54] and found that this history demonstrated that criminal trials "have long been presumptively open."[55] Open trials were said to enhance the integrity and quality of criminal trials, promote confidence in the judicial system, provide a therapeutic value to the community, and serve as a form of legal education.[56] Burger found that "this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past"[57] compelled the conclusion "that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[58]

The Chief Justice then addressed the question of "whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials."[59] Focusing on the freedoms of speech, press, and assembly, expressly guaranteed by the first amendment, Burger asserted that the first amendment should be read to include the right to attend criminal trials to prevent these enumerated guarantees from losing much of their meaning.[60] Thus,

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[53]*Id.* at 564. Burger referred to his own concurring opinion in *Gannett* that emphasized the distinction between a pretrial suppression hearing and an actual trial. *Id.* The Chief Justice also noted that the *Gannett* decision had only considered the sixth amendment claim of the petitioner and did not decide whether the first amendment guaranteed a right of the public to attend trials. *Id.*

[54]*Id.* at 564-73. This is the same approach that Blackmun took in his dissent in *Gannett*. *See supra* note 43.

[55]448 U.S. at 569.

[56]More specifically, Chief Justice Burger found that the following reasons supported the practice of open criminal trials: (1) Open trials promoted confidence in the judicial system and fostered an appearance of fairness; (2) Open trials enhanced the quality of testimony, discouraged perjury, and provided the opportunity for someone in attendance at the trial who had knowledge of the relevant facts to furnish additional evidence or expose false testimony; (3) Open trials enhanced the performance of all those involved in criminal prosecutions and discouraged misconduct by the participants; (4) Open trials protected the judge from imputations of dishonesty and discouraged decisions based on partiality or secret bias; (5) Open trials had a significant community therapeutic value and served a prophylatic purpose of providing an outlet for the concerns, emotions, and hostilities of the community; finally, (6) Open trials served as a forum of legal education for the public, providing the public with an understanding of the legal system in general and the procedures and rules of law in a particular case, thereby increasing respect for the law. *Id.* at 569-73.

[57]*Id.* at 573.

[58]*Id.*

[59]*Id.* at 575.

[60]*Id.* at 575-80. The Chief Justice stated that these explicit first amendment "freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.* at 575. Burger found that the manner in which criminal trials are conducted is an aspect of government of the highest concern and importance to the public. *Id.* Thus, the first amendment guarantees "pro-

even though no explicit right to attend criminal trials can be found in the Constitution, the plurality concluded that the right to attend criminal trials "is implicit in the guarantees of the First Amendment; without the freedom to attend such trials . . . important aspects of freedom of speech and 'of the press could be eviscerated.' "[61]

Having concluded that the public's right to attend criminal trials was protected under the first amendment, Burger found the closure order challenged in *Richmond Newspapers* to be invalid.[62] The trial judge made no findings to support the order, did not inquire into alternative solutions to closure, and failed to recognize any constitutional right of the public and the press to attend the trial.[63] The standard that Burger devised to determine the validity of closure orders was "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[64] Under this standard, the challenged order in *Richmond Newspapers* was invalid.[65]

Justice Stevens' impression of the significance of the *Richmond Newspapers* decision can best be appreciated by the first sentence of his concurring opinion: "This is a watershed case."[66] In his view, the Court was recognizing for the first time a first amendment right of access to newsworthy information.[67]

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hibit the government from summarily closing courtroom doors," *id.* at 576, otherwise the first amendment freedoms would lose much of their meaning. There would not be much value in a free press that was prohibited from scrutinizing an important government function, such as criminal trials, that had traditionally been open.

[61]*Id.* at 580 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

[62]448 U.S. at 581.

[63]The final criticism of the trial judge's conduct is interesting because *Richmond Newspapers* was the first case in which the Supreme Court recognized any constitutional right of the public and the press to attend criminal trials.

[64]448 U.S. at 581 (footnote omitted). Burger further found that the public's right to attend criminal trials was not absolute. He suggested that "a trial judge [may], in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." *Id.* at 581-82 n.18. However, the limits he discussed involved situations where there was a limited amount of seating in the courtroom or a risk that the trial would not be conducted in an orderly setting. *Id.*

[65]*Id.* at 581. In a brief concurring opinion, Justice White expressed his view that this case would not have been necessary if the Court, in *Gannett*, had "construed the Sixth Amendment to forbid excluding the public from criminal proceedings." *Id.* at 581-82 (White, J., concurring).

[66]*Id.* at 582 (Stevens, J., concurring).

[67]*Id.* at 583. Stevens suggested that this case represented an adoption, by a majority of the Court, of the dissenting opinions in Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (Powell, J., dissenting), and Houchins v. KQED, Inc., 438 U.S. 1, 19-40 (1974) (Stevens, J., dissenting). 448 U.S. at 582-83. In each of those cases a right of access to penal institutions was denied to the press. Stevens characterized the right of access in the public and the press as "rights of access to information about the operation of their government, including the Judicial Branch." *Id.* at 584. This view has broad implications in regard to civil cases, administrative hearings, legislative hearings, and juvenile proceedings.

In his separate concurring opinion, Justice Brennan derived an independent public right of access to criminal trials from the first amendment's structural role in our republican system of self-government.[68] Brennan found that "[i]mplicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but also the antecedent assumption that valuable public debate . . . must be informed."[69] In right of access cases, Brennan contended that the courts should first "consult historical and current practice with respect" to public access to the particular proceedings or information, and, second, should assess the specific importance of public access to the governmental process involved.[70] Applying this approach to public access to criminal trials, and to this case in particular, Justice Brennan found that the Virginia statute violated the first and fourteenth amendments.[71]

Justice Stewart wrote a brief concurring opinion in which he distinguished his opinion in *Gannett* as interpreting only the sixth amendment.[72] Stewart found that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."[73] He stated that this right is not absolute, however, and therefore it may be restricted by such non-constitutional considerations as the preservation of trade secrets, and the protection of a youthful prosecution witness in a rape case, as long as the accused's sixth amendment right to a public trial was not impaired.[74]

Justice Blackmun's concurring opinion reiterated his sixth amendment position from his dissent in *Gannett*, but concluded as a secondary position that the first amendment must also provide some measure of protection for the public right of access to trials.[75] Blackmun expressed reservations, however, about the "veritable pot-

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[68]448 U.S. at 587 (Brennan, J., concurring).

[69]*Id.* at 587 (citation and footnote omitted) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[70]448 U.S. at 588-89 (Brennan, J., concurring).

[71]*Id.* at 589-98. Justice Brennan, as Chief Justice Burger had done, *id.* at 581-82 n.18, did not specifically address "[w]hat countervailing interests might be sufficiently compelling to reverse this presumption of openness." *Id.* at 598 (Brennan, J., concurring). Brennan did suggest, however, that national security may be such a compelling interest. *Id.* at 598 n.24.

[72]*Id.* at 598-99 (Stewart, J., concurring).

[73]*Id.* at 599 (footnote omitted).

[74]*Id.* at 600 n.5. Justice Stewart was foreshadowing the issues of Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

[75]*Id.* at 603-04 (Blackmun, J., concurring). Blackmun found the Court's decision personally gratifying because the Court adopted his technique from *Gannett* of relying on legal history to determine the right of access to criminal trials, *id.* at 601; *see supra* note 43, and also because the opinion at least partially cleared up some of the confusion left by *Gannett*. *Id.* at 602-03 & nn.1-2; *see supra* note 42 and accompanying text.

pourri" of constitutional sources for the right of access that the various justices had advanced.[76] In Blackmun's view, "uncertainty mark[ed] the nature—and strictness—of the standard of closure the Court adopt[ed]."[77]

In both *Gannett* and *Richmond Newspapers*, the trial court had ordered closure presumably to protect the defendants' right to a fair trial; therefore, the Supreme Court was faced with the task of determining whether any constitutional protection existed for the public's interest in attending criminal trials and then balancing that right against the effect of a public trial on the defendant's right to a fair trial. *Globe Newspaper Co. v. Superior Court*[78] was the Court's first opportunity to balance the newly recognized public right of access against other state interests.[79] The case arose when reporters for the Boston Globe were denied access to a rape trial involving three minor victims. The trial judge had ordered the courtroom closed during the hearings on preliminary motions.[80] Before the actual trial began, the appellant, Globe Newspaper Company (Globe), moved that the court revoke the closure order. The court refused to accept Globe's motion and ordered the exclusion of the press and the public from the courtroom during the trial, based on Section 16A of Chapter 278 of the Massachusetts General Laws.[81]

Globe unsuccessfully sought injunctive relief through a petition

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[76]*Id.* at 603.

[77]*Id.* The lone dissenter in *Richmond Newspapers* was Justice Rehnquist who found nothing in the first or sixth amendment, or any other provision of the Constitution, that prohibits a state trial judge from closing a criminal trial to the public and the press when the parties consent. *Id.* at 605 (Rehnquist, J., dissenting).

[78]457 U.S. 596 (1982).

[79]The state's interests asserted in *Globe Newspaper* were "the protection of minor victims of sex crimes from [the] further trauma and embarrassment [of public testimony]; and the encouragement of such victims to come forward and testify in a truthful and credible manner." *Id.* at 607 (footnote omitted).

[80]*Id.* at 598 & n.2.

[81]*Id.* at 599. The relevant portion of the statute reads as follows:

> At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with, or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981).

One interesting point that the Court failed to address was the fact that the defendant had objected to the exclusion order that closed the trial to the general public and the press. 457 U.S. at 599. Apparently the defendant never pursued the trial court's overruling of his objection because the trial resulted in his aquittal; however, an interesting question is raised when the public's first amendment together with the accused's sixth amendment rights to an open criminal trial are balanced against the state's interest in protecting minor victims.

filed with a single justice of the Supreme Judicial Court of Massachusetts,[82] and eventually appealed to the United States Supreme Court.[83] Justice Brennan wrote for the majority.[84] After finding that the case was not moot,[85] Justice Brennan emphasized that the "decision in *Richmond Newspapers* firmly established for the first time that the press and the general public have a constitutional right of access to criminal trials."[86] In attempting to give this constitutional right a consistent and principled interpretation, Justice Brennan asserted that any interference with the public's right of access to criminal trials will have to meet the rigid standards of strict scrutiny.[87] Thus, before

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[82]457 U.S. at 599-600.

[83]After the single justice of the Supreme Judicial Court of Massachusetts denied the newspaper's petition for injunctive relief, Globe attempted an appeal to the full court; however, before Globe could file this appeal, the rape trial ended in an acquittal for the defendant. *Id.* at 600. When the Supreme Judicial Court of Massachusetts finally issued its judgment on Globe's appeal, it held that the case was moot, because the criminal trial had already ended in acquittal. 362 Mass. 846, 401 N.E.2d 360, *vacated*, 449 U.S. 894 (1980). Recognizing that the issues were "'capable of repetition yet evading review,'" 362 Mass. at 847, 401 N.E.2d at 362 (quoting Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911)), the court set forth its view as to the proper interpretation of the statute. The court held that Section 16A mandated closure only during the testimony of minor victims. 362 Mass. 846, 401 N.E.2d 360. Globe then appealed to the United States Supreme Court which vacated the judgment and remanded the case for further consideration in light of *Richmond Newspapers*. 449 U.S. 894 (1980).

On remand, the Supreme Judicial Court of Massachusetts held that the statute, construed to mandate closure of a trial involving sexual assault on a minor victim during the testimony of the minor, was constitutional under the first amendment. 432 N.E.2d 773 (Mass. 1981), *rev'd*, 457 U.S. 596 (1982). The court discerned an exception to the tradition of openness in criminal trials in cases involving sexual assaults and also emphasized "genuine State interests" in the mandatory closure rule which "would be defeated if a case-by-case determination were used." 423 N.E.2d at 779. The court did not think "that *Richmond Newspapers* require[d] the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims." *Id.* at 781.

[84]Justices Blackmun, White, Marshall, and Powell joined in Justice Brennan's opinion forming the "odd Quintuplet" Justice Rehnquist had referred to in *Gannett*. 443 U.S. at 406 n.2 (Rehnquist, J., concurring).

[85]457 U.S. at 603.

[86]*Id.*

[87]*Id.* at 606-07; *see also id.* at 607 n.17. The application of strict scrutiny to the first amendment right implies that Brennan considered the right of access to be a fundamental right. A key point in Justice Brennan's analysis of the right of access in *Globe Newspapers* was buried in a footnote. *See id.* at 605 n.13, This footnote implies that Brennan believed that, because the tradition of open criminal trials had been recognized as constitutionally protected and fundamental to our system of justice in *Richmond Newspapers*, the court should no longer look exclusively to history to ascertain the contours of the rights. Brennan's opinion implies that the court should now develop a reasoned exposition of this traditional value and adopt a functional approach in interpreting the right of access by letting the rationales underlying the right dictate its scope. Thus, Chief Justice Burger's criticism of the majority for ignoring the history of exclusion in cases involving sexual assaults missed the point. By extending

the state can deny access to the public to any segment of a criminal trial, "it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[88]

The state interests asserted by Massachusetts in support of the mandatory closure statute were "the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner."[89] Justice Brennan found that the first interest was a compelling one, but that Section 16A was not narrowly tailored to serve that interest.[90] In Justice Brennan's view, a case-by-case determination of whether closure was necessary to protect the welfare of a minor would serve this interest just as well as a *mandatory* closure rule.[91] The majority also rejected the state's second interest as a justification for Section 16A's interference with the public's constitutional right. Justice Brennan found that this was not a compelling interest and criticized Massachusetts for asserting this claim without empirical support.[92] Moreover, Brennan contended that this interest was speculative and "open to serious question as a matter of logic

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the right of access to all criminal trials, the Court was not contending that the right to attend trials involving sexual assaults has always existed, it was merely asserting that, given the long tradition of openness of criminal trials in general and the benefits that the public derives from the openness, there must be some principled basis for treating criminal trials involving sexual assaults differently from other criminal trials before the public's constitutional right of access can be restricted.

[88]*Id.* at 607.

[89]*Id.* (footnote omitted).

[90]*Id.* at 607-09.

[91]*Id.* at 609. Moreover, a case-by-case determination would ensure that the constitutional right of the press and general public would not be restricted except where necessary to protect the state's interest. Justice Brennan found support for the case-by-case approach to closure orders in Chief Justice Burger's plurality opinion in *Richmond Newspapers*: "Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public." *Id.* at 608 n.20 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980)).

Justice Brennan also contended that in order for a case-by-case approach to be meaningful, the press and the general public must be given an opportunity to express their objections to the closure order. 457 U.S. at 609 n.25. This suggests that a hearing will have to be held before the Court can constitutionally exclude the public and the press from a trial.

[92]457 U.S. at 609-10. It is not clear from the majority opinion in *Globe Newspapers* when the Court will require empirical data to support a request for closure. The Court found the first state interest — protecting child rape victims from the trauma of public testimony — to be sufficiently compelling and therefore found no need for empirical evidence. However, the Court apparently found that the second asserted state interest — encouraging minor victims to come forward and cooperate with the authorities — was not sufficiently compelling, and therefore indicated a need for empirical support. Thus, perhaps the requirement of empirical data to support a request for closure may

and common sense."[93] Thus, the Court held that, because the mandatory closure rule contained in Section 16A could not meet the standards of strict scrutiny, the statute violated the first amendment.[94] In his final footnote, Justice Brennan stated that the holding was a narrow one and emphasized that the mandatory nature of the statute, requiring no particularized determinations in individual cases, was the primary reason that Section 16A was unconstitutional.[95]

Justice O'Connor concurred in the judgement; however, in her brief separate opinion, she stressed that in her interpretation neither *Richmond Newspapers* nor *Globe Newspaper* carried any implications outside the context of criminal trials.[96]

Chief Justice Burger joined by Justice Rehnquist wrote a strong dissent. Burger began by noting a "disturbing paradox":[97] As a result of the Court's opinion in *Globe Newspaper*, a state could mandate the closure of all proceedings in order to protect a minor charged with rape; however, it could not require the closure of part of a criminal trial in order to protect a minor victim of a rape.[98] Burger saw the Court's decision as "a gross invasion of state authority and a state's duty to protect its citizens."[99] He criticized the Court for its "expansive interpretation of . . . *Richmond Newspapers, Inc. v. Virginia*, [and] its cavalier rejection of the serious interests supporting Massachusetts' mandatory closure rule."[100]

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only be necessary when the asserted state interest is not clearly compelling.

However, an alternative indication of when empirical support is necessary might depend on the interest asserted. Some interests are more conducive to demonstration by empirical data than others. Thus, if the interest is conducive to a demonstration by empirical data, the Court may require this demonstration before it would uphold an order restricting access to a criminal trial. Therefore, a criminal defendant who seeks a closure order may be required to demonstrate empirically that the increase in publicity from an open trial would jeopardize his constitutional right to a fair trial. Empirical data on the volume of media coverage concerning his arrest and trial should be sufficient to establish that his interest in closure is compelling; however, the trial court will have to make findings of fact and consider alternatives to closure to ensure that closure is narrowly tailored to serve the defendant's interest.

[93]*Id.* at 610.

[94]*Id.* at 610-11.

[95]*Id.* at 611 n.27. The opinion in *Globe Newspaper* suggests that a state statute that gave the trial court discretion to close a portion of a criminal trial to protect a minor rape victim from the trauma of public testimony would be constitutional, but only if the trial court first holds a hearing, makes findings that support the closure order, and considers alternatives to closure. Among the factors to be weighed in determining whether closure is necessitated "are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.* at 608.

[96]*Id.* at 611 (O'Connor, J., concurring).

[97]*Id.* at 612 (Burger, C.J., dissenting).

[98]*Id.*

[99]*Id.* at 613.

[100]*Id.* (citation omitted).

According to Burger, the Court incorrectly interpreted *Richmond Newspapers* as providing a first amendment right of access to all aspects of all criminal trials under all circumstances. The fundamental basis of the right of access to criminal trials, in Burger's view, was the historical tradition of openness.[101] The Chief Justice criticized the majority for ignoring the fact that there was no history of openness in cases involving sexual assaults, particularly those against minors.[102] Because of this lack of history of openness, Burger asserted that "*Richmond Newspapers* gives no support to the proposition that closure of the proceedings during the testimony of the minor victim violates the First Amendment."[103]

Burger also objected to the majority's use of strict scrutiny and contended that a lower level of scrutiny was appropriate. Because neither the purpose nor the effect of the Massachusetts statute was to primarily deny the public access to information, the Chief Justice thought the Court should merely inquire as to whether the restrictions were reasonable and then balance the limited effect on the public's first amendment rights[104] against the state's interest in protecting a child rape victim from the trauma of public testimony, which in many states would include television coverage.[105] Chief Justice Burger contended that the test developed in *Richmond Newspapers*[106] did not require the statute to "be precisely tailored so long as the state's interest overrides the law's impact on First Amendment rights and the restrictions imposed further that interest."[107] Thus, under this standard of review, Burger found that the Massachusetts statute was constitutional.[108]

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[101]*Id.* at 613-14. Chief Justice Burger cited to language in Justice Brennan's opinion in *Richmond Newspapers* as support for Burger's approach of consulting legal history in right of access cases. *Id. See supra* note 70 and accompanying text.

[102]For Justice Brennan's response to this criticism, see *supra* note 87.

[103]457 U.S. at 614 (Burger, C.J., dissenting) (footnote omitted).

[104]Chief Justice Burger described the effects on the public's access right as limited because the statute, as construed by the Supreme Judicial Court of Massachusetts, only denied access to the portion of the trial where the minor victim was testifying and a verbatim transcript of the testimony was available to the public to be used without limit. *Id.* at 615.

[105]*Id.* at 616-17. *Cf.* Chandler v. Florida, 449 U.S. 560 (1980) (states can provide radio, television, and still photographic coverage of a criminal trial, but are admonished to protect certain witnesses—children, victims of sex crimes, some informants, and the very timid—from the tensions of being televised).

[106]*See supra* text accompanying note 64.

[107]457 U.S. at 616 (Burger, C.J., dissenting). Chief Justice Burger emphasized that the mandatory rule was necessary to give assurances to minor rape victims that they would be protected from the trauma of public testimony. *Id.* at 618-19.

[108]*Id.* at 616. Justice Stevens also dissented, taking the position that, because the opinion of the Massachusetts Supreme Judicial Court was an advisory one, the Court should not have evoked the exception to the mootness doctrine. *Id.* at 620-23 (Stevens, J., dissenting).

The Court's most recent examination of the scope of the right of access, *Press-Enterprise Co. v. Superior Court*,[109] evolved from a trial judge's exclusion of the press and the public from the individual voir dire examinations in a trial for the rape and murder of a teenage girl.[110] The trial judge also refused to release a transcript of the voir dire proceedings, even after the trial had ended.[111] Chief Justice Burger delivered the opinion of the Court,[112] and began by reviewing the historical evidence on public jury selection.[113] After determining that "[p]ublic jury selection was the common practice in America when the Constitution was adopted,"[114] the Chief Justice examined the many benefits of open proceedings in today's criminal justice system[115] and

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[109]104 S. Ct. 819 (1984).

[110]*Id.* at 821. The state opposed Press-Enterprise's motion that the voir dire proceedings be open to the public, and the trial judge agreed, permitting the public to attend only the general, not the individual, voir dire examinations. *Id.* As a result of this order, only three days of a *six week* voir dire were open to the public. *Id.* The Court felt compelled to admonish the trial court for the length of the voir dire proceeding and asserted "that a *voir dire* process of such length, in and of itself undermines public confidence in the courts and the legal process." *Id.* at 824 n.9. *Contra id.* at 830-31 (Marshall, J., concurring).

[111]*Id.* at 821. Thus, the effect on the public's right to access in *Press-Enterprise* was greater than any of the three previous right of access cases. *Cf. Globe Newspaper*, 457 U.S. at 615 (Burger, C.J., dissenting) (state did not deny the public or the media access to the trial transcript); *Richmond Newspapers*, 448 U.S. at 562 n.3 (tapes of the closed trial were available to the public as soon as the trial terminated); *Gannett*, 443 U.S. at 376 n.4 (transcript of the closed suppression hearing made available to petitioner immediately after defendants plead guilty).

[112]This was a unanimous decision with Justices Brennan, White, Blackmun, Powell, Rehnquist, Stevens, and O'Connor all joining the opinion of the Court. Justices Blackmun and Stevens filed concurring opinions and Justice Marshall filed an opinion concurring in the judgment.

[113]104 S.Ct. at 822-23. This technique of examining the history of openness of the particular portion of a criminal proceeding at issue was rejected by the majority in *Globe Newspaper*, 457 U.S. at 596 n.13 (ignoring history of closed trial when minor sex victim testified). Chief Justice Burger's use of this technique in the context of voir dire proceedings may indicate that a majority of the Court favors such an examination when the public or the press attempt to extend the right of access beyond the context of criminal trials. Such an approach would reconcile the reasoning in these two decisions. *See* 104 S. Ct. 828 (Stevens, J., concurring). *But see infra* note 115. However, the applicability of the right of access to proceedings not historically open remains unclear.

[114]*Id.* at 823. It is worthy to note that one of the major reasons for examining the history of voir dire is to determine what the practice was at the time the Constitution was adopted. *See id.* at 829 n.8. This is the critical time period "because the Constitution carries the gloss of history." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). Another value in finding a tradition of openness is that such a finding "implies the favorable judgment of experience." *Id.*

[115]104 S. Ct. at 823-24. In listing these benefits. Chief Justice Burger referred to the benefits of open trials in general, rather than open voir dire proceedings in particular. This might imply that the majority considered voir dire to be a part of a criminal trial rather than a separate proceeding. *But see id.* at 828 (Stevens, J., con-

concluded that the guarantees of open proceedings in criminal trials apply to voir dire examinations of potential jurors.[116] The Court, thus, applied strict scrutiny to the trial court's interference with the constitutionally protected right of access.[117] The trial court asserted two interests in support of its actions: the right of the accused to a fair trial, and the privacy rights of certain prospective jurors who revealed sensitive information during the individual voir dire examinations.[118] The Court conceded that the first of these interests was compelling,[119] but rejected the trial court's conclusion that these interests were sufficient to warrant closure, because the trial court failed to make "findings showing that an open proceeding in fact threatened those interests."[120] Burger also criticized the trial court's failure to consider alternatives to closure and complete suppression of the transcript.[121] Thus, the Court found that the trial court's actions violated the first amendment right of access.[122]

In summary, the first amendment right of access developed as a result of the media's efforts to provide greater coverage of criminal

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curring) (suggesting that the Court's opinion was not based on a finding that voir dire is a part of a criminal trial). On the other hand, the Court's use of the benefits of open trials in general, in the context of the effect of openness on voir dire, may indicate that the Court found no principled reason for treating a voir dire proceeding any different than a criminal trial for purposes of the first amendment right of access, even though voir dire was not recognized as a part of the criminal trial itself.

[116]*Id.* at 824.

[117]*Id.*

[118]*Id.*

[119]*Id.*

[120]*Id.* at 825 (footnote omitted). The Court went on to state that "it is not possible to conclude that closure was warranted" when the trial court fails to make such findings. *Id.* Thus, it appears that even if a state asserts a compelling interest in support of a closure order, such as the defendant's sixth amendment right to a fair trial, *see id.* at 823 ("No right ranks higher than the right of the accused to a fair trial"), the order will not be upheld, unless the issuing court made findings demonstrating that closure was necessary to protect the asserted interest.

[121]*Id.* at 825-26. "Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." *Id.* Thus, the consideration of alternatives to closure that would protect the state's interests is also a requirement for a closure order to be valid.

[122]Justice Blackmun wrote a brief concurring opinion to emphasize that in his interpretation the Court's opinion did not recognize a constitutional right of privacy for prospective jurors. *Id.* at 826-27 (Blackmun, J., concurring).

Justice Stevens also authored a brief concurring opinion in which he asserted that the Court's decision was not based on a finding that voir dire is a part of a criminal trial and in fact such a determination is not even necessary in evaluating first amendment right of access issues. *Id.* at 828 (Stevens, J., concurring). Stevens reiterated his view from his concurring opinion in *Richmond Newspapers*, 448 U.S. at 582-83 (Stevens, J., concurring), and his dissenting opinion in Houchins v. KQED, Inc., 438 U.S. 1, 30, 31-32 (Stevens, J., dissenting), that the first amendment right of access is not limited to a public right to attend criminal trial, but rather encompasses a right in the public to "access to information about the operation of their government." *Richmond Newspapers*, 448 U.S. at 584 (Stevens, J., concurring).

trials and the resulting conflicts with the criminal justice system. The Supreme Court has recognized that the press and the general public have a constitutionally protected right to attend criminal trials that can only be restricted by a compelling state interest which meets the standards of strict scrutiny. Due to the increase of unlawful conduct by juveniles,[123] one area of future conflict between the press and the judicial system is likely to involve access to juvenile delinquency hearings.[124] In contrast to the first amendment's mandate of openness in adult criminal trials, no clear constitutional guidelines exist with respect to the right of the public and the press to attend juvenile court hearings. The remainder of this Note will examine the issue of whether the right of access should be extended to include juvenile court proceedings, and the effect on juvenile court procedures and state statutes if such an extension is recognized.

III. The Right of Access versus Juvenile Court Confidentiality

A. Background on Juvenile Court Confidentiality

The question of whether the public's right of access should be extended to hearings in juvenile courts raises difficult and complex policy and constitutional issues.[125] An examination of the background of juvenile court confidentiality will prove helpful in resolving these issues. This discussion will analyze both the theories underlying the

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Justice Marshall concurred in the judgment of the Court but wrote separately to emphasize that he would require trial courts to demonstrate that "the [closure] order in question constitutes *the least restrictive means available* for protecting compelling state interests." 104 S. Ct. at 830 (Marshall, J., concurring).

[123]*See supra* sources cited at note 13.

[124]As was previously noted, *see supra* note 7, this Note recognizes that juvenile courts handle many types of cases besides delinquency cases; however, the discussion herein relates only to cases where juveniles have committed acts that if committed by an adult would be crimes. Additionally, this Note makes no effort to distinguish between adjudicatory and disposition hearings in juvenile court for the purpose of the right of access.

[125]Right of access issues can arise in two ways in juvenile proceedings: the juvenile respondent can request that the public and press be admitted or the public or press could request access over the juvenile's objections. In the first type of right of access case, the Court focuses on the juvenile's interests in publicity, similar to the adult defendant's sixth amendment right to a public trial. *See* R.L.R. v. State, 487 P.2d 27 (Alaska 1971) (concluding that juveniles have a right to a public trial). In the second type of case, the Court focuses on the public's interest in attending the proceeding. This Note deals only with the latter type of case.

For a discussion of issues on whether a juvenile should be accorded the right to public trial see, McKeiver v. Pennsylvania, 403 U.S. 528, 553-56 (1971) (Brennan, J., concurring and dissenting); I.J.A./A.B.A. Juvenile Justice Standards Project, Standards Relating to Adjudication, Standards 6.1-6.3, at 70-76 (1980); McLaughlin & Whisenard, *Jury Trial, Public Trial and Free Press in Juvenile Proceedings: An Analysis and Comparison of IJA/ABA, Task Force and NAC Standards*, 46 Brooklyn L. Rev. 1 (1979).

juvenile justice system and the reality of how the system has achieved its dual goals of preventing juvenile crime and rehabilitating juvenile offenders.

1. History and Philosophy of the Juvenile Court System.—The current juvenile court system is based on the concept of parens patriae[126] and developed in response to the problems of accelerated industrialization, mass immigration, and rapid urbanization of the nineteenth century.[127] The social problems created by the phenomenon of the Industrial Revolution led to reform movements in the treatment of children.[128] In addition, throughout the nineteenth century, as the social sciences developed and became more prominent, an awareness of the special problems of juveniles emerged and with it an optimism that juveniles could be rehabilitated.[129] Thus, the juvenile court was founded on a philosophy of treatment and rehabilitation.

The passage of the Juvenile Court Act[130] by the Illinois legislature in April, 1899 is generally regarded as the most significant event of the juvenile reform movement.[131] The Act created the first statewide court especially for children and contained most of the distinctive features of the current juvenile court, including confidential records, private hearings, and procedural informality.[132] The concept spread rapidly to other states and by 1925 all but two states had juvenile courts.[133]

Prior to the development of a separate juvenile court system, juveniles were treated as adults for the purposes of the criminal laws.[134] The new juvenile statutes brought with them a new vocabulary,[135] new types of courtrooms,[136] new procedures,[137] new

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[126]TASK FORCE, *supra* note 13, at 2. The discussion of the development, philosophy, and assessment of the juvenile court system relies heavily on this source. For other sources that provide a history and development of the modern juvenile justice system, see Fox, *Juvenile Justice Reform: An Historical Prospective*, 22 STAN. L. REV. 1187 (1970); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909) (classic summary of the early juvenile court proponents' thoughts on the goals of the system).

[127]*See* TASK FORCE, *supra* note 13, at 2-3.

[128]*Id.* at 2.

[129]Jonas, *supra* note 8, at 288; TASK FORCE, *supra* note 13, at 2-3.

[130]Act of Apr. 21, 1899, 1899 Ill. Laws 131.

[131]*See* Jonas, *supra* note 8, at 290-92; TASK FORCE, *supra* note 13, at 3.

[132]Jonas, *supra* note 8, at 290; TASK FORCE, *supra* note 13, at 3.

[133]TASK FORCE, *supra* note 13, at 3.

[134]*See generally In re* Gault, 387 U.S. 1, 15 (1967); TASK FORCE, *supra* note 13, at 2-3.

[135]TASK FORCE, *supra* note 13, at 3 ("Petition instead of complaint, summons instead of warrant, initial hearing instead of arraignment,. . . disposition instead of sentence."). For a more detailed comparison of the vocabulary of juvenile and criminal trials, see L. SIEGEL & J. SENNA, *supra* note 13, at 281.

[136]TASK FORCE, *supra* note 13, at 3 ("The physical surroundings . . . should seem less imposing than a courtroom, with the judge at a desk or table instead of behind a bench, fatherly and sympathetic while still authoritative and sobering.").

[137]*Id.* at 3. The juvenile statutes stressed procedural informality.

goals,[138] and even a new type of judge.[139] Juvenile courts differed from adult criminal courts in a number of basic respects, reflecting the philosophy that erring children should be protected and rehabilitated rather than punished.[140] Thus, the original juvenile courts stressed informal procedures rather than adversary tactics; therefore, lawyers were unnecessary.[141] The emphasis was on the juvenile respondent's background instead of the facts of a given incident, and the court relied on the social services to diagnose and treat the juvenile.[142] The courts believed that it was in the best interests of the child to substitute flexible judicial handling for the due process protections of adult criminal trials.[143] In order to justify these procedural informalities against constitutional attacks, the juvenile courts characterized their proceedings as fundamentally noncriminal.[144]

In accordance with their emphasis on protecting and helping juveniles and to promote an informal atmosphere, the reformers advocated confidential records and hearings. Protecting confidentiality in the juvenile process was believed to be essential to rehabilitation.[145] Therefore, the reformers advocated placing restrictions upon the public's access to juvenile hearings and to juvenile records.[146]

2. Subsequent Developments in the Juvenile Court System.— Traditionally the juvenile courts treated juvenile offenders with leniency and tolerance instead of processing them through a system that resembled the adult criminal justice system. However, in recent years, the constitutional framework within which the juvenile courts function has been redefined.[147] The Supreme Court has set aside procedural informality by introducing due process protections into juvenile court proceedings.[148] The constitutional doctrine of fundamental fairness, derived from the due process clause of the fourteenth amendment, requires that juvenile proceedings become more like adult criminal trials.[149]

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[138]*Id.* The goal of the reformers was to rehabilitate rather than punish. For a discussion of the goals of the modern juvenile system, see L. SIEGEL & J. SENNA, *supra* note 13, at 284-88.

[139]TASK FORCE, *supra* note 13, at 3 ("Even the judicial role began to attract extralegal specialists, men and women aware of and interested in the social and scientific development of the day . . . ."). For a discussion of the role of the juvenile court judge in the modern juvenile court, see L. SIEGEL & J. SENNA, *supra* note 13, at 394-95.

[140]*See* TASK FORCE, *supra* note 13, at 3. *See also* L. SIEGEL & J. SENNA, *supra* note 13, at 280-84 (discussing distinctions between both the early and the modern juvenile court system and the adult criminal system).

[141]TASK FORCE, *supra* note 13, at 3.

[142]*Id.*

[143]Jonas, *supra* note 8, at 292-93.

[144]*Id.* at 293.

[145]*Id.* at 294-97.

[146]*Id.*

[147]*See generally* L. SIEGEL & J. SENNA, *supra* note 13, at 321-44.

[148]*See In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

[149]*See* Breed v. Jones, 421 U.S. 519, 541 (1975) (recognizing due process guarantees

The Supreme Court has formalized juvenile proceedings through five major decisions over the last two decades. The first of these cases was *Kent v. United States*,[150] decided in 1966. In *Kent*, the juvenile court had transferred jurisdiction of the juvenile respondent's case to an adult criminal court without a hearing or findings to support the transfer.[151] The Supreme Court overturned the transfer on both statutory and due process grounds,[152] holding that the juvenile had a right to a hearing, access to social service records, and a statement of the reasons supporting a decision to transfer jurisdiction to the adult court.[153] The Court did not specifically address the question of due process protections in a juvenile delinquency hearing; however, the decision did emphasize "that the [transfer] hearing must measure up to the essentials of due process and fair treatment."[154]

The most significant constitutional case in formalizing the juvenile court's activities was handed down the following year. In *In re Gault*,[155] the Court held that juvenile adjudicatory hearings must provide certain due process protections where the juvenile could be committed to a state institution.[156] These due process requirements include the right to notice of charges in advance of the hearing, the right to counsel, the right to cross-examine and to confront witnesses, and the privilege against self-incrimination.[157] The *Gault* decision was significant not only because of the procedural reforms it initiated, but because of its far-reaching impact throughout the entire juvenile justice system. In *Gault*, the Court reviewed the inadequacies of the

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juveniles the right to protection against double jeopardy); *In re* Winship, 397 U.S 358, 368 (1970) (recognizing due process guarantees juveniles the right to a standard of proof beyond a reasonable doubt); *In re* Gault, 387 U.S. 1, 30 (1967) (recognizing due process guarantees juveniles the right to notice of charges, the right to counsel, the right to confront and cross-examine witnesses, and the right against self-incrimination).

[150]383 U.S. 541 (1966).

[151]Kent was under probation for housebreaking when he was arrested for housebreaking, robbery, and rape. After the juvenile court waived its jurisdiction over the sixteen-year-old, Kent was indicted by the grand jury and was subsequently found guilty of housebreaking and robbery and not guilty by reason of insanity on the charge of rape. Kent was sentenced to serve a period of 30 to 90 years. *Id.* at 550.

[152]*Id.* at 553.

[153]*Id.* at 561-63.

[154]*Id.* at 562, *cited in In re* Gault, 387 U.S. 1, 12, 30 (1967).

[155]387 U.S. 1 (1967).

[156]*Id.* at 30-31. *In re Gault* arose from a juvenile court's order that a 15-year-old boy be committed to a state industrial school for six years. The juvenile had been on probation for being in the company of another boy who stole a wallet when he was taken into custody for making obscene telephone calls. *Id.* at 7. After an informal hearing, the juvenile court judge committed the juvenile to the state industrial school until he reached majority. *Id.* The Supreme Court noted that if Gault had been an adult, the maximum penalty would have been a fine of $5 to $50 or imprisonment for not more than two months. *Id.* at 8-9, 29.

[157]*Id.* at 31-57.

traditional juvenile court procedures and noted that the early ideals had not been met and that the system needed to be reformed.[158]

In *In re Winship*,[159] the Court rejected the idea that the juvenile justice system was a civil system and held that a juvenile in a delinquency adjudication must be proven guilty beyond a reasonable doubt.[160] The Court observed that "[t]he same considerations that demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child."[161] The state's argument that "afford[ing] juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process"[162] was rejected by the Court. Thus, the Court concluded that extending this protection to juveniles "'will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.'"[163]

The decision in *McKeiver v. Pennsylvania*[164] demonstrated that the Court was unwilling to extend all the constitutional protections of an adult criminal trial to juvenile hearings. In *McKeiver*, the Court decided that the sixth amendment right to a jury trial is not among the constitutional safeguards that the due process clause requires at delinquency adjudication hearings.[165] In so holding, the Court retreated to the traditional criminal-noncriminal distinction by declaring that juvenile proceedings are not criminal prosecutions under the sixth amendment.[166] The majority found that a jury trial is not necessary for accurate fact-finding and would not remedy the problems associated with the lack of rehabilitation in the juvenile court.[167] Moreover, the Court feared that if the right to a jury trial were imposed on the juvenile court, it would bring the delays, formality, and "clamor of the adversary system" to the juvenile court.[168] The Court also suggested that extending the right to a jury trial to juveniles might bring the public trial to the juvenile system, a consequence that the plurality apparently opposed.[169] Thus, the Court believed that granting the juvenile offender the right to a jury trial would hinder rather than advance the juvenile justice system.

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[158]*Id.* at 17-31.

[159]397 U.S. 358 (1970).

[160]*Id.* at 368.

[161]*Id.* at 365.

[162]*Id.* at 366.

[163]*Id.* at 367 (quoting *In re* Gault, 387 U.S. at 21).

[164]403 U.S. 528 (1971).

[165]*Id.* at 545.

[166]*Id.* at 541.

[167]*Id.* at 547.

[168]*Id.* at 550.

[169]*Id. But see id.* at 553-56 (Brennan, J., concurring and dissenting). Justice Brennan concurred in the judgment in *McKeiver* that the right to a jury trial need not be extended to juvenile proceedings in which the press and the public were admitted; however, in the consolidated case of *In re* Burris, 403 U.S. 528 (1971), Justice Brennan

Since the *McKeiver* decision, the Supreme Court has heard only one case involving an extension of some aspect of the criminal justice system to juvenile proceedings. In *Breed v. Jones*,[170] the Court held that the prosecution of the juvenile respondent in an adult criminal court, after an adjudicatory proceeding in juvenile court, violated the double jeopardy clause of the fifth amendment.[171] The Court again recognized that "a gap [existed] between the original benign conception of the [juvenile court] and its realities."[172] The Court further observed that with the exception of the *McKeiver* case, its response to this perception has been to treat juvenile proceedings and criminal prosecutions alike in regard to the applicability of due process guarantees.[173]

Studies conducted by various groups support the Court's observations in *Kent*, *Gault*, *Winship*, and *Breed* that the rehabilitative goals and ideals of the juvenile reform movement of the nineteenth century have not been met.[174] The modern juvenile court system has not succeeded in rehabilitating delinquent minors or in reducing juvenile crime.[175] The community's unwillingness to provide the necessary resources is often cited as one reason for the failures;[176] however, there may be an even more basic reason. One study has concluded that the failure of the juvenile system to fulfill its goals stems from the overly optimistic views of the reformers who created the system.[177] Thus far methods for rehabilitating juveniles that also prevent juvenile crime have not been successfully developed.[178]

This limitation on the system's ability to meet its dual goals of rehabilitating juvenile offenders and preventing juvenile criminality, combined with public anxiety over the increase in the numbers of juveniles committing serious crimes, has produced a schism between

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dissented on the same issue because under the juvenile procedures in that case the press and the public were excluded. Brennan felt that allowing accused juveniles to bring the community's attention to bear upon their hearings protected the interests that the sixth amendment right to a jury trial was intended to protect. *Id.* at 555 (Brennan, J., concurring and dissenting).

[170]421 U.S. 519 (1975).

[171]*Id.* at 541.

[172]*Id.* at 528.

[173]*Id.* at 528-29. The *Breed* decision sought to balance the juvenile's interest in procedural protections and the rehabilitative goals of the juvenile justice system. *Id.* at 535-41.

[174]*See generally* TASK FORCE, *supra* note 13, at 7 and sources cited therein.

[175]*Id.*, *cited in McKeiver*, 403 U.S. at 544.

[176]TASK FORCE, *supra* note 13, at 7-8, *cited in McKeiver*, 403 U.S. at 544.

[177]TASK FORCE, *supra* note 13, at 8.

[178]*Id.* The Task Force noted that "[e]xperts in the field agree that it is extremely difficult to develop successful methods for preventing serious delinquent acts through rehabilitative programs for the child." *Id.*

the theory and practice of the juvenile court.[179] The juvenile court statutes still generally reflect the philosophy of treatment and rehabilitation, but in practice, the juvenile court finds itself operating more like an adult criminal court with the associated characteristics of punishment and deterrence.[180] The Supreme Court recognized this and felt compelled to extend most of the due process protections of the adult criminal trial to juvenile proceedings.[181] However, juvenile court laws and procedures still remain which affect the public's right of access to those proceedings and can only be rationalized on the basis of the system's original theories of treatment and rehabilitation. If attempts at rehabilitation are futile, it no longer makes sense to argue that practices such as juvenile court confidentiality should be maintained to promote rehabilitation. Therefore, the following section will analyze the benefits to the public of open juvenile proceedings and balance these benefits against the state's interests in closure.

B. Extending the Right of Access to Juvenile Hearings

Even though the right of access to criminal trials has been narrowly construed, it still has implications for public access to juvenile delinquency hearings because the benefits of public scrutiny that the right is based on are equally applicable to juvenile proceedings. The Court's approach in right of access cases has been to first review the historical evidence on public access to the particular proceeding and then assess the specific importance of public access to the governmental process involved.[182] Therefore, in evaluating a first amendment challenge to a state statute or a particular juvenile court closure order, the Court would consult the historical and current practices of the juvenile courts with respect to public access and assess the specific importance of public access to the functioning of the juvenile courts.

In reviewing the history of public access to juvenile proceedings the Court would find that juvenile proceedings have traditionally been closed to provide confidentiality which was thought to be essential to rehabilitation.[183] An interesting aspect of the historical review of juvenile court proceedings is that it only dates back to 1899,[184] prior to that time juveniles were treated like adults for purposes of the

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[179]*Id.*

[180]*Id. See infra* note 197 and accompanying text.

[181]*See supra* note 149.

[182]*See* Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 822-24 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-06 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-80 (1980); *id.* at 589-97 (Brennan, J., concurring).

[183]*See supra* notes 145-46 and accompanying text.

[184]*See supra* notes 130-33 and accompanying text.

criminal law.[185] In the historical examinations of open criminal trials and voir dire proceedings, the Court focused on the period before the Constitution was adopted to determine what the practice was at the time the Constitution was enacted.[186] This pre-Constitution examination would be futile in evaluating the history of juvenile court practices; therefore, a review of the historical evidence may be of little value in resolving this issue.

The applicability of the first amendment right of access to proceedings not historically open remains unclear, but in the context of juvenile hearings the Court could also consult the current practices of the juvenile courts for guidance on this issue. Presently many state statutes provide for the exclusion of the general public, but allow for the presence of interested persons at the judge's discretion.[187] Other jurisdictions have adopted a conditional access approach under which those permitted by the court to attend the juvenile proceeding may not reveal the identity of the juvenile offender.[188] Because of these various approaches, juvenile hearings today cannot truly be described as closed to the public.[189] In fact, an examination of the current practice may reveal a tradition of access with limits on publishing the identity of the juvenile respondent.

Because the history of juvenile hearings only dates back to 1899 and because of the various approaches to public access among the states, a review of the historical and current practices of juvenile courts in this area will probably not be determinative in resolving a case of first impression on whether the first amendment right of access should be extended to juvenile hearings. Therefore, the Court will have to resolve the case by examining the importance of public access to the juvenile justice system. In developing the public right of access to criminal trials, the Supreme Court has emphasized that open judicial proceedings "[play] an important role in the administration of justice today."[190] Public scrutiny "enhances the quality and safeguards the integrity of the fact-finding process."[191] Public access also "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the

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[185]*See supra* note 134 and accompanying text.

[186]*See* Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 822-23 (1984) (history of voir dire); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-69 (1980) (history of open criminal trials).

[187]*See, e.g.*, GA. CODE ANN. § 15-11-28(c) (1982); HAWAII REV. STAT. § 571-41 (Supp. 1982).

[188]*See, e.g.*, ALA. CODE § 12-15-65 (1975); D.C. CODE ANN. § 16-2316(d) (1981). *See generally* Comment, *Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of "Confidential Access,"* 13 U.C.D. L. REV. 123 (1979).

[189]*See In re* Gault, 387 U.S. 1, 24 (1967) ("This claim of secrecy, however, is more rhetoric than reality.").

[190]Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 823 (1984).

[191]Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

system."[192] Open trials "[permit] the public to participate in and serve as a check upon the judicial process,"[193] thereby discouraging decisions based on partiality or secret bias.[194] Moreover, public trials serve as a form of legal education for the public, providing an understanding of the legal system in general and the procedures and rules of law in a particular case.[195] Finally, open trials provide an outlet for community concern over crime and increase respect for the law and the judicial process.[196]

All of these benefits of public scrutiny in criminal trials are equally applicable to juvenile hearings. In many ways a juvenile delinquency hearing is similar to a criminal prosecution.[197] The juvenile court is a court of law, charged, like other agencies of the criminal justice system, with protecting the community against threatening conduct. Because of the increase in juvenile criminality and the failure to fulfill its rehabilitative goal, the modern juvenile court operates more like an adult criminal court focusing on punishment and deterrence. In response to this change in the practices of juvenile courts, the Supreme Court set aside flexible judicial handling by introducing due process protections into juvenile court proceedings.[198] Thus, in most respects the modern juvenile court more closely resembles an adult criminal court than the ideal envisioned by its founders.[199]

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[192]Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 823 (1984). *Cf.* E. SCHUR, RADICAL NONINTERVENTION 161 (1973) (arguing that formality in juvenile court procedures would actually make juvenile offenders feel they have been treated justly).

[193]Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

[194]Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

[195]*Id.* at 572-73.

[196]Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 823-24 (1984); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571-72 (1982).

[197]*See In re* Gault, 387 U.S. 1, 28-29 (1967) ("[T]he points to which the [juvenile] judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute." (footnote omitted)).

[198]*See supra* note 147-73 and accompanying text.

[199]*See supra* notes 179-81 and accompanying text. As was previously noted, *see supra* text accompanying note 144, juvenile courts have characterized their proceedings as noncriminal. Some state statutes even specifically refer to juvenile hearings as civil cases. *See, e.g.*, MISS. CODE ANN. § 43-21-203(5) (1981). One approach that the courts could take in extending the right of access to juvenile proceedings would be to first recognize a public right of access to civil trials, and then, adhering to the "civil label of convenience" that has been attached to juvenile proceedings, include these proceedings within the extended scope of that right. In both *Richmond Newspapers* and *Gannett*, the Court noted that historically both civil and criminal trials have traditionally been open to the public. *Richmond Newspapers*, 448 U.S. at 580 n.17; *Gannett*, 443 U.S. at 386 n.15. In his concurring opinion in *Richmond Newspapers*, Justice Stewart explicitly stated that the public's right of access to criminal *and civil* trials was constitutionally protected. Moreover, a recent fifth circuit case has extended the public's right of access to civil proceedings relating to the release or incarceration of prisoners or to the conditions of their confinement. Newman v. Graddick, 696 F.2d 796 (5th Cir. 1983). Thus, the courts might extend the right of access to juvenile proceedings by first extending the public's right of access to include civil trials.

Moreover, the actions of the juvenile court significantly affect the public; therefore, the public has a vital interest in the workings of juvenile courts. Juvenile courts are entrusted with the responsibility of administering justice in cases involving the youth of society and, thus, are properly the subject of special public concern. Open juvenile hearings would increase the public's awareness of the need for adequate support services and resources. In addition, juvenile courts need to be held accountable to the public for the failure to fulfill their goal of preventing juvenile crime. Public scrutiny would promote a more conscientious performance by juvenile court judges and their staffs. Therefore, the first amendment right of access should be extended to juvenile delinquency hearings.

The main policy argument against extending the public right of access to juvenile hearings is that public access will create publicity and publicity is considered detrimental to rehabilitation.[200] Publicity is said to give the juvenile respondent a self-image of criminality and to stigmatize him, thus causing him to commit more delinquent acts.[201] In addition, adverse publicity may create future disabilities for a juvenile by limiting employment and educational opportunities.[202] The philosophy of the juvenile court is based on treatment and rehabilitation, exposure to adverse publicity is seen as a form of punishment. Moreover, advocates of closed proceedings claim that it is cruel and counterproductive to punish the parents of delinquents by publishing the child's misbehavior. Finally, it is alleged that some delinquents want attention and recognition; therefore, publicity may reward or contribute to delinquent behavior.[203]

The first flaw in these arguments is that rehabilitation is no longer the sole goal of the juvenile court, an equally compelling goal is protecting the public and preventing juvenile crime, which may be furthered by the deterrent effect that publicity would have. Moreover, proponents of the traditional arguments in favor of confidentiality often fail to recognize that confidentiality and rehabilitation are only impaired by the publication of the identity of the juvenile respondent, not by mere access alone. Juvenile court confidentiality involves two concepts, access and publication.[204] Only the latter directly affects

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[200]*See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104 (1979); *see generally* Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 286 (1967) (alleging that any relaxation on the curb of publicity betrays the philosophy of the juvenile court system).

[201]*See* Jonas, *supra* note 8, at 296; Comment, *supra* note 8, at 153.

[202]*See* Jonas, *supra* note 8, at 296; Comment, *supra* note 8, at 156.

[203]*See* Jonas, *supra* note 8, at 297; Comment, *supra* note 8, at 155.

[204]To shield juvenile offenders from the adverse effects of publicity, juvenile courts can exclude the press from the courtroom, thereby limiting the press' access, or the juvenile court could prohibit the publication of any information concerning juvenile

rehabilitation. Access may detract from the informal atmosphere of the proceedings, but the Supreme Court's introduction of due process safeguards has already significantly formalized juvenile court hearings. Thus, access along does not affect rehabilitation.

Moreover, the Supreme Court's decisions in *Oklahoma Publishing Co. v. District Court*[205] and *Smith v. Daily Mail Publishing Co.*[206] have resolved the conflict between the press's first amendment right to publish and the state's interests in protecting the identity of juvenile offenders in favor of the public's right to know the juvenile offender's name.[207] These cases affirmed the right of reporters to publish the lawfully obtained identity of juvenile offenders, whether such identity was obtained inside or outside of the juvenile courtroom.[208] Therefore, excluding the press and the general public from juvenile court hearings is likely to be ineffective in protecting the identity of juveniles who have committed serious acts of delinquency because the press is likely to learn of the juvenile respondent's identity through lawful means, such as interviewing witnesses at the scene of the incident.[209]

Because efforts at rehabilitation have proved to be futile, maintaining closed juvenile proceedings to promote rehabilitation can no longer be justified. Moreover, the efforts to achieve confidentiality

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proceedings, thereby limiting the press' ability to publish information. The major focus of this Note is on the concept of access. An in depth discussion of juvenile court efforts to limit publication is beyond the scope of this Note, but the issue is briefly considered *See infra* notes 205-09 and accompanying text.

[205]430 U.S. 308 (1977) (per curiam).

[206]443 U.S. 97 (1979).

[207]In *Oklahoma Publishing*, the Court held that a juvenile court could not use an injunction to prohibit the press from publishing the identity of a juvenile offender if such information was released while the press was in the courtroom. 430 U.S. at 311-12. In *Smith v. Daily Mail Publishing Co.*, the Court held that a state statute which made it a crime for a newspaper to publish the name of a juvenile respondent, even where such name was lawfully obtained by monitoring police band radio frequencies and interviewing witnesses, was unconstitutional. 443 U.S. at 106.

[208]*Smith v. Daily Mail Publishing Co.* was the Court's first opportunity to address the issue of whether a state can punish the publication of information lawfully obtained by the press outside of the courtroom and prior to the court's involvement in the case.

[209]*See, e.g.*, Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979). Some state courts that have addressed the issue of the press' right to attend juvenile proceedings have recognized the public's interests involved and the need for media access. Brian W. v. Superior Court, 20 Cal. 3d 618, 623, 574 P.2d 788, 791, 143 Cal. Rptr. 717, 719-20 (1978) (urging juvenile courts to "*actively encourage greater participation by the press*"); *In re* Jones, 46 Ill.2d 506, 509, 263 N.E.2d 863, 864-65 (1970) (stating the need for media access in rejecting minor's claim of a constitutionally protected right to a private hearing); *In re* R.L.K., 269 N.W.2d 367, 370 (Minn. 1978) (holding that the news media have a direct interest in attending juvenile proceedings, as required by statute); *In re* L., 24 Or. App. 257, 260 n.1 (1976) (recognizing the value of press access in focusing public attention on the failures and financial needs of the juvenile justice system).

by closing juvenile hearings may no longer be successful after *Smith v. Daily Mail Publishing Co.* Therefore, because the benefits to the public of open juvenile hearings outweigh the interests in restricting access to such hearings, the constitutionally protected right of access should be extended to include juvenile delinquency hearings.

IV. The Impact of Extending the Right of Access to Juvenile Hearings

A. Strict Scrutiny of Closed Juvenile Proceedings

The significance that the Court has attached to the first amendment right of access was demonstrated by its application of strict scrutiny to any restrictions on the public's access to criminal trials and voir dire proceedings.[210] The application of strict scrutiny implies that the Court considers this right to be fundamental. Therefore, if this constitutional protection were extended to juvenile proceedings, any interference with the public's access to these proceedings would also have to meet the standards of strict scrutiny. Thus, the current procedures used by juvenile courts would have to be altered to accommodate this new constitutional right.

Juvenile proceedings would be presumptively open if the right to access were extended to include such proceedings. Thus, in order for a juvenile court judge to exclude the press and the general public from a juvenile hearing, she would first have to hold a separate hearing and determine that a compelling interest exists that overrides the presumption of openness. The juvenile court judge would also have to articulate specific findings that closure was essential to protect the overriding interest, that closure was narrowly tailored to serve this interest, and that alternatives to closure were considered. Only after this procedure was completed could a juvenile court judge close her courtroom to the public and the press.

The interest traditionally advanced in favor of closed juvenile hearings is rehabilitation of the juvenile respondent. It is often asserted that confidentiality is essential to rehabilitation because of the possible adverse effects of publicity that might follow from an open proceeding. At the hearing on the closure issue, the juvenile court judge will first have to determine whether rehabilitation is a compelling interest. In *Davis v. Alaska*,[211] the state's contention that rehabilitation of a juvenile offender constituted a compelling interest was not challenged by the Court;[212] however, the Court concluded that the state

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[210]Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 824-26 (1984) (voir dire); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-10 (1982).

[211]415 U.S. 308 (1974).

[212]*Id.* at 319.

interest must be subordinated to a defendant's sixth amendment right of confrontation.[213] Similarly, in *Smith v. Daily Mail Publishing Co.*,[214] the asserted state interest in protecting the anonymity of juvenile offenders did not prevail against the first amendment rights of the press to publish lawfully obtained information.[215] Thus, rehabilitation will not always be a compelling interest, the finding may depend on the facts of the particular case, e.g., a juvenile offender with a dozen previous appearances may be beyond rehabilitation, while a first time offender, who did not commit a serious act of delinquency, might deserve every opportunity for rehabilitation.

If the juvenile court determines that rehabilitation is a compelling interest in a particular case, the court must then decide whether closure is essential to protect rehabilitation and narrowly tailored to serve that interest. On these issues the court might require empirical data to support the claim that the confidentiality derived from closed proceedings promotes rehabilitation. This evidence may be difficult to produce given the disappointing performance of the juvenile system thus far. Moreover, barring the public and the press from the courtroom may not ensure confidentiality. In *In re Gault*,[216] the Court noted that often the "claim of secrecy . . . is more rhetoric than reality."[217] The juvenile court must determine these issues on the facts of the case. Closed proceedings may be futile if there was extensive preadjudication publicity on the act of delinquency in which the identity of the juvenile was revealed.

Finally, the juvenile court must also consider alternatives to closure. This determination is closely related to the issue of whether closure is narrowly tailored to serve rehabilitation. If the only adverse effect of open proceedings is the possibility that the juvenile's identity will be revealed, which would impair his rehabilitation, the court might be able to open the proceeding, but conceal the juvenile respondent's identity from the members of the public and press who attend.[218] This would be a less restrictive alternative that would still provide the benefits of public scrutiny. If the juvenile court's ability to conceal the respondent's identity is in doubt, however, closure may be the preferred procedure to protect the interest of rehabilitation. Even if closure is found to be appropriate in a particular case, the juvenile court may still be required to provide the public and the press with a transcript of the proceedings with all the references to the child's identity deleted.

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[213] *Id.* at 319-20.

[214] 443 U.S. 97 (1979).

[215] *Id.* at 104-05.

[216] 387 U.S. 1 (1967).

[217] *Id.* at 24.

[218] *But see* Note, *The Press and Juvenile Delinquency Hearings: A Contextual Analysis of the Unrefined First Amendment Rights of Access*, 39 U. PITT. L. REV. 121, 127 (1977).

B. The Effect of the Right of Access on State Statutes

If the first amendment right of access was extended to delinquency proceedings, juveniles, as a class, would no longer be shielded from public exposure in proceedings conducted in juvenile courts.[219] The state legislatures would have to address this development and, at the least, revise their current statutes. Presently there are a variety of statutory schemes designed to protect confidentiality. Some states have left the decision on whether to close juvenile hearings to the discretion of the juvenile court judge.[220] Others provide that the general public is presumptively excluded from juvenile proceedings, but those with a direct interest in the case or in the work of the court[221] may attend at the discretion of the juvenile court judge.[222] Section 24(b) of the Uniform Juvenile Court Act contains similar language, however the commentary to this section indicates a conditional access scheme.[223] Under conditional access those permitted by the court to attend the juvenile proceedings may not reveal the identity of the juvenile offenders.[224] This practice has been adopted in several states.[225] Other states permit unconditional access to juvenile

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[219]In more than half the states this means juvenile trials could be televised. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 616 (Burger, C.J., dissenting).

[220]Fifteen states have adopted this approach either by statute or court rule. These states include: ALASKA STAT. § 47.10.070 (1975); ARIZ. R. PROC. JUV. CT. 19; ARK. STAT. ANN. § 45-442 (1977); COLO. REV. STAT. § 19-1-107(2) (1973); FLA. STAT. ANN. § 39.09(1)(c) (West Supp. 1983); IND. CODE § 31-6-7-10 (1982); IOWA CODE ANN. § 232.39 (West Supp. 1983-1984); KAN. STAT. ANN. § 38-822 (1981); MD. CTS. & JUD. PRAC. CODE ANN.§ 3-812(e) (1980); MO. ANN. STAT. § 211.171.5 (Vernon 1983); MO. R. PRAC. & PROC. JUV. CT. 117.02; N.C. GEN. STAT. § 7A-629, 640 (1981); OHIO REV. CODE ANN. § 2151.35 (Page Supp. 1982); TENN. CODE ANN. § 37-225(d) (1977); TEX. FAM. CODE ANN. § 54.08 (Vernon 1975).

[221]It is interesting to note that the language of the rape shield statute held unconstitutional in *Globe Newspaper* is almost identical to the language used in these juvenile shield statutes. *Compare* MASS. GEN. LAW ANN. ch. 278, § 16A (West 1969) *with* IDAHO CODE § 16-1608(b) (Supp. 1983).

[222]Sixteen states have adopted this approach either by statute or court rule. These states include: CONN. GEN. STAT. ANN. § 46b-122 (West Supp. 1983-1984); DEL. FAM. CT. R. 200(b)(2); HAWAII REV. STAT. § 571-41 (Supp. 1982); IDAHO CODE § 16-1608(b), 1813 (Supp. 1983); KY. REV. STAT. ANN. § 208.060(1) (Bobbs-Merrill 1982); LA. CODE JUV. PROC. ANN. art. 69 (West 1984); MASS. GEN. LAWS ANN. ch. 199, § 65 (West 1969); MICH. COMP. LAWS ANN. § 712A.17(1) (West Supp. 1983-1984); MISS. CODE ANN. § 43-21-203(6) (1981); NEV. REV. STAT. § 62.193(1) (1983); OKLA. STAT. ANN. tit. 10, § 1111 (West Supp. 1983-1984); R.I. GEN. LAWS § 14-1-30 (1981); S.C. CODE ANN. § 14-21-610 (Law. Co-op. 1976); VA. CODE § 16.1-302 (Supp. 1983); WASH. REV. CODE ANN. § 13.34.110 (Supp. 1983-1984); W. VA. CODE § 49-51(d) (Supp. 1983).

[223]UNIF. JUV. CT. ACT § 24(d), 9A U.L.A. 32-33 commissioners' note (Master ed. 1979).

[224]*See* I.J.A./A.B.A. JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ADJUDICATION, Standards 6.1-6.3, at 70-76 (1980).

[225]Fifteen jurisdictions have adopted this approach either by statute, court rule or judicial interpretation. These include: ALA. CODE § 12-15-65 (1975); Brian W. v. Superior Court, 20 Cal.3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1978) (intent of the

cases involving crimes which, if charged against adults, would be felonies.[226] In two states, all juvenile court proceedings are closed to the press and the public.[227]

The recognition of a right of access to juvenile proceedings will have an effect on all of these statutory schemes. The right of access would require that all juvenile proceedings be presumptively open and that any interference with this right meet the standards of strict scrutiny. The mandatory closure rule in the juvenile courts of New Hampshire and Vermont will probably be unable to meet the requirements of strict scrutiny. These statutes are not narrowly tailored to serve the needs of rehabilitation because a case-by-case approach would be just as effective and less restrictive. Moreover, these statutes fail to recognize that juvenile proceedings are presumptively open.

The states which presently allow access only to hearings involving specified offenses, i.e., felonies, will have to show that denying access to hearings on less serious offenses is founded on empirical evidence that demonstrates that confidentiality for certain classes of offenses promotes the rehabilitation of persons within that class. Those jurisdictions which have adopted the Uniform Act's conditional access approach might have to revise their practices even if a right of access to juvenile proceedings is not recognized, because such practices might be unconstitutional under the doctrines of *Smith v. Daily Mail Publishing Co.* and *Oklahoma Publishing Co. v. District Court.*[228]

The practice of excluding the general public, but admitting, at the juvenile court judge's discretion, those with a direct interest in the case or in the work of the court will probably be constitutionally infirm as not narrowly tailored to serve the interests of confidentiality since those properly admitted cannot be prevented from publicizing the events of the proceedings. The states that currently employ this scheme might have to adopt either a scheme of unconditional

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legislature in vesting juvenile court judge with discretion to admit those with a direct interest in the case was to allow press attendance); CAL. WELF. & INST. CODE § 346 (West Supp. 1984); D.C. CODE ANN. § 16-2316(e) (1981); GA. CODE ANN. § 15-11-28(c) (1982); ILL. ANN. STAT. ch. 37, § 701-20(6) (Smith-Hurd Supp. 1983-1984); MINN. STAT. ANN. § 260.155(1) (West 1982); N.J. JUV. & DOM. REL. CT. R. 5:9-1(a); N.M. STAT. ANN. § 32-1-31(B) (1981); N.Y. FAM. CT. ACT § 741(b) (McKinney 1983); N.Y. FAM. CT. R. 2501.2(a)(3), (c); N.D. CENT. CODE § 27-20-24(5) (Supp. 1983); OR. REV. STAT. § 419.498(1) (1983); 42 PA. CONS. STAT. ANN. § 6336(d) (Purdon 1982); S.D. CODIFIED LAWS ANN. § 26-8-32 (1976); WIS. STAT. ANN. § 48.299 (West Supp. 1983-1984); WYO. STAT. § 14-6-224(b) (1977).

[226]Three states have adopted this approach by statute. These states include: ME. REV. STAT. ANN. tit. 15, § 3307(2) (Supp. 1983-1984); MONT. CODE ANN. § 41-5-521(5) (1983); UTAH CODE ANN. § 78-3a-33 (1977).

[227]Two states have adopted this approach either by statute or judicial interpretation. These states are: N.H. REV. STAT. § 169-C:14 (Supp. 1983); *In re* J.S., 140 Vt. 458, 438 A.2d 1125 (1981); VT. STAT. ANN. tit. 33, § 651(c) (1981).

[228]*See generally*, Comment, *supra* note 8, at 140-48.

access to juvenile proceedings or a scheme that leaves the decision on closure to the juvenile court judge's discretion.

Finally, the statutes or court rules in those jurisdictions that already employ a discretionary scheme would probably be constitutional if a right of access to juvenile hearings was recognized. However, before a juvenile court judge could close a proceeding by exercising his discretion, he would first have to hold a hearing and provide those who object to the order an opportunity to be heard. The juvenile judge would also be required to make findings that show that closure was necessitated by a compelling state interest and that the closure was narrowly tailored to serve those interests.

V. Conclusion

The first amendment right of access developed from the conflict between freedom of the press and a defendant's right to a fair trial. A constitutional right of access has been recognized, but limited, thus far, to criminal trials and voir dire proceedings which have historically been open to the public. Juvenile proceedings, by contrast, have not historically been open. Nevertheless, the principal policy arguments in favor of access to adult trials apply with substantial force to juvenile proceedings. Open courtroom proceedings in both adult and juvenile cases have a value to society as a whole. Open proceedings strengthen public confidence in the courts, increase public respect for the law, permit the public to obtain information about institutions it must support financially, and help prevent miscarriages of justice. Therefore, juvenile delinquency proceedings represent one area that the right of access may be extended to include.

Although juvenile proceedings have traditionally been confidential to ensure that publicity would not interfere with the court's efforts to rehabilitate juvenile offenders, thus far, juvenile courts have not been successful in obtaining this goal of rehabilitation. The juvenile system has also failed to achieve the equally important goal of preventing juvenile crime. Because of the dramatic increase in juvenile crime and the lack of success of efforts to rehabilitate, the modern juvenile court currently operates much like an adult criminal court with an emphasis on punishment and deterrence. The Supreme Court has recognized the reality of this situation and has generally treated juvenile proceedings and criminal trials alike in the context of due process rights of the accused. Because of the system's failure to achieve its dual goals, the Court may decide that there is no principled basis for treating juvenile proceedings differently than criminal trials for purposes of the public's right of access.

If the right of access were extended to juvenile proceedings, such proceedings would be presumptively open and any attempt to close

a juvenile hearing would have to meet the rigid requirements of strict scrutiny; therefore, a state's interest in maintaining privacy for rehabilitative purposes might not always be sufficient to justify a denial of the public's first amendment right. Another consequence of such an extension of the right of access would be that the state legislatures would have to redraft their current statutes. The right of access would require the adoption of either a discretionary approach or a scheme of unconditional access. Before any juvenile proceeding could be closed, the juvenile court judge would have to hold a hearing, provide the public and the press an opportunity to state their objections, and make findings that support the closure order under the standards of strict scrutiny.

HARRY TODD