At the Crossroads of *Richmond* and *Gault*: Addressing Media Access to Juvenile Delinquency Proceedings Through a Functional Analysis

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INTRODUCTION

Nearly two decades ago, the Supreme Court for the first time affirmatively recognized a right to public and press access to criminal trials as grounded in the First and Ninth Amendments[1] and at least suggested, without reaching the question, that such a right may be implicit with regard to civil trials as well.[2] Since that time, the Court has expanded and strengthened this right of access by rejecting mandatory closure rules,[3] extending access to voir dire,[4] and opening pretrial hearings.[5] To date, the Supreme Court has yet to answer whether the right of access extends to juvenile delinquency proceedings. Examination of modern juvenile proceedings, however, reveals

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[1] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion).

[2] *See id.* n.17 ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."). Later in the same case, Justice Stewart noted in his concurrence 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." *Id.* at 599 (Stewart, J., concurring).

[3] *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602 (1982).

[4] *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508-10 (1984) [hereinafter *Press Enterprise I*].

[5] *See* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 149-50 (1993); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 10-13 (1986) [hereinafter *Press-Enterprise II*].

that—ordinarily at least—there is no functionally meaningful distinction between a juvenile delinquency adjudication and an adult criminal trial. Public scrutiny serves an important function in our system of self-government, and access would bring benefits to a troubled juvenile justice system. It is my conclusion, therefore, that *Richmond Newspapers* and its progeny should and do apply to juvenile proceedings, thereby requiring that such proceedings be presumptively open to the press and public.

To address properly the debate over media access to delinquency proceedings, it is necessary to study two major issues: first, the doctrine the Supreme Court has developed for addressing requests by the press, media, or other representatives of the public to attend a criminal justice proceeding and, second, the state of the juvenile justice system in general and delinquency proceedings specifically. This Article will survey the issue of access to juvenile delinquency proceedings by examining both of these components independently before considering how the two interact.

Part I provides an overview of the rationale used by the Supreme Court in answering access questions in the past, evaluating each of the Court's major access[6] cases. Part II takes a closer look at the two-part test the Court has developed to address access issues and examines what each element of the Court's test has come to mean today. In order to provide a solid point of departure, my analysis of Supreme Court precedent in Parts I and II will be general. Having established the access elements, I will then focus on juvenile proceedings as the case in point. In Part III, I suggest functionalism as a methodology with which to carry out my examination of the juvenile justice system. I point to Supreme Court decisions that apply a functional analysis of empirical elements for a study of this kind of First Amendment issue. I argue that such an analysis requires looking past the labels and rhetoric surrounding an issue and toward a substantive understanding. In Part IV, I apply the functional analysis recommended in Part III by examining the history, hyperbole, and reality of the juvenile justice system and delinquency proceedings. Part V then applies the Supreme Court tests discussed in Parts I and II to juvenile proceedings as seen through the functional analysis of

[6] For the purpose of clarity, "access" in this paper refers to the ability of the press and public to attend a given criminal justice proceeding for the purpose of providing public scrutiny. Therefore, by this definition, a proceeding would still be considered open despite a judge placing reasonable limitations on the total number of individual members of the press and public in attendance. *See generally* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (discussing "access" in the criminal justice proceeding context).

Part IV. I examine whether there is sufficient support to attach a presumptive right of access to delinquency proceedings. I then consider the possible countervailing arguments against granting such access, resolving finally that Supreme Court precedent and the state of the juvenile justice system call for a presumptive right of access to juvenile delinquency proceedings. Lastly, Part VI offers some parting thoughts on the issue of media access to juvenile delinquency proceedings.

I. OVERVIEW OF THE SUPREME COURT'S CASES ADDRESSING PUBLIC ACCESS TO CRIMINAL JUSTICE PROCEEDINGS

In a nation founded on a healthy distrust of its own government, the public's ability to observe and scrutinize that government in action has always been important.[7] The Constitution reflects the Framers' valuation of public observation as an inhibitor of a tyrannical government. Not only does the Sixth Amendment specifically provide for a "public trial," but both the Sixth and Seventh Amendments[8] mandate jury trials—the jury long recognized as a tool for public scrutiny, providing parties protection "against possible oppression by what is in essence an appeal to the community conscience, as embodied in the jury . . . ."[9] These amendments indicate a deep conviction that public participation in the government generally, and in the judiciary specifically, plays an important role in the larger system of checks and balances.[10] The First Amendment[11] fur-

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[7] *See* Potter Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631, 633-34 (1975) (arguing that the First Amendment's explicit protection of the press shows the Framers' desire that the public, via the press, should monitor the activities of the government).

[8] The Sixth Amendment provides that "[i]n 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 . . . ." U.S. CONST. amend. VI. The Seventh Amendment reads, "In Suits at common law, where the value of the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court in the United States, than according to rules of the common law." U.S. CONST. amend. VII.

[9] McKeiver v. Pennsylvania, 403 U.S. 528, 554-55 (1971) (Brennan, J., concurring in part and dissenting in part).

[10] *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982). As the Court in *Globe Newspaper* stated: "And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Id.*

[11] The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

ther protects this vital public check not only through its protection of the ability to *speak* one's mind, but also the ability of the press to provide information to make that speech *informed*. The freedoms of speech and press, then, must also encompass a freedom to listen.[12] Especially where people have neither the time nor the inclination to observe the judicial system first hand,[13] the press has developed into the "eyes and ears" of the body politic.[14]

That the public, with and through the press, has some right to observe the judiciary in action does not, of course, end discussion of the access question. As with many other rights, the interests or rights of one group may clash, or at least conflict, with the interests or rights of another. Thus, while there may be some right of access to the courtroom in the abstract, how that right affects other considerations, like the right to a fair trial,[15] or the state's concern for the privacy or the confidentiality of those involved in the judicial system,[16]

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and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[12] Speaking specifically about the criminal justice system, Laurence H. Tribe argues that meaningful First Amendment protection of access to such proceedings must acknowledge that a courtroom is "a public forum for *watching* and *listening*, rather than a forum for *speech*." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-20, at 965 (2d ed. 1988). Dissenting in *Houchins v. KQED, Inc.*, Justice Stevens sounded a similar chord by arguing that the First Amendment, to serve its purpose of protecting an informed self-governing democracy, must not only protect speech and the press but the "acquisition of information about the operation of public institutions . . . ." Houchins v. KQED, Inc., 438 U.S. 1, 32 (1978) (Stevens, J., dissenting); *see also* Lamont v. Postmaster General, 381 U.S. 301, 305 (1965) (invalidating a federal statute restricting the flow of mail deemed "communist political propaganda" to the addressee as a "limitation on the unfettered exercise of the addressee's First Amendment rights").

[13] The general public's lack of attendance in the modern courtroom is in contrast to conditions during colonial times. As Chief Justice Burger noted in *Richmond Newspapers*, "In earlier times, both in England and America, attendance at court was a common mode of 'passing the time.'" Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) (plurality opinion) (citations omitted). Chief Justice Burger explained the trend away from that phenomenon over time: "With the press, cinema, and electronic media now supplying the representations or reality of the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime." *Id.* This is even more the case today, with the proliferation of cameras in the courtroom.

[14] "One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right." Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari).

[15] *See* Gannett Co. v DePasquale, 443 U.S. 368, 378-84 (1979) (weighing the right of access against the defendant's right to a fair trial).

[16] *See generally* Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (weighing the right of access against the state's interest in protecting juvenile witnesses from trauma associated in testifying about sexual assault).

remains a complex and somewhat open issue. The Supreme Court has handed down five major decisions directly addressing the question of a First Amendment right of media access to criminal justice proceedings.[17] These five cases have at least two relevant things in common: first, they have all found a qualified First Amendment right of access to such proceedings, in spite of various countervailing interests[18] and, second, they have done so through various permutations of a test first developed in Chief Justice Burger's opinion and Justice Brennan's concurrence in *Richmond Newspapers, Inc. v. Virginia*,[19] often now referred to as the "experience and logic" test.[20] Before analyzing this constitutional test more closely, it is worth examining briefly how this doctrine has developed over the course of these five major cases.

A. Richmond Newspapers, Inc. v. Virginia[21]

The Court first directly addressed the question of a First Amendment right to attend judicial proceedings[22] in *Richmond Newspapers*. During his fourth trial for murder, the defendant, without objection, successfully moved the court to close the trial to the press and public. The motion to open the proceedings subsequently filed by two reporters was denied, and the Virginia Supreme Court denied their petition to appeal.[23] In a plurality opinion, the United States Supreme Court found that the closure order violated the right of access enjoyed by the public and the media under the First and Four-

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[17] *See generally* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) [hereinafter *Press-Enterprise II*]; Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984) [hereinafter *Press-Enterprise I*]; *Globe Newspaper*, 457 U.S. 596; *Richmond Newspapers*, 448 U.S. 555.

[18] These interests include the right to a fair trial, *see El Vocero*, 508 U.S. at 149-50; *Press-Enterprise II*, 478 U.S. at 14; *Globe Newspaper*, 457 U.S. at 603; the privacy of minor rape victims while testifying, *see Globe Newspaper*, 457 U.S. at 607-10; and the privacy of potential jurors, *see Press-Enterprise I*, 464 U.S. at 511-12.

[19] 448 U.S. at 589 (Brennan, J., concurring).

[20] *See Press-Enterprise II*, 478 U.S. at 9.

[21] 448 U.S. 555 (1980) (plurality opinion).

[22] In *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), the Court held that the accused's right to a public trial, guaranteed under the Sixth Amendment, did not give the press or public a right of access to a pretrial hearing. *See id.* at 387. As Chief Justice Burger pointed out in *Richmond Newspapers*, "the Court [in *Gannett*] did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials." *Richmond Newspapers*, 448 U.S. at 564; *see also* TRIBE, *supra* note 12, § 12-20, at 957.

[23] *See Richmond Newspapers*, 448 U.S. at 562.

teenth Amendments.[24] The plurality found additional support for a right of access to criminal trials in the Ninth Amendment,[25] although three Justices in concurrence found the First and Fourteenth Amendments independently sufficient.[26]

Chief Justice Burger's opinion, which was joined by Justices White and Stevens, heavily emphasized historical precedent, noting that "throughout its evolution, the trial has been open to all who cared to observe."[27] Chief Justice Burger also discussed the benefits of open trials, focusing again on historical perspectives.[28] While the Chief Justice gauged past history and the benefits of access, Justice Brennan's concurrence on the other hand explicitly suggested the use of experience and logic as a test, dubbing them "two helpful principles":[29]

> First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree into particular proceedings or information . . . in part because the Constitution carries the gloss of history. . . . Second, the value of access must be measured in specifics . . . what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.[30]

In subsequent criminal justice access cases, the Court has used the basic considerations of experience and logic—history and benefit—as its guiding principles. The Court also considered circumstances under which even a presumptively open proceeding could be closed. Chief Justice Burger's opinion argued that criminal courts should be open "[a]bsent an overriding interest articulated in [the] findings."[31] Such formulations of standards for a countervailing interest have resurfaced and changed slightly over the course of subsequent opinions.

B. Globe Newspaper Co. v. Superior Court[32]

In the wake of *Richmond Newspapers*, a landmark decision without a majority opinion, it was only a matter of time before the issue

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[24] *See id.* at 581.

[25] *See id.* at 579-80 & n.15.

[26] *See id.* at 585 (Brennan, J., Marshall, J., concurring); *id.* at 599 (Stewart, J., concurring).

[27] *Id.* at 564.

[28] *See id.* at 569.

[29] *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

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

[31] *Id.* at 581.

[32] 457 U.S. 596 (1982).

of access to criminal justice proceedings arose again. In *Globe Newspaper*, the trial court closed a rape trial where the defendant had been charged with raping three minors.[33] In closing the proceeding, the court relied on a state statute[34] designed to minimize trauma and embarrassment to juvenile sexual assault victims by requiring closure of criminal trials in which these victims were to testify.[35] Originally remanded in light of the *Richmond Newspapers* decision,[36] the Massachusetts Supreme Judicial Court (SJC) again upheld closure, based largely on the "broad, paternal protection afforded children generally."[37] While agreeing that the state's "interest—safeguarding the physical and psychological well-being of a minor—[was] compelling,"[38] the Supreme Court reversed the decision of the SJC, seven to two.

Before reaching its discussion of the experience and logic test, the Court spoke expansively about the impact of the First Amendment on the access issue. The Court noted that the Framers were concerned with "broad principles" in drafting the First Amendment[39] and that the Amendment was designed to protect free and informed "discussion of governmental affairs."[40] Thus, the *Globe Newspaper* Court took strong steps to adopt a broad reading of the First Amendment as it relates to the access question. The Court then returned to the experience and logic test from *Richmond Newspapers*.[41] The Court held that historical openness and the important role public access plays in criminal trials made a mandatory closure rule, even to protect minor sexual assault victims, repugnant to the Constitution.[42] The Court opted instead to require the trial court to determine the need for closure on a case-by-case basis.[43]

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[33] *See id.* at 598.

[34] *See* MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981).

[35] *See Globe Newspaper*, 457 U.S. at 599.

[36] *See* Globe Newspaper Co. v. Superior Court, 401 N.E.2d 360 (Mass. 1980), *vacated by* 449 U.S. 894 (1980), *remanded to* 423 N.E.2d 773 (Mass. 1981), *probable jurisdiction noted by* 454 U.S. 1051 (1981), *rev'd*, 457 U.S. 596 (1982).

[37] *Globe Newspaper*, 423 N.E.2d at 780.

[38] *Globe Newspaper*, 457 U.S. at 607.

[39] *See id.* at 604.

[40] *Id.* at 604-05.

[41] *See id.* at 603.

[42] *See id.* at 605-06.

[43] *Id.* at 607-09. The Court called on trial courts to weigh "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 (citation omitted). The discretion vested in trial court judges has raised the eyebrows of some commentators. Laurence Tribe, for example, has posited that "permitting *ad hoc*

The *Globe Newspaper* Court also offered further discussion of the level of interest required to outweigh the First Amendment right: "Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[44] This standard added teeth to Chief Justice Burger's "overriding interest" test,[45] signaling that the Court was serious about the real constitutional importance of access.

C. Press-Enterprise Co. v. Superior Court[46] (*Press-Enterprise I*)

The affirmation of the basic tenets of the *Richmond Newspapers* opinion by seven Justices in *Globe Newspaper* seemed to shore up the Court's standards for dealing with access to criminal justice proceedings. What remained to be seen was how far that access would extend beyond the actual criminal trial itself. *Press-Enterprise I* addressed that question when the media and public were excluded from portions of *voir dire* in a rape and murder case and were later denied a copy of the transcript of the proceedings. Arguing that "[t]he process of juror selection is itself a matter of importance . . . to the criminal justice system,"[47] the Court seemed to have little trouble extending *Richmond Newspapers* past the actual trial stage. The Court predictably used the basic experience and logic framework, combing through the history of access to *voir dire* and

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decisions by the judge might result in less closure but more hidden censorship by the government." TRIBE, *supra* note 12, § 12-20, at 961. Professor Tribe's concern is supported by precedent; the Supreme Court has been loath to grant any official too much unbridled censorial power, preferring strict standards to limit official discretion. *Cf.* Lovell v. Griffin, 303 U.S. 444 (1938) (striking down an ordinance that granted the City Manager standardless review power of parties wishing to distribute literature; the unbounded nature of the review power established a censorial power in violation of the First Amendment). It is precisely this kind of power, however, that many juvenile court statutes currently grant to presiding judges. See *infra* notes 195-197, 363-365, and 441-444 and accompanying text for a discussion of this issue. The issue of judicial *ad hocery* in the juvenile court will be discussed in Parts IV and V *infra*.

[44] *Globe Newspaper*, 457 U.S. at 606-07. The fact that the state's interest was in protecting minors from trauma makes this case especially important in the discussion of juvenile proceedings. See Part V *infra* for further discussion of this point.

[45] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (plurality opinion).

[46] 464 U.S. 501 (1984).

[47] *Id.* at 505. The Court has underscored the centrality of the jury to the criminal justice system by refusing to allow peremptory challenges sought to perpetuate racial or gender biases. *See generally* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

underscoring the importance of public scrutiny in that phase of the criminal justice process.[48] By this time the Court seemed comfortable applying the experience and logic test and finding a qualified First Amendment right of access for any proceeding that passed the test.[49]

In honing the proper standard to address countervailing interests once a First Amendment right has been established, the Court continued to favor public and press access. The Court confirmed that the qualified First Amendment right will almost always mandate access, stating flatly that "[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness."[50] Pulling these statements together, the Court clarified:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. That interest must be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[51]

The Court further required that trial courts consider alternatives to closure, "[e]ven with findings adequate to support closure."[52]

D. Press-Enterprise Co. v. Superior Court[53] *(Press-Enterprise II)*

By the time the Court reached its fourth major access decision in six years, it seemed ready to present a clear, defined set of rules and standards. In *Press-Enterprise II*, a California trial court denied press access to a preliminary hearing that lasted an astounding forty-one days.[54] The state supreme court affirmed the closure, arguing specifically that the First Amendment extended to events called "trials," and not to events dubbed "pretrial hearings."[55] The United States Supreme Court quickly disposed of that linguistic argument:

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[48] *See Press-Enterprise I*, 464 U.S. at 505-08.

[49] The Court explicitly stated that meeting the experience and logic test creates a qualified First Amendment right just two years later in *Press-Enterprise II*, 478 U.S. 1, 9 (1986). For a slightly more in-depth discussion, see *infra* note 62 and accompanying text.

[50] *Press-Enterprise I*, 464 U.S. at 509.

[51] *Id.* at 510.

[52] *Id.* at 511.

[53] 478 U.S. 1 (1986).

[54] *See id.* at 4.

[55] *Id.* at 5.

> The California Supreme Court concluded that the First Amendment was not implicated because the proceeding was not a criminal trial, but a preliminary hearing. However, the First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, "trial" or otherwise, particularly where the preliminary hearing functions much like a full-scale trial.[56]

This emphatic rejection of the notion that the holdings of *Richmond Newspapers* and its progeny can be limited to one specific type of proceeding is an important development in the evolution of the standard. While the Court had from the beginning "eschewed any 'narrow, literal conception' of the [First] Amendment's terms"[57] and had already extended access to *voir dire*,[58] the Court in *Press-Enterprise II* finally affirmed the applicability of the experience and logic test to proceedings outside the criminal trial.[59]

Having established the test, the Court next summarized its "considerations of experience and logic"[60] up through *Press-Enterprise II*:

> In cases dealing with the claim of a First Amendment right of access to criminal proceedings, our decisions have emphasized two complementary considerations. First . . . we have considered whether the place and process have been historically open to the press and general public. . . . Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question.[61]

The Court also articulated explicitly that meeting these considerations is independently sufficient to create a constitutional right of access.[62] Once this qualified right is established, it is the trial court's task to determine if this qualified right has been outweighed by a sufficiently "weighty" state's interest. Drawing on the *Press-Enterprise I* decision, the Court reiterated that the First Amendment interest should prevail unless an overriding interest makes closure essential

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[56] *Id.* at 7.

[57] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) (citing NAACP v. Button, 371 U.S. 415, 430 (1963)).

[58] *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 513 (1984) [hereinafter *Press-Enterprise I*].

[59] *See Press-Enterprise II*, 478 U.S. at 8.

[60] *Id.* at 9.

[61] *Id.* at 8. Note the use of the phrase "criminal proceeding" in connection with the experience and logic test. The Court's own linguistics signals a broader applicability of the test. *See id.*

[62] "If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches." *Id.* at 9.

to preserve higher values, and even then the closure must be narrowly tailored to serve the interest.[63]

E. El Vocero de Puerto Rico v. Puerto Rico[64]

This latest application of the experience and logic test by the Supreme Court, while adding little to the core of the doctrine itself, is still important in at least two respects. First, it suggests how the current Court might address another media access case requiring application of the jurisprudence developed originally in *Richmond Newspapers*. Second, it shows that the Court is even more committed to the continued and expanded use of *Richmond Newspapers* and its progeny.

In *El Vocero*, the Court examined whether the right of access extended to special pretrial hearings designed to determine whether a defendant should stand trial.[65] Rule 23(c) of the Puerto Rico Rules of Criminal Procedure specifically allowed these proceedings to be closed unless the defendant requested otherwise.[66] Ignoring arguments that Puerto Rico's "unique history and traditions" justified closure,[67] the Court made quick work of the case. Finding that Rule 23 hearings, like California pretrial hearings, were "'sufficiently like a trial' to require public access,"[68] the Court struck down the privacy provision in Rule 23(c) as unconstitutional and "irreconcilable with *Press-Enterprise [II]*."[69]

El Vocero reveals several general propositions. First, the Court reaffirmed the applicability of the experience and logic test to proceedings outside the criminal trial itself. The Court also confirmed its loyalty to the particular formulation of the experience and logic test found in *Press-Enterprise II*. These stances are relevant primarily in highlighting the Court's increasing comfort with the experience and logic test. The Court in *El Vocero*, however, did use an important analytical shortcut, arguing that, because the proceeding in question has a sufficient number of similar "features" or "commonalities" with the proceeding in *Press-Enterprise II*, the same analysis mandates access in both situations.[70] The Court's emphasis on functional equiva-

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[63] *See id.* at 9-10.
[64] 508 U.S. 147 (1993).
[65] *See id.* at 148.
[66] *See* P.R. LAWS ANN. tit. 34, App. II R. 23(c) (1991 & Supp. 1997).
[67] *See El Vocero*, 508 U.S. at 149.
[68] *Id.* at 149-50.
[69] *Id.* at 149.
[70] *See id.* at 149-50.

lence in its analysis of access cases has become increasingly prevalent and will play an important role in this Article's discussion of media access to juvenile proceedings.[71]

II. ANALYSIS OF THE *RICHMOND NEWSPAPERS* TEST

As the Court displayed in *El Vocero*, the two-part test most recently articulated in *Press-Enterprise II* has become the basic formula in dealing with access to criminal justice proceedings. Given the centrality of this test to the issue of granting access to juvenile proceedings,[72] it is important to parse each facet of these tests and examine what the standards and thresholds have come to mean. First, this section will examine each part of the experience and logic test. Next, it will look at how the Court has weighed countervailing interests against the qualified First Amendment right that attaches to proceedings that pass the test.[73]

A. *The Experience Test*

In *Richmond Newspapers*, an analysis of historical evidence relating to access to the proceeding in question played a central role for at least a majority of the Justices.[74] Indeed, Chief Justice Burger's opinion relied almost exclusively on historical analysis. According to the Chief Justice, "What is significant for [our] present purposes is that throughout its evolution, the trial has been open to all who cared to observe."[75] Likewise, Justice Brennan's concurring opinion, which provided the basic formula for the experience and logic test, emphasized history.[76]

A closer examination of historical analysis merits breaking it into at least two parts: history as an indication of "the favorable judgment of experience"[77] and—of seemingly greater importance to the Court—history as it relates specifically to original intent.[78] The

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[71] See *infra* Part III, discussing the use of a functional analysis generally; see also *infra* Part IV, applying a functional analysis to juvenile proceedings.

[72] For an explanation of this author's decision to use the *Richmond Newspapers* test, see *infra* note 283 and notes and text referred to therein.

[73] *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9 (1986) [hereinafter *Press-Enterprise II*].

[74] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 559 (1980) (Burger, C.J., joined by White and Stevens, J.J.); *id.* at 584 (Brennan, J., concurring, joined by Marshall, J.).

[75] *Id.* at 564.

[76] *See id.* at 589-90 (Brennan, J., concurring).

[77] *Id.* at 589 (Brennan, J., concurring).

[78] *See generally Press-Enterprise II*, 478 U.S. at 15 (Stevens, J., dissenting); *see also*

former considers the continuing evolution of the law from the time of ratification of the Constitution—the "modern history." The latter focuses on history as it relates to the period before and during which our organic laws were adopted and the Constitution was ratified—the "colonial history."[79]

Colonial history, used as a gauge of the intent of the Founding Fathers, has played the largest role in previous applications of historical analysis. As Chief Justice Burger noted in *Richmond Newspapers*, "[T]he historical evidence demonstrates conclusively that *at the time when our organic laws were adopted,* criminal trials both here and in England had long been presumptively open."[80] Later, Chief Justice Burger again emphasized history as a measure of original intent: "The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself . . . ."[81] In the same opinion he stated, "[T]he First Amendment guarantees of speech and press, standing alone, prohibit[ed] government from summarily closing courtroom doors which had long been open to the public *at the time that Amendment was adopted.*"[82] Justice Brennan, too, in laying out the framework for the experience and logic test, emphasized the prevalence of open courts at the time of the adoption of our common law and the ratification of the Constitution.[83]

Richmond Newspapers, 448 U.S. at 569, 576. My discussion focuses solely on the era during which the First Amendment was ratified, despite that both the First and Fourteenth Amendments are central to the right of access. This is not so much an oversight as a simple reflection of the Court's practice of focusing on the colonial era in discussing original intent. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604-05 (1982) (discussing the background against which the First Amendment was drafted, making no mention of the ratification of the Fourteenth Amendment); *Richmond Newspapers*, 448 U.S. at 564-82 (analyzing the history of criminal trials with an emphasis on the colonial era without mentioning ratification of the Fourteenth Amendment); *see also infra* notes 80-87 and accompanying text. The Court's focus on the First Amendment, of course, does not diminish the point that, because both amendments are central to the right, the original intent of the ratifiers of the Fourteenth Amendment should be taken into account as well. Given that the first juvenile court was not established until over thirty years after the Fourteenth Amendment was ratified, however, the notion holds that the background against which that amendment was written, as with the First Amendment, was one of public access to proceedings involving juveniles charged with a criminal offense. See *infra* Part IV for a discussion of the history of juvenile courts.

[79] The phrases "modern history" and "colonial history" are my own terms that describe the two phases of historical evidence the Court seems to be examining.

[80] *Richmond Newspapers*, 448 U.S. at 569 (emphasis added).

[81] *Id.* at 575.

[82] *Id.* at 576 (emphasis added).

[83] *See id.* at 590-91 (Brennan, J., concurring).

That the historical test serves primarily as a test of original intent is apparent in *Press-Enterprise I.* In the Court's discussion of the experience test, the *entire* narrative is devoted to history as it led up to the adoption of the Constitution.[84] It traces jury selection from its roots in the days before the Norman Conquests, through English law and into colonial America.[85] Chief Justice Burger *ends* his discussion of history in the late Eighteenth Century.[86] Nowhere does the opinion suggest that considerations of subsequent developments should play a role in determining the history of a given procedure. That some circumstances may justify closure of the proceeding, and that some states currently allow such closure, does not divert the Court's historical analysis.[87] Rather, such modern considerations seem to come into play more in the discussion of the state's interest, not in deciding whether a qualified First Amendment right attaches in giving access to a given court proceeding.

The Court attempts a more balanced look at history in *Press-Enterprise II,* but still relies heavily on colonial history. The Court discusses the evolution of the modern criminal justice proceeding, from events that resembled town meetings, to cases held before "'moots,' a collection of freemen in the community," through to its development as a public event in colonial America.[88] Although the Court argues that open preliminary proceedings have been "the near uniform practice of state and federal courts,"[89] modern history indicates a mixture of access and closure.

In giving lip service to balancing colonial-era and modern-day history, but still relying on colonial-era history to conduct the experience test, the Court minimizes the modern history, which is far from consistently pro-access. While noting that the "vast majority" of states allowed access to preliminary hearings,[90] the Court also admits that "several states . . . have allowed preliminary hearings to be closed on the motion of the accused."[91] The Court claims that, because preliminary proceedings in those states are "closed only for cause

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[84] *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505-08 (1984) [hereinafter *Press-Enterprise I*].

[85] *See id.*

[86] "Public jury selection thus was the common practice in America *when the Constitution was adopted.*" *Id.* at 508 (emphasis added).

[87] *See id.* at 511 n.10.

[88] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) [hereinafter *Press-Enterprise II*].

[89] *Id.* at 10.

[90] *See id.* at 10 n.3.

[91] *Id.* at 11.

shown," the mixed level of access sufficiently passes the historical test.[92]

The Court's attempt to skirt modern history proves ultimately unconvincing unless one accepts the analysis offered by Justice Stevens in dissent. He argues that Chief Justice Burger's attempt to claim near-uniform access in contemporary courts falls flat: "In the final analysis, the Court's lengthy historical disquisition demonstrates only that in *many* [s]tates preliminary proceedings are *generally* open to the Public . . . . In other [s]tates . . . such proceedings have been *closed*."[93] As Justice Stevens surmises, "in our prior cases history mattered *primarily* for what it revealed about the intentions of the Framers and ratifiers of the First Amendment."[94] The implicit message of the Court, then, is that a proceeding with a mixed modern record that was open at the time of the Constitution's adoption is sufficiently public in the eyes of the Court to "have been accorded 'the favorable judgment of experience.'"[95]

The Court's recent decision in *El Vocero*[96] offers one final lesson regarding the experience test. In that case, the Court ignores arguments that the special "Rule 23"[97] preliminary proceedings have an equally special history of closure based on "Puerto Rican tradition."[98] If modern (post-1791) history were truly a consideration, then Puerto Rico's modern tradition of closure for Rule 23 preliminary proceedings should have been persuasive. Instead, the Court gives it very little weight, insisting that "reliance on [that] tradition is [] mis-

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[92] *Id.*

[93] *Id.* at 23-24 (Stevens, J., dissenting) (emphasis added).

[94] *Press-Enterprise II*, 478 U.S. at 22 (Stevens, J., dissenting) (emphasis added); *see also* McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511, 1517 & n.6 (1995) (citing the tradition of anonymity in the advocacy of political causes as supporting the First Amendment's protection for anonymous leafleting); *id.* at 1525, 1530 (Thomas, J., concurring) ("Thus, our analysis must focus on the practices and beliefs held by the Founders. . . . While, like Justice Scalia, I am loath to overturn a century of practice shared by almost all of the states, I believe the historical evidence from the framing outweighs recent tradition."); *id.* at 1531 (Scalia, J., dissenting) ("'[O]n every question of construction, [we should] carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.'") (citation omitted).

[95] *Press-Enterprise II*, 478 U.S. at 11 (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982)).

[96] El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993).

[97] For a discussion of and citation to Puerto Rico Rule of Criminal Procedure 23, see *supra* note 66 and accompanying text.

[98] *El Vocero*, 508 U.S. at 150.

placed."[99] Rather, the experience test focuses on the history of that "*type* or *kind*" of proceeding "throughout the United States."[100]

The analysis further reflects a diminished emphasis on the modern history of the given proceeding—that of Rule 23 pretrial hearings. Instead, the Court continues to look at the historical analogue—the type or kind of proceeding—to establish the proceeding's "colonial" history. Finally, the Court returns to and relies on the model of mixed history in *Press-Enterprise II*, stating that "[t]he established and widespread tradition of open preliminary hearings" was confirmed in that case.[101] Recall, however, that all *Press-Enterprise II* established was a widespread tradition of access in *colonial* history and a mixed tradition in modern times. In sum, the test looks disproportionately at history as a gauge of original intent *circa* 1789-91, focusing on how courts acted around the time the Constitution and Bill of Rights were adopted. Further, *Press-Enterprise II* and *El Vocero* show that the experience test can still be met if such colonial history is pervasive, even with a mixed modern history. Finally, it is a test that focuses on the general substance of the proceeding, rather than its specific title or purpose.

B. The Logic Test

The second half of the experience and logic test is concerned with two intertwining issues. First, whether providing public access to a given proceeding would further the First Amendment's general aims of "protect[ing] the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch."[102] Second, "whether public access plays a significant positive role in the functioning of the particular process in question."[103]

While it would be easy to view an informed public as merely a subset of a properly functioning proceeding, the Court recognizes benefits of public access that do exist, and would exist, independent of the aim and purpose of the process in question. For example, among the advantages of public access listed by Chief Justice Burger in *Richmond Newspapers* were the following "meta-procedural" bene-

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[99] *Id.*

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

[101] *Id.* at 150-51.

[102] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 584 (1980) (Stevens, J., concurring).

[103] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 8 (1986) [hereinafter *Press-Enterprise II*].

fits: assuring fairness to the public, providing a check on the judicial system, enhancing public support for the process, providing an outlet for public catharsis and concern in the wake of a violent or shocking crime, quelling vigilante instincts, decreasing fear of corruption, and educating the public generally.[104] Many of these benefits spring not simply from furthering the aim of the process, but from allowing the public to view the process simply for viewing's sake. Thus, if the Court's concern is solely with the operation of the individual process, then there must be an implicit understanding that for a process to function properly public scrutiny must be at work. As Justice Brennan wrote in *Richmond Newspapers*:

> [T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government. Implicit 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—as well as other civic behavior—must be informed.[105]

So, even where the goal of the specific procedure in question is, for example, locating a reasonable pool of jurors or determining the guilt or innocence of the defendant, that procedure will function *better* toward its goal where the public is allowed to scrutinize the process. "Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."[106] In other words, the Court values access both because it actually improves the functioning of the system and because it buoys public support that allows the system to continue functioning.

C. *The Countervailing State's Interest*

Once the Court determines whether a qualified First Amendment right attaches, the analysis is not over.[107] As Justice Brennan explained in *Richmond Newspapers*, "Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree

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[104] *See Richmond Newspapers*, 448 U.S. at 569-74.

[105] *Id.* at 587 (Brennan, J., concurring) (citations omitted).

[106] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508 (1984) (citing *Richmond Newspapers*, 448 U.S. at 569-71) [hereinafter *Press-Enterprise I*].

[107] As the Supreme Court has stated, "[E]ven when a right of access attaches, it is not absolute." *Press-Enterprise II*, 478 U.S. at 9.

of restraint dictated by the nature of the information and the countervailing interests in security or confidentiality."[108] In determining whether countervailing interests are sufficient to justify closing a proceeding, the Court has developed standards of closure. The current standard comes from *Press-Enterprise I*:

> [T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.[109]

In addition, courts are to explore fully alternatives to closure that may satisfy the state's interests.[110] Further, a court must be careful to separate the impact of the proceeding with and without access, ensuring that a state's interest in closure properly encompasses only that *additional* burden that press and public access would entail. In discussing trials involving minor sexual assault victims, the Court makes the point: "[T]he measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying *in the presence of the press and the general public.*"[111]

To justify closure of a criminal justice proceeding once a qualified First Amendment right has been established, the trial court must satisfy six criteria: (1) an overriding state's interest, (2) closure must be essential to preserve higher values, (3) any closure order must be narrowly tailored, (4) analysis and facts supporting closure must be sufficiently articulated for review, (5) there exist no alternatives that preserve the interest, and (6) the incremental impact on the interest alone must satisfy the above criteria. This stringent standard mandates a high burden on the party seeking closure and is intended to be very difficult to meet. "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness."[112]

III. DEMANDING A FUNCTIONAL ANALYSIS APPROACH

The test set out in *Richmond Newspapers* and its progeny addresses difficult constitutional questions. The issues surrounding

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[108] *Richmond Newspapers*, 448 U.S. at 586 (Brennan, J., concurring).

[109] *Press-Enterprise II*, 478 U.S. at 9-10 (quoting *Press-Enterprise I*, 464 U.S. at 510).

[110] *See id.* at 14.

[111] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 n.19 (1982).

[112] *Press-Enterprise I*, 464 U.S. at 509.

such controversies reach deep into basic issues in our society and in our democracy. Such constitutional analysis, then, must be conducted on a level beyond mere labels and rhetoric. In determining whether *Richmond Newspapers* should extend to juvenile proceedings, or any other proceedings, it is vital that we look behind the curtain, so to speak, and find out what is really going on in the proceeding in question. Because of the special importance of constitutional conflicts, the Court has recognized that the analysis must be performed not on a superficial level, but on a functional one.[113] It is thus imperative for a true constitutional analysis that courts "eschew . . . label[s]-of-convenience"[114] and examine the facts contextually.

Particularly in the arena of the First Amendment, the Supreme Court has insisted on a functional approach. After all, our right to free speech, press, and assembly allows us to exercise effectively a check on those empowered to run our government—"an essential component in our structure of self-government."[115] Recently, in *Colorado Republican Campaign Committee v. FEC*, the Court addressed the issue of labeling in a case involving campaign contributions by political parties.[116] The government had attempted to deem all campaign donations from a political party to a candidate "coordinated contributions," which can be constitutionally constrained.[117] The Republican Party, on the other hand, argued that the funds were "independent expenditures," donations the Court had previously held to be a more direct political expression by the donor that could not be limited by law.[118] Thus, the First Amendment protection sought by the party hinged on what *label* was given to the donations. The Federal Elections Committee argued that all donations from parties were contributions and not expenditures, stating that "coordination with candidates is presumed."[119] The Court rejected

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[113] *See In re* Gault, 387 U.S. 1, 49-50 (1967).

[114] Breed v. Jones, 421 U.S. 519, 529 (1975) (citation omitted).

[115] *Globe Newspaper*, 457 U.S. at 606. The full comment reads: "And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Id.*

[116] *See generally* Colorado Republican Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996).

[117] *See generally* Buckley v. Valeo, 424 U.S. 1 (1976).

[118] *See id.* at 23-38.

[119] *Colorado Republican*, 116 S. Ct. at 2318 (citation omitted).

this characterization, made "without any internal or external evidence":[120]

> [W]e recognize that the FEC may have characterized the expenditures as "coordinated" in light of this Court's constitutional decisions prohibiting regulation of most independent expenditures. But, if so, the *characterization* cannot help the Government prove its case. *An agency's simply calling an independent expenditure a "coordinated expenditure" cannot (for constitutional purposes) make it one.*[121]

The Court cited *NAACP v. Button* for the proposition that "the government 'cannot foreclose the exercise of constitutional rights by mere labels,'"[122] and *Edwards v. South Carolina* as holding that a "[s]tate may not avoid [the] First Amendment's strictures by applying the label 'breach of peace' to peaceful demonstrations."[123] In conducting an analysis of a case with constitutional, and particularly First Amendment, ramifications, the Court demanded a deeper examination beyond how parties characterize key components of the case. This requires asking how something actually works or what is actually going on, rather than accepting the assumptions made implicitly by traditional labels.

When the Supreme Court relies on an examination of historical evidence in determining a constitutional issue, as in the *Richmond Newspapers* experience test, it prefers of course to compare identical procedures.[124] Often, however, there is no identical procedure to which the Court can compare a modern procedure, which is the case with juvenile proceedings, having only been "invented" at the turn of this century.[125] In such circumstances, the Court must, and does, look for close analogies in history to conduct comparative analyses. The Court has developed this procedure in a line of decisions relating to the availability of a jury trial in various causes of action based on the Seventh Amendment.[126] In Seventh Amendment cases, just as

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[120] *Id.*

[121] *Id.* at 2319 (emphasis added).

[122] *Id.* (citing NAACP v. Button, 371 U.S. 415, 429 (1963)).

[123] *Id.* (citing Edwards v. South Carolina, 372 U.S. 229, 235-38 (1963)).

[124] The Court has been able to examine identical parallels (for example, *Richmond Newspapers*) with regard to criminal trials. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565-69 (1980) (plurality opinion).

[125] See *infra* note 146 and accompanying text, noting that the first juvenile court was established in 1899.

[126] *See generally* Markman v. Westview Instruments, Inc., 116 S. Ct. 1384 (1996) (patent infringement action should be tried to a jury because it is analogous to a legal cause of action); Tull v. United States, 481 U.S. 412 (1987) (defendant entitled to a jury trial where government sought civil penalties and inductive relief be-

in *Richmond Newspapers*, the Court uses an "historical test."[127] The Court looks first for an identical cause of action, but failing that will locate a cause of action that is analogous.[128] This is particularly important in classifying a modern practice that may draw from several sources to create a "mongrel practice."[129] "Where there is no exact antecedent, the best hope lies in comparing the modern practice to earlier ones whose allocation to court or jury we do know, seeking the best analogy we can draw between [the] old and the new."[130] Such a comparison requires, again, a functional analysis—one that looks at the "substance" of the rights or causes of action or proceedings, to find the closest analogy possible. As with *Colorado Republican*[131] and *Button*,[132] the Court will not stop its analysis simply because it must go beyond labels into substance, essence, or analogy.

A functional analysis of the access issue requires courts to look carefully at each of the relevant tests. The experience analysis should not focus on how other proceedings with similar *labels* have been treated historically, but should instead examine proceedings in which similar *events* occur and similar *purposes* are served. Likewise, the logic test should not look at the procedural and societal benefit of access to similarly *named* proceedings, but should look at proceedings that *transpire* in a fashion similar to the one at issue. Finally, and most importantly, when determining the strength of the state's interest, a court should not accept as a forgone conclusion that the interests suggested by the state are either valid or well served. "When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured."[133] To outweigh a qualified First Amendment right, then, a denial of access must be based on more than a mere claim of harms. Such claims must be carefully examined and substantiated to test their validity.

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cause cause of action was more analogous to suits traditionally tried before a jury); Curtis v. Loether, 415 U.S. 189 (1974) (either party entitled to a jury in an action for damages under the Civil Rights Act of 1968, because the cause of action was analogous to an ordinary action for damages).

[127] *Markman*, 116 S. Ct. at 1389 (quoting Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640-43 (1973)).

[128] *See Tull*, 481 U.S. at 420.

[129] *Markman*, 116 S. Ct. at 1390.

[130] *Id.* (citations omitted).

[131] Colorado Republican Campaign Comm. v. FEC, 116 S. Ct. 2309 (1996).

[132] NAACP v. Button, 371 U.S. 415 (1963).

[133] *Colorado Republican*, 116 S. Ct. at 2317 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994)).

When addressing constitutional issues, the Court has endorsed a functional analysis of both criminal justice proceedings generally and juvenile proceedings specifically, demanding discussion be built on analysis "sturdier than mere verbiage, [with] reasons more persuasive than cliché can provide."[134] In other words, the Court must be satisfied that the facts actually merit the rhetoric. "[I]t is clear under [Supreme Court] cases that determining the relevance of constitutional policies, like determining the applicability of constitutional rights, in juvenile proceedings, requires that courts eschew 'the 'civil' label-of-convenience which has been attached to juvenile proceedings,' and that 'the juvenile process . . . be candidly appraised.'"[135]

Part IV uses the kind of functional analysis suggested by the Court in the cases discussed in this section as a framework with which to examine the modern juvenile justice system.

IV. A FUNCTIONAL LOOK AT JUVENILE PROCEEDINGS

A functional analysis of juvenile proceedings requires pushing past characterizations to ask what is occurring to the individual juveniles in the system. Throughout the course of American history, the way the criminal justice system has viewed juveniles has changed.[136] From a functional point of view, however, the only question before and after these changes can be stated simply: how do they alter the way juveniles are being treated? A good metaphor might be a time-traveling fourteen-year-old with a bad habit of committing burglaries. How would such a youth have been treated two hundred and fifty years ago, fifty years ago, twenty years ago, and today? Only if the answers change can it be said that the juvenile system is functionally different. If the answers do not change, then the juvenile justice system becomes the functional equivalent of the criminal justice system with a juvenile defendant. If that is the case, then from a constitutional perspective, the doctrine that applies to criminal proceedings must apply to juvenile proceedings as well. Although juvenile procedures may contain some unique elements, if they are substantially analogous to criminal proceedings then again the same rules and protections surely must apply.[137] This is not to say that juvenile pro-

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[134] *In re* Gault, 387 U.S. 1, 29-30 (1967).

[135] Breed v. Jones, 421 U.S. 519, 529 (1975) (citations omitted).

[136] *See generally* ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY (2d ed. 1977) (providing a general history of the juvenile justice system).

[137] For further discussion of this issue, see *supra* notes 126-29 and accompanying text.

ceedings should become adult criminal trials or be abolished altogether. With the access issue, for example, juvenile justice has been and continues to be carried out under public scrutiny in many jurisdictions without destroying the courts.[138] But in the access context, it takes more than a benevolent label to justify ignoring Supreme Court precedent. It takes contrasts on the deepest levels.

A. *The History and Underpinning of the Juvenile Justice System*

Historically speaking, the entire notion of a separate justice system for juvenile defendants is a relatively new development. For centuries, before and after the colonization of America, children charged with a criminal act were treated no differently from adults accused of the same crime.[139] At the time when our organic laws were adopted and the Constitution was ratified, any juvenile accused of committing a crime was tried as any other person would be: in a criminal court.[140]

The child was arrested; placed in prison; indicted by the grand jury; tried by a petit jury—under all the forms and technicalities of our criminal law—with the aim of ascertaining whether it had done the specific act (and nothing else); and if it had, then of visiting the punishment of the state upon it.[141]

Given that criminal trials were open to the public,[142] any trial of a juvenile would have been freely attended by the public. If convicted, the child would have been sentenced to a term of incarceration in an adult facility, again with the single criminal justice system.

It was, in fact, this system of parallel *punishment*, not parallel *adjudication*, that was the real driving force behind nineteenth-century reformers.[143] Efforts to create reformatories and other less-punitive

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[138] See *infra* notes 308-311 and accompanying text, noting that many states currently allow the public and press access in some or all juvenile proceedings.

[139] *See* HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES 13-14 (1927). Lou details the hanging of children as young as eight during the seventeenth, eighteenth, and nineteenth centuries. *See id.* at 13. Although historians are unclear exactly how young a defendant could be, Julian Mack has stated that a child over the age of criminal responsibility, "seven at common law and in some of our states, ten in others," was treated no differently than any other criminal defendant. *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909). Presumably a child under the age of criminal responsibility was deemed not to have the requisite *mens rea* to commit a criminal act.

[140] *See* Mack, *supra* note 139, at 106.

[141] *See id.*

[142] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980) (plurality opinion).

[143] "The idea that the reform movement leading to the 1899 Act was aimed at

methods of incarceration began in the 1820s[144] and ran off and on throughout the nineteenth century. Again, during this time, reformers allowed children to continue being tried in adult criminal courts.[145] It was not until 1899 that Illinois established the first separate juvenile court.[146] After Illinois, other states followed suit, and by 1925, all but two states had passed some type of juvenile court legislation.[147]

Juvenile justice reformers were motivated by profoundly philanthropic motives. It was their intent to eliminate completely the notion of punishment for juvenile offenders, replacing it with reform and rehabilitation.[148] Discussing the District of Columbia's juvenile justice system in *Kent v. United States*,[149] the Supreme Court summed up the theoretical underpinnings that drove the founding of juvenile courts:

> The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the *corpus juris*. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment.[150]

To accomplish the goals of this new nonpunitive system, reformers envisioned a trade-off of sorts: the rights normally granted to a criminal defendant, seen as rigidities of criminal procedure that only impeded the interests of the child, were to be taken away in exchange for a system where the state would offer a guiding hand, not

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substituting an informal judicial process for criminal trials has no basis in historical fact. . . . [C]hild welfare advocates wanted a better place for the child to live *when he was in state custody*." Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1220-21 (1970) (emphasis added); *see also* LOU, *supra* note 139, at 15-16 ("The attention of reformers was at first directed not to the modification of court procedure and the prevention of the conviction of the child for an offense but to the idea that after conviction he should be kept in confinement apart from adult criminals.").

[144] *See* Fox, *supra* note 143, at 1189-90.

[145] *See* LOU, *supra* note 139, at 19.

[146] *See* Fox, *supra* note 143, at 1222.

[147] *See* Gilbert Geis, *Publicity and Juvenile Court Proceedings*, 30 ROCKY MTN. L. REV. 101, 105 (1958).

[148] *See, e.g.*, Mack, *supra* note 139, at 107 ("[T]he child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian.").

[149] 383 U.S. 541 (1966).

[150] *Id.* at 554.

serve as a punitive enforcer. "The substitution of enlightened paternalism for the procedural and sentencing rigidities of criminal procedure is basic to the juvenile court system."[151] From the beginning, then, diminished protection *from* the state was exchanged for heightened protection *by* the state. True, juveniles defending against criminal charges lost the procedural safeguards afforded adults charged with the same crimes,[152] but reformers promised they would in return be dealt with more as lost souls than as societal miscreants. "The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive."[153]

Reformers envisioned a new system that would be different from the adult system on every level, from the juvenile's entry into custody, through adjudication, to the time the child was released. Youths would not be arrested and put into the criminal justice system; rather, they would be sent to a juvenile judge.[154] Once there, the fatherly jurist would put an arm around the youth[155] and talk with him "as a wise and merciful father handles his own child,"[156] discussing making things better rather than determining guilt.[157] Children who committed criminal acts would not be deemed guilty, but only in need of reform. That reform was to come in an utterly nonpunitive environment that would in no way resemble a jail or other incar-

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[151] Geis, *supra* note 147, at 101.

[152] *See id.* at 123 (observing that "[j]uvenile courts eliminated constitutional guarantees to an almost unlimited extent").

[153] *In re* Gault, 387 U.S. 1, 15-16 (1967).

[154] This theme of establishing a separate lexicon for the juvenile justice system was widespread. In fact, the juvenile justice system specialized in euphemisms. As one early reformer explained,

> [T]he proceedings are divested of all the features which attach to a criminal proceeding. Instead of a "complaint" or "indictment," there is a "petition." Instead of a "warrant" there is a "summons." The child is not "arrested" but is brought in by the parent or guardian or by a probation officer.

T.D. HURLEY, JUVENILE COURTS AND WHAT THEY HAVE ACCOMPLISHED 76 (1904). Children were also not to be placed in jail but in "a 'detention home' or other suitable place outside of the jail." *Id.*

[155] Such language is not mere hyperbole. One early juvenile court judge described his goals with a juvenile defendant: "[I]f I could get close enough to him to put my hand on his head or shoulder, or my arm around him, in nearly every such case I could get his confidence." ROBERT M. MENNEL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES 1825-1940, at 135 (1973) (quoting George W. Stubbs, a juvenile court judge in Indianapolis).

[156] Mack, *supra* note 139, at 107.

[157] *See id.*

ceration.[158] Reformers saw a foster home as the preferred placement option and thought the juvenile justice system could place most delinquents in such settings.[159] Those few who could not be placed with individual foster parents were to be sent to group homes where, in units of no more than four, these lost angels would learn skills and morals, preferably in a country setting:[160]

> What is needed is a large area, preferably in the country[]—because these children require the fresh air and contact with the soil even more than does the normal child[]—laid out on the cottage plan, giving opportunity for family life, and in each cottage some good man and woman who will live with and for the children. Locks and bars and other indicia of prisons must be avoided; human love, supplemented by human interest and vigilance, must replace them.[161]

Such a system was to wash the juvenile clean of his or her bad tendencies and create good citizens and productive adults, "fitted to do a man's or woman's work in the world."[162] Reformers saw the juvenile court as a modern-day panacea that "reache[d] right down into the heart of evil and promise[d] to tear out, in time, the roots which cause the growth of bad citizenship."[163]

To embark on this program of rehabilitation-driven reform, states needed a rationale to justify this planned, benevolent deprivation of juvenile defendants' rights. The "theoretical justification for subjecting predelinquent children to a coercive court commitment"[164] came in the form of *parens patriae*, a doctrine that allowed government to circumvent formal protections based on the state's right to step in and serve as the "parent" of children whose own parents would not or could not provide sufficient guidance.[165] The state

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[158] *See, e.g.*, HURLEY, *supra* note 154, at 11-12 ("[T]he entire thought of those who framed the [juvenile court] law was to banish all idea of crime and punishment and to overcome entirely the positive evil of a jail commitment and a formal trial . . . .").

[159] The system's reliance on foster homes and a home-like setting is evident even in the statutory intent laid out in Illinois's first-in-the-nation Juvenile Court Act, which gave as its purpose "[t]hat the care, custody, and disciple of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done the child be placed in an improved family home and become a member of the family by legal adoption or otherwise." Illinois Juvenile Court Act of Apr. 21, 1889, § 16, 1899 Ill. Laws 136-37.

[160] *See* Mack, *supra* note 139, at 114.

[161] *Id.*

[162] *Id.*

[163] HURLEY, *supra* note 154, at 29.

[164] Fox, *supra* note 143, at 1192.

[165] *See* BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (defining *parens patriae* as "the principle that the state must care for those who cannot take care of themselves,

reasoned that, because children would benefit from an informal, nonpunitive forum and because legal protection of children was not equal,[166] diminished procedural protections would be both warranted by the promises of reform and justified by its role as *parens patriae*.

In short, juvenile justice reform began out of concern for children's treatment while incarcerated and only at the turn of the century began to consider how children were treated by the courts. Latching on to a justification for diminished procedural protection through *parens patriae*, reformers embarked on a self-described "epoch-making movement."[167] Pledged to rehabilitation and naively altruistic,[168] this new movement set out to create an entirely new system, from one end to the other, unlike anything the criminal justice system had ever produced.

B. *A Closer Examination of the Juvenile System's Foundations and Rationale*

While there can be no doubt that the juvenile justice reforms of the late-nineteenth and early-twentieth centuries intended to achieve stunning results,[169] almost from the beginning critics and supporters alike began to realize that the juvenile court system was failing to make good on any of its lofty promises.[170] The system was understaffed and underfunded,[171] the judges were underqualified,[172] and if

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such as minors who lack proper care and custody from their parents").

[166] For a description of this principle, see *infra* note 184 and accompanying text. *See also* Schall v. Martin, 467 U.S. 253, 265 (1984) ("[J]uveniles, unlike adults, are always in some form of custody . . . ."); Lehman v. Lycoming County Children's Servs., 458 U.S. 502, 510-11 (1982) (same).

[167] LOU, *supra* note 139, at 19.

[168] This fact is evident by the very language used by reformers to describe the juvenile justice system they envisioned. *See supra* notes 154-158 and accompanying text; *see also infra* note 169.

[169] *See* HURLEY, *supra* note 154, at 7-8. Hurley's enthusiasm is sadly misplaced. "Potentially, the Juvenile Court law, as adopted by the Legislature of the State of Illinois, provides the solution of the entire economic problem—the problem of ignorance, poverty, and crime. . . . It appears to the enthusiast to be the very ultima thule of legislation, . . . bringing about in time a millennial condition . . . ." *Id.*

[170] *See generally* ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 137-62 (1978) (discussing the history of the disillusionment felt by reformers and others with the juvenile justice system as it came into being).

[171] *See* Fox, *supra* note 143, at 1224.

[172] The juvenile court generally ranks low in state judiciary hierarchy; this—along with a lack of resources—keeps many qualified judges away. *See* Stephen Jonas, *Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment*, 17 COLUM. J.L. & SOC. PROBS. 287, 310-11 (1982). As late as 1971, juvenile judges were often incompetent to perform the tasks of the attorneys appearing before them. The Supreme Court observed, "A recent study of juvenile court judges . . . revealed that

children were sent to a separate facility at all, it was often "heavily punitive and functioned much like the adult prisons."[173] It was distinguishable only in that none of the inmates had reached majority—a far cry from the country cottages promised by reformers.[174] Even Judge Benjamin Lindsey, a lion of the juvenile justice movement,[175] and Julia Lathrop, another forceful advocate, expressed their concern that the system they envisioned had not materialized.[176] During these first decades, supporters acknowledged that the juvenile court "had not succeeded in providing the services it had promised,"[177] but responded by pushing for further reforms, leading one former advocate of reform to ask, "Are we not ourselves, in this delinquency business, something of fanatics? 'Fanatics are those who redouble their efforts—when they have forgotten their aim.'"[178] Despite a continued "fanaticism" of one type or another since then, today's juvenile proceedings remain a far cry from their intended condition and are only likely to get worse in the future.[179]

Why the juvenile justice system never created the panacea promised by the "massive propaganda campaign" surrounding it[180] remains an interesting historical question. The most obvious possible reason is that the juvenile court system was largely never more than a rhetorical concept, unendowed with any real infrastructural or logistical support.[181] As one historian put it, "juvenile courts . . . provided new bottles for old wine."[182] Even more succinctly, "the juvenile court law changed nothing of substance."[183] Still, there have of course been

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half had not received undergraduate degrees; a fifth had received no college education at all; a fifth were not members of the bar." McKeiver v. Pennsylvania, 403 U.S. 528, 544 n.4.

[173] Fox, *supra* note 143, at 1234.

[174] Compare *supra* notes 160-61 and accompanying text for some of the language used by reformers; *see also* PLATT, *supra* note 136, at 61-66 (outlining the cottage plan).

[175] *See* RYERSON, *supra* note 170, at 30 (calling Lindsay "one of the most influential leaders of the juvenile court movement").

[176] *See id.* at 138.

[177] *Id.*

[178] *Id.* at 139 (quoting Mariam Van Waters, *The Delinquent Attitude—A Study of Juvenile Delinquents from the Standpoint of Human Relationships, in* PROCEEDINGS OF THE NATIONAL COUNCIL OF SOCIAL WORK 165 (1924)).

[179] See *infra* notes 277-80 and accompanying text, discussing the shortcomings of today's juvenile justice system.

[180] *See* Fox, *supra* note 143, at 1230.

[181] *See id.* at 1224.

[182] MENNEL, *supra* note 155, at 132.

[183] Fox, *supra* note 143, at 1230.

some juvenile courts and detention facilities built since that time. The problem, then, must go deeper.

Another possible reason lies in the questionable premise upon which the system was—and is—built. The constitutional basis was *parens patriae* and the sociological basis was rehabilitation. As discussed above, *parens patriae* provided the "cornerstone justification"[184] for juvenile justice reforms, including the juvenile courts movement. The Supreme Court examined more closely the *parens patriae* rationale in *In re Gault*: "The Latin phrase [*parens patriae*] proved to be a great help to those who rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."[185]

This slightly pointed explanation of the doctrine exposes a deeper and too often overlooked element of the rationale used to justify the modern juvenile justice system. Juveniles gave up a lot when they were thrust into the modern juvenile system. Before the reforms of the early-twentieth century, "the state was not deemed to have *authority* to accord [juveniles] fewer procedural rights than adults."[186] Courts felt *compelled* to offer the same type of protections given to adults for the same reasons they were given to adults, and courts felt they lacked the power to do otherwise. Thus, children were indeed "treated as adults with all the formalities of the criminal law and constitutional safeguards."[187] These safeguards were necessary because of the threat the state made on the defendant's liberty. Reformers offered a new system in which the state would no longer pose a threat to the defendant, but instead would serve as a protector. This system would remove the threat of a punitive judiciary; thus, the safeguards previously required were deemed "altogether inapplicable."[188] This authority to grant fewer rights, again, was discovered by reformers in the *parens patriae* doctrine. As the Court explains in *Gault*, *parens patriae* is not without is sacrifices:

> The right of the state, as *parens patriae*, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "*not to liberty but to custody.*" He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions—that is, if the child is "delinquent"—the state

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[184] *Id.* at 1193.

[185] *In re* Gault, 387 U.S. 1, 16 (1967).

[186] *Id.* at 17 (emphasis added).

[187] LOU, *supra* note 139, at 19.

[188] *Gault*, 387 U.S. at 15 (citing Mack, *supra* note 139, at 119-20).

> may intervene. In doing so, it does not deprive the child of any rights, *because he has none.* It merely provides the "custody" to which the child is entitled. *On this basis,* proceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.[189]

Such a system risks all the child's rights in the hope of saving the child. It is no wonder that Dean Roscoe Pound commented, as quoted by the *Gault* Court, that "'[t]he powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . . . .'"[190] This notion of a child without rights or liberties, however, does not mesh with the Court's own proclamations on the rights of juveniles.[191] For example, the Court has stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[192] Certainly these rights were of a lesser degree than those afforded adults.[193] Even assuming, however, the state had the option to provide reduced procedural protection to juvenile defendants because of their status as minors, that option was valid only as long as *parens patriae* provided a reasonable substitute to ensure just outcomes. Neither *parens patriae* nor any other doctrine could support the elimination of basic fairness and due process[194] in any criminal justice proceeding, juvenile or otherwise. "Under our Constitution, the condition of being a boy does not justify a kangaroo court."[195] Yet it was precisely that kind of arbitrariness that forced the Supreme Court to give the system, and *parens patriae,* another look.[196] Given

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[189] *Id.* at 17 (emphasis added).

[190] *Id.* at 18 (citation omitted).

[191] *See* Kent v. United States, 383 U.S. 541, 554-55, 563 (1966). In fact, the Court has recognized the rights of minors in other contexts as well. *See, e.g.,* Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

[192] *Gault,* 387 U.S. at 13.

[193] *See, e.g.,* Schall v. Martin, 467 U.S. 253, 266 (1984) (children are always subject to parental control and thus have diminished rights).

[194] *See Kent,* 383 U.S. at 553.

[195] *Gault,* 387 U.S. at 28.

[196] *See, e.g., Kent,* 383 U.S. at 555-56. In *Kent,* the Court questioned whether the juvenile court has the ability to live up to its *parens patriae* obligations. The Court correctly voiced its concern that the infrastructure of the juvenile court system was simply insufficient to meet the significant responsibility thrust upon it—that of serving as the juvenile's *parens patriae.* "There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the [s]tate in a *parens patriae* capacity, at least with respect to children charged with law violation." *Id.*

the diminished credibility of the *parens patriae* doctrine,[197] the juvenile justice system soon became an elaborately constructed framework, *sui generis* in its design and purpose, if not its function, with a rapidly disintegrating foundation.

Other possible reasons for the failure of the juvenile justice model are systemic. Sanford J. Fox argues that the system was fueled by a naively simplistic theory that a "predictive relationship" existed between poverty and delinquency—that poverty was linked to immorality, immorality to crime, and therefore poverty itself was seen as the cause of criminal instincts in children.[198] Once this view was discredited,[199] the notion that juvenile delinquents were somehow not responsible for their acts also collapsed, and so went the underlying justification for a nonadjudicatory, nonpunitive juvenile system.[200]

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[197] *See* RYERSON, *supra* note 170, at 148-50 (discussing the Supreme Court's refusal to allow the *parens patriae* doctrine to justify denial of due process to juvenile defendants). Although it is true that *parens patriae* is not completely discredited as a proper motivation for the state, *see Schall*, 467 U.S. at 265-66 (reaffirming that the state has *parens patriae* power to intervene where parents fail to control their children), it simply lacks the kind of talismanic power it was granted in the early years of the juvenile justice system. *See, e.g.*, Commonwealth v. Fisher, 213 Pa. 48 (1905) (holding that the *parens patriae* power justified deprivation of due process rights to the juvenile in light of the state's noble aim). The constitutionality of decisions like *Fisher* was found with relative ease at the turn of the century, in large part based on the power of *parens patriae*. *See* LOU, *supra* note 139, at 9-12.

[198] *See* Fox, *supra* note 143, at 1233. Fox puts the demise of the "predictive relationship" theory around the time of the Great Depression, "when impersonal economic forces reduced to poverty great numbers of Americans whose moral credentials were not open to question." *Id.* (citations omitted).

[199] The notion that juvenile courts can in any way reliably predict future delinquency remains thoroughly discredited today. *See, e.g.*, Edward J. McLaughlin & Lucia Beadel Whisenand, *Jury Trial, Public Trial and Free Press in Juvenile Proceedings: An Analysis and Comparison of the IJA/ABA, Task Force and NAC Standards*, 46 BROOK. L. REV. 1, 16 (1979); David A. Geller, Note, *Putting the "Parens" Back into Parens Patriae: Parental Custody of Juveniles as an Alternative to Pretrial Juvenile Detention*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 509, 519-21 (1995).

[200] *See* Fox, *supra* note 143, at 1233-35. An interesting historical residue of the rise and fall of the notion that *all* juveniles were not culpable has been the impact on children generally below ten years of age. At common law, these children were seen as too young to have the requisite criminal culpability to commit a crime. *See* Mack, *supra* note 139, at 106. While many states have a minimum age for juvenile court jurisdiction, ranging from six to twelve years of age, *see* HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 73 (1995), in many states these children were, and are, made subject to the jurisdiction of the juvenile court largely because it was intended to be non-criminal. Ironically, as the juvenile justice system has become increasingly punitive, these very young children have had to face a harsher fate than would have befallen them centuries ago, before the supposedly benevolent reforms of the early twentieth century.

One unofficial analog to the idea that younger children lack culpability may be the use of informal rather than formal juvenile proceedings for younger offenders.

Another systemic failure cuts even deeper into the viability of the concept of a juvenile court: some have charged that there existed a "disabling incongruity between the judicial and therapeutic functions."[201] Perhaps seeking to build a nonadversarial, rehabilitative institution around an adversarial, adjudicatory body was doomed from the start.[202] Whether or not it is theoretically possible to conduct a nonadjudicatory adjudication, it has not been achieved in juvenile courts. In juvenile adjudications, it became clear that the judge was deciding criminal culpability.[203]

One clear structural reason juvenile courts have failed to live up to their promises of rehabilitation is that the courts themselves were never intended to be the nexus of reformation of delinquents. Rather, courts were to serve as a gateway to new rehabilitative institutions. Fox argues that "consistent evidence from the most relevant sources" indicates that the heart of the reform movement was aimed at changing institutional conditions, not changing the procedure used to channel juveniles into those institutions.[204] Even more than with attempts to reform adjudication, however, efforts and legislation to change institutions were, by all accounts, "a colossal failure."[205] Turn-of-the-century legislation practiced "financial starvation"[206] on juvenile reform legislation, and as a result, conditions remained stagnant. Children continued to be thrown into adult prisons and jails.[207] Twenty years later, little had changed. Juveniles were either placed in highly punitive and overcrowded juvenile facilities[208] or

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Informal proceedings involve the defendant agreeing to voluntary sanctions in exchange for avoiding a formal adjudication. *See id.* at 131. Nearly half of all delinquency cases are handled in this informal manner, with younger defendants receiving the informal treatment more often. *See id.* (citation omitted).

[201] RYERSON, *supra* note 170, at 139.

[202] One commentator and veteran juvenile defense attorney explains: "A judicial system, juvenile, criminal, or civil, is meant to resolve disputes . . . and to punish those individuals who somehow upset society's balance. Trying to make a court become a rehabilitative social instrument has been a noble experiment, but nevertheless a failure." PATRICK T. MURPHY, OUR KINDLY PARENT—THE STATE 171 (1974).

[203] *See* Fox, *supra* note 143, at 1235. Fox quotes a particularly clear critique from a California appeals court judge, who observed, "'While the juvenile court law provides that adjudication of a minor to be a ward of the court shall not be deemed a conviction of crime, nevertheless, for all practical purposes this is a legal fiction, presenting a challenge to credulity and doing violence to reason.'" *Id.* (quoting *In re* Contreras, 241 P.2d 631, 633 (Cal. Ct. App. 1952)).

[204] *Id.* at 1224.

[205] *Id.*

[206] *Id.*

[207] *See* PLATT, *supra* note 136, at 146.

[208] One account of life at the St. Charles School for Boys in the late 1920s recounted punishment for infractions by the leather strap or worse. *See id.* at 150.

regular jails and prisons because many states had not actually established independent juvenile facilities.[209] These problems persisted into the 1950s. Describing juvenile detention facilities, Albert Deutsch observed the hypocrisy of the rhetoric. "Catch-words of the trade—'individualization of treatment,' 'rehabilitating the maladjusted'—rolled easily off the tongues of many institutional officials who not only didn't put these principles into practice but didn't even understand the meaning."[210] This problem has only become worse since Deutsch's observations over forty years ago.[211]

The Supreme Court's juvenile due process decisions firmly establish that confinement to a modern juvenile detention facility—by whatever name—constitutes incarceration.[212] Facilities remain hopelessly overcrowded[213] and the staff are overworked and underpaid.[214] What is more, in spite of one-hundred years of rhetoric, juveniles are either placed in "jail-like" detention homes or jail itself.[215] Thus, the single most important goal of the reforms that established the juvenile justice system—to change the institutions in which delinquent children were held[216]—has failed completely. This failure to reform these institutions is particularly damning to the original cause of rehabilitation. It is in these facilities that children were to receive the moral training that would enable them to return to society and become productive adults.[217] Without facilities in which to conduct rehabilitation, there was simply no teeth to the nonpunitive vision of juvenile justice.

"Some boys were punished by being locked up in the 'hole' for up to thirty-two days with no shoes and no mattress. They slept on wooden boards nailed to the concrete floor. Some were handcuffed to iron pipes and kept manacled day and night." *Id.* (citation omitted).

[209] *See* MENNEL, *supra* note 155, at 146.

[210] Fox, *supra* note 143, at 1233 (quoting ALBERT DEUTSCH, OUR REJECTED CHILDREN 15 (1950)).

[211] The Department of Justice notes that the 26% increase in the volume of cases passing through an already overwhelmed juvenile justice system, coupled with a disproportionate increase in cases involving violent crime, has "placed a strain on the system." SNYDER & SICKMUND, *supra* note 200, at 126.

[212] For a discussion of this principle, see *infra* notes 241-45 and accompanying text.

[213] *See* SOL RUBIN, LAW OF JUVENILE JUSTICE 17 (1976) (noting that detention homes, when built at all, are immediately close to full or overcrowded).

[214] *See* PLATT, *supra* note 136, at 152.

[215] *See* RUBIN, *supra* note 213, at 16-18.

[216] *See* Fox, *supra* note 143, at 1222-24.

[217] See *supra* notes 158-63 and accompanying text, elaborating on the idealized facilities that were to serve as the heart of the new system.

The Supreme Court's string of decisions considering (and all but one mandating) the re-installation of procedural safeguards for juvenile defendants provides a good account of the realization that the juvenile justice experiment had largely failed, leaving juveniles in a perilous limbo. Starting in 1966, with *Kent v. United States*, the Court began a systematic re-examination of juvenile proceedings, with disturbing findings. "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[218]

The basic fear that drove the Court was that the underpinnings of the system, rehabilitation as justified by *parens patriae*, were simply failing to provide the promised results, often leaving juvenile defendants worse off than if they had been tried in a criminal court.[219]

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults.[220]

In the years that followed *Kent*, the Court again and again answered these most serious questions regarding juvenile proceedings in the negative, further suggesting that the experiment of trading rights for rehabilitation had resulted only in the former without fulfilling the promises of the latter. As the Court explained, promises of compassion and benevolence "[have] not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[221]

Particularly disturbing to the Supreme Court was that the rights of the juvenile had clearly been eliminated, yet the promised pay-off of a more individualistic and rehabilitative system had not appeared. After listing several possible rights violations that allegedly occurred

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[218] Kent v. United States, 383 U.S. 541, 556 (1966).

[219] One famous example of this is the outcome in *In re Gault*, where the defendant, Gerald Francis Gault, was placed in custody for six years for committing an offense with a maximum six-month sentence for adult offenders. As one commentator noted, "This was *parens patriae* turned on its philosophical head." Jonas, *supra* note 172, at 303.

[220] *See Kent*, 383 U.S. at 555.

[221] *In re* Gault, 387 U.S. 1, 18-19 (1967).

in *Gault* (unlawful detention, interrogation outside the presence of counsel or a guardian, failure to notify the juvenile's parents, deprivation of liberty without finding of probable cause, no warning regarding a right to counsel, no warning of a right to remain silent, and the illegal taking and use of fingerprints), the Court expressed these concerns:

> These contentions raise problems of substantial concern as to the construction of and compliance with the Juvenile Court Act. They also suggest basic issues as to the justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses, particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated, or explained by action of the Government, as *parens patriae*, evidencing the special solicitude for juveniles commanded by the Juvenile Court Act.[222]

Put another way, even if the idea behind the reformer's model was justifiable, that justification becomes moot when the system does not live up to its own promises. What the Court saw, and what we continue to see today, is a system (1) based on a constitutional tradeoff, (2) grounded in a shaky doctrine, (3) that pursues a laudable but thus-far illusory goal, and (4) that has—not surprisingly—failed to meet its own expectations. Instead, the current juvenile justice system is short on funds, vision, public support, and justifiability. As Mark Harrison Moore remarked in the introduction to his examination of the juvenile justice system, "What began as a promising social experiment has disappointed nearly everyone."[223]

C. *Juvenile Proceedings Today: A Comparative Analysis with Adult Trials*

Juvenile proceedings were, from their inception, intended to provide an alternative to the criminal justice system, where different goals and different values would create a wholly separate paradigm. With those goals unattained and those values under fire, however, of what does the modern juvenile justice system actually consist? It seems logical to examine the system juvenile courts were intended to replace to determine if in fact the juvenile court of today is truly anything more than the criminal court of the underaged. The analysis is made with an eye toward the ultimate question: if the two systems are sufficiently alike, should not the constitutional safeguards for

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[222] *Kent*, 383 U.S. at 551-52.

[223] MARK HARRISON MOORE, *Preface to* 1 FROM CHILDREN TO CITIZENS vii (1987).

both the defendant and the community in each system be commensurate?

In its cases since *Richmond Newspapers*,[224] the Court has gone about the task of extending rights beyond criminal trials largely by performing a functional analysis of the proceeding in question. The Court will ask if a given proceeding is "sufficiently like a trial,"[225] requiring an examination of what goes on during the proceeding, not what the proceeding is called. This entails examining the components of the proceeding and determining if those same components can be found in a proceeding already deemed open to the public.[226]

Press-Enterprise II enumerated the elements of a pretrial proceeding in California. "The accused has the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence."[227] The Court then found that a proceeding with such attributes was indeed similar enough in importance to the system and risk to the defendant that it justified the extension of *Richmond Newspapers* to allow access.[228] Juvenile defendants received all of the same rights in most delinquency proceedings.[229] In fact, in the pretrial proceeding that the Court held "sufficiently like a trial"[230] to justify finding a First Amendment right of access, there is actually *less* at stake for the defendant than in a juvenile proceeding, particularly for a felony, for unlike a juvenile proceeding, and "unlike a criminal trial, the California preliminary hearing *cannot result in the conviction of the accused.*"[231] Further, the Court observed that, "[b]ecause of its

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[224] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion).

[225] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) [hereinafter *Press-Enterprise II*].

[226] *See* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 149-50 (1993) (reversing Puerto Rico's policy of Rule 23 pretrial proceedings, noting that "*each* of the features cited by *Press-Enterprise [II]* in support of the finding that California's preliminary hearings were 'sufficiently like a trial' to require public access is present here"); *cf. supra* notes 124-30 (examining the functional analysis performed by the Court when searching for analogous common law causes of action when parties seek a jury trial).

[227] *Press-Enterprise II*, 478 U.S. at 12.

[228] *See id.* at 13.

[229] The Supreme Court has granted juvenile defendants the rights to notice, to counsel, to cross-examine witnesses, to protect against self-incrimination, *see In re* Gault, 387 U.S. 1, 31-57 (1967), to be convicted only after delinquency is proven beyond a reasonable doubt, *see In re* Winship, 397 U.S. 358, 361-68 (1970), and to double jeopardy protection. *See* Breed v. Jones, 421 U.S. 519, 528-31 (1975).

[230] *Press-Enterprise II*, 478 U.S. at 12.

[231] *Id.* (emphasis added).

extensive scope, the preliminary hearing is *often* the final and most important step in the criminal proceeding."[232] In the juvenile court, the trial proceeding is *always* "the final and most important step" in that system, truly offering the sole occasion for public observation of the juvenile justice system.[233] Thus, a proceeding equal in its procedural complexity and actually *less* threatening to the defendant than a juvenile proceeding still warranted constitutionally protected press and public access. Under the standard in *Press-Enterprise II*, the juvenile proceedings certainly reach the requisite level of adversity, severity, and complexity to merit press and public scrutiny.

In *El Vocero*, the most recent access decision, the Court further clarified the underlying "sufficiently similar" test from *Press-Enterprise II*. The Court underscored that *Press-Enterprise II* had struck down California's private preliminary proceedings law "on the grounds that preliminary criminal hearings have traditionally been public, and because the hearings at issue were 'sufficiently like a trial' . . . that public access was 'essential to the[ir] proper functioning.'"[234] It seems that the Court has almost replaced the logic test with a "sufficiently similar" standard, at least where, as here, the proceeding in question is very much like a proceeding already adjudicated to merit access.

In *El Vocero*, the Court addressed whether Puerto Rico's unique pretrial proceeding, a so-called "Rule 23 hearing," met the tests for access, including the "sufficiently similar" test. Finding that the privacy provision in Rule 23 was unconstitutional, the Court explained:

> *[E]ach* of the features cited by *Press-Enterprise [II]* in support of the finding that California's preliminary hearings were "sufficiently like a trial" to require public access is present here. Rule 23 hearings are held before a neutral magistrate; the accused is afforded the rights to counsel, to cross-examination, to present testimony, and, at least in some instances, to suppress illegally seized evidence; . . . in a substantial portion of criminal cases, the hearing provides the only occasion for public observation of the criminal justice system; and no jury is present.[235]

Such a description could just have easily been given of a typical juvenile proceeding. In fact, juvenile proceedings are more like

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[232] *Id.* (emphasis added).

[233] *See generally* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion).

[234] El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 149 (1993) (citing *Press-Enterprise II*, 478 U.S. at 12).

[235] *Id.* at 149-50.

criminal trials than are Rule 23 hearings. In addition to defendants being afforded similar procedural safeguards, in *all* instances the delinquency proceeding provides the *only* chance for public scrutiny of the criminal justice system's treatment of juvenile defendants. As with Rule 23 hearings, a jury is almost never present in juvenile proceedings. *El Vocero* provides us with the most recent and most germane discussion by the Court on the issue of access to a given judicial proceeding, and under the standard used, juvenile proceedings would qualify for First Amendment access.

One of the key benchmarks used to gauge the seriousness of a proceeding in a variety of constitutional contexts is the consequence of a negative outcome for the defendant.[236] In other words, is something very significant, like the defendant's liberty, at stake? In the juvenile justice context, the liberty of the defendant is profoundly threatened. That Gerald Francis Gault, the juvenile defendant in the proceeding that led to the landmark *Gault* decision, was sentenced to six years in the State Industrial School proves that juveniles can and do face a severe loss of liberty and that such a sentence is far beyond a merely rehabilitative aim; it is clearly punitive as well.[237] Judges conduct juvenile hearings in a criminal tone and with an eye toward determination not of need, but of guilt.[238] This punitive mindset has only become more prevalent as the rehabilitative model is increasingly questioned[239] and juvenile court judges face exploding numbers of violent cases on their dockets.[240]

Gerald Gault's sentence led the Court to admit that juvenile proceedings present a comparably "awesome prospect of incarceration" to the juvenile defendant as is faced by the adult defendant.[241] Finding there to be "no material difference" in the need for counsel in both adult and juvenile proceedings, the Court noted the high

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[236] *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979) (noting three levels of proof for different types of cases, depending on the severity of the risk to the defendant); *see also generally* Argersinger v. Hamlin, 407 U.S. 25 (1972) (using risk to liberty as a test in determining when an indigent criminal defendant is entitled to counsel, holding that any defendant facing a risk to liberty via imprisonment is entitled to counsel).

[237] *See In re* Gault, 387 U.S. 1, 7-8 (1967).

[238] *See id.* at 28-29 ("[T]he points to which the judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute.").

[239] *See* MOORE, *supra* note 223, at vii-ix.

[240] "Over the 5-year period from 1988 through 1992, the juvenile courts saw a disproportionate increase in violent offense cases and weapon law violations . . . ." SNYDER & SICKMUND, *supra* note 200, at 126.

[241] *Gault*, 387 U.S. at 36.

degree to which a juvenile defendant's freedom is jeopardized.[242] Juvenile sentences, like the one in *Gault*, often place a juvenile in custody until the age of majority, often five or more *years* away, even when the adult sentence for a comparable crime is at most a few months.[243] In light of these sentencing realities, a ruling to detain a juvenile can hardly be seen as benign. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is *comparable in seriousness to a felony prosecution.*"[244] Commitment to a juvenile "home" is incarceration and must be treated as such. According to the *Gault* Court: "[Commitment] is incarceration against one's will, whether it is called 'criminal' or 'civil.'"[245] Here again the Court sluffs off the labels used and addresses the empirical consequences in determining constitutional ramifications.

The Court continued to take a functional analysis when determining which safeguards were needed in a given proceeding, again refusing to stop at the level of labels. In its most aggressive attack on those advocates seeking to limit debate on juvenile proceedings by the labels they have been given, the Court demanded a much more probing analysis:

> Against the application to juveniles of the right to silence, it is argued that juvenile proceedings are "civil" and not "criminal," and therefore the privilege should not apply.... However... the availability of the privilege does not turn upon the *type of proceeding* in which its protection is invoked, but upon the nature of the statement or admission and the *exposure which it invites.*
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> ...
>
> [J]uvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for the purposes of the privilege against self-incrimination. *To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings.*[246]

Just as labeling a donation one way or deeming a peaceful demonstration another cannot foreclose a closer look when protecting constitutional rights,[247] dubbing a procedure "civil" that has all the

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[242] *See id.*

[243] *See* MURPHY, *supra* note 202, at 5.

[244] *Gault*, 387 U.S. at 36 (emphasis added).

[245] *Id.* at 50.

[246] *Id.* at 49-50 (emphasis added).

[247] See *supra* notes 121-23 and accompanying text for a discussion of this issue.

same dangers and opportunities for abuse as a criminal trial will not foreclose full consideration of the empirical reality at hand.

Although the Supreme Court must ultimately apply the functional analysis to juvenile proceedings, the Court has, ironically, also been one of the most influential forces shaping the juvenile justice system. Of course, the juvenile system has been affected by countless forces, and juvenile proceedings were falling far short of their informal, rehabilitative goals long before the Court's decisions in *Kent* and *Gault*.[248] Indeed, this gap between reality and rhetoric motivated the Court's involvement. But it was the Court's "constitutional domestication"[249] of delinquency proceedings that radically overhauled the juvenile justice system, reinstalling virtually all of the procedural protections accorded an adult defendant.[250] Both because of the failure of reform and because of the Court's actions, by the late 1970s a juvenile delinquency proceeding was virtually indistinguishable from an adult trial.[251]

The Court's decisions in *Gault* and its progeny have radically reshaped the juvenile courts. As Chief Justice Burger commented in his dissent in *Winship*, "The Court's opinion today rests entirely on the assumption that all juvenile proceedings are 'criminal prosecutions,' hence subject to constitutional limitations. This derives from earlier holdings, which, like today's holding, were steps eroding the differences between juvenile courts and traditional criminal

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[248] *See Gault*, 387 U.S. at 68 (Harlan, J., concurring in part and dissenting in part) ("[W]e must recognize that the character and consequence of many juvenile court proceedings have in fact closely resembled those of ordinary criminal trials . . . ."); *see also supra* notes 170-223 and accompanying text (discussing the juvenile court system's failure to make good on any of its lofty promises).

[249] *Gault*, 387 U.S. at 22.

[250] *See* Breed v. Jones, 421 U.S. 519 (1975) (finding that juvenile proceedings expose the defendant to jeopardy for the purposes of determining double jeopardy); Davis v. Alaska, 415 U.S. 308 (1974) (holding that the defendant's right to use a witness's past juvenile delinquency record for impeachment in cross-examination is paramount to the state's interest in confidentiality of the witness's juvenile delinquency); McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (declining to grant a right to trial by jury to juveniles); *In re* Winship, 397 U.S. 358 (1970) (mandating that juveniles only be "convicted" using the beyond a reasonable doubt standard); *Gault*, 387 U.S. 1 (granting the right to notice, right to counsel, right against self-incrimination, and right to confront witnesses to juvenile defendants); Kent v. United States, 383 U.S. 541 (1966) (demanding a minimum level of fairness and due process in juvenile proceedings).

[251] *See Gault*, 387 U.S. at 68 (Harlan, J., concurring in part and dissenting in part) (noting that even before the Court's string of procedural-safeguard decisions "the character and consequences of many juvenile court proceedings have in fact closely resembled those of ordinary criminal trials"); *see also Breed*, 421 U.S. at 530 (juvenile and criminal trials have consequences that are substantially indistinguishable).

courts."[252] Thus, even while the Court was reinstating procedural safeguards to protect children from a decidedly criminal proceeding, those safeguards worked to make such proceedings even less like the informal, contemplative "meetings of the minds" envisioned by juvenile court reformers.

Perhaps the most honest assessment of the impact of *Gault*, the most sweeping of the major decisions, came from Justice Black's concurrence. He stated succinctly, "This holding strikes a well-nigh fatal blow to much that is unique about the juvenile courts."[253] Justice Black's sentiment is endemic to the Court's: respectful of the system's goals but concerned over the system's lack of workability. He continued:

> The juvenile court planners envisaged a system that would practically immunize juveniles from "punishment" for "crimes" in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions. I agree with the Court, however, that *this exalted ideal has failed of achievement since the beginning of the system.*[254]

In requiring traditional criminal procedures to safeguard juvenile defendants, the Court has admitted the failure of the system to protect juveniles through *parens patriae*. Finding that rights had been given up not for benevolence and informality but for inconsistent, arbitrary, and disturbingly adult outcomes, the *Gault* Court began to nail shut the coffin on an informal, nonadversarial juvenile system with the hammer of procedural safeguards. As Justice Black's concurrence explained, however, these safeguards were both necessary and overdue:

> Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment.[255]

In the end, the Court took steps not to destroy the dream of a new model for juvenile justice, but to save the liberty and humanity of those individual children caught up in a system gone wrong.

It became apparent just how tightly *Gault* had closed the coffin on the rehabilitative/civil juvenile delinquency proceeding when the

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[252] *Winship*, 397 U.S. at 375-76 (Burger, C.J., dissenting).

[253] *Gault*, 387 U.S. at 60 (Black, J., concurring).

[254] *Id.* (emphasis added).

[255] *Id.* at 61 (Black, J., concurring).

Court next considered applying further procedural safeguards to juvenile proceedings in *In re Winship*.[256] In that case, the issue was whether a juvenile court could find a minor delinquent based on a mere preponderance of the evidence, as the New York Family Court had done, or "whether proof beyond a reasonable doubt [was] among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult."[257] Once again, when faced with a concrete issue, the Court looked at function over form and found in favor of using the criminal standard, further discrediting the nonadversarial model.

The Supreme Court flatly rebuffed the attempt by the New York Court of Appeals to rely on the civil label and the benevolent intentions generally presumed of juvenile proceedings. The Court stated that *Gault* had "expressly rejected" both the "civil label-of-convenience" and the notion that "juvenile proceedings are designed 'not to punish, but to save the child,'" as reasons not to apply constitutional scrutiny to juvenile proceedings.[258] By the time the Court decided *Winship*, it was committed to the functional analysis: "We made it clear in [*Gault*] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts . . . ."[259]

The Court only gave pause to its reinstallation movement when it refused to *require* that juvenile proceedings be tried to a jury in *McKeiver v. Pennsylvania*.[260] Although the holding refused to extend this particular constitutional safeguard, the Court's dicta continued to express disappointment and alarm over the system the Justices saw before them.[261] In fact, the Court's opinion essentially condemned the juvenile justice system of the present, while merely holding out hope that it might still "contain the seeds from which a truly appropriate system can be brought forth."[262] In short, the Court put the juvenile justice system on probation, disheartened by the results to that point, but unwilling to pull the plug just yet in hopes of future change.

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[256] 397 U.S. 358 (1970).
[257] *Id.* at 359.
[258] *Id.* at 365.
[259] *Id.* at 365-66.
[260] 403 U.S. 528 (1971).
[261] *See id.* at 534.
[262] *Id.* at 540 (citations omitted).

The *McKeiver* opinion has since been widely criticized for granting the juvenile justice system this period of probation.[263] Ultimately, the Court chose to ignore the present in hopes of a brighter future. The future, however, is now, and the outlook is decidedly dim. As Joseph Sanborn has articulated, today's juvenile justice system is even more punitive, more criminal, and more abusive than it was when the Court heard *McKeiver*.[264] With admitted hindsight, the Court's holding in *McKeiver* is ultimately faulty; by ignoring the empirical data and failing to address the need for public scrutiny of the system itself, the Court did nothing more than perpetuate a broken system.

McKeiver, then, offered the juvenile justice system a reprieve—one last chance to implement the "idealistic prospect of an intimate, informal protective proceeding."[265] Nevertheless, by 1975 the "ero[sion of] the differences between juvenile courts and traditional criminal courts" that began with *Kent* and continued through *Gault* and *Winship* was nearly complete.[266] With little of the hopeful rhetoric of the *McKeiver* decision, and with even less deference to it, the Court continued to grant safeguards to juvenile defendants in *Breed v. Jones*.[267] The holding and dicta of *Breed* show just how far the Court has come toward viewing juvenile proceedings as criminal trials. The issue in *Breed* was "whether the prosecution of respondent as an adult, after Juvenile Court proceedings which resulted in a finding that respondent had violated a criminal statute and a subsequent finding that he was unfit for treatment as a juvenile, violated the Fifth and Fourteenth Amendments to the United States Constitution."[268] Speaking for a *unanimous* Court, Chief Justice Burger found that the Double Jeopardy Clause had been violated.[269] Ironically, it was the Chief Justice whose dissent in *Winship* five years earlier had warned of the demise of the juvenile proceeding.[270]

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[263] *See, e.g.*, CLIFFORD DORNE & KENNETH GEWERTH, AMERICAN JUVENILE JUSTICE: CASES, LEGISLATION AND COMMENTS 574-76 (1995); Joseph B. Sanborn Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 230, 233 n.26 (1993).

[264] *See* Sanborn, *supra* note 263, *passim*.

[265] *McKeiver*, 403 U.S. at 545.

[266] *In re* Winship, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting) (discussing the erosion of the differences "between juvenile courts and traditional criminal courts").

[267] 421 U.S. 519 (1975).

[268] *Id.* at 520.

[269] *See id.* at 532-33.

[270] *See Winship*, 397 U.S. at 375 (Burger, C.J., dissenting).

The Court's holding illustrates its larger view of juvenile proceedings. The issue of double jeopardy is particularly illustrative of the Court's shift in thinking toward a criminal framework. In determining whether jeopardy attaches in juvenile delinquency proceedings, the Court explains, "In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution .... [T]he risk to which the [Double Jeopardy] Clause refers *is not present in proceedings that are not 'essentially criminal.'*"[271] For the Court to hold as it does, then, is to admit that juvenile proceedings have indeed become "essentially criminal" proceedings.

Almost reflectively, the Court seems to realize that too much has transpired in the modern juvenile justice system, both in the form of case law and empirical developments, to deny the similarities of juvenile and adult trials:

> We believe it is simply too late in the day to conclude ... that a juvenile is not put in jeopardy at a proceeding whose *object* is to determine whether he has committed acts that violate a criminal law and whose potential *consequences* include both the stigma inherent in such a determination and the deprivation of liberty for many years.[272]

This holding is especially damning, because it flatly refutes the notion that such proceedings are rehabilitative and nonpunitive as well as the rhetoric that the juvenile justice system neither stigmatizes juveniles nor threatens their liberty. "[I]n terms of potential consequences, there is little to distinguish [a juvenile] adjudicatory hearing ... from a traditional criminal prosecution."[273]

The series of Supreme Court cases beginning with *Gault* and ending with *Breed* may have established procedural rights for juvenile defendants, but their relevance does not stop there. The argument could be made that the Supreme Court is willing to admit that juvenile proceedings are criminal when looking at the rights of the juvenile, but will still cling to a quasi-civil label in other contexts. That argument, however, must ultimately fail. If such a line can be drawn, it seems to be artificial, propped up not by tangible differences, but by wishful thinking.[274] The Court's opinions show time after time that juvenile hearings fail to meet the goal of a civil, informal, nonpunitive, nonadversarial proceeding. The truth in those findings

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[271] *Breed*, 421 U.S. at 528 (emphasis added) (citations omitted).

[272] *Id.* at 529 (emphasis added).

[273] *Id.* at 530.

[274] *See supra* notes 260-65 and accompanying text (discussing the Supreme Court's "wishful thinking").

cannot be ignored when the focus turns to the access question, or any other question outside the realm of procedural safeguards.

The Court in *Richmond Newspapers* found public access to criminal justice proceedings necessary because of *what* was threatened—the defendant's liberty and good name—and *who* was doing the threatening—the state, via the judiciary. Because we *all* have an interest in the proper functioning of our governmental institutions, scrutiny protects the community at large as well as individual defendants. By its nature, the criminal court determines guilt and exacts a punishment. The power to make such decisions and demand such burdens, according to the Court, must be monitored by the general public to ensure that it is not abused.[275] Such scrutiny protects the individual defendant currently on trial, all other present and future defendants, and thus all of us, or—in the case of juvenile proceedings—all of our children. But it also protects communities by ensuring that the judiciary performs its duty to protect the general public. Neither a system that coddles dangerous criminals nor one that is overly-punitive to younger, small-time offenders can be considered successful. Both the community and the defendant share an interest in securing proper scrutiny of the system, and neither one can or should speak to the exclusion of the other.[276]

The Court's opinions in the *Gault* line of cases, and the empirical data available, prove that what occurs in juvenile proceedings is not substantially different from what occurs in adult trials. That being so, precedent demands that juvenile proceedings cannot and should not be shrouded in secrecy, regardless of the wishes of any individual defendant. Not only should such requests be discounted because of the source—what defendant, of any age, would wish to have his or her transgressions made public knowledge—but because of the source's lack of knowledge about the system. The juvenile may think privacy will serve his or her interests, but once shrouded, the inadequacies of the system are also hidden from the public's gaze. The well-reasoned decision to force accountability of our judges and judicial personnel through public access is the foundation of a right shared by the accused and the community. Thus, the *Gault* line of cases stands for more than a need to protect the actual defendant. Those cases must also stand for a need to protect the

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[275] *See supra* notes 104-06 and accompanying text (discussing public scrutiny of the juvenile system).

[276] *See infra* notes 327-72 and accompanying text (discussing the need for public access to juvenile proceedings in order to garner public support for the system).

community from a system that threatens the same values as were threatened by a closed adult criminal justice system.

If it was "too late in the day" to deny the criminal nature of juvenile proceedings in 1975, then night has truly fallen since that time. The Supreme Court's decisions following *Kent* left juveniles with an impressive array of procedural safeguards: the right to counsel, the right to notice of specific charges of offense, the right to confront and cross-examine witnesses, the right to subpoena defense witnesses, the right to remain silent, the right to be tried with a burden beyond a reasonable doubt, and the right to have jeopardy attach to a juvenile proceeding.[277] In 1985, a former president of the National Council of Juvenile and Family Court Judges deemed juvenile proceedings "[i]n almost all particulars . . . like [] criminal trial[s]."[278] The conditions in juvenile detention facilities are still deplorable—facilities are overcrowded, and just sixteen percent of long-term custody facilities meet the Department of Justice's six basic health service criteria.[279] Further, coming under the jurisdiction of the juvenile court is an even greater threat to liberty today: "States are incarcerating more juvenile offenders for longer periods and redefining more of them as adults."[280] In short, compared with the juvenile justice system the Court saw as increasingly criminal two decades ago, today's system is more punitive, more crowded, and less healthy—with longer and harder time being served by juveniles.

V. APPLYING THE *RICHMOND NEWSPAPERS* TEST TO JUVENILE DELINQUENCY PROCEEDINGS

As noted earlier, the Supreme Court has yet to decide officially whether the press and public, via the First Amendment, have a right of access to juvenile proceedings. Having first examined the Court's analysis in answering access questions,[281] and subsequently studying how the modern juvenile justice system functions,[282] I turn now to the task of determining if the press and public should be allowed ac-

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[277] *See supra* note 250 (citing the decisions after *Kent* granting procedural protections to juveniles).

[278] CARL E. GUERNSEY, HANDBOOK FOR JUVENILE COURT JUDGES 18 (1985); *see also* Schall v. Martin, 467 U.S. 253, 282 n.3 (1984) (Marshall, J., dissenting) ("In most respects . . . such a hearing is the functional equivalent of an ordinary criminal trial.").

[279] *See* SNYDER & SICKMUND, *supra* note 200, at 170, 173.

[280] PATRICIA TORBET ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 34 (1996).

[281] *See supra* Parts I and II.

[282] *See supra* Part IV.

cess to juvenile proceedings even over a juvenile defendant's objections. The discussion of juvenile proceedings in Part IV will be applied to the *Richmond Newspapers* line of cases.[283] Part V considers *Richmond Newspapers*' "two complementary considerations":[284] first, "whether the place and process have historically been open to the press and general public"[285]—the experience test—and, second, "whether public access plays a significant positive role in the functioning of the particular process in question"[286]—the logic test.

A. *Applying the Experience Test to Juvenile Proceedings*

The experience test looks at what treatment the process in question has been given historically, in both more recent "modern history" and more importantly "colonial history."[287] These factors, as they relate to juvenile proceedings, find a mixed modern history and a colonial history where juveniles were tried in open court.

Considering first "colonial history," it is undisputed that any juvenile accused of breaking a criminal law was tried in an open, adult criminal trial at the time our organic laws were adopted and the Constitution ratified.[288] Any child over the age of criminal responsibility—"seven at common law and in some of our states, ten in others"—was treated no differently than any other criminal defendant.[289]

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[283] I have argued that juvenile delinquency proceedings operate much like criminal trials and that notions of a distinct, quasi-civil proceeding are mere rhetoric. *See supra* notes 224-80 and accompanying text. I have also highlighted that the Court has extended the right of access to proceedings that are "sufficiently like a [criminal] trial." Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12 (1986) [hereinafter *Press-Enterprise II*]; *see also supra* notes 230-34 and accompanying text. It seems, therefore, that the *Richmond Newspapers* test provides the proper analysis of this issue. Nevertheless, some argue that juvenile proceedings are civil proceedings and that *Richmond Newspapers* and its progeny are thus inapplicable. *See, e.g.*, Douglas A. Bahr, Note, Associated Press v. Bradshaw: *The Right of Press Access Extended to Juvenile Proceedings in South Dakota*, 34 S.D. L. REV. 738, 750 (1989). Based on the functional analysis of juvenile proceedings, concluding, as has the Supreme Court, that the civil label is merely a "label-of-convenience," Breed v. Jones, 421 U.S. 519, 529 (1975), this paper rejects the use of the civil label and therefore applies the *Richmond Newspapers* test. *See supra* Part IV (applying the *Richmond Newspapers* test to juvenile proceedings).

[284] *Press-Enterprise II*, 478 U.S. at 8.

[285] *Id.*

[286] *Id.*

[287] These phrases are my own. *See supra* notes 77-79 and accompanying text. For a discussion of this bifurcated view, see generally *supra* notes 74-101 and accompanying text.

[288] *See supra* notes 139-41 and accompanying text (discussing the treatment of juveniles historically).

[289] Mack, *supra* note 139, at 106.

Although it may seem like a truism to say that juveniles were treated equally with adults before there were juvenile courts established to treat them differently, it is a key point in the experience analysis. In looking for "appropriate analogies" to twentieth-century juvenile proceedings, how the judicial system treated juveniles in 1791 must be examined.[290] Subsequent developments such as the turn-of-the-century reform movement do not diminish the importance of colonial history in the Court's analysis, nor do they change the fact that the historical analogue to the "mongrel" procedure that is the modern juvenile proceeding was the adult (then simply the only) criminal trial.[291] The dominant consideration under the experience test in previous Supreme Court decisions has been one of original intent:[292] "[I]n our prior cases history mattered *primarily* for what it revealed about the intentions of the Framers and ratifiers of the First Amendment."[293] Asking what the Framers would have seen at the trial of a juvenile, therefore, is to ask what they would have seen at any criminal trial: full access by the general public.[294] It was this tradition of access that served as the "background of shared values and practices" against which the Constitution and the First Amendment were drafted.[295]

In considering the modern history element of the experience test—that period running from ratification to the present day—the question of juvenile proceedings requires an examination of two distinct phases: (1) from 1791 until the first juvenile courts act was passed in 1899 and (2) from that point to the present day. Even framing the discussion in this manner points out another piece of the historical puzzle. For a large portion of the post-ratification "modern period," proceedings involving juveniles remained open. So, in addition to the colonial period being one of access to juvenile criminal proceedings, nearly the entire first century of the modern era saw open criminal proceedings against juveniles as well. Not un-

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[290] *See* Tull v. United States, 481 U.S. 412, 420 (1987).

[291] *See supra* notes 225-73 and accompanying text (equating the juvenile proceeding with the criminal proceeding).

[292] *See supra* notes 75-93 and accompanying text (discussing how the historical test serves primarily as a test of original intent).

[293] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 22 (1986) (Stevens, J., dissenting) (emphasis added) [hereinafter *Press-Enterprise II*].

[294] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-69 (1980) (plurality opinion).

[295] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982).

til the first juvenile court act was passed in 1899 was any real attention paid to how juveniles were treated by the court system.[296]

At the turn of the century, only Illinois had passed legislation creating a juvenile court.[297] Over the next half-century, every other state adopted some kind of juvenile justice legislation.[298] Although juveniles have been subjected to proceedings addressing criminal acts for as long as adults have been subject to the process, specialized proceedings addressing criminal acts of juveniles alone are a relatively new development.

Even within this small subset of history during which there have been special juvenile proceedings, the attitude of the juvenile justice system toward press and public access, both from individual judges and statutory mandates, has been far from uniform. Ten years after the experiment began, only a handful of states excluded the general public.[299] Ten years after that, when a majority of states had passed juvenile courts legislation, "a comprehensive survey found [that] seven states bann[ed] the publication of juvenile court proceedings."[300] Early versions of the Standard Juvenile Court Act did not call for confidentiality,[301] and subsequent versions allowed access only for those with a "direct interest in the case."[302] Not until 1949 was the decision about who had a direct interest vested solely in the presiding judge.[303] In 1965, the Advisory Council of Judges of the National Council on Crime and Delinquency advocated cooperation with the media by juvenile court judges,[304] arguing that juvenile courts had an "obligation" to provide the news media with information about the daily operations of juvenile proceedings.[305] Indeed, the record is var-

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[296] *See* LOU, *supra* note 139, at 19.

[297] *See id.*

[298] *See* Geis, *supra* note 147, at 105 (citations omitted). "Wyoming was the last to join the [juvenile court] movement, finally inaugurating a juvenile court system in 1951." *Id.*; *see also supra* notes 146-47 and accompanying text (discussing the issue).

[299] *See* Geis, *supra* note 147, at 116.

[300] *Id.*

[301] *See* COMMITTEE ON STANDARD JUVENILE COURT LAWS, NATIONAL PROBATION ASSOCIATION, A STANDARD JUVENILE COURT LAW § 13 (1926).

[302] COMMITTEE ON STANDARD JUVENILE COURT LAWS, NATIONAL PROBATION ASSOCIATION, A STANDARD JUVENILE COURT LAW § 13 (1933).

[303] *See* NATIONAL PROBATION AND PAROLE ASSOCIATION, A STANDARD JUVENILE COURT ACT § 17 (1949).

[304] *See* ADVISORY COUNCIL OF JUDGES, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, GUIDES FOR JUVENILE COURT JUDGES ON NEWS MEDIA REGULATIONS 5, 8-9 (1965) [hereinafter GUIDES FOR JUVENILE COURT JUDGES].

[305] *See id.* at 5.

ied enough to say that the issue of press and public access has never been completely settled.

Although it is certainly true that the public and press are often excluded from modern juvenile proceedings, the mixed approach to the question of access remains a reality today. State laws remain far from unified in the level of access they allow to juvenile proceedings. Nationwide, the degree of confidentiality and approaches taken by states remains, as one commentator has put it, a kind of patchwork,[306] with recent trends decidedly pro-access.[307] In this patchwork are statutes ranging from mandated access to near-mandated closure. Three states expressly require press or public access in all cases,[308] and twelve others require access where the juvenile has been charged with having committed a violent felony, with some states adding age restrictions as well.[309] In nine other states there is at least a presumption in favor of openness, and some of those permit closure only upon a finding of certain specific circumstances.[310] Seven

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[306] *See* Jonas, *supra* note 172, at 295.

[307] *See* TORBET ET AL., *supra* note 280, at 35.

[308] *See* 705 ILL. COMP. STAT. ANN. 405/1-5(6) (West 1992); MONT. CODE ANN. § 41-5-1502(7) (1997) (general public may not be excluded from delinquency proceedings); N.M. STAT. ANN. § 32A-2-16(B) (Michie 1995).

[309] *See* CAL. WELF. & INST. CODE § 676 (West 1984) (access required in cases involving a list of enumerated violent offenses); DEL. CODE ANN. tit. 10, § 1063(a) (1975 & Supp. 1996) (proceedings involving juveniles charged with felonies must be open); GA. CODE ANN. § 15-11-28(c) (1994) (open for all felony and repeat offenders); KAN. STAT. ANN. § 38-1652 (1993) (access required in all cases where the juveniles are 16 or older, and in all cases with defendants over 14 unless access for these younger juveniles is found not to be in the best interest of the child); LA. STAT. ANN. ch. C, art. 879(B) (West 1995) (proceedings open when involving a crime of violence or defendant is a repeat felony offender); ME. REV. STAT. ANN. tit. 15, § 3307(2) (West 1980) (all felonies); MASS. GEN. LAWS ANN. ch. 119, § 65 (West 1993) (requiring access in all cases where the state has proceeded by indictment—presumably a vehicle for opening all cases involving serious felonies); MINN. STAT. ANN. § 260.155(1) (West 1992) (all felonies allegedly committed by juveniles 16 and older); MO. REV. STAT. § 211.171(5) (1996) (open for all cases involving Class A and B felonies, and repeat felony offenders); PA. CONS. STAT. ANN. tit. 42, § 6336 (West 1982) (access required in all felony cases where defendant over 14, and in enumerated serious felony cases where defendant over 12); S.D. CODIFIED LAWS § 26-7A-36 (Michie 1992) (proceedings for violent crimes or certain drug felonies shall be open); UTAH CODE ANN. § 78-3a-511(1)-(2) (1996) (age 16 or older and charged with felony, court may close these proceedings on particular findings).

[310] *See* ARIZ. JUV. CT. R. 7(c) (presumed open except upon written finding of clear public interest in closure); COLO. REV. STAT. ANN. § 19-1-106(2) (West 1990) (hearings must be open unless closure would serve the public's or the juvenile's interest); FLA. STAT. ANN. § 39.052(1)(c) (West 1996) (repealed 1998) (court must be open unless closure is held by the presiding judge to serve the public interest and the welfare of the child); IND. CODE ANN. § 31-6-7-10(b) (West 1979) (access must be granted where defendant charged with a felony unless closure necessary to pro-

states essentially leave the issue to the court's discretion without establishing a presumption.[511]

Even with recent pro-access trends, more often than not juvenile proceedings remain closed to the public.[512] In sixteen states, hearings are presumptively closed, but the judge has discretion to open them. Usually, parties with a "direct" or "proper" interest in the case or the work of the court can be permitted access at the discretion of the judge. Several states have interpreted this language to permit access to the press.[513] Only two states actually limit access to

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tect the welfare of the child on specific written findings); IOWA CODE ANN. § 232.39 (West 1994) (closure only if court finds that harm to juvenile outweighs public interest in open proceedings); MICH. COMP. LAWS ANN. § 712A.17(7) (West 1993) (permitting closure if necessary to protect juvenile welfare after consultation of enumerated factors); NEV. REV. STAT. ANN. § 62.193(1) (Michie 1996) (must be open absent finding closure in best interest of child, and then only those portions of hearing necessary to preserve the interest); TEX. FAM. CODE ANN. § 54.08 (West 1996) (open unless judge rules closure is required for good cause); VA. CODE ANN. § 16.1-302 (Michie 1996) (open for felony cases where defendant over 14; judge may close for good cause and upon a written public statement of reasons).

[511] *See* ARK. CODE ANN. § 9-27-325(i) (Michie 1993); MD. R. JUV. CAUSES 11-110; N.J. STAT. ANN. § 2A:4A-60(g) (West 1987) (court "may" permit access if there is no "substantial likelihood [of] specific harm" to the juvenile); N.Y. JUD. LAW § 341.1 (McKinney 1983); N.C. GEN. STAT. § 7A-629 (1997); OHIO REV. CODE ANN. § 2151.35 (Anderson 1994); TENN. CODE ANN. § 37-1-124 (1996).

[512] It should be noted that this Article's analysis focuses on cases where the juvenile defendant either shows no preference or actively seeks closure of the proceeding. Where a defendant seeks access, the discussion must shift to the Sixth Amendment. Some state statutes specifically mandate open proceedings if the defendant requests that the public be allowed to attend. *See, e.g.*, ALASKA STAT. § 47.10.070 (Michie 1996) (requiring that the hearing be open upon the juvenile's request); ARK. CODE ANN. § 9-27-325(i) (Michie 1993) (same); CAL. WELF. & INST. CODE § 676 (West 1984) (same). Others fail to mention a specific right to a public trial. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-76h (West 1994); D.C. CODE ANN. § 16-2316(e) (1997); N.H. REV. STAT. ANN. § 169-B:34 (1994). Case law has been mixed, with some courts holding that the juvenile is entitled to a public trial. *See generally* R.L.R. v. State, 487 P.2d 27 (Alaska 1971) (juvenile's right to public trial is guaranteed); *In re* Dino, 359 So. 2d 536 (La. 1978) (juvenile must be granted public trial if so requested). Other courts have extended the notion that the proceeding is not criminal into Sixth Amendment jurisprudence. *See generally In re* McM., 105 Cal. App. 3d 187 (1980) (no constitutional right to a public trial); *In re* D.H., 666 A.2d 462 (D.C. 1995) (delinquency proceedings are not criminal proceedings within the meaning of the Sixth Amendment). While it seems that the Sixth Amendment should allow access when the defendant seeks a public venue, such a discussion is beyond the scope of this Article, which instead focuses on resolving the situation where the juvenile and/or the state seek a confidential proceeding, and the press or another third party seeks access.

[513] *See, e.g.*, Brian W. v. Superior Court, 574 P.2d 788, 791 (Cal. 1978) (concluding that the California legislature intended similar language "to allow press attendance at juvenile hearings"); *In re* R.L.K., 269 N.W.2d 367, 370-71 (Minn. 1978) (concluding that "[t]he weight of authority is that the news media have a 'direct interest' in the work of the court" because "[t]he news media have a strong

juvenile proceedings without mentioning judicial discretion to admit others.[514]

The national trend is clearly toward rethinking confidential juvenile proceedings.[515] Between 1992 and 1995, ten states passed statutes favoring open juvenile proceedings.[516] Since that time, seven additional states have followed the pro-access trend,[517] which is likely to continue in light of the mounting public concern about continued violence by juveniles.[518]

The history of juvenile proceedings, in short, has been one of total access during colonial history, continued full access[519] during the first half of modern history, and mixed access only during the past eighty or so years, with increasing trends in the past five years toward restoring access. Applying that history to the *Richmond Newspapers* tests and comparing it to the histories of other proceedings upon which the Court has ruled, particularly the pretrial proceedings in *Press-Enterprise II* and *El Vocero*,[520] juvenile proceedings on balance have been sufficiently open to "have been accorded 'the favor-

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interest in obtaining information regarding our legal institutions and an interest in informing the public about how judicial power in juvenile courts is being exercised"); *In re* L., 546 P.2d 153, 155 n.1 (Or. Ct. App. 1976) (same). Several state statutes and court rules currently use this language. *See* ALA. CODE § 12-15-65(a) (1995); HAW. REV. STAT. § 571-41(b) (1993); IDAHO JUV. R. 37, 52; KY. REV. STAT. ANN. § 610.070(3) (Michie 1990); MISS. CODE ANN. § 43-21-203(6) (1993); N.D. CENT. CODE § 27-20-24(5) (1991); OKLA. STAT. ANN. tit. 10, § 7003-4.1 (West 1987); R.I. GEN. LAWS § 14-1-30 (1994); S.C. CODE ANN. § 20-7-755 (Law. Co-op. 1985); VT. STAT. ANN. tit. 33, § 5523(c) (1995); WASH. REV. CODE ANN. § 13.34.110 (West 1993); W. VA. CODE § 49-5-2(i) (1996); WIS. STAT. ANN. § 48.299 (West 1997); WYO. STAT. ANN. § 14-6-224(b) (Michie 1997). Other states similarly permit the court to open proceedings in its discretion. *See* ALASKA STAT. § 47.10.070 (Michie 1996); D.C. CODE ANN. § 16-2316(e) (1997) (noting expressly that press may be admitted).

[514] *See* CONN. GEN. STAT. ANN. § 54-76h (West 1994); N.H. REV. STAT. ANN. § 169-B:34 (1994). Two states, Nebraska and Oregon, have no statute regulating access to juvenile proceedings.

[515] *See* TORBET ET AL., *supra* note 280, at 35.

[516] Statutes were passed in California, Georgia, Indiana, Louisiana, Minnesota, Missouri, Nevada, Pennsylvania, Texas, and Utah. *See id.* at 45.

[517] Arizona, Idaho, Kansas, Massachusetts, Montana, South Dakota, and Virginia have all passed statutes increasing the level of access allowed in their respective juvenile courts in the last two years.

[518] *See* Gordon A. Martin, Jr., *Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 393, 393-95 (1995).

[519] That is to say, access parallel to that given to press and public attending adult criminal trials.

[520] *See supra* notes 88-101 and accompanying text (discussing the Supreme Court's decisions in *Press-Enterprise II* and *El Vocero*).

able judgment of experience,'"[521] thereby meeting the experience test.

B. *Applying the Logic Test to Juvenile Proceedings*

The logic half of the *Richmond Newspapers* test simply asks whether opening the proceeding in question will produce benefits justifying such access. As discussed in Part II, the Court considers first whether access will benefit the First Amendment's goal of an informed, involved, and scrutinizing public and second whether access will improve the functioning of the specific procedure at hand.[522] The Court has highlighted several specific benefits of granting access to the various proceedings it has considered opening. This section will focus on those already developed benefits and determine how well they analogize to juvenile proceedings.

Skyrocketing juvenile crime, especially violent juvenile crime,[523] has brought public sentiment to a boiling point.[524] A recent Department of Justice report confirms that this sentiment is based not simply on rhetoric, but on fact: juvenile arrests for violent crime increased by 50% between 1988 and 1994 and juvenile arrests for

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[521] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 11 (1986) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 605 (1982)) [hereinafter *Press-Enterprise II*].

[522] *See supra* notes 102-06 and accompanying text (discussing the Supreme Court's "logic test").

[523] *See* HOWARD N. SNYDER ET AL., NATIONAL CENTER FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1996 UPDATE ON VIOLENCE 14 (1996) ("[T]he juvenile violent crime arrest rate soared between 1988 and 1994.").

[524] *See* Elizabeth Mehren, *Girl Trouble: America's Overlooked Crime Problem*, L.A. TIMES, Aug. 8, 1996, at E1 (observing that public ranks juvenile crime as a major threat and views juvenile statutes as overly indulgent); Joseph Neff, *Judge Urges Rewording of Code*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 26, 1997, at A14 (revealing that opinion polls show increasing fear of juvenile crime and a sense that juvenile justice is outstripped by modern juvenile crime); Judith Van deWater, *Violent Crime Brings Changing View of Juvenile Codes—Some Officials Favor Opening Up of Information on Young Offenders*, ST. LOUIS POST-DISPATCH, Jan. 3, 1995, at 1 (community favors tougher juvenile laws and access to information about juvenile proceedings). This is not to say that the public does not still support the notion that children should be rehabilitated. Recent polls suggest the public has not given up on the reform ideal. *See* Frank Green & Michael Hardy, *Rehabilitation Favored; Crime Rate Down, Figures Say Juvenile Crime More Violent*, RICHMOND TIMES-DISPATCH, Oct. 14, 1995, at B1 (two-thirds of those polled favored rehabilitation over punishment even with increased violence in juvenile crime). Rather, the public is unconvinced and unsupportive of the current juvenile justice system, not with the system's goals. *See, e.g.*, *Most in Poll Want Juveniles Tried as Adults*, BATON ROUGE ADVOC., Mar. 16, 1987, at 1B (one person polled on whether juveniles should be tried as adults replied, "Yes, I do, but they should have a fair chance at rehabilitation").

weapons violations grew 103% during that same period.[525] The juvenile court's need to address public concern and gain public support has never been more acute.[526]

Granting access to juvenile proceedings will in all likelihood address one of the most important benefits of access—namely, public support for the system.[527] "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[528] As one juvenile judge has noted, keeping juvenile proceedings confidential "unnecessarily [brings] down upon [juvenile courts] public misunderstanding and even hostility."[529] Thirty years after that statement, another judge observed the public's "growing perception that something is seriously wrong with our handling of youth."[530] This prompted his call for lifting the "cloak of confidentiality . . . to rebuild[] trust and dissipate[] the fear that the closed juvenile system fosters."[531] Justice Brennan's warning in *Richmond Newspapers* has become the reality of the public's perception of juvenile courts today:

> Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.[532]

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[525] *See* SNYDER ET AL., *supra* note 323, at 14, 21.

[526] The juvenile arrest rate for violent crime in 1994 was "far above any year since the mid-1960's, the earliest time period for which comparable statistics are available." *Id.* at 14.

[527] This is a commonly held belief of modern pro-access reformers. *See generally* Martin, *supra* note 318; *see also supra* note 324 (noting that the public is angry at this system but still supports rehabilitation); *infra* notes 333-36 (finding that the Supreme Court recognizes that greater public access generally improves the public's outlook on a proceeding).

[528] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980) (plurality opinion).

[529] GUIDES FOR JUVENILE COURT JUDGES, *supra* note 304, at 14 (quoting William G. Long, then a Seattle juvenile court judge). Judge Long went on to explain that he had similar problems "until [he] took the news media into partnership," a practice he suggested other judges follow. *See id.*

[530] Martin, *supra* note 318, at 394.

[531] *Id.* at 394-95.

[532] *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring) (citation omitted).

The Court has recognized access as a way to buoy public support, at least to the extent the proceeding warrants such support.[353] In discussing public access to *voir dire*, the Court explained, "This open process gave assurance . . . that others were able to observe the proceedings and enhanced public confidence."[354] It seems reasonable, then, to assume that the public's lack of confidence in the juvenile justice system springs in part from the secrecy surrounding its proceedings, and at least some of that animosity would be diminished by reversing a policy of confidentiality.

In addition to the support of the population, the Supreme Court has recognized the beneficial community outlet that open proceedings provide:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers.[355]

The Court here was discussing adult crimes, but the anger, frustration, and need to see justice done is no less pressing when the perpetrator happens to be a juvenile.[356] It is precisely this kind of outlet of which communities are robbed by closed juvenile proceedings.[357] Particularly in light of increasingly violent juvenile crime,[358] our larger social order would benefit from a juvenile court system that allows the public to see justice done and begin to heal accordingly—or, just as importantly, allows the public to see *injustice* done,

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[353] *Cf.* Florida Bar Ass'n v. Went For It, Inc., 115 S. Ct. 2371 (1995); *see also infra* note 339 (discussing Justice Kennedy's dissent in *Florida Bar*).

[354] Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 507 (1984) [hereinafter *Press-Enterprise I*].

[355] *Richmond Newspapers*, 448 U.S. at 571 (citation omitted).

[356] "The harm suffered by the victim of a crime is not dependent upon the age of the perpetrator." Schall v. Martin, 467 U.S. 253, 264-65 (1984).

[357] *See Press-Enterprise I*, 464 U.S. at 509 ("When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest.").

[358] *See supra* notes 325-26 and accompanying text (discussing the increasingly violent nature of juvenile crime).

and begin to work toward change.[339] Simply put, "the appearance of justice can best be provided by allowing people to observe it."[340]

Public access to juvenile proceedings is not beneficial solely to the general public, or to the individual community touched by juvenile crime, but to the proceeding and to the individual defendant as well. The Court has long recognized that "[p]ublic access to court proceedings is one of the numerous 'checks and balances' of our system, because 'contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.'"[341] That juvenile proceedings are almost never heard by a jury and are rarely appealed[342] further exacerbates the need for public scrutiny via general access. In discussing preliminary proceedings that were also carried out without a jury, the Court in *Press-Enterprise II* noted the heightened importance of public scrutiny in light of the lack of a jury—the other major public check on the justice system. "[T]he absence of a jury . . . makes the importance of public access to a preliminary hearing even more significant."[343] Juvenile proceedings, which often consider matters with higher stakes and greater importance than pretrial proceedings, should demand at least the level of public scrutiny the Court has deemed appropriate for the pretrial process.[344]

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[339] This point should not be under-emphasized. A fear that the public's reaction to the juvenile justice system might be one of outrage or concern does not justify denying access. Observe Justice Kennedy's dissent in *Florida Bar Ass'n v. Went For It, Inc.*, 115 S. Ct. 2371 (1995), where the Court upheld a prohibition on direct-mail solicitation of personal injury or wrongful death clients within 30 days partially on grounds that such actions reflected poorly on the legal profession. *See id.* at 2381. Justice Kennedy eloquently notes that concern for reputation, for a profession, or for the government cannot and should not justify limiting public exposure to the problem. *See id.* at 2383 (Kennedy, J., dissenting). If the sight of an unseemly practice tarnishes an image, the Justice argues, "it must be remembered that real progress begins with more rational speech, not less." *Id.* at 2386 (Kennedy, J., dissenting). Here, as there, if the system is inept or corrupted, then public access will allow a real opportunity to "improv[e] the substance" of the juvenile courts. *See id.* As one commentator put it, "[i]f the public was informed about how the juvenile system functions—and more importantly, does *not* function—this might prompt an 'understandable community reaction of outrage and public protest' over the way children are suffering within the juvenile system." Jan L. Trasen, Note, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. THIRD WORLD L.J. 359, 382 (1995).

[340] *Richmond Newspapers*, 448 U.S. at 572.

[341] *Id.* at 592 (Brennan, J., concurring) (quoting *In re* Oliver, 333 U.S. 257, 270 (1948)).

[342] *See* Bahr, *supra* note 283, at 756.

[343] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 12-13 (1986) (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968)) [hereinafter *Press-Enterprise II*].

[344] *See infra* notes 351-61 and accompanying text (outlining the benefits of public

The Court has taken a functional approach to determining whether the benefits of opening one type of proceeding translate to other types of proceedings. In discussing the extension of access to pretrial proceedings, the Court said in *Press-Enterprise II*: "We have already determined . . . that public access to criminal trials and the selection of jurors is essential to the *proper functioning* of the criminal justice system. California preliminary hearings are *sufficiently like a trial* to justify the same conclusion."[345] In other words, if one proceeding is sufficiently analogous to another, then the benefits of opening that proceeding are also analogous.

How the system performs under public scrutiny is important both because of the need for social peace via the system and because of the important check on governmental action provided by public scrutiny. Criminal justice proceedings earn the public's support by demonstrating that such proceedings fulfill their roles. Juvenile proceedings on the other hand are an easy and frequent target of criticism[346] because the secrecy of the proceedings prevents the public from seeing what is occurring.[347] The public thus naturally assumes the worst—that the system "is trying to hide its inefficiency in secrecy."[348] Some have argued that is precisely the case.[349] Others claim that the juvenile justice system and the actors involved function "diligently and effectively."[350] Either way, the proper solution is to allow the public to perform its constitutionally assigned role—indeed its civic duty—to scrutinize the system in action.

The logic test, again, focuses not only on benefits to society as a whole, but on whether access will help maintain and improve the quality of individual proceedings.[351] One gauge of how well a process is functioning, especially in a criminal justice proceeding, is whether

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scrutiny to the defendant).

[345] *Press-Enterprise II*, 478 U.S. at 11-12 (emphasis added).

[346] *See infra* note 349 and accompanying text (citing criticisms of the juvenile system).

[347] *See* T. Markus Funk, *Young & Arrestless*, REASON, Feb. 1, 1996, at 50 (general public is unable to evaluate the juvenile justice system for lack of information about its operations).

[348] GUIDES FOR JUVENILE COURT JUDGES, *supra* note 304, at 14.

[349] *See* MURPHY, *supra* note 202, at viii (secrecy of juvenile proceedings perpetuated to protect those who operated the system); *see also generally* Trasen, *supra* note 339 (the veil of secrecy over juvenile proceedings only serves to hide the flaws of the system, ultimately more detrimental to the children than public access would ever be); David Glovin, *Secrecy Courts Operate Behind Closed Doors*, THE RECORD, Feb. 14, 1994, at A01 (same).

[350] Martin, *supra* note 318, at 395.

[351] *See supra* notes 102-06 and accompanying text (discussing the "logic" test).

the defendant receives a fair trial. Concerns about biased judges[352] and incompetent court personnel[353] threaten a juvenile's chance to receive a fair trial as well as a community's chance to see justice done. The benefits of an open judicial proceeding toward securing a fair trial are well recognized by the Supreme Court. An open trial "gave assurance that the proceedings were conducted fairly to *all concerned*, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality."[354] A juvenile, no less than an adult defendant, wants the system to provide the best adjudication possible. "Plainly, the defendant has a right to a fair trial but, as we have repeatedly recognized, one of the important means of assuring a fair trial is that the process be open to neutral observers."[355] This assurance of fairness, of course, is bigger than any one defendant; it refers not only to one defendant's perceptions or whims, but to what provides the best possible proceeding systemwide.

For a check on governmental power to work, it must serve the entire system. At the same time the public wishes to ensure that the system is working to protect the community. Rather than being in conflict, the right to access helps secure *both* the individual defendant's right to a fair trial as well as the public's right to observe and scrutinize. Thus, the Court notes that "[t]he right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness."[356] Truly, the rights—and the benefits—of public access are spread among the individual defendant, all defendants, and the community at large.

The notion that the juvenile defendant may well have something appreciable to gain from public scrutiny is well expressed in Justice Brennan's partial concurrence and partial dissent in *McKeiver*. Justice Brennan gauges the need for a jury based on the level of public scrutiny otherwise available. Following the heritage of *Kent* and its progeny, Justice Brennan pins the due process question as it relates to juveniles not "upon the basis of general characteristics of juvenile proceedings, but only in terms of the adequacy of a particular state

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[352] *See* Sanborn, *supra* note 268, at 235-36.

[353] *See* Trasen, *supra* note 339, at 379 (noting several criticisms of the juvenile system); *see also* Jonas, *supra* note 172, at 310 (finding a "lack of resources and qualified personnel").

[354] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (emphasis added) (plurality opinion).

[355] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7 (1986) [hereinafter *Press-Enterprise II*].

[356] *Id.*

procedure to 'protect the [juvenile] from oppression by the Government.'"[357] In concurring with the Court that Pennsylvania should not be *required* to engage a jury in juvenile proceedings, Justice Brennan found solace in the fact that such proceedings in Pennsylvania were open to the public.

> The availability of trial by jury allows an accused to protect himself against possible oppression by what is in essence an appeal to the community conscience, as embodied in the jury.... [A] similar protection may be obtained when an accused may in essence appeal to the community at large, by focusing public attention upon the facts of his trial, exposing improper judicial behavior to public view, and obtaining, if necessary, executive redress through the medium of public indignation.
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> ...
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> [J]uveniles who fear that delinquency proceedings will mask judicial oppression may obtain adequate protection by focusing community attention upon the trial of their cases.... Juveniles able to bring the community's attention to bear upon their trials may therefore draw upon a reservoir of public concern unavailable to the adult criminal defendant.[358]

Justice Brennan finds that Pennsylvania, a state that allows public access, provides sufficient scrutiny without requiring a jury. In North Carolina, however, where neither a jury trial nor public access was provided, Justice Brennan deemed protection of the defendant insufficient: "[N]either the opinions supporting the judgment nor the respondent... has pointed to any feature of North Carolina's juvenile proceedings that could substitute for public or jury trial in protecting the [juvenile defendant] against misuse of the judicial process."[359] Justice Brennan has articulated that juvenile proceedings are functionally better at providing a fair trial and a favorable outcome when they are subject to public scrutiny, either by the public or by a jury.[360] *McKeiver* ultimately held that states were free to use juries

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[357] McKeiver v. Pennsylvania, 403 U.S. 528, 554 (1971) (Brennan, J., concurring in part and dissenting in part) (quoting Singer v. United States, 380 U.S. 24, 31 (1965)).

[358] *Id.* at 554-55 (Brennan, J., concurring in part and dissenting in part).

[359] *Id.* at 556 (Brennan, J., concurring in part and dissenting in part).

[360] Although this argument is certainly grounded in the Sixth Amendment, it is not irrelevant to the debate over public access via *Richmond Newspapers*. For one thing, in the realm of criminal proceedings, the defendant's Sixth Amendment right to a public trial and the public's First Amendment right of access to those proceedings work together. "The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness." *Press-Enterprise II*, 478 U.S. at 7. In this context, the benefits and arguments for one

in juvenile proceedings but they were not required;[361] thus, public access becomes the only remaining form of protective scrutiny.

Procedural safeguards heretofore granted by the Supreme Court have not abated the need for public scrutiny to ensure fairness to the defendant or to the community. There is currently widespread noncompliance with the Supreme Court's holdings in the day-to-day operations of juvenile courts.[362] Such noncompliance can occur because the safeguards currently required by the Court in juvenile proceedings are all, to a greater or lesser extent, self-enforced by the judge. Without a jury or the public present, enforcement of the Supreme Court's holdings is left to the "honor system" for juvenile court judges.[363] In short, largely because of the insufficient external checks on the juvenile justice system, the efforts made by the Supreme Court in *Kent*, *Gault*, *Winship*, and *Breed* have failed to make substantial improvements on the core injustices that brought about those cases.[364] The juvenile justice system remains itself "reformed but not rehabilitated."[365]

It is important at this point to note that most children's advocates,[366] including some members of the Court,[367] have traditionally viewed confidentiality as pro-child and have seen the call for press and public access as anti-child. The call for access, however, is decidedly not anti-child. Public access would benefit juvenile defen-

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right serve only to feed and underscore those for the other. In addition, the kind of scrutiny Justice Brennan seeks does more than benefit the individual defendant. It serves to ensure the fairness of the system toward the community at large, as well as verifying to all members of the community that the system will remain fair should they ever become personally involved in the criminal justice system.

[361] *See McKeiver*, 403 U.S. at 545 (juries not a constitutional requirement in juvenile trials); *id.* at 548 ("There is, of course, nothing to prevent a juvenile court judge, in a particular case where he feels the need, or when the need is demonstrated, from using an advisory jury.").

[362] *See* JAMES T. SPROWLS, DISCRETION AND LAWLESSNESS: COMPLIANCE IN THE JUVENILE COURT xi, 17 (1980). Sprowls goes on to say that the greatest ally to noncompliance and unfair outcomes is the lack of public access. *See id.* at 69.

[363] *See id.* at 85-90 (noting a lack of official oversight and insufficient unofficial oversight via the press and public).

[364] *See* IRA M. SCHWARTZ, JUVENILE JUSTICE AND PUBLIC POLICY: TOWARD A NATIONAL AGENDA 81-82 (1992).

[365] *Id.* at 81.

[366] *See, e.g.*, GUERNSEY, *supra* note 278, at 2-3 (dismissing publicity as anti-rehabilitative).

[367] Chief Justice Rehnquist is the foremost example. *See, e.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring). As the Chief Justice stated in *Smith*: "This insistence on confidentiality [in the juvenile justice system] is born of a tender concern for the welfare of the child, to hide his youthful errors and 'bury them in the graveyard of the forgotten past.'" *Id.* (citation omitted).

dants themselves as much as if not more than it would benefit any other segment of society. Juvenile proceedings remain arbitrary,[368] judges remain biased[369] and underqualified,[370] and confidentiality remains not a shield for rehabilitation, but a veil of secrecy to hide the shortcomings of the system.[371] Even those individual defendants who may *think* that closed proceedings would be beneficial to their own rehabilitation may only be fooling themselves from lack of knowledge. Such a request is likely made on an assumption that, once behind closed doors, the juvenile judge and the rest of the system will operate in a fair and even-handed manner. If the results are to the contrary, the juvenile's reaction will likely not be a desire to reform, but instead "a sense of injustice that will thwart the effectiveness of even the best rehabilitative efforts."[372] Ultimately, media access may be the system's salvation, not the signal of its demise.

Juvenile proceedings meet both prongs of the experience and logic tests. An examination of history with an emphasis on the colonial era shows that access to proceedings against juveniles was clearly enjoyed at the time the First Amendment was ratified. Since that time, the issue has been handled in a variety of ways, the modern historical record mixed. Because of the emphasis on colonial history when weighing experience evidence, this solid-colonial, mixed-modern record is sufficient to meet the experience test. As for the logic test, the Supreme Court has shown in no uncertain terms that press and public access to criminal justice proceedings behooves both an informed and involved public and an efficient and equitable proceeding.[373] In addition, the scrutiny provided by public access can aid the juvenile defendant in obtaining a fair and unbiased trial.[374] In light of the close similarities between juvenile proceedings

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[368] The Supreme Court has repeatedly noted the high level of inconsistency in juvenile proceedings. *See supra* notes 195-97, 221 and accompanying text. The Court's "constitutional domestication" of proceedings has thus far failed to remedy this trend. *See generally* SPROWLS, *supra* note 362.

[369] *See* SPROWLS, *supra* note 362, at xi ("[T]he central finding of this study is widespread noncompliance among juvenile court judges with very specific legislative requirements . . . . The line between discretion and lawlessness has become blurred.").

[370] *See supra* note 172 and accompanying text (discussing the difficulty for the juvenile justice system to recruit qualified judges).

[371] *See supra* note 349 and accompanying text (discussing the "veil of secrecy" problem).

[372] SCHWARTZ, *supra* note 364, at 82.

[373] *See supra* notes 106, 351-56 and accompanying text (discussing the "logic" test).

[374] *See supra* notes 357-61 and accompanying text (discussing public access as a

and proceedings already opened by the Supreme Court, both internal and external benefits suggest access should be allowed to juvenile proceedings.

To reiterate the Supreme Court's complete test as articulated in *Press-Enterprise II*, "If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches. But even when a right of access attaches, it is not absolute."[375] Even so, such proceedings can be closed to the press and public only with a state's interest of sufficient magnitude.

C. *Examining the State's Interests Against Open Juvenile Proceedings*

In examining the state's interest in closed juvenile proceedings, it is worth pausing to review exactly how significant the interest must be to justify closure once a qualified First Amendment right has been established.[376] The state's interest must be "compelling,"[377] "overriding,"[378] and have a "higher value."[379] It must be sufficiently important that a constitutional right—access—should be compromised for its benefit. It is no wonder the Court has set such an exceptionally high bar for the state to clear.[380]

It is also worth taking a closer look at the "state's interest" concept itself before proceeding. A third party, usually the media, must be denied access to a given proceeding by the trial court judge before a *Richmond Newspapers*-type problem can arise. Thus, the trial court will have acted at someone's behest—either the defendant's (the juvenile, his or her guardian(s), or counsel), the prosecutor's, or on its own motion, probably in reliance on the state statute—to close the proceeding.[381] The source of that request has been unim-

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form of protective scrutiny for the juvenile system).

[375] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9 (1986) [hereinafter *Press-Enterprise II*].

[376] For a complete discussion of this question, see *supra* notes 107-12 and accompanying text.

[377] Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982).

[378] *Press-Enterprise II*, 478 U.S. at 14.

[379] *Id.* at 13.

[380] *See supra* notes 107-12 and accompanying text (discussing the state's interest and what is required to meet this standard).

[381] Regardless of which party moves for closure, the Court has addressed the interests ultimately proffered on the record in the same way. The request for closure can, and has, come from the defendant. *See Press-Enterprise II*, 478 U.S. at 3 (defendant moved to close pretrial proceeding); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 559 (1980) (plurality opinion) ("Before the trial began, counsel for the defendant moved that it be closed to the public."). The request for closure can and also has come from the prosecution, *see* Press-Enterprise Co. v. Su-

portant in considering the merits of the closure motion. Rather, the judge's justification for that closure constitutes the state's-interest element of the *Richmond Newspapers* analysis.[382] For the purposes of a larger policy consideration, this Article attempts to pull together the arguments likely to be made against access and collectively deem them the "state's interest."[383]

Whether on its own or at the request of a juvenile defendant,[384] a state now wishing to close proceedings that this Article has determined to be presumptively open will have to offer interests sufficiently compelling to justify that closure. Although a confidential juvenile delinquency proceeding presents many of the same possible concerns as a closed adult hearing,[385] the involvement of a juvenile in

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perior Court, 464 U.S. 501, 503 (1984) (motion by media to open *voir dire* opposed by the prosecution), or even from the trial court itself in response to an intervenor's motion for access. *See* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147, 148 (1993) (trial court denied media's motion to gain access to pretrial proceeding); *Globe Newspaper*, 457 U.S. at 598-99 (trial court, over the objection of the defendant, closed courtroom).

[382] In considering a state's interest, the *Richmond Newspapers* test focuses not on the reasons proffered by any given party, but on the reasons ultimately accepted as findings by the trial court. *See Richmond Newspapers*, 448 U.S. at 581. *Cf. generally* Shelley v. Kraemer, 334 U.S. 1 (1948) (court's acceptance and enforcement of a party's arguments give those arguments the imprimatur of state support and thus state action).

[383] It is impossible to anticipate all theoretical reasons for closure in every single case, as the Supreme Court recognized in *Richmond Newspapers* by inserting the flexible state's-interest prong of the test. Like the Court, this Article does not purport to answer the access question in every case, but only suggests how the *Richmond Newspapers* test should be applied and what its outcome should be in the majority of cases.

[384] Of course, one of the implicit assumptions the system makes is that most juveniles *want* proceedings to be held in private. As discussed *supra* in note 312, some states, either in their statutory or common law, have addressed cases where the juvenile actively seeks a public audience with mixed results. Given this Article's position that access should be granted, in no small part as a check against abuses in the system against the juvenile defendant, it seems clear that the Sixth Amendment should extend to juvenile proceedings and allow the juvenile to demand a public venue. Given that this Article favors the extension of *Richmond Newspapers* to juvenile proceedings to provide the same protections adult defendants receive from public scrutiny, it is not the rare juvenile who senses the need for such protection with which this Article is concerned. Rather, it is the vast majority of juveniles who unwittingly throw themselves on the mercy of an arbitrary, secretive proceeding that would benefit from the public's watchful gaze. Establishing a constitutionally mandated minimum level of public access via *Richmond Newspapers* would, however, also assist the juvenile defendant seeking public access over a claim by the state, as *parens patriae*, that access would be detrimental. It is, of course, this claim of beneficent secrecy that many claim the juvenile justice system uses every day to cloak its own shortcomings and *ad hocery*. *See supra* note 349 and accompanying text (discussing the "veil of secrecy" over juvenile proceedings).

[385] *See supra* notes 327-74 and accompanying text (discussing the benefits of pub-

the proceeding requires a somewhat different analysis in light of the Supreme Court's previously articulated heightened concern for the well being of children, even in a First Amendment context.

This concern is manifested most clearly in a pair of recent decisions involving the sale and possession of child pornography: *New York v. Ferber*[386] and *Osborne v. Ohio*.[387] In *Ferber*, the Court upheld a statute outlawing the sale of child pornography. The Court found that "[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children"[388] in large part because of the state's justifiable concern with the "physiological, emotional, and mental health of [children]."[389] In *Osborne*, the Court cites this very language from *Ferber* to justify upholding a statute outlawing the possession of child pornography—even in small quantities—in one's own home.[390] In both cases, the Court underscored the need to consider the "minor factor" by refusing simply to treat the situation as it would in a parallel case involving adult pornography.[391] Applying this reasoning to juvenile proceedings, an argument could be made that the *Richmond Newspapers* standard should likewise not be applied precisely because of the involvement of minors. Despite the concern shown by the Court in *Ferber* and *Osborne* for the well-being of children, that argument fails in the context of criminal justice proceedings—even those involving underaged defendants.

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[386] 458 U.S. 747 (1982).

[387] 495 U.S. 103 (1990).

[388] *Ferber*, 458 U.S. at 756.

[389] *Id.* at 758.

[390] *See Osborne*, 495 U.S. at 108.

[391] In *Ferber*, the Court struck down the court of appeals' assumption that "the standard of obscenity . . . in *Miller v. California*, 413 U.S. 15 (1973) . . . constitutes the appropriate line dividing protected from unprotected expression . . . ." *Ferber*, 458 U.S. at 758. The Court explained:

> The *Miller* standard . . . does not reflect the [s]tate's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed by the production of the work. . . . We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.

Id. at 761 (citation omitted). In *Osborne*, the Court refused to extend its holding in *Stanley v. Georgia*, 394 U.S. 557 (1969), a case with facts virtually identical to those in *Osborne* except that the pornography in *Stanley* depicted adults rather than minors. *See Osborne*, 495 U.S. at 108.

In *Globe Newspaper Co. v. Superior Court*,[392] a decision that both pre-dated *Ferber* and *Osborne* and was cited in those opinions, the Supreme Court had already considered the general tension between a desire to protect the general welfare of children and the First Amendment in an access context, and come to a conclusion quite opposite the holdings of *Ferber* and *Osborne*. One of the elements of the pro-rehabilitation argument for closure is the notion that testifying at a public proceeding will be traumatic to the juvenile, thus damaging his or her ability to rehabilitate and become a healthy, noncriminal adult.[393]

This argument echoes the concerns the Court sounded in *Ferber* and *Osborne*,[394] but the stakes here are different. In *Globe Newspaper*, where the issue was whether criminal proceedings could be closed during the testimony of minor sexual assault *victims*, the state's interests were both to encourage such individuals to testify and also to protect the minor "from further trauma and embarrassment."[395] Although the Court deemed the interest in protecting minor sexual assault victims "compelling," the Court held that concern for the "physical and psychological well-being of a minor"[396] did not justify mandatory closure, mandating instead a case-by-case determination of "whether closure is necessary to protect the welfare of a minor victim."[397] In other words, there can be no presumption of detrimental impact sufficient to outweigh constitutional liberties. Only specific, empirical findings (that *this* child in *this* case will be damaged in *this* way by *this* type of access) approach the kind of sufficiently compelling interest to consider at least partial closure of that individual proceeding.[398]

The holdings in *Ferber*, *Osborne*, and *Globe Newspaper*, though resulting in differing outcomes, are not incongruous. Rather, each case voices a similar concern—that of the well-being of minor children. The contrast exists because of the context in which this concern arises. In *Ferber* and *Osborne*, the context is child pornography—

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[392] 457 U.S. 596, 607 (1982).

[393] *See generally* David C. Howard et al., *Publicity and Juvenile Court Proceedings*, CLEARINGHOUSE REV., July 1977, at 203 (arguing that publicity can cause psychological trauma on the juvenile defendant).

[394] *See supra* notes 386-91 and accompanying text (discussing *Ferber* and *Osborne*).

[395] *Globe Newspaper*, 457 U.S. at 607.

[396] *Id.*

[397] *Id.* at 608 (footnote omitted).

[398] *See supra* notes 109-12 and accompanying text (discussing the requisite elements a court must meet to order closure of a proceeding once a qualified First Amendment right is established).

one of the few forms of speech held to be entirely "outside the protection of the First Amendment"[399] because the value of such speech is "exceedingly modest, if not *de minimis*."[400] In *Globe Newspaper*, on the other hand, the context is the criminal courtroom, where the value of access is no less than "an essential component in our structure of self-government."[401]

Another important contrast comes from the actual trauma the state can legitimately claim an interest in preventing. With child pornography, obviously, seeing the elimination of the entire experience—from the trauma of the actual production[402] to the haunting effect the existence of the recording will have on the child[403]—is within the state's interest. The same cannot be said for the trauma of testifying that the Court confronted in *Globe Newspaper*.[404] In that case, the Court pointed out that the state cannot claim an interest in reducing all the trauma of the proceeding, but only "the incremental injury suffered by testifying *in the presence of the press and the general public*."[405] Faced with only this incremental impact in *Globe Newspaper*, it is only logical that the Court's holding would be far less deferential to the needs of the child than in *Ferber* or *Osborne*, where everything involved in child pornography lacks value, First Amendment or otherwise.

The state can claim an even smaller incremental interest in the trauma and stigmatization of juvenile delinquency proceedings than it could in *Globe Newspaper*. For one thing, given the increasingly criminal, punitive tone of delinquency proceedings,[406] mere involvement in the process has itself become a stigmatizing event for juvenile defendants.[407] Further, through the post-adjudicatory release of

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[399] New York v. Ferber, 458 U.S. 747, 763 (1982).

[400] *Id.* at 762.

[401] *Globe Newspaper*, 457 U.S. at 606. The full comment reads, "And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government." *Id.*

[402] *See Ferber*, 458 U.S. at 758.

[403] *See id.* at 760.

[404] Nor, for that matter, can the same be said about the trauma of juvenile proceedings on the defendant.

[405] *Globe Newspaper*, 457 U.S. at 607 n.19.

[406] *See* TORBET ET AL., *supra* note 280, at 16 (sentencing and dispositions increasingly favor punitive incarceration); *see also supra* notes 264, 277-80 and accompanying text (discussing the punitive nature of today's juvenile system).

[407] *See In re* Gault, 387 U.S. 1, 23-24 (1967) (the term juvenile delinquent "has come to involve only slightly less stigma than the term 'criminal' applied to adults"); *see also* Note, *The Public Right of Access to Juvenile Delinquency Hearings*, 81

court records, any negative impact of public knowledge of delinquency is already occurring to many, if not most, former juvenile delinquents. As the Court explained in *Gault*,

> Juvenile Courts are sometimes defended by a statement that it is the law's policy "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past." *This claim of secrecy, however, is more rhetoric than reality.* Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers.[408]

The degree to which a juvenile's past indiscretions are already public knowledge has greatly increased since the Court's ruling thirty years ago. "Formerly private, juvenile court records are increasingly available to a wide variety of people."[409] All but a few states have provisions for release of juvenile court records to "at least one of the following parties: the public, the victim(s), the school(s), the prosecutor, law enforcement, or social agenc[ies]."[410] As the Gina Grant case[411] vividly illustrates, long-term confidentiality of juvenile delinquency is today nearly *always* rhetoric and *never* reality.

The threat to a juvenile's liberty in a delinquency proceeding creates an even greater contrast between delinquency proceedings and *Ferber* and *Osborne* than there was with *Globe Newspaper*. Unlike the minor witness in *Globe Newspaper*, juvenile defendants have been brought before the court for committing some sort of malfeasance, for which the court must determine a proper legal response. Thus, if one accepts the arguments made by the Supreme Court not only in the *Richmond Newspapers* cases,[412] but also by Justice Brennan in *McKeiver*,[413] public scrutiny can benefit the juvenile defendant, coun-

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MICH. L. REV. 1540, 1549 (1983) ("In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services—by society generally—as a criminal.").

[408] *Gault*, 387 U.S. at 24 (emphasis added).

[409] TORBET ET AL., *supra* note 280, at 36.

[410] *Id.* at 38.

[411] In 1995, Gina Grant's early offer of admission to Harvard University was rescinded when the university was made aware that Ms. Grant had killed her mother five years earlier, at the age of 14, in Columbia, South Carolina. *See* Alice Dembner & Jon Auerback, *Pupil's Past Clouds Her Future: Harvard Rescinds Offer After Learning That Honors Student Killed Her Mother*, BOSTON GLOBE, Apr. 7, 1995, at 1.

[412] *See supra* Part II (for a discussion of *Richmond Newspapers* and its progeny).

[413] *See supra* notes 357-61 and accompanying text (discussing Justice Brennan's concurrence in *McKeiver*).

tervailing the negative impact of publicity. In the sharpest contrast, there is obviously no countervailing benefit to the child—or society—in child pornography.

Though it is indeed "evident beyond the need for elaboration"[414] that the introduction of children into the constitutional equation warrants a somewhat different "weighing" of the constitutional issues, the degree to which such a reshuffling would affect the outcome of a *Richmond Newspapers* analysis in the case of juvenile proceedings is unclear. Where there are real constitutional concerns on both sides, the *Richmond Newspapers* test provides a sufficiently flexible rubric to weigh the impact of the defendant's status as a minor all within the basic two-step, three-prong test.

A concern for the general welfare of children may be implicit in the analysis of trial courts, but rarely is it specifically articulated as a major concern in access cases. Rather, the interest relied upon time and time again by courts in justifying closed juvenile proceedings can be summarized in one word—rehabilitation.[415] The state argues that publicity will create a stigmatizing trauma that will, in turn, destroy the juvenile's chances to rehabilitate himself or herself, thereby effectively eliminating the child's chance for a fresh start.[416] The entire purpose of the juvenile justice system is "saving children;"[417] thus,

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[414] New York v. Ferber, 458 U.S. 747, 756 (1982).

[415] A sampling of state supreme courts as well as the District of Columbia Court of Appeals reveals an automaton-like recitation of rehabilitation as the driving force behind confidentiality statutes, as well as the juvenile justice system generally. There was also an absence of any other articulated interest. *See generally* Brian W. v. Superior Court, 574 P.2d 788, 791 (Cal. 1978) ("The provisions for confidentiality in the juvenile court law . . . were included to prevent the underlying rehabilitative philosophy from being thwarted by unduly stigmatizing the juvenile offender."); *In re* J.D.C., 594 A.2d 70, 72 (D.C. 1991) ("The primary purpose . . . [for] provid[ing] that in general the public shall be excluded from juvenile proceedings, is to preserve the anonymity of juvenile respondents in order to foster an atmosphere conducive to rehabilitation"); Florida Publ'g Co. v. Morgan, 322 S.E.2d 233, 235-36 (Ga. 1984) ("The asserted state interest in the closure of the hearing was the protection of the anonymity of the juvenile offender in order to further his or her rehabilitation."); *In re* T.R., 556 N.E.2d 439 (Ohio 1990) (aim of traditionally closed juvenile proceedings is rehabilitative); *In re* M.C., 527 N.W.2d 290, 293 (S.D. 1995) ("The purpose behind closed juvenile proceedings is to 'protectively rehabilitate juveniles.'"); *In re* J.S., 438 A.2d 1125, 1128 (Vt. 1981) (juvenile proceedings sole concern is rehabilitation of the juvenile delinquent).

[416] *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 319 (1974) (state did not want to allow adult defendant to use witness' juvenile record for fear that "exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures"); *see also* Geis, *supra* note 147, at 101.

[417] There is a particularly philanthropic explanation of the purpose of juvenile justice in HURLEY, *supra* note 154, at 11-12. Hurley explains:

> It is not the objective of the Juvenile Court to punish the children

any element that diminishes the chances of rehabilitation would, in theory, undercut the entire system.[418]

Even assuming that rehabilitation was within the power of the juvenile justice system and that publicity had a detrimental effect on such rehabilitation, that alone is likely insufficient to outweigh a constitutional right such as the right to access established by the experience and logic tests.[419] The Supreme Court has considered similar interests in other cases and found that the interest of the child, though compelling, can be outweighed by constitutional rights of other parties. For example, in *Davis v. Alaska*,[420] the Court considered whether the state's interest in concealing a witness's history of delinquency was sufficient to prevent the use of that information to impeach a witness. It held that it was not.[421] While the Court explained that it "[did] not and need not challenge the State's interest . . . [in] seek[ing] to preserve the anonymity of a juvenile offender[,]"[422] the Court made it clear that this interest had its limits. Between the desire to protect children from publicity and the criminally accused defendant's constitutional right to confront witnesses, the Court placed the latter right squarely above the former interest. The Court held that "the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result . . . is outweighed by petitioner's right to probe into the influence of possible bias."[423] The state's desire to allow the juvenile to testify "free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself."[424] Whatever weight the state's interest should be accorded, "[t]he State's policy

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> brought before it. In fact, the entire thought of those who framed the law was to banish all idea of crime and punishment and to overcome entirely the positive evil of a jail commitment and a formal trial.

Id. He continues, stating that the "little thing" (the juvenile) is unprotected from falling into vice because "there is no wise, guiding hand to turn him back into the 'straight and narrow way,' and no voice to warn him that the shining thing which looks so red and luscious is only a dead sea-apple that will turn to ashes in his hand." *Id.* at 12.

[418] For a detailed argument that confidentiality is vital to delinquent rehabilitation, see generally Kathleen M. Laubenstein, Comment, *Media Access to Juvenile Justice: Should Freedom of the Press be Limited to Promote Rehabilitation of Youthful Offenders*, 68 TEMP. L. REV. 1897 (1995).

[419] *See supra* Part II (discussing the Supreme Court's experience and logic test).

[420] 415 U.S. 308 (1974).

[421] *See id.* at 320.

[422] *Id.* at 319.

[423] *Id.*

[424] *Id.* at 320.

interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness."[425]

The Court in *Davis* was not arguing that the state's interest was outweighed by a right as substantial as the general right to cross-examine an accusing witness, or even the right within that right to cross-examine those witnesses with regard to potential biases. Rather, the Court in this case held that the state's interest in protecting the confidentiality of a juvenile for rehabilitative purposes was outweighed by the defendant's right to cross-examine the juvenile *using his delinquency record.* The Court so held over the objection of the Alaska Supreme Court, which previously found that "counsel for the defendant was able adequately to question the youth in considerable detail concerning the possibility of bias or motive."[426] Thus, the use of a juvenile record of only moderate utility to the defendant's cross-examination of a single witness still outweighed the possible negative impact of the juvenile witness's previous delinquency becoming public knowledge in open court.

Though the *Richmond Newspapers* equation remains the same regardless of the origin of the state's interests in the trial court's findings, it is worth considering how the equation may differ when it is the defendant or his or her guardians arguing, as I suggest above, that in fact *this* child's chances of rehabilitation in *this* case will indeed be hindered by press and public access. As in adult criminal trials, there may certainly be isolated extreme cases where closure is warranted. Simply moving the rehabilitative argument from the general to the specific in most cases, however, is not likely to alter the outcome. While an appeal from an individual defendant claiming that public access would damage his or her personal health and well-being comes closer to the general concern for children expressed by the Court in *Globe Newspaper, Ferber,* and *Osborne,* the proper response to such a claim is to continue the *Richmond Newspapers* test, and weigh whatever evidence the juvenile brings forth within that analysis. If there is no general program for rehabilitation available,[427] a claim that access diminishes the juvenile's chance for rehabilitation loses its power, regardless of the source of the argument. One can imagine, however, a situation where the juvenile offers, for example, psychological testimony or other unique evidence

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[425] *Id.*

[426] Davis v. State, 499 P.2d 1025, 1036 (Alaska 1972).

[427] *See infra* notes 430-33 and accompanying text (discussing the lack of rehabilitative programs).

about his or her own case. The trial court's job, *strictly within* the *Richmond Newspapers* test, is to weigh such evidence in determining what level of access the press and public should be allowed.

The generic fears of diminished rehabilitation or protection of the juvenile's welfare are likely insufficient to justify closing juvenile courts. The assumption that access would somehow destroy the very *raison d'être* of the juvenile court, however, is debatable at best. Some argue that access will assist in putting the child on the road to real rehabilitation by showing him or her that his or her actions were wrong.[428] Regarding the claim that publicity would negatively impact rehabilitation, Gilbert Geis has said, "It is believed, though it has never been empirically demonstrated."[429] Many juvenile courts have operated and continue to operate with some degree of publicity, thus undercutting the notion that publicity will be the death of the juvenile justice system. Furthermore, solving this psychological quandary over the impact of publicity on rehabilitation is not necessary to address the constitutional issue presented here. In resolving the access debate, it is not needed to determine how publicity would affect a program of rehabilitation because *there is no program of rehabilitation* from which juvenile delinquents would possibly be shying away,[430] and in most instances there never was.[431] Simply put, the prescription has never matched the description: its theories flawed,[432] its courts like criminal trials,[433] and its "homes" like jails and prisons, the juvenile justice system that existed in the minds of reformers has essentially never existed anywhere else. In fact, the great irony of the debate over media access, as well as the juvenile justice system in general, may be that all the fuss has been over a system that never got off the ground, and the bits of it that did came crashing down

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[428] *See, e.g.*, United States v. Three Juveniles, 862 F. Supp. 651, 658-59 (D. Mass. 1994), *aff'd*, 61 F.3d 86 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1564 (1996) (noting that juveniles may "benefit, in a rehabilitative way, from the public opprobrium attached to these charged acts").

[429] Geis, *supra* note 147, at 102.

[430] *See supra* Part IV (discussing the shortcomings of the juvenile justice system and its lack of rehabilitative programs).

[431] *See generally* Fox, *supra* note 143, at 1229-35 (noting that the reform movement was far more rhetoric and propaganda, and that there were no substantive moves toward genuine rehabilitative efforts); *see also* RYERSON, *supra* note 170, at 137-48 (concluding that we as a nation have lost faith in the rehabilitative ideal and that the juvenile court system never succeeded in achieving a rehabilitative model).

[432] *See supra* notes 184-97 and accompanying text (discussing the *parens patriae* rationale underlying the juvenile justice system, and its diminished credibility).

[433] *See supra* notes 227-73 and accompanying text (discussing the similarities between juvenile proceedings and adult criminal trials).

soon thereafter. In many ways, fighting tooth and nail to maintain confidential hearings, while failing to develop and further a rehabilitative regime, has served only to hide the flaws and inefficiencies of the system. This myth of beneficent secrecy can only harm those juveniles currently being herded through the system.[434]

Interests in shielding juveniles from the public gaze to prevent embarrassment or to encourage rehabilitation boil down to a fundamental state's interest in the general welfare of children. Even where the juvenile offers individualized evidence and arguments that access would be detrimental to his or her own psychological health, it is the larger society's interest in "'the healthy, well-rounded growth of young people into full maturity as citizens'"[435] that drives the state's interest in the youth's rehabilitation. Having accepted the rhetoric regarding the benefits of secrecy, states naturally capitulated and passed statutes limiting access to juvenile proceedings.[436] The benefits of secrecy, though, have become increasingly questionable, while the detriments of justice done in a dark corner have become increasingly manifest. Many have argued that confidentiality does the children involved more harm than good—that the "veil of secrecy . . . is perpetuated more to protect those who work within the state bureaucracies than to maintain the anonymity of those who are compelled to endure being 'saved' by the system of juvenile justice."[437] At the same time, it is not a compelling interest to protect a child from publicity in order to avoid damaging a rehabilitative regime that does not exist. Justice Brennan noted in *Globe Newspaper* that the state can claim an interest only in shielding a child from the incremental difference between what would occur without access and what would occur with access.[438]

Where there is no rehabilitation, the state's interest in preserving the rehabilitative process boils down to an incremental interest in the protection of nothing. Likewise, the claim of an individual defendant that closure is necessary to preserve his or her ability to

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[434] The ill effects of secrecy are especially acute because many members of the public, while frustrated with the current system, still support the ideal of rehabilitation for youthful offenders—if done properly. *See supra* note 324 (detailing the public's preference for rehabilitation over punishment).

[435] New York v. Ferber, 458 U.S. 747, 757 (1982) (quoting Prince v. Massachusetts, 321 U.S. 158, 168 (1944)).

[436] *See supra* notes 311-18 and accompanying text (citing several state statutes limiting access to juvenile proceedings).

[437] MURPHY, *supra* note 202, at viii; *see also generally* Trasen, *supra* note 339; *supra* note 349 and accompanying text.

[438] *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 n.19 (1982).

rehabilitate, also relying on the juvenile justice system to facilitate such a reform, is nothing more than an empty reliance on a dysfunctional system. Finally, given the punitive, criminal nature of the proceeding, the psychological trauma of a public juvenile delinquency proceeding is likely to be nearly identical to the trauma of the same proceeding conducted behind closed doors—hardly a sufficiently compelling justification for closure.[439]

Any special interest the state may have in closing juvenile proceedings falls far short of the kind of compelling interest required under the First Amendment. That is not to say that there are never cases that warrant partial or even complete closure of a juvenile proceeding. To preserve the public's First Amendment right of access, however, the constitutional minimum is a presumption of openness as currently enjoyed in most other criminal justice proceedings. In weighing arguments against that presumption, the determination must be made with the same heavy hand currently prescribed for other criminal justice proceedings in the *Richmond Newspapers* line of cases. The qualified First Amendment right of access to juvenile proceedings established above cannot be systematically denied by slogans, talismans, or rhetoric. Only on a narrow, case-by-case basis should juvenile delinquency proceedings be closed to the press and public. Of course, this type of judicial scrutiny could be a basis for some amount of concern that decisions will be made arbitrarily.[440] Still, a *Richmond Newspapers* analysis at a minimum would substantially *reduce* judicial discretion in half of the states today by at least requiring that the judge not act on instinct or bias, but that the reason for closure be "'articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."'[441] In these twenty-five states, judges are either explicitly granted discretion,[442] allowed to determine access bounded only by a vague "direct" or "proper" interest test,[443] or given no guidance at all about what level of discretion they are granted to open proceedings.[444] In the other half of the nation, legislatures have mandated a

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[439] *See* Note, *Public Right of Access*, *supra* note 407, at 1557-58 ("Nor does the incremental effect of publicity seem likely to intensify the psychological identification process beyond the labeling influence of the legal proceedings and records themselves.").

[440] *See supra* note 43 (discussing the discretion vested in judges).

[441] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9-10 (1986) [hereinafter *Press-Enterprise II*].

[442] *See supra* note 311 and accompanying text (seven states).

[443] *See supra* note 313 and accompanying text (sixteen states).

[444] *See supra* note 314 and accompanying text (two states).

test of scrutiny commensurate to that of *Richmond Newspapers*[445] or an access policy that goes beyond the constitutional minimum,[446] as is their prerogative.[447] While the First Amendment right of access here is "not absolute,"[448] precluding any black-and-white rule that would avoid altogether the risk of judicial *ad hocery*, the extension of *Richmond Newspapers* to juvenile proceedings and the establishment of a constitutional minimum level of access would constitute a great leap forward.

VI. CONCLUSION: OPEN THE DOORS[449]

The debate over access to juvenile proceedings has been a clash of idealism and rhetoric against pragmatism and reality. Catching and curing criminal instincts during an individual's youth is nothing less than a praiseworthy aim. Not even the Supreme Court, however, could deny that the juvenile justice system's "reach [had] exceeded [its] grasp,"[450] and that a system that started out protecting children from an uncaring establishment soon became something *from which* juvenile defendants desperately needed protection. The reformers' visions gave way to a struggling, arbitrary, and secretive order, unable to offer juvenile defendants anything better than the luck of the draw.

During these struggles, failures, and valiant attempts by the juvenile justice system, the public was left decidedly out of the loop. Confidentiality, intended only to help those juveniles in the system, too soon became a veil of incompetence, and a shield for failure. The stinging irony in that secrecy is that public access and genuine community involvement may have helped curb the shortcomings and address the problems. Our democracy, our Constitution, and our society rely on a well-informed and properly-involved public to ensure that our government never loses sight of for whom it works and to whom it is accountable. The Supreme Court has recognized

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[445] *See supra* note 310 and accompanying text (nine states).

[446] *See supra* notes 308-09 and accompanying text (fifteen states).

[447] *Cf., e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 545, 548 (1971) (mandating that juries are not required in juvenile proceedings, but allowing states the freedom to utilize juries at their discretion).

[448] Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9 (1986) [hereinafter *Press-Enterprise II*].

[449] This is taken from the title of Judge Martin's article. *See generally* Martin, *supra* note 318.

[450] *McKeiver*, 403 U.S. at 546 n.6 (quoting PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 9 (1967)).

that the system must serve the public and that the public must monitor the system.

For all its lofty goals, and for all its enlightened rhetoric—indeed maybe *because* of it—the juvenile justice system is not and should not be immune from these larger lessons. Having become a sprawling network of courts and post-adjudicatory institutions, handling not just hapless miscreants but the most deadly of professional criminals, the juvenile justice system is in dire need of the kind of thoughtful, reasoned reform that can only come from an open—and informed—debate.

Lest we forget, we as a society have entrusted collectively the fate of many of our children to this institution. A paper shield of rhetoric and an assurance of benevolence is cold comfort against an arbitrary or incompetent judge, a sentence not commensurate with the crime, or a barbaric prison with a euphemistic moniker. A blind promise to protect and serve is equally unfulfilling to a community rocked by violence, no matter what the age of the perpetrators. For both groups, neither one deserving to be ignored any longer, allowing the light of day to flood the halls of juvenile justice once and for all may be the last, best hope to repair a system that has shortchanged everyone while pleasing no one.

The Supreme Court speculated that there may be a time when the juvenile court experiment had sufficiently failed to require its dissolution. "Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it."[451] Twenty-five years ago, writing the system off meant allowing public access commensurate with an adult criminal trial. Today, that kind of public scrutiny, hopefully providing sufficient support for real reform to this nearly century-old experiment, may be the only way to reverse the "ultimate disillusionment" many still feel toward the juvenile justice system.

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[451] *Id.* at 551.