

COMMENT

Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of "Conditional Access"

Many states avoid the basic choice between open and closed juvenile court proceedings by conditioning press access to hearings upon the news reporter's promise not to divulge the identity of accused juveniles. This comment argues that such "conditional access" schemes impose a prior restraint which violates the first amendment. Therefore, the legislatures in "conditional access" states must reassess their present confidentiality practices. This comment critically analyzes the policies promoted by open and closed juvenile court proceedings and concludes that the interest in open hearings outweighs the competing interest in closure.

Without publicity, all other checks are insufficient; in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.¹

INTRODUCTION

In recent years, courts have faced an emerging conflict between those who advocate confidential juvenile court proceedings and those who insist upon the right to attend and publicize those proceedings. In *Oklahoma Publishing Co. v. District Court*² and *Smith v. Daily Mail Publishing Co.*,³ the United States Supreme Court affirmed the right of reporters to publish the lawfully obtained identity of juvenile offenders both inside and outside the juvenile courtroom. In *Gannett Co. v. DePasquale*,⁴ however, the Court circumscribed the right to obtain such information at judicial proceedings.

¹ 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827).

² 430 U.S. 308 (1977) (*per curiam*).

³ 99 S. Ct. 2667 (1979).

⁴ 99 S. Ct. 2898 (1979).

At least thirteen jurisdictions sidestep the conflict between confidentiality and publicity by adopting a "conditional access" scheme for their juvenile courts.⁵ Under "conditional access,"

⁵ At least 13 jurisdictions have adopted "conditional access" statutes and/or rules for their juvenile courts. This comment focuses exclusively upon California's statute and rule of court since they are typical of "conditional access" schemes found in other jurisdictions. See CAL. WELF. & INST. CODE § 676 (West 1972); CAL. JUV. CT. R. 1311(e) (West 1979); *Brian W. v. Superior Court*, 20 Cal. 3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1978), discussed at notes 46-55 and accompanying text *infra*. See also I.J.A./A.B.A. JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ADJUDICATION, Standards 6.1-6.3, at 70-76 (1977).

Section 24(d) of the UNIFORM JUVENILE COURT ACT excludes the general public, but permits the admission of those persons whom the court "finds have a proper interest in the proceeding or in the work of the court." *Reprinted in* 9A UNIFORM LAWS ANNOTATED 32 (Master ed. 1979). Commentary to this section by the Uniform Commissioners clearly indicates an intent to condition access to juvenile court proceedings upon the "understanding that the identity of the cases observed will not be published." *Id.* at 33. Section 24(d) of the UNIFORM JUVENILE COURT ACT has been adopted by the following jurisdictions to date: Georgia (GA. CODE ANN. § 24A-1801(c) (1976)), North Dakota (N.D. CENT. CODE § 27-20-24(5) (Smith Cum. Supp. 1977)) and Pennsylvania (42 PA. CONS. STAT. ANN. § 6336(d) (West Supp. 1979)).

In addition, the following nine jurisdictions employ "conditional access" either by statute, court rule or judicial interpretation: Alabama (1975 Ala. Acts 2428, act 1305, § 5-128(a)), District of Columbia (D.C. JUV. CT. R. 53(a) (West 1978)), Illinois (ILL. ANN. STAT. ch. 37, §§ 701-20(6), 702-10.1 (Smith-Hurd Cum. Supp. 1978)); *In re Jones*, 46 Ill. 2d 500, 263 N.E.2d 863 (1970) (upholding juvenile court judge's decision to permit access by news reporters on the condition that they not reveal what transpired in the proceedings); *cf.* 1973 ILL. OP. ATT'Y GEN. S-645, at 185 ("[I]t is my opinion that a juvenile court may not restrict the news media from publishing that information which is obtained from their attendance at juvenile proceedings, unless, in a particular case, such publication would offer an immediate threat to the judicial proceedings"), Minnesota (MINN. STAT. ANN. § 260.155(1) (West 1971); *In re R.L.K.*, ___ Minn. ___, 269 N.W.2d 367 (1978)), New Jersey (N.J. JUV. & DOM. REL. CT. R. 5:7B(g) (West Supp. 1979)), New Mexico (N.M. STAT. ANN. § 13-14-28(B) (Smith 1976)), New York (N.Y. FAM. CT. ACT § 741 (McKinney 1975); N.Y. FAM. CT. R. 2501.2(a)(3), (c) (West 1978)), Oregon (OR. REV. STAT. § 419.498(1) (1977); *In re L.*, 24 Or. App. 257, 546 P.2d 153 (Ct. App. 1976)) and Wisconsin (Wis. STAT. ANN. § 48.31(5) (West 1979); *State ex rel. E.R. v. Flynn*, 88 Wis. 2d 37, 276 N.W.2d 313 (Ct. App. 1979)).

Six states have statutes and/or court rules which are virtually identical to many of those provisions which, in other states, were judicially interpreted to require "conditional access." These statutes and rules require the exclusion of the general public from juvenile court hearings, but nevertheless vest the judge with discretion to admit those deemed to have a "direct," "legitimate" or "proper" interest in "the case or work of the court." However, in none of these jurisdictions have courts to date interpreted the statutes and/or rules to require

those who attend juvenile court proceedings may not reveal the identity of the accused offender. As will be developed later,⁶ such a practice conflicts with *Smith* and *Oklahoma Publishing* and,

“conditional access.” These six states are: Kentucky (KY. REV. STAT. ANN. § 208.060 (Bobbs-Merrill 1977)), South Carolina (S.C. CODE § 14-21-610 (1977)), Utah (UTAH CODE ANN. § 78-3a-33 (Smith 1977) (misdemeanors only)), Vermont (VT. STAT. ANN. tit. 33, § 651 (Cum. Supp. 1979)), Washington (WASH. REV. CODE ANN. § 13.34.110 (Bancroft-Whitney & West Cum. Supp. 1979); WASH. JUV. CT. R. 3.7(a) (West 1979)) and Wyoming (WYO. STAT. § 14-6-224(b) (1977)).

In nine states, the attendance of the public or press is solely within the discretion of the juvenile court judge. In arriving at their decision, these judges are to be guided by “the interest of justice,” “the public interest” and the interests of the accused juvenile. These states are: Alaska (ALASKA STAT. § 47.10.070 (1975); ALASKA R. JUV. PROC. 12(d)(2) (Supp. 1966); R.L.R. v. State, 487 P.2d 27 (Alas. 1971)), Florida (FLA. STAT. ANN. § 39.09(1)(c) (West Cum. Supp. 1978)), Indiana (IND. CODE § 31-51-7-15 (1976)), Iowa (IOWA CODE ANN. § 232.39 (West Cum. Supp. 1979)), Kansas (KAN. STAT. § 38-822 (Cum. Supp. 1977)), North Carolina (N.C. GEN. STAT. § 7A-285 (Michie Cum. Supp. 1975); *In re Potts*, 14 N.C. App. 387, 188 S.E.2d 643, *cert. denied*, 281 N.C. 622, 190 S.E.2d 471 (1972); *In re Burrus*, 275 N.C. 517, 169 S.E.2d 879 (1969) (access denied)), Oklahoma (OKLA. STAT. ANN. tit. 10, § 1111 (West Cum. Supp. 1978)), Tennessee (TENN. CODE ANN. § 37-224(d) (1977)) and Texas (TEX. FAM. CODE ANN. tit. 3, § 54.08 (Vernon 1975)).

In 12 states, the general public is excluded from juvenile court proceedings, but those with a “direct interest in the case” may attend at the discretion of the juvenile court judge. Based upon such statutory language, New York derived a “conditional access” juvenile court rule. *See* N.Y. FAM. CT. R. 2501.2(a)(3), (c) (West 1978). It is unclear whether other state courts would likewise interpret these similar statutes or rules to require the adoption of “conditional access.” These 12 states (excluding New York) are: Arizona (ARIZ. R. PROC. JUV. CT. 19 (West 1978)), Delaware (DEL. FAM. CT. R. 200(b)(2) (1975)), Hawaii (HAW. REV. STAT. § 571-41 (Supp. 1975), as amended by 1976 Haw. Sess. Laws 122, act 85, § 9), Idaho (IDAHO CODE § 16-1608(b) (1979)), Maryland (MD. CTS. & JUD. PROC. CODE § 3-812(e) (Supp. 1978)), Massachusetts (MASS. GEN. LAWS ANN. ch. 119, § 65 (West 1969)), Michigan (MICH. STAT. ANN. § 27.3178(598.17) (Callaghan 1962)), Mississippi (MISS. CODE ANN. § 43-21-17 (1973), as amended by 1975 Miss. Laws 742, ch. 494, § 3), Missouri (MO. ANN. STAT. § 211.171(5) (Vernon 1962); Mo. R. PRAC. & PROC. JUV. CT. 117.02 (West 1979)), Ohio (OHIO REV. CODE ANN. § 2151.35 (Anderson Supp. 1976); OHIO R. JUV. PROC. 27 (Anderson 1979)), Rhode Island (R.I. GEN. LAWS § 14-1-30 (1970)) and West Virginia (W. VA. CODE § 49-5-1(d) (Michie Cum. Supp. 1979)).

In contrast, the following three states permit unconditional press access to juvenile court cases involving offenses which, if charged against adults, would be felonies: Maine (ME. REV. STAT. tit. 15, § 3307(2) (West Supp. 1978)), Montana (MONT. REV. CODES ANN. § 10-1220(5) (Supp. 1977)) and Utah (UTAH CODE ANN. § 78-3a-33 (Smith 1977)). On the other hand, all juvenile court proceedings are apparently closed to the press and public in New Hampshire (N.H. REV. STAT. ANN. § 169:20 (1978)).

⁶ *See* Section III *infra*.

therefore, is unconstitutional.

No judge or legal commentator has yet undertaken a comprehensive examination of the validity of the policies underlying confidentiality. This comment critically analyzes the policy interests in confidential juvenile court hearings by comparing and contrasting the arguments advanced in favor of and against juvenile court publicity. *Gannett* removes federal constitutional values from an analysis of courtroom access. Nevertheless, state legislative reform is necessary. This comment proposes the outline of such reform with emphasis upon changes in California's juvenile court law.⁷

I. CONFIDENTIALITY AND THE JUVENILE COURT

The separation of juvenile jurisdiction from the adult criminal court system⁸ resulted from public and legislative repugnance for housing juveniles and hardened criminals in the same correctional institutions, and for subjecting juveniles to the disabilities of a criminal conviction.⁹ Proponents of the new juvenile court

⁷ For discussion of the competing interests in open and closed juvenile court hearings and a comparative analysis thereof, see Section IV *infra*.

⁸ The first juvenile court was created in Illinois in 1899. 1899 Ill. Stats. 131. Within ten years, nearly every state had followed suit. California's first Juvenile Court Act was passed in 1903. 1903 Cal. Stats. 44, ch. 43. By 1917, juvenile courts had been established in all but three states. U.S. CHILDREN'S BUREAU, REPORT TO THE CONGRESS ON JUVENILE DELINQUENCY 7 (1960).

⁹ Expressing the orthodox understanding of the original juvenile courts, Justice Fortas wrote for the Supreme Court:

The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help "to save him from a downward career."

In re Gault, 387 U.S. 1, 25-26 (1967).

The question of juvenile culpability also concerned many reformers. Traditional common law presumptions of a youth's criminal capability were disregarded because juvenile proceedings were not deemed criminal. See generally Fox, *Juvenile Justice in America: Philosophical Reforms*, 5 HUMAN RIGHTS 63, 73 (1975).

Nevertheless, since 1970, California has formally incorporated the common law capacity presumptions (codified at CAL. PENAL CODE § 26(1) (West Cum. Supp. 1979)) into the juvenile court. For the view that the common law capacity presumptions are too restrictive, see generally Comment, *Penal Code Section 26(1): Rebuttable Presumption of a Juvenile's Incapacity to Commit a Crime—A Necessary Statute?*, 12 U.C. DAVIS L. REV. 885 (1979). For further discussion, see notes 136-37 and accompanying text *infra*.

believed that informality, flexibility, speed of adjudication and an emphasis upon rehabilitation were the cornerstones of effective juvenile justice.¹⁰

Acting under the doctrine of *parens patriae*,¹¹ the state seeks to rehabilitate rather than adjudicate guilt or punish juveniles for their criminal conduct.¹² In determining the needs of the child and of society, the state acts as a benevolent and omnipotent guardian.¹³

In the belief that confidentiality is essential to the ultimate rehabilitation of juvenile delinquents, the state, as *parens patriae*, shields juvenile delinquents from the adverse social consequences of youthful misconduct.¹⁴ Theoretically, confidentiality

¹⁰ For the classic summary of early juvenile court proponents' thoughts on the protective and rehabilitative goals of the juvenile court and the need for special court procedures, see Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909).

¹¹ Originally a doctrine in the Courts of Chancery, *parens patriae* means "parent of the country." In the United States, *parens patriae* refers to the state's sovereign power of guardianship. BLACK'S LAW DICTIONARY 1003 (5th ed. 1979). For a discussion of the roots of the *parens patriae* doctrine and the extension of its jurisdiction into independent, "non-criminal" juvenile courts, see Mack, *supra* note 10, at 111. See also *In re Gault*, 387 U.S. 1, 16 (1967); Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281 (1967); Ketcham, *The Development of Juvenile Justice in the United States*, reprinted in THE CHANGING FACES OF JUVENILE JUSTICE 13-14 (V. Stewart ed. 1978).

¹² Under *parens patriae*, the state evinces "special solicitude" for the interests of juveniles by conducting non-adversary proceedings emphasizing rehabilitation. *Kent v. United States*, 383 U.S. 541, 551-54 (1966) (district court waiver of juvenile jurisdiction reversed for denial of adequate representation).

"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." *In re Gault*, 387 U.S. 1, 15-16 (1967). See also Mack, *supra* note 10, at 107, 119-20.

The "critical philosophical position" of the juvenile court movement was that no formal, legal distinctions should be drawn between delinquent, dependent or neglected children. Unlike adult offenders, adolescents who broke the law were not considered the "enemies of society." Instead, reformers felt that juvenile offenders should be viewed and treated by the state much as wise and understanding parents would handle their wayward children. As a by-product of this philosophical position, there was no need for protective criminal rights. The interests of child and society coincided, rather than conflicted. Handler, *The Juvenile Court and the Adversary System: Problems of Function and Form*, 1965 WIS. L. REV. 7, 9-10.

¹³ See note 11 *supra*.

¹⁴ See Geis, *Publication of the Names of Juvenile Felons*, 23 MONT. L. REV. 141 (1962); Cashman, *Confidentiality of Juvenile Court Proceedings: A Review*, 24 JUV. JUST., No. 2, 30 (1973); Volenick, *Juvenile Court and Arrest Records*, 9 CLEARINGHOUSE REV. 169 (1975); Edwards & Sagatun, *A Study of Juvenile Rec-*

facilitates the re-entry of juvenile offenders into the mainstream of society.¹⁵

In order to promote confidentiality, states employ both direct and indirect restraints upon publicity. These methods include prohibitions upon publishing the identity of juvenile offenders as well as restrictions upon press and public access to juvenile hear-

ord Sealing Practices in California, 4 PEPPERDINE L. REV. 543 (1977). For a discussion of the interest in confidential juvenile court hearings, see notes 109-42 *infra*; for a brief discussion of the interest in confidential juvenile records, see notes 122, 126-27 and accompanying text *infra*.

Many of the original juvenile court acts did not provide for confidential proceedings or records. See, e.g., 1899 Ill. Stats. 131; 1903 Cal. Stats. 44, ch. 43. Early juvenile court proponents did not consider confidentiality essential to juvenile court success. See Mack, *supra* note 10. Over the past 70 years, however, states introduced and strengthened confidentiality provisions. The history of California's enactment of confidentiality provisions is typical of most states.

In 1909, minors or their parents were granted the right to compel private juvenile court hearings. 1909 Cal. Stats. 224, ch. 133, § 23; CAL. WELF. & INST. CODE § 733 (Bancroft-Whitney 1937). In 1929, the right to close juvenile proceedings was expanded by granting juvenile court judges the discretion to close proceedings without a request from the parties. 1929 Cal. Stats. 1067, ch. 645, § 5; CAL. WELF. & INST. CODE § 733 (Bancroft-Whitney 1937). By 1960, under former WELF. & INST. CODE § 733, all but seven of California's 52 counties conducted private hearings in all juvenile cases. REPORT OF THE GOVERNOR'S SPECIAL STUDY COMMISSION, PART II, A STUDY OF THE ADMINISTRATION OF JUVENILE JUSTICE IN CALIFORNIA 14 (1960) [hereinafter cited as GOVERNOR'S COMMISSION II]. Confidentiality under § 733 was supplanted by present CAL. WELF. & INST. CODE § 676 (West 1972) when the Arnold-Kennick Juvenile Court Act was enacted in 1961. 1961 Cal. Stats. 3480, ch. 1616, § 2. Section 676 is discussed at notes 46-57 *infra*.

Complete confidentiality of juvenile records was not a mandatory provision of California's juvenile court law until the Arnold-Kennick Act. Beginning in 1921, inspection of probation officers' reports and recommendations to the juvenile court were limited to the court, the parties and their attorneys unless, for good cause, the juvenile judge otherwise directed by written order. 1921 Cal. Stats. 813, ch. 517, § 20 [sic]; CAL. WELF. & INST. CODE § 643 (Bancroft-Whitney 1937). By 1955, concern for confidential records led to the enactment (1955 Cal. Stats. 1867, ch. 967, § 1) of former CAL. WELF. & INST. CODE § 751 (West 1959). Under this code section, a juvenile court judge could order the "destruction" (expungement) of juvenile court records five years after the termination of jurisdiction over an individual. The 1961 law was the basis for present CAL. WELF. & INST. CODE § 781 (West Cum. Supp. 1979) which provides for "sealing" of juvenile court and arrest records five years after termination of juvenile court jurisdiction. 1961 Cal. Stats. 3493, ch. 1616, § 2. The Arnold-Kennick Act also provided for unsealed, but nevertheless confidential, court record storage prior to sealing. 1961 Cal. Stats. 3494, ch. 1616, § 2; CAL. WELF. & INST. CODE § 827 (West Cum. Supp. 1979).

¹⁵ See note 14 *supra*.

ings and records.¹⁶

The United States Supreme Court has questioned the "historic credentials" of *parens patriae*¹⁷ and has consistently held that the rehabilitative goal of juvenile courts cannot justify denying youthful offenders their constitutional rights.¹⁸ Today, juveniles enjoy nearly every federal constitutional protection accorded criminal defendants except the unqualified right to a jury trial.¹⁹

¹⁶ See, e.g., CAL. WELF. & INST. CODE §§ 676, 781, 828 (West Cum. Supp. 1979). This comment focuses solely upon the propriety of confidential juvenile court hearings.

¹⁷ The Supreme Court, discussing the origins of *parens patriae*, found it to be "a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance." *In re Gault*, 387 U.S. 1, 16 (1967).

Kent v. United States, 383 U.S. 541, 555 (1966). The *Kent* Court found "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." *Id.* at 556. *Accord*, *In re Gault*, 387 U.S. 1, 17-18 (1967).

¹⁸ The United States Supreme Court recognized that juvenile commitment to treatment institutions is a "deprivation of liberty" and "incarceration against one's will, whether it is called 'criminal' or 'civil.'" *In re Gault*, 387 U.S. 1, 50 (1967). *Accord*, *In re Winship*, 397 U.S. 358, 365 (1970); *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971); *Breed v. Jones*, 421 U.S. 519, 529 (1975). See also *Richard M. v. Superior Court*, 4 Cal. 3d 370, 375, 482 P.2d 664, 668, 93 Cal. Rptr. 752, 756 (1971).

¹⁹ The Supreme Court has recognized the following due process guarantees for juveniles: the right to notice of charges, the right to counsel, the right to confront and cross-examine witnesses, the right against self-incrimination (see *In re Gault*, 387 U.S. 1 (1967)); the right to a standard of proof beyond a reasonable doubt (see *In re Winship*, 397 U.S. 358 (1970)); the right to protections against double jeopardy (see *Breed v. Jones*, 421 U.S. 519 (1975)).

In *McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 545, 547 (1971), the Supreme Court found jury trials were not constitutionally mandated in juvenile proceedings because a jury is not essential to fundamental fairness in fact-finding procedures. The *McKeiver* analysis has been strongly criticized on the ground that no compelling state interest justifies the denial of the asserted fundamental right to a jury trial. Indeed, denying minors a jury trial may establish an invidious classification which violates the equal protection clause of the fourteenth amendment to the U.S. Constitution. See Comment, *Jury Trials for Juveniles: Rhetoric and Reality*, 8 PAC. L. J. 811 (1977).

However, the Supreme Court did not preclude states from extending the right to trial by jury in any or all juvenile cases. *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971). Several states have done so.

Alaska has recognized that juveniles have a right to jury trials in all cases under the state constitution. *R.L.R. v. State*, 487 P.2d 27 (Alas. 1971). Both New York and New Mexico have recognized that juveniles have the right to jury trials in some cases under their respective state constitutions. *In re Phillip S.*, 77 Misc.

More importantly, in every instance where the Court confronted the conflict between a constitutional guarantee and a state's policy of confidentiality, it concluded that the policy interest must yield to the constitutional right. In *Davis v. Alaska*,²⁰ the state's interest in maintaining the confidentiality of juvenile court records yielded to a criminal defendant's sixth amendment²¹ right to adequately confront an adverse juvenile witness.²² In *Oklahoma Publishing Co. v. District Court*,²³ the state interest in preventing the revelation of the identity of an accused juvenile yielded to a news reporter's first amendment²⁴ right to publish information obtained in open court.²⁵ Finally, in *Smith v. Daily*

2d 194, 352 N.Y.S.2d 808 (Fam. Ct. 1974); *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968).

In addition, at least 12 jurisdictions statutorily create the right to jury trial in all juvenile cases: Colorado (COLO. REV. STAT. § 19-1-106(4) (Bradford-Robinson 1978)), the District of Columbia (D.C. CODE ENCYCL. § 16-2382 (West 1966)), Massachusetts (MASS. GEN. LAWS. ANN. ch. 119, § 55A (West Cum. Supp. 1979)), Michigan (MICH. STAT. ANN. § 27.3178(598.17) (Callaghan 1962); MICH. JUV. CT. R. 12 (Callaghan 1976)), Montana (MONT. REV. CODES ANN. § 10-1220(1) (Smith Cum. Supp. 1977)), New Mexico (N.M. STAT. ANN. § 13-14-28(A) (Smith 1976)), Oklahoma (OKLA. STAT. ANN. tit. 10, § 1110 (West Cum. Supp. 1978)), South Dakota (S.D. CODIFIED LAWS § 26-8-31 (1977) (available upon court's own motion)), Texas (TEX. FAM. CODE ANN. tit. 3, § 54.03(c) (Vernon Cum. Supp. 1978)), West Virginia (W. VA. CODE § 49-5-6 (Michie Cum. Supp. 1979)), Wisconsin (WIS. STAT. ANN. § 48.243(1)(g) (West 1979)) and Wyoming (WYO. STAT. § 14-6-223(c) (1978)).

In Kansas, the right to jury trial is statutorily afforded only to juveniles charged with felony offenses. KAN. STAT. ANN. § 38-808(a) (Cum. Supp. 1978).

²⁰ 415 U.S. 308 (1974).

²¹ U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor"

U.S. CONST. amend. XIV, § 1 provides: "nor shall any State deprive any person of life, liberty, or property without due process of law"

The confrontation clause of the sixth amendment has been incorporated into the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400 (1965); *Parker v. Gladden*, 385 U.S. 363 (1966). The compulsory process clause of the sixth amendment has been incorporated into the fourteenth amendment. *Washington v. Texas*, 388 U.S. 14 (1967).

²² *Davis v. Alaska*, 415 U.S. 308, 320 (1974).

²³ 430 U.S. 308 (1977) (*per curiam*).

²⁴ U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech or of the press" See note 21 *supra*, for text of U.S. CONST. amend. XIV.

The free speech and free press clauses of the first amendment have been incorporated into the fourteenth amendment. *Gitlow v. New York*, 268 U.S. 652 (1925); *Near v. Minnesota*, 283 U.S. 697 (1931).

²⁵ 430 U.S. 308, 311 (1977) (*per curiam*).

Mail Publishing Co.,²⁶ the state's interest in preventing the revelation of an accused juvenile's name learned outside court proceedings was insufficient to permit the imposition of criminal sanctions for exercising first amendment rights by publishing lawfully obtained, truthful information.²⁷ Thus, juvenile court confidentiality practices may not conflict with constitutional rights.

II. THE CALIFORNIA JUVENILE COURT

A. Juvenile Court Purposes

In 1957, Governor Edmund G. Brown appointed the Special Study Commission on Juvenile Justice to examine and make recommendations regarding California's then-existing juvenile justice system. The Commission's findings²⁸ led, in 1961, to the passage of the Arnold-Kennick Juvenile Court Act, California's present juvenile justice system.²⁹ The 1961 statute introduced many uniform procedural safeguards into the juvenile court process.³⁰

The initial purposes of the Arnold-Kennick Act were exclusively rehabilitative.³¹ For over fifteen years, this rehabilitative

²⁶ 99 S. Ct. 2667 (1979).

²⁷ *Id.* at 2671-72.

²⁸ See REPORT OF THE GOVERNOR'S SPECIAL STUDY COMMISSION ON JUVENILE JUSTICE, PART I, RECOMMENDATIONS FOR CHANGES IN CALIFORNIA'S JUVENILE COURT LAW (1960) [hereinafter cited as GOVERNOR'S COMMISSION I]; GOVERNOR'S COMMISSION II, *supra* note 14.

²⁹ CAL. WELF. & INST. CODE §§ 200-940 (West Cum. Supp. 1979).

³⁰ For a comprehensive discussion of the reforms initiated by the Arnold-Kennick Act, see Comment, *1961 California Juvenile Court Law: Effective Uniform Standards for Juvenile Court Procedure?*, 51 CALIF. L. REV. 421 (1963). See also Boches, *Juvenile Justice in California: A Reevaluation*, 19 HASTINGS L.J. 47 (1967); GOVERNOR'S COMMISSION I, *supra* note 28; GOVERNOR'S COMMISSION II, *supra* note 14.

³¹ The California Legislature adopted the following language:

[T]o secure for each minor under the jurisdiction of the juvenile court such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental and physical welfare of the minor and the best interests of the State; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care and discipline as nearly as possible equivalent to that which should have been given by his parents. This chapter shall be liberally construed to carry out these purposes.

CAL. WELF. & INST. CODE § 202 (West 1972) (former § 502).

focus was the hallmark of California's juvenile court system. In 1976, however, in light of the dramatically increasing rate of serious juvenile offenses,³² the Legislature broadly expanded the pur-

³² Serious and violent crime, including juvenile crime, exploded in California between 1968 and 1976. The rate of "crimes of personal violence" (homicide, forcible rape, robbery and aggravated assault) perpetrated by all offenders increased from 411 per 100,000 population in 1968 to 667 per 100,000 in 1976 (a 61 per cent rise). Similarly, the rate of felony "crimes against property" (burglary, theft of over \$200, motor vehicle theft, etc.) grew from 2,416 per 100,000 population in 1968 to a staggering 3,552 per 100,000 in 1976 (a 47 per cent increase). See CAL. DEP'T OF JUST., CRIME & DELINQUENCY IN CALIFORNIA, PART I—CRIMES AND ARRESTS 4 (1969) [hereinafter cited as 1969 CRIME & DELINQUENCY I]; CAL. DEP'T OF JUST., CRIME & DELINQUENCY IN CALIFORNIA, PART I—CRIMES AND ARRESTS 4 (1977) [hereinafter cited as 1977 CRIME & DELINQUENCY I].

Although an exact measure of juvenile crime is not presently available, "[t]here are a number of indices which, when viewed together, provide a general measurement of juvenile delinquency. These are: youth population, arrests, new probation referrals, initial petitions filed for juvenile court action, declarations of wardship for local supervision and first admissions to Youth Authority." CAL. DEP'T OF JUST., CRIME & DELINQUENCY IN CALIFORNIA 39 (1973) [hereinafter cited as 1973 CRIME & DELINQUENCY].

Because they are more prone to delinquency than younger children, the population most frequently analyzed in California juvenile statistics is the group of minors aged 10 to 17. See CAL. DEP'T OF JUST., CRIME & DELINQUENCY IN CALIFORNIA 49 (1976) [hereinafter cited as 1976 CRIME & DELINQUENCY]. (Only statistics covering the 0-10, 10-17 and 0-17 age groups are available from official state publications.) In 1973, for example, 98 per cent of "crimes of personal violence" by juveniles nationally were committed by 11-17 year-olds. Similarly, 95 per cent of "crimes against property" by juveniles nationally were committed by 11-17 year-olds. Derived from U.S. DEP'T OF JUST., SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 515 (1975).

Table I (below) indicates that the rate of felony arrests of juveniles in California for "crimes of personal violence" more than doubled between 1968 and 1976. The rate of felony arrests of juveniles in the state for "crimes against property" increased by 29 per cent between 1968 and 1976.

In both 1968 and 1976, youths 10 to 17 years old constituted 15.3 per cent of California's total population. In 1968, arrests of juveniles accounted for 18 per cent of total arrests for "crimes of personal violence." By 1976, however, the percentage of juvenile arrestees had risen to 23.8 per cent of all arrests for these crimes of violence. 1973 CRIME & DELINQUENCY, *supra*, at 17, 21, 66; 1976 CRIME & DELINQUENCY, *supra*, at 25-26, 49.

Other indices also reveal increasingly prevalent and serious juvenile offenses. New probation referrals of juveniles (*i.e.*, first-time offenders) increased 17.2 per cent between 1973 and 1977. CAL. DEP'T OF JUST., CRIME & DELINQUENCY IN CALIFORNIA, PART II—DISPOSITIONS, CORRECTIONS, PROBATION 32 (1977). Filings of initial petitions for wardship (*i.e.*, the more serious first-time offenders) increased 44.4 per cent. *Id.* at 32. Declarations of wardship for local supervision (*i.e.*, wards placed on formal court probation) increased by 0.2 per cent. *Id.* at 34. First admissions to the California Youth Authority (the most severe disposition a juvenile court can make) increased 48.7 per cent. *Id.* at 34.

poses of the juvenile courts to include greater protection "from the consequences of criminal activity."³³ It also instructed probation officers, police and the courts to "take into account such protection of the public" in the performance of their respective duties.³⁴

The Legislature further strengthened the "criminal" aspects of the Act in 1977 by explicitly declaring that juvenile courts should seek "to protect the public from criminal conduct by minors; to impose on the minor a sense of responsibility for his own acts."³⁵

TABLE I

Felony Arrests of Juveniles in California

Year	Youth (10-17) Population	Crimes of Personal Violence*		Crimes Against Property**	
		Arrests	Rate/100,000 Youth	Arrests	Rate/100,000 Youth
1968	2,976,000	7,869	264	52,135	1,751
1970	3,066,000	9,447	308	54,290	1,770
1973	3,141,000	15,249	485	60,999	1,942
1976	3,073,000	16,398	533	69,444	2,259

* Includes homicide, robbery, forcible rape, aggravated assault.

** Includes burglary, theft of over \$200, motor vehicle theft.

Sources — Population: 1973 CRIME & DELINQUENCY, *supra* at 17, 66; 1976 CRIME & DELINQUENCY, *supra*, at 49.

Arrests: CAL. DEP'T OF JUST., CRIME & DELINQUENCY IN CALIFORNIA 51 (1972); 1977 CRIME & DELINQUENCY I, *supra*, at 22.

³³ 1976 Cal. Stats. 4741, ch. 1068, § 1.5; CAL. WELF. & INST. CODE § 202(b) (West Cum. Supp. 1979).

³⁴ *Id.* Also, in 1976, the California Legislature recognized the victim's interest in learning the final disposition by the juvenile court of the case arising from the illegal act committed against the victim. 1976 Cal. Stats. 4813, ch. 1070, § 4; CAL. WELF. & INST. CODE § 742 (West Cum. Supp. 1979).

³⁵ 1977 Cal. Stats. 2782, ch. 910, § 1; CAL. WELF. & INST. CODE § 202(a) (West Cum. Supp. 1979). The legislative counsel's digest accompanying S.B. 626 (Cal. Legislature 1977) declared that the changes enacted were technical in nature. However, the alterations to section 202 since 1961 seem far more than merely technical. These changes indicate that the goals of *parens patriae* must be balanced against the public's interest in protecting itself and in disciplining juvenile offenders.

Both the 1976 and 1977 amendments to California's juvenile court purposes comport with the public's perception of how the juvenile courts should operate: "Most citizens now believe that gentleness and a helping hand are justified in dealing with juveniles, *provided public safety is assured*. But if nothing but a junior criminal court can assure law and order, they seem to prefer that to a continuation of present policies." Ketcham, *The Changing Philosophy of the*

In the same year, California's indeterminate sentencing law for adult criminals and juvenile offenders, which stressed the goal of rehabilitation, was abolished.³⁶ The determinate sentencing law, enacted in its place, explicitly states that the purpose of imprisonment is punishment.³⁷

These recent amendments significantly alter the original purpose of California's juvenile court law.³⁸ While rehabilitation re-

Juvenile Justice System, 20 JUV. CT. JUDGES' J., No. 2, 59, 62 (1969) (emphasis added).

³⁶ 1976 Cal. Stats. 5140, ch. 1139, § 273, operative July 1, 1977; CAL. PENAL CODE § 1170 (West Cum. Supp. 1979).

Underlying the repeal of the indeterminate sentencing law was the belief that rehabilitation is not a "viable concept." Comment, *Senate Bill 42—The End of the Indeterminate Sentence*, 17 SANTA CLARA L. REV. 133, 134, 139 (1977).

³⁷ "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." CAL. PENAL CODE § 1170(a)(1) (West Cum. Supp. 1979).

The Legislature and Governor expeditiously applied the substance of the determinate sentencing statute to those minors committed to California Youth Authority facilities under provisions of California Welfare and Institutions Code § 1766. 1977 Cal. Stats. 4158, ch. 1238, § 3, urgency, effective October 1, 1977. CAL. WELF. & INST. CODE § 1766(b) (West Cum. Supp. 1979) provides:

When a person has been committed to the [California Youth] authority, it may . . .

(b) Order his confinement under such conditions as it believes best designed for the protection of the public, except that [such] a person . . . may not be held in physical confinement for a total period of time in excess of the maximum period of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought the minor under the jurisdiction of the juvenile court

³⁸ The current statute outlining the purposes of California's Juvenile Court Law provides:

(a) The purpose of this chapter is to secure for each minor under the jurisdiction of the juvenile court such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the state; to protect the public from criminal conduct by minors; to impose on the minor a sense of responsibility for his own acts; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when necessary for his welfare or for the safety and protection of the public; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents. This chapter shall be liberally construed to carry out these purposes.

(b) The purpose of this chapter also includes the protection of the public from the consequences of criminal activity, and to such purpose probation officers, peace officers, and juvenile courts shall take

mains an important goal, protecting the public from minors' unlawful conduct and impressing upon juveniles a sense of responsibility for their own conduct are equally important objectives.³⁹

Despite these changes in the overall purpose of the juvenile court law, provisions governing confidentiality in juvenile court hearings and records have remained essentially unaltered.⁴⁰ The underlying reason for confidentiality provisions in juvenile court is their asserted contribution to rehabilitation.⁴¹ Nevertheless, these confidentiality provisions conflict with the non-rehabilitative juvenile court purposes recently added by the California Legislature.⁴² Confidentiality makes it difficult to impress juvenile delinquents with a sense of responsibility for their acts.⁴³

into account such protection of the public in their determinations under this chapter.

CAL. WELF. & INST. CODE § 202 (West Cum. Supp. 1979) (emphasis added). Cf. text of previous statute at note 31 *supra* (exclusively rehabilitative purposes).

³⁹ CAL. WELF. & INST. CODE § 202 (West Cum. Supp. 1979).

⁴⁰ CAL. WELF. & INST. CODE § 676 (West 1972) *set forth in* note 46 *infra* (juvenile court hearings). CAL. WELF. & INST. CODE §§ 781, 827-28 (West Cum. Supp. 1979); *see* notes 122, 126-27 *infra* (juvenile court records).

⁴¹ *See* note 14 *supra*. This article questions whether confidentiality in fact contributes to rehabilitation. *See* notes 112-32 and accompanying text *infra*.

⁴² Arguably, confidentiality conflicts with all of the present juvenile court purposes, including rehabilitation. Indeed, publicity may promote rehabilitation. San Bernardino County Juvenile Court Judge Joseph B. Campbell argues that "the judicious use of reasonable punishment [including disclosure of the identities of juvenile delinquents] and appropriate rewards" is necessary to modify minors' anti-social behavior, *i.e.*, to rehabilitate them. Campbell, *Feathers in the Aquarium and Fish Scales in the Bird Cage: One Judge's Personal View of the Juvenile Justice System*, 1 J. Juv. L. 79, 83, 86 (1977).

⁴³ Judges and commentators have noted that confidential juvenile court proceedings mislead juveniles and their parents into underestimating the seriousness of illegal acts. Judge Campbell believes that disclosure of the identity of juvenile delinquents would have the "salutary effect" of teaching that "one of the consequences of illegal conduct is a temporary social disability." *Id.* at 86.

In a letter to the authors on file at the offices of the U.C. Davis Law Review, Orange County Juvenile Court Judge Raymond F. Vincent stated that juveniles, "knowing that [they] will not be subject to public scrutiny, [are] more apt to violate the law." Vincent Letter, (October 26, 1978), at 2 [hereinafter cited as Vincent Letter II]. In an earlier letter, also on file, Judge Vincent stated:

I do not recall handling a single case in which the youngster did not know exactly what he had done, if he actually did it.

While I remain committed to the philosophy that we should do all we can to help and rehabilitate law-violating minors, I believe that the present law shielding his identity from public scrutiny does more harm than good. From the earliest age a child should be taught that he is responsible for his own conduct and that misconduct will result in a meaningful consequence. These concepts, taught in the

In addition, confidentiality diminishes the extent to which the juvenile justice system is capable of protecting society.⁴⁴ Such a conflict among state policies suggests the need for legislative reform of juvenile confidentiality provisions.⁴⁵

*B. Access To and Restraints Upon Press Coverage
of Juvenile Court Hearings*

California Welfare and Institutions Code section 676 governs access to juvenile court hearings. This statute expressly excludes the general public and limits admittance at such proceedings to court officers, the minor, the child's parents or guardian and

family home, keep most kids out of the juvenile court. For the youngster who chooses to violate the law one of the consequences ought to be that he is subject to the approbation of his peers and the rest of the community [T]oday's bright youngster would think twice before violating the law if he knew that he would subject himself and his family to unfavorable publicity. I also believe that parents would be more aware of their responsibilities under such circumstances.

Vincent Letter, (October 5, 1978), at 1-2 [hereinafter cited as Vincent Letter I]. See also Parker, *Instant Maturation for the Post-Gault "Hood"*, 4 FAM. L. Q. 113, 124-26 (1970); Handler, *supra* note 12, at 19-21.

⁴⁴ Juvenile Court Judge Campbell has written that concealing the identity of juvenile offenders inhibits the effective deterrence of juvenile crime. "Obviously, there is no deterrent effect to be derived from the imposition of sanctions in secret." Campbell, *supra* note 42, at 86.

Cf. the comment of the Uniform Law Commissioners to section 24(d) of the UNIFORM JUVENILE COURT ACT:

There has been some recent tendency to permit publicity to juvenile court proceedings, on the theory that this will act as a curb to juvenile delinquency. There is little evidence to support this theory and considerable indication that it affords the hard core delinquent the kind of recognition he wants. On the other hand, the harm it causes may be great in the case of the repentant offender.

Reprinted in 9A UNIFORM LAWS ANNOTATED 33 (Master ed. 1979) (emphasis added) (restricting access to juvenile court hearings).

The Uniform Commissioners' justification for restricting access in the case of the unrepentant, publicity-seeking, hard-core delinquent is inapposite in California for two reasons. First, many such "hard core" delinquents over the age of 16 would not be adjudged amenable to treatment in juvenile court and jurisdiction would accordingly be transferred to the superior court for criminal prosecution. See CAL. WELF. & INST. CODE § 707 (West Cum. Supp. 1979). Second, all juveniles may demand a public hearing of right under CAL. WELF. & INST. CODE § 676 (West 1972).

⁴⁵ In addition, there are problems arising from a conflict between confidentiality and the first amendment. These constitutional problems also suggest the need for legislative reform or judicial action. See generally Section III *infra*.

anyone whom the judge or referee "deems to have a direct and legitimate interest in the particular case or work of the court."⁴⁶ Section 676 adopts verbatim Recommendation #5 of the Governor's Special Study Commission on Juvenile Justice.⁴⁷

The recommendation's premise is that juvenile courts should conduct informal, non-adversary hearings:⁴⁸

[W]e do not intend that this recommendation be used to exclude bonafide representatives of the press from attending juvenile court hearings. In so stating, we are convinced the press will continue to respect their voluntarily adopted code of ethics, whereby the names of juvenile offenders are not identified to the public.

We believe the press can assist juvenile courts in becoming more effective instruments of social rehabilitation by providing the public with greater knowledge of juvenile court processes, procedures, and unmet needs. We, therefore, urge juvenile courts to actively encourage greater participation by the press. It is the feeling of the Commission that proceedings of the juvenile court should be confidential, not secret.⁴⁹

⁴⁶ CAL. WELF. & INST. CODE § 676 (West 1972) provides:

Unless requested by the minor concerning whom the petition has been filed and any parent or guardian present, the public shall not be admitted to a juvenile court hearing. The judge or referee may nevertheless admit such persons as he deems to have a direct and legitimate interest in the particular case or work of the court.

"[P]ersons admitted under such circumstances must respect the confidentiality of juvenile proceedings and must not reveal the identity of a minor, parent, or guardian nor any details of the case that might reveal their identities." H. THOMPSON, CALIFORNIA JUVENILE COURT DESKBOOK 41 (Cal. Cont. Ed. Bar 1978). To similar effect, *see also* R. BOCHES & J. GOLDFARB, CALIFORNIA JUVENILE COURT PRACTICE §§ 114-15 (Cal. Cont. Ed. Bar 1968 and Supp. 1977). At least twelve states other than California have adopted "conditional access" schemes similar to WELF. & INST. CODE § 676 (West 1979) and CAL. JUV. CT. R. 1311(e) (West 1979). *See note 5 supra*.

⁴⁷ GOVERNOR'S COMMISSION I, *supra* note 28, at 23-24.

⁴⁸ The generally held view is that the general public should be excluded from the juvenile court hearing to insure an informal, protective atmosphere. It is also obvious that the intent of the present law is to provide closed hearings, even though it may be interpreted to permit open or semi-public hearings. For that reason, the Commission has recommended that the present ambiguity in the law be eliminated so that the general public is excluded from all juvenile court proceedings. If the recommendation is enacted only those persons will be admitted whose presence is requested by the parent or guardian or who the judge determines have a direct interest in the case or a professional interest in the work of the court.

GOVERNOR'S COMMISSION II, *supra* note 14, at 14.

⁴⁹ GOVERNOR'S COMMISSION I, *supra* note 28, at 24. *See also* 6 WITKIN, SUMMARY

In 1977, the California Judicial Council adopted Juvenile Court Rule 1311(e)⁵⁰ construing Welfare and Institutions Code section 676 to permit the admittance of those with a "direct and legitimate interest in the particular case or work of the court," but making clear that the names of involved parties and any method of ascertaining those names were not to be revealed.⁵¹ California juvenile courts may enforce this restraint through their contempt powers.⁵²

OF CALIFORNIA LAW, PARENT & CHILD § 298 (8th ed. 1974).

Discussing the above commentary accompanying Recommendation #5, the California Supreme Court in *Brian W. v. Superior Court*, 20 Cal. 3d 618, 623, 574 P.2d 788, 791, 143 Cal. Rptr. 717, 720 (1978), stated that "[e]xplanatory comments by a law review commission are persuasive evidence of the intent of the Legislature in subsequently enacting its recommendations into law." *Accord*, *In re Mitchell P.*, 22 Cal. 3d 946, 956, 587 P.2d 1144, 1151, 151 Cal. Rptr. 330, 338 (1978) (Bird, C.J., dissenting); *In re Wayne H.*, 24 Cal. 3d 595, 604 n.4, 596 P.2d 1, 7 n.4, 156 Cal. Rptr. 344, 350 n.4 (1979).

⁵⁰ CAL. JUV. CT. R. 1311(e) (West 1979) provides:

Unless requested by the minor and any parent, guardian or adult relative present, the court may nevertheless admit any person it deems to have a direct and legitimate interest in the particular case or the work of the court, subject to the condition that neither the name of the minor, parent, or guardian, nor any means of ascertaining their names be disclosed by that person.

See commentary upon Rule 1311(e) at JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE 34-35 (1977) [hereinafter 1977 JUDICIAL COUNCIL REPORT], explaining the rule by reference to GOVERNOR'S COMMISSION I, *supra* note 28, at 24.

⁵¹ The California Constitution vests the California Judicial Council with authority to "adopt rules for court administration, practice and procedure, not inconsistent with statute." CAL. CONST. art. 6, § 6. See also CAL. GOV'T CODE § 68070 (West Cum. Supp. 1979). "A valid rule, phrased in mandatory language, is generally said to have 'the force of positive law,' i.e., to be as binding on the court and parties as a procedural statute. [Citations omitted.]" 1 WITKIN, CALIFORNIA PROCEDURE, COURTS § 130 (2d ed. 1970).

The first comprehensive statewide judicial court rules were promulgated by the Judicial Council in 1977. "The new Rules restate statutory procedures in the light of governing judicial decisions and provide clarification and guidance in areas in which the statutes are uncertain or incomplete." 1 WITKIN, CALIFORNIA PROCEDURE, COURTS § 125A (2d ed. Supp. 1977).

⁵² A juvenile court could, under the authority of § 676 and Rule of Court 1311(e), validly restrain publication of the identity of a juvenile learned by the press while present in the courtroom. An individual may be held in contempt for violating or interfering with a valid juvenile court order and, as a result, could be subjected to a fine or jail sentence or both for each act of contempt.

CAL. WELF. & INST. CODE § 213 (formerly § 512) (West Cum. Supp. 1979) provides: "[a]ny willful disobedience or interference with any lawful order of the juvenile court or of a judge or referee thereof constitutes a contempt of

The only case construing either Welfare and Institutions Code section 676 or Juvenile Court Rule 1311(e) is *Brian W. v. Superior Court*.⁵³ In *Brian W.*, a seventeen-year-old juvenile sought to exclude the press from his fitness hearing.⁵⁴ In unanimously denying the minor's writ of mandate, the California Supreme Court reaffirmed the statutory right of press access to juvenile court hearings *conditioned* upon the withholding from publication of any information which would directly or indirectly identify the juvenile offender.⁵⁵

Although not at issue in *Brian W.*, the California Supreme Court implicitly upheld the constitutionality of "conditional access" under Welfare and Institutions Code section 676.⁵⁶ However, the California Supreme Court's analysis conflicts with re-

court." For an example of the scope of this rule, see *In re Carboni*, 46 Cal. App. 2d 605, 116 P.2d 453 (1st Dist. 1941). See also CAL. JUV. CT. R. 1313(d) (West 1979).

CAL. CIV. PROC. CODE § 1209(5) (West Cum. Supp. 1979) provides that "disobedience of any lawful judgment, order or process of the court" is an act in contempt of the authority of the court. One found guilty of contempt may be fined \$500, sentenced to jail for up to five days, or both, for each act of contempt. CAL. CIV. PROC. CODE § 1218 (West Cum. Supp. 1979).

⁵³ 20 Cal. 3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1978).

⁵⁴ In California, as in most states, the Juvenile Court Act includes a "transfer" or "waiver" of jurisdiction over the minor to criminal courts under particular circumstances. CAL. WELF. & INST. CODE § 707 (West Cum. Supp. 1979) requires that a fitness hearing be held prior to transfer to determine whether the juvenile is a proper subject for rehabilitative treatment. See generally Comment, *Section 707 Fitness Hearing: An Argument for Retention and Reform*, 12 U.C. DAVIS L. REV. 851 (1979).

⁵⁵ *Brian W. v. Superior Court*, 20 Cal. 3d 618, 623, 574 P.2d 788, 791, 143 Cal. Rptr. 717, 720 (1978).

The scheme contemplated by the *Brian W.* decision (and by CAL. WELF. & INST. CODE § 676) rests in part on the press' continued adherence to its "voluntarily adopted code of ethics," whereby the identity of juvenile offenders is not revealed. See notes 48-49 and accompanying text *supra*. Though guidelines of this nature have been recognized as "a commendable acknowledgment by the media that constitutional prerogatives bring enormous responsibilities" (*Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 613 (1976) (Brennan, J., concurring)), deviation from such a voluntary code is not a proper basis for the imposition of sanctions.

Furthermore, a voluntary code of ethics supplies, at best, a shaky foundation upon which to construct a statute limiting the freedom of the press. Indeed, in the view of H.L. Mencken, "journalistic codes of ethics are all moonshine," quoted in *Pennekamp v. Florida*, 328 U.S. 331, 365 n.13 (1946) (Frankfurter, J., concurring).

⁵⁶ See notes 90-93 and accompanying text *infra*.

cent United States Supreme Court decisions and impermissibly compromises first amendment rights of the press.⁵⁷

III. THE CONSTITUTIONAL RIGHT TO PUBLISH THE IDENTITY OF JUVENILE OFFENDERS

The first amendment protects the publication of truthful information which is lawfully obtained.⁵⁸ “[A]bsent a need to further a state interest of the highest order,” neither a prior restraint nor subsequent sanction upon publication is constitutionally permissible.⁵⁹

Traditionally, prior restraints are viewed as “the most serious and least tolerable infringement on First Amendment rights”⁶⁰ because they produce an “irremediable loss” in the immediacy and impact of expression.⁶¹ The Supreme Court has repeatedly held that any “system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity.”⁶² Court orders enjoining publication are the classic form of

⁵⁷ See Section III *infra*.

⁵⁸ *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667, 2671 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 311 (1977) (*per curiam*); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975).

⁵⁹ *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667, 2671 (1979).

⁶⁰ *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558-59 (1976).

⁶¹ A. BICKEL, *THE MORALITY OF CONSENT* 61 (1975), cited with approval in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 n.6 (1976). See also T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 506 (1970), quoted with approval in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 589-90 (1976) (Brennan, J., concurring).

⁶² *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-59 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (*per curiam*); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). See also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

The rule was eloquently articulated by Justice Brennan:

The press may be arrogant, tyrannical, abusive and sensationalist, just as it may be incisive, probing and informative. But at least in the context of prior restraints on publication, the decision of what, when and how to publish is for editors, not judges.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 613 (1976) (Brennan, J., concurring).

The only possible exception to the general invalidity of prior restraints upon publication might arise when there was a grave and irreparable danger to national security. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*) (rejecting U.S. government allegations that publication of the Pentagon Papers posed such an immediate danger to national security). *Cf.* *United States*

prior restraint.⁶³ However, other restrictions may have the same stifling effect upon speech. A statute, for example, may act as effectively to prevent speech or publication as does a court order. The United States Supreme Court has recognized that such statutes, in a broader sense, are prior restraints.⁶⁴

In recent years, the Supreme Court has indicated that the effect of subsequent sanctions upon the publication of truthful information should likewise be carefully examined.⁶⁵ In some cases the Court was unclear whether statutes which impose sanctions

v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (*appeal pending*) (preliminary injunction against publication of magazine article entitled *The H-Bomb Secret—How We Got It, Why We're Telling It*), vacated, ____ F.2d ____ (7th Cir. Sept. 28, 1979).

See *Near v. Minnesota*, 283 U.S. 697, 716 (1931): "When the Nation is at war . . . publication of the sailing dates of ships or the number and location of troops" might be constitutionally enjoined (*dicta*). See also *Schenck v. United States*, 249 U.S. 47 (1919); *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971) (Brennan, J., concurring).

⁶³ See discussion of *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (*per curiam*) (holding unconstitutional a state court order prohibiting publication of the identity of juveniles obtained in open court) in *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667, 2671 (1979). See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

⁶⁴ The Supreme Court has consistently struck down statutes which, on their face, imposed prior restraints upon freedom of expression in a variety of contexts. See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (plays); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (parade permit requirements); *Freedman v. Maryland*, 380 U.S. 51 (1965) (films); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (books); *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (discriminatory tax on gross receipts of particular newspapers). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-31, at 724-26 (1978).

⁶⁵ In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) (applying "clear and present danger" test to preclude criminal or civil sanction for publishing identity of a judge who was the subject of a secret administrative investigatory proceeding), the Court declared:

Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Id. at 843-44. Thus, it is incumbent upon any court to pierce the legislative determination of state interest and examine for itself the particular utterance in question and the circumstances of its publication "to determine to what extent the substantive evil" is a "likely consequence" and whether "the degree of likelihood" is "sufficient" to justify subsequent punishment or restraint. *Bridges v. California*, 314 U.S. 252, 271 (1941), quoted in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 844 (1978).

upon publication also act as prior restraints.⁶⁶ Whether or not such statutes were deemed "prior restraints," the Supreme Court nevertheless found them unconstitutional because they did not adequately further a sufficiently compelling state interest.⁶⁷

In *Smith v. Daily Mail Publishing Co.*,⁶⁸ the Court addressed the issue of sanctions upon the publication of lawfully obtained, truthful information in the context of juvenile court proceedings. In *Smith*, two West Virginia newspapers reported the identity of a junior high school student who allegedly murdered a classmate.⁶⁹ The newspapers were prosecuted under a state criminal statute prohibiting newspapers from publishing the name of any youth charged as a juvenile offender without the written approval of the juvenile court.⁷⁰ In holding that the statute violated the first and fourteenth amendments, the Court declared that "the magnitude of the state's interest" in protecting "the anonymity of the juvenile offender" was inadequate to "justify application of a criminal penalty" for revealing the juvenile offender's identity.⁷¹

In an earlier case, *Oklahoma Publishing Co. v. District Court*,⁷² the Supreme Court considered the propriety of a "prior restraint"⁷³ in the juvenile courtroom setting. Oklahoma law required the closure of juvenile detention hearings unless the presiding judge specifically opened them to the public.⁷⁴ Though no

⁶⁶ *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491, 495-96 (1975) (declaring unconstitutional a statute imposing criminal sanctions for publication of identity of rape victims); *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667, 2670 (1979) (declaring unconstitutional a statute imposing criminal sanctions for publication of identity of juvenile offenders).

⁶⁷ In *Cox Broadcasting*, the acknowledged state interest in protecting the privacy of rape victims was insufficiently compelling to justify sanctions upon accurate reporting because the state itself had placed the identity of the rape victim in the public domain. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489-95 (1975).

In *Landmark Communications*, Virginia's recognized state interest in protecting the reputation of its judges and in maintaining the institutional integrity of its courts was insufficient to justify subsequent punishment or restraint. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-45 (1978).

See also *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667, 2671-72 (1979), discussed at notes 68-71 and accompanying text *infra*.

⁶⁸ 99 S. Ct. 2667 (1979).

⁶⁹ *Id.* at 2669.

⁷⁰ *Id.* at 2668-69.

⁷¹ *Id.* at 2671-72.

⁷² 430 U.S. 308 (1977) (*per curiam*).

⁷³ See note 63 *supra*.

⁷⁴ OKLA. STAT. ANN. tit. 10, § 1111 (West Cum. Supp. 1979), in relevant part,

such order was made in this case, the media was present at the juvenile's detention hearing and learned the minor's name. Film footage of the arrested juvenile was shown on local television stations and his name was published in three Oklahoma City newspapers and broadcast over radio and television. At the minor's subsequent arraignment, the judge enjoined the publication of any further information identifying the accused juvenile.⁷⁵

Compelled by its prior rulings in *Nebraska Press Association v. Stuart*⁷⁶ and *Cox Broadcasting Corp. v. Cohn*,⁷⁷ the *Oklahoma Publishing* Court held that the first and fourteenth amendments do not permit state courts "to prohibit the publication of widely disseminated information obtained at court proceedings that were in fact open to the public."⁷⁸

Following *Smith* and *Oklahoma Publishing*, the major unresolved issue is whether a reporter conditionally admitted to juvenile court proceedings⁷⁹ may nevertheless publish the name of the accused offender without restraint or sanction. After *Smith*, it is not clear whether a reporter conditionally admitted to a juvenile court hearing "lawfully obtains" the accused minor's name so that the youth's identity may be published with impunity.⁸⁰ The reliance of the *Smith* Court upon the "lawfully obtained" distinction may indicate that a penal statute sanctioning the publication of *unlawfully obtained* information would be constitutional.⁸¹

reads as follows: "The [juvenile court] hearings shall be private unless specifically ordered by the judge to be conducted in public, but persons having a direct interest in the case shall be admitted."

⁷⁵ *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 309 (1977) (*per curiam*).

⁷⁶ 427 U.S. 539, 568, 570 (1976). See prior discussion at notes 58, 60-62 *supra*.

⁷⁷ 420 U.S. 469; 491 (1975). See prior discussion at notes 58, 66-67 *supra*.

⁷⁸ *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310 (1977) (*per curiam*). The manner by which the juvenile's identity was learned in this case was similar to the manner in which the name of the rape victim in *Cox Broadcasting* was placed in the public domain. *Id.* at 311.

Only the court order was at issue. The constitutionality of the Oklahoma statute was not challenged nor was the broader issue of "denying the public or the press access to official records of juvenile proceedings." *Id.* at 310.

⁷⁹ See, e.g., *Brian W. v. Superior Court*, 20 Cal. 3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1978). See notes 53-55 *supra*.

⁸⁰ See notes 81-83 and accompanying text *infra*.

⁸¹ Cf. A.B.A., STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, Standard 8-3.1, at 13-14 (Approved draft 1978) [hereinafter cited as A.B.A. STANDARDS]. The American Bar Association has adopted the view that all information "in possession of the press, regardless of the method by which it was acquired," may be published. If reporters obtain

Information obtained through the "transgressions of general criminal laws"⁸² (such as theft, bribery or fraud) would probably satisfy anyone's definition of "unlawfully obtained." Beyond such patent illegality, however, the Supreme Court has not suggested the contours of the "unlawfully obtained" doctrine.⁸³ However, when the Court ultimately faces this issue, it must confront the more limited holding of *Smith*, *i.e.*, states may not constitutionally prohibit the media from publishing the name of a juvenile offender learned outside the juvenile courtroom. It would be anomalous indeed for the Court to hold that such a prohibition is unconstitutional outside the juvenile courtroom, but is constitutional at hearings attended by the press.

The principle that the press has an absolute right to publish truthful information learned at *open* judicial proceedings is clear.⁸⁴ Following *Oklahoma Publishing*, the mere presence of a reporter at a juvenile hearing renders the proceedings "open in fact,"⁸⁵ precluding constitutional restraint upon publication of the juvenile's name. Thus, the presence of the press⁸⁶ is sufficient

information by unlawful means, punishment should be aimed "at the method by which the information was acquired and not the publication itself." *Id.* at 13-14.

⁸² *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 588 n.15 (1976) (Brennan, J., concurring). See also A.B.A. STANDARDS, *supra* note 81, at 28-29.

⁸³ In *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978), the United States Supreme Court employed the concept "lawfully obtained" without explaining it. In *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667, 2671 (1979), the Court stated that "where the government itself provided or made possible press access to the information," such information is "lawfully obtained."

⁸⁴ See notes 58, 60-62, 66-67, 78 and accompanying text *supra*.

⁸⁵ In *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (*per curiam*), the United States Supreme Court declared that the juvenile court proceedings at issue were "*in fact open to the public*" [*Id.* at 310 (emphasis added)] because the press was present at the hearing:

[A] state statute provided for closed juvenile hearings unless specifically opened to the public by court order Whether or not the trial judge expressly made such an order, members of the press were *in fact present* at the hearing with the full knowledge of the presiding judge. The name and picture of the juvenile here were "*publicly revealed* in connection with the prosecution of the crime."

Id. at 311 (emphasis added). See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 568, 570 (1976) (prior restraint upon "reporting or commentary on judicial proceedings held in public" found unconstitutional) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (information obtained by reporters from court documents which they are permitted to view may not be enjoined from publication).

⁸⁶ Some juvenile courts have attempted to distinguish between recognized

to "open" any proceedings.⁸⁷

State juvenile court confidentiality provisions must comport with these constitutional requirements. The "conditional access" restrictions imposed upon juvenile court proceedings by some states⁸⁸ appear, at first glance, to restrict access, not publication. However, conditional access in fact impinges upon the right of the press to fully report that which transpires in the courtroom.⁸⁹

(i.e., bona-fide) and unrecognized news media representatives. See, e.g., "RULES FOR NEWS MEDIA REPORTING JUVENILE COURT PROCEEDINGS" promulgated by Presiding Los Angeles County Juvenile Court Judge Richard A. Gadbois, Jr., in 1975. However, Chief Justice Bird and Justice Newman of the California Supreme Court rejected such efforts to distinguish among the media as violating both the United States and California constitutions. *Brian W. v. Superior Court*, 20 Cal. 3d 618, 626-27, 574 P.2d 788, 793, 143 Cal. Rptr. 717, 722 (1978) (Bird, C.J., and Newman, J., concurring).

⁸⁷ *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310-11 (1977) (*per curiam*) (see note 85 *supra*).

In *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978), the Seventh Circuit held that the defendants, charged with rape, were not denied their sixth amendment rights to a public (open) trial because members of the press were permitted to remain in or to enter the courtroom, even though other members of the public were excluded from the courtroom during the testimony of the complaining witness. Likewise, in *Johnson v. Simpson*, 433 S.W.2d 644, 647 (Ky. Ct. App. 1968), the mere presence of several press representatives was sufficient to open the juvenile court proceedings: "when the meetings were open to a portion of the public they at that time became public hearings."

Where the press, however, is excluded from judicial proceedings, those proceedings are "closed." In *People v. Jelke*, 308 N.Y. 56, 66-67, 123 N.E.2d 769, 773-74 (1954), the New York Court of Appeals held that a trial open to friends and relatives of the defendant violates the accused's right to a public trial where "no representative of the press is permitted to attend."

⁸⁸ At least thirteen jurisdictions — Alabama, California, the District of Columbia, Georgia, Illinois, Minnesota, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania and Wisconsin — have adopted "conditional access" restrictions upon attendance at their juvenile court proceedings. See note 5 *supra*.

⁸⁹ A trial is a public event. What transpires in the court room is public property . . . Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in proceedings before it.

Craig v. Harney, 331 U.S. 367, 374 (1947) (no "clear and present danger" to the fair administration of justice in news and editorial comment on pending cases), cited with approval, *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2922 (1979). See also *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *Estes v. Texas*, 381 U.S. 532, 541 (1965); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941); L. TRIBE, *supra* note 64, at 628.

Indeed, in *Brian W. v. Superior Court*,⁹⁰ both Justice Mosk (writing for the majority) and Chief Justice Bird (in her concurring opinion) recognized that California Welfare and Institutions Code section 676 places a prior restraint upon the publication of information obtained while reporters are present at juvenile court hearings.⁹¹ Nevertheless, in *Brian W.*, the California Supreme Court purposely avoided the question of whether media representatives present at juvenile court proceedings can be constitutionally prevented from publishing any information they learn.⁹² In *obiter dicta*, Justice Mosk stated:

[R]estraints [upon disclosing a juvenile's identity] are clearly not proscribed by recent decisions of the United States Supreme Court Though prior restraints on publication always demand a heavy burden of justification, the absolute ban on such restraints in *Oklahoma Publishing* and *Cox* applies only to information already in the public domain. The holdings in these cases then do not necessarily extend to juvenile court hearings that are not open to the public, but which media representatives are conditionally permitted to attend [citation omitted].⁹³

*Smith v. Daily Mail Publishing Co.*⁹⁴ clarifies that which the *Brian W.* Court apparently thought ambiguous — *i.e.*, whether prior restraints upon the publication of the identity of juvenile

⁹⁰ 20 Cal. 3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1978) (discussed at notes 53-55 *supra*).

⁹¹ *Id.* at 624 n.6, 574 P.2d at 791 n.6, 143 Cal. Rptr. at 720 n.6; *Id.* at 627, 574 P.2d at 794, 143 Cal. Rptr. at 722-23 (Bird, C.J., concurring).

The prior restraint imposed by "conditional access" statutes such as CAL. WELF. & INST. CODE § 676 (West 1972) is distinguishable from the contractual prior restraint at issue in *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972), *cert. denied*, 409 U.S. 1063 (1972). In *Marchetti*, a retired C.I.A. agent had signed a secrecy agreement prior to accepting employment. The agreement required that he submit for prior C.I.A. approval any material disclosing classified information obtained during the course of his employment. However, the constitutional right to publish the identity of juvenile offenders arises from the presence of the press in the courtroom (*see* notes 84-87 and accompanying text, *supra*). Once they are so admitted, no court may implicitly or explicitly force the press to "contract away" that constitutional right. Furthermore, conditional access imposes a blanket prohibition upon publication without any independent assessment of the harm that could flow from the revelation of the juvenile's identity, a safeguard present in the C.I.A.'s secrecy agreement at issue in *Marchetti*.

⁹² *Brian W. v. Superior Court*, 20 Cal. 3d 618, 623 n.6, 574 P.2d 788, 791 n.6, 143 Cal. Rptr. 717, 720 n.6 (1978). *Id.* at 627, 574 P.2d at 792, 143 Cal. Rptr. at 722-23 (Bird, C.J., concurring).

⁹³ *Id.* at 623-24 n.6, 574 P.2d at 791 n.6, 143 Cal. Rptr. at 720 n.6.

⁹⁴ 99 S. Ct. 2667 (1979).

offenders violate the first amendment. The California Supreme Court incorrectly analyzed the United States Supreme Court's decision in *Oklahoma Publishing Co. v. District Court*.⁹⁵

The Oklahoma Supreme Court had concluded that the juvenile court proceedings were closed *because* the presiding judge had not issued an order opening the hearing to the general public.⁹⁶ The presence of reporters in the courtroom was held insufficient to open the hearing.⁹⁷

In overturning the Oklahoma Supreme Court, the United States Supreme Court analyzed the constitutionality of imposing a prior restraint upon the revelation of the accused's name *without regard* to whether the presiding judge had permitted the press to attend. The Court found, instead, that the in-court presence of the media *meant* that the proceedings "were in fact open to the public."⁹⁸

The *Brian W.* Court failed to recognize that the Oklahoma and California statutes are nearly identical⁹⁹ and that the decision in *Oklahoma Publishing* consequently must apply equally to both. Justice Mosk's *dictum* incorrectly assumes that information learned by reporters present at juvenile court hearings is neither "publicly revealed" or "in the public domain."

"[W]here the government itself provided or made possible press access to the information," *Smith* declares that such information is "lawfully obtained."¹⁰⁰ Therefore, whenever state courts

⁹⁵ 430 U.S. 308 (1977) (*per curiam*).

⁹⁶ *Oklahoma Publishing Co. v. District Court*, 555 P.2d 1286, 1293 (Okla. 1976), *rev'd per curiam*, 430 U.S. 308 (1977).

⁹⁷ *Id.* at 1293.

⁹⁸ For the full statement of this idea, see *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308, 310-11 (1977) (*per curiam*), quoted at note 85 *supra*.

⁹⁹ Both the Oklahoma and California statutes provide for confidential hearings unless the juvenile court judge expressly permits the press to attend. Unless expressly ordered to be conducted in public, Oklahoma's juvenile court proceedings "shall be held in private" under OKLA. STAT. ANN. tit. 10, § 1111 (West Cum. Supp. 1978). California likewise begins with the premise of closed proceedings to which the "public shall not be admitted" unless otherwise requested by the accused juvenile. CAL. WELF. & INST. CODE § 676 (West 1972). (OKLA. STAT. ANN. tit. 10, § 1111 is set forth in relevant part in note 74 *supra*; CAL. WELF. & INST. CODE § 676 is set forth in note 46 *supra*.)

Under Oklahoma's statute, the press may be admitted to juvenile proceedings by the juvenile court judge under the exception for "persons having a direct interest in the case." Once again, this provision closely parallels that found in section 676 which permits juvenile court judges to admit the press under the exception for persons having "a direct and legitimate interest in the particular case or work of the court." See notes 48-49 and accompanying text *supra*.

¹⁰⁰ 99 S. Ct. 2667, 2671 (1979).

confront "conditional access" statutes, such as California Welfare and Institutions Code section 676, they must hold these statutes violative of the first amendment because they impose prior restraints upon the publication of truthful information in the public domain.

Justice Mosk's *dictum* also did not separate the question of access to juvenile proceedings from the more limited issue of prior restraints where reporters are present in court. Such analytical imprecision avoids the inevitable choice between complete closure of juvenile court hearings and unconditional access thereto.

In the past, "conditional access" has provided a convenient compromise position through which courts and legislatures have evaded the clear choice between complete closure and unconditional access. Recent United States Supreme Court decisions render "conditional access" constitutionally untenable. Consequently, states will face the choice of opening or closing their juvenile courts to the press.¹⁰¹ As they do, such a choice requires that states assess competing interests in publicity and confidentiality.

IV. ACCESS TO JUVENILE COURTS: COMPETING INTERESTS AND LEGISLATIVE CHOICES

After *Gannett Co. v. DePasquale*,¹⁰² it is highly unlikely that either the press or public have any constitutional right to attend juvenile court proceedings.¹⁰³ Absent *both* a constitutional right

¹⁰¹ Under present laws, the probable choice of most juvenile court judges faced with this dilemma would be to close the hearings to the press. In so ruling, juvenile court judges would rely on the traditional view that confidentiality promotes rehabilitation, the initial underlying purpose of juvenile courts.

¹⁰² 99 S. Ct. 2898 (1979).

In *Gannett*, the Court held 5-4 that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials." *Id.* at 2911. Although *Gannett* involved the exclusion of the public and press from a *pre-trial* evidentiary suppression hearing, at least four justices appear willing to extend this rule to *all* phases of criminal prosecutions. *Cf. Id.* at 2913-14 (Burger, C.J., concurring). Within one month of the *Gannett* ruling, a survey by *TIME* revealed that "at least thirty-nine judges have banned press or public or both from pre-trial hearings or trials." Silverman & Thomas, *Judging the Judges*, *TIME*, Aug. 20, 1979, at 49, col. 1. The U.S. Supreme Court has agreed to hear a case raising the constitutionality of trial closure. *Richmond Newspapers, Inc. v. Virginia*, *cert. granted*, 48 U.S.L.W. 3235 (Oct. 9, 1979).

¹⁰³ If juvenile court proceedings are found to be "criminal," there is no sixth amendment right of public or press access to those proceedings. *See* note 102 *supra*. On the "quasi-criminal" nature of juvenile court hearings, *see* notes 17-19 and accompanying text *supra*. If juvenile court proceedings are deemed

of access to juvenile courts and the constitutional availability of "conditional access" statutes,¹⁰⁴ state legislatures are now con-

"civil," then there is no constitutional provision which would permit or prohibit *the public* from attending juvenile court hearings.

In *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979), the Court declined to decide whether there is an independent right to attend judicial proceedings arising from the first and fourteenth amendments. *Id.* at 2911-12; 2940 (Blackmun, J., dissenting, joined by Brennan, White & Marshall, JJ.). Justice Powell apparently accepts the existence of such a right (*Id.* at 2914-16 (Powell, J., concurring)), while Justice Rehnquist clearly rejects such an independent right (*Id.* at 2917-19 (Rehnquist, J., concurring)). Indeed, Justice Rehnquist expressed concern that in a future *Gannett*-type case, Justice Powell might join the four dissenters, thereby forming an "odd quintuplet" to permit access to criminal trials based upon different constitutional provisions. *Id.* at 2919 n.2 (Rehnquist, J., concurring).

Nevertheless, the *Gannett* majority reiterated the longstanding rule that the press has no greater right of access to information than the general public. *Id.* at 2911-12. See *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (companion cases denying press access to state and federal prison inmates: "The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally. . . . That proposition finds no support in the words of the Constitution or in any decision of this court."). *Accord*, *Houchins v. KQED*, 438 U.S. 1, 9 (1978) (denying television crew access to county jail: "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within governmental control."). See also *Branzburg v. Hayes*, 408 U.S. 665 (1972) (first amendment does not shield reporters from disclosing the criminal conduct of news sources to grand juries); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (denying challenge to travel restrictions to Cuba by reporter: "The right to speak and publish does not carry with it the unrestrained right to gather information."); *Estate of Hearst*, 67 Cal. App. 3d 777, 136 Cal. Rptr. 821 (2d Dist. 1977) (declaring invalid a court order providing limited access to sealed probate records to the extent that it granted the press greater rights of access to the files than to the general public); *C. v. C.*, 320 A.2d 717 (Del. 1974); *Grand Forks Herald, Inc. v. Lyons*, 101 N.W.2d 543 (N.D. 1960). In these cases, one commentator has noted that "by simply equating the right of the press to gather information with that of the public, the Court seems to have defined one unknown in terms of another and avoided determining the parameters of either." Comment, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109, 139 (1977).

Several justices have argued that the press should be afforded a right of access to information beyond that accorded the general public. See *Zemel v. Rusk*, 381 U.S. at 24 (Goldberg & Douglas, JJ., dissenting); *Branzburg v. Hayes*, 408 U.S. at 727-28 (Stewart, J., dissenting, joined by Brennan & Marshall, JJ.); *Id.* at 721 (Douglas, J., dissenting); *Pell v. Procunier*, 417 U.S. at 840 (Douglas, J., dissenting, joined by Brennan & Marshall, JJ.). See also *United States v. Gurney*, 558 F.2d 1202, 1208-09 (5th Cir. 1977). *Garrett v. Estelle*, 556 F.2d 1274, 1277-78 (5th Cir. 1977). For a discussion of the historical and policy reasons supporting an independent right of access to information, see generally Comment, *supra*, at 135-43.

¹⁰⁴ See Section III *supra*.

fronted with the choice of permitting or denying public and press attendance at juvenile court proceedings.

A variety of factors are asserted to justify the policies of opening and closing juvenile courts. Typically, however, commentators fail to analyze the weight which these factors should be accorded and neglect to balance the respective interests.¹⁰⁵ Part of the explanation for this failure may be the near-universal presumption in the past that "conditional access" statutes were constitutional; an in-depth examination of factors was unnecessary where the policy adopted (conditional access) itself represented a compromise between various competing interests.¹⁰⁶ Today, an informed legislative choice between the polar opposite policies of confidentiality and publicity depends upon just such a weighing and balancing process.¹⁰⁷

Many commentators simultaneously advocate confidential juvenile court hearings and confidential juvenile court/arrest records.¹⁰⁸ In so doing, they do not distinguish between the interests advanced by confidential hearings and confidential records. Instead, they believe that confidentiality in general is the best way to achieve rehabilitation and that closed hearings and records are complementary devices for promoting this objective. These com-

¹⁰⁵ See, e.g., Comment, *The Press and Juvenile Delinquency Hearings: A Contextual Analysis of the Unrefined First Amendment Right of Access*, 39 U. PITT. L. REV. 121 (1977); Howard, Grisso, & Neems, *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203 (1977) [hereinafter cited as Howard et al.]; Cashman, *supra* note 14; Geis, *supra* note 14; Volenick, *supra* note 14.

¹⁰⁶ See e.g., GOVERNOR'S COMMISSION I, *supra* note 28, at 23-24; GOVERNOR'S COMMISSION II, *supra* note 14, at 14, discussed at notes 47-49 and accompanying text *supra*.

See also UNIFORM JUVENILE COURT ACT § 24(d) and commentary thereupon: "The section as drawn permits the court in its discretion to admit news reporters. This is frequently done with the understanding that the identity of the cases observed will not be published." *Reprinted in 9A UNIFORM LAWS ANNOTATED* 33 (Master ed. 1979).

¹⁰⁷ The legislative decision whether to open or close juvenile court hearings to the press and/or public is purely a policy consideration. Open juvenile court hearings — even if such hearings are deemed "criminal" — would not violate any constitutional rights of the accused minor:

While the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial. "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right." *Singer v. United States*, 380 U.S. 24, 34 [1965].

Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2907 (1979).

¹⁰⁸ See, e.g., Geis, *supra* note 14; Volenick, *supra* note 14.

mentators rarely recognize a generalized competing interest in openness or, if such a general interest is recognized, they fail to distinguish the policies which support open juvenile court hearings from the policies which support open juvenile court/arrest records. This comment confines itself to an analysis and comparison of the competing interests arising from a policy of closing or opening juvenile court hearings.

A. *The Interest in Closed Juvenile Court Proceedings*

Traditionally, the closure of juvenile court hearings is premised solely upon the contribution of anonymity toward the ultimate rehabilitation of juvenile offenders.¹⁰⁹ Absent the underlying justification of rehabilitation, there is no interest in closed juvenile court hearings. Several commentators argue that the goal of rehabilitation does not justify a separate juvenile justice system.¹¹⁰ If

¹⁰⁹ See note 14 and accompanying text *supra*. See also discussion of the "state interest" in *Davis v. Alaska*, 415 U.S. 308, 319 (1973); *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667, 2671 (1979); *Id.* at 2673 (Rehnquist, J., concurring).

No court has recognized nor commentator suggested that accused juvenile offenders have a constitutionally protected privacy right to confidential juvenile court proceedings. Indeed, if there is no invasion of privacy when the identity of a rape victim is publicly revealed (*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)), *a fortiori* there can be no invasion of this penumbral federal constitutional right where the identity of a juvenile offender or accused delinquent is disclosed.

¹¹⁰ An increasing number of authors — led by the Institute of Judicial Administration/American Bar Association Joint Commission on Juvenile Justice Standards — reject "the rehabilitative ideal" upon which the juvenile justice system was founded.

Juvenile courts . . . can ground dispositional decisions upon such vague and subjective criteria as "the child's need for treatment" or the "child's best interests."

The Joint Commission rejected this subjective [*i.e.*, rehabilitative] approach and instead recommended the fundamental criminal law principle of proportionality — that coercive sanctions are punishment, and punishment ought to be proportional to the seriousness of the harm inflicted.

Gilman, *IJA/ABA Juvenile Justice Standards Project: An Introduction*, 57 B.U. L. REV. 617, 623 (1977). See discussion of the principle of proportionality and its applicability to juvenile courts in I.J.A./A.B.A. JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS FOR JUVENILE JUSTICE: A SUMMARY AND ANALYSIS 7-9, 11-13, 21-23 (1977). Regarding the I.J.A.-A.B.A. project, see also Kaufman, *Protecting the Rights of Minors: On Juvenile Autonomy and the Limits of the Law*, 52 N.Y.U. L. REV. 1015, 1017-19 (1977).

Some commentators question whether the rehabilitative philosophy is viable

rehabilitation does not justify a juvenile justice system separate from criminal courts, then *a fortiori* neither does rehabilitation justify closed juvenile court hearings. Most writers, however, continue to believe that rehabilitation is possible and that it justifies a separate juvenile system.¹¹¹

It is insufficient to justify closing juvenile court hearings simply

and whether it is adequate to justify a separate juvenile justice system. They argue that the notions of "treatment" and "punishment" are indistinguishable to the accused minor and, therefore, that it makes no sense to maintain the fiction that the adult and juvenile justice systems pursue different goals. See Fox, *supra* note 9, at 69, 71-72; Fox, *The Reform of Juvenile Justice: The Child's Right to Punishment*, 25 JUV. JUST., No. 2, 2 (1974) [hereinafter cited as Fox II]; McCarthy, *Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REF. 181 (1977). See also Wizner & Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977).

In addition, some commentators question whether the juvenile justice system rehabilitates enough offenders to justify its separation from adult criminal courts. They doubt that juvenile courts and support agencies are capable of providing effective "individualized treatment" for juvenile delinquents. McCarthy, *supra*, at 201 ("We must inquire whether our inability to provide effective treatment discredits any justification predicated upon it. . . . If treatment cannot be supplied, it follows that any intervention by the juvenile court which is premised exclusively on treatment is unjustifiable."); Comment, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CALIF. L. REV. 984 (1976); Guggenheim, *Abolishing the Juvenile Justice System*, 15 TRIAL 23 (1979).

Robert Martinson's comprehensive review of nearly all juvenile and adult rehabilitation programs reported through 1976 supports this pragmatic skepticism. Martinson ultimately found that rehabilitation methods are ineffective regardless of where they are applied. "[W]ith few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." R. MARTINSON, T. PALMER, & S. ADAMS, *REHABILITATION, RECIDIVISM AND RESEARCH* 10 (1976). Indeed, at least two independent studies indicate that the efforts of juvenile courts are counter-productive since any type of official intervention appears to increase the rate of recidivism. See Gold & Williams, *National Study of the Aftermath of Apprehension*, 3 PROSPECTUS 3, 8-9 (1969). (Regarding the high rate of recidivism among juvenile offenders, see note 116 *infra*.) Milton Luger, Commissioner of the New York Division of Youth, has observed: "With the exception of a relatively few youths, it would probably be better for all concerned if young delinquents were not detected, apprehended or institutionalized. Too many of them get worse in our care." Orlando & Black, *Classification in Juvenile Court: The Delinquent Child and the Child in Need of Supervision*, 25 JUV. JUST., No. 1, 13, 23 (1974).

¹¹¹ See, e.g., Polow, *The Juvenile Court: Effective Justice or Benevolent Despotism?*, 53 A.B.A. J. 31 (1967); Siegal, Senna, & Libby, *Legal Aspects of the Juvenile Justice Process: An Overview of Current Practices and Law*, 12 NEW ENG. L. REV. 223 (1976); Note, *supra* note 11.

because rehabilitation is possible and occurs frequently. If confidentiality is truly justified by its contribution to rehabilitation, then confidentiality must promote rehabilitation. Advocates of confidentiality believe that closed hearings contribute to rehabilitation in numerous ways.

First, they assert that publicity leads juveniles to commit further acts of delinquency.¹¹² Under one view, publicity would intensify the "labelling" process by which juvenile offenders are identified as delinquents, ultimately fixing a self-image of criminality and reinforcing illegal conduct.¹¹³ Alternatively, they argue publicity creates additional "strain" upon delinquents, social pressures which lead to the commission of additional and more serious delinquent acts.¹¹⁴

The thesis that publicity leads inexorably to the fixation of criminality in the juvenile's psyche or to the perpetuation of a cycle of delinquency presents a questionable and empirically unsupported proposition.¹¹⁵ Despite present confidentiality prac-

¹¹² See, e.g., Gardner, *Publicity and Juvenile Delinquents*, 15 JUV. CT. JUDGES' J., No. 2, 29 (1964).

¹¹³ Under the "labelling" hypothesis, juveniles are identified as "delinquents" simply by their exposure to the juvenile courts. This label, in turn, causes these minors to be excluded from participation in groups and events in which they would otherwise have participated. Such social ostracism has one further effect of reinforcing deviant (illegal) conduct *because* the juvenile begins to think of himself as delinquent.

For an excellent summary of the "labelling" hypothesis and empirical research, see Orlando & Black, *supra* note 110, at 20-21. See generally E. SHUR, LABELLING DELINQUENT BEHAVIOR (1971); Wheeler, Cottrell, & Romasco, *Juvenile Delinquency: Its Prevention and Control*, reprinted in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 409, 417-19 (1967) [hereinafter cited as JUVENILE TASK FORCE REPORT].

If juvenile court intervention reinforces illegal conduct, then the court's rehabilitative efforts have failed. Regarding the success of juvenile courts in rehabilitating delinquents, see generally note 110 *supra*.

¹¹⁴ Under the "strain" hypothesis, a self-perpetuating cycle of delinquency is established. Juveniles with serious familial, scholastic, social and employment problems experience strain and tension which ultimately lead to delinquency. Society's approbation toward delinquent conduct in turn heightens this strain, thereby worsening institutional relationships and ultimately resulting in more serious delinquency. See, e.g., S. SHOHAM, THE MARK OF CAIN (1970). See also Orlando & Black, *supra* note 110, at 22-23; Gardner, *supra* note 112; Howard et al., *supra* note 105, at 204.

¹¹⁵ "Empirical research attempts to support the labelling hypothesis have been inconclusive." Orlando & Black, *supra* note 110, at 21. Other studies dispute the validity of the labelling hypothesis and its explanation of the fixation of criminality in the psyches of juvenile delinquents. There is almost no varia-

tices, the high rate of recidivism among minors¹¹⁶ indicates that factors other than publicity motivate juveniles to commit addi-

tion between the self-conceptions of youths — all of whom committed delinquent acts, but only some of whom were classified “delinquent.” Jensen, *Delinquency and Adolescent Self-Conceptions: A Study of the Personal Relevance of Infraction*, 20 Soc. PROB. 84, 97-99 (1972). Furthermore, only a very small proportion of minors labelled delinquents perceive any significant changes in their interpersonal or institutional relationships. Foster, Dinitz, & Reckless, *Perceptions of Stigma Following Public Intervention for Delinquent Behavior*, 20 Soc. PROB. 202, 207 (1972). This latter study undermines both the “strain” and “labelling” hypotheses.

For a general discussion of theoretical weaknesses and the failure of empirical research to verify the “labelling” and “strain” hypotheses, see B. GRIFFIN & C. GRIFFIN, *JUVENILE DELINQUENCY IN PERSPECTIVE* 195-201 (1978); Orlando & Black, *supra* note 110, at 23. Even if the “labelling” and/or “strain” hypotheses are viable, the extent to which publicity contributes to either or both of these deleterious trends is unproven. Indeed, it is likely that those who would scorn the individual minor — peers, relatives, neighbors and teachers — presently learn of the delinquent’s illegal conduct through the “grapevine.” To this extent, publicity would not increase labelling-based social ostracism or “strain.”

¹¹⁶ Despite disagreement over the explanation of juvenile offender recidivism and the implications of recidivism in evaluating juvenile court performance, “everyone seems to agree that the present recidivism rates are alarmingly high.” Comment, *supra* note 110, at 987-88 n.17. Recidivism is typically determined as a percentage of either: 1) offenders who have committed a previous offense; or 2) offenders who commit a subsequent offense. (For a discussion of the methodological difficulties in both types of recidivism studies, see *Id.* at 1006-07.)

Among recidivism studies of the first type, where various prison populations were selected, “a quarter to two-thirds of inmates have juvenile records, the higher figures being associated with prisons reserved for ‘hardened’ criminals.” *Id.* at 1006. In a juvenile court study conducted for the President’s Commission on Crime in the District of Columbia, fully 61 per cent of juveniles referred to juvenile courts in the District had previously been referred to the court at least once. Forty-two per cent of these juveniles had been referred at least twice before. REPORT OF THE PRESIDENT’S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 773 (1966).

Among the second type of recidivism studies, one project revealed that 84 per cent of offenses were committed by recidivists who comprised 54 per cent of the sample (all boys born in 1945 and residing in Philadelphia between ages 10-18). Offenders with five or more offenses comprised 18 per cent of the sample and were responsible for 51 per cent of delinquent acts. M. WOLFGANG, R. FIGLIO, & T. SELLIN, *DELINQUENCY IN A BIRTH COHORT* 88, 112 (1972).

Recently, a California study of recidivism among the more serious juvenile offenders was completed. County probation departments operate over 50 local camps and schools designed to provide rehabilitation and treatment of juvenile offenders following juvenile court commitment. The subsequent records of over 3,600 randomly chosen juvenile delinquents were followed for an 18-month period after their release from county-operated camps. “Recidivism” was defined as subsequent delinquent behavior resulting in a “subsequent disposi-

tional illegal acts. Prejudice, poverty, alienation, abuse and neglect create the requisite environment in which criminality is fostered.¹¹⁷ Since juvenile offenders either return to the environment which nurtured their criminal conduct or are placed in Youth Authority facilities with other delinquents, opening juvenile court proceedings would likely have a *de minimis* impact upon their continued delinquency.

In addition, for hard-core delinquents, confidentiality advocates argue that publicity provides the kind of attention they seek, thereby encouraging the commission of further illegal acts.¹¹⁸ However, if a delinquent truly wishes to obtain publicity in California, he or she may demand a public hearing in the juvenile court.¹¹⁹ Thus, in California and in all other jurisdictions which recognize the minor's right to demand a public hearing, closing juvenile proceedings to the public and/or press does not

tion." "Subsequent dispositions" included: 1) commitments to county camps; 2) commitments to juvenile halls; 3) commitments to California Youth Authority facilities (state-operated institutions reserved for the most serious and/or dangerous juvenile offenders); and 4) any adult court convictions. "Where there were multiple subsequent dispositions, the most serious was selected Juvenile dispositions which did not result in confinement were excluded since they were less indicative of serious subsequent behavior." CAL. DEP'T OF JUST., JUVENILE CAMP RECIDIVISM 5 (1978).

Of the juveniles admitted to county-operated camps and schools, 33.7 per cent subsequently committed delinquent conduct serious enough to merit a "subsequent disposition." *Id.* at 12. Among juveniles who completed the camp program (66 per cent of the total admitted to the camps), 28 per cent had a "subsequent disposition." *Id.* Among the 34 per cent of juveniles who either failed out of the camp program or ran away, and therefore did not complete the program, 44.6 per cent had a "subsequent disposition." *Id.* An average of only nine and one-half months elapsed between the date of camp release and the most serious "subsequent disposition." *Id.* at 13. These results were very similar to results obtained in a comparable 1966 study of juvenile camp recidivism. *Id.* at 15-17.

¹¹⁷ *McKeiver v. Pennsylvania*, 403 U.S. 528, 562-69 (1971) (Douglas, J., dissenting). The factors identified by Justice Douglas repeatedly appear as major contributing or dominant forces in psychological and sociological explanations of juvenile delinquency. For an excellent summary, comparison and analysis of psychological and sociological theories of juvenile delinquency and accompanying empirical research, see B. GRIFFIN & C. GRIFFIN, *supra* note 115, at 115-268. See also R. TROJANOWICZ, JUVENILE DELINQUENCY: CONCEPTS AND CONTROL 29-67 (1978); JUVENILE TASK FORCE REPORT, *supra* note 113.

¹¹⁸ *Davis v. Alaska*, 415 U.S. 308, 319 (1974). Cf. *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667, 2673 (1979) (Rehnquist, J., concurring); UNIFORM JUVENILE COURT ACT, comment to § 24(d), *reprinted in* 9A UNIFORM LAWS ANNOTATED 33 (Master ed. 1979).

¹¹⁹ CAL. WELF. & INST. CODE § 676 (West 1972), *set forth in* note 46 *supra*.

necessarily prevent hard-core delinquents from seeking attention. Furthermore, when hard-core delinquents commit violent or dangerous felonies, juvenile court jurisdiction may be waived and the minor prosecuted as an adult in criminal courts¹²⁰ where the accused's right to a public trial is guaranteed under the sixth amendment.¹²¹

Second, advocates of confidentiality believe that publicity would increase the stigma which juvenile offenders already encounter, impairing rehabilitation in both the short- and long-run. The stigma attaching to juvenile delinquency is viewed as a barrier to successful interpersonal relationships, completion of high school and the pursuit of employment or higher education.¹²²

The effect of short-term stigma attaching to juvenile delinquency has apparently been overestimated.¹²³ Both interpersonal relationships and the successful completion of secondary education are not significantly impaired by adjudications of delinquency.¹²⁴ However, even if important short-term effects of stigma are assumed, it is unlikely that access to juvenile courts would noticeably exacerbate these effects since those in direct contact with the juvenile delinquent — peers, relatives, neighbors and teachers — will already have learned of the minor's delinquency through the "grapevine."¹²⁵

¹²⁰ For example, CAL. WELF. & INST. CODE § 707 (West Cum. Supp. 1979) provides for the transfer to superior court of all juveniles sixteen and over who are deemed not amenable to treatment. See Comment, *supra* note 54. Nearly all states have similar provisions.

¹²¹ U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . ." The public trial clause of the sixth amendment has been incorporated into the fourteenth amendment. In *re* Oliver, 333 U.S. 257 (1948).

¹²² Howard et al., *supra* note 105, at 204, 209-10. Regarding the effects arising from the stigma attaching to juvenile delinquency, see generally Volenick, *supra* note 14; Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 168-74.

The interest in confidentiality is an interest in avoiding stigma in order to promote rehabilitation. See, e.g., discussion of nature of confidentiality interest in *Davis v. Alaska*, 415 U.S. 308, 319 (1974); *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667, 2671 (1979); *Id.* at 2673 (Rehnquist, J., concurring).

¹²³ See Orlando & Black, *supra* note 110, at 21-22 (summary and comparative discussion of numerous studies).

¹²⁴ Jensen, *supra* note 115, at 97-99; Foster, Dinitz, & Reckless, *supra* note 115, at 207.

¹²⁵ Furthermore, since the media may not be sanctioned for publishing the identity of juveniles learned outside the courtroom (see *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667 (1979)), the minor's identity may be exposed well before the hearing takes place. This public identification of the minor as an

In the long-run, state and institutional practices diminish former delinquents' employment, military and educational opportunities.¹²⁶ If such long-term effects of stigma arising from delinquency are to be avoided, then these practices must change.¹²⁷ But it is irrelevant whether juvenile court hearings are open or closed since, in this context, the possibility of long-term stigma attaching to contemporaneous news reports is exceedingly remote. Those interested in the background of the juvenile — employers, licensing agencies, the armed forces and educational institutions — seek out cumulative records of the individual's past conduct, rather than specific, isolated news reports.¹²⁸

arrestee is at least as damaging in terms of its immediate stigmatic effect as is the identification of the juvenile in connection with court proceedings.

¹²⁶ It is standard practice for employers, the armed forces, unions, licensing agencies, educational institutions and others to inquire of applicants regarding court or arrest records either on application forms or in personal interviews. Even if the presence of such a record is not the basis for automatic rejection (though it frequently is), it is at least a significant factor. To many employers, the nature of the record is not as significant as its mere existence. Thus, the rejection rate of applicants with an arrest and subsequent acquittal is higher than that of applicants who were not arrested. Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 Soc. PROB. 133 (1962); JUVENILE TASK FORCE REPORT, *supra* note 113, at 54; Gough, *supra* note 122, at 153-54; Orlando & Black, *supra* note 110, at 22-23; Edwards & Sagatun, *supra* note 14, at 550-51.

In addition, state and local agencies (the courts, law enforcement, probation departments, etc.) retain juvenile arrest and court records. Information contained in these records is widely disseminated among such agencies and to other government agencies, including the Federal Bureau of Investigation and the military. "Rap sheets" compiled by state and federal law enforcement agencies have proven surprisingly durable and easy for employers to obtain. Yet they frequently contain arrest information without any accompanying data on the ultimate disposition of the case. Hayden, *How Much Does the Boss Need to Know?*, 3 Civ. LIB. REV. 23, 31 (1976); Edwards & Sagatun, *supra* note 14, at 547, 549-51.

¹²⁷ Employers and other social institutions might be prohibited from inquiring about prior records. Such a prohibition was suggested in oral argument before the U.S. Supreme Court as a less-restrictive alternative to the prior restraint at issue in *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667 (1979). See 47 U.S.L.W. 3602 (March 20, 1979).

As well, juvenile record statutes might be improved by faster sealing and/or expungement, better controls on record dissemination and mandatory inclusion of disposition information with all arrest data. See, e.g., Volenick, *supra* note 14, at 170-71; Orlando & Black, *supra* note 110, at 22; Edwards & Sagatun, *supra* note 14, at 568-72.

¹²⁸ In *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667 (1979), Justice Rehnquist states that "publicity . . . renders nugatory States' expungement laws, for a potential employer or any other person can retrieve the information the States seek to 'bury' simply by visiting the morgue of the local newspaper."

Third, advocates of confidentiality claim that open juvenile court proceedings interfere with the "case work relationship" between the judge and the juvenile. They believe that offending youths would no longer be treated as the objects of the state's solicitous care, but rather would be viewed as adversary parties.¹²⁹

The contention that the "informal" and "parental" atmosphere of the juvenile court will be unduly disturbed by the introduction of members of the press is no longer relevant, if indeed it ever was. Since 1967, juvenile court procedures have been formalized to insure due process, thereby undermining the early *parens patriae* notion.¹³⁰ There is some evidence that more formal legal

Id. at 2673 (Rehnquist, J., concurring).

This statement ignores the reality of job screening and newspaper operations. Employers obtain their information about potential employees by asking the employees whether they have a criminal or juvenile record. Employers do not obtain information about potential employees by visiting the morgue of their local newspaper. Researching the background of potential employees from the local newspaper would be extremely costly, time-consuming and would only very infrequently yield the desired information. Moreover, the New York Times and Wall Street Journal are the only newspapers in the country which publish a comprehensive, historical and readily available name and subject-matter index.

Furthermore, newspapers would not likely publicize the identity of juvenile delinquents any more often than they publicize the identity of adult criminals or apprehended suspects. This thesis is borne out by the infrequent revelation of juvenile identity where no statutory prohibitions upon publication existed. Several studies conducted in jurisdictions which allowed the publication of the names of accused delinquents found that the identity of only four per cent of all youthful offenders was revealed by the media. Conway, *Publicizing the Juvenile Court: A Public Responsibility*, 16 *Juv. Ct. JUDGES' J.* 21, 22 (1965). "As a practical matter, the news media have no interest in any but the 'important' cases. If the cloak of secrecy were removed, the identity of the misdemeanant and the run-of-the-mill felon would be of little interest and would not be greatly publicized." Campbell, *supra* note 42, at 86. Thus, there is no reason to suppose that the press would deviate from its practice of reporting only cases involving serious crimes, well-known victims or infamous defendants.

¹²⁹ See, e.g., *R.L.R. v. Alaska*, 487 P.2d 27, 37 (Alas. 1971).

¹³⁰ See prior discussion of due process in juvenile courts at notes 15-17 and accompanying text *supra*. Since 1961, the California Legislature has provided many formal procedural protections for juveniles and, within the last several years, has undertaken a re-evaluation of the goals of the juvenile court system, emphasizing protection of the public and imbuing juveniles with a sense of responsibility for their illegal acts. See discussion of the California juvenile courts at notes 28-45 and accompanying text *supra*.

With reference to California's juvenile courts, Judge Vincent has stated:

As to law-violating minors, the [California] Juvenile Court is a "civil" court in name only. In every respect, except the jury trial, it is a pattern of the adult criminal court. The offenses charged against

procedures provide the means by which juveniles feel that they are being dealt with in a fair, just and adult manner, and not merely as expediently or speedily as possible. This, in turn, promotes true rehabilitation.¹³¹ Some commentators also note that informal court proceedings hinder rehabilitation by misleading juveniles and their parents into underestimating the seriousness of delinquency.¹³²

minors today affect every element of society and are of great concern to the community.

Vincent Letter II, *supra* note 43, at 2.

With virtually every protective rule of the adult criminal courts in effect in the juvenile court, the likelihood of an innocent minor being "convicted" is minimized. If we continue, and strengthen, our efforts to rehabilitate these law-violating youngsters what good reason remains for concealing their identity?

Vincent Letter I, *supra* note 43, at 2.

¹³¹ The appearance as well as the actuality of fairness, impartiality and orderliness — in short, the essentials of due process — may be a more impressive and more therapeutic attitude so far as the juvenile is concerned [W]hen the procedural laxness of the "parens patriae" attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed "Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."

In re Gault, 387 U.S. 1, 26 (1967). See generally, S. WHEELER & L. COTTRELL, JUVENILE DELINQUENCY — ITS PREVENTION AND CONTROL (1966) and F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE (1964).

The formality which has accompanied the recognition of a juvenile's right to due process has contributed to a more positive perception of the juvenile court by minors. A post-*Gault* study analyzing juveniles' perceptions of the fairness of the legal process where the formality of court proceedings varied found that:

Reactions of the juvenile subsequent to their hearings support the conclusions of Justice Fortas in the *Gault* decision that a denial of "fundamental fairness" will give rise to a dysfunctionally negative perception of the legitimacy of the entire juvenile procedure There was also evidence of a media-influenced anticipation of the nature of the fact-finding hearing and of the roles that the judge and attorney would play.

Comment, *Juvenile Court: The Legal Process as a Rehabilitative Tool*, 51 WASH. L. REV. 697, 728 (1976) (footnote omitted).

"Traumatic experiences of denial of basic rights only accentuate the past deprivation and contribute to the problem. Thus, a general societal attitude of acceptance of the juvenile as a person entitled to the same protection as an adult may be the true beginning of the rehabilitative process." *McKeiver v. Pennsylvania*, 403 U.S. 528, 562 (1971) (Douglas, J., dissenting).

¹³² Judges Campbell and Vincent and Professors Parker and Handler have strongly argued that informal and confidential juvenile court proceedings mis-

Fourth, proponents of confidentiality believe that youthful offenders are immature and, therefore, only partially responsible for acts in violation of the law. They argue that the societal opprobrium accompanying publicity would force delinquent minors to accept full responsibility for illegal acts — responsibility juveniles should not be expected to assume.¹³³ Indeed, these commentators believe that confidentiality is an expression of the underlying rehabilitative philosophy of juvenile justice and that publicity is a form of punishment.¹³⁴

The argument that adolescents are less emotionally and intellectually mature than adults does not mean, however, they are unable to distinguish between right and wrong or conform their conduct to the dictates of the law.¹³⁵ Under California law, all

lead minors and their parents into underestimating the seriousness of illegal acts. See note 47 *supra*.

¹³³ See, e.g., Geis, *supra* note 14, at 144-46; Gardner, *supra* note 112, at 30-31; Howard et al., *supra* note 105, at 203-04; Volenick, *supra* note 14.

¹³⁴ *Id.*

¹³⁵ The objection that children do not possess the requisite moral judgment and should be treated differently from adults ignores the point that most of the youths over whom the juvenile court exercises its jurisdiction probably do have the ability to distinguish between right and wrong and to conform their conduct accordingly. Studies on the subject of the moral judgment of children indicate that the concept of responsibility plays an important role not only in the law, but in psychology as well. Consequently, there may be little reason to distinguish between an adult and a child on the basis of the capacity of either to make responsible judgments. In cases where the capability is lacking, traditional principles for determining responsibility found in the common law appear to be in accord with the behavioral sciences.

McCarthy, *supra* note 110, at 215-16. See also Parker, *supra* note 43, at 116-17.

During the many years he has served as a juvenile court judge, including the time he spent as Orange County's presiding juvenile judge, Raymond F. Vincent is unable to "recall handling a single case in which the youngster did not know exactly what he had done, if he actually did it." Vincent Letter I, *supra* note 43, at 1.

In his dissenting opinion in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), Justice Douglas pointed out the dubious nature of distinctions between juveniles and adults:

The argument that the adjudication of delinquency is not the equivalent of criminal process is spurious. This Court has discussed the futility of making distinctions on the basis of labels in prior decisions. Because the legislature dictates that a child who commits a felony shall be called a delinquent does not change the nature of the crime. Murder is murder; robbery is robbery — they are both criminal offenses, not civil, regardless and independent of the age of the doer.

juveniles over fourteen years of age who commit criminal acts are *conclusively* presumed as "capable" as adults of appreciating the wrongfulness of their conduct.¹³⁶ Any juvenile under age fourteen may be made a ward of the court if the judge finds that the minor in fact appreciated the wrongfulness of his/her acts.¹³⁷ Therefore, the argument that confidentiality is justified by the fact that juveniles do not understand the wrongfulness of their conduct was rejected by the California Legislature and is open to serious question.

Indeed, whether juvenile offenders as a class lack the "maturity and responsibility" of adult criminals in the aggregate is also subject to question. Not *all* juvenile offenders are less criminally sophisticated than *all* adult criminals. Juveniles with long records of criminal activity and multiple exposures to the juvenile justice system are more criminally "sophisticated" — in any meaningful sense of the word — than adults who commit one-

Id. at 571-72. In contrast to conduct illegal for all persons regardless of age (situations in which minors are able to distinguish right from wrong and conform their conduct accordingly), there are many juvenile "status offenses" (e.g., curfew violation, truancy, purchasing alcohol). Where the illegality of conduct depends solely upon the age of the perpetrator, minors may understandably fail to distinguish right from wrong.

¹³⁶ The California Supreme Court in *In re Gladys R.*, 1 Cal. 3d 855, 464 P.2d 127, 83 Cal. Rptr. 671 (1970) incorporated the provisions of CAL. PENAL CODE § 26(1) (West Cum. Supp. 1979) into the juvenile court law.

CAL. PENAL CODE § 26(1) provides: "All persons are capable of committing crimes except those belonging to the following classes: (1) Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." This statute codifies certain common law presumptions respecting the capacity of minors to commit crimes. *Accord*, *In re T.R.S.*, 1 Cal. App. 3d 178, 81 Cal. Rptr. 574 (4th Dist. 1969).

¹³⁷ Three recent California Court of Appeal cases provide examples of illegal conduct by juveniles under age 14 in which "clear proof" of the minor's capacity to appreciate the wrongfulness of conduct was adduced:

In re Gregory S., 85 Cal. App. 3d 206, 149 Cal. Rptr. 216 (3d Dist. 1978) (13-year-old boy committed kidnapping for the purpose of robbery; flight and presentation of conflicting testimony supplied ample evidence that the juvenile understood the situation and the wrongfulness of his conduct).

In re Cindy E., 83 Cal. App. 3d 393, 147 Cal. Rptr. 812 (4th Dist. 1978) (sufficient evidence to find that 13-year-old who received and concealed stolen property with the knowledge that it was stolen appreciated the wrongfulness of her acts).

In re Tanya L., 76 Cal. App. 3d 725, 143 Cal. Rptr. 31 (2d Dist. 1977) (substantial proof that 12-year-old appreciated wrongfulness of aiding another in the purchase of clothes with a stolen credit card).

See generally Comment, *supra* note 9.

time impulse crimes.¹³⁸

Fifth, proponents of confidentiality believe that publicity is a form of punishment to juveniles and to their parents. When parents are so punished (through public embarrassment), family ties are allegedly weakened, the child is rejected and rehabilitation is ultimately impaired.¹³⁹

Some juvenile court judges have disputed this assertion. Their experience indicates it is at least as likely that publication of a juvenile offender's identity would impress upon the minor's parents the need to spend more time with their child and more closely supervise his/her activities.¹⁴⁰ In general, these judges question whether publicizing juvenile offenders' identities hinders their rehabilitation; they argue that insulating the accused minor from publicity and its attendant consequences actually reduces the juvenile's chances for rehabilitation.¹⁴¹

Finally, whether or not rehabilitation is promoted by confidentiality, rehabilitation is no longer the sole nor even pre-eminent purpose of California's juvenile justice system.¹⁴² Consequently, confidentiality conflicts with all of the newly-added juvenile jus-

¹³⁸ Orange County Superior Court Judge William L. Murray, the present presiding juvenile court judge in that county, has discussed the sophistication and increasing use of violence by juvenile offenders. See *Los Angeles Times*, July 11, 1978, § 1, at 1, col. 1.

Superior Court Judge Vincent, after many years in the juvenile court, has written: "The original juvenile court law, of which the non-disclosure aspect is a part, was designed for the unworldly and naive youngsters of years past. Today's sophisticated youngster can recite the Miranda warning better than most policemen." Vincent Letter I, *supra* note 43, at 2.

¹³⁹ See, e.g., Gardner, *supra* note 112, at 30-31.

¹⁴⁰ Judge Vincent, who remains committed to the goal of rehabilitation, has stated that among the beneficial effects accompanying the public revelation of juveniles' identity are: 1) "that parents would be more aware of their responsibilities under such circumstances"; and 2) "that today's bright youngster would think twice before violating the law if he knew that he would subject himself and his family to unfavorable publicity." (See Judge Vincent's comments set forth in note 43 *supra*.)

Judge Campbell, cognizant of the need to improve and strengthen family relationships to effectuate rehabilitation, nevertheless has stated that publication of a juvenile's name would not be "counter-productive." Revelation of juvenile offenders' identity, in his view, is part of the "reasonable punishment" necessary to effective rehabilitation. Campbell, *supra* note 42, at 83, 86, 90.

¹⁴¹ Judges Vincent and Campbell both believe that publicity would contribute to rehabilitation by helping the court inculcate a sense of responsibility in juveniles and by assisting the court in teaching them the necessity of reforming their conduct. See note 43 and accompanying text *supra*.

¹⁴² See notes 42-44 and accompanying text *supra*.

tice objectives and, at best, may serve only one of the juvenile court goals.

B. The Interest in Open Juvenile Court Proceedings

A strong public interest in open judicial proceedings is undisputed.¹⁴³ The United States Supreme Court has repeatedly acknowledged pervasive and important public benefits of open judicial proceedings.¹⁴⁴ Although discussions of the societal interest in

¹⁴³ Nearly every state or federal court which has considered the issue recognizes that the public has a strong interest in maintaining open trials. See cases cited in *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2931-32 n.10-11 (1979) (Blackmun, J., dissenting).

See generally 6 J. WIGMORE, *EVIDENCE IN TRIALS IN COMMON LAW* § 1834, at 435-41 (Chadbourn rev. 1976); Wiggins, *The Public's Right to Public Trial*, 19 F.R.D. 25, 27 (1955); 2 COOLEY, *CONSTITUTIONAL LIMITATIONS* 931-32 (Carrington ed. 1927); A.B.A. STANDARDS, *supra* note 81, Standard 8-3.2, at 15; 3 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 372-73 (15th ed. 1809); M. HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 343, 345 (6th ed. 1820); J. BENTHAM, *TREATISE ON JUDICIAL EVIDENCE* 67 (1825); 1 J. BENTHAM, *supra* note 1, at 525; T. SMITH, *DE REPUBLICA ANGLORUM* 79, 101 (Alston ed. 1972).

¹⁴⁴ In *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979), the majority and dissenters agreed that there are important and pervasive public benefits of open judicial proceedings, despite intense disagreement over the proper interpretation of the sixth amendment's public trial clause.

Justice Stewart, writing for the five-member majority in *Gannett*, declared:

There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system.

Id. at 2907. See *Estes v. Texas*, 381 U.S. 532, 583 (1965) (Warren, C.J., concurring).

Justice Blackmun, writing for the four dissenters, expressed similar sentiments:

[O]pen judicial processes . . . protect against judicial, prosecutorial, and police abuse; provide a means for citizens to obtain information about the criminal justice system and the performance of public officials; and safeguard the integrity of the courts. Publicity is essential to the preservation of public confidence in the rule of law and the operation of courts.

Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2940 (1979) (Blackmun, J., dissenting) (emphasis added).

See also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) ("The operations of the courts and the judicial conduct of judges are matters of utmost public concern"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) ("Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and

open court proceedings frequently focus upon criminal proceedings,¹⁴⁵ the same public benefits would accompany open juvenile court hearings.

First, just as open criminal proceedings serve an important informative and educative function,¹⁴⁶ opening juvenile courts

integrity of that system is of crucial import to citizens concerned with the administration of government"); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492, 495 (1975) (publicity "serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice"); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (publicity "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism"; "[It is] the handmaiden of effective judicial administration"); *Estes v. Texas*, 381 U.S. 532, 541 (1965) ("the public has the right to be informed of what occurs in the courts"); *Levine v. United States*, 362 U.S. 610, 616 (1960) ("justice must satisfy the appearance of justice"); *In re Oliver*, 333 U.S. 257, 270 (1948) (open proceedings have "always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power"; *Id.* at 270 n.24: "Other benefits attributed to publicity have been: (1) Public trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony. [Citations omitted.] . . . (2) The spectators learn about their government and acquire confidence in their judicial remedies. [Citations omitted.]").

¹⁴⁵ First, open court proceedings educate the public and increase awareness of the administration of courts and of government generally. See note 146 and accompanying text *infra*.

Second, conscientious performance by judge and counsel is enhanced by open proceedings; checks are placed upon abuse of the accused's civil rights or disturbance of procedural decorum. See note 152 and accompanying text *infra*.

Third, the quality and availability of the evidence before the court is improved. See note 156 and accompanying text *infra*.

Fourth, individuals may be deterred from criminal activity by the enhanced awareness that undesirable conduct may be avoided where its wrongfulness is taught by the example of others — either observed at trial or publicized. See note 162 and accompanying text *infra*.

¹⁴⁶ Press reports of open proceedings educate the public about judicial processes and inform the public of current trials. Awareness of the judicial treatment of crime and the overall operation of the justice system may calm community fears, increase public knowledge about the prevalence of certain types of crimes and permit uninvolved citizens to learn if they are, in fact, affected by a particular case. In addition, reform in court, police and treatment practices may be inspired. Whether confidence in or reform of the system result from publicity, the general interest in exposing all branches of government to continual searching inquiry and scrutiny is served. *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2907 (1979); *Id.* at 2928 n.8, 2930-31, 2933 n.13, 2938, 2940 (Blackmun, J., dissenting); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J.,

would permit the public (via the press) to learn about the nature and prevalence of juvenile delinquency and about how effectively or ineffectively the juvenile justice system deals with delinquents.¹⁴⁷ Today, the public's major source of data about the day-to-day functioning of the juvenile justice system rests too frequently upon rumor and speculation.

Although more accurate and detailed information about juvenile courts is available in academic journals, such as law or sociology publications, the general public rarely reads such journals. Instead, in a world where "each individual has but limited time and resources with which to observe . . . the operations of his government, he relies upon the press to bring to him in convenient form the facts of those operations."¹⁴⁸ Because academic journals, by nature, are not contemporaneous news reports and because they publish aggregate data and general studies, they hold little interest for non-specialized lay authors, including news reporters, and lay readers.

Where reporters are only permitted to attend juvenile court hearings upon the condition that they not disclose the identity of the accused minor, they probably will not attend those hearings at all.¹⁴⁹ Consequently, the total amount of information re-

concurring); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492, 495 (1975); *Estes v. Texas*, 381 U.S. 532, 541 (1965); *In re Oliver*, 333 U.S. 257, 270 n.24 (1948). See also *State v. Allen*, 73 N.J. 132, 373 A.2d 377 (1977); 6 J. WIGMORE, *supra* note 143, at 428-41.

Finally, Justice Blackmun has correctly noted that "[j]udges, prosecutors, and police officials often are elected or are subject to some control by elected officials, and a main source of information about how these officials perform is the open trial." *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2930 (1979) (Blackmun, J., dissenting). To the extent that court proceedings are conducted in secret, all citizens are precluded from becoming fully informed voters.

¹⁴⁷ Juvenile Court Judge Campbell has written:

To the extent that we deny the media access to information concerning court proceedings, we guarantee a distrust of what we do. This distrust is reflected in the media's reports concerning the effectiveness of our approach to the problems of dealing with minors who have violated the law. As soon as we do not deal effectively with youngsters who violate the law, any possibility of the deterrent effect of potential sanctions is lost. The poorer a job people *think* we do, the poorer a job we are able to do.

Campbell, *supra* note 42, at 87 (emphasis in original). See also Conway, *supra* note 128, at 23-24 (1965); Brucker, *The Right to Know About Juvenile Delinquents*, 15 *Juv. Ct. Judges' J.*, No. 2, 16, at 17-18 (1964).

¹⁴⁸ *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

¹⁴⁹ In jurisdictions which permit publication of juvenile offenders' identities at the discretion of the media, the "evidence indicates that the press tends to

garding the juvenile justice system available to the public is significantly diminished.

In addition to limiting public knowledge of court procedures, successes and shortcomings, restricting access to the juvenile court may lull the community into a false sense of security or, conversely, may inspire undue apprehension regarding the prevalence of juvenile crime.¹⁵⁰ Neither result is desirable. Publicity of juvenile court proceedings might lead to increased awareness of the need for adequate support services in achieving the rehabilitative goals of the system.¹⁵¹

Second, publicizing adult trials promotes conscientious performance by court and counsel and provides an incentive for law enforcement officials and trial judges to conform their practices and procedures to the requirements of law.¹⁵² In contrast, the

base the decision to publish names on whether or not the youth's offense is, in the press view, serious enough to warrant this form of punishment." JUVENILE TASK FORCE REPORT, *supra* note 113, at 39. In the view of newspaper editors, "[m]ajor crimes or chronic offenses call for publication of names." AMERICAN NEWSPAPER PUBLISHERS ASS'N, GENERAL MANAGEMENT BULLETIN 29 (Feb. 19, 1958), *quoted in* Geis, *supra* note 14, at 233.

However, in those jurisdictions where publication of the identity of accused juveniles is proscribed by statute, court rule or judicial interpretation (*see* note 5 *supra*), the press is faced with a starker choice: Is any coverage of juvenile court proceedings worth the commitment of time and resources? In most cases, the answer to this question will be no. Unless the crime is particularly heinous or the victim particularly well-known, a news story which fails to identify the suspect is of minimal journalistic interest.

¹⁵⁰ The probability that the public will acquire a false impression of the effectiveness of actual juvenile court practice is greatest when access is limited and only annual cumulative crime and delinquency statistics are made available to the press and public.

The view that the public should know and understand *all* aspects of the justice system is implicit in the California Community Release Board's recent decision to permit reporters to attend prisoners' parole hearings. *See* Los Angeles Times, Oct. 17, 1978, § 1, at 22, col. 5.

¹⁵¹ *See* Conway, *supra* note 128, at 23-24; Brucker, *supra* note 147, at 16-17.

¹⁵² Open trials . . . enable the public to scrutinize the performance of police and prosecutors in the conduct of public judicial business Any interest on the part of the prosecution in hiding police or prosecutorial misconduct or ineptitude may coincide with the defendant's desire to keep the proceedings private, with the result that the public interest is sacrificed from both sides.

Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2930 (1979) (Blackmun, J., dissenting). *Id.* at 2940. *See also* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 606-07 (1976) (Brennan, J., concurring); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492, 495 (1975); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *In re Oliver*, 333 U.S. 257, 270 (1948).

performance of judges and attorneys in juvenile cases is presently insulated from public observation and criticism.¹⁵³ Granting the press and public unconditional access to juvenile courts would subject judges and attorneys to increased public scrutiny. Such an examination would provide an additional incentive for court and counsel to perform in a fair and competent manner, thereby promoting the protection of the juvenile's constitutional rights and insuring procedural decorum.¹⁵⁴ The slow pace of reform in juvenile courts is arguably a result of inadequate publicity.¹⁵⁵

Third, in adult criminal courts, open proceedings improve the quality and availability of the evidence before the court in many cases.¹⁵⁶ Similarly, witnesses in juvenile court proceedings would

"While the public's more generalized interest in open trials includes a concern for justice to individual defendants, it goes beyond that. The transcendent reason for public trials is to ensure efficiency, competence, and integrity in the overall operation of the judicial system." A.B.A. STANDARDS, *supra* note 81, at 14. See also 6 J. WIGMORE, *supra* note 143, at 438; Wiggins, *supra* note 143, at 27-28.

¹⁵³ The performance of elected judges, prosecutors and police officials in juvenile courts is presently insulated from public scrutiny by statutory denials of access or conditional access. As discussed previously, conditional access discourages the attendance of news reporters at juvenile hearings. See note 149 and accompanying text *supra*. Therefore, the public cannot be fully informed and vote intelligently upon the election of such officials. See note 146 *supra*.

¹⁵⁴ The Alaska Supreme Court explicitly questioned whether confidential juvenile court proceedings foster inferior judicial performance:

We cannot help but notice that the children's cases appealed to this court have often shown much more extensive and fundamental error than is generally found in adult criminal cases, and wonder whether secrecy is not fostering a judicial attitude of casualness toward the law in children's proceedings.

R.L.R. v. State, 487 P.2d 27, 38 (Alas. 1971) (footnote omitted) (recognized juvenile's state constitutional right to demand a jury trial and open proceedings).

¹⁵⁵ While there has been some reform in juvenile courts, the pace of change has been slow. This is not surprising because appellate review, the primary source of reform in recent years, provides relief only in extreme cases of unfairness or arbitrariness. See, e.g., *In re Gault*, 387 U.S. 1 (1967) (denial of due process). The slow pace of legislative reform in the juvenile courts may be attributed in part to the lack of public knowledge about the operations of the juvenile justice system. Public ignorance about juvenile courts, in turn, may be substantially attributed to limitations upon press access.

¹⁵⁶ Courts and commentators have repeatedly recognized that falsification and perjury are discouraged by public and press awareness of the substance of testimony. In addition, press coverage and attendance by the public may lead to the production of witnesses and other evidence previously unknown to either the court or the parties. As a result, others involved in the same or related criminal activity who remain unapprehended may be implicated.

be less likely to testify falsely if the proceedings were open and they were aware that the public might learn of their testimony.

Since *In re Gault*,¹⁵⁷ accused juveniles enjoy the right to confront and cross-examine witnesses. Insofar as open court proceedings promote honest testimony, juveniles' sixth amendment rights would be reinforced by permitting the public and press to attend juvenile court hearings.¹⁵⁸ In addition, open proceedings would promote more forthright testimony by accused juvenile offenders themselves. But regardless of whether the accused juvenile benefits personally from more accurate and truthful testimony, open juvenile court proceedings serve the public's interest in justice.¹⁵⁹

In many cases, say rather in most . . . , the publicity of the examination or deposition operates as a check upon mendacity and incorrectness [of a witness] Environed as he sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face and every unknown countenance, presents to him a possible source of detection, from whence the truth he is struggling to suppress may through some unsuspected channel burst forth to his confusion Another advantage of this publicity [by printing the proceedings] . . . is the chance it affords to justice of receiving, from hands individually unknown, ulterior evidence, for the supply of any deficiency or confutation of any falsehood, which inadvertency or mendacity may have left or introduced.

6 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 355 (Bowring's ed. 1823), cited with approval, 6 J. WIGMORE, *supra* note 143, at 437.

See also *Gannett Co. v. DePasquale*, 99 S. Ct. 2898, 2907 (1979); *Id.* at 2927, 2930, 2933 (Blackmun, J., dissenting); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 606 (1976) (Brennan, J., concurring); *Estes v. Texas*, 381 U.S. 532, 583 (1965) (Warren, C.J., concurring); *In re Oliver*, 333 U.S. 257, 270 n.24 (1948); *Wiggins*, *supra* note 143, at 27; *State v. Allen*, 73 N.J. 132, 373 A.2d 377 (1977).

¹⁵⁷ 387 U.S. 1, 42-58 (1967).

California applies the rules of evidence in criminal trials regarding evidentiary admission and exclusion to juvenile delinquency proceedings. CAL. WELF. & INST. CODE § 701 (West Cum. Supp. 1979).

¹⁵⁸ Frequently, juvenile court witnesses are themselves minors who are more easily awed by the proceeding itself. Consequently, open juvenile courtrooms would arguably promote honest testimony even more effectively than they already do in open adult court. Admittedly, some juveniles — primarily those involved in a conspiracy — might possibly be more inclined to cover up, particularly where there is an audience which might contain co-conspirators.

¹⁵⁹ The protection against perjury which publicity provides, and the opportunity publicity offers to unknown witnesses to make themselves known, do not necessarily serve the defendant. The public has an interest in having criminal prosecutions decided on truthful and complete records, and this interest, too, does not necessarily coincide with that of the accused.

Open criminal proceedings not only improve the quality of testimony but also increase the quantity of evidence before the court.¹⁶⁰ There is no reason to believe that opening juvenile proceedings would not likewise lead to the production of witnesses and other evidence previously unknown to either the court or the parties.¹⁶¹ For example, a juvenile responsible for numerous sexual assaults but charged only with a single count of rape is virtually assured, under the present system of closed hearings, that none of his other victims will know to come forward and identify the minor as the perpetrator of the prior assaults. If proceedings were open, however, the accused juvenile's name, photograph and other identifying information would likely be publicized. Once available to the public, such information would prompt other victims to come forward and identify the juvenile.

Fourth, publicity of criminal proceedings teaches by example the wrongfulness and consequences of criminal conduct and arguably deters others from committing crimes.¹⁶² To the extent publicized criminal proceedings act as an effective deterrent to criminal conduct, publicized juvenile proceedings will have a similar effect.¹⁶³

Gannett Co. v. DePasquale, 99 S. Ct. 2898, 2930 (1979) (Blackmun, J., dissenting) (citation omitted).

¹⁶⁰ See note 156 *supra*.

¹⁶¹ Additional witnesses and evidence would help exonerate innocent juveniles falsely accused, assist the juvenile court in adjudicating wardship, and lead to the apprehension of others involved in illegal conduct.

¹⁶² "[O]pen proceedings operate as a deterrent upon those who witness in the operation of justice a threat to them if they attempt like violations of the law. They are furnished dramatic examples of the consequences of wrongdoing. . . ." Wiggins, *supra* note 143, at 28.

Nevertheless, the general deterrence-by-publicity argument is disputed and empirically unverified. See LAW REFORM COMMISSION OF CANADA, FEAR OF PUNISHMENT: DETERRENCE 29-31 (1976).

In addition, insofar as publicity is a form of punishment which actually deters subsequent offenses by a criminal, publicity also acts as a specific deterrent.

¹⁶³ Several juvenile court judges and commentators argue that publicized juvenile court hearings would have a deterrent effect upon delinquent activity. Campbell, *supra* note 42; Parker, *supra* note 43, at 126-27; Brucker, *supra* note 147, at 17-18. See also Judge Vincent's comments *set forth in* note 43 *supra*.

Other commentators strongly disagree that publicized juvenile court hearings would have any deterrent effect. Geis, *In Re: Juvenile Court Publicity*, 16 JUV. CT. JUDGES' J. 12, 13-14 (1965); Gardner, *supra* note 112, at 29. See also commentary to UNIFORM JUVENILE COURT ACT § 24(d), *supra* note 44.

C. Legislative Choices: Balancing Competing Interests

Careful examination of the interest in closed juvenile court proceedings raises serious questions about the viability of the justifications proffered by proponents of confidentiality.¹⁶⁴ The many authorities who assert that closed juvenile court hearings promote rehabilitation fail to support that assertion with statistical evidence.¹⁶⁵ While closed juvenile court hearings are traditionally believed to further the rehabilitative purposes of the juvenile justice system,¹⁶⁶ the foregoing discussion indicates that, in fact, open hearings may more directly and effectively contribute to this goal.¹⁶⁷

In general, the interest in open judicial proceedings is important, pervasive and undisputed.¹⁶⁸ Opening juvenile court hearings would likely serve the same public interests advanced by open criminal trials.¹⁶⁹ Typically, proponents of confidentiality ignore or deprecate the interests that would be served by open juvenile court hearings.¹⁷⁰

Thus, in many states, legislatures are confronted by a weak interest in closed juvenile court hearings, a strong interest in open proceedings, and the present unconstitutional practice of "conditional access" to juvenile court hearings.¹⁷¹ Common sense

¹⁶⁴ See notes 109-42 and accompanying text *supra*.

¹⁶⁵ The articles which assert that confidential hearings promote rehabilitation support their assertion by frequently citing other articles making the same assertion. None of these articles contain empirical studies which sustain the assertion. See generally Geis, *supra* note 14; Geis, *supra* note 163; Gardner, *supra* note 112; Gough, *supra* note 122; Note, *supra* note 11; Howard et al., *supra* note 105. By contrast, there is some empirical support for the proposition that cumulative records have a negative impact upon rehabilitation of juvenile delinquents. See notes 122, 126-27 and accompanying text *supra*.

¹⁶⁶ See notes 14-15, 41, 109, 112-14, 118, 122, 126-27, 129, 139 and accompanying text *supra*.

¹⁶⁷ See notes 43, 131-32, 140-41 and accompanying text *supra*.

¹⁶⁸ See notes 143-46, 152, 156, 160 and accompanying text *supra*.

¹⁶⁹ See notes 147-51, 153-55, 157-59, 161 and accompanying text *supra*.

¹⁷⁰ Often no interest in publicity of juvenile court hearings is even discussed. See, e.g., Howard et al., *supra* note 105; Volenick, *supra* note 14; Gardner, *supra* note 112. In those rare articles in which advocates of confidentiality even acknowledge the existence of a competing interest in publicity, that interest is frequently mischaracterized and never fully analyzed.

Gilbert Geis' view of the matter is typical of this genre. Geis discussed only social protection (informing neighbors through news reports that a juvenile was delinquent) and deterrence of juvenile delinquencies as policies arguably promoted by publicity. Evidently in Geis' view, no other policies would be served by open juvenile court hearings. Geis, *supra* note 163.

¹⁷¹ See notes 79-100 and accompanying text *supra*.

dictates that, in the absence of viable compromises, an imbalance between competing interests should lead states to adopt the relatively stronger interest. Concomitantly, the greater the imbalance between the competing interests, the fewer the conditions which should be placed upon legislation enacting the stronger interest. If, as this comment suggests, there is no demonstrable interest in closed juvenile court hearings, then press and public access to all juvenile court proceedings should be unrestrained and a *per se* rule to this effect should be adopted.

Any closing of juvenile proceedings can only be justified where closure demonstrably promotes rehabilitation. While necessary, such a legislative finding is not sufficient to close juvenile court proceedings. In addition, closure should not conflict with other purposes of a state's juvenile justice system. In California, whether or not closed juvenile court hearings contribute to the goal of rehabilitation, such closure clearly conflicts with other purposes of the state's Juvenile Court Act — namely, protecting the public from minors' unlawful conduct and impressing upon juvenile delinquents a sense of responsibility for their own acts.¹⁷²

Nevertheless, assuming that closed juvenile proceedings can promote rehabilitation and do not conflict with other juvenile court purposes, then the nature of the contribution of closure to rehabilitation must be carefully examined. Any restriction upon unconditional access must be precisely tailored to the interest which that limitation serves. For example, if closing the hearings of first-time misdemeanants promotes their rehabilitation, but does not promote the rehabilitation of repeat juvenile felons, then a state legislature is justified only in closing the hearings of first-time juvenile misdemeanants.

In general, there are four potential alternatives to unconditional access or to the complete denial of access. These compromise positions are:

- (1) Access only to certain members of the public and press;¹⁷³

¹⁷² See notes 31-44 and accompanying text *supra*.

If open hearings do not contribute to rehabilitation, then closed hearings and open hearings serve different purposes — closure will aid rehabilitation and hinder the other purposes of the juvenile justice system; access will aid these other purposes and impair rehabilitation. However, since it appears that open proceedings contribute to rehabilitation (see note 167 and accompanying text *supra*), opening juvenile court hearings will not lead to such a conflict.

If the manner in which hearings are conducted — either open or closed — cannot contribute simultaneously to all of the juvenile court purposes, then the purposes themselves are incompatible.

¹⁷³ For example, the class of persons having a "direct and legitimate interest"

- (2) Access only to particular phases of the proceedings;¹⁷⁴
- (3) Access only to hearings involving specified offenses;¹⁷⁵ and
- (4) Access only to hearings involving specific classes of accused juveniles.¹⁷⁶

Such partial access/partial closure schemes, however, are not free of constitutional problems or functional infirmities.

The first alternative mandates that distinctions be drawn among reporters or between reporters and other citizens. This practice may violate the equal protection clause of the fourteenth amendment.¹⁷⁷

The second alternative, denial of access to particular phases of juvenile court proceedings, would not prevent those present at other phases of the proceedings from learning and publishing the identity of the accused juvenile. If closure promotes rehabilitation through anonymity, then the underlying rationale for this alternative is not adequately served.

The third and fourth alternatives, denying access to hearings involving less serious offenses or less sophisticated offenders, must be founded upon empirical evidence demonstrating that confidentiality for certain classes of offenses or offenders promotes the rehabilitation of persons within that class. The burden remains with proponents of closure to demonstrate that the third and fourth alternatives promote rehabilitation.¹⁷⁸

Therefore, even a brief examination of partial access/partial closure schemes indicates they would have many of the same

in the proceeding or work of the court generally, or "bona-fide" members of the press.

¹⁷⁴ For example, access might be permitted to the adjudicatory hearing, but not to the fitness hearing.

¹⁷⁵ For example, access might be permitted to hearings involving violent offenses or felonies, but not to hearings involving non-violent offenses or misdemeanors. See distinctions suggested for "dangerous" and "violent" felonies by S.B. 450, Cal. 1979-80 Reg. Sess. Such distinctions may be found in the present statutes of at least three states — Maine (ME. REV. STAT. tit. 15, § 3307(2) (West Supp. 1978)), Montana (MONT. REV. CODES ANN. § 10-1220(5) (Supp. 1977)) and Utah (UTAH CODE ANN. § 78-3a-33 (Supp. 1977)).

¹⁷⁶ For example, access might be limited to hearings of juveniles over a certain age (possibly, those deemed "culpable" under CAL. PENAL CODE § 26(1) (West Cum. Supp. 1979)) or to those hearings involving juveniles who have prior offense records.

¹⁷⁷ At least two justices of the California Supreme Court have rejected as unconstitutional any efforts to distinguish between members of the media. See note 86 *supra*. See also *Smith v. Daily Mail Publishing Co.*, 99 S. Ct. 2667, 2672-75 (Rehnquist, J., concurring).

¹⁷⁸ See note 165 and accompanying text *supra*.

fundamental weaknesses as complete closure of juvenile court proceedings. Consequently, unconditional access to juvenile court hearings is the only approach supported by considerations of policy and free from constitutional infirmities.

CONCLUSION

The closure of juvenile court proceedings and the imposition of restraints upon the disclosure of juvenile identity have traditionally been analyzed as the constituent parts of an overall policy of juvenile court confidentiality. Closure has been justified by its purported contribution toward the rehabilitation of juvenile delinquents.

Many states, including California, have adopted a statutory policy of "conditional access" to juvenile court proceedings. A legislative compromise between advocates of closed and open juvenile court proceedings, "conditional access" requires that reporters admitted to juvenile court hearings not disclose the identity of the accused minor.

However, the United States Supreme Court has recently held that criminal sanctions or prior restraints upon the publication of juvenile delinquents' identities violate the first amendment. Consequently, the press — both print and broadcast media — may publish with impunity all truthful information which is either lawfully obtained or in the public domain. In practice, "conditional access" acts as a prior restraint upon publication of information which is lawfully obtained and which is in the public domain. Therefore, "conditional access" violates the first amendment.

The constitutional demise of "conditional access" forces state legislatures to reassess the policies underlying closure of juvenile court hearings and to balance them against the competing policies underlying open juvenile proceedings. Careful examination of the justifications for closed and open hearings indicates that there is a strong public interest in open hearings and a weak or non-existent interest in closed hearings. Balancing these competing interests, legislatures must reform present juvenile court practices to serve the stronger public interest in open proceedings. Unless evidence indicates that closing certain juvenile court hearings would significantly promote the rehabilitative or other goals of a state's juvenile justice system — evidence which has yet to be adduced — all juvenile court hearings must be open to the press and public.

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