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Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings

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Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings

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INTRODUCTION

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty.

—*In re Oliver*, 1948¹

Under our Constitution, the condition of being a boy does not justify a kangaroo court.

—*In re Gault*, 1967²

Today's juvenile courtroom functions quite differently than did its 1899 Chicago ancestor.³ During every decade since the

1. *In re Oliver*, 333 U.S. 257, 268-69 (1948) (footnote omitted).

2. *In re Gault*, 387 U.S. 1, 28 (1967).

3. For three comprehensive historical accounts of the juvenile justice system's development since its 1899 Chicago founding, see generally ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* (1978); JOHN C. WATKINS JR., *THE JUVENILE JUSTICE CENTURY: A SOCIOLEGAL COMMENTARY ON AMERICAN JUVENILE COURTS* (1998); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970) (including a discussion of pre-1899 youth justice).

A number of academics, most notably Professor Barry Feld of the University of Minnesota Law School, have argued that the juvenile reforms of the last three decades have so transformed the juvenile court—from a social welfare institution “into a scaled-down, second-class criminal court for young offenders”—that it should be abolished. Barry C. Feld, *The Transformation of the Juvenile Court—Part II: Race and the “Crack Down” on Youth Crime*, 84 MINN. L. REV. 327, 327-31 (1999) [hereinafter Feld, *Race and the “Crack Down” on Youth Crime*]; see also Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 69 (1997) (“No compelling reasons exist to maintain separate from an adult criminal court, a punitive juvenile court whose only remaining distinctions are its persisting procedural difficulties.”) [hereinafter Feld, *Abolish the Juvenile Court*]; Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1187-88 (1989) (same) [hereinafter Feld, *The Right to Counsel in Juvenile Court*]; Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 691-93 (1991) (arguing that the juvenile system is merely a mirror-image of the adult criminal system, with more procedural problems) [hereinafter Feld, *Transformation of the American Juvenile Court*].

Other notable juvenile scholars have echoed Feld's concerns and have endorsed his solution. See, e.g., Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1083-85 (1991) (same) [hereinafter Ainsworth, *Re-Imagining Childhood*]; Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 928-30 (1995) (proposing abolition of the juvenile court, and replacement with a unified criminal court, because its “promise of individualized dispositions crafted with attention to the social needs of the juvenile offender” have proven to be “a cruel hoax”) [hereinafter Ainsworth, *Youth Justice in a Unified Court*]; Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preserva-*

1960s, the juvenile court system has undergone a number of fundamental, structural changes.⁴ The most recent of these "mega change[s]"⁵ came during the 1990s, when a number of states abandoned their existing presumptive closure statutes and mandated

tion of Children's Legal Rights, 16 J. CONTEMP. L. 23, 25 (1990) ("[I]f there is a chance that children have rights and the ability to exercise them, then [what] inevitably results i[s] the abolition of the juvenile court."). *But see* Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 165 ("I do not . . . [believe] . . . in the abolitionist solution, even though it is prompted by a despair that I do share.").

4. The most important development of the 1960s was the Supreme Court's 1967 *In re Gault* decision. *In re Gault*, 387 U.S. 1 (1967). In *Gault*, the Court largely formalized the juvenile courtroom by extending to youths the constitutional rights to counsel, confrontation of witnesses, notice of charges, and the privilege against self-incrimination. *Id.* at 1-59.

The 1970s brought another seminal juvenile decision, *In re Winship*, in which the Court held that the constitutional requirement of proof beyond a reasonable doubt applies in delinquency proceedings, 397 U.S. 358, 368 (1970), thus leaving considerable doubt whether those proceedings remained "civil" or had become full-blown criminal prosecutions. *See id.* at 365-66 ("[C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts . . ."). The Court's 1971 *McKeiver v. Pennsylvania* decision resolved that question, although only five members of the Court (Chief Justice Burger and Justices Blackmun, Brennan, Stewart, White), in scattered opinions, agreed that delinquency proceedings "ha[d] not yet been held to be . . . 'criminal prosecution[s],' within the meaning and reach of the Sixth Amendment . . ." *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971) (emphasis added); *id.* at 553 (Brennan, J., concurring in the judgment) (agreeing with Justice Blackmun's plurality opinion that juvenile proceedings are not "criminal prosecutions"). *But see id.* at 571 (Douglas, J., dissenting) ("The argument that the adjudication of delinquency is not the equivalent of criminal process is spurious."). This Note suggests below, but does not conclude, that juvenile delinquency proceedings may have changed so substantially since 1971 that they have become "criminal prosecutions" within the meaning of the Sixth Amendment, even though they were not at the time of *McKeiver*. *See infra* Part II.A.2.

This suggestion would seem to be bolstered by one of the major shifts of the 1980s: the increased use of juvenile waiver statutes, which allow for "serious or chronic young offenders . . . [to] be tried and sentenced as . . . adults." Marcy Rasmussen Podkopacz & Barry C. Feld, *Judicial Waiver Policy and Practice: Persistence, Seriousness, and Race*, 14 LAW & INEQ. 73, 74 (1995) [hereinafter Podkopacz & Feld, *Judicial Waiver Policy and Practice*]; *see also* Feld, *Race and the "Crack Down" on Youth Crime*, *supra* note 3, at 357 & n.81 ("The rate of judicial waiver increased 68% between 1988 and 1992."); Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449, 456-57 (1996) (describing Minnesota's early-1980s statutory shift toward waiver through a provision presumptively finding youths un-amenable to treatment) [hereinafter Podkopacz & Feld, *An Empirical Study of Judicial Waiver*].

5. E. Hunter Hurst, III, *The Juvenile Court at 100 Years of Age: The Death of Optimism*, 49 JUV. & FAM. CT. J. 39, 40-44 (1998) (describing five recent "mega change[s]" in juvenile legislation: increased use of criminal jurisdiction through waiver, experimentation with new sentencing options, development of new correctional programs, inclusion of juvenile victims as "active participants" in the juvenile justice process, and, of course, the opening of proceedings and records).

that juvenile delinquency proceedings⁶ be held in the open for the press and the public to see.⁷

The policy reviews of this development have been mixed. Some commentators criticize the recent trend, asserting that open proceedings enervate the juvenile system's ultimate goal of rehabilitating wayward youths.⁸ Others laud the new openness, arguing that closure no longer serves the rehabilitative ethic,⁹ or that young offenders need to be held accountable to the body politic for their increasingly violent and adult-like wrongs against society.¹⁰ This Note also praises the trend toward openness, but it takes a different tack than do these commentators; it suggests, as the United States Supreme Court suggested in *Oliver*, that if a person's liberty is at stake, public scrutiny is the only "tolerably efficient check"

6. Throughout this Note, the terms "juvenile proceedings," "delinquency proceedings," "juvenile delinquency proceedings," and "juvenile court proceedings" are all used interchangeably; no difference in meaning is intended. For purposes of this Note, these proceedings include juvenile transfer hearings.

7. This trend began around 1992. PATRICIA M. TORBET ET AL., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT 36 (1996) [hereinafter TORBET]. It gained momentum in the latter half of the 1990s; during the 1996-97 period alone, twelve states modified or enacted legislation permitting open juvenile court hearings. See PATRICIA M. TORBET & LINDA SZYMANSKI, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME: 1996-97 UPDATE 8-11 (1998) (outlining the trend of states' de-emphasizing closure and their new emphasis on information sharing) [hereinafter TORBET & SZYMANSKI]. See also *infra* note 13 (enumerating the fifty-one jurisdictions' access statutes).

8. See, e.g., Kathleen M. Laubenstein, Comment, *Media Access to Juvenile Justice: Should Freedom of the Press Be Limited to Promote Rehabilitation of Youthful Offenders?*, 68 TEMP. L. REV. 1897, 1897 & n.5, 1901-08 (1995) (arguing that media access to juvenile proceedings must be limited because it otherwise may serve to perpetuate the "public's flawed perception" of a juvenile crime wave and because it "will likely impede . . . [a juvenile's] rehabilitation" by "increas[ing] his self-perception of his own delinquency") (citing *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 107-08 (1979) (Rehnquist, J., concurring) (declaring that closed proceedings and sealed records are essential to the rehabilitation of youthful offenders)); cf. Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 414 (1987) (finding that "the uses to which the information [from open criminal trials] will be put are far from certain").

9. See, e.g., Ainsworth, *Re-Imagining Childhood*, *supra* note 3, at 1128-30 (observing that "low public visibility" in the juvenile setting may lead juvenile judges, who have heavy caseloads, to cut corners and render inappropriate treatment to youths in need of rehabilitation); Gordon A. Martin, Jr., *Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 393, 394-95 (1995) ("[E]limination of juvenile delinquency's historic cloak of confidentiality is essential to rebuilding trust and dissipating the fear that the closed juvenile system fosters.") (footnote omitted) [hereinafter Martin, *Open the Doors*]; Joseph B. Sanborn, Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 230, 236 (1993) (arguing that access to delinquency proceedings "helps keep the judge under control and eliminates the hearing's secret nature, which both hides and promotes carelessness and cavalier attitudes on the part of court workers") (footnotes omitted).

10. See, e.g., Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 400 (1996) (concluding that public access is a desirable policy because it holds young offenders accountable for "crimes which society cannot, and should not, forget").

against potential abuse or malfunction of the adjudicative process.¹¹ It argues that, aside from the states' policy-based reasons for abandoning presumptive closure statutes, serious due process problems inhere in presumptive closure schemes. Thus, this Note does not concern itself with the states that have recently overturned their presumptive closure statutes; it instead turns its attention toward the nineteen jurisdictions that retain theirs.¹²

This Note concludes that the nineteen remaining presumptive closure statutes¹³ are unconstitutional because they violate the

11. *In re Oliver*, 333 U.S. 257, 271 (1948) (quoting 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).

12. The nineteen closure jurisdictions are Alabama, Alaska, Connecticut, District of Columbia, Idaho, Kentucky, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, Ohio, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming.

13. The nineteen closure statutes remaining on the books are remarkably similar. Virtually all of them clearly establish the baseline that members of the general public and of the press will be excluded from juvenile proceedings unless the juvenile judge finds that some of them have a "direct" or "proper" interest in the matter. See ALA. CODE § 12-15-65(a) (1995 & Lexis Supp. 2000); ALASKA STAT. § 47.10.070(a) (Michie 2000); CONN. GEN. STAT. ANN. § 54-76(b) (West 1994) (mandatory closure); D.C. CODE ANN. § 16-2316(e) (1997 & Lexis Supp. 2000); IDAHO CODE § 16-1608(b) (Michie 1979 & Supp. 2000); KY. REV. STAT. ANN. § 610.070(3) (Michie 1999); MASS. GEN. LAWS ANN. ch. 119, § 65 (West 1993 & Supp. 2000); MISS. CODE ANN. § 43-21-203(6) (2000); N.H. REV. STAT. ANN. § 169-B:34(I)(a) (1994 & Lexis Supp. 2000) (mandatory closure); N.J. STAT. ANN. § 2A:4A-60(i) (West 1987 & Supp. 2000); N.Y. JUD. CT. ACTS § 341.1 (McKinney 1999); OHIO REV. CODE ANN. § 2151.35(A) (West Supp. 2000); R.I. GEN. LAWS § 14-1-30 (1994); S.C. CODE ANN. § 20-7-755 (Law. Co-op. 1985 & West Supp. 2000); TENN. CODE ANN. § 37-1-124(d) (1996); VT. STAT. ANN. tit. 33, § 5523(c) (1991 & Lexis Supp. 1999); W. VA. CODE ANN. § 49-5-2(f) (Michie 1999 & Lexis Supp. 2000); WIS. STAT. ANN. § 48.299(1)(a) (West 1997 & Supp. 2000); WYO. STAT. ANN. § 14-6-224(b) (Michie 1999).

Many of the states that have recently overturned their closure statutes have simply turned this presumption on its head; thus, twelve states now provide for presumptively open juvenile proceedings that can be closed by the juvenile judge if she finds good cause for doing so. See ARIZ. JUV. CT. R. 7(c)(3) (West 1997 & Supp. 2000); COLO. REV. STAT. ANN. § 19-1-106(2) (West 1997 & Supp. 2000); FLA. STAT. ANN. § 985.205 (West 1996 & Supp. 2001); IND. CODE ANN. § 31-32-6-2 (Michie 1997); IOWA CODE ANN. § 232.39 (West 2000); KAN. STAT. ANN. § 38-1652 (2000); MICH. COMP. LAWS ANN. § 712A.17(7) (West 1993 & Supp. 2000); NEV. REV. STAT. ANN. § 62.193(1) (Michie 1996 & Supp. 1999); N.M. STAT. ANN. § 32A-2-16(B) (Michie 1995); N.C. GEN. STAT. § 7B-801(a) (1999); TEX. FAM. CODE ANN. § 54.08(a) (Vernon 1996 & Supp. 2001); WASH. REV. CODE ANN. § 13.40.140(6) (West 1993 & Supp. 2001). The constitutionality of these (also remarkably similar) statutes is beyond the scope of this Note, but the Note presupposes their constitutionality because they appear, on their faces, to be less invasive of the juvenile's Fourteenth Amendment due process rights than presumptive closure statutes.

Fifteen other states provide that their juvenile proceedings shall be closed where the youth has committed a minor offense, but that the proceedings will be open to press and public where the youth has committed an offense that would be a felony or other serious crime under the respective state's criminal code. See CAL. WELF. & INST. CODE § 676(a)(1)-(28) (West 1998 & Supp. 2001); DEL. CODE ANN. tit. 10 § 1063(a) (1999); GA. CODE ANN. § 15-11-78(b)(1) (Supp. 2000); HAW. REV. STAT. ANN. §§ 571-41(b), 571-84.6(c) (Michie 1999); LA. REV. STAT. ANN. Ch.C, art. 879(B) (West 1995 & Supp. 2001); ME. REV. STAT. ANN. tit. 15, § 3307(2) (West 1980 & Supp. 2000); MD. CODE ANN., CTS & JUD. PROC. § 3-812(f) (1995 & Lexis Supp. 2000); MINN. STAT. ANN. § 260B.163(c) (West 1998 & Supp. 2001); MO. ANN. STAT. § 211.171(6) (West 1996 & Supp.

Due Process Clause of the Fourteenth Amendment. The argument proceeds in two major Parts. Part I lays the necessary factual groundwork for the case against the statutes by describing how they affect today's juvenile proceedings. Part II introduces and evaluates three separate—but related—constitutional challenges to the statutes. That is, it briefly acknowledges and rejects First Amendment and Sixth Amendment arguments, and it then raises a freestanding Fourteenth Amendment due process argument.¹⁴ Part II suggests that, while both the First and Sixth Amendment arguments could reasonably be brought to bear on presumptive closure statutes,¹⁵ only the freestanding due process claim has a strong chance of succeeding under existing Supreme Court jurisprudence.¹⁶ This Note concludes that the statutes are “fundamentally unfair” under that jurisprudence and can no longer withstand constitutional scrutiny.

2001); N.D. CENT. CODE § 27-20-24(5) (1991 & Lexis Supp. 1999); OKLA. STAT. ANN. tit. 10 § 7303-4.2(A) (West 1998); 42 PA. CONS. STAT. ANN. § 6336(e) (West 2000); S.D. CODIFIED LAWS § 26-7A-36 (Lexis 1999); UTAH CODE ANN. § 78-3a-115(1)(b)-(c) (1996 & Lexis Supp. 2000); VA. CODE ANN. § 16.1-302 (Michie 1999). This Note presupposes that these diverse statutes are constitutional as well.

Three states mandate open proceedings, in one form or another, without allowing discretion for closure. See ARK. CODE ANN. § 9-27-325(i)(2) (Michie 1998 & Lexis Supp. 1999) (providing juveniles with the right to a hearing open to both public and press); 705 ILL. COMP. STAT. ANN. § 405/1-5(6) (West 1999 & Supp. 2000) (providing for mandatory openness to the press, but not to the general public); MONT. CODE ANN. § 41-5-1502 (7) (1999) (providing for mandatory openness to the general public).

Two states, Nebraska and Oregon, have no statutes regarding access. See generally NEB. REV. STAT. ch. 43 (1998); OR. REV. STAT. § 419 (1995).

14. As it is used here, the term “freestanding” means only that the argument does not rest upon incorporation against the states of the First Amendment's protections, of the Sixth Amendment's guarantee of a public trial in all “criminal prosecutions,” or of any other of the Bill of Rights' safeguards. Rather, it rests solely upon independent due process (i.e., “fundamental fairness”) grounds.

15. One commentator has, indeed, argued authoritatively that closure of juvenile delinquency proceedings raises serious First Amendment concerns. See generally Joshua M. Dalton, *At the Crossroads of Richmond and Gault: Addressing Media Access to Juvenile Delinquency Proceedings Through a Functional Analysis*, 28 SETON HALL L. REV. 1155 (1998) (concluding that, under the First Amendment and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), “experience and logic” mandate that delinquency proceedings be presumptively open to the press). There is no need to reproduce Dalton's comprehensive analysis in this Note. Nonetheless, the press's First Amendment claim against presumptive closure is briefly summarized below, see *infra* Part II.A.1, to illustrate that, while the claim is a fairly powerful one, the Due Process Clause of the Fourteenth Amendment is a stronger constitutional source than the First Amendment for striking down closure schemes.

16. Along with the First Amendment argument, the Sixth Amendment argument is fairly convincing, though this Note argues that a realistic and cautious interpretation of existing Court doctrine counsels against adopting that argument whole-heartedly. See *infra* Part II.A.2.

I. FACTUAL BACKGROUND: TODAY'S JUVENILE PROCEEDINGS
(AND THE STATUTES THAT CLOSE THEM)

The typical presumptive closure statute provides that "the general public shall be excluded from hearings"¹⁷ unless the juvenile judge, in her sole discretion, finds a very good reason¹⁸ for allowing some level of access. This baseline of closure makes sense if one still accepts the juvenile justice system's original theories of rehabilitation and *parens patriae*,¹⁹ and if one believes that state legislatures likewise still accept them. Those foundational ideals were, indeed, sound and promising at the time of the juvenile court's inception in 1899. Today, however, they are questionable bases upon which to rest the closure of juvenile delinquency proceedings.

One academic has concluded that "a review of the assumptions underlying the juvenile court shows it to be a bankrupt legal institution. The theories that have guided juvenile law through the twentieth century are without foundation."²⁰ While this view may overstate the case, an examination of those theories in light of today's realities reveals a troubled court system that has fallen short of the idyllic "supermarket of social services"²¹ its pioneers sought to establish. Today's youths are faced instead with an institution that, for two reasons, closely resembles the adult criminal justice system. First, most states have largely abandoned the rehabilitative ethic in favor of a more punitive approach.²² Second, recognizing that this new punishment ethic puts a young offender's liberty at stake, the United States Supreme Court has, over the past three decades, doctrinally departed from the early systemic vision of *parens patriae* informality by affixing necessary procedural safeguards

17. *E.g.*, D.C. CODE ANN. § 16-2316(e) (1997 & Lexis Supp. 2000).

18. Again, most of the closure statutes allow the judge to open the proceedings in a limited fashion by admitting those persons having a "direct" or "proper" interest in the matter. *See supra* note 13. Two closure states—Connecticut and New Hampshire—mandate that the proceedings be closed under all circumstances, leaving the judge no discretion to admit such persons. *See* CONN. GEN. STAT. ANN. § 54-76(h) (West 1994); N.H. REV. STAT. ANN. §169-B:34(I)(a) (1994 & Lexis Supp. 2000).

19. Under this doctrine, the state figuratively steps into the shoes of a juvenile's parents or guardian, providing "civic and moral education as well as general nurturance." WATKINS, *supra* note 3, at 9. That is, the state simply takes a delinquent child "into custody" rather than "arrest[ing]" him or her. *Id.* at 43-48. The state then proceeds to "protect and rehabilitate" the child in his or her "best interest," at least theoretically. *Id.* at 48.

20. Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 166 (1989).

21. WATKINS, *supra* note 3, at 50-51 & n.11.

22. *See infra* Part I.A.

to juvenile proceedings.²³ This Part of the Note summarizes each of these two fundamental transformations, which call into question the continued constitutional vitality of the presumptive closure statutes. The Part then concludes by describing why those statutes were initially enacted, and how they affect today's juvenile court system.

A. *From Rehabilitation to Punishment*

1. Early Visions of Rehabilitation

While the adult criminal justice system has largely abandoned the goal of rehabilitation,²⁴ the youth justice system continues to identify it as a main objective.²⁵ In the juvenile court's early years, juvenile theorists and practitioners sought mechanisms that would save young offenders before they became unsalvageable.²⁶ These progressive penal reformers hoped to remove the concept of blame from juvenile proceedings, emphasizing instead that delinquents were simply needy, troubled children incapable of criminal-mindedness.²⁷ The reformers demanded an institution in which the main philosophical objective would be to eliminate deviant behavior during its early phases.²⁸ Most importantly, they sought a proba-

23. See *infra* Part I.B.

24. See Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57, 58 (1992) [hereinafter Martin, *Is There Still a Place for Rehabilitation?*]. Though the word "penitentiary" itself does reflect an early rehabilitative approach, "[t]he perceived failure of the criminal justice and penal systems to deter recidivism [and] . . . [t]he adoption in 1987 by Congress of the United States Sentencing Guidelines . . . are indicative of society's embrace of the punitive model of criminal justice." *Id.* (footnotes omitted).

25. *Id.* at 59-60.

26. See RYERSON, *supra* note 3, at 19 (noting that early juvenile models "were built upon the encouraging notion that, under strict supervision away from the normal world of excitement and temptation, children who broke the law could learn the values and habits which make upstanding citizens").

27. See *id.* at 37 (discussing the petition procedures that the reformers constructed when they removed the criminal complaint procedure and its resulting "implication that the child was capable of criminal intent"); Fox, *supra* note 3, at 1191 (stating that "the reformers fully understood that these children were guilty of little more than being poor and neglected"). See generally Fox, *supra* note 3 (providing extensive discussion about early theories and proponents of rehabilitation).

28. See WATKINS, *supra* note 3, at 49 (stating that this "ethos" of prevention, which would supposedly "reduce youth crime by eradicating delinquent behavior in its 'budding' stages," was one of the founders' rudimentary goals).

tionary institution that could replace bad behavior with good.²⁹ In short, this approach would develop, rather than punish, the child.³⁰

On various occasions, the Supreme Court has recognized the rehabilitative approach as worthwhile.³¹ It has observed that many juveniles need protection from themselves because they lack sound judgment and often make poor decisions.³² Chief Justice Rehnquist in particular has evinced a continuing faith in the system's rehabilitation tenet, remarking that it is "born of a tender concern for the welfare of the child."³³ He and the Court's other members have thus ensured the survival of rehabilitation as a primary goal of the juvenile system,³⁴ but not without some misgivings.³⁵

29. See *id.* at 50. Watkins notes the reformers' desire for "a tribunal whose probation division would, in effect, open to the juvenile a 'supermarket of social services' under the aegis of a new social science." *Id.* at 49-50 (footnote omitted).

30. See Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909) (calling for treatment of wayward children, "not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen").

31. See, e.g., *Schall v. Martin*, 467 U.S. 253, 266 (1984) ("Society has a legitimate interest in protecting a juvenile from the consequences of his criminal activity . . .").

32. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

33. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 107-08 (1979) (Rehnquist, J., concurring) (noting that rehabilitation increases "youths' prospects for adjustment in society and acceptance by the public"). In *Smith*, then-Associate Justice Rehnquist also asserted the importance of confidentiality to this end, stating that dissemination of a juvenile offender's name may defeat rehabilitation. *Id.* at 108 (Rehnquist, J., concurring) (stating that publicity "place[s] additional stress on [the juvenile] during a difficult period of adjustment in the community, and it interfere[s] with his adjustment at various points when he [is] otherwise proceeding adequately") (quoting David C. Howard et al., *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203, 210 (1977)).

34. See Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 483-84 (1995). Sheffer notes that "even while there is evidence that the juvenile court is becoming more punitive, neither legislatures nor courts are yet willing to abandon the goal of rehabilitation." *Id.* The Supreme Court's own hesitancy to acknowledge this evidence, most notably in *McKeiver v. Pennsylvania*, 403 U.S. 528, 544-46 (1971), has possibly caused these lawmakers and courts to balk at wholesale renunciation of the treatment ideal.

35. In *Gault*, the Court "candidly appraised" the first tenet of the juvenile court, 387 U.S. 1, 21-22 (1967), and concluded that "[t]he constitutional and theoretical basis for this peculiar system is—to say the least—debatable." *Id.* at 17; see also Melton, *supra* note 20, at 148 n.18 ("In *Gault* itself, the Court made unmistakably clear its view that the juvenile court had failed to accomplish its stated purposes and, indeed, that it had often operated in countertherapeutic ways.").

In *McKeiver*, the Court found "that the fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized." *McKeiver*, 403 U.S. at 543-44. Yet "[d]espite all these disappointments, all these failures, all these shortcomings," the Court was unwilling to "put an effective end to . . . [the] idealistic prospect of an intimate, informal protective proceeding" by extending juveniles the right to a jury trial. *Id.* at 545; see also *infra* Part II.A.2.

2. The Shift Toward Punishment

The Court's misgivings are partially due to the fact that the youth justice system has worked to serve not only rehabilitation, but the sometimes-conflicting goal of punishment³⁶ as well.³⁷ Punishment took on unforeseen significance at an early date because the system's officers discovered that rehabilitation could not be attained on as grand a scale as they had originally hoped.³⁸ They lacked the resources to individualize treatment for a seemingly infinite number of juvenile offenders, and they were quickly forced to reconsider goals that had proven unworkable.³⁹ Their vision of "treatment" necessarily regressed into simply detaining wayward children in massive congregate institutions that provided neither the attention nor the guidance the system's founders sought.⁴⁰ Indeed, the consequences were unintentionally but diametrically opposed to the founders' early vision; juvenile justice was mass-produced and ceased to be case-specific, serious and benign offenders mingled, recidivism increased rapidly and, most discouragingly, some children who had merely misbehaved became hardened, recurrent offenders.⁴¹

36. "Punishment" can include a mix of purposes, including incapacitation and retribution. See Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 333-37 (1991).

37. See *In re K.B.*, 639 A.2d 798, 800-01 (Pa. Super. Ct. 1994) (Cirillo, J.) (labeling the system "schizophrenic" because of its equal emphasis on rehabilitation and punishment); see also Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1058 (1995) (recognizing the juvenile system's dual goals); Sheffer, *supra* note 34, at 482-86 (conceding that rehabilitation may be the stated goal, but also explaining that the punishment ethic has been an increasingly important influence on the juvenile court in recent years).

38. See Jennifer M. O'Connor & Linda K. Treat, Note, *Getting Smart About Getting Tough: Juvenile Justice and the Possibility of Progressive Reform*, 33 AM. CRIM. L. REV. 1299, 1303-04 (1996) (describing how the juvenile system quickly fell short of its optimistic aims).

39. *Id.* at 1303 (describing how "the system soon moved toward aggregate treatment as it became overburdened by growing numbers of juvenile offenders," and how its "factory-like approach to dispositions" would send youths through the process "numerous times with little more than a slap on the wrist") (footnote omitted). While industrialization and urbanization at the turn of the century gave rise to Progressive juvenile dogma, the Industrial Revolution no doubt also thrust a heavy juvenile offense rate upon a fledgling system that was not prepared to handle it. See *id.* at 1302-04.

40. See *id.* at 1303-04 (accounting for how the juvenile system unavoidably shifted its focus from rehabilitation to punishment).

41. *Id.* ("Youths were placed in these facilities for periods ranging from weeks to years, and the treatment or response [if any] was not tailored to the severity of the crime."); see also Forst & Blomquist, *supra* note 36, at 332-33 (finding merit to the suggestion "that informal procedures, contrary to original intent, may themselves have constituted a further obstacle to effective

Some statistics and studies thus indicate that the juvenile system has largely failed in its rehabilitative aims,⁴² and that the problem has only grown worse in recent years.⁴³ Perceiving a sharp increase in juvenile crime,⁴⁴ the general public has reacted⁴⁵ to such studies by seeking legislation that makes youths more accountable for their increasingly violent offenses.⁴⁶ A large number of states, therefore, have begun to "crack down" on juvenile offenders.⁴⁷ These states have enacted "get tough" statutes⁴⁸ that allow for increased use of judicial waiver or legislative exclusion of specified offenses. The judicial waiver mechanism gives a juvenile judge wide discretion in deciding whether a youth is dangerous or not amenable to treatment.⁴⁹ If the judge determines that the juvenile "poses a

treatment") (citing PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 85 (1967)).

42. *E.g.*, *In re Gault*, 387 U.S. 1, 21-22 (1967) (refusing to ignore "such startling findings as that reported in an exceptionally reliable study of repeaters or recidivism"). The *Gault* Court referred to the Stanford Research Institute's study for the President's Commission on Crime in the District of Columbia, which revealed that, in 1966, about 66% of sixteen- and seventeen-year-old delinquents brought into custody had been in custody at least once before. *Id.* at 22.

43. See HOWARD N. SNYDER, *JUVENILE ARRESTS 1997* 1 (1998) (indicating that the number of juvenile Violent Crime Index arrests increased by 49% in the decade from 1988-97, while adult Violent Crime Index arrests increased over the same period by only 19%); Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 975 (1995) (showing that juveniles commit a disproportionate amount of crime) [hereinafter Feld, *Violent Youth and Public Policy*].

44. Owing to the statutory trend toward openness, increased press access to juvenile proceedings has fueled public perception of a juvenile crime wave. See Feld, *Violent Youth and Public Policy*, *supra* note 43, at 982-86 (citing Minnesota's statutory trend toward press coverage in only the most serious cases, and arguing that the coverage has shaped public perceptions of, and political responses to, escalation of "violent crime by teenagers, . . . criminal victimization of children[,] . . . guns, gangs, drive-by shootings, random violence, and 'senseless' lethal encounters with juveniles") (footnotes omitted).

45. The public has probably *over-reacted* to these statistics. By selectively (though perhaps necessarily) reporting only the most horrific youth offenses, such as axe murders and sexual assaults, the popular media have probably misled the public into believing that the youth crime problem is worse than it really is. See *id.* at 982-86. Indeed, the "popular media are often careless in distinguishing juveniles from those over eighteen years of age. Since so many young adults continue to dress and act like teenagers, adult offenders may often be mistaken for juveniles, when in fact they are not." *Id.* at 983 n.69 (quoting Peter W. Greenwood, *Juvenile Crime and Juvenile Justice*, in *CRIME* 91 (James Q. Wilson & Joan Petersilia eds., 1994)).

46. See generally TORBET & SZYMANSKI, *supra* note 7.

47. See generally Feld, *Race and the "Crack Down" on Youth Crime*, *supra* note 3; see also Forst & Blomquist, *supra* note 36, at 323-24; Lisa Stansky, *More and More States are Telling Teens: If You Do an Adult Crime, You Serve the Adult Time*, 82 A.B.A. J., Nov. 1996, at 60, 61 (showing concern that states are "allowing prosecutors to file certain charges directly in criminal court, [and] empowering juvenile judges to impose adult-style sentences").

48. Sheffer, *supra* note 34, at 491 (describing states' "get tough" approaches). See generally PATRICIA M. TORBET ET AL., *TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS* (1998).

threat to public safety," she can waive jurisdiction over the youth, and send the case to adult criminal court.⁵⁰ Similarly, the legislative exclusion mechanism automatically excludes certain enumerated offenses from juvenile court jurisdiction, directing these more serious cases to the adult system by default.⁵¹ Each of these statutory options assumes that punishment serves many, or even most, youths better than does rehabilitation.⁵²

In light of the states' legislation, several commentators have challenged the rehabilitative characterization of juvenile justice.⁵³ Some of them argue that the system's dual purposes can coexist and do justify the juvenile court's continued existence,⁵⁴ while others insist on merging the juvenile system into the adult criminal struc-

49. Feld, *Transformation of the Juvenile Court*, *supra* note 3, at 703-06 (explaining judicial waiver at length); see also TORBET & SZYMANSKI, *supra* note 7, at 4 (updating states' judicial waiver schemes through 1997, and showing that forty-six jurisdictions had provided for it).

50. Feld, *Transformation of the Juvenile Court*, *supra* note 3, at 703-04.

51. *Id.* at 706-08 (explaining legislative exclusion at length); see also TORBET & SZYMANSKI, *supra* note 7, at 4 (updating states' legislative exclusion schemes through 1997, and showing that twenty-eight jurisdictions had provided for it); O'Connor & Treat, *supra* note 38, at 1312 (indicating that exclusion is typically reserved for "those juveniles accused of serious offenses such as murder and other offenses against persons") (footnote omitted).

52. See Federle, *supra* note 3, at 50 (asserting that "[a]utomatic waiver provisions inherently contradict the concept of child incompetence and eliminate the very justification for a separate juvenile court"). Some evidence indicates that these increasingly punitive measures have not helped recidivism rates. See Donna M. Bishop et al., *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 129, 155 (1998) (finding that the best evidence indicates that neither rehabilitation nor "the rush to impose adult status on juveniles" is preventing offenders from offending again); Richard E. Redding, *Examining Legal Issues: Juvenile Offenders in Criminal Court and Adult Prison*, 61 CORRECTIONS TODAY, Apr. 1, 1999, at 92, available at 1999 WL 14218781 (declaring that "[c]learly, transfer to criminal court results in higher recidivism rates for most types of offenders").

53. See, e.g., Ainsworth, *Re-Imagining Childhood*, *supra* note 3, at 1105 ("From a world in which the child by definition was morally incapable of committing a crime, we have now passed to a world in which juveniles are to be held strictly accountable for their crimes."); Federle, *supra* note 3, at 38-39 & n.79 ("The new juvenile court is a model of accountability, retribution, and deterrence."); Feld, *Abolish the Juvenile Court*, *supra* note 3, at 68 (remarking that state "reforms have converted the historical ideal of the juvenile court as a social welfare institution into a penal system that provides young offenders with neither therapy nor justice"); Forst & Blomquist, *supra* note 36, 374-75; Rosenberg, *supra* note 3, at 165-66; Charles E. Springer, *Rehabilitating the Juvenile Court*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 397, 398 (1991) (finding an "inherent conceptual fallacy [in the assertion] that a court can be made into a clinic"). But see Martin, *Is There Still a Place for Rehabilitation?*, *supra* note 24, at 59. Judge Martin indicates that he has not completely given up on rehabilitation, which he believes could be salvaged by offering "alternatives to the increased transfer and exclusion of juveniles that might temper the concerns of the public with less compromise of the rehabilitative ideal." *Id.* at 64.

54. See, e.g., Martin, *Is There Still a Place for Rehabilitation?*, *supra* note 24, at 63-64; Rosenberg, *supra* note 3, at 184-85 (rejecting the abolitionist solution but agreeing with Professor Feld that juvenile courts impose punishment in the name of treatment); Sheffer, *supra* note 34, at 510.

ture.⁵⁵ These two camps do agree, however, that as the present juvenile court steadily becomes a more punitive mechanism, procedural rights must be strengthened concomitantly because youths risk a greater loss of liberty.⁵⁶

B. From *Parens Patriae* to Procedure

1. Early Visions of *Parens Patriae*

As with the early aim of rehabilitation, the doctrine of *parens patriae* in the juvenile court was promising at the outset. With this guardianship ideal⁵⁷ in mind, the early reformers attempted to differentiate the juvenile institution from the existing criminal system.⁵⁸ The juvenile court was "civil" in nature, and its processes

55. E.g., Ainsworth, *Re-Imagining Childhood*, *supra* note 3, at 1118; Federle, *supra* note 3, at 49-51; Feld, *Abolish the Juvenile Court*, *supra* note 3, at 69; Francis Barry McCarthy, *Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale*, 52 N.Y.U. L. REV. 1093, 1118 (1977) (resolving that "it would be more efficient to preserve the distinction between adult and youth sentencing by incorporating it into a criminal statute than by maintaining a separate judicial system").

56. See, e.g., Ainsworth, *Re-Imagining Childhood*, *supra* note 3, at 1118-32 (arguing, in a section entitled "Abolishing the Separate and Unequal Juvenile Court," that the court's procedural informalities no longer make sense in a society where the "child-adult dichotomy" has been obliterated by punitive juvenile legislation); Federle, *supra* note 3, at 51 (lamenting that "[a]lthough the distinction between delinquency and crime has blurred, there has been no concomitant expansion of constitutional protections nor a willingness to enforce existing legal rights"); Feld, *Abolish the Juvenile Court*, *supra* note 3, at 87 (similarly protesting that "[d]espite the criminalizing of juvenile courts, most states provide neither special procedures to protect youths from their own immaturity nor the full panoply of adult procedural safeguards"); McCarthy, *supra* note 55, at 1112 ("Th[e] shift away from a preoccupation with individualized treatment toward a more traditional criminal law approach to juvenile justice serves as the catalyst for a change in the procedures by which dispositional decisions are to be made."); Rosenberg, *supra* note 3, at 174-75 (arguing that the separate juvenile system should be retained because, if appropriate reforms were enacted, the juvenile system would promise *stronger* procedural protections for youths than would the adult criminal system); see also *Kent v. United States*, 383 U.S. 541, 556 (1966) (not yet applying constitutional protections to juvenile proceedings, but finding that children in juvenile courts "receive[] the worst of both worlds" because both rehabilitative resources and procedural protections from punishment are lacking); David R. Barrett et al., Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 808-10 (1966) (finding, before *Gault*, that the system lacked resources to adequately rehabilitate youths, and that its informal in-court and out-of-court procedures could not be justified) (cited in *In re Gault*, 387 U.S. 1, 11 & n.7 (1967)).

57. See RYERSON, *supra* note 3, at 66 (describing the *parens patriae* doctrine as "[t]he belief that the delinquent resembled the dependent in that each had suffered at the hand of society, and that both therefore needed the protection of the state").

58. See WATKINS, *supra* note 3, at 157; see generally *id.* at 127-216 (describing at length the overall structure of the juvenile courtroom, pretrial process, adjudication, and disposition procedures). "[T]he child savers opted for a setting less ceremonial and intimidating than the tradi-

were directed toward discovering the cause of a child's delinquency.⁵⁹ This enabled the court and its probation staff, as *parens patriae*, to shape a personalized disposition that fit the "best interest of the child."⁶⁰ The juvenile in need of the court's help was not to be found "guilty," and the proceedings were "non-judgmental."⁶¹

A judge in this system needed wide discretion in crafting the ideal and case-specific disposition.⁶² That latitude allowed for tailored sentences, and it also permitted the judge to "waive" jurisdiction over particularly persistent or violent offenders when even specialized treatment could not help.⁶³ Notably, transfer maintained the paternalistic ideal; these persistent offenders simply had less hope of realizing the rehabilitation brought by *parens patriae*, and were thought to be better served by a punitive criminal system.⁶⁴

2. The Shift Toward Procedure

The Supreme Court first acknowledged the suspect nature of the *parens patriae* doctrine in *In re Gault*,⁶⁵ finding that "[t]he Latin phrase proved 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."⁶⁶ In *Gault*, *In re Winship*,⁶⁷ and *Breed v. Jones*,⁶⁸ the Court responded to this revelation of a disturbing "gap between the originally benign conception of the [juvenile] justice system and its

tional criminal courtroom." *Id.* at 157. The "tone and atmosphere was more akin to a child-guidance clinic than to a judicial proceeding." *Id.*

59. *See id.* at 157-58.

60. *Id.*

61. *Id.* at 49.

62. *See* CHRISTOPHER MANFREDI, *THE SUPREME COURT AND JUVENILE JUSTICE* 184 (1998) (stating that juvenile court judges have enjoyed "almost unlimited discretion to impose indeterminate dispositions"); Feld, *Transformation of the Juvenile Court*, *supra* note 3, at 700 (observing that "[h]istorically, juvenile court sentences were discretionary [and] indeterminate").

63. Of course, the power to decide whether a given offender is particularly persistent or violent resides solely with the judge. *See* Feld, *Transformation of the Juvenile Court*, *supra* note 3, at 701 (explaining that, under judicial waiver, "a judge may transfer jurisdiction on a discretionary basis after a hearing to determine whether a youth is amenable to treatment or a threat to public safety").

64. *See id.*

65. *In re Gault*, 387 U.S. 1 (1967).

66. *Id.* at 16.

67. *In re Winship*, 397 U.S. 358 (1970).

68. *Breed v. Jones*, 421 U.S. 519 (1975).

realities"⁶⁹ by steadily "mak[ing] applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions."⁷⁰ In doing so, the Court repeatedly affirmed that the elusive *parens patriae* ethic must give way to young offenders' due process rights.

In *Gault*, the Court held that juveniles are entitled to 1) adequate and timely notice of charges;⁷¹ 2) legal counsel;⁷² 3) confrontation and cross-examination of witnesses;⁷³ and 4) the privilege against self-incrimination.⁷⁴ The *Gault* Court acknowledged that the juvenile court's founders had insisted upon discarding the "apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law,"⁷⁵ but it nonetheless insisted that "[d]ue process of law is the primary and indispensable foundation of individual freedom."⁷⁶ While the Court had not specified whether juveniles were entitled to any procedural protections whatsoever prior to this constitutional landmark,⁷⁷ the *Gault* decision removed all doubt by emphatically and famously declaring that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁷⁸

In *Winship*, the Court extended to juvenile proceedings the traditional criminal procedural requirement that guilt be estab-

69. *Id.* at 528.

70. *Id.* at 528-29. For a complete account of how the Court brought juvenile justice institutions under constitutional control in these cases, see generally MANFREDI, *supra* note 62, at 53-155.

71. *Gault*, 387 U.S., at 31-34. Justice Fortas wrote the majority opinion. *Id.* at 1-59.

72. *Id.* at 34-42.

73. *Id.* at 42-57.

74. *Id.*

75. *Id.* at 15.

76. *Id.* at 20-21 & n.27 (citing *Malinski v. New York*, 324 U.S. 401, 414 (1945) (opinion of Frankfurter, J.) ("The history of American freedom is, in no small measure, the history of procedure.")).

77. See Monrad G. Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 SUP. CT. REV. 233, 233-34 (quipping that one obscene and offensive telephone call to a neighbor assured Gerald Francis Gault "a kind of immortality [because h]is name is carried by the first juvenile court case in history to be decided on constitutional grounds").

78. *Gault*, 387 U.S. at 13. For two excellent synopses of this and the other *Gault* holdings, published shortly after the decision, see generally Paulsen, *supra* note 77, and *The Supreme Court, 1966 Term—Leading Cases*, 81 HARV. L. REV. 171 (1967). For a more extensive discussion of the decision and the context from which it sprung, see generally B. JAMES GEORGE, *GAULT AND THE JUVENILE COURT REVOLUTION* (1968) (providing a commentary of the case as well as transcripts and briefs from every phase of the *Gault* litigation). The "revolution" description of *Gault* predominates; the decision is by far the most important development in the juvenile court's history. See, e.g., Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 54 (1984) ("Akin to *Brown v. Board of Education*, *Gault* has been hailed as the 'keystone' of the rise of a nationwide 'children's liberation' movement.").

lished by proof beyond a reasonable doubt.⁷⁹ The Court held for the first time that the reasonable doubt standard in adult criminal trials is of constitutional stature.⁸⁰ The Court reasoned that "[t]he accused during a criminal prosecution has at stake [an] interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction."⁸¹ Having made this significant clarification about the reasonable doubt standard, the *Winship* Court then proceeded to apply the constitutional requirement to juvenile delinquency proceedings, finding that "[t]he same considerations that demand extreme caution in factfinding to protect the innocent adult apply as well to the innocent child."⁸² Quoting *Gault*, the Court thus held that the Due Process Clause requires the reasonable doubt safeguard in juvenile courts because a "proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution."⁸³

Finally, in *Breed v. Jones*, a unanimous Court held applicable in juvenile proceedings the Fifth Amendment's guarantee that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."⁸⁴ The Court "believe[d] that it [was] simply too late in the day to conclude . . . that a juvenile is not put in jeopardy at a proceeding whose object is to determine whether he has committed acts that violate a criminal law and whose potential consequences include both the stigma inherent in such a determination and the deprivation of liberty for many years."⁸⁵

79. *In re Winship*, 397 U.S. 358, 368 (1970) (holding that, because juveniles are subject to confinement, they are entitled to this safeguard "as a matter of due process") (quoting *In re Winship*, 247 N.E.2d 253, 260 (N.Y. 1969) (Fuld, C.J., dissenting)).

80. *Id.* at 364 ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

81. *Id.* at 363.

82. *Id.* at 365.

83. *Id.* at 366 (quoting *Gault*, 387 U.S. at 36). For a more complete synopsis of the *Winship* decision, see generally *The Supreme Court, 1969 Term—Leading Cases*, 84 HARV. L. REV. 156 (1970).

84. U.S. CONST. amend. V. (incorporated into the Fourteenth Amendment against the states in *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (declaring that the Double Jeopardy Clause is a "fundamental ideal in our constitutional heritage" and, as such, must be enforced against the states)); see generally *Breed v. Jones*, 421 U.S. 519 (1975).

85. *Breed*, 421 U.S. at 529 & n.11 (eschewing, once again, the "civil label-of-convenience, which has been attached to juvenile proceedings") (quoting *Gault*, 387 U.S. at 50).

In each of the foregoing cases, the Court's repeated emphasis on a juvenile's loss of liberty highlights the crucial role that due process plays in the juvenile context. While those three cases do, indeed, help to ensure the procedural soundness of delinquency proceedings, significant and unseen procedural infirmities persist inside the juvenile courtroom.⁸⁶ Chief among these are statutes dictating the courts' presumptive closure.

C. What Goes on Behind Closed Doors?

1. Early Visions of Closure

The presumptive closure statutes were enacted on the assumption that open proceedings and disclosure of the juvenile's identity would inhibit his⁸⁷ rehabilitation.⁸⁸ Public humiliation and

86. Professor Feld contends that *Gault* and its progeny "represent[] a procedural revolution that failed and that produced unintended negative consequences." Feld, *Race and the "Crack Down" on Youth Crime*, *supra* note 3, at 350 (emphasis in original). He demonstrates that, "[p]rocedurally, a substantial gulf still remains between the 'law on the books' and the 'law in action' in juvenile courts" because, on one hand, "states' laws and policies treat juveniles just like adults when formal equality results in practical inequality." *Id.* at 351-52 & n.74 (citing as an example the *Miranda* waiver setting, in which "almost all states use the adult standard of 'knowing, intelligent, and voluntary waiver' . . . even though juveniles lack the competence of adults"); see also *Fare v. Michael C.*, 442 U.S. 707, 724-27 (1979) (applying the knowing, intelligent and voluntary waiver under-the-totality-of-the-circumstances test to the juvenile context). And on the other hand, Feld points out, "even as juvenile courts have become more punitive, most states continue to deny juveniles access to jury trials and to other procedural rights guaranteed to adults." Feld, *Race and the "Crack Down" on Youth Crime*, *supra* note 3, at 353-54 (citing Feld, *Violent Youth and Public Policy*, *supra* note 43, at 1099-1108 (discussing states' provisions and case law regarding juvenile jury trials)).

Other juvenile law scholars have also lamented that the system has fallen short of what *Gault*, *Winship*, and *Breed* seemed to promise procedurally when they were handed down. See, e.g., Ainsworth, *Youth Justice in a Unified Court*, *supra* note 3, at 928 ("[J]uveniles accused of law violations receive procedurally and substantively inferior adjudication in comparison to that accorded adult defendants . . . The trials that juveniles accused of crimes do receive are all too often perfunctory and barely contested."); Melton, *supra* note 20, at 170, 172 (citing studies that "have shown that juvenile respondents rarely assert their [F]ifth and [S]ixth [A]mendment rights . . . [and] there can be no question of its adverse consequences. Not only do juveniles often waive their rights to silence and counsel during interrogation, they often are not represented by counsel at any stage of the proceeding.") (emphasis in original).

87. This Note often uses the terms "he" and "his" because most juvenile offenders are male. See SNYDER, *supra* note 43, at 7 (showing that 74% of all juveniles taken into custody are male). The percentage of female arrests, however, has increased in recent years. See *id.*

88. WATKINS, *supra* note 3, at 49 ("Clearly, condemnation and community and personal stigma were to be avoided at all costs."); see also Mack, *supra* note 30, at 115 (recommending that, to promote rehabilitation, "children's cases [should] be heard in a court held in a separate room or at a separate time from the courts which are held for adult cases, and . . . the public who

criminal stigma were perceived as harmful to the juvenile's self-image and to his motivation to engage in socially acceptable behavior.⁸⁹ Originally, the statutes were intended to keep a troubled youth's court proceedings and records sealed to assist in counteracting this potential stigmatizing effect.⁹⁰ Intimate and sensitive information about the offender would be essential for prescription of appropriate treatment, and closure would ensure that such information would be freely given to social servants without falling into the wrong hands.⁹¹ Finally, keeping the information private would prevent any outside political pressure and interference with the judicial process.⁹²

2. The Unforeseen (and Unseen) Effects of Closure

Given that legislators have accommodated public cries for juvenile punishment and accountability,⁹³ and given that the Supreme Court has extended several important procedural protections to juvenile proceedings,⁹⁴ closure is much more difficult to justify today than at the time of the statutes' enactment. In addition, while

are not concerned in the cases [should] be excluded from admission") (citing Herbert Samuels, an English Member of Parliament who introduced this principle in the House of Commons).

89. See WATKINS, *supra* note 3, at 49. The Supreme Court has recognized that this is indeed the systemic goal of closure: hiding "youthful errors from the full gaze of the public and bury[ing] them in the graveyard of the forgotten past" so that youths may be re-integrated into productive society. *In re Gault*, 387 U.S. 1, 24 (1967). Nevertheless, while Chief Justice Rehnquist has staunchly defended the closure policy as a means to the rehabilitation end, see *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 108 (1979) (Rehnquist, J., concurring), the Court on the whole has found only a tenuous link between closure and rehabilitation. See, e.g., *Gault*, 387 U.S. at 24 & n.31, 26-27 & n.37 (citing evidence that closed proceedings and informal procedures may actually decrease the odds of effectively rehabilitating a delinquent); MANFREDI, *supra* note 62, at 120-21.

90. See WATKINS, *supra* note 3, at 49. Watkins discusses the early goal of establishing "a tribunal whose processes would largely avoid public scrutiny through closed-door proceedings and the judicial sealing of juvenile records." *Id.*

91. See *id.* at 122 ("[T]he collection of a maximum amount of personal data on the child is considered a necessary predicate for equitable judgments. Under *parens patriae*, the generating of information on a juvenile is considered part and parcel of the special obligation incurred by the state to assure proper dispositional alternatives.").

92. See *id.* at 122-26 (noting, however, that many commentators question this justification for a hidden process, especially considering recent revolutions in technology, which assist determined parties in finding the information anyway).

93. See *supra* Part I.A.2; see also Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 390-91 (demonstrating that legislators have emphasized criminal punishment objectives in response to the public's reaction to higher offense rates and its "perception that the increase is somehow related to the failure of the juvenile court").

94. See *supra* Part I.B.2.

they are unforeseen and unintended effects, judicial abuse and systemic malfunction have often closely followed closure.⁹⁵

Disturbingly, a juvenile judge's actual power and discretion to "treat" youths flows from the state's *police* power via a statute.⁹⁶ Indeed, it is "a function of the social contract, representing power ceded to the government by the people to restrict the freedom of [juveniles] for the protection of public welfare, order and security."⁹⁷ This "authoritarian nature of the [adjudication] enterprise"⁹⁸ not only undermines the assumption that the judge always acts in the best interest of the child,⁹⁹ it also begs for some check on the far-ranging discretion¹⁰⁰ that judges exercise sight unseen in presumptive closure jurisdictions. This unchecked, unseen discretion is es-

95. See *infra* notes 100-09 and accompanying text.

96. See Stephen Wizner, *On Youth Crime and the Juvenile Court*, 36 B.C. L. REV. 1025, 1031-32 (1995) (accounting for the juvenile court's mandate) [hereinafter Wizner]; see also Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 562 (1984) ("Non-culpable children faced with the criminal process must be protected, not by the state, but from state . . . This, in sum, is the received wisdom of the last twenty-five years of juvenile sociological and jurisprudential study.") (emphasis added); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120, 1126 (1977) (repudiating "the idea that the state, in the form of the juvenile court and under the guise of omniscient benefactor, is best able to effect social goals relating to child development") [hereinafter Wizner & Keller].

97. Wizner, *supra* note 96, at 1031.

98. *Id.* at 1032.

99. See *id.* (recognizing "that when, in an authoritative setting, we attempt to do something for a child 'because of what he is and what he needs,' we are also doing something to him Whatever one's motivations, however elevated one's objectives, . . . the measures taken result in the compulsory loss of the child's liberty.") (quoting FRANCIS A. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 18 (1964)).

100. See *supra* Part I.B.1 (discussing the original need for wide judicial discretion to shape a personalized disposition fitting the "best interest of the child"); see also Wizner & Keller, *supra* note 96, at 1123 (discussing the "unbridled discretion of juvenile courts to intervene in the lives of children and their families and to impose coercive sanctions disproportionate to the behavior that triggered its [sic] jurisdiction"). The Supreme Court has acknowledged the juvenile judge's wide discretion in sentencing and in waiving jurisdiction, most notably in *Kent v. United States*, 383 U.S. 541, 552-53 (1966) (finding that the statute at issue contemplated considerable latitude for a judge to render treatment tailored to a particular offender's needs). Nevertheless, in reminding juvenile judges that they must comport with due process standards, the Court has promulgated certain criteria creating boundaries on that discretion. See *id.* at 553, 566-67. The criteria that govern waiver include the seriousness of the offense, the merit of the complaint, the juvenile's history and maturity, and the prospects for rehabilitation. See *id.*; see also Federle, *supra* note 3, at 33-34 & n.51 (discussing *Kent*). These criteria were codified in the Juvenile Justice Delinquency Prevention Act ("JJDPA"). See 18 U.S.C. § 5032 (1994).

Many states have also reduced judicial discretion on their own accord by promulgating statutory juvenile sentencing schemes, but these have often proven harsh. See Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of the Children*, 33 NEW ENG. L. REV. 39, 63 (1998) (describing how statutes like California's "three-strikes" law have dramatically affected youths). Moreover, such schemes seem to indicate that many, if not most, states have abandoned efforts to personalize dispositions in the best interest of the child.

pecially troubling in light of empirical evidence indicating that juvenile judges often not only lack the innate ability to treat delinquent youths adequately,¹⁰¹ but that some may be careless, arbitrary, or even racist in adjudication.¹⁰²

While unchecked judicial abuse in the juvenile process probably owes as much to a broad delegation of authority as it does to closure, institutional malfunction seems to be a direct effect of closure.¹⁰³ Although the juvenile court's founders supposed that closure encouraged free-flow of information among the system's participants,¹⁰⁴ it can actually be counterproductive, impeding adjudication by causing "misinformation and delay."¹⁰⁵ Adjudications may be postponed because juvenile information agencies sometimes balk at sharing confidential information.¹⁰⁶ At its worst, closure "handicap[s] the authorities and endanger[s] the community" by preventing information exchange between juvenile and adult law enforcement agencies.¹⁰⁷ This information is vital in today's legislative

101. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 544 & n.4 (1971). The *McKeiver* Court cited a President's Commission Task Force Report, which indicated to the Court that "the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged." *Id.* at 544.

102. See Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 405 (1996) (concluding from a quantitative analysis of Florida's juvenile system that there are "clear disadvantages for nonwhites at multiple stages in delinquency case processing. While the magnitude of the race effect varies from stage to stage, there is a consistent pattern of unequal treatment."); Podkopacz & Feld, *An Empirical Study of Judicial Waiver*, *supra* note 4, at 453 (concluding, based on an in-depth statistical analysis, that "[t]he subjective nature of waiver decisions allows unequal application of the law to similarly situated youths without any effective check. Juvenile courts cannot administer these discretionary statutes on a consistent, even-handed basis."); Robert J. Sampson & John H. Laub, *Structural Variations in Juvenile Court Processing: Inequality, the Underclass, and Social Control*, 27 LAW & SOC'Y REV. 285, 293 (1993) (arguing that political leaders have used juvenile courts to keep members of the underclass under "social control"); Sanborn, *supra* note 9, at 235 ("Judges have been found to be biased against juveniles because they had discovered the defendant's record before trial, remembered the youth from previous crimes or from previous hearings for the current offense, or learned the child had been held in detention.").

103. See generally Jan L. Trasen, Note, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. THIRD WORLD L.J. 359 (1995) (concluding that closed hearings protect the system, not the child).

104. See WATKINS, *supra* note 3, at 122 (stating that "[t]he confidentiality concept was advanced to foster a complete and unfettered information flow among and between the juvenile, and the court and probation staff").

105. Trasen, *supra* note 103, at 380 (demonstrating that sealing of records and closure have fostered anything but unfettered information flow).

106. See Martin, *Open the Doors*, *supra* note 9, at 407 (describing one case in which "[i]t took a court order to the agencies involved to convene . . . [and] break the gridlock").

107. Trasen, *supra* note 103, at 380.

schemes, because transfer from the juvenile system to the adult system is occurring with increasing frequency.¹⁰⁸

These problems, as well as the transformations outlined earlier in this Part, have led some commentators to recommend abandoning closure—or even the entire juvenile system—as a matter of policy.¹⁰⁹ In contrast, the next Part turns its attention to some of the constitutional implications of these developments.

II. CONSTITUTIONAL DOCTRINE: THE FOURTEENTH AMENDMENT DUE PROCESS CLAIM

The Fourteenth Amendment provides that “[n]o State shall . . . deprive any person of life, liberty, or property without due process of law.”¹¹⁰ The Due Process Clause, of course, incorporates many of the original Bill of Rights’ provisions as protections against state action.¹¹¹ Thus, the press’s First Amendment claim and the juvenile’s Sixth Amendment claim against the state-enacted presumptive closure statutes are, structurally, Fourteenth Amendment claims.¹¹²

Section A outlines the First Amendment and Sixth Amendment challenges to presumptive closure statutes. Illustrating that,

108. The 1980s and 1990s brought waiver figures to unprecedented highs, especially because of new “prosecutorial waiver” mechanisms. See Feld, *Race and the “Crack Down” on Youth Crime*, *supra* note 3, at 358-59, 369 (noting that the “rate of judicial waiver increased 68% between 1988 and 1992,” observing that forty-seven states since 1992 have enacted tougher transfer laws, and suggesting that this recent “tidal wave of law reforms . . . disproportionately affects young black men”).

109. See *supra* note 3 (enumerating a number of scholars’ works proposing abolition because of these problems).

110. U.S. CONST. amend. XIV, § 1.

111. See AKHIL REED AMAR, *THE BILL OF RIGHTS* xiv (1998) (describing incorporation’s “three main approaches—Hugo Black’s ‘total incorporation’ theory, William Brennan’s ‘selective incorporation’ model, and Felix Frankfurter’s ‘fundamental fairness’ doctrine”) [hereinafter AMAR, *THE BILL OF RIGHTS*].

112. Structurally speaking, the press would challenge a closure statute as a deprivation of its “liberty” of First Amendment access to delinquency proceedings. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, *CONSTITUTIONAL LAW* 454 (13th ed. 1997) (describing substantive due process generally, and noting that “the term ‘liberty’ is . . . the major basis of the Court’s active enforcement of personal rights today . . . [including] the ‘specific’ First Amendment guarantees of freedom of speech, press and religion long ‘incorporated’ into the 14th Amendment”).

A juvenile would challenge a closure statute as a deprivation of his “liberty”—freedom from incarceration—without the proper procedures. That is, he would charge that a public trial, by its very enumeration in the Sixth Amendment, is essential to an accurate determination of whether, and for how long, he should be incarcerated (or whether he should be waived into the adult criminal court system). See *id.* at 432-34 (discussing “due” criminal procedures and the structural debate over the Bill of Rights’ criminal protections’ incorporation into the Due Process Clause).

in light of current Supreme Court precedent, the statutes may well pass constitutional muster under these incorporated protections, it introduces an alternative but related freestanding due process challenge, which is explicated in Section B. This Part concludes by demonstrating that the closure statutes are unconstitutional under the Due Process Clause and the Court's accompanying "fundamental fairness" jurisprudence.

A. Failed Attempts: Rejecting Two Incorporated Protections in the Juvenile Context

1. The Press's First Amendment Claim

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." ¹¹³ While the First Amendment freedom of the press is incorporated into the Fourteenth Amendment as a check on state governments, ¹¹⁴ that restriction has traditionally been more vigorous in protecting the press's dissemination of information lawfully obtained ¹¹⁵ than in protecting the obtainment itself. ¹¹⁶ Thus, states enacting statutes that presumptively close court proceedings may be able to deprive the press of its access to a courtroom without violating the First Amendment. That is, if access to court proceedings is not found to be within the freedom of the press, its curtailment by presumptive or mandatory closure statutes will likely pass constitutional muster. ¹¹⁷

113. U.S. CONST. amend. I.

114. See *Near v. Minnesota*, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the [D]ue [P]rocess [C]lause of the Fourteenth Amendment from invasion by state action."); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) ("[The] right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment.").

115. See Potter Stewart, *Address, Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975) (indicating that "the autonomous press may publish what it knows").

116. See *id.* (acknowledging that the media "may seek to learn what it can," but remarking that the "Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act"). But see William J. Brennan, Jr., *Address*, 32 RUTGERS L. REV. 173, 177 (1979) (stating that, under the "structural model" of press freedom, "[t]he press is not only shielded when it speaks out, but when it performs all the myriad tasks necessary for it to gather and disseminate the news"); Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838, 864 (1971) (concluding that courts should interpret the freedom of the press "to include protection for essential and unique functions of the information media, especially the gathering of information").

117. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (applying extremely deferential 'rational basis' scrutiny to a state regulation prohibiting homosexual sex, a personal liberty not

The central issues thus become, first, the constitutional status of press access to courts, and second, in accordance with that status, the level of scrutiny a court will apply to statutes presumptively closing court proceedings. The Supreme Court addressed these two questions respectively in *Richmond Newspapers, Inc. v. Virginia*¹¹⁸ and *Globe Newspaper Co. v. Superior Court*.¹¹⁹

In *Richmond Newspapers*, a 7-1 decision with seven opinions and no majority,¹²⁰ the Court held that press access to criminal proceedings does receive at least some level of First Amendment protection, and that its curtailment by the state would thus be restricted by Fourteenth Amendment substantive due process. Writing for the plurality,¹²¹ Chief Justice Burger declared:

Free speech carries with it some freedom to listen . . . What this means in the context of trials is that the First Amendment guarantees of free speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.¹²²

The plurality acknowledged the obvious argument that "the Constitution nowhere spells out a guarantee for the right of the public to attend trials."¹²³ Nevertheless, it viewed access as a necessary corollary to the enjoyment of the more established freedoms of speech, press, and assembly.¹²⁴ It reasoned that those enumerated liberties "would lose much meaning," and that purposeful discussion of the criminal system would come to a standstill, if "access to observe the trial could . . . be foreclosed arbitrarily."¹²⁵

listed in the text of the Constitution); cf. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955) (applying extremely deferential 'rational basis' scrutiny to an economic regulation, finding that "it is for the legislature, not the courts, to balance the advantages and disadvantages" of those laws affecting unlisted economic liberties).

Nonetheless, the freedom to gather news at court proceedings may garner more vigorous constitutional protection than other newsgathering in general because "the information is released in a forum . . . not wholly internal to the government." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-20 at 955 (2d ed. 1988).

118. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

119. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

120. For a complete discussion of the Court's opinions, see generally *The Supreme Court, 1979 Term—Leading Cases*, 94 HARV. L. REV. 149 (1980).

121. Chief Justice Burger's judgment was joined by Justices White and Stevens. See *Richmond Newspapers*, 448 U.S. at 558.

122. *Id.* at 576. The plurality also recognized a First Amendment right to "receive information and ideas." *Id.* (quoting *Kleindeinst v. Mandel*, 408 U.S. 753, 762 (1972)).

123. *Id.*

124. *Id.* at 579 (recognizing that "important but unarticulated rights have . . . been found to share constitutional protection in common with [such] explicit guarantees").

125. *Id.* at 577; see also *The Supreme Court, 1979 Term—Leading Cases*, *supra* note 120, at 150.

The plurality also analyzed the adult criminal proceeding's "uncontradicted history," which indicated that "openness inheres in the very nature of a criminal trial under our system of justice."¹²⁶ Upon reviewing an array of historical and philosophical sources emphasizing the trial's public nature,¹²⁷ it found ample evidence to support the newspaper's claim that access "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system."¹²⁸ Concurring, Justice Brennan agreed with the plurality on this point, stressing the long tradition of open criminal proceedings.¹²⁹ Justice Brennan declared that "the case for a right of access has special force when drawn from an enduring and vital tradition of public entrée . . . because the Constitution carries the gloss of history."¹³⁰

Two years later, the Court in *Globe Newspaper*¹³¹ continued its line of reasoning from *Richmond Newspapers*, holding that it would apply strict scrutiny to any statute presumptively closing criminal trials.¹³² In striking down a Massachusetts statute requiring the press's exclusion from a criminal proceeding during a minor victim's testimony, the Court solidified the scattered opinions of *Richmond Newspapers*.¹³³ It held that, to justify statutorily excluding the press from such trials, the state must show that denial of access "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."¹³⁴

126. *Richmond Newspapers*, 448 U.S. at 573.

127. *Id.* at 565-73 & nn.5-8. Among other sources, the Court relied heavily on numerous early English cases and well-known English scholars, including Holdsworth, Lord Coke, Sir Frederick Pollock, and Jeremy Bentham. *Id.*

128. *Id.* at 573 (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring in the judgment)).

129. *Id.* at 589-93 (Brennan, J., concurring) (concluding that "[t]radition, contemporaneous state practice, and this Court's own decisions manifest a common understanding that [a] trial is a public event") (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)). Justice Brennan's concurrence, joined by Justice Marshall, contained a two-part "experience and logic" test, the strand of reasoning upon which the Court has since most heavily relied. *See generally* Dalton, *supra* note 15 (describing Justice Brennan's framework and its development over a string of the Court's access decisions, and applying it to juvenile delinquency proceedings).

130. *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring) (citation omitted).

131. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

132. *Id.* at 606-07 (holding that "the State's justification in denying access must be a weighty one").

133. *Id.* at 602 (reversing the lower court's judgment by finding that the Massachusetts mandatory closure rule was unconstitutional under the First Amendment). This time there was a majority opinion, written by Justice Brennan, who was joined by four other justices. Justice O'Connor filed an opinion concurring in the judgment. *Id.* at 611. Chief Justice Burger filed a dissent in which Justice Rehnquist joined. *Id.* at 612. Justice Stevens filed a separate dissent on the ground of mootness, accusing the Court of writing an advisory opinion. *Id.* at 620-21.

134. *Id.* at 606.

Noting that “the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole,”¹³⁵ the Court found that Massachusetts’ statutory justifications for closure failed the second prong of the compelling interest test.¹³⁶ In holding that the Massachusetts law was not “a narrowly tailored means of accommodating the State’s asserted interest,”¹³⁷ it hinted that any statute providing blanket denial of access in criminal cases would fail this prong because a “court can [better] determine on a case-by-case basis whether closure is necessary If the trial court had been permitted to exercise its discretion, closure might well have been deemed unnecessary.”¹³⁸

Justice O’Connor’s concurrence emphasized that the constitutional status of access “rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness.”¹³⁹ She interpreted neither *Richmond Newspapers* nor *Globe Newspaper* “to carry any implications outside the context of criminal trials.”¹⁴⁰ Her desire to write separately is notable; while some courts and commentators have not adhered to her warnings,¹⁴¹ her concurrence may reveal that the Court will refuse to extend *Richmond Newspapers* and *Globe Newspaper* beyond their original criminal scope.¹⁴² Indeed, the Court has not yet made any such extension.

135. *Id.*

136. *Id.* at 608-09.

137. *Id.* at 609.

138. *Id.* at 608-09.

139. *Id.* at 611 (O’Connor, J., concurring).

140. *Id.* (O’Connor, J., concurring).

141. In his well-known treatise, Professor Tribe contends that the *Richmond Newspapers* and *Globe Newspaper* opinions stand for the proposition that the government “must, even at some inconvenience to its courts . . . let the press and the public enter its courtrooms to observe a kind of drama—a forum for *watching* and *listening*, rather than a forum for *speech*.” TRIBE, *supra* note 117, § 12-20 at 965 (emphasis in original). Tribe, who represented *Richmond Newspapers, Inc.*, in the Supreme Court case, believes that the justices’ approaches suggest that most of the Court’s members stand ready to extend access beyond the criminal sphere to civil trials. *See id.* § 12-20 at 962 & nn.55-56. Some courts have made that leap already. *See, e.g.,* *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-79 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). Indeed, the California Supreme Court recently read *Richmond Newspapers* and *Globe Newspaper* this way. *See NBC Subsidiary, Inc. v. Superior Court*, 980 P.2d 337, 351-60 (Cal. 1999). In discussing both cases at length, that court “confirm[ed] the existence and scope of a First Amendment right of access” to civil proceedings in general. *Id.* at 365-67 (applying Justice Brennan’s “logic” and “experience” framework).

142. *Cf. EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* 515-16 (1999). In a controversial “insider’s” account of the Court, Lazarus—who clerked for Justice Blackmun during the 1988 Term—points out that Justice

If lower courts adhere to Justice O'Connor's *Globe Newspaper* concurrence, it will probably be fatal to the press's First Amendment case against the presumptive closure statutes. The Court has held that juvenile proceedings are not "criminal prosecutions" for purposes of the Sixth Amendment,¹⁴³ indicating that they are probably not criminal trials for purposes of the First.¹⁴⁴ More importantly, unlike criminal proceedings, juvenile proceedings have not benefited from "an enduring and vital tradition of public entrée."¹⁴⁵ True, the plurality's observation in *Richmond Newspapers* that the criminal courts "had long been open to the public at the time [the First] Amendment was adopted"¹⁴⁶ applies not only to criminal trials but to delinquency proceedings as well. When the Amendment was adopted in 1791, an independent juvenile system did not yet exist.¹⁴⁷ Trials involving youths, just as those involving adults, were open to the public and press.¹⁴⁸ Nonetheless, notwithstanding recent legislation to the contrary, the longstanding tradition since the juvenile court's founding in 1899, for better or worse, has been closure for the prevention of stigmatization.¹⁴⁹ A press entity seeking to challenge the presumptive closure statutes on First

O'Connor, along with Justice Kennedy, often holds the "swing-vote" on major constitutional issues dividing the justices. *Id.* at ix-x; see also STEPHEN E. GOTTLIEB, *MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA* 106-08 (2000) (describing how Justices O'Connor and Kennedy have largely determined the Rehnquist Court's path on a number of significant constitutional issues); cf. *Bush v. Gore*, 121 S. Ct. 525 (2000) (*per curiam*).

143. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971). For discussion of this aspect of *McKeiver*, see *infra* Part II.A.2.

144. Still, the importance of distinguishing the juvenile's potential Sixth Amendment right to a public trial and the press's (or public's) potential First Amendment right of access to proceedings cannot be overstated. See Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1901-04 (1978) (clarifying this distinction because "discussions of public access to criminal trials readily become intertwined and confused with questions pertaining to the defendant's [S]ixth [A]mendment right a public trial") [*hereinafter* Note, *Trial Secrecy*].

145. *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring).

146. *Id.* at 576 (plurality opinion).

147. See Fox, *supra* note 3, at 1187 (showing a lack of major legislation regarding "the means for dealing with juvenile deviants" until at least 1825). The system as we know it today was not conceived until 1899. See generally *id.* (providing an oft-cited historical analysis of the juvenile system's development).

148. See Dalton, *supra* note 15, at 1201 ("[I]t is undisputed that any juvenile accused of breaking a criminal law was tried in an open, adult criminal trial at the time our organic laws were adopted and the Constitution ratified.") (citing HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 13-14 (1927) (discussing the colonial practice of hanging juveniles as young as eight years old)); see generally Fox, *supra* note 3, at 1187-1221 (describing pre-1899 youth justice, and noting that proceedings were generally held in public even though the juvenile only had a "right" to a public hearing in serious cases).

149. See WATKINS, *supra* note 3, at 49; Mack, *supra* note 30, at 115.

Amendment *Richmond Newspapers* and *Globe Newspaper* grounds, therefore, should not be overly optimistic that the Court will apply those cases, or their accompanying constitutional scrutiny, to the statutes.

Assuming, for the sake of argument, that the Court *does* apply *Globe Newspaper's* compelling interest scrutiny to statutes closing juvenile proceedings,¹⁵⁰ the statutes may still pass the test.¹⁵¹ Admittedly, rehabilitation,¹⁵² the interest that states have repeatedly and exclusively offered as justification for closure,¹⁵³ has fallen short of original expectations.¹⁵⁴ The juvenile court's systemic lack of resources has often landed juvenile offenders in institutions no more rehabilitative than adult prisons.¹⁵⁵ Considering the strin-

150. Dalton applies the "experience and logic" test of the *Richmond Newspapers* line of cases to juvenile proceedings, and convincingly argues that the application *should* trigger the constitutional scrutiny of the Court. See generally Dalton, *supra* note 15. The title of this Section is not meant to suggest that his argument is nothing more than a "failed attempt." On the whole, his conclusion is convincing. Importantly, however, the Court has not yet extended, and may never extend, the *Richmond Newspapers* cases beyond the criminal sphere. Therefore, even if his argument succeeds in some states as a matter of state constitutional law, cf. Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 315 (2000) (suggesting that the Framers "did not conceive of the United States Constitution as the ultimate means of guaranteeing . . . political and personal [freedoms because] [t]hat function was served by other charters and documents—most importantly state constitutions . . .") (footnote omitted), it may not succeed in the Supreme Court, especially in light of Justice O'Connor's *Globe Newspaper* concurrence and the *McKeiver* holding that juvenile proceedings are not "criminal prosecutions." Thus, this Note puts forth an alternative due process argument, see *infra* Part II.B, to bypass this potential roadblock.

151. Once again, Dalton argues that closure will fail the compelling interest test, and, once again, his analysis to that effect is largely convincing. Nonetheless, this Note does not assume that presumptive closure statutes will fail the First Amendment test, especially because the Court has found rehabilitation compelling before. See, e.g., *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971).

It should be recognized either way that the press's interest in access to delinquency proceedings has probably never been more "proper" or "direct" under the text and meaning of the presumptive closure statutes than it is now, because of the transformation of the juvenile court into a more punitive mechanism. See *supra* Part I.A.2; Sanborn, *supra* note 9, at 236-37 (emphasizing the "need for safeguards" in today's juvenile court, including publicity, because of judicial bias and the increasing tendency of severely punishing youths). One juvenile judge also adds that the press has a positive role to play in "rebuilding trust and dissipating the fear" that the public feels now more than ever as a result of both increasing youth crime rates and the closed juvenile system. Martin, *Open the Doors*, *supra* note 9, at 394-95. This judge's conclusion gives one hope that, even if the statutes pass constitutional muster, juvenile judges will find a "direct" or "proper" interest on behalf of the press more frequently than they have in the past.

152. For an extensive review of the general rehabilitation theory and its development over time, see generally RYERSON, *supra* note 3.

153. See Dalton, *supra* note 15, at 1222 & n.415 (describing the "automaton-like recitation of rehabilitation as the driving force behind confidentiality statutes" and listing a number of state supreme court cases wherein the state articulated no other interest).

154. See *supra* Part I.A.

155. See SHAY BILCHICK, A JUVENILE JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (1998) (asserting that the juvenile system has not been able to handle "the challenge presented during the

gency of the compelling interest test,¹⁵⁶ many states could be hard-pressed to empirically justify dispensing with the press's (heretofore unrecognized) constitutional right of access in the name of rehabilitation.¹⁵⁷ Nevertheless, even though it now shares its priority status with punitive goals,¹⁵⁸ rehabilitation is not an entirely useless or unrealistic ideal.¹⁵⁹ Its failure to live up to expectations does not necessarily mean that the Supreme Court would not find it "compelling" under the *Globe Newspaper* test. The Court has recognized the severity of rehabilitation's shortcomings, yet has simultaneously refused to hold "that the system cannot accomplish its rehabilitative goals."¹⁶⁰ It has therefore found rehabilitation a worthy aim that, apparently, holds sufficient promise of success in the future.¹⁶¹

If the state's interest in rehabilitation is compelling—and it may well be—the presumptive closure statutes must still face the stringent narrow tailoring requirement established in *Globe Newspaper*.¹⁶² There, the Court struck down the Massachusetts statute even though it pursued the compelling governmental objective of protecting young rape victims from public embarrassment.¹⁶³ The statute failed the Court's scrutiny because it did not enact the least invasive infringement on the press's right of access.¹⁶⁴

past decade," and has been especially unable to "meet the treatment and rehabilitation needs of each juvenile offender"); see also Dalton, *supra* note 15, at 1182-87 (demonstrating that the juvenile system is hopelessly failing in treatment, and that its condition is "only likely to get worse in the future"). Dalton observes that, "in spite of one-hundred years of rhetoric, juveniles are either placed in 'jail-like' detention homes or jail itself." *Id.* at 1187 (citing SOL RUBIN, *LAW OF JUVENILE JUSTICE* 16-18 (1976)).

156. Compelling interest scrutiny, more often than not, is fatal to the state. See Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 918-19 (1988) (finding a "dearth of commentary" on the standard because of the Court's "lack of analysis" and cavalier dismissals of compelling governmental interests).

157. See Dalton, *supra* note 15, at 1225 (arguing that "generic fears of diminished rehabilitation . . . are likely insufficient to justify closing juvenile courts").

158. See Ross, *supra* note 37, at 1040-41 ("The post-*Gault* juvenile court is characterized by unresolved conflicts between the urge to allow judicial discretion where it serves the purposes of rehabilitation and demands for procedural protections; between the rehabilitative goal and societal demands for retribution; and between idealistic hopes and realistic disappointments."); Sheffer, *supra* note 34, at 482-84 (demonstrating that the system expends as much energy on punishment as it does on rehabilitation).

159. See Martin, *Is There Still a Place for Rehabilitation?*, *supra* note 24, at 64 (concluding that rehabilitation is still attainable on some scale).

160. *McKeiver v. Pennsylvania*, 403 U.S. 528, 547 (1971).

161. *Id.*

162. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608-09 (1982).

163. *Id.* at 608.

164. *Id.*

Statutes presumptively closing delinquency proceedings are arguably unconstitutional as well, because alternative methods of rehabilitation may be constitutionally less invasive than excluding the press from the courtroom. As many states have done, presumptive closure jurisdictions could enact legislation providing for presumptively *open* proceedings,¹⁶⁵ or for open proceedings in the most serious cases.¹⁶⁶ Such legislation would reduce the hazard of judicial abuse¹⁶⁷ because, with a baseline of openness, juvenile judges would have to publicly account for the reasoning underlying their closure of hearings. Arbitrary transfers to adult court would be difficult to justify, thus reducing careless decision-making.¹⁶⁸ Such reforms would appear to be more narrowly tailored than presumptive closure schemes, because they serve the treatment of youths yet still give the press access to more proceedings and require enumeration of particular ways in which closure serves the rehabilitation end. Under some states' recent legislation, for example, judges can only deny access where publicity impedes rehabilitation.¹⁶⁹

Even after considering all of this, however, a cautious reading of *Globe Newspaper* counsels against whole-heartedly subscribing to the First Amendment argument against the presumptive closure statutes. Alternative legislative measures are indeed more palatable than closure statutes as a policy matter, but most of the closure statutes do not provide for the same type of blanket exclu-

165. See ARIZ. JUV. CT. R. 7(c)(3) (West 1997 & Supp. 2000); COLO. REV. STAT. ANN. § 19-1-106(2) (West 1997 & Supp. 2000); FLA. STAT. ANN. § 985.205 (West 1996 & Supp. 2001); IND. CODE ANN. § 31-32-6-2 (Michie 1997); IOWA CODE ANN. § 232.39 (West 2000); KAN. STAT. ANN. § 38-1652 (2000); MICH. COMP. LAWS ANN. § 712A.17(7) (West 1993 & Supp. 2000); NEV. REV. STAT. ANN. § 62.193(1) (Michie 1996 & Supp. 1999); N.M. STAT. ANN. § 32A-2-16(B) (Michie 1995); N.C. GEN. STAT. § 7B-801(a) (1999); TEX. FAM. CODE ANN. § 54.08(a) (Vernon 1996 & Supp. 2001); WASH. REV. CODE ANN. § 13.40.140(6) (West 1993 & Supp. 2001); see also *supra* note 13 (enumerating all fifty-one jurisdictions' access statutes).

166. See CAL. WELF. & INST. CODE § 676(a)(1)-(28) (West 1998 & Supp. 2001); DEL. CODE ANN. tit. 10 § 1063(a) (1999); GA. CODE ANN. § 15-11-78(b)(1) (Supp. 2000); HAW. REV. STAT. ANN. §§ 571-41(b), 571-84.6(c) (Michie 1999); LA. REV. STAT. ANN. Ch.C, art. 879(B) (West 1995 & Supp. 2001); ME. REV. STAT. ANN. tit. 15, § 3307(2) (West 1980 & Supp. 2000); MD. CODE ANN., CTS & JUD. PROC. § 3-812(f) (1995 & Lexis Supp. 2000); MINN. STAT. ANN. § 260B.163(c) (West 1998 & Supp. 2001); MO. ANN. STAT. § 211.171(6) (West 1996 & Supp. 2001); N.D. CENT. CODE § 27-20-24(5) (1991 & Lexis Supp. 1999); OKLA. STAT. ANN. tit. 10 § 7303-4.2(A) (West 1998); 42 PA. CONS. STAT. ANN. § 6336(e) (West 2000); S.D. CODIFIED LAWS § 26-7A-36 (Michie 1999); UTAH CODE ANN. § 78-3a-115(1)(b)-(c) (1996 & Lexis Supp. 2000); VA. CODE ANN. § 16.1-302 (Michie 1999); see also *supra* note 13 (enumerating all fifty-one jurisdictions' access statutes).

167. For a brief review of juvenile judges' wide discretion and the resulting potential for abuse, see *supra* notes 62-64, 95-102, *infra* notes 249-85, and accompanying text.

168. See generally Sanborn, *supra* note 9 (arguing that publicity provides for judicial accountability and encourages diligence on the part of juvenile officials).

169. See, e.g., IOWA CODE ANN. § 232.39 (West 2000).

sion included in the Massachusetts statute at issue in *Globe Newspaper*. With the exception of Connecticut and New Hampshire, which mandate exclusion regardless of the circumstances,¹⁷⁰ the closure jurisdictions give the juvenile judge discretion to allow into the courtroom those persons with a "direct" or "proper" interest in the matter.¹⁷¹ Such persons might include members of the press, especially in very serious or high-profile cases. In any event, as the *Globe Newspaper* Court recognized, the judge "can [best] determine on a case-by-case basis whether closure is necessary If the trial court [is] permitted to exercise its discretion, closure might well [be] deemed unnecessary."¹⁷²

The outcome of the First Amendment challenge to closure statutes remains unclear, making it all the more necessary to parse the Constitution for other provisions under which the statutes might be held invalid. The next logical stop is the Sixth Amendment.

170. CONN. GEN. STAT. ANN. § 54-76(h) (West 1994); N.H. REV. STAT. ANN. §169-B:34(I)(a) (1994 & Lexis Supp. 2000); see also *supra* note 13 (enumerating all fifty-one jurisdictions' access statutes). These two statutes are the most invasive of the press's potential First Amendment right of access to juvenile proceedings, and if *Globe Newspaper* scrutiny were applied to them, they would be the most likely candidates to fail the test because they do not appear to be "narrowly tailored." Either way, the conclusion that presumptive closure statutes violate the Due Process Clause, see *infra* Part II.B, obviously applies to these two rather draconian statutes.

171. The presumptive closure statutes are all surprisingly similar in this way; almost all of them use the "direct interest" or "proper interest" language. See ALA. CODE § 12-15-65(a) (1995 & Lexis Supp. 2000); ALASKA STAT. § 47.10.070(a) (Michie 2000); D.C. CODE ANN. § 16-2316(e) (1997 & Lexis Supp. 2000); IDAHO CODE § 16-1608(b) (Michie 1979 & Supp. 2000); KY. REV. STAT. ANN. § 610.070(3) (Michie 1999); MASS. GEN. LAWS ANN. ch. 119, § 65 (West 1993 & Supp. 2000); MISS. CODE ANN. § 43-21-203(6) (2000); N.J. STAT. ANN. § 2A:4A-60 (i) (West 1987 & Supp. 2000); N.Y. JUD. CT. ACTS § 341.1 (McKinney 1999); OHIO REV. CODE ANN. § 2151.35(A) (West Supp. 2000); R.I. GEN. LAWS § 14-1-30 (1994); S.C. CODE ANN. § 20-7-755 (Law. Co-op. 1985 & West Supp. 2000); TENN. CODE ANN. § 37-1-124(d) (1996); VT. STAT. ANN. tit. 33, § 5523(c) (1991 & Lexis Supp. 1999); W. VA. CODE ANN. § 49-5-2(j) (Michie 1999 & Lexis Supp. 2000); WIS. STAT. ANN. § 48.299(1)(a) (West 1997 & Supp. 2000); WYO. STAT. ANN. § 14-6-224(b) (Michie 1999); see also *supra* note 13 (enumerating all fifty-one jurisdictions' access statutes).

172. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608-09 (1982). Of course, the judge may well abuse this discretion, and the press's constitutional interest in access, no doubt, is thereby infringed. The abuse of discretion concern, however, is better argued from the juvenile's perspective, under the auspices of a due process claim, because his constitutional interest in freedom from incarceration seems weightier than the press's access interest. Indeed, the primary justification for press access in the first place is to vindicate the *juvenile's* interest. It seems more logical to vindicate that interest directly through the Fourteenth Amendment's independent procedural content rather than indirectly through its incorporation of the First Amendment.

2. The Juvenile's Sixth Amendment Claim

The Sixth Amendment to the United States Constitution provides:

In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.¹⁷³

If the argument succeeds that juvenile proceedings are "criminal prosecutions," an accused youth would benefit not only from the Sixth Amendment's array of criminal safeguards, but he would likely benefit from the Fifth Amendment's protections¹⁷⁴ as well.¹⁷⁵ The Supreme Court's application of substantial portions of those amendments to juvenile proceedings might, at first blush, appear to render the "criminal prosecution" argument academic. Indeed, after *Gault*, *Winship*, and *Breed*, juveniles are already entitled to most of the criminal protections enumerated in the Fifth and Sixth Amendments, including notice of charges, assistance of counsel, confrontation of witnesses, the privilege against self-incrimination, and protection from double jeopardy.¹⁷⁶ The argument becomes much more significant, however, in the context of presumptive closure statutes; were a juvenile's "prosecution" taking place behind closed doors, he could persuasively claim that the state was denying his Sixth Amendment "right to a . . . public trial."¹⁷⁷ And, were it

173. U.S. CONST. amend. VI (emphasis added). The Sixth Amendment's protections have been incorporated into the Fourteenth Amendment's Due Process Clause as restrictions on state government action. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

174. The Fifth Amendment provides, in pertinent part, that

[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself . . .

U.S. CONST. amend. V. The Fifth Amendment's protections have been incorporated into the Fourteenth Amendment's Due Process Clause as restrictions on state government action. See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964).

175. This conclusion follows from the Supreme Court's long-standing rule that a "criminal prosecution under [the Sixth Amendment] is much narrower than a criminal case under [the Fifth Amendment]." *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1891). Thus, if a juvenile proceeding did indeed qualify as a "criminal prosecution" for purposes of the Sixth Amendment, it would logically follow that it would easily qualify as a "criminal case" for purposes of the Fifth Amendment as well.

176. See *supra* Part I.B.2.

177. U.S. CONST. amend. VI.

not for *McKeiver v. Pennsylvania*,¹⁷⁸ this argument would be a compelling and dispositive one.

In *McKeiver*—decided just one year after the strongly-worded *Winship* decision—a plurality of the Supreme Court took an aberrant but momentous detour from its “constitutional domestication”¹⁷⁹ of the juvenile court system. Though it again acknowledged the system’s punitive nature and its due process failings,¹⁸⁰ the Court retreated from its stance in *Gault* and *Winship* by refusing to apply the Sixth Amendment right to trial “by an impartial jury”¹⁸¹ to juvenile courts.¹⁸²

While the plurality conceded that there were extensive systemic shortcomings justifying such a right,¹⁸³ it was “reluctant to say that, despite disappointments of grave dimensions, [the system] still does not hold promise . . . [or] that [it] cannot accomplish its rehabilitative goals.”¹⁸⁴ Upon examining the language of *Gault* and *Winship*, the plurality found that “the juvenile proceeding has not yet been held to be a ‘criminal prosecution,’ within the meaning and reach of the Sixth Amendment.”¹⁸⁵ Justice Brennan agreed “with the plurality’s conclusion that the proceedings below in these cases were not ‘criminal prosecutions’ ” for the Sixth Amendment’s purposes,¹⁸⁶ bringing the total on that issue to a five-justice majority,

178. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971). Five opinions were filed in *McKeiver*; Justice Blackmun delivered the judgment of the Court in a plurality opinion, in which Chief Justice Burger and Justices Stewart and White joined. *Id.* at 530. Justice White filed a concurring opinion, *id.* at 551, Justice Brennan filed an opinion concurring in part and dissenting in part, *id.* at 553, and Justice Harlan filed an opinion concurring in the judgment, *id.* at 557. Justice Douglas’ dissent was joined by Justices Black and Marshall. *Id.* at 558.

179. Professor Paulsen coined this term to describe the *Gault* Court’s constitutional formalization of juvenile court procedures. See generally Paulsen, *supra* note 77.

180. *McKeiver*, 403 U.S. at 544 n.5 (affirming *Gault*’s emphasis on the due process requirements of notice, counsel, confrontation and cross examination, especially because the juvenile court “labels truants and runaways as junior criminals”).

181. U.S. CONST. amend. VI.

182. *McKeiver*, 403 U.S. at 545.

183. *Id.* The plurality found the *Gault* requirements essential to accurate fact-finding, yet simultaneously saw a jury as dispensable. *Id.* at 543. For the argument that a jury trial is essential in today’s juvenile proceedings, see generally Sanborn, *supra* note 9.

184. *McKeiver*, 403 U.S. at 547.

185. *Id.* at 541.

186. *Id.* at 553 (Brennan, J.). Justice Harlan’s opinion was more ambiguous on the issue; while he seemed to find some merit in the suggestion “that juvenile delinquency proceedings have in practice actually become in many, if not all, respects criminal trials,” he apparently rejected it, but not explicitly. *Id.* at 557 (Harlan, J., concurring in the judgment). Justice Douglas’s dissent was clearer. Joined by Justices Black and Marshall, Justice Douglas emphasized the Court’s holding in *Gault*, the fact that punishment for youth and adults is often the same, and that the Constitution “speaks of denial of rights to ‘any person,’ not denial of rights to ‘any adult person.’ ” *Id.* at 559-60 (Douglas, J., dissenting). He therefore would have found delin-

and textually short-circuiting a juvenile's Sixth Amendment public trial claim against presumptive closure statutes.

To be sure, juvenile proceedings have changed substantially since the 1971 *McKeiver* ruling,¹⁸⁷ and numerous observers contend that they are now essentially criminal in nature.¹⁸⁸ Indeed, after the *Gault* revolution and substantive changes in state legislation, juvenile courts function much more like their criminal counterparts than they have since their establishment in 1899, and they have become far more punitive as well.¹⁸⁹ The splintered "criminal prosecution" ruling in *McKeiver* garnered only five votes.¹⁹⁰ The Court's other juvenile decisions from the *McKeiver* period cast some doubt on the holding. The *Gault* Court refused to "disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings."¹⁹¹ Four years after *McKeiver*, the *Breed* Court implicitly called into question that case's Sixth Amendment ruling by applying the Double Jeopardy Clause to juvenile proceedings¹⁹² after recognizing that "the risk to which the Clause refers is not present in proceedings that are not essentially criminal."¹⁹³

Nonetheless, the *Gault* and *Breed* rulings, convincing and powerful as they are, are not binding precedent on the Sixth Amendment issue.¹⁹⁴ On the other hand, *McKeiver*, outdated and

quency proceedings to be criminal prosecutions for Sixth Amendment purposes. *Id.* at 557-63 (arguing that the distinction between "criminal" and "juvenile" is senseless). For a concise synopsis of the justices' scattered *McKeiver* opinions and approaches, see generally *The Supreme Court, 1970 Term—Leading Cases*, 85 HARV. L. REV. 113 (1971).

187. See *supra* note 4 and accompanying text; *supra* Part I.A.2.

188. Feld, *Race and the "Crack Down" on Youth Crime*, *supra* note 3, at 328 & n.4 ("Within the past three decades, judicial decisions, legislative amendments, and administrative changes have transformed the juvenile court from a nominally rehabilitative social welfare agency into a scaled-down, second-class criminal court for young offenders that provides neither therapy nor justice."); Thomas F. Geraghty, *Justice For Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 191 (1998) ("I see daily the tragic impact of the criminalization of the juvenile court and referral of my clients to criminal court and believe that this trend does not serve victims or society at large."). See generally Ainsworth, *Youth Justice in a Unified Court*, *supra* note 3 (recommending that the juvenile court be merged into the criminal system because its idealistic "civil" goals have not been attained).

189. See *supra* Part I.A.2.

190. See *supra* notes 178-86 and accompanying text.

191. *In re Gault*, 387 U.S. 1, 50 (1967).

192. *Breed v. Jones*, 421 U.S. 519, 529-30 (1975).

193. *Id.* at 528 (quoting *Helvering v. Mitchell*, 303 U.S. 391, 398 (1938)).

194. *Gault* and *Winship* were decided explicitly and exclusively on Fourteenth Amendment Due Process grounds. *In re Winship*, 397 U.S. 358, 359 (1970) ("This case presents the single, narrow question whether proof beyond a reasonable doubt is among the 'essentials of due process and fair treatment' required during the adjudicatory stage when a juvenile is charged with an act which would constitute a crime if committed by an adult.") (citing *Gault*, 387 U.S. at 13);

questionable as it may be, could not be more on-point or explicit: "[T]he juvenile court proceeding has not yet been held to be a 'criminal prosecution,' within the meaning and reach of the Sixth Amendment."¹⁹⁵ While the "not yet" language seems to leave the Sixth Amendment door ajar, it remains that a public trial claim against presumptive closure statutes cannot succeed without a full-scale reversal of *McKeiver* and, therefore, an extension of a jury trial to all delinquency proceedings.¹⁹⁶ The argument can be—and has been—made that the transformation of the juvenile court over the past thirty years justifies such a reversal.¹⁹⁷ Still, that argument has not succeeded. If the doctrine of *stare decisis*¹⁹⁸ is not sufficient on its own to uphold *McKeiver*, the fact that the Court was unwilling in 1971 to impose upon states the costs associated with

Gault, 387 U.S. at 41 (extending juveniles the right to assistance of counsel because "the Due Process Clause of the Fourteenth Amendment requires [it when] the juvenile's freedom is curtailed"). More obviously, *Breed* was decided explicitly and exclusively on Fifth and Fourteenth Amendment grounds. *Breed*, 421 U.S. at 528-31 (applying the protection against double jeopardy to juvenile proceedings). None of these rulings even marginally rested upon any provision of the Sixth Amendment.

195. *McKeiver*, 403 U.S. at 541.

196. Recall the language of the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . ." U.S. CONST. amend. VI. Textually, the "speedy . . . trial," "public trial," and "impartial jury" requirements appear inextricably bound to one another. That is, any "criminal prosecution" will simultaneously trigger all three entitlements, and cannot possibly trigger less than all three; reading this clause any other way would seem to defy verbal logic and convention. Hence, even though the *McKeiver* Court was solely concerned with the jury trial requirement, see generally *McKeiver*, 403 U.S. 528, its ruling, at least on the Sixth Amendment front, is preclusive of a public trial as well. This is one major reason why the Fourteenth Amendment takes on added significance in the presumptive closure context; the Due Process Clause does not inseparably link a "public trial" with an "impartial jury."

197. Sanborn, *supra* note 9, at 231 (arguing that "the *McKeiver* opinion, even if it were sound in 1971, can no longer survive scrutiny. It developed a picture of juvenile court that does not meet today's reality."); Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 555-57 & nn.9, 15 (1998) (citing four cases and fifteen commentaries making an argument similar to Sanborn's, and suggesting that "juries are generally more likely than judges to be fair and just triers of fact on the issue of guilt or innocence in a criminal or delinquency case").

Where courts and commentators do not recommend reversal of *McKeiver*, they still suggest that their respective state's constitution and laws should be more protective of the jury trial "right" than the U.S. Constitution as interpreted by *McKeiver*. See, e.g., *In re C.B.*, 708 So. 2d 391, 400 (La. 1998) (in which the Louisiana Supreme Court first constitutionally required juvenile jury trials because the state's juvenile statutes have "sufficiently tilted the scales away from a 'civil' proceeding, with its focus on rehabilitation, to one purely criminal").

198. For an authoritative account of the *stare decisis* doctrine, see Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 740 (1988) (framing the question underlying the doctrine as: "Should the Court adhere to a prior controlling decision even though a majority of the Court now believes the precedent to be inconsistent with original understanding?").

jury trials¹⁹⁹ pulls strongly against reversal when the costs, if anything, are higher in 2001.²⁰⁰ Although *McKeiver's* vitality is debatable, the decision seems likely to stand, and the only way around it in the context of closure statutes appears to be the freestanding due process claim.²⁰¹

199. *McKeiver*, 403 U.S. at 550 (predicting that “[i]f the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system”).

200. One commentator urging *McKeiver's* reversal admits that “[i]f the jury trial [were today] granted to all juvenile defendants nationwide . . . real burdens could result.” Sanborn, *supra* note 9, at 237. Nonetheless, he notes that, as a practical matter, “where the right to jury trial has existed, it has been exercised rarely.” *Id.* Moreover, echoing a California appellate court, he aptly points out that “policy considerations cannot dictate the fate of the right to jury trial. Fundamental constitutional rights must be enforced whatever the administrative inconvenience or financial cost.” *Id.* (quoting *In re Javier A.*, 206 Cal. Rptr. 386, 425 (Cal. Ct. App. 1984)).

201. There may be one other less conventional way. In the criminal context, Professor Amar makes an intriguing observation that might be applied to the juvenile setting as well, especially in today’s more punitive, accountability-oriented juvenile courtroom. He observes:

Perhaps the public trial [is] also a right of, well, the public [T]he Ninth Amendment explicitly cautions against a too-quick inference that the expression of one right (here, the accused’s) implicitly negates another “right[] . . . retained by the people.” And this explicit reminder seems especially apt when we deal with what are, quite literally, rights of “the people”—rights, that is, of the public and populace at large.

AMAR, *THE BILL OF RIGHTS*, *supra* note 111, at 111 (quoting U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”)). From an array of historical sources, he calculates the original understanding of the Public Trial Clause in the overall constitutional scheme:

Sir Edward Coke declared that the very word *court* implied public access Coke’s contrast of *courts* with *chambers* had special meaning for eighteenth-century Americans; one of the defining characteristics of the Star Chamber that they had been taught to despise was that this (juryless) body interrogated suspects in private, not in public. Joseph Story echoed Coke’s ode to openness in his *Commentaries on the Constitution*, where he wrote that the Sixth Amendment “does but follow out the established course of the common law in all trials for crimes. *The trial is always public.*”

Id. (citing EDWARD COKE, *THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 103 (London: E. and R. Brooke, 5th ed., 1797), and quoting 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1785 at 662 (Boston: Hillard, Gray, 1833)) (emphasis in original). Professor Amar continues by stating the systemic importance of the *public's* right to be present at criminal proceedings:

The framers crafted a system of *republican* governments, state and federal—governments of, by, and for the people. Here, the people would rule—not day to day, but ultimately, in the long run. . . . If citizens did not like what they saw their government agents doing in open court, the people could throw the rascals out at the next election, or could petition and agitate to change the law.

Id. at 112 (emphasis in original).

Given that it has recently legislated for juvenile punishment and accountability with some vigor, *see supra* Part I.A, the public would seem to have nearly as large a stake in reviewing juvenile proceedings as it does “criminal prosecutions.” According to this line of reasoning, the public needs to be confident that its legislative wishes are being carried out properly and fairly in the juvenile courtroom. Alternatively, it at least needs to become informed about where the system needs improvement and which of its participants need to be ousted in the next election.

B. The Solution: The Juvenile's Freestanding Due Process Claim

With the First and Sixth Amendment claims against the closure statutes likely foreclosed, it is worth revisiting the text of the Fourteenth Amendment: "No State shall . . . deprive any person of life, liberty, or property without due process of law" ²⁰² At this point in its history, the Due Process Clause unquestionably contains more protections than simply those specifically listed in the Bill of Rights. ²⁰³ Furthermore, at this point in the juvenile court's history, states regularly deprive juvenile offenders of their "liberty" in the Fourteenth Amendment sense. The Supreme Court has emphatically and repeatedly affirmed that juvenile "commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" ²⁰⁴ Of course, this fact by itself does not create a constitutional problem. ²⁰⁵ The question presented, therefore, is whether those states presumptively closing delinquency proceedings from the public and press have deprived youths' liberty without due process—that is, without "fundamental fairness." ²⁰⁶ This Note contends that they have. ²⁰⁷

While this argument may be politically unpalatable, and probably would not succeed in light of the open-ended and perhaps unenforceable nature of the Ninth Amendment, it stands on insights that should not be ignored, especially because they arise once again in the due process context.

202. U.S. CONST. amend. XIV, § 1.

203. See YALE KAMISAR ET AL., *BASIC CRIMINAL PROCEDURE* 34-35 (9th ed. 1999) ("[T]he Court early found among the procedural requirements of Fourteenth Amendment due process certain rules paralleling provisions of the first eight amendments. . . . The logically critical thing, however, . . . was not that the rights had been found in the Bill of Rights, but that they were deemed [to] be fundamental.") (quoting *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) (Harlan, J., dissenting)); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993) (noting that "[t]he Due Process Clause generates rights, among other things, to administrative procedures, to judicial review of administrative decisions, to judicial procedures, and to judicial remedies") [hereinafter Fallon, *Some Confusions About Due Process*]; see generally GUNTHER & SULLIVAN, *supra* note 112, at 432-52 (discussing this "incorporation controversy").

204. *Breed v. Jones*, 421 U.S. 519, 530 (1975) (quoting *In re Gault*, 387 U.S. 1, 50 (1967)); see also *In re Winship*, 397 U.S. 358, 366 (1970) (stating that a delinquent is "subjected to the loss of his liberty for years") (quoting *Gault*, 387 U.S. at 36).

205. See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 113 (2000) ("[T]he document says that 'liberty' may be limited by 'due process of law' When government duly enacts evenhanded statutes and follows fair procedures, it has provided the requisite 'due process of law.'") (quoting U.S. CONST. amend. XIV, § 1) [hereinafter Amar, *The Document and the Doctrine*].

206. See *infra* Part II.A.1.

207. See *infra* Part II.A.2.

1. Recognizing the Fundamental Fairness Doctrine

As with every other constitutional case concerning juvenile proceedings, the due process case against closure statutes begins with *Gault*. There, the Court framed the central issue addressed in this Note: "As to [juvenile] proceedings, there appears to be little current dissent from the proposition that the Due Process Clause has a role to play. The problem is to ascertain the precise impact of the due process requirement upon such proceedings."²⁰⁸

In the relatively young, policy-oriented debate over the closure of juvenile court proceedings, the role of the Due Process Clause, *as such*, has been largely ignored. Commentators have erroneously neglected *Gault*'s due process starting point, jumping straight to the First Amendment²⁰⁹ or to the political implications of "open[ing] the doors."²¹⁰ For example, in arguing that the press has a First Amendment right of access to juvenile proceedings, one commentator quotes for authority Justice Black's incorporation-based *Gault* concurrence as an apparent starting point, rather than Justice Fortas' due process-based majority opinion:

Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment.²¹¹

This quote fails to acknowledge that Justice Black's incorporation approach lends little credence to the press's First Amendment case against presumptive closure statutes, because the "liberty" that Black recognized needed safeguarding was the juvenile's freedom from incarceration, not the press's "liberty" of access.²¹² The classic

208. *Gault*, 387 U.S. at 13-14.

209. See generally Dalton, *supra* note 15.

210. See generally Martin, *Open the Doors*, *supra* note 9 (concluding, as a policy matter, that juvenile proceedings should be opened to rekindle public confidence in the system); Laubenstein, *supra* note 8 (concluding, as a policy matter, that juvenile proceedings should be closed to promote rehabilitation); Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Opened or Closed?*, 18 YALE L. & POLY REV. 155 (1999) (enumerating the arguments on both sides, including both policy and First Amendment access concerns, and endorsing a pragmatic "balancing" approach whereby juvenile judges would be able to resolve the difficult access question case-by-case).

211. Dalton, *supra* note 15, at 1195 (quoting *Gault*, 387 U.S. at 61 (Black, J., concurring)).

212. *Gault*, 387 U.S. at 59-64 (Black, J., concurring). Justice Black observed that, historically, state juvenile laws "from the first one on contained provisions, written in emphatic terms, for arresting and charging juveniles with violations of state criminal laws, as well as for taking juveniles by force of law away from their parents and turning them over . . . for confinement."

problem for the First Amendment argument in this context, then, is lack of standing by the press to assert the deprivation of the juvenile's Fourteenth Amendment "liberty."²¹³

To be sure, Justice Black's "total incorporation"²¹⁴ approach does not help the juvenile in pursuit of open proceedings any more than it does the press. The above quotation of Black's concurrence omits a critical piece of that opinion:

Appellants are entitled to these rights [to notice, to counsel, to confrontation of witnesses, and against self-incrimination], *not because* "fairness, impartiality and

Id. at 60. Nowhere, of course, did he mention any interest of the press, because that was not an issue in the case. *See generally id.* at 59-64 (Black, J., concurring).

Professor Amar's view of the Public Trial Clause is instructive once again. Looking to history and purpose, he finds that the Clause empowers the public to serve as a check on judicial function. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 118 (1997) (finding that the people's "very presence in the courtroom can help discourage judicial misbehavior") (citing MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 344 (6th ed. 1820) ("[I]f the judge be PARTIAL, his partiality and injustice will be evident to all bystanders.")) [hereinafter AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE*]. Because Dalton similarly argues in the juvenile setting that a youth needs protection "against an arbitrary or incompetent judge, a sentence not commensurate with the crime, or a barbaric prison with a euphemistic moniker," Dalton, *supra* note 15, at 1229, it is striking that he did not examine the Sixth and Fourteenth Amendments, provisions that could directly vindicate the *youth's* interests rather than the press's.

213. *See, e.g.,* *United States v. Raines*, 362 U.S. 17, 20-22 (1960) (stating the general presumption that one person or party may not assert the constitutional rights of another person or party); *but see* Richard H. Fallon, Jr., *As Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1359-64 (2000) [hereinafter Fallon, *Third Party Standing*]. Professor Fallon would find valid "the claims of a challenger who asserts that a single application of a law both injures him and [thereby] impinges upon the constitutional rights of [identifiable] third persons," especially in the First Amendment context. *Id.* at 1359 (quoting Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423, 423-24 (1974)). His conclusion gives the First Amendment case some hope; if presumptive closure statutes violate the press's (potential) right of access, they incidentally burden the juvenile's Fourteenth Amendment due process right to have interested parties present that could reveal malfunction or abuse of discretion. *See also id.* (noting that the Court has characterized the rule against third party standing as "'prudential' and thus, apparently, as discretionary") (citing *City of Chicago v. Morales*, 119 S. Ct. 1849, 1859 n.22 (1999)).

Regardless of whether or not a lack-of-standing argument would preempt the First Amendment claim, Dalton's analysis seems defensible on the whole. This Note simply suggests that, in light of such First Amendment complications, the Fourteenth Amendment alternative should not be ignored as it has been.

214. For more complete explications of Black's "total incorporation" model in a number of contexts, see AMAR, *THE BILL OF RIGHTS*, *supra* note 111, at 139 ("The Fourteenth Amendment, claimed Black, made applicable against the states each and every provision of the Bill, lock, stock, and barrel—at least if we define the Bill to include only the first eight amendments.") (citing *Duncan v. Louisiana*, 391 U.S. 145, 162-71 (1968) (Black, J., dissenting); *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting); *Betts v. Brady*, 316 U.S. 455, 474-75 & n.1 (1942) (Black, J., dissenting); HUGO LAFAYETTE BLACK, *A CONSTITUTIONAL FAITH* xvi-xvii, 34-42 (1968)); GUNTHER & SULLIVAN, *supra* note 112, at 432 (stating that Justice Black "objected to the vague, 'natural law' formulations of the majority that spoke in terms of 'fundamentals'").

orderliness—in short, the essentials of due process”—require them and not because they are “the procedural rules which have been fashioned from the generality of due process,” but because they are specifically and unequivocally granted by the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States.²¹⁵

As previously seen, the incorporation into the Fourteenth Amendment of the Sixth Amendment’s public trial requirement means nothing to a juvenile; although the protection then applies in state proceedings, *McKeiver* makes clear that it does not apply in state juvenile proceedings because those are not “criminal prosecutions.”²¹⁶ While Justice Black’s *Gault* concurrence would undermine any constitutional challenge to the presumptive closure statutes in this way,²¹⁷ the *Gault* Court did not subscribe to his total incorporation approach and, for better or worse, his approach has not succeeded outside of the juvenile context.²¹⁸

215. *Gault*, 387 U.S. at 61 (Black, J., concurring) (emphasis added).

216. *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971).

217. Recall, however, that Justice Black joined Justice Douglas’s dissent in *McKeiver*, agreeing with Justice Douglas that “the guarantees of the Bill of Rights, made applicable to the States by the Fourteenth Amendment, require a jury trial.” *Id.* at 558 (Douglas, J., dissenting). Especially given the textual intertwining of “public trial” and “an impartial jury [trial],” *see supra* note 196, Justice Black apparently would have extended to juveniles in all fifty-one jurisdictions a public trial right, courtesy of total incorporation and in disregard of the Sixth Amendment “criminal prosecutions” roadblock. *See Gault*, 387 U.S. at 61 (Black, J., concurring) (“I think the Constitution requires that [juveniles] be tried in accordance with the guarantees of all of the provisions of the Bill of Rights. . . .”) (emphasis added).

218. *See GUNTHER & SULLIVAN, supra* note 112, at 432. Many of the Court’s most controversial cases in the criminal procedure context and in the analogous substantive due process context have relied upon a “fundamental rights” or “natural law” approach that has subjected the Court’s members to cries of judicial subjectivity. For one prominent criticism, see generally John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978). Professor Ely introduces his critique of the fundamental rights cases, including *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny, by quoting Alexander Bickel:

[I]t remains to ask the hardest questions. Which values, among adequately neutral and general ones, qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts? And how is the Court to evolve and apply them? . . . No answer is what the wrong question begets . . .

Id. at 5 (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 55, 103 (1962)).

The substantive due process cases are not precisely equivalent to the criminal procedure cases, and this Note does not mean to commingle the two different categories. Nonetheless, criticisms like Ely’s are illustrative of Justice Black’s view, in the criminal context and elsewhere, that the main benefit of the total incorporation model is its rigidity. That is, it may be less likely than the fundamental fairness doctrine to result in judicial manipulation over time. *See Griswold v. Connecticut*, 381 U.S. 479, 511-12 (1965) (Black, J., dissenting) (rejecting, in a substantive due process case, the “premise that this Court is vested with the power to invalidate all state laws that it consider[s] to be arbitrary, capricious, unreasonable, or oppressive,” arguing that it would “require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary”); *Adamson*, 332 U.S. at 69-70 (Black, J., dissenting) (rejecting, in a criminal procedure case, the Court’s imposition of its own “conception of what at a particular time constitutes ‘civilized decency’ and ‘fundamental principles of liberty

The *Gault* majority, instead, adhered to the dominant Due Process Clause framework of "fundamental fairness."²¹⁹ This methodology, most frequently associated with Justice Frankfurter²²⁰ and the second Justice Harlan,²²¹ "insists that, strictly speaking, the Fourteenth Amendment . . . requires only that states honor basic principles of fundamental fairness and ordered liberty—principles that might indeed happen to overlap wholly or in part with some of the rules of the Bill of Rights but that bear no logical relation to those rules."²²² To the *Gault* Court, a juvenile's rights to notice of

and justice,' " arguing that it "degrade[s] the constitutional safeguards of the Bill of Rights and simultaneously appropriate[s] for this Court a broad power which [was] not authorized by the Constitution").

While Justice Black's subjectivity concerns should not be neglected, this Note finds that the fundamental fairness methodology is just as viable a theory as total incorporation and recognizes that the former is probably here to stay. It is certainly a methodology worth arguing in the juvenile closure context, especially because a juvenile's due process right to a public trial would have Bill of Rights analogues in the First and Sixth Amendments. *Cf. supra* Part II.A.

219. *Gault*, 387 U.S. at 30-31 & n.47 (reiterating "that the hearing must measure up to the essentials of due process and fair treatment," this time in "connection with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution") (quoting *Kent v. United States*, 383 U.S. 541, 562 (1966)).

220. *See, e.g., Adamson*, 332 U.S. at 67 (Frankfurter, J., concurring) (finding independent procedural content in the Due Process Clause, and rejecting the "warped construction" of the Fourteenth Amendment that would allow states to engage in "conduct clearly condemned by due process but not easily fitting into the pigeon-holes of the specific provisions" of the Bill of Rights). *See generally* Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

221. *See, e.g., Gault*, 387 U.S. at 67 (Harlan, J., concurring in part and dissenting in part) ("Among the first premises of our constitutional system is the obligation to conduct any proceeding in which an individual may be deprived of liberty or property in a fashion consistent with the traditions and conscience of our people.") (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

Of course, the Justice Harlan referred to here was on the Court from 1955 to 1971. *See* GUNTHER & SULLIVAN, *supra* note 112, app. at B-6. He is not to be confused with the first Justice Harlan, his grandfather, who was on the Court from 1877 to 1911. *See id.* app. at B-3.

222. AMAR, *THE BILL OF RIGHTS*, *supra* note 111, at 139. Closely related to this methodology, and just as helpful to the due process case against the presumptive closure statutes, is the "selective incorporation" model, explicated most notably by Justice Cardozo in the seminal 1937 *Palko* decision. *See generally* *Palko v. Connecticut*, 302 U.S. 319 (1937). Under this approach, as the Court explained in *Twining v. New Jersey*, 211 U.S. 78 (1908),

[i]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.

Id. at 99 (internal citation omitted) (quoted in GUNTHER & SULLIVAN, *supra* note 112, at 434-35 (adding that, since *Twining* and *Palko*, "the Court has found most Bill of Rights guarantees pertaining to the criminal process applicable to the states, but the Court has achieved that result by finding Bill of Rights guarantees to be 'fundamental' one by one, rather than by incorporating

charges, confrontation of witnesses, assistance of counsel, and the privilege against self-incrimination were all inherent in and necessary to the American system of justice;²²³ the enumeration of those protections in the Bill of Rights perhaps just made that case even more convincing.²²⁴

The *Gault* Court left to future cases the question of what other procedures were required to ensure a fundamentally fair juvenile court.²²⁵ Applying the proof beyond a reasonable doubt standard to juvenile proceedings when that issue was before it in *Winship*,²²⁶ the Court observed that "a person accused of a crime would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."²²⁷ The *Winship* ruling uniquely illustrates the independent power of the Due Process Clause; the protection of proof beyond a reasonable doubt is, of course, nowhere to be found in the Bill of Rights.²²⁸ Not surprisingly, then, Justice Black dissented in *Winship* on those very grounds,²²⁹ charging that the standard was not constitutionally required in either criminal or juvenile proceedings.²³⁰

them in one fell swoop, as Justice Black would have done") (emphasis in original)). For broad, comparative discussions on all three incorporation models and their respective adherents, see HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 83-91 (1998); see generally AMAR, *THE BILL OF RIGHTS*, *supra* note 111, at xiii-xv, 137-307.

223. *Gault*, 387 U.S. at 33-34, 49-51, 56-57.

224. Justice Brennan, one of the main proponents of the selective incorporation model, see *supra* note 111, joined in the majority opinion, likely because the rights' enumeration in the Bill was strong evidence to him that they are fundamental. See AMAR, *THE BILL OF RIGHTS*, *supra* note 111, at 139-40 (discussing Brennan's "back door" move toward total incorporation via the possibility that every right in the Bill would be held fundamental and, therefore, incorporated); cf. *supra* note 222.

225. *Gault*, 387 U.S. at 13 (clarifying that neither the procedures "applicable to the pre-judicial stages of the juvenile process, nor . . . the post-adjudicative or dispositional process[es]" were at issue in *Gault*).

226. *In re Winship*, 397 U.S. 358 (1970); see also *supra* Part I.B.2.

227. *Winship*, 397 U.S. at 363 (quoting *In re Winship*, 247 N.E.2d 253, 259 (N.Y. 1969) (Fuld, C.J., dissenting)); see also *id.* at 369 (Harlan, J., concurring) ("I am in full agreement that this statutory provision offends the requirement of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment . . .").

228. See generally U.S. CONST. amends. I-VIII. *But cf.* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

229. *Winship*, 397 U.S. at 377 (Black, J., dissenting) ("[N]owhere in that document is there any statement that conviction of a crime requires proof beyond a reasonable doubt.").

230. *Id.* at 377-85 (Black, J., dissenting).

Even in *McKeiver*²³¹ and *Breed*,²³² a majority of the Court again invoked the fundamental fairness doctrine. In holding that young offenders were not constitutionally entitled to a jury trial, the *McKeiver* Court rejected a freestanding due process argument in addition to the more visible Sixth Amendment claim.²³³ The plurality recognized that "the applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness,"²³⁴ but it nonetheless rejected the notion that a jury was an indispensable component of fair fact-finding in the juvenile courtroom.²³⁵ Similarly, though it extended to juveniles the protection against double jeopardy solely on Fifth Amendment incorporation grounds,²³⁶ the *Breed* Court also acknowledged that fundamental fairness was the touchstone in the Court's other juvenile decisions.²³⁷

In short, a majority of the Court has explicitly found that, under the Due Process Clause's freestanding procedural content, some safeguards are constitutionally required to ensure the fundamental fairness of juvenile proceedings, and some are not. The Court has not decided into which category an open hearing falls, but the best evidence indicates that it falls into the former, rendering presumptive closure statutes unconstitutional.

231. *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); see also *supra* Part I.B.2.

232. *Breed v. Jones*, 421 U.S. 519 (1975); see also *supra* Part I.B.2.

233. *McKeiver*, 403 U.S. at 540-41 (rejecting the Sixth Amendment argument); *id.* at 541-43 (rejecting the due process argument).

234. *Id.* at 543.

235. *Id.* at 543, 550.

236. *Breed*, 421 U.S. at 531, 541 ("We hold that the prosecution of respondent in Superior Court, after an adjudicatory proceeding in juvenile court, violated the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment."). One would presume that, had he still been on the Court at the time of *Breed*, Justice Black would have (perhaps triumphantly) joined in the Court's unanimous "incorporation" opinion. Justice Black, however, had resigned on September 17, 1971, less than three months after he had joined Justice Douglas's *McKeiver* dissent. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 184 (1979). On September 23, Justice Harlan, one of Black's long-time opponents in the incorporation controversy, sent his resignation to President Nixon as well. See *id.* at 185. On September 25, at age seventy-one, Justice Black passed away. See *id.*

237. *Breed*, 421 U.S. at 531 (noting that the "jeopardy" to which a youth might be subjected multiple times, including litigation expenses and other "burdens incident to a juvenile's defense," had increased "since our decisions implementing fundamental fairness in the juvenile court system").

2. Applying the Fundamental Fairness Doctrine to Presumptive Closure Statutes

In its 1948 *In re Oliver*²³⁸ decision, where it held unconstitutional the secret investigation of a one-man grand jury,²³⁹ the Supreme Court recognized that there are at least three benefits of holding court proceedings in public.²⁴⁰ First, the Court found that publicity's most important function is to restrain misuse of judicial authority.²⁴¹ Second, it observed that "public trials come to the attention of key witnesses unknown to the parties. Those parties may then voluntarily come forward and give important testimony."²⁴² Third, the Court noted that "the spectators learn about their government and acquire confidence in their judicial remedies."²⁴³ No doubt, all three of these benefits are relevant to the overall case against presumptive closure statutes in the juvenile setting. The most important consideration to the fundamental fairness inquiry

238. *In re Oliver*, 333 U.S. 257 (1948).

239. *Id.* at 272-74. To be precise, the Court held that, because of the "dangers to freedom" inherent in secret proceedings, along with "the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law" required one-man grand jury investigations to be conducted in the open. *Id.* at 273.

Thus, the Court's holding was not based on the Sixth Amendment's guarantee of a public trial in "criminal prosecutions." *Cf.* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."). Indeed, the Sixth Amendment is mentioned but once in the Court's opinion, and even then only to illustrate that, at the time of the decision, forty-one jurisdictions had adopted state constitutional provisions or statutes similar to the Sixth Amendment's guarantee. *Oliver*, 333 U.S. at 267-68 & nn.16-20. The decision rested squarely on the Fourteenth Amendment's procedural due process requirement of accuracy in proceedings that can potentially result in a deprivation of liberty. *Id.* at 273-74 (reaffirming the recognition that "departure from the accepted standards of due process [is] capable of grave abuses," and discussing a line of Court precedent establishing baseline procedural due process requirements, including the rights "to examine the witnesses . . . to offer testimony, and to be represented by counsel"); *see also infra* note 248 and accompanying text.

The great irony of this Due Process Clause-based decision is that none other than the stalwart opponent of selective incorporation and fundamental fairness—Justice Black—wrote the majority opinion. *Oliver*, 333 U.S. at 258. One can only assume that he was satisfied that the right to open one-man grand jury proceedings had strong textual support in the Bill of Rights, with a Sixth Amendment "public trial" analogue.

240. *Id.* at 270 & n.24.

241. *Id.* at 270.

242. *Id.* at 270 n.24.

243. *Id.*; *see also* JOHN HENRY WIGMORE, 6 EVIDENCE § 1834(2) at 438 (Chadbourn rev. 1976) (stating that publicity provides "a strong confidence in judicial remedies . . . which could never be inspired by a system of secrecy"); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 929 (1992) (arguing that the press should enjoy "a special constitutional right of access in newsgathering" so that it can "bare the secrets of government and inform the people") (quoting *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring)); *supra* note 201.

here, however, is the first—the necessity of “review in the forum of public opinion” as a check on “any attempt to employ our courts as instruments of persecution.”²⁴⁴

The *Oliver* Court’s willingness to apply procedural due process protections traditionally reserved for criminal prosecutions to a proceeding that, on its face, was not precisely a criminal trial apparently stemmed from its observation that “this nation[] [has a] historic distrust of secret proceedings.”²⁴⁵ In emphasizing both this historical distrust²⁴⁶ as well as the functional underpinnings of public scrutiny,²⁴⁷ the Court simultaneously de-emphasized the nature of the proceedings in which that public scrutiny would be absolutely essential to ensure the fairness and accuracy guaranteed by the Fourteenth Amendment’s procedural content.²⁴⁸ Thus, its warnings of unchecked judicial discretion²⁴⁹ are strong evidence that openness is essential for fundamental fairness in today’s juvenile courts,²⁵⁰ where, in nineteen jurisdictions, presumptive closure statutes shield juvenile judges from public view.²⁵¹

244. *Oliver*, 333 U.S. at 270.

245. *Id.* at 273.

246. *Id.* at 266-69. The Court discussed at great length “[t]his nation’s long accepted practice of guaranteeing a public trial,” which “has its roots in our English common law heritage.” *Id.* at 266. Indeed, the Court remarked that the parties “have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country.” *Id.*

247. *Id.* at 270-71.

248. *See id.* at 266-73. The Court warned that the lack of public review of judges “symbolize[s] a menace to liberty . . . in ruthless disregard of the right of an accused to a fair trial.” *Id.* at 269-70. Procedural due process is the dominant theme throughout the opinion. *See, e.g., id.* at 272 (“[T]his Court [has previously] assumed that a criminal trial conducted in secret would violate the procedural requirements of the Fourteenth Amendment’s [D]ue [P]rocess [C]ause. . . .”). In fact, Justice Black’s majority opinion invoked the same sort of “natural law” and “national conscience” language that he so vehemently rejected on other occasions:

In view of this nation’s historic distrust of secret proceedings [and] their inherent dangers to freedom, . . . the Fourteenth Amendment’s guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.

Id. at 273; *see also id.* at 278 (“It is ‘the law of the land’ that no man’s life, liberty, or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal.”) (quoting *Chambers v. Florida*, 309 U.S. 227, 236 (1940)). Justice Black’s opinion in *Chambers* was an even greater deviation from his otherwise mechanical incorporation approach. *See ABRAHAM & PERRY, supra* note 222, at 114 n.96 (noting that “the *Chambers* opinion contains one of the great Black exhortations: ‘Under our constitutional system courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice and public excitement’”) (quoting *Chambers*, 309 U.S. at 241) (emphasis in original).

249. *See Oliver*, 333 U.S. at 269-71.

250. The Court briefly mentioned delinquency proceedings in a footnote: “Whatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public. But it has never been the practice wholly to exclude parents, relatives, and friends,

Such statutes allow access to delinquency proceedings only upon a “direct” or “proper” interest determination *by the judge*,²⁵² and thus circumvent the primary purpose of access—reduction of judicial abuse and error.²⁵³ Finding themselves quite competent, or harboring political motives they do not want revealed, juvenile judges often see no reason to grant access to the public or to the press, whose only “direct” or “proper” interest is to reveal potential abuse.²⁵⁴ Justice Brennan has pointed out the problems inherent in such schemes. In his *McKeiver* opinion, Justice Brennan concurred in the plurality’s *McKeiver* judgment, but he dissented from its judgment in the companion case, *In re Burrus*.²⁵⁵ This opinion, which commentators have too often neglected,²⁵⁶ serves as an excellent foundation for the case against presumptive closure statutes:

For me . . . the question in these cases is whether [a] jury trial is among the “essentials of due process and fair treatment.”²⁵⁷

or to refuse juveniles the benefit of counsel.” *Id.* at 266 n.12. The issue presented in this Note, of course, was not before the *Oliver* Court, and this footnote in *Oliver* is the only mention of juvenile proceedings. In any event, since the time of the *Oliver* decision in 1948, juvenile proceedings have changed dramatically. See *supra* Part I. This Note essentially argues that, in light of the juvenile court’s paradigm shift, the Court would today reject a juvenile exception to the *Oliver* Court’s general proposition that court proceedings may not be conducted in private without some effective check on discretion.

251. See *supra* note 13.

252. See, e.g., D.C. CODE ANN. § 16-2316(e) (1997 & Lexis Supp. 2000) (providing that the juvenile court may “admit such other persons (including members of the press) as have a proper interest in the case,” but not mandating such admission). The statute, similar to other closure statutes, allows discretion for the judge to determine that members of the public or press have no interest in the proceeding or, alternatively, that they should be excluded even if they *do* have a proper interest. See also *supra* note 13.

253. See Note, *Trial Secrecy*, *supra* note 144, at 1905 (recognizing the interrelated goals of public access to judicial proceedings—inducing court officers to perform conscientiously by forcing them to act within the public’s view, and empowering the public to see those officers in action so that it may determine if they are acting properly); see also *In re R.L.K.*, 269 N.W.2d 367, 370-71 (Minn. 1978); Sanborn, *supra* note 9, at 236 (showing that public accountability keeps the judge under control by “eliminat[ing] the hearing’s secret nature, which both hides and promotes carelessness and cavalier attitudes”).

254. Some states have judicially established a *per se* rule that “the news media have a ‘direct interest’ in the work of a juvenile court” because they “obtain[] information regarding our legal institutions” and “inform[] the public about how judicial power in juvenile courts is being exercised.” *R.L.K.*, 269 N.W.2d at 370-71; see also, e.g., *In re L.*, 546 P.2d 153, 155 n.1 (Or. Ct. App. 1976). Not surprisingly, these states do not have presumptive closure statutes, because they would have little or no effect.

255. *McKeiver v. Pennsylvania*, 403 U.S. 528, 553 (1971) (Brennan, J., concurring in the judgment in No. 322 [*McKeiver*] and dissenting in No. 128 [*Burrus*]).

256. It appears that only Dalton discusses Justice Brennan’s *McKeiver* opinion in any detail. Dalton, *supra* note 15, at 1212-13.

257. *McKeiver*, 403 U.S. at 553 (opinion of Brennan, J.) (quoting *In re Gault*, 387 U.S. 1, 30 (1967)).

[T]he States are not bound to provide jury trials on demand so long as *some other aspect* of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve.²⁵⁸

Examined in this light, I find no defect in the Pennsylvania [*McKeiver*] case[] before us. . . . The North Carolina [*Burrus*] case[], however, present[s] a different situation. North Carolina law either permits or requires the exclusion of the general public from juvenile trials. In the case[] before us, the trial judge "ordered the general public excluded from the hearing room and stated that only officers of the court, the juveniles, their parents or guardians, their attorney and witnesses would be present for the hearings," *notwithstanding petitioners' repeated demand for a public hearing.*²⁵⁹

The [*Burrus*] case[] [itself], which arise[s] out of a series of demonstrations by black adults and juveniles who believed that the Hyde County, North Carolina, school system unlawfully discriminated against black schoolchildren, present[s] a paradigm of the circumstances in which there may be a substantial "temptation to use the courts for political ends." And finally, neither the opinions supporting the judgment nor the respondent in [*Burrus*] has pointed to any feature of North Carolina juvenile proceedings that could substitute for public or jury trial in protecting the petitioners against misuse of the judicial process.²⁶⁰

The opinion illustrates three key points in support of the due process case against presumptive closure statutes. First, and most importantly, it acknowledges that the applicable standard in determining if closure statutes violate the Due Process Clause is whether they will result in proceedings that are fundamentally unfair.²⁶¹

Second, Justice Brennan's opinion demonstrates that, in answering this touchstone question, we must consider available alternatives to access that can similarly guard against juvenile judges' virtually limitless discretion.²⁶² A number of observers and academics have amassed much unsettling evidence indicating that juvenile judges, at best, have unevenly exercised their discretion and,

258. *Id.* at 554 (Brennan, J.) (emphasis added).

259. *Id.* at 554-56 (Brennan, J.) (emphasis added) (quoting *In re Burrus*, 167 S.E.2d 454, 456 (N.C. Ct. App. 1969)). The North Carolina statute to which Justice Brennan refers has been repealed. North Carolina now holds presumptively open proceedings, courtesy of N.C. GEN. STAT. § 7B-801(a) (1999).

260. *McKeiver*, 403 U.S. at 556 (Brennan, J.) (quoting *McKeiver*, 403 U.S. at 522 (White, J., concurring)).

261. *Id.* at 553-54 (Brennan, J.) ("The Due Process Clause commands not a particular procedure, but only a result: in my Brother BLACKMUN's words, 'fundamental fairness . . . [in] fact-finding.'").

262. *Id.* at 554 (Brennan, J.) ("[T]he due process question [must] be decided . . . in terms of the adequacy of a particular state procedure to protect the [juvenile] from oppression by the government, . . . and to protect him against the compliant, biased, or eccentric judge.") (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *Singer v. United States*, 380 U.S. 24, 31 (1965)).

at worst, have shamelessly abused it.²⁶³ Indeed, without fear of consequences, biased judges who may remember particular delinquents from previous occasions have been known to act on an unjustifiable predisposition to quickly incarcerate these youths.²⁶⁴ Worse yet, in transfer proceedings, some judges have casually shuffled such offenders off to the adult system, subjecting them to even harsher, albeit more procedurally sound, treatment.²⁶⁵ While transfer may well be justified in many of these repeat-offender cases,²⁶⁶ all too often judges have, without due procedure, waived to the criminal courts youths who might have been better served by what remains of the rehabilitation ethic in juvenile detention facilities.²⁶⁷ Also, disturbingly, a disproportionate number of these mistreated offenders have been racial minorities.²⁶⁸

263. See, e.g., Feld, *Race and the "Crack Down" on Youth Crime*, *supra* note 3, at 373 n.147 (citing sources indicating that "individualized sentencing discretion is often synonymous with racial discrimination"); Jeffrey Fagan & Elizabeth Piper Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314, 347 (1990); Podkopacz & Feld, *An Empirical Study of Judicial Waiver*, *supra* note 4, at 453 (concluding from an empirical analysis that "judicial waiver practices are inherently arbitrary, capricious, and discriminatory") (citing DONNA M. HAMPARIAN ET AL., *YOUTH IN ADULT COURT: BETWEEN TWO WORLDS* 102-07 (1982); Ross, *supra* note 37, at 1038-45 (describing how the juvenile judge's discretion has recently come "under fire" because large portions of society believe it has been exercised erratically); Wizner, *supra* note 96, at 1034 (suggesting that judges have doled out punishment and rehabilitation arbitrarily, not because they are biased, but because "we are not capable of articulating or agreeing upon a precise definition of the juvenile offender who should, in every case, be prosecuted in the adult criminal court").

264. See Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for Juvenile Court*, 69 MINN. L. REV. 141, 245-46 (1984) (showing that juvenile judges are more likely to convict than juries are, partially because they are subjected to excessive amounts of prejudicial information, like seeing the same youth on multiple occasions).

265. See generally Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507 (1995) (arguing, among other things, that lack of judicial accountability leads to arbitrary sentencing and transfer, especially because judges can and do discriminate on the basis of race).

266. The juvenile's prior history is one of *Kent's* suggested criteria governing waiver decisions, and it is now codified at 18 U.S.C. § 5032 (1994). *Kent v. United States*, 383 U.S. 541, 566-67 (1966); see also *supra* note 100.

267. See generally Abbe Smith, *They Dream of Growing Older: On Kids and Crime*, 36 B.C. L. REV. 953, 1003-12 (1995) (providing a rather literary account of how the juvenile system, through both its social policy and adjudication, has sought revenge against youths as a class, punishing even those who could be rehabilitated) (quoting "Officer Mazilli" from RICHARD PRICE, *CLOCKERS* 95 (1992) ("You want to know what I believe in? I believe in punishment, I believe in fear, and I believe in revenge.") (emphasis in original)).

268. See Feld, *Race and the "Crack Down" on Youth Crime*, *supra* note 3, at 373-78 (detailing the historical and current systemic bias against non-whites in the juvenile system generally and in the transfer mechanism specifically); see also *id.* at 379 ("Despite 'rehabilitative rhetoric' and a euphemistic vocabulary, the simple truth is that juvenile court judges increasingly consign disproportionately minority offenders to overcrowded custodial warehouses that constitute little more than youth prisons."); Podkopacz & Feld, *An Empirical Study of Judicial Waiver*, *supra* note 4, at 454 & n.22 (citing to evidence that a young offender's race affects the waiver decision).

Thus, some restraint on discretion is essential not simply to assure that youths are punished justly.²⁶⁹ It is also necessary to ensure that those offenders amenable to treatment are identified as such and placed in an environment that suits their rehabilitative needs, to the extent possible.²⁷⁰ Were juveniles entitled to jury trials, there would already be a "tolerably efficient check"²⁷¹ in place to counter the juvenile judge's discretion.²⁷² But they are not,²⁷³ and

269. This, however, would seem to be the primary objective, given the system's present emphasis on punishment. See Sanborn, *supra* note 9, at 236 (declaring that the "ever-increasing tendency of juvenile courts to respond punitively to young offenders . . . demonstrates that juvenile defendants need additional protections against the judge and the system"); see also *supra* Part I.A.2.

"Justly," in this context, means only "as accurately as possible." Obviously, no defendant is entitled to a perfect proceeding; rather, the Court "consistently has held" that the "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Of course, the content of "meaningful manner" varies case-by-case. In *Mathews*, the Court elucidated three factors for determining what procedures are 'due' under procedural due process in a specific case. They are, "[f]irst, the private interest that will be affected by the official action[,] second, the risk of an erroneous deprivation of such interest through the procedures used . . . and finally, the Government's interest, including the . . . fiscal and administrative burdens that [an] additional or substitute procedural requirement would entail." *Id.* at 335.

As Professor Fallon demonstrates, even though "the Supreme Court has treated *Mathews* as a furnishing test for all seasons, it was designed for resolving claims of entitlement to particular types of administrative, rather than judicial, procedures." Fallon, *Some Confusions About Due Process*, *supra* note 203, at 331 (emphasis omitted). Nonetheless, it does help illustrate why youths *should* be entitled to a public trial under the fundamental fairness doctrine. Merely allowing members of the press into a juvenile courtroom—a negative, not affirmative, action—would probably impose few, if any, additional "fiscal and administrative burdens" on a state government. On the other side of the *Mathews* equation, many youths literally have years of "liberty" riding on the juvenile court's procedures, which have empirically proven less than reliable on the "risk of an erroneous deprivation" prong. See *supra* notes 96-109, 263-68 and accompanying text.

270. But see Sanborn, *supra* note 9, at 238 ("[J]uvenile courts are free to promote rehabilitation for the non-serious offender who is not about to be given severe sanctions by the court. For most juvenile defendants, juvenile courts can preserve their traditional identities by operating without juries or the public.").

What Sanborn ignores is the murky line between punishment and rehabilitation, which makes it administratively impossible to determine at the margins which youths are entitled to a public trial and which are not. More problematic still is that this arbitrary determination would once again be left to the judge's sole—unchecked—discretion. Sanborn's "check" would thus seem to be no check at all in a rather large percentage of cases.

271. *In re Oliver*, 333 U.S. 257, 271 (1948) (quoting 1 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827)).

272. See *McKeiver*, 403 U.S. 528, 554 (1971) (Brennan, J.) ("The Due Process Clause commands not a particular procedure, but only a result . . . [W]hat this means is that the States are not bound to provide [any particular procedure] on demand so long as some . . . aspect of the process adequately protects the [juvenile] . . . against the compliant, biased, or eccentric judge.") (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

273. See *id.* at 528-41 (plurality opinion).

there is not.²⁷⁴ Access to juvenile proceedings, therefore, becomes the only suitable proxy to ensure a youth fundamental fairness in his punishment, or, if the judge so chooses, in his rehabilitation.

Third, Justice Brennan's *McKeiver/Burrus* opinion indicates that some juveniles would request that members of the public or press be present at their delinquency hearings,²⁷⁵ and it suggests that denying such a request violates fundamental fairness.²⁷⁶ Indeed, the *Burrus* case offers the "paradigm" example of a violation.²⁷⁷ The youths in that case recognized a potential bias on the judge's behalf, and calculated that the risk of an erroneous deprivation of liberty behind closed doors was greater than the opposing risk of social stigmatization in the open. The North Carolina closure statute in *Burrus*,²⁷⁸ however, delegated the juveniles' choice in this matter to the judge, who apparently had more to gain from closure.

Assuming that procedural safeguards are meant to protect the *innocent*,²⁷⁹ the delegation of this choice from a putative of-

274. See Dalton, *supra* note 15, at 1228 (concluding that the media's First Amendment right of access to juvenile proceedings would provide juveniles much-needed leverage in a system that is "struggling, arbitrary, secretive [and] unable to offer to juvenile defendants anything better than the luck of the draw").

275. *McKeiver*, 403 U.S. at 556 (Brennan, J.). The concrete factual circumstances of the *Burrus* case are in stark contrast to the juvenile court's original, overly abstract, conventional wisdom that young offenders would never want the public present. See, e.g., Bazelon, *supra* note 210, at 169 ("If courts were closed to the public, a child could confess his troubles without fear of public stigma. Closed records would prevent a record of juvenile offenses from being used against [him as a] defendant[] in adult court.") (citing RYERSON, *supra* note 3, at 39-40); *cf. id.* at 156 ("[C]onfidentiality is still viewed as a protective measure—but increasingly one that juvenile delinquents do not deserve.").

276. *McKeiver*, 403 U.S. at 554-57 (Brennan, J.).

277. *Id.* at 556 (Brennan, J.); see also *supra* note 260 and accompanying text.

278. The text of the statute at issue, which is no longer on the books, see *supra* note 259, permitted but did not require closure. *McKeiver*, 403 U.S. at 556 n.4 (opinion of Brennan, J.). As Justice Brennan notes, however, the North Carolina Supreme Court in *Burrus* itself read the statute "as a legislative determination that a public hearing is [not] in the best interest of the youthful offender." *Id.* (Brennan, J.) (quoting *In re Burrus*, 169 S.E.2d 879, 887 (N.C. 1969)).

279. See *supra* notes 82-83 and accompanying text. For two thorough accounts—from a prominent constitutional scholar—arguing that protecting the innocent instead of the guilty is precisely what constitutional criminal procedure is meant to accomplish, see generally AMAR, THE BILL OF RIGHTS, *supra* note 111, and AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE, *supra* note 212. This point is less obvious than it might seem. Professor Amar demonstrates that "Supreme Court case law in this field is remarkably complex, sometimes perverse, and often contradictory," mostly because it protects the guilty at the expense of the innocent. AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE, *supra* note 212, at x. An illustrative and entertaining snapshot of Professor Amar's argument concerns the Fourth Amendment:

The Fourth Amendment today is an embarrassment. . . . [The] three pillars of modern Fourth Amendment case law [namely, that the Amendment generally requires warrants for searches and arrests, probable cause for searches and arrests, and exclusion of ill-gotten evidence] are hard to support; in fact, today's

fender to the judge becomes quite troublesome. Innocent defendants have the most to gain from publicity, even where the rehabilitation ethic prevails, and guilty (i.e., "delinquent") defendants have the most to lose.²⁸⁰ For example, assume that a juvenile is "taken into custody" for a robbery that he did not commit. He is a black male, and believes that the judge is a racist who transfers a disproportionate number of black youths to the adult criminal system, where transferees are subjected to harsh punishment. This judge, of course, has sole discretion in determining whether the juvenile is delinquent, whether he should be transferred, and, if he is not transferred, what treatment best suits his needs. Concerned that the judge is biased, the juvenile requests that the delinquency and transfer hearings be held in the open. The judge, for whatever reason, denies the request.

Whether the juvenile is correct or incorrect that the judge is biased makes little difference here. Even if there is almost no chance that she is biased, the juvenile has calculated that it is more important for him to eliminate this risk of an erroneous deprivation of liberty than to eliminate the public stigma that might result from the open proceedings. In the name of rehabilitation, which often wrongfully deprives an innocent juvenile of his liberty in the same manner that punishment does, presumptive closure statutes lodge the access choice with the one person who actually may not exercise it in the child's "best interest." Ironically, the Supreme Court has held that a young offender is capable of making a voluntary, knowing, and intelligent waiver of his Fifth Amendment rights in the coercive setting of a police interrogation room.²⁸¹ In light of this ju-

Supreme Court does not really support them. Except when it does. Warrants are not required—unless they are. All searches and seizures must be grounded in probable cause—but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so. . . . The result is [that] . . . [c]riminals go free while honest citizens are intruded upon in outrageous ways with little or no real remedy.

Id. at 1; see generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

280. See AMAR, *THE BILL OF RIGHTS*, *supra* note 111, at 112-13 (demonstrating, in the adult context, that "the ability of the public to judge the judge . . . protect[s] innocent defendants from judicial corruption or oppression, but public scrutiny [is] bad news for many a guilty defendant, who might prefer an incompetent judge or one 'partial' to the defendant's cause—an old political friend, perhaps, or a new financial one. So too, the public right to monitor witnesses at trial [is] designed to help the truth come out, and truth [will] as a rule help innocent defendants more than guilty ones.").

281. *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979) ("[T]he determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain si-

risprudence, the paternalistic assumption that such an offender is less able than a juvenile judge to determine his own best interests thus seems anachronistic, inconsistent and a little peculiar.²⁸²

No doubt, many guilty youths will waive the due process right to a public trial once recognized.²⁸³ Moreover, many innocent youths will probably waive it as well, believing that the judge is competent and impartial,²⁸⁴ and that the greater risk is being labeled a criminal in the community. The power to make that decision, however, should rest with the juvenile, and with the counsel to which he is constitutionally entitled.²⁸⁵ The Due Process Clause requires no less.

CONCLUSION

While the Supreme Court has acknowledged the juvenile court's systemic objective of rehabilitation,²⁸⁶ it has recognized that the system has fallen far short of its rehabilitative goals.²⁸⁷ Even though it has conceded that *parens patriae* informality may assist juvenile judges in personalizing treatment for a particular wayward youth,²⁸⁸ it has declared that informality and discretion must not come at the expense of liberty and procedure.²⁸⁹ Despite the Court's appreciation for the rehabilitative value of hiding "youthful errors from the full gaze of the public and bury[ing] them in the graveyard of the forgotten past,"²⁹⁰ it has suggested that confidentiality and closure may actually harm juvenile offenders.²⁹¹ Additionally, although the Court has held that juvenile proceedings are not "criminal prosecution[s]," within the meaning and reach of the Sixth

lent and to have the assistance of counsel. . . . We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so." (citing *Miranda v. Arizona*, 384 U.S. 436, 475-77 (1966)). *Bul cf.* Robert E. McGuire, Note, *A Proposal to Strengthen Juvenile Miranda Rights: Requiring Parental Presence in Custodial Interrogations*, 53 VAND. L. REV. 1355, 1387 (2000) (concluding that, in the custodial interrogation setting, "we must pay special attention to the needs of juveniles").

282. *Cf. supra* note 86.

283. *Cf. supra* notes 279-80.

284. One would hope that these innocent youths are correct in this belief most of the time.

285. *See In re Gault*, 387 U.S. 1, 41 (1967) (holding that the Due Process Clause provides juvenile defendants the right to counsel in delinquency proceedings).

286. *See supra* Part I.A.1.

287. *See supra* Part I.A.2.

288. *See, e.g., Gault*, 387 U.S. at 15-17.

289. *See supra* Part I.B.2.; *see also, e.g., Gault*, 387 U.S. at 18 ("Juvenile court history has . . . demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.").

290. *Gault*, 387 U.S. at 24.

291. *See, e.g., id.* at 22.

Amendment,"²⁹² it has repeatedly eschewed the " 'civil' label-of-convenience"²⁹³ that stubbornly clings to them. Perhaps most importantly of all, it has rejected the distinction between 'civil' and 'criminal' as a basis "for holding the Due Process Clause inapplicable to a juvenile proceeding."²⁹⁴

Indeed, the Due Process Clause is the strongest constitutional foundation upon which to rest the case against the presumptive closure statutes. In the jury trial context, two prominent juvenile law scholars have criticized the petitioners in *McKeiver* for honing in on policy distinctions and the Sixth Amendment rather than on the Due Process Clause:

With hindsight, it is apparent that a central shortcoming of the *McKeiver* appellants' argument was that it did not sufficiently emphasize the Court's "fundamental fairness" analysis. The appellants did not make clear precisely why the jury trial model is indispensable to a "fundamentally fair" trial or in what manner this model significantly furthers the interests of accuracy and fairness.²⁹⁵

This same mistake should not be made when arguing the case against presumptive closure statutes, which are fundamentally unfair because they do not allow public scrutiny to counterbalance the "menace to liberty"²⁹⁶ of unchecked judicial discretion in juvenile proceedings.²⁹⁷

As Justice Black demonstrated on numerous occasions, "fundamental fairness" is an admittedly murky standard by which to determine the constitutionality of the statutes that close today's delinquency proceedings.²⁹⁸ Courts faced with the task might follow Justice Scalia's lead by looking for guidance in the U.S. Constitution's Preamble.²⁹⁹ Like the Fourteenth Amendment, the Preamble is open-ended, but it does serve to remind us that one of the six reasons we "ordain[ed]" our Constitution was to "secure the Blessings of Liberty to ourselves *and our Posterity*."³⁰⁰ If the Due Process

292. *McKeiver v. Pennsylvania*, 403 U.S. 525, 541 (1971).

293. *Gault*, 387 U.S. at 50.

294. *In re Winship*, 397 U.S. 358, 365 (1970).

295. Guggenheim & Hertz, *supra* note 197, at 560 (citing *McKeiver*, 403 U.S. at 541-43, 550 (describing the appellants' arguments)).

296. *In re Oliver*, 333 U.S. 257, 269 (1948).

297. *Gault*, 387 U.S. at 18-19 ("In 1937, Dean Pound wrote: 'The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts' The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. . . . Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.") (citation omitted).

298. See *supra* notes 214-15, 218, 236 and accompanying text. But see *supra* notes 239, 248.

299. See Amar, *The Document and the Doctrine*, *supra* note 205, at 114 n.292 (describing Justice Scalia's recent willingness to invoke the Preamble).

300. U.S. CONST. preamble (emphasis added).

Clause does not provide sufficient textual endorsement of the constitutional case against the presumptive closure statutes, perhaps this neglected passage does.

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