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, 1948

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

—In re Gault, 1967

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

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

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. The most recent of these "mega change[s]" came during the 1990s, when a number of states abandoned their existing presumptive closure statutes and mandated

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 "[n]ot 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.


5. E. Hunter Hurst, III, The Juvenile Court at 100 Years of Age: The Death of Optimism, 49 JUV. & FAM. CRIM. 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 proceedings\(^6\) 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.


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?*, 63 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 "increasing his self-perception of his own delinquency") (citing Smith v. Daily Mail Pubg 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) ("Elimination 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 abandon-
ing 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 Colum-
bia, Idaho, Kentucky, Massachusetts, Mississippi, New Hampshire, New Jersey, New York,
Ohio, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, Wisconsin, and Wy-
oming.
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
2000); ALASKA STAT. § 47.10.070(a) (Michie 2000); CONN. GEN. STAT. ANN. § 54-76(b) (West
1994) (mandatory closure); D.C. CODE ANN. § 16-2315(c) (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);
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(i)
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 Four-
teenth 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
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., CRTS & JUD. PROC. § 3-812(f) (1995 & Lexis Supp. 2000); MINN. STAT.
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. Part II suggests that, while both the First and Sixth Amendment arguments could reasonably be brought to bear on presumptive closure statutes, only the freestanding due process claim has a strong chance of succeeding under existing Supreme Court jurisprudence. This Note concludes that the statutes are "fundamentally unfair" under that jurisprudence and can no longer withstand constitutional scrutiny.


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" unless the juvenile judge, in her sole discretion, finds a very good reason 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, 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." 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" 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. 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

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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.
21. WATKINS, supra note 3, at 50-51 & n.11.
22. See infra Part I.A.
to juvenile proceedings. 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, the youth justice system continues to identify it as a main objective. In the juvenile court's early years, juvenile theorists and practitioners sought mechanisms that would save young offenders before they became unsalvageable. 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. The reformers demanded an institution in which the main philosophical objective would be to eliminate deviant behavior during its early phases. Most importantly, they sought a proba-

23. See infra Part I.B.


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 . . .").


33. Smith v. Daily Mail Pub'Lg 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.
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 punishment. 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. 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. 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. 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.


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).


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, and that the problem has only grown worse in recent years. Perceiving a sharp increase in juvenile crime, the general public has reacted to such studies by seeking legislation that makes youths more accountable for their increasingly violent offenses. A large number of states, therefore, have begun to “crack down” on juvenile offenders. These states have enacted “get tough” statutes 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. If the judge determines that the juvenile “poses a
threat to public safety,” she can waive jurisdiction over the youth, and send the case to adult criminal court. 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. Each of these statutory options assumes that punishment serves many, or even most, youths better than does rehabilitation.

In light of the states’ legislation, several commentators have challenged the rehabilitative characterization of juvenile justice. Some of them argue that the system’s dual purposes can coexist and do justify the juvenile court’s continued existence, 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 “automatic 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.
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.

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 ideal in mind, the early reformers attempted to differentiate the juvenile institution from the existing criminal system. The juvenile court was "civil" in nature, and its processes...
were directed toward discovering the cause of a child's delinquency. This enabled the court and its probation staff, as parens patriae, to shape a personalized disposition that fit the "best interest of the child." The juvenile in need of the court's help was not to be found "guilty," and the proceedings were "non-judgmental."

A judge in this system needed wide discretion in crafting the ideal and case-specific disposition. 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. 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.

2. The Shift Toward Procedure

The Supreme Court first acknowledged the suspect nature of the parens patriae doctrine in In re Gault, 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." In Gault, In re Winship, and Breed v. Jones, the Court responded to this revelation of a disturbing "gap between the originally benign conception of the [juvenile] justice system and its

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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.
66. Id. at 16.
realities” by steadily “mak[ing] applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions.” 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; 2) legal counsel; 3) confrontation and cross-examination of witnesses; and 4) the privilege against self-incrimination. 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,” but it nonetheless insisted that “[d]ue process of law is the primary and indispensable foundation of individual freedom.” While the Court had not specified whether juveniles were entitled to any procedural protections whatsoever prior to this constitutional landmark, 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.”

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.\textsuperscript{79} The Court held for the first time that the reasonable doubt standard in adult criminal trials is of constitutional stature.\textsuperscript{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.”\textsuperscript{81} Having made this significant clarification about the reasonable doubt standard, the \textit{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.”\textsuperscript{82} Quoting \textit{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.”\textsuperscript{83}

Finally, in \textit{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.”\textsuperscript{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.”\textsuperscript{85}

\textsuperscript{79}\textit{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 \textit{In re Winship}, 247 N.E.2d 253, 260 (N.Y. 1969) (Fuld, C.J., dissenting)).

\textsuperscript{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.”).

\textsuperscript{81} Id. at 363.

\textsuperscript{82} Id. at 365.

\textsuperscript{83} Id. at 366 (quoting \textit{Gault}, 387 U.S. at 36). For a more complete synopsis of the \textit{Winship} decision, see generally \textit{The Supreme Court, 1969 Term—Leading Cases}, 84 HArv. L. Rev. 156 (1970).

\textsuperscript{84} U.S. CONST. amend. V. (incorporated into the Fourteenth Amendment against the states in \textit{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).

\textsuperscript{85} \textit{Breed}, 421 U.S. at 529 & n.11 (eschewing, once again, the “civil label-of-convenience, which has been attached to juvenile proceedings”) (quoting \textit{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 SYNDER, 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.\textsuperscript{89} Originally, the statutes were intended to keep a troubled youth's court proceedings and records sealed to assist in countering this potential stigmatizing effect.\textsuperscript{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.\textsuperscript{91} Finally, keeping the information private would prevent any outside political pressure and interference with the judicial process.\textsuperscript{92}

2. The Unforeseen (and Unseen) Effects of Closure

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

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\textsuperscript{89} 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." \textit{Id.}

\textsuperscript{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." \textit{Id.}

\textsuperscript{91} 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." \textit{Id.}

\textsuperscript{92} 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." \textit{Id.}

\textsuperscript{93} See supra Part I.A.2; see also Marygold S. Melli, \textit{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").

\textsuperscript{94} See supra Part I.B.2.
they are unforeseen and unintended effects, judicial abuse and sys-
temic malfunction have often closely followed closure.\(^9\)

Disturbingly, a juvenile judge’s actual power and discretion
to “treat” youths flows from the state’s police power via a statute.\(^9\)
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.”\(^9\)
This “authoritarian nature of the [adjudication] enterprise”\(^9\)
not only undermines the assumption that the judge always acts in the
best interest of the child,\(^9\) it also begs for some check on the far-
ranging discretion\(^10\) 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 Obso-
lete?, 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 re-
manding 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

Many states have also reduced judicial discretion on their own accord by promulgating statu-
tory 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. 32, 65 (1995) (describing how statutes like California’s “three-strikes” law have dramati-
cally 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.
especially troubling in light of empirical evidence indicating that juvenile judges often not only lack the innate ability to treat delinquent youths adequately, but that some may be careless, arbitrary, or even racist in adjudication.\footnote{101} 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.\footnote{103} Although the juvenile court's founders supposed that closure encouraged free-flow of information among the system's participants,\footnote{104} it can actually be counterproductive, impeding adjudication by causing "misinformation and delay."\footnote{105} Adjudications may be postponed because juvenile information agencies sometimes balk at sharing confidential information.\footnote{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.\footnote{107} This information is vital in today's legislative

\footnote{101}{See, e.g., \textit{McKeiver v. Pennsylvania}, 403 U.S. 528, 544 & n.4 (1971). The \textit{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." \textit{Id.} at 544.}

\footnote{102}{See Donna M. Bishop & Charles E. Frazier, \textit{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, \textit{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, \textit{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, \textit{ 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.").}

\footnote{103}{See generally Jan L. Trasen, Note, \textit{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).}

\footnote{104}{See \textit{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").}

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

\footnote{106}{See Martin, \textit{Open the Doors}, \textit{ 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").}

\footnote{107}{Trasen, \textit{ supra} note 103, at 380.}
schemes, because transfer from the juvenile system to the adult system is occurring with increasing frequency.103

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,
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 obtained115 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

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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) ("[T]he 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\textsuperscript{118} and Globe Newspaper Co. v. Superior Court.\textsuperscript{119}

In Richmond Newspapers, a 7-1 decision with seven opinions and no majority,\textsuperscript{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,\textsuperscript{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.\textsuperscript{122}

The plurality acknowledged the obvious argument that “the Constitution nowhere spells out a guarantee for the right of the public to attend trials.”\textsuperscript{123} Nevertheless, it viewed access as a necessary corollary to the enjoyment of the more established freedoms of speech, press, and assembly.\textsuperscript{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.”\textsuperscript{125}

\textsuperscript{118}Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
\textsuperscript{119}Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).
\textsuperscript{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).
\textsuperscript{121}Chief Justice Burger’s judgment was joined by Justices White and Stevens. See Richmond Newspapers, 448 U.S. at 558.
\textsuperscript{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)).
\textsuperscript{123}Id.
\textsuperscript{124}Id. at 579 (recognizing that “important but unarticulated rights have . . . been found to share constitutional protection in common with [such] explicit guarantees”).
\textsuperscript{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.” Upon reviewing an array of historical and philosophical sources emphasizing the trial’s public nature, 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.” Concurring, Justice Brennan agreed with the plurality on this point, stressing the long tradition of open criminal proceedings. 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.”

Two years later, the Court in *Globe Newspaper* continued its line of reasoning from *Richmond Newspapers*, holding that it would apply strict scrutiny to any statute presumptively closing criminal trials. 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*. 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.”

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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).
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," the Court found that Massachusetts' statutory justifications for closure failed the second prong of the compelling interest test. In holding that the Massachusetts law was not "a narrowly tailored means of accommodating the State's asserted interest," 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."

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." She interpreted neither Richmond Newspapers nor Globe Newspaper "to carry any implications outside the context of criminal trials." Her desire to write separately is notable; while some courts and commentators have not adhered to her warnings, her concurrence may reveal that the Court will refuse to extend Richmond Newspapers and Globe Newspaper beyond their original criminal scope. 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, indicating that they are probably not criminal trials for purposes of the First. More importantly, unlike criminal proceedings, juvenile proceedings have not benefited from "an enduring and vital tradition of public entry." 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" 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. Trials involving youths, just as those involving adults, were open to the public and press. 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. A press entity seeking to challenge the presumptive closure statutes on First

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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 [Sixth Amendment right to a public trial]" [hereinafter Note, *Trial Secrecy*].


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 deviates" 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, 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-
gency of the compelling interest test, many states could be hard-
presst to empirically justify dispensing with the press's (hereto-
fore unrecognized) constitutional right of access in the name of re-
habilitation. Nevertheless, even though it now shares its priority
status with punitive goals, rehabilitation is not an entirely use-
less or unrealistic ideal. 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 recog-
nized the severity of rehabilitation's shortcomings, yet has simulta-
neously refused to hold "that the system cannot accomplish its re-
habilitative goals." It has therefore found rehabilitation a worthy
aim that, apparently, holds sufficient promise of success in the fu-
ture.

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 News-
paper. There, the Court struck down the Massachusetts statute
even though it pursued the compelling governmental objective of
protecting young rape victims from public embarrassment. The
statute failed the Court's scrutiny because it did not enact the least
invasive infringement on the press's right of access.

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 juve-
nile 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 Constitu-
tional 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 govern-
mental interests).

157. See Dalton, supra note 15, at 1225 (arguing that "generic fears of diminished rehabilita-
tion... 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 socie-
tal demands for retribution; and between idealistic hopes and realistic disappointments."); Shof-
fer, supra note 34, at 482-84 (demonstrating that the system expends as much energy on pun-
ishment 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).


161. Id.


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 abuse\(^ {167}\) 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-


\(^{167}\) For a brief review of juvenile judges' wide discretion and the resulting potential for abuse, see supra notes 62-64, 95-102, infra notes 249-86, 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).

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,\(^\text{170}\) the closure jurisdictions give the juvenile judge discretion to allow into the courtroom those persons with a "direct" or "proper" interest in the matter.\(^\text{171}\) 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."\(^\text{172}\)

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.

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\(^\text{170}\) 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.


\(^\text{172}\) 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.
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 protections\(^ {174} \) 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


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

[no 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*,\(^\text{178}\) 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"\(^\text{179}\) of the juvenile court system. Though it again acknowledged the system's punitive nature and its due process failings,\(^\text{180}\) the Court retreated from its stance in *Gault* and *Winship* by refusing to apply the Sixth Amendment right to trial "by an impartial jury"\(^\text{181}\) to juvenile courts.\(^\text{182}\)

While the plurality conceded that there were extensive systemic shortcomings justifying such a right,\(^\text{183}\) 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."\(^\text{184}\) 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."\(^\text{185}\) 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,\(^\text{186}\) bringing the total on that issue to a five-justice majority.

\(^\text{178}\) *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.

\(^\text{179}\) Professor Paulsen coined this term to describe the *Gault* Court's constitutional formalization of juvenile court procedures. See generally Paulsen, *supra* note 77.

\(^\text{180}\) *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").

\(^\text{181}\) U.S. CONST. amend. VI.

\(^\text{182}\) *McKeiver*, 403 U.S. at 545.

\(^\text{183}\) *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.

\(^\text{184}\) *McKeiver*, 403 U.S. at 547.

\(^\text{185}\) *Id.* at 541.

\(^\text{186}\) *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, and numerous observers contend that they are now essentially criminal in nature. 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. The splintered "criminal prosecution" ruling in McKeiver garnered only five votes. 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." 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 proceedings after recognizing that "the risk to which the Clause refers is not present in proceedings that are not essentially criminal."

Nonetheless, the Gault and Breed rulings, convincing and powerful as they are, are not binding precedent on the Sixth Amendment issue. 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.


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." 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. The argument can be—and has been—made that the transformation of the juvenile court over the past thirty years justifies such a reversal. Still, that argument has not succeeded. If the doctrine of *stare decisis* 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.


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 trials\textsuperscript{199} pulls strongly against reversal when the costs, if anything, are higher in 2001.\textsuperscript{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.\textsuperscript{201}

\textsuperscript{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").

\textsuperscript{200} One commentator urging McReiver'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)).

\textsuperscript{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[ . . . re-]

tained 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 contemporaries, 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 sus-

pects 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 Amend-

ment "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 . . . ." At this point in its history, the Due Process Clause unquestionably contains more protections than simply those specifically listed in the Bill of Rights. 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.' Of course, this fact by itself does not create a constitutional problem. 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." This Note contends that they have.

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.


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, 169 (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").


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.”

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 Amendment or to the political implications of “open[ing] the doors.” 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.

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. The classic

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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. & POL’Y 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."\footnote{213}

To be sure, Justice Black's "total incorporation"\footnote{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], \textit{not because} "fairness, impartiality and

\textit{Id.} at 60. Nowhere, of course, did he mention any interest of the press, because that was not an issue in the case. \textit{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. A\textsc{khil} R\textsc{eed} A\textsc{mar}, \textsc{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 T\textsc{heodore} H\textsc{ale}, \textsc{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, \textit{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.

\footnote{213} See, \textit{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); \textit{but see} Richard H. Fallon, Jr., \textit{As Applied and Facial Challenges and Third-Party Standing}, 113 HARV. L. REV. 1321, 1359-64 (2000) [hereinafter Fallon, \textit{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. \textit{Id.} at 1359 (quoting Note, \textit{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. \textit{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.

\footnote{214} For more complete explications of Black's "total incorporation" model in a number of contexts, see AMAR, \textsc{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 D\textsc{uncan} v. L\textsc{ouisiana}, 391 U.S. 145, 162-71 (1968) (Black, J., dissenting); A\textsc{damson} v. C\textsc{alifornia}, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting); B\textsc{etta} v. B\textsc{rady}, 316 U.S. 455, 474-75 & n.1 (1942) (Black, J., dissenting); H\textsc{ugo} L\textsc{afayette} B\textsc{lack}, \textsc{A Constitutional Faith xvi, xvii}, 34-42 (1968)); G\textsc{unther} & S\textsc{ullivan, 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

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:

[J]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, 611-12 (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."\textsuperscript{210} This methodology, most frequently associated with Justice Frankfurter\textsuperscript{220} and the second Justice Harlan,\textsuperscript{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."\textsuperscript{222} To the Gault Court, a juvenile's rights to notice of

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\textsuperscript{210} 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).

\textsuperscript{220} 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;\textsuperscript{223} the enumeration of those protections in the Bill of Rights perhaps just made that case even more convincing.\textsuperscript{224}

The \textit{Gault} Court left to future cases the question of what other procedures were required to ensure a fundamentally fair juvenile court.\textsuperscript{225} Applying the proof beyond a reasonable doubt standard to juvenile proceedings when that issue was before it in \textit{Winship},\textsuperscript{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."\textsuperscript{227} The \textit{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.\textsuperscript{228} Not surprisingly, then, Justice Black dissented in \textit{Winship} on those very grounds,\textsuperscript{229} charging that the standard was not constitutionally required in either criminal or juvenile proceedings.\textsuperscript{230}

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\textsuperscript{223} \textit{Gault}, 387 U.S. at 33-34, 49-51, 56-57.
\textsuperscript{224} \textit{In re 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 \textit{Gault}).
\textsuperscript{225} \textit{In re Winship}, 397 U.S. 358 (1970); see also \textit{supra} Part I.B.2.
\textsuperscript{226} \textit{Winship}, 397 U.S. at 363 (quoting \textit{In re Winship}, 247 N.E.2d 253, 259 (N.Y. 1969) (Fuld, C.J., dissenting)); see also \textit{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... ").
\textsuperscript{227} \textit{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.").}
\textsuperscript{228} \textit{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.").
\textsuperscript{229} \textit{id.} at 377-85 (Black, J., dissenting).
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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.

\(\hspace{1cm}^{231}\) *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); see also supra Part I.B.2.

\(\hspace{1cm}^{232}\) *Breed v. Jones*, 421 U.S. 519 (1975); see also supra Part I.B.2.

\(\hspace{1cm}^{233}\) *McKeiver*, 403 U.S. at 540-41 (rejecting the Sixth Amendment argument); *id.* at 541-43 (rejecting the due process argument).

\(\hspace{1cm}^{234}\) *Id.* at 543.

\(\hspace{1cm}^{235}\) *Id.* at 543, 550.

\(\hspace{1cm}^{236}\) *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 BRETHREN 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.*

\(\hspace{1cm}^{237}\) *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 decision, where it held unconstitutional the secret investigation of a one-man grand jury, the Supreme Court recognized that there are at least three benefits of holding court proceedings in public. First, the Court found that publicity's most important function is to restrain misuse of judicial authority. 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." Third, the Court noted that "the spectators learn about their government and acquire confidence in their judicial remedies." 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

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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.”

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.” In emphasizing both this historical distrust as well as the functional underpinnings of public scrutiny, 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. Thus, its warnings of unchecked judicial discretion are strong evidence that openness is essential for fundamental fairness in today’s juvenile courts, where, in nineteen jurisdictions, presumptive closure statutes shield juvenile judges from public view.

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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]lausule . . . .”). 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 ABRAM & 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, and thus circumvent the primary purpose of access—reduction of judicial abuse and error. 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. 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. This opinion, which commentators have too often neglected, 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."
The 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, presents 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 arises 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, presents 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 academicians 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).
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. 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. 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. While transfer may well be justified in many of these repeat-offender cases, 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. Also, disturbingly, a disproportionate number of these mistreated offenders have been racial minorities.

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. C.R.M. 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. Guttmann, 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. 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. Were juveniles entitled to jury trials, there would already be a “tolerably efficient check” in place to counter the juvenile judge’s discretion. But they are not, 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, 405 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. 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, and it suggests that denying such a request violates fundamental fairness. Indeed, the Burrus case offers the "paradigm" example of a violation. 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, 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, 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 ("[Confidentiality is still viewed as a protective measure—but increasingly one that juvenile delinquents do not deserve.").

276. Id. at 556-57 (Brennan, J.).

277. 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. 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. In light of this ju-

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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.\textsuperscript{282}

No doubt, many guilty youths will waive the due process right to a public trial once recognized.\textsuperscript{283} Moreover, many innocent youths will probably waive it as well, believing that the judge is competent and impartial,\textsuperscript{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.\textsuperscript{285} The Due Process Clause requires no less.

**CONCLUSION**

While the Supreme Court has acknowledged the juvenile court’s systemic objective of rehabilitation,\textsuperscript{286} it has recognized that the system has fallen far short of its rehabilitative goals.\textsuperscript{287} Even though it has conceded that *parens patriae* informality may assist juvenile judges in personalizing treatment for a particular wayward youth,\textsuperscript{288} it has declared that informality and discretion must not come at the expense of liberty and procedure.\textsuperscript{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,”\textsuperscript{290} it has suggested that confidentiality and closure may actually harm juvenile offenders.\textsuperscript{291} Additionally, although the Court has held that juvenile proceedings are not “‘criminal prosecution[s],’” within the meaning and reach of the Sixth
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 admitted 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

293. Gault, 387 U.S. at 50.
295. Guggenheim & Hertz, supra note 197, at 560 (citing McKeiver, 403 U.S. at 541-43, 550 (describing the appellants' arguments)).
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.
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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