NEW MEXICO LAW REVIEW

Volume 10
Issue 2 *Summer 1980*

Summer 1980

First Amendment versus Sixth Amendment: A Constitutional Battle in the Juvenile Courts

Jill K. McNulty

Recommended Citation
Jill K. McNulty, *First Amendment versus Sixth Amendment: A Constitutional Battle in the Juvenile Courts*, 10 N.M. L. Rev. 311 (1980).
Available at: https://digitalrepository.unm.edu/nmlr/vol10/iss2/5

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

FIRST AMENDMENT VERSUS SIXTH AMENDMENT: A CONSTITUTIONAL BATTLE IN THE JUVENILE COURTS

JILL K. McNULTY*

INTRODUCTION

State laws and court rules which refuse to allow the news media to publish a juvenile's misdeeds are designed to protect juveniles from public exposure of those misdeeds. At the same time, such laws keep the public from knowing how the judicial system deals with juvenile offenders. In *Smith v. Daily Mail Publishing Co.*,[1] the United States Supreme Court held unconstitutional a state law denying newspapers the right to publish a juvenile offender's name,[2] thus resolving the conflict in favor of the public's right to know. With its decision in *Smith,* the Supreme Court has at last focused national attention upon important constitutional problems which have increasingly concerned juvenile courts and the news media.

This paper explores the contrasting policies regarding publicity of the adult criminal and juvenile justice systems, considers whether a minor has a right under the sixth amendment to demand a public trial in state juvenile offender proceedings, and discusses the central concern of *Smith v. Daily Mail Publishing Co.*, i.e., first amendment implications of state attempts to restrict news media access to or publication of information obtained from juvenile court records and hearings. In addition, the recommendations of the Task Force on Juvenile Justice and Delinquency Prevention and of the Institute for Judicial Administration—American Bar Association Joint Commission on Juvenile Justice Standards on the foregoing issues are analyzed. Finally, some recommendations for the alleviation of conflict between the news media and the juvenile justice system are suggested.

---

*Associate Judge, Circuit Court of Cook County, Illinois; Professor of Law (on leave), IIT/Chicago-Kent College of Law, Chicago, Illinois; A.B., Northwestern University, Evanston, Illinois, 1957; J.D., Northwestern University, Chicago, Illinois, 1960. The author expresses her gratitude to Michael D. Fine, third-year law student at IIT/Chicago-Kent College of Law, for his help with the research for this article.

1. 99 S. Ct. 2667 (1979).
2. *Id.* at 2672.

THE CONTRASTING POLICIES OF THE ADULT CRIMINAL JUSTICE SYSTEM AND THE JUVENILE SYSTEM REGARDING PUBLICITY

The Criminal Justice System

The first amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press";[3] the sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime has been committed . . . ."[4] Tension exists between the constitutional right of the news media under the first amendment to gather and disseminate information about court proceedings and the right of a person criminally accused to a fair and impartial trial under the sixth amendment. This tension has continually concerned the press and the judicial, legislative, and executive branches of government at every level.

One focus of current discussion is the impact of television cameras filming trials in progress on a defendant's right to a fair trial. Another is the right of news reporters to protect confidential sources from compulsory disclosure through subpoena when a defendant claims that such information is essential to defend himself against serious criminal charges. A recent New York case illustrates the latter problem.[5] A New York Times reporter was jailed and substantial fines were imposed against his newspaper for contempt of court. The reporter and the newspaper had refused to produce investigative notes for court inspection. The court determined the notes should have been produced to enable the court to decide whether they would be helpful in preparing the defense of a physician accused of murder.[6]

Although the proper interface between the rights protected by the first and the sixth amendments engenders heated debate, this much is certain: a criminal trial is a public event, the record of what transpires is public property, and under most circumstances may be reported with impunity.[7] The public has a right to know what goes on in the courtroom as long as the accused's right to a fair trial in criminal proceedings is not impaired.[8] Underlying these statements is

---

3. U.S. Const. amend. I.
4. *Id.* amend. VI.
5. *In re* Farber, 78 N.J. 259, 394 A.2d 330, *cert. denied,* 439 U.S. 997 (1978).
6. *Id.* at ____, 394 A.2d at 338.
7. *See* Craig v. Harney, 331 U.S. 367 (1947).
8. *See* Estes v. Texas, 381 U.S. 532 (1965); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941). *But see* Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979) (upholding judge's right to bar the press from a pretrial suppression hearing).

the principle that the public must have such information to assess adequately the performance of its public servants and the functioning of its courts. The press has traditionally supplied this information. "The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees, and generally informing the citizenry of public events and occurrences, including court proceedings."[9]

The access of the press to the courtroom is therefore merely derivative of the public's right to know. The United States Supreme Court has declared that the access rights of the press to governmental information are coextensive with those of the public[10] and that the first amendment confers no greater access rights than those the public in general possess.[11]

> [T]he people as a whole retain their interest in free speech . . . and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. *It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.*[12]

The Juvenile Justice System

In contrast to the openness of the adult criminal trial mandated by the sixth amendment, no clear constitutional guidelines exist with respect to public or press access to juvenile court delinquency hearings. The United States Supreme Court in *McKeiver v. Pennsylvania*[13] declared that the sixth amendment does not mandate jury trials in juvenile delinquency proceedings on the ground that such proceedings are not "criminal prosecution[s]."[14]

A basic goal of the separate juvenile court system, which has existed in Illinois since 1899, has been to rehabilitate, rather than to punish, children charged with criminal law violations.[15] This objective continues to be recognized in a great majority of states,[16] has

---

9. Estes v. Texas, 381 U.S. 532, 539 (1965).

10. Pell v. Procunier, 417 U.S. 817 (1974) (concerning access to prisoners).

11. Houchins v. KQED, Inc., 438 U.S. 1 (1978). Neither the first amendment nor the fourteenth amendment mandates a right of access to government information or sources of information and the news media have no constitutional right of access to a county jail over and above that of other persons to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television. This position was also taken in *Gannett*, 99 S. Ct. 2898 (1979).

12. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (emphasis added).

13. 403 U.S. 528 (1971).

14. *Id.* at 541.

15. *Id.* at 539-40.

16. *See* Cal. Welf. & Inst. Code §§ 502-503 (West 1972); Ill. Ann. Stat. ch. 37, §§ 701-2 (Smith-Hurd Supp. 1979); Mass. Gen. Laws Ann. ch. 18, § 2 (West 1973).

been acknowledged by the Supreme Court in several cases,[17] and is intended to serve the welfare of both the child and society. To accomplish this goal, most states have statutorily provided that an adjudication of delinquency does not result in the imposition of civil disabilities, e.g., loss of right to vote or hold public office, that ordinarily result from a criminal conviction.[18] States attempt to assure that the child's contacts with the juvenile justice system are helpful and do not adversely affect him.

The rehabilitative goal of the juvenile court has, however, too rarely been achieved.[19] The existence of a juvenile police or court record and the publication of numerous cases of juvenile misbehavior and criminality have been identified as major obstacles to rehabilitation. Employment opportunities may be limited, educational opportunities may be threatened, and the possibility of joining the armed forces may be foreclosed. Finally, publicity surrounding a delinquency charge may result in social ostracism by a society that fails to differentiate between criminal conduct committed by those under a certain age and those over it. These factors have led a number of states to pass statutes allowing expungement of juvenile police and court records and statutes obstructing public and news media access to juvenile proceedings.[20]

THE PROBLEM OF PROPER BALANCE BETWEEN THE MEDIA'S RIGHT TO INFORMATION AND THE MINOR'S RIGHT TO CONFIDENTIALITY IN JUVENILE DELINQUENCY PROCEEDINGS

The Minor's "Right" to a Public Trial— Sixth Amendment Concerns

The leading case discussing the subject of public trials in relation to the sixth amendment enumerates the values of permitting the

17. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); Kent v. United States, 383 U.S. 541 (1966).

18. Howard, Grisso, & Neems, *Publicity and Juvenile Court Proceedings,* 11 Clearinghouse Review 203, 204 (1977); *see also* Ill. Ann. Stat. ch. 37, §§ 702-9 (Smith-Hurd 1972). Criminal jurisprudence is based upon notions of moral blameworthiness and condemnation. Punishment has a fourfold purpose: (1) future deterrence of the specific individual who commited the act, (2) deterrence of the general public through punishment of the specific violator, (3) retribution, and (4) incapacitation of the violator from further criminality through imprisonment. *See generally* F. Allen, The Borderland of Criminal Justice 49-60 (1964); S. Kadish & M. Paulsen, Criminal Law and Its Processes 2-5 (3d ed. 1975); *See also* Ill. Ann. Stat. ch. 38, §§ 1-2 (Smith-Hurd 1972).

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

20. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status,* 1966 Wash. U.L.Q. 147, 168-74. *See also* Note, *Rights and Rehabilitation in the Juvenile Courts,* 67 Colum. L. Rev. 281, 285-89 (1967).

"public" to view court proceedings.[21] Public viewing safeguards society against courts being used as a weapon of persecution, checks abuse of judicial power, calls the facts of a case to the attention of previously unknown witnesses, teaches citizens about their government, and instills confidence in judicial remedies.[22] The net effect is to "guarantee that the accused [is] fairly dealt with. . . . "[23] Justice Brennan has stated that openness in the judicial process is analogous to the function of a jury; it protects the accused from possible judicial oppression by submitting judicial behavior to the forum of public opinion.[24]

The Institute for Judicial Administration-American Bar Association Juvenile Justice Project's Standards Relating to Adjudication (hereinafter referred to as IJA-ABA Standards Relating to Adjudication), recommends that "[e]ach jurisdiction should provide by law that a respondent in a juvenile court adjudication proceeding has a right to a public trial."[25] The Supreme Court in *McKeiver*, however, held that juvenile proceedings are not "criminal prosecutions" within the meaning of the sixth amendment and a juvenile has no absolute right to a jury trial.[26] Mr. Justice White, concurring, declared that a jury trial in juvenile cases is not necessary because the distinctive intake policies and procedures of the juvenile system are sufficient to protect youthful offenders from overzealous prosecutors. As to judicial misfeasance, he asserted that the system itself "eschews punishment for evil choice."[27] The majority found that requiring a jury trial in juvenile cases would remake the system into an adversary proceeding with the attendant delay, formality, and clamor, but would fail to remedy any defects of the system or improve the fact finding process.[28] Such a drastic change would mean abandoning the traditional goals of fairness, concern, and parental involvement in the juvenile courts; it would close the door on the ideal of an informal, protective proceeding.[29] The Court cited with approval a Pennsylvania court's[30] commendation of the

21. *In re* Oliver, 333 U.S. 257 (1948).
22. *Id.* at 270.
23. Estes v. Texas, 381 U.S. 532, 538 (1965).
24. McKeiver v. Pennsylvania, 403 U.S. 528, 554-55 (1971) (Brennan, J., concurring in part and dissenting in part).
25. IJA-ABA Juvenile Justice Standards Project, Standards Relating to Adjudication, Std 6.1, at 70 (Tent. Draft 1977) [hereinafter cited as IJA-ABA Standards—Adjudication].
26. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
27. *Id.* at 552 (White, J., concurring).
28. 403 U.S. at 545-51 (majority opinion).
29. *Id.*
30. Commonwealth v. Johnson, 211 Pa. Super. Ct. 62, 234 A.2d 9 (1967).

Supreme Court's refusal to impose all rights constitutionally assured for adults, including the right to a jury trial, on juvenile court proceedings. " 'It is clear to us that the Supreme Court has properly attempted to strike a *judicious balance* by injecting procedural orderliness into the juvenile court system. It is seeking to reverse the trend "whereby the child receives the worst of both worlds. . . ." ' "[31] The commentary of the IJA-ABA Standards Relating to Adjudication answers the concerns expressed in *McKeiver* about the adverse impact of jury trials on juvenile proceedings by citing *RLR v State*[32] where the Alaska Supreme Court noted that the possible adverse impact has not been empirically tested and may be false.[33]

Two appeals were consolidated in *McKeiver.* Justice Brennan, concurring in the result reached under Pennsylvania law but dissenting in that reached under North Carolina law, declared that the approach to the due process concerns taken by the plurality was clearly inadequate. Agreeing that an adjudicatory hearing is not a "criminal prosecution," he nevertheless asserted that fundamental fairness mandates some safeguard in the process equivalent to that supplied by a jury in the criminal process. The due process clause commands a "result," not a particular procedure.[34] Justice Brennan said that a jury could guarantee this result (fairness in the fact finding process) in juvenile delinquency proceedings. In the absence of a jury hearing, "an accused may in essence appeal to the community at large, by focusing public attention upon the facts of his trial . . . . "[35] The record revealed that under the Pennsylvania statute, there was no prohibition imposed by the court against admitting the press or public and, in practice, the courts generally permitted such access. Justice Brennan, in affirming the majority result, noted that, "[m]ost important, the record in these cases is bare of any indication that any person whom the appellants sought to have admitted to the courtroom was excluded."[36]

The North Carolina case, *In re Burrus,*[37] presented a different situation. State law permitted the trial judge to exclude the public.

31. 211 Pa. Super. Ct. at 74, 234 A.2d at 15 (emphasis added) (quoting Kent v. United States, 383 U.S. 541, 556 (1966)).

32. 487 P.2d 27 (Alaska 1971), *cited in* IJA-ABA Standards—Adjudication, Std 4.1, note, at 52.

33. *Id.* at 37.

34. 403 U.S. at 554 (Brennan, J., concurring in part and dissenting in part).

35. *Id.* at 555.

36. *Id.* at 555-56.

37. 275 N.C. 517, 169 S.E.2d 879 (1969), *consol. with* McKeiver v. Pennsylvania *and aff'd,* 403 U.S. 528 (1971).

The cases before the court concerned the participation of juveniles in civil rights demonstrations against alleged racial discrimination in the Hyde County school system. Charged with obstructing traffic and disturbing the peace, both misdemeanors, the youths were adjudged delinquent and committed to the public welfare department for placement.[38] The trial judge, exercising his statutory discretion, ordered the public and the press excluded from the proceedings over the minors' objections. The North Carolina Court of Appeals affirmed, as did the state supreme court. The court of appeals refused to allow the juvenile court to become a public forum for the adults who had instigated the demonstrations.[39] Emphasizing that exclusion of the public in that case was beneficial to the child, the court held that the juvenile offenders were not entitled to demand a public hearing.[40]

The United States Supreme Court affirmed. Justice Brennan dissented, noting that there is nothing in the "North Carolina's juvenile proceedings that could substitute for public or jury trial in protecting the petitioners against misuse of the judicial process."[41] He cited the dissenting opinion of Mr. Justice Harlan in *Duncan v. Louisiana*[42] for the proposition that access to the "political process" is a legitimate substitute for the jury system.[43] Justice Brennan affirmed the juvenile court philosophy that juvenile adjudications are noncriminal proceedings designed to rehabilitate juvenile offenders.[44] Nevertheless, he concluded that due process compels some form of public scrutiny of the fact finding process. Fundamental fairness at least requires the courts to admit persons whom the accused minor requests be admitted. In dissenting from the North Carolina decision, Justice Brennan implicitly rejected the notion that a court alone should determine what, if any, degree of public exclusion is in the child's best interest. In the absence of a jury system, the juvenile offender has a constitutional right to a "public" trial, at least to the extent of having persons he desires present.

The same year *McKeiver* was decided, the Supreme Court of Alaska in *RLR v. State*[45] decided whether, under the Alaska Con-

38. *In re* Burrus, 4 N.C. App. 523, 167 S.E.2d 454, *modified,* 275 N.C. 517, 169 S.E.2d 879 (1969), *consol. with* McKeiver v. Pennsylvania *and aff'd,* 403 U.S. 528 (1971).

39. *Id.* at 460.

40. *Id.*

41. 403 U.S. at 556 (Brennan, J., concurring in part and dissenting in part).

42. 391 U.S. 145, 188 (1968).

43. 403 U.S. at 556-57 (Brennan, J., concurring in part and dissenting in part).

44. *Id.* at 555.

45. 487 P.2d 27 (Alaska 1971).

stitution, a minor had a right to a public trial in juvenile delinquency proceedings. Alaska's juvenile court statute provided for blanket exclusion of the public unless the court in its discretion found that the attendance of a particular individual at a hearing was "compatible with the best interests of the minor."[46] Alaska's Rules of Juvenile Procedure[47] provided that the interest of the public was to be considered as well. Citing Justice Harlan's concurrence in *Estes v. Texas,*[48] the Alaska Supreme Court held that the right to a public trial belongs to the accused.[49] Noting that

> civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '[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,'[50]

the court stated that "[t]he reasons for the constitutional guarantees of public trial apply as much to juvenile delinquency proceedings as to adult criminal proceedings."[51] The court observed that juvenile cases appealed to the state supreme court often demonstrated more "extensive and fundamental error than is generally found in adult criminal cases" and declared that under the Alaska Constitution a juvenile offender has a constitutional right to a public trial.[52] As to the statutory and court rule allowance of judicial discretion regarding exclusion and admission, the court ruled that such discretion be limited to those "persons whose presence is not desired by the child" nor by his guardian ad litem (who may be appointed where "the child's choice may be adverse to his own interests").[53]

The Supreme Court's refusal in *McKeiver* to expand constitutional protection for juveniles in delinquency proceedings halted the trend begun in the middle 1960's. In the sixties and seventies, the Supreme Court imposed many features of the adult adversarial system upon juvenile proceedings. In 1967, the U.S. Supreme Court in *In re Gault*[54] held that due process, measured by the standard of

46. Alaska Stat. § 47.10.070 (1979).
47. Alaska R. Juv. P. 12(d)(2) (Supp. 1966).
48. Estes v. Texas, 381 U.S. 532, 587 (1965) (Harlan, J., concurring).
49. 487 P.2d at 36 (citing Estes v. Texas, 381 U.S. 532, 588 (1965)).
50. *Id.* at 38 (quoting *In re* Winship, 397 U.S. 358, 365-66 (1970)).
51. *Id.*
52. *Id.*
53. *Id.* at 39. The Louisiana Supreme Court has recently reached a similar conclusion. *See In re* Dino, 359 So. 2d 586 (La.), *cert. denied,* 439 U.S. 1047 (1978). *See also* Hopkins v. Youth Court of Issaquena County, 227 So. 2d 282 (Miss. 1969), which held that regardless of the charge, an accused minor has the right to the presence of a parent.
54. 387 U.S. 1 (1967).

"fundamental fairness," requires that a juvenile be afforded certain procedural protections in an adjudicatory hearing considering a finding of delinquency.[55] Written notice of charges, advice as to the right to counsel, the right to confront and cross-examine witnesses, and freedom from self-incrimination were rights specifically enumerated.[56] The Court has articulated its basic due process requirement in this way:

> We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of *the usual administrative hearings;* but we do hold that the hearing must measure up to the essentials of due process and fair treatment.[57]

It is of particular interest that the Supreme Court singled out administrative hearings as a standard of comparison. As in juvenile proceedings, the question of due process protections has played an important and expanding role in such hearings.

In 1971, the United States District Court for the District of Columbia considered whether a closed hearing relating to termination "for cause" of an employee's contract before the Civil Service Commission was unconstitutional as violative of due process and concluded, in *Fitzgerald v. Hampton,*[58] that it was. Despite a tradition of judicial hesitancy to intervene in the procedural processes of administrative agencies, the *Fitzgerald* court permanently enjoined the Civil Service Commission, its agents, and employees from holding closed hearings.

Plaintiff Fitzgerald asserted that conducting the hearing in secrecy would forever deprive him of a fundamental right. The court agreed, rejecting defendant's argument that since administrative hearings are not prosecutorial in nature, the full panoply of due process protections does not inure to the plaintiff. While agreeing that indeed the challenged hearing was not prosecutorial, the court noted that, "it is nevertheless one where the final outcome is a decision on the merits of the issues raised, and this decision directly affects the legal rights of an individual. Fitzgerald's right to a livelihood is at stake."[59] In due process terms, the right to a livelihood is viewed as a property interest affecting the liberty to seek future employment.

55. *Id.* Three years later, in *In re Winship,* the Supreme Court held that the standard required in a delinquency proceeding is proof beyond a reasonable doubt. 397 U.S. 358 (1970).

56. 387 U.S. at 33, 36, 42, 49.

57. *Id.* at 30 (quoting Kent v. United States, 383 U.S. 541, 562 (1966)).

58. 329 F. Supp. 997 (D.D.C. 1971).

59. *Id.* at 998.

Citing Mr. Justice Brennan's dissent in *McKeiver,* the court rejected the defendant's assertion that a closed hearing was necessary to protect plaintiff's privacy interests.

Comparisons between administrative hearings and juvenile proceedings can be made. Administrative hearings are conducted under attenuated due process safeguards[60] just as juvenile proceedings are.[61] In the *Fitzgerald* case, the interest involved was one of property. In a juvenile court, liberty is at stake. As has often been noted, both interests invoke due process safeguards.[62] It is no casual coincidence that the fourteenth amendment places liberty before property. Clearly, the district court's reasoning in *Fitzgerald* is all the more compelling in a juvenile proceeding where a person's liberty is at stake.

The cases discussed above suggest that, even in judicial pro- in which due process protections are attenuated, the right to confidentiality belongs to the accused. This right may be waived by him in the interest of obtaining a fair hearing by opening the proceedings to public scrutiny.

The Press' Right of Access to Juvenile Court Proceedings Over Minors' Objections—Sixth and First Amendment Concerns in Privacy Rights

A. The Law in Relation to Adult Trials.

The New York Court of Appeals in *United Press Association v. Valente*[63] noted that the right to a public trial is a right of the accused alone. While acknowledging the legitimate public interest in viewing a court trial, the court stated that the sixth amendment did not grant the public or press any enforceable right of access to a criminal trial; if it did, the defendant would be deprived of his right to waive a public trial. The following discussion involves the few cases in which courts have been called upon to balance the public's right of access to court proceedings against an individual's right to a fair trial.

Gannett Co. v. DePasquale[64] was the first case in which the Supreme Court dealt directly with the issue of whether the sixth amendment confers a right upon the news media to attend a pretrial suppression hearing over the defendant's objection when a clear and present danger to his right to a fair trial has not been shown. The

60. *See* 5 U.S.C. §§ 551-559 (1976).

61. *See* text accompanying notes 54-57 *supra.*

62. *See In Re* Winship, 397 U.S. 358 (1970); *In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966); Fitzgerald v. Hampton, 329 F. Supp. 997 (D.D.C. 1971).

63. 308 N.Y. 71, 123 N.E.2d 777 (1954).

64. 99 S. Ct. 2898 (1979).

Court, while agreeing that the sixth amendment does not guarantee a right to a private trial, declined to hold that the sixth amendment requires an open pretrial proceeding when the participants in the litigation agree that it should be closed to protect the defendant's right to a fair trial.[65] The majority held "that members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."[66] *Gannett* also raised the question of whether the first amendment conferred upon the press a right of access to criminal pretrial proceedings. The Court declined to answer that question, stating that "even assuming, *arguendo,* that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this putative right was given all appropriate deference by the state *nisi prius* court in the present case."[67] The court made it clear, however, that even if a first amendment right of access exists, that right can be limited even when there is no showing that a clear and present danger exists to the accused's right to obtain a fair trial.[68] The Supreme Court suggested that courts should balance the press' right to report a court proceeding of public interest against the extent to which it might impair a defendant's right to a fair trial.[69]

The extent to which courts may bar news media from a trial at the parties' request has been considered by a few state courts. In *State ex rel. Gore Newspaper Co. v. Tyson,*[70] a Florida appellate court ruled that excluding the press and public and sealing the record were beyond the trial judge's power. The parties to the litigation had requested a private hearing but had given no "cogent reason" why their request should be granted. The reviewing court noted that circumstances such as the testimony of a child in a domestic relations case which might result in embarrassment, scandal, or lack of candor could justify such exclusionary and protective orders.[71]

Several courts have considered whether the exclusion of "spectators" from a criminal trial over the defendant's objections violates his sixth amendment right to a public trial. The Eighth Circuit Court of Appeals has acknowledged the propriety of excluding "spec-

65. *Id.* at 2907-08.

66. *Id.* at 2911.

67. *Id.* at 2912.

68. *Id.* The clear and present danger test governs the right of government to prohibit publication of pretrial information lawfully obtained by the press. *See* Schenck v. United States, 249 U.S. 47 (1919), for a formulation of the clear and present danger test.

69. 99 S. Ct. at 2912.

70. 313 So. 2d 777 (Fla. Dist. Ct. App. 1975), *overruled on other grounds,* 348 So. 2d 293 (Fla. 1977).

71. *Id.* at 783.

tators" during testimony of a victim in a rape case.[72] The interests of privacy present in a rape prosecution suffice to uphold such orders.[73] The Minnesota Supreme Court in *State v. Schmit*,[74] however, held that the exclusion of the general public due to the "obscene" nature of the testimony violated defendant's right to a public trial even when members of the press and bar were permitted to remain.

B. The Law in Relation to Juvenile Proceedings.

Several courts have thus held that the public ordinarily has a right of access to courtroom proceedings in cases involving adults although some restrictions may be imposed. Ignoring for the moment the question of desirability of excluding the press and public from juvenile proceedings, the question remains whether a legislative body may constitutionally do so with respect to juvenile delinquency proceedings. In *Gault*, Mr. Justice Fortas suggested that since "treatment" is the benefit or the *quid pro quo* that the minor receives as a result of the juvenile adjudication process, that process need not afford all the procedural protections of an adult criminal trial.[75] Several federal courts have supported Justice Fortas' reasoning by holding that a minor has a fourteenth amendment right to treatment and rehabilitation by the state when he has been deprived of his liberty by an adjudication process in which procedural safeguards were attenuated.[76] One might argue that a minor ought to have greater right to privacy than an adult because adult criminal and civil trials have a full panoply of procedural safeguards. Following this line of reasoning, the public, including the press, should be excluded from the courtroom at the minor's request. However, the Supreme Court held in *Davis v. Alaska*[77] that the state's interest in protecting a juvenile's court record from public view must yield

72. Harris v. Stephens, 361 F.2d 888 (8th Cir. 1966), *cert. denied,* 386 U.S. 964 (1967). *See also* Geise v. United States, 262 F.2d 151 (9th Cir. 1958), *cert. denied,* 361 U.S. 842 (1959) (order of exclusion during testimony of juvenile witness based on embarrassment factor upheld); State v. Holm, 67 Wyo. 360, 224 P.2d 500 (1950).

73. *See* Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), *cert. denied,* 434 U.S. 1076 (1978) (defendant's right to public trial not absolute. Removal of spectators not violative thereof; press and others with "substantial interest" permitted to remain).

74. 273 Minn. 78, 139 N.W.2d 800 (1966), *limited on other grounds,* 166 N.W.2d 710 (1969).

75. 387 U.S. 1, 30 (1967).

76. Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972), *aff'd,* 491 F.2d 352 (2d Cir.), *cert. denied,* 417 U.S. 976 (1974); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub. nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974); United States v. Alsbrook, 336 F. Supp. 973 (D.D.C. 1971); Lollis v. New York Dep't of Social Servs., 322 F. Supp. 473 (S.D.N.Y. 1970), *modified,* 328 F. Supp. 1115 (S.D.N.Y. 1971).

77. 415 U.S. 308 (1974).

when such protection impairs the sixth amendment right of an accused to confront and cross-examine the witnesses against him. *Smith v. Daily Mail Publishing Co.*[78] cited *Davis* with approval in holding that the state's interest in rehabilitating juveniles does not outweigh the press' right to publish truthful information lawfully obtained about the identity of a juvenile delinquent.[79] Arguably the *Davis* rationale suggests that a minor cannot or should not be permitted to exclude the press from juvenile court proceedings.

Courts in Illinois, Oregon, California, and Minnesota have addressed the first amendment concern of admitting the press to juvenile court proceedings. In *In re Jones*,[80] the minor respondent in a delinquency hearing waived his right to a public trial and objected when the trial court admitted a news reporter to the hearing. The Illinois Juvenile Court Act barred the general public from juvenile court hearings but specifically exempted the news media from the exclusion.[81] The Illinois Supreme Court rejected the minor's claim that he had a constitutional right to a private trial. It found that the statute expressed a legislative intent not only to protect the respondent's right to public trial but to preserve "the right of the general populace to know what is transpiring in its courts."[82]

In 1976, the Oregon Court of Appeals in *In re L.*,[83] was confronted with the question of whether, in light of existing practice, the trial court's failure to exclude a newsman from a juvenile proceeding over objection of the child's attorney was reversible error. The Court ruled that it was not.[84] The case concerned the appropriate commitment of a minor child who had been removed from the parental home at age eleven after "a long history of sexual abuse" and who subsequently had run away from various foster homes and institutions. Under Oregon law, juvenile proceedings were closed to the public unless the child or his parents requested otherwise. The statute, however, allowed the court to admit such persons "as the judge finds have a proper interest in the case or the work of the court."[85] The court of appeals, noting that it would have been advisable to notify the parties in advance that a reporter would be present, nevertheless held that the court's failure to do so was not reversible

---

78. 99 S. Ct. 2667 (1979).
79. *Id.* at 2671.
80. 46 Ill. 2d 506, 263 N.E.2d 863 (1970).
81. Ill. Ann. Stat. ch. 37, § 701-20(6) (Smith-Hurd Supp. 1979).
82. 46 Ill. 2d at ____, 263 N.E.2d at 864 (1970).
83. 24 Or. App. 257, 546 P.2d 153 (1976).
84. *Id.* at ____, 546 P.2d at 155 n.1.
85. Or. Rev. Stat. § 419.498(1) (Repl. 1977).

error.[86] The reviewing court quoted the trial judge's rationale for permitting the press to be present.

> [T]he reporter is here with the permission of the Court because the Court feels this is a case of special, particular significance to the people of the State of Oregon and because the Court knows from its own experience this is not an isolated incident where this particular issue [disposition in regard to proper treatment] has been involved, and the Court feels that one of the reasons we have this problem is because the people of the State of Oregon and, specifically, members of the Legislature, are not really aware of the magnitude of the problem; and I believe it is the function of the press as well as the function of all of us to see that the people of this state and, particularly, members of the Legislature, are confronted with the grave reality and stark reality of children in need in this state whose needs are not being met now; and I can't do that, and I think the press can.[87]

The California Supreme Court held in *Brian W. v. Superior Court of Los Angeles County*[88] that a minor was not constitutionally entitled to exclude the press from a hearing on his fitness to be tried as an adult. The California statute provided that the public was to be excluded from juvenile court hearings, and in addition provided that "[t]he judge . . . may . . . admit such persons as he deems to have a direct and legitimate interest in the particular case or the work of the court."[89] In response to the minor's argument that admission of the press would defeat the confidentiality of the juvenile court process, the court quoted with approval the comments of the study commission which drafted the confidentiality provisions of the statute.

> "We believe the press can assist juvenile courts in becoming more effective instruments of social rehabilitation by providing the public with greater knowledge of juvenile court processes, procedures and unmet needs. We, therefore, urge juvenile courts to *actively encourage greater participation by the press.* It is the feeling of the Commission that *proceedings of the juvenile court should be confidential, not secret.*"[90]

The court further noted that media coverage of proceedings had been neither excessive nor sensational and that prejudicial pretrial publicity could be neutralized in ways less drastic than excluding the

86. 24 Or. App. at _____, 546 P.2d at 155 n.1.
87. *Id.*
88. 20 Cal. 3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1978) (en banc).
89. Cal. Welf. & Inst. Code § 346 (West Supp. 1979).
90. 20 Cal. 3d at 622-23, 574 P.2d at 790-91, 143 Cal. Rptr. at 719-20 (emphasis by the court).

press from proceedings. Granting a change of venue, a continuance, conducting a searching *voir dire* of prospective juries, giving corrective instructions to the jury, or sequestering it could neutralize the effects of publicity.

A Minnesota statute grants judges discretion to admit persons with a direct interest in the work of the juvenile court to juvenile proceedings.[91] In *In re R.L.K.*,[92] the Minnesota Supreme Court held that the news media have such a "direct interest."[93] The case involved a termination of parental rights proceeding. The court had admitted a news reporter, over the objections of the parents' attorneys, after the reporter stated on the record that he would not use the name of anyone and that he would "mask the addresses."[94] In balancing the privacy interests of the parents with the news media's right to gather information about juvenile court proceedings, the court stated:

> The news media have a strong interest in obtaining information regarding our legal institutions and an interest in informing the public about how judicial power in juvenile courts is being exercised. The news media thus clearly have "a direct interest . . . in the work of the court" within the meaning of [the statute].[95]

The court found no abuse of discretion on the part of the juvenile court judge in admitting the reporter; the reporter's assurances not to reveal the names and addresses of the parties were deemed adequate to protect the parties' privacy interests.[96]

Justice Wahl, in dissent, was not persuaded that an acceptable balance had been struck in this case.

> The parents in the present case had already attained media notoriety by their manslaughter convictions in connection with the starvation death of another child. The promise of deletion of names and addresses gave no assurance of confidentiality in the instant proceedings in view of the factual detail of the coverage and the ready accessibility of the previously published reports which expressly identified the parents. Under these circumstances additional publicity would make any prospect of future reunification of the family, after parental rehabilitation, that much more difficult. Thus, the publicity would itself be an additional, subtle pressure for termination of parental ties.[97]

91. Minn. Stat. Ann. § 260.155(1) (West 1971).
92. 269 N.W.2d 367 (Minn. 1978).
93. *Id.* at 370.
94. *Id.* at 368.
95. *Id.* at 371.
96. *Id.* at 372.
97. *Id.* at 372 (footnotes omitted).

In the four cases discussed above and in the IJA-ABA Standards Relating to Adjudication,[98] the rights of the public through the press to know about juvenile court proceedings and the rights of the minor to confidentiality were balanced by admitting the press on condition that no publication of the identity of the minor and his family would occur.[99] Whether a court may condition press access to juvenile proceedings on a promise that identities will not be published had never been considered by the Supreme Court.

The News Media's Right to Publish Information Obtained Through Direct or Indirect Access to Court Proceedings

A. The Law In Relation to Adult Proceedings.

In 1966, the United States Supreme Court articulated the necessity for judicial protection of the defendant's right to a fair trial, stating that judges must be alert lest the balance of interests weigh against the accused."If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."[100]

While the Court's holding intimated that some restraint on the right to publish in adult proceedings might be constitutionally permissible, to date no suggestions as to what form such restrictions might take have been forthcoming. There are clear indications that framing such restrictive standards will be difficult, if not impossible. The Supreme Court has indicated its predisposition in various statements. For any contraction of first amendment rights to withstand the test of constitutionality, "The substantive evil must be extremely serious and the degree of imminence extremely high. . . ."[101] "The danger must not be remote or even probable; it must immediately imperil."[102] The "evil" or "danger" requirements are narrowly drawn; they require a showing that the restricted behavior in fact impedes justice.[103] The reason for this extreme stance is to be found in

98. *See* IJA-ABA Standards—Adjudication, *supra* note 25, Stds 6.1, 6.2 & 6.3.

99. Brian W. v. Superior Court of Los Angeles County, 20 Cal. 3d 618, 622, 574 P.2d 788, 790, 143 Cal. Rptr. 717, 719 (1978); *In re* Jones, 46 Ill. 2d 506, _____, 263 N.E.2d 863, 864 (1970); *In re* R.L.K., 269 N.W.2d 367, 371 (Minn. 1978); *In re* L., 24 Or. App. 257, _____, 546 P.2d 153, 155 n.1 (1976).

100. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966) (conduct of murder trial due to overzealous press characterized as Roman Holiday).

101. Bridges v. California, 314 U.S. 252, 263 (1941).

102. Craig v. Harney, 331 U.S. 367, 376 (1947). *Accord,* Thomas v. Collins, 323 U.S. 516 (must show clear and present danger based on solidity of the evidence).

103. *See* Sweeney v. Schenectady Union Publishing Co., 122 F.2d 288 (2d Cir. 1941), *aff'd per curiam,* 316 U.S. 642 (1942).

the Supreme Court's reluctance to balance first and sixth amendment interests:

> [I]f the authors of the first and sixth amendments, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do . . . yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it.[104]

B. The Law in Relation to Juvenile Proceedings.

There have been few reported cases which scrutinize legislative and judicial attempts to restrict the publication of the identities of minors subject to juvenile court proceedings. As the discussion below reveals, although a few courts have held that the imposition of restrictions on the media regarding publication of identifying information is justified, the holdings of recent Supreme Court decisions regarding this and related issues are to the contrary.

A federal district court in *Government of Virgin Islands v. Brodhurst*[105] upheld a statute making it a misdemeanor to publish the names of children under juvenile court jurisdiction without court permission. The court rejected press claims that the statute violated first amendment rights; it found that this was a reasonable restriction on the press in the interest of rehabilitating youthful offenders.[106]

In *Ithaca Journal News, Inc. v. City Court of Ithaca,*[107] the court which had ordered juveniles' records sealed held a newspaper reporter in contempt for publishing the identities of the youths. The reporter, however, had learned the identities of the youths while they were a matter of public record and before the court entered its sealing order. The New York Supreme Court sidestepped the constitutional questions involved by reversing the lower court's decision on the ground that its order directing the news media not to identify the youths exceeded the powers conferred on it by the legislature.[108]

In *Oklahoma Publishing Co. v. District Court of Oklahoma County,*[109] the question arose again as a result of a court order for-

104. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 561 (1976).
105. 285 F. Supp. 831 (D.V.I. 1968).
106. *Id.* at 838.
107. 58 Misc. 2d 73, 294 N.Y.S.2d 558 (Sup. Ct. 1968).
108. *Id.* at _____, 294 N.Y.S.2d at 563.
109. 555 P.2d 1286 (Okla. 1976).

bidding publication of the name and picture of an eleven year old who was before the juvenile court on a murder charge. Information about him had been obtained when the minor appeared at a detention hearing at which members of the press were present with the knowledge of the prosecutor, the judge, and defense counsel. The newspaper publisher had relied on *Cox Broadcasting Corp. v. Cohn*[110] in publishing the juvenile's name.[111] The United States Supreme Court in *Cox* had held that the state could not impose sanctions on the press for publishing the name of a rape victim "which was publicly revealed in connection with the prosecution of a crime."[112] The Oklahoma Supreme Court distinguished *Cox*, finding that, unlike criminal proceedings, juvenile court hearings are not public unless expressly so ordered by the judge.[113] The Oklahoma Supreme Court, applying the rationale of *Nebraska Press Assn. v. Stuart*,[114] held that the restraining order could not be upheld on the grounds that it was necessary to assure a fair trial because there were no findings that a fair trial was otherwise unobtainable and less drastic alternatives to prior restraint had been considered.[115] However, the court upheld the order; relying on the rationale of *Government of Virgin Islands v. Brodhurst*,[116] the court held that the state's interest in the rehabilitation of the minors justified the restriction on publication of minors' identities.[117]

This decision was overturned by the United States Supreme Court in *Oklahoma Publishing Co. v. District Court In and For Oklahoma County*.[118] In a per curiam opinion the Court stated that the rationales of *Nebraska Press* and *Cox* compelled a holding that the restraining order violated first amendment rights. "Whether or not the trial judge expressly made such an order, members of the press were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor and the defense counsel."[119]

The rationale underlying *Government of Virgin Islands v. Brodhurst*[120] appears to have been totally rejected by the Supreme Court in *Landmark Communications, Inc. v. Virginia*.[121] The question

110. 420 U.S. 469 (1975).
111. 555 P.2d at 1293.
112. 420 U.S. at 471.
113. 555 P.2d at 1293.
114. 427 U.S. 539 (1976).
115. 555 P.2d at 1289-90.
116. 285 F. Supp. 831 (D.V.I. 1968).
117. 555 P.2d at 1293, 1295.
118. 430 U.S. 308 (1977).
119. *Id.* at 311.
120. 285 F. Supp. 831 (D.V.I. 1968).
121. 435 U.S. 829 (1978).

presented in this case was whether the first amendment permits criminal punishment of newspaper publishers, strangers to the inquiry, for divulging or publishing truthful information lawfully obtained regarding confidential proceedings of the state Judicial Inquiry and Review Commission. The Virginia Supreme Court agreed that the "clear and present danger" test was the appropriate constitutional benchmark. It found that the test had been met because premature disclosure of the Commission's sensitive proceedings would result in imminent impairment of the effectiveness of the Commission and immediate threat to the orderly administration of justice.[122] The United States Supreme Court rejected that conclusion.

> The threat to the administration of justice posed by the speech and publications in *Bridges, Pennekamp, Craig,* and *Wood* was, if anything, more direct and substantial than the threat posed by Landmark's article. If the clear-and-present-danger test could not be satisfied in the more extreme circumstances of those cases, it would seem to follow that the test cannot be met here. It is true that some risk of injury to the judge under inquiry, to the system of justice, or to the operation of the Judicial Review and Inquiry Commission may be posed by premature disclosure, but the test requires that the danger be "clear and present" and in our view the risk here falls far short of that requirement. Moreover, much of the risk can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings.[123]

The Supreme Court assumed for purposes of decision that the confidentiality provision serves legitimate state interests. It observed, however, that the real question was whether these interests are sufficient to justify the imposition of criminal sanctions against nonparticipants such as Landmark. In concluding that they were not, the Court stated:

> [N]either the Commonwealth's interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality.[124]

The latest case dealing with the question of whether a state statute making it a crime for newspapers to publish the identities of minors

---

122. *Id.* at 833.
123. *Id.* at 845 (footnote omitted).
124. *Id.* at 841.

involved in delinquency proceedings violates first amendment guarantees of press freedom was decided by the Supreme Court in 1979. In *Smith v. Daily Mail Publishing Co.*,[125] the newspapers uncovered the identity of an accused youthful slayer through their own investigative techniques. They did not obtain the information as the result of attending a public hearing as was the case in *Oklahoma Publishing.* In *Smith,* as in *Landmark*, the information the newspapers obtained and published, although confidential, was truthful and did not involve any wrongdoing on the part of the newspapers. In *Landmark*, the Supreme Court found that neither Virginia's interest in protecting its judges' reputations nor its interest in maintaining its courts' institutional integrity justified the punishment of speech. It is not surprising, therefore, that the United States Supreme Court ruled in *Smith* that West Virginia's interest in protecting the reputation of juveniles to aid in rehabilitation did not justify the punishment of speech.[126] A seven member majority, in an opinion written by Chief Justice Burger, relied heavily on *Davis v. Alaska.*[127] The Court noted that in *Davis* it had declared that the state's interest in protecting a juvenile court record from public exposure must yield to an accused's right under the sixth amendment to confront and cross-examine witnesses against him.[128] In *Smith*, the Court held that even though a state has a substantial interest in the rehabilitation of youthful offenders, the first amendment prohibits the state from attempting to accomplish that goal by subjecting newspapers to subsequent punishment for publishing truthful information about the identity of a youthful offender when such information had been lawfully obtained through their own investigative methods.[129]

Justice Rehnquist, in a separate concurring opinion, stated that a state's interest in preserving the anonymity of its juvenile offenders was of the highest order, far outweighing the minimal interference with freedom of the press that a ban on publication of the youths' names entails.[130] He concurred, however, in the result. He found that the statute did not accomplish its purpose and should be struck down because the West Virginia statute only imposed a prohibition against newspapers, while allowing the electronic media and other forms of publication to announce the youth's name with impun-

125. 99 S. Ct. 2667 (1979).
126. *Id.* at 2671-72.
127. 415 U.S. 308 (1974).
128. 99 S. Ct. at 2671.
129. *Id.* at 2671-72.
130. *Id.* at 2673 (Rehnquist, J., concurring).

ity.[131] He then made it clear that he would find a general ban on publication that applied to all forms of mass communication, electronic and print media alike, to be constitutional.[132]

The narrow state court holdings of *Nebraska Press, Oklahoma Publishing, Landmark,* and *Gannett* leave important questions unanswered: is it constitutionally permissible for a state to deny all public and press access to juvenile court proceedings as a way of preserving confidentiality? Is it permissible for a state to condition press access to juvenile court proceedings upon written agreement by the press not to publish the identity of the minor unless the minor is transferred to adult criminal court for trial and to punish breaches of such agreements through criminal sanction or contempt of court? As the Supreme Court of Massachusetts observed in *Ottaway Newspapers, Inc. v. Appeals Court,*[133] issues different from those in *Nebraska Press, Cox Broadcasting,* and *Oklahoma Publishing* are raised by the question of how far a state is constitutionally required to go in assisting press access to court proceedings and files.[134] As all the foregoing questions were expressly reserved in those cases and were not in issue in *Smith* nor in *Gannett,* they remain in uncharted constitutional waters.

THE NATIONAL STANDARDS

In formulating recommendations to cover news media access to, and disclosure of information from, juvenile police and court records as well as from juvenile delinquency hearings, examination of the Standards promulgated by the Task Force on Juvenile Justice and Delinquency Prevention[135] (hereinafter referred to as the Task Force) and the Institute For Judicial Administration-American Bar Association Joint Commission on Juvenile Justice Standards[136] (hereinafter referred to as IJA-ABA) should be considered.

Access to and Disclosure of Police and Court Records

A. Task Force Standards.

Standard 5.14 sets forth the general rule that police records on juveniles should be kept separate from adult records and, except by

131. *Id.* at 2674-75.

132. *Id.* at 2675.

133. 372 Mass. 539, 362 N.E.2d 1189 (1977).

134. *Id.* at ____, 362 N.E.2d at 1195.

135. National Advisory Committee on Criminal Justice Standards and Goals: Report of the Task Force on Juvenile Justice and Delinquency Prevention (1976) [hereinafter cited as Task Force Report].

136. IJA—ABA Juvenile Justice Standards Project, Standards Relating to Juvenile Records and Information Systems (Tent. Draft 1977) [hereinafter cited as IJA-ABA Standards—Juvenile Records].

court order, should not be open to inspection nor their contents disclosed; criminal justice agencies must justify their inspection of the records on a need-to-know basis.[137] The commentary accompanying the standard asserts that protection of the privacy of juvenile records is a matter on which there must be community agreement and calls for cooperation on the part of the juvenile court, the police, other agencies in the juvenile justice system, and the news media.[138]

Standard 5.13 recommends that each state enact legislation requiring confidential police handling of identifying information about juveniles.[139] The standard also provides that with exception of "dangerous fugitives" (which term is not defined), law enforcement agencies should not release names or photographs of juvenile law violators to the news media.[140] The commentary to Standard 5.13 cautions, however, that inflexible regulations prohibiting publication of a juvenile suspect's identification under all circumstances are not in the public interest.[141] It is sometimes necessary to publish or broadcast the names of "dangerous juvenile fugitives" who have escaped in order to obtain information that may lead to apprehension and to protect citizens who might come in contact with the fugitives.[142]

The Task Force Report also recommends that if the juvenile court waives its jurisdiction and transfers a minor accused of a crime to the adult criminal court for trial, the proscription on release of information should not apply.[143] Confidentiality is based upon the protection and rehabilitation purposes of the juvenile system; in cases in which the court determines that the juvenile is not amenable to treatment within the system, confidentiality is inappropriate.[144]

Standard 28.2 provides that juvenile court records should not be made public and that access to and use of court records should be strictly controlled. This standard seeks to minimize the risk that information will be misused or misinterpreted, that children will be unnecessarily denied opportunities and benefits, or that the rehabilitative purposes of court intervention will be disturbed.[145]

Finally, Standard 28.5 recommends that states enact legislation

137. Task Force Report, *supra* note 135, at 226.
138. *Id.* at 227.
139. *Id.* at 224.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 225.
144. *Id.*
145. *Id.* at 773.

providing for sealing of juvenile records including police records when, due to dismissal of a petition, the rehabilitation of the juvenile, or the passage of time, the adverse consequences that may result from disclosure of such records outweigh the necessity or usefulness of retaining them.[146] Once a juvenile record is sealed, only the juvenile involved or an authorized representative should have access to the record.[147]

B. IJA-ABA Standards.

Standard 20.1[148] and Standard 19.4,[149] like Task Force Standard 5.14,[150] recommend that records and files maintained by a law enforcement agency pertaining to the arrest, detention, adjudication, or disposition of a juvenile's case should not be a public record and should be kept in a secure place separate from adult records and files.

Standard 19.6[151] permits fingerprinting and photographing juveniles taken into custody for the purpose of police investigation. Unlike Task Force Standard 5.13,[152] it does not allow release of names and photographs of "dangerous juvenile fugitives" or juveniles transferred to adult court for trial.

Standard 15.1[153] parallels Task Force Standard 28.2;[154] juvenile court records should not be public records and access to them must be strictly controlled. Under Standard 15.2[155] reporters should not be given access to court records; reporters might, however, qualify as researchers under Standard 5.6[156] provided they give assurances that anonymity of the juvenile and his family will be protected. The commentary in support of Standard 15.2[157] acknowledges that the question of news media publicity about juvenile court proceedings has been the subject of some debate and that some states provide that juvenile offenders' identities should be published. It notes that most states have no statute governing the issue; some, however, prohibit publication of identities. Standard 15.2 allocates to juvenile

146. *Id.* at 781.
147. *Id.*
148. IJA-ABA Standards—Juvenile Records, *supra* note 136, at 147.
149. *Id.* at 142.
150. *See* Task Force Report, *supra* note 135, at 226 and text accompanying note 137 *supra*.
151. IJA—ABA Standards—Juvenile Records, *supra* note 136, at 143-44.
152. *See* Task Force Report, *supra* note 135, at 224 and text accompanying notes 139 and 140-42 *supra*.
153. IJA-ABA Standards—Juvenile Records, *supra* note 136, at 115.
154. *See* Task Force Report, *supra* note 135, at 773 and text accompanying note 145 *supra*.
155. IJA-ABA Standards—Juvenile Records, *supra* note 136, at 116.
156. *Id.* at 84.
157. *Id.* at 116-18.

courts the responsibility of limiting access to their own records, thereby avoiding the issue of the constitutionality of a statute purporting to exercise direct control over the contents of publication.[158]

Standards 17.1 through 17.7[159] and 22.1[160] provide for destruction of juvenile court and police records after a certain period of time has elapsed and after attempts to notify the juvenile who is the subject of a record. The juvenile may be provided with a copy of the record upon request.

It is clear that both standard-promulgating groups opt in favor of confidentiality, even though it limits the ability of the press to monitor a public institution, on the theory that the costs of publicity (a reduction in the chance for success of juvenile court intervention) outweigh the benefits of publicity (deterrence).

News Media Access to Juvenile Court Hearings

A. The Adjudicatory Hearing.

In a delinquency adjudication hearing, the primary issue is whether the minor committed the alleged act. Both the Task Force Standards and the IJA-ABA Standards recommend that the delinquency adjudication hearing be public and open to the press at the request of the minor and his counsel.[161] In addition, the IJA-ABA Standards recommend that a minor be afforded a jury trial upon demand at the delinquency adjudication hearing.[162] In support of its recommendation for a public trial, the IJA-ABA commentary cites many of the benefits alluded to in *In re Oliver* and *RLR v. State,* discussed above,[163] and in support of trial by jury declares that the benevolent purposes of juvenile courts and the appellate process are not sufficient procedural protection against the overzealous prosecutor and the biased or eccentric judge.[164]

The Task Force Standards are silent on whether a minor may opt for a private hearing and exclude the news media. IJA-ABA Standard 6.2, however, declares that each jurisdiction should provide by law that the judge of the juvenile court has discretion to permit members of the public who have a legitimate interest in the proceedings or in the work of the court, including representatives of the

158. *Id.* at 116.

159. *Id.* at 126-32.

160. *Id.* at 152.

161. Task Force Report, *supra* note 135, Std 13.4 & note, at 420-21; IJA-ABA Standards—Adjudication, Std 6.1 & note, at 70-72 (Tent. Draft 1977).

162. IJA-ABA Standards—Adjudication, *supra* note 161, Std 4.1 & note, at 52-56.

163. *See* text accompanying notes 21 & 32 *supra.*

164. IJA-ABA Standards—Adjudication, *supra* note 161, Std 6.1 & note, at 52-56.

news media, to view adjudication proceedings even in cases in which the defendant has waived the right to a public trial.[165] The commentary, while acknowledging these are sharply conflicting views, enunciates several reasons why representatives of the media should be allowed to view private proceedings. First, the public has a right to know about the workings of the judicial system, including that part which deals with juveniles.[166] Second, the public's representatives exert a balancing influence on the court's operation and thus protect the accused.[167] Another reason, not mentioned in the commentary, is that public attention needs to be drawn to the juvenile court's lack of rehabilitative resources.[168] Where the minor has opted for a private trial and the judge has admitted the public, IJA-ABA Standard 6.3 provides that each jurisdiction should provide by law that persons so admitted not be allowed to disclose the identity of the minor and that the judge so announce to persons attending the adjudication hearing.[169] The commentary proposes an alternative method to achieve the same result by stating that, although a state may not provide that records or proceedings are public and then prohibit publication of accurate information obtained from them, states do have flexibility in determining which records and proceedings are to be categorized as public.[170]

B. The Dispositional Hearing.

The delinquency dispositional hearing occurs after the adjudication hearing if the state proves beyond a reasonable doubt that the minor committed the offenses with which he was charged.[171] The focus of the inquiry at the dispositional hearing is how much official intervention in the minor's life is necessary to protect the public and assist the minor in conforming his conduct to the requirements of the law.[172] Sanctions for delinquent behavior can include an official reprimand, probation, or institutionalization in a juvenile prison (euphemistically called a training school).[173] Information utilized by the court in making the dispositional decision often includes a written report prepared by a probation officer covering such aspects of

165. *Id.*, Std 6.2, at 72-73.
166. *Id.* note, at 74.
167. *Id.*
168. *See In re* L., 24 Or. App. 257, 546 P.2d 153 (1976) and text accompanying notes 83-87 *supra*.
169. IJA-ABA Standards—Adjudication, *supra* note 161, Std 6.3, at 75.
170. *Id.* note, at 75-76 (citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)).
171. *See* Ill. Ann. Stat. ch. 37, § 705-1 (Smith-Hurd 1972).
172. *See* Ill. Ann. Stat. ch. 37, § 705-2 (Smith-Hurd Supp. 1979).
173. *Id.*

the minor's life as family background, school record, and prior contacts with social welfare agencies, law enforcement agencies, and the juvenile court.[174] In cases in which the minor's mental health is in question, the court might also receive a psychologist's or psychiatrist's report.[175]

Therefore, at the dispositional hearing, unlike the adjudicatory hearing, intimate details of the minor's personal and family life may be revealed. Should the news media be permitted to attend all or part of this hearing? The IJA-ABA Standards specifically recognize that the public has a legitimate interest in the adjudicatory proceeding at which the minor's guilt or lack thereof is determined.[176] The IJA-ABA Standards do not acknowledge, however, that the public, through the news media, has a proper interest in the hearing at which the court determines what action is to be taken to protect the public and rehabilitate the minor.

IJA-ABA Standard 3.1 governing Dispositional Procedures, entitled "Necessary and Allowable Parties" provides: "The juvenile, the attorney for the juvenile, the juvenile's parents or guardian, and an attorney for the state should be present at all stages of the dispositional proceeding. Other parties with a bona fide interest in the proceedings may be present at the discretion of the court."[177] The commentary following this standard notes that numerous statutes bar the general public from juvenile proceedings, including the dispositional phase, and that the IJA-ABA supports such a bar with respect to dispositional proceedings.[178] Examples of persons whom the judge might permit at his discretion to attend the dispositional hearing as a party with a "bona fide interest" include "legitimate researchers, students, individuals connected with other juvenile justice systems, law clinic interns, etc."[179] Conspicuously absent from this list are news media representatives. The Task Force standards are silent as to whether the news media are entitled to any information concerning dispositional proceedings.

SUMMARY AND CONCLUSIONS

In the great majority of states, juvenile court statutes express the policy that minors involved in juvenile court proceedings ought to be

174. *See* Ill. Ann. Stat. ch. 37, § 705-1(3) (Smith-Hurd 1972).

175. *See* Ill. Ann. Stat. ch. 37, § 706-3 (Smith-Hurd 1972).

176. *See* text accompanying notes 166-67 & 169 *supra*.

177. IJA-ABA Juvenile Justice Standards Project, Standards Relating to Dispositional Procedures 41 (Tent. Draft 1977).

178. *Id.* note, at 41-42.

179. *Id.* at 42.

afforded the protection of confidentiality. Most states have attempted to achieve this goal by limiting public and press access to juvenile police and court records and to juvenile court proceedings. This policy of confidentiality is often thwarted by information "leaks" which have prompted a few states to pass laws prohibiting publication of the identities of juveniles involved in such proceedings under sanction of criminal punishment. In *Smith v. Daily Mail Publishing Co.*, the Supreme Court declared that such proscriptions unconstitutionally abridge the first amendment guarantee of press freedom. The holdings of *Nebraska Press, Cox Broadcasting, Oklahoma Publishing, Landmark* and now *Smith* compel the conclusion that, once truthful information has found its way into the public domain, attempts to restrict the news media from publishing it are constitutionally intolerable absent any showing of improper conduct on the part of the news media in obtaining the information and absent a clear and present danger to national security or the right of the accused to receive a fair trial. Although states can do little, consistent with the first amendment guarantee of press freedom, to restrict publication of information that has entered the public domain, states still have much latitude in determining what information is available to the public and the press. State laws declaring that the interest in preserving confidentiality in the juvenile court process outweighs the public's right of unlimited access to information about the system and its clientele are on fairly firm constitutional ground. Although the Supreme Court has indicated that the first amendment prohibition against abridgement of press freedom undoubtedly carries with it a right of the press to gather information,[180] it has never defined whether or to what extent a state is obligated to assist or refrain from hampering the news media in gathering information.[181] State laws and court rules prohibiting public and press access to juvenile court proceedings and records are therefore probably safe from constitutional attack as violative of the first amendment. The tradition of confidentiality that has permeated the juvenile court system since its inception in Illinois in 1899 supports this conclusion.

It can, however, be forcefully argued that to preserve confidentiality at the cost of prohibiting press access to juvenile court proceedings would be a cure far worse than the disease of misuse and

---

180. Branzburg v. Hayes, 408 U.S. 665 (1972).

181. *But see* Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979), wherein newspaper argues that exclusion of news media at the request of prosecution and defense from pretrial suppression hearing violates the first amendment absent a showing of clear and present danger to the right of the accused to obtain a fair trial. *Gannett* would seem to indicate that state laws restricting press access to court proceedings are on firm constitutional grounds.

misinterpretation of information by the news media. Courts are institutions, the actions of which significantly affect the public, and in which the public, therefore, has a vital interest. Juvenile courts are no exception. As the societal institutions charged with the responsibility of alleviating and ameliorating the problems of, or caused by, troubled and troublesome youth, they are properly the object of special public concern. Juvenile courts need to be held accountable to the children and families whom they serve and to the general public as well. In addition, juvenile courts, like other public institutions, are more apt to function fairly, efficiently, and effectively if their performance is monitored by agencies outside the scope of their own administrative framework. The press has historically served that function with respect to government and its agencies and should continue to do so with respect to juvenile courts.

How then are the tensions between the public policy of preserving the protective nature of juvenile proceedings by affording a measure of confidentiality to its clients and the needs of the press to gather and disseminate information to the public about these important courts to be rationally and consistently resolved? As the foregoing analysis indicates, state laws and court rules have often not achieved a satisfactory balance. Editorial policies formulated by the newspapers and the broadcast media in response to the problem have been ambivalent and inconsistent.[182] The Supreme Court's decision

182. On July 2, 1978 the Chicago Sun-Times published an article entitled, "Chicago Press Brought to Carpet Over a Name." Chicago Sun-Times, July 2, 1978, at 40. It related to a story about how a single paragraph in an otherwise routine story concerning the arrest of 18 year old Clifford Finley resulted in a confrontation between the right of the press to disclose information and the right of a defendant accused of crime to a fair trial and to have his police and court record kept confidential as required by Illinois law. *Id.* at 40, col. 1 Finley was charged with a number of serious felonies of violence as a result of a shooting in Chicago of a tourist from Ohio. *Id.* Under the Illinois Juvenile Court Act, law enforcement records of all minors under the age of seventeen are not open to public inspection, nor may their contents be disclosed except by order of court. Ill. Ann. Stat. ch. 37, § 702-8 (Smith-Hurd 1972). Despite the existence of the statute, a story in the Chicago Tribune carried a detailed description of the defendant's juvenile police record, including the fact that he had been arrested "16 times as a juvenile since he was 9 years old. Juvenile charges included burglary, strong-armed robbery, shoplifting, theft, disorderly conduct, purse snatching, criminal damage to property and criminal trespass to a vehicle." Chicago Sun-Times, July 2, 1978 at 40, col. 1. The richness of detail with which the defendant's record was described led his attorneys to charge that his juvenile files had been "leaked." *Id.* One of the defendant's attorneys, calling the Tribune article a "plain violation of the Juvenile Court Act," filed a motion in juvenile court asking that both reporters appear in court and reveal their source of the secret information. *Id.* He contended that only by discovering who had unlawfully disclosed the information could the Juvenile Court Act be made real and viable to protect future defendants from this abuse. *Id.*

Clayton Kirkpatrick, a Tribune editor, when questioned about editorial policy concerning publication of juvenile names and records, was quoted as saying that, although, generally speaking, names were not used, "if the case is particularly flagrant, and the juvenile is towards the upper end of the age bracket, then we consider using his name." Chicago Sun-Times, July

in *Smith v. Daily Mail Publishing Co.* is evidence that the Court views the problem as one of national importance. However, that decision only determines the narrow question of whether it is a violation of the first amendment protection of press freedom for a state to punish criminally newspapers for publishing the identity of a juvenile, subject to juvenile court proceedings, when the identity was truthful and lawfully obtained. The far more important policy questions concerning what information about juvenile court proceedings ought to be available to the press and what information ought to be published remain unanswered.

An examination of the Task Force Standards and the IJA-ABA Standards reveals that they too have left many questions concerning access to information and plans for controlling dissemination of information unanswered. Perhaps the time has come to form a task force consisting of academic and practicing attorneys, judges with expertise and experience in juvenile courts, and members of the news media. This task force should pinpoint problems and formulate a set

---

2, 1978 at 40, col. 2. The questions that remain, however, are who should determine when the case is "flagrant," and when a juvenile has reached the age bracket where publication of his name is appropriate? Editor Kirkpatrick further defended the use for this purpose of juvenile files stating, "we are justified in getting information from the files; we are not doing it for frivolous reasons. A strict proscription against using those records . . . might lead to situations where a reporter's suspicions about juvenile court proceedings could not be investigated because an inflexible policy would preclude a review of those courts." *Id.* These statements indeed reveal the crux of the dilemma.

The Sun-Times article pointed out that the defendant's attorneys move to force disclosure of the reporters' sources collided head-on with another statute giving journalists a modified privilege against revealing the names of secret informants. Under the Illinois reporter's privilege law, no court can compel disclosure unless it can be demonstrated that "a specific public interest . . . would be adversely affected if the factual information sought were not disclosed." Ill. Ann. Stat. ch. 51, § 114 (Smith-Hurd, Supp. 1979). To compel disclosure the court must further find that "all other available sources of information have been exhausted" and that identifying the source "is essential to the protection of the public interest involved." Ill. Ann. Stat. ch. 51, § 117 (Smith-Hurd Supp. 1979). The Sun-Times reporter also noted that according to the official Sun-Times style book the disclosure of a juvenile's name "should be considered an integral part of the story" when the juvenile is involved in a "felonious crime" that is given "prominent display." Chicago Sun-Times, July 2, 1978 at 40, col. 2. However, despite the official policy stated in the style book, he noted that, according to Ralph Otwell, a Sun-Times editor, a juvenile's name or previous arrest record is rarely disclosed in the paper. *Id.* Editor Otwell further stated that the juvenile would only be identified by name if a decision were made by the juvenile court to permit trial of the youth in an adult criminal court. *Id.* The Sun-Times reporter's survey of Chicago's three network television stations revealed that general policy is not to report the name of a youthful defendant, but all networks said exceptions to the policy do exist. *Id.*

The foregoing illustrates that, as confusing and conflicting as the law appears to be in attempting to achieve a proper balance between a juvenile's need for confidentiality in juvenile court and the news media's right to gather and disseminate information about the court and serious juvenile offenders, journalists in formulating editorial policy seem to do little better in establishing ones that are both more rational and more consistent.

of standards to govern press access to information about juvenile court proceedings and dispositions, and to govern the dissemination and publication of statistical data and individually identifying information on juveniles accused of delinquency or adjudicated delinquent. As the foregoing material suggests, the problems are difficult, but resolution of some may be possible through dialogue between journalists, lawyers, and judges who have experience and interest in the operation of the juvenile justice system. Satisfactory resolutions of these problems, however, can only be achieved through joint effort and cooperation between professional journalists and the legal profession.

The formulation of a set of national standards governing access to and dissemination of information concerning juveniles charged with delinquent conduct would be the major goal of such a task force. Once a set of standards had been formulated, the question of implementation would remain. Since laws attempting to restrict publication of information by the press are unlikely to withstand first amendment scrutiny, the task force might recommend the following implementary mechanism: each state formulates juvenile court procedural rules which incorporate the national task force standards' recommendations on access to information by the news media. Access would be conditioned upon the news media signing written agreements to abide by the standards' recommendations governing the publication or other dissemination of such information. In this way a reasonable and consistent balance might be achieved between the goal of protecting juveniles from the full public impact of youthful mistakes and the goal of disseminating information to the public about the operation of juvenile courts. Such dissemination is required to assess fairly not only the efficiency and effectiveness of juvenile courts but also the need for their continued existence.