1984

Reporter's Privilege and Juvenile Anonymity: Two Confidentiality Policies on a Collision Course

Diane Geraghty
Assoc. Prof., Loyola University of Chicago, School of Law, dgeragh@luc.edu

Alan Raphael
Assist. Prof., Loyola University of Chicago, School of Law, araphae@luc.edu

Follow this and additional works at: http://lawecommons.luc.edu/luclj
Part of the First Amendment Commons, and the Juvenile Law Commons

Recommended Citation
Available at: http://lawecommons.luc.edu/luclj/vol16/iss1/3
I. INTRODUCTION

In the course of gathering news for publication, reporters frequently rely on information given to them by sources who do not wish to be identified. Over the past twenty-five years, journalists have been subpoenaed more frequently to appear before grand juries investigating crime and ordered to disclose their confidential sources. In *Branzburg v. Hayes*, a closely divided Supreme Court refused to exempt journalists from the citizen's duty to divulge information relevant to prosecution of a crime. The trend among courts and commentators in the decade since *Branzburg*, however, has been to limit that decision to its facts and to adopt the position of five Justices in the case. Under that position, the first amendment creates a qualified testimonial privilege for reporters to refuse to disclose information when requested to do so in criminal or civil litigation. In a parallel movement, several state legislatures have enacted statutes creating an absolute or qualified testimonial privilege for reporters.

In *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act* [hereinafter referred to as *Warden*], the Illinois Supreme Court addressed for the first time the scope of the

---

2. See infra note 47.
4. See infra notes 100-07 and accompanying text.
5. See infra note 48.
journalist's privilege in Illinois. A newspaper reporter/editor, Rob Warden, challenged a court order requiring him to disclose to a grand jury his source for transcripts of juvenile court hearings. The grand jury was impaneled to investigate unauthorized release of the transcripts in violation of a state statute protecting the confidentiality of juvenile records. Warden argued that forced disclosure of his source for the transcripts violated the Illinois Reporter's Privilege Act and the free press guarantees of the federal and state constitutions.

The Illinois Supreme Court in Warden limited its holding to the narrow issue of whether the circuit court properly divested the reporter of his privilege under the state "shield" law. The court ruled that divestiture was inappropriate because all other available sources of the information had not been exhausted as required by statute. Language in the opinion, however, raises disturbing questions for the future regarding the degree of protection the court will recognize for Illinois reporters called upon to disclose confidential sources of information.

This article utilizes the Warden case to examine the extent of the reporter's privilege under the Illinois Reporter's Privilege Act and the federal Constitution. In Warden, the circuit court had ordered the reporter to disclose his source for juvenile court transcripts in

7. The reporter's statutory privilege is set forth in ILL. REV. STAT. ch. 110, §§ 8-901 to -909 (1983).
8. The alleged crimes which the grand jury was impaneled to investigate are official misconduct (ILL. REV. STAT. ch. 38, § 33-3 (1983)) and removal or destruction of public records (ILL. REV. STAT. ch. 38, § 32-8 (1983)). On January 17, 1984, DuPage County Circuit Court Chief Judge Bruce Fawell ordered a special grand jury to be impaneled. See In re Alleged Violations of the Juvenile Court Act, No. MR-10, Order to Impanel Special Grand Jury. In an earlier order, the chief judge had appointed a special prosecutor to investigate allegations regarding improper disclosure of transcripts contained in a resolution of the local bar association. In re Alleged Violations of the Juvenile Court Act, Miscellaneous Order Nos. 84-2, 84 MR-10 (Jan. 9, 1984). The bar association's resolution called for the appointment of a special prosecutor because "the significant question of the identity of the person or persons who furnished transcripts of those proceedings to the Judicial Inquiry Board, the media or other person has not been resolved . . . ." Resolution Adopted by Directors of DuPage County Bar Association, p. 1 (Dec. 9, 1983).
10. The United States Constitution guarantees "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The Illinois Constitution provides that "[a]ll persons may speak, write and publish freely, being responsible for the abuse of that liberty." ILL. CONST. art. 1, § 4. A discussion of the impact of the Illinois constitutional provision on the outcome in Warden is beyond the scope of this article.
11. Warden, 104 Ill. 2d at 428.
12. See infra note 41 and accompanying text.
Confidentiality Policies

order to protect the integrity of the state’s policy of juvenile confidentiality. A cornerstone of juvenile justice philosophy has been the belief that the rehabilitative goals of the system can best be accomplished if the child’s identity is known only to those directly involved in the rehabilitative process. To that end, all states have some form of juvenile confidentiality policy. Such a policy creates an inevitable conflict between the child’s right to anonymity and the public’s right to information regarding the operation of its courts. It is that conflict and its appropriate resolution which this article seeks to address.

This article will focus on the competing confidentiality policies in *Warden*. First, it will present the factual setting in *Warden* and the Illinois Supreme Court’s decision denying divestiture. Next, it will examine the reporter’s claim under the Illinois Reporter’s Privilege Act and the first amendment. The article traces the role of confidentiality in juvenile courts and analyzes the importance of the public’s right of access to information regarding judicial proceedings. Alternatives for protecting the confidentiality of juveniles without undue limitations on the press are explored. Finally, the article concludes that both the state shield law and the first amendment create a qualified privilege for newsmen, and that, under the facts in *Warden*, the public’s interest in obtaining information regarding juvenile proceedings outweighs the state’s interest in preserving juvenile confidentiality.

II. THE FACTUAL SETTING

In May, 1981, two Chicago journalists, Rob Warden of Chicago Lawyer, and James Warren, a Chicago Sun-Times reporter, received transcripts of two juvenile dispositional hearings held in March, 1981. The transcripts contained racially-oriented language, sexual comments, and profanity spoken by a juvenile court judge during the hearings. The transcripts were referred to in

---

14. On March 25, 1981, Judge Teschner, a circuit court judge in DuPage County, Illinois, held a dispositional hearing to determine if Nancy A. should be sent to a juvenile institution. The following conversation took place between the court and Nancy A.

The Court: Temporary placement with Pat and Lisa B. is authorized. Nancy, you’re making a deal with me.

The Court: But you’re still sixteen. No pot. No booze; not even beer. Keep your grades. You complete the school. Will you promise me that?
Nancy A.: Yes . . . .

The Court: You prove yourself.
Nancy A.: I will.
Warren's "Law Memo" column and were quoted in an article written by Warden.\textsuperscript{15} Neither newspaper disclosed the names of the juveniles involved in the proceedings.

Before the Chicago Lawyer article was published, the Illinois Judicial Inquiry Board had begun an investigation of the judge's conduct. The Board filed a complaint with the Illinois Courts Commission alleging that the juvenile judge's conduct tended to bring his office into disrepute.\textsuperscript{16} The Commission dismissed the complaint in August, 1983.\textsuperscript{17}

After the dismissal, the local bar association passed a resolution requesting the chief judge of the circuit court to appoint a special prosecutor to investigate the release of the transcripts in alleged violation of the Juvenile Court Act.\textsuperscript{18} In response to this request, the chief judge appointed a special prosecutor and impaneled a grand jury to investigate disclosure of the transcripts.\textsuperscript{19}

Reporters Warren and Warden were called to testify before the grand jury. Warren told the grand jury that he had no knowledge

\begin{quote}
\textbf{The Court:} If you fuck up, if I read about you in the paper, I can be mean too.

Patrick L. appeared before Judge Teschner on March 26, 1981, for a dispositional hearing. The following is part of that hearing:

The Court: Hey, you know where that is heading? You know what the judges do with the people who don't take responsibility for themselves?

Patrick L.: Put them in jail.

The Court: . . . . but you got to be willing to help yourself and take responsibility for yourself.

If you're not, you can't do it there, you're seventeen. Then it's isolation. And the facts of life are, you're a slight, white male. And the prisons are full of big, black people. And if you were going to the Department of Corrections, the facts of life are you'll have one in your mouth and one in your ass.

. . . .

The Court: Get your shit together. It's the first day of the rest of your life my friend. Change your mind right now that you're going to not hurt anybody, invade anybody else, and you're going to be responsible to yourself. Make that decision.
\end{quote}


\textsuperscript{15} Warren's Sun-Times article appeared May 18, 1981. Warden's article appeared in the June, 1981 publication of Chicago Lawyer.

\textsuperscript{16} \textit{Warden}, 104 Ill. 2d at 421-22. The transcripts supplied to the Board were not only of the March 25 and March 26, 1981, hearings, quoted \textit{supra} note 14, but also were of two other hearings before Judge Teschner.

\textsuperscript{17} \textit{Id.} at 422.

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Id.} The State's Attorney's office petitioned first the circuit court and then the Illinois Supreme Court to rescind the orders appointing a special prosecutor and impaneling a grand jury. Both petitions were denied. \textit{Id.}
of the source of the transcripts. Warden, however, admitted knowing the source, but declined to reveal it, invoking his privilege under the Illinois Reporter's Privilege Act ("the Act"). The special prosecutor then moved to divest Warden of the privilege, a procedure authorized under the Act. The divestiture application asserted a public interest in the grand jury's "full and fair investigation" into violations of both the Juvenile Court Act and the Illinois Criminal Code. The application further maintained that the source of the transcripts supplied to Warden was not known to the local state's attorney's office, the judge who ordered their transcription, or the court reporter who transcribed them. Finally, it alleged that there were no alternative sources who could provide the information sought by the grand jury.

A. The Circuit Court Decision

In ruling on the application for divestiture, the circuit court interpreted the Act as allowing it to consider the possibility of alternative means of obtaining the desired information. It concluded, however, that all other reasonably available sources of the information sought from Warden had been investigated without avail.

The court emphasized that the public interest in juvenile record confidentiality is established by law. It acknowledged that Warden had not divulged the juvenile's name, but found a public interest in the confidentiality of juvenile transcripts regardless of whether the confidentiality of the juvenile's identity had been

20. Warden, 104 Ill. 2d at 423. Warren testified that he received the transcripts "in a brown envelope without a return address or cover letter, and that he did not know the identity of the person who sent them." Id.
22. ILL. REV. STAT. ch. 110, § 8-903. See infra notes 54, 55.
24. Id. at 3-4.
25. Id. at 4.
26. The court conceded that § 8-907(2), which states a requirement "that all other available sources were exhausted" appears to convey a "strong legislative intent." In re Special Grand Jury Investigation of Alleged Violations of the Juvenile Court Act, No. 84-MR-10, slip op. at 1 (Circuit Court of DuPage County May 23, 1984). It held, however, that the preceding paragraph § 8-906, dilutes some of the absolutism implied in § 8-907(2), thereby allowing a trial court some latitude in determining the exhaustion issue. Id. at 2. See ILL. REV. STAT. ch. 110, §§ 8-906, 8-907(2) (1983).
27. Id. at 2. See ILL. REV. STAT. ch. 110, §§ 8-906, 8-907(2) (1983).
28. Id.
breached. The opinion suggested that the public interest in the operations of the juvenile court could have been furthered under state law by Warden's attendance at court, thereby avoiding "the commission of a crime" by whoever provided the juvenile trial transcripts to Warden without court authorization. The court concluded that the only manner in which the state's policy of juvenile confidentiality could have been protected was through the divestiture of Warden's privilege and compulsion of his testimony. It found no reporter's privilege protection in either the federal or state constitutions.

B. The Illinois Supreme Court Decision

Warden appealed this divestiture order directly to the Illinois Supreme Court. The court analyzed the provisions of the Re-
porter's Privilege Act which permit divestiture of a reporter's privilege when "all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved." 34

In reversing the circuit court's divestiture order, the Illinois Supreme Court concluded that the lower court erred in finding that all other available sources of information had been exhausted. 35 The court reviewed the grand jury testimony and noted that five attorneys reportedly had possessed the relevant trial transcripts, but that only one of the five had been asked to appear before the grand jury. 36 To determine whether all available sources for the information had been questioned, the court looked to standards applied in other jurisdictions and found that every jurisdiction recognizing a qualified privilege for reporters requires a showing of exhaustion of other available sources before divestiture is required. 37 Instead of expressly adopting other states' standards, however, the court fashioned its own definition of "available sources." It found a "clear legislative intent" in enacting the Reporter's Privilege Act to "create a standard which balances the reporter's first amendment rights against the public interest in the information sought and the practical difficulties in obtaining the information elsewhere." 38 Applying this balancing test to the facts in Warden, the court concluded that the other four attorneys should have been called to testify before the grand jury. 39 In so holding, the court rejected any suggestion that divestiture may be allowed merely upon "a showing of inconvenience to the investigator." 40

Although the court dismissed the divestiture order on the

--

34. ILL. REV. STAT. ch. 110, § 8-907(2) (1983).
35. Warden, 104 Ill. 2d at 428 (Ill. S. Ct. Nov. 30, 1984).
36. Id. at 422-23, 428.
37. Id. at 425.
38. Id. at 427. It is uncertain whether the court refers to "first amendment rights" with the intention of basing the Act on federal constitutional requirements or is simply using the phrase as a convenient shorthand reference to the legislature's intention in enacting the statute.
39. Id. at 428.
40. Id. at 428-29.
grounds that available sources had not been called before the grand jury, it noted in dictum that it agreed with the circuit court that “a compelling public interest will be served by ascertaining the person or persons who violated the confidentiality provisions of the Juvenile Court Act.”

Because of the factual basis for the reversal in Warden, the court did not consider the constitutional free press argument advanced by the petitioner. It acknowledged, however, that the first amendment protects the right of the press to gather and disseminate information, and, at one point, appeared to recognize that freedom of the press can be compromised by compelled disclosure of a reporter's confidential sources. At another point, the court also quoted approvingly what it viewed as the rule of Branzburg v. Hayes, as “permitting forced disclosure of the reporter's source when the public interest in the information is sufficiently compelling.”

It is not clear whether the court's references to the first amendment suggest that analysis of the compelled disclosure issue is identical under the constitution and the Illinois Reporter's Privilege Act, or whether it viewed the first amendment merely as a helpful analogy in determining the rights of journalists under the state statute.

Justice Simon concurred in the majority opinion. He disagreed, however, with the majority's acknowledgement of a compelling public interest in the case. Noting that the public interest in juvenile confidentiality was not implicated because no juvenile's name was released, Justice Simon concluded that the Act should not be used “to shield a judge rather than a juvenile.”

III. ILLINOIS REPORTER'S PRIVILEGE ACT

A. History and Purpose

Reporters have long asserted that it is necessary, in order to meet their responsibilities as newsgatherers, for them to receive information from confidential sources and to respect the source's

---

41. Id. at 425. Justice Simon disagreed with this dictum. Id. at 429-30. See infra note 46 and accompanying text.
42. Warden, 104 Ill. 2d at 424.
43. Id.
44. 408 U.S. 665 (1972).
45. Warden, 104 Ill. 2d at 424.
46. Id. at 430 (Simon, J., specially concurring).
confidence by not disclosing his or her identity.\(^\text{47}\) In recognition of the reporter's interest in maintaining the confidentiality of sources, the majority of states have established, through statutes and court opinions, an evidentiary privilege protecting a reporter from forced disclosure of sources.\(^\text{48}\) Although adoption of the privilege in some

\(\text{47}\) The reporter's concern for protecting the identity of sources was present in colonial America:

1. One of the Pieces in our News-Paper, on some political Point which I have now forgotten, gave Offence to the Assembly. He was taken up, censur'd and imprison'd for a Month by the Speaker's Warrant, I suppose because he would not discover his Author. I too was taken up and examin'd before the Council; but tho' I did not give them any Satisfaction, they contented themselves with admonishing me, and dismiss'd me; considering me perhaps as an Apprentice who was bound to keep his Master's Secrets.

\text{THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 69 (Yale Univ. Press 1964).}

In 1934, the American Newspaper Guild first addressed the issue of protecting confidential sources by including in its Code of Ethics the requirement "[t]hat newspapermen shall refuse to reveal confidences or disclose sources of confidential information in court or before other judicial or investigatory bodies." \text{J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS 414 (1979).}

Sigma Delta Chi, the journalistic fraternity, provides in its Code of Ethics that "[j]ournalists acknowledge the newsman's ethics of protecting confidential sources of information." \text{Id.}


The Justice Department under President Nixon served numerous subpoenas on newspapers, television stations, and reporters regarding demonstrations and police beatings of reporters during the 1968 Democratic Convention in Chicago: "The government served subpoenas on all four major Chicago daily newspapers, the three major television networks and \text{NEWSWEEK, TIME and LIFE} magazines, calling for all their notes, film footage, stories, rough drafts and anything else in their possession that might be connected with the Democratic National Convention." \text{U.C.L.A. Note, supra, at 162. See also W. FRANCOIS, supra, at 400.}

states followed and apparently responded to the decision of the United States Supreme Court in *Branzburg v. Hayes,*\(^4^9\) the shield law concept dates back to 1896 when Maryland adopted a reporter's privilege.\(^5^0\)

**B. The Illinois Act**

Since 1971 Illinois has provided a statutory qualified privilege for reporters to refuse to disclose sources of information requested in the course of litigation.\(^5^1\) Under the Illinois Reporter's Privilege Act, P.A. 77-1623, effective Sept. 23, 1971. Governor Richard Ogilvie of Illinois, upon signing the bill into law, explained its purpose:

This bill takes a small, but vital, step toward guaranteeing the freedom of the press underpinning our constitutional liberties. It allows reporters in Illinois to perform their tasks without undue harassment from overzealous policemen anxious to take advantage of their hard work.

But it is more than a declaration of fair play for newsmen. It also assures a better informed public, for it allows reporters to seek the truth wherever it is to be found, without the fear that their sources of information will be cut off by unnecessary disclosure.
Act, courts are prohibited from compelling disclosure of "the source of any information obtained by a reporter during the course of his or her employment . . . ." The privilege is inapplicable to a libel or slander action in which a reporter or news medium is a defendant.

This statute creates a qualified privilege rather than an absolute privilege. One seeking to divest a reporter of the statutory privilege is required to apply to the circuit court of the county hearing the underlying action for an order of divestiture and an order to the reporter to disclose the source of the information. The application to divest must provide basic factual information about the matter, indicate the specific information sought and its relevancy to the proceedings, and demonstrate the "specific public interest" which would be harmed by non-disclosure. The court must then

---


52. ILL. REV. STAT. ch. 110, § 8-901 provides:

No court may compel any person to disclose the source of any information obtained by a reporter during the course of his or her employment except as provided in Part 9 of Article VIII of this Act. The privilege conferred by these Sections is not available in any libel or slander action in which a reporter or news medium is a party defendant.

"Reporter" is defined in the statute as "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium; and includes any person who was a reporter at the time the information sought was procured or obtained." ILL. REV. STAT. ch. 110, § 8-902(a) (1983). "News medium" is defined as "any newspaper or other periodical issued at regular intervals and having a paid general circulation; a news service; a radio station; a television station; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing." Id. at § 8-902(b). "Source" is defined as "the person or means from or through which the news or information was obtained." Id. at § 8-902(c).

Arguably this statute excludes, probably unintentionally, news gatherers working occasionally for sporadically issued publications or for publications issued without cost. For other states' more inclusive coverage under shield laws, see, e.g., IND. CODE § 34-3-5-1 (1979); NEB. REV. STAT. §§ 20-144 to -147 (1983).


54. ILL. REV. STAT. ch. 110, § 8-903 (1983) provides:

In any case where a person claims the privilege conferred by Part 9 of Article VIII of this Act, the person or party, body or officer seeking the information so privileged may apply in writing to the circuit court serving the county where the hearing, action or proceeding in which the information is sought for an order divesting the name therein of such privilege and ordering him or her to disclose his or her source of the information.

55. Id.

56. ILL. REV. STAT. ch. 110, § 8-904 (1983) dictates the requirements for an application for divestiture:

The application provided in Section 8-903 of this Act shall allege: the name of the reporter and of the news medium with which he or she was connected at the time the information sought was obtained; the specific information sought
rule on divestiture in light of four factors: the nature of the proceedings; the merits of the claim or defense; the adequacy of other remedies; and the availability of alternative means of acquiring the information sought. The court must hold a hearing and, if it grants an order of divestiture, is required to make findings that the information sought is not required by any other law to be kept secret, that it is not available from sources other than the reporter, and that disclosure is "essential to the protection of the public interest involved." A divestiture order is enforceable by contempt, but the privilege continues during pendency of an appeal.

Although the shield law was enacted more than ten years ago, there are few reported Illinois cases addressing its provisions. This paucity of cases may reflect various factors. Reporters in Illinois may not have been requested often to disclose sources. When requested, some reporters may have refused to divulge sources and the party or governmental body decided not to seek the information under the provisions of the Act. In other instances, reporters may have divulged the information voluntarily. Unlike other evidentiary privileges such as those involving doctor-patient and lawyer-client relationships, the reporter's privilege belongs to the reporter alone and may be waived by the reporter without any con-

---

57. Ill. Rev. Stat. ch. 110, § 8-906 (1983) provides:

In granting or denying divestiture of the privilege provided in Part 9 of Article VIII of this Act the court shall have due regard to the nature of the proceedings, the merits of the claim or defense, the adequacy of the remedy otherwise available, if any, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove.


An order granting divestiture of the privilege provided in Part 9 of Article VIII of this Act shall be granted only if the court, after hearing the parties, finds:

(1) that the information sought does not concern matters, or details in any proceeding, required to be kept secret under the laws of this State or of the Federal government; and

(2) that all other available sources of information have been exhausted and disclosure of the information sought is essential to the protection of the public interest involved.

If the court enters an order divesting the person of the privilege granted in Part 9 of Article VIII of this Act it shall also order the person to disclose the information it has determined should be disclosed.


61. A review of other states reveals few cases interpreting shield laws, so the lack of Illinois cases is probably not a result of local factors.
Consideration of the wishes of the source. Although it is possible that some divestiture orders have not been appealed or reported, this is unlikely in light of the vigor with which news media generally defend their rights against governmental action.

The Appellate Court of Illinois addressed the underlying policy of the shield act in *People ex rel. Scott v. Silverstein.* It analyzed the purpose of the Act, the scope of its protections, the possibility of waiver of the privilege, and its relationship to constitutional free press guarantees. The case arose out of a proceeding by the Attorney General of Illinois against a museum and its directors. One of the directors subpoenaed a Chicago Tribune reporter to appear for a deposition and to produce certain documents regarding stories he had written for the Tribune about questionable sales of art objects by the museum. The reporter had made disclosures regarding the museum's activities to a special assistant attorney general involved in the state's suit. These conversations occurred both prior to and after the state filed its legal action. The reporter moved to quash the subpoena as violative of his privilege.

In denying the motion to quash, the circuit court held that the reporter's conversations with the special assistant attorney general constituted a waiver of his reporter's privilege. It then ordered him to answer questions at the deposition; however, these questions were limited to the matters that had been divulged in the attorney general's office. The parties conceded, and the court agreed, that absent a finding of waiver the defendant seeking to depose the reporter did not meet the divestiture requirements of the Act.

The appellate court described the Act as reflecting "a paramount public interest in the maintenance of a vigorous, aggressive and

---


Evidence scholars have generally been critical of evidentiary privileges because they exclude trustworthy evidence from the trier of fact. C. McCormick, *supra*; 8 J. Wigmore, *Evidence* §§ 2184a, 2192 (McNoughton rev. 1961).

63. 89 Ill. App. 3d 1039, 412 N.E.2d 692 (1st Dist. 1980), *rev'd on other grounds,* 87 Ill. 2d 167, 429 N.E.2d 483 (1981). The Illinois Supreme Court reversed on the grounds that the trial court's order was not final and appealable. *See supra* note 33. Given this reversal, the appellate court's discussion may have no precedential value. Nonetheless, it was the only reported case prior to *Warden* which discussed the purpose of this Act.

64. *Id.* at 1042-44, 412 N.E.2d at 694-95.

65. *Id.* at 1040-41, 412 N.E.2d at 693.

66. *Id.* at 1040, 412 N.E.2d at 693.

67. *Id.* at 1042, 412 N.E.2d at 694. The court did not discuss the state or federal constitutional arguments raised by the reporter because "it is clear this act incorporates the guarantees of a free press under the first amendment to the United States Constitution and under article 1, section 4 of the Illinois Constitution of 1970." *Id.*
independent press capable of participating in robust, unfettered debate over controversial matters . . . " It indicated that the Act's protection of "the source of the information" encompassed both confidential and non-confidential sources. The court interpreted "source" broadly to include a reporter's resource materials. It reasoned that the reporter's disclosures to the Attorney General did not result in a waiver because the reporter's privilege, unlike other evidentiary privileges, is not dependent upon confidentiality. The court further noted that, regardless of whether a source was confidential, enforcement of subpoenas against a reporter would have a "'chilling effect' . . . on the flow of information to the press and to the public."
On appeal, the Illinois Supreme Court held that the trial court's order requiring the reporter to appear for deposition was not final and appealable. Having reversed for this reason, the court did not address the merits of the substantive issues or the issue of waiver.

Prior to the decision in _Warden, People v. Childers_ was the only Illinois authority addressing divestiture under the Reporter's Privilege Act. The defendant in _Childers_ argued that the trial court committed reversible error when it failed to divest a reporter of the privilege in response to the defendant's request. The reporter had written an article which stated that Childers had confessed to three murders after a fourteen-hour interrogation. Childers argued that his confession was involuntary because of the length of the interrogation and other factors. Evidence before the court indicated that the defendant was in police custody for twelve and one-half hours before confessing to the murders.

The circuit court trying the murder case denied the motion for divestiture. The appellate court affirmed, concluding that other sources were available for the information sought from the reporter. Mind of protecting the identity of newsmen's confidential sources, we think the statutory privilege broad enough to encompass any source of news or information, without regard to whether the source gave his information in confidence or not. Consequently, it is for the newsman to determine whether he will disclose the "source" of his news or information, and such disclosure cannot be compelled by requiring that he answer questions aimed, directly or indirectly, toward ascertaining the source's identity.

_id._ at 724-25, 294 A.2d at 156 (footnote omitted). The _Lightman_ court, however, affirmed the contempt judgment against the reporter because he refused to answer grand jury questions about criminal activity which the reporter personally witnessed. _Id._ at 726, 294 A.2d at 157. _But cf._ People v. Wolf, 69 Misc. 2d 256, 329 N.Y.S.2d 291 (1972) (required that information be imparted to the reporter under a cloak of confidentiality in order for New York shield law to be applicable). The _Warden_ court did not discuss this issue and thus appears to have adopted the position that a reporter need not assert that the source wished to remain confidential in order for the reporter to claim the privilege under the Act.


74. _Id._


76. During that time, he first told police that he had not been in the house where the murders occurred and later said that he was there and found the bodies of his mother, stepfather, and brother. _Id._ at 108-09, 418 N.E.2d at 962.

77. The court applied ¶ 8-907(2) of the Act, and concluded that divestiture was not warranted because all available sources had not been exhausted. _Id._ at 112, 418 N.E.2d at 965.
porter. Because of the availability of other sources, the Childers court followed the Act in denying the request for divestiture and did not need to address whether disclosure was “essential to the protection of the public interest involved.”

C. The Warden Interpretation of the Shield Law

In Warden, the Illinois Supreme Court properly read the Act as allowing divestiture if two requirements are met: first, that other sources of information be exhausted and second, that “the information sought [be] essential to the protection of the public interest involved.” The court’s adoption of a balancing test to determine the existence of alternative sources of information sought from a reporter recognizes the inappropriateness of requiring exhaustion of every conceivable peripheral source of information but requires more than a “showing of inconvenience to the investigator before a reporter can be compelled to disclose his sources . . . .” The test balances “the reporter’s first amendment rights against the public interest in the information sought and the practical difficulties in obtaining the information elsewhere.”

Application of the test in Warden logically led the court to find non-exhaustion. This is because the grand jury failed to contact four attorneys who were identified by name as having had access to the transcripts, who had a logical possibility of providing relevant information to the grand jury, and who apparently were available to testify.

The scope of the court’s test, nevertheless, is imprecise and will become clear only after being applied in other cases. The greater the likelihood that an alternative source can provide the information sought or can provide relevant material leading to the information sought, the less likely that disclosure will be ordered. The prong of the test regarding “the public interest in the information sought” may indicate that a less exhaustive search for alternative

78. Id. With respect to the other sources, the court indicated that defense counsel had not asked any police officers about the length of the interrogation, that defendant had never claimed that the interrogation had lasted for fourteen hours, and that defendant’s fiancee and her mother had been present at the police station all day but had not testified that a fourteen-hour period had elapsed. Id. The Childers court’s interpretation of the exhaustion requirement appears consistent with the test created by the Warden court.


80. Warden, 104 Ill. 2d at 425 (quoting ILL. REV. STAT. ch. 110 ¶ 8-907 (2)(1983)).

81. Warden, 104 Ill. 2d at 428-29.

82. Id. at 427.
sources will be required as the public interest increases. The court’s inclusion of first amendment considerations in the required balancing test suggests that the extent of harm to first amendment interests from disclosure of the source will affect the determination of how extensive the search for alternative sources should be. If no alternative sources exist, however, the only remaining question under the statute is whether there is a public interest requiring disclosure.

Although the court found that the exhaustion requirement was not met, it concluded “that a compelling public interest will be served by ascertaining the person or persons who violated the confidentiality of the Juvenile Court Act.”83 Because this sentence is the only discussion of the “public interest” prong of the divestiture statute, it is unclear whether the supreme court accepted the circuit court’s apparent reading of the Act that any articulable public interest is sufficient to satisfy the “essential to the public interest” requirement.84 Under such an interpretation, divestiture would be required whenever any public interest would be served and no alternative sources exist for the information possessed by the reporter.

Alternatively, the court’s language may be read as permitting forced disclosure of a journalist’s source only when no alternative sources exist and the public interest in the information is “compelling.” Use of the term “compelling” may suggest that, in interpreting the Act, the court intended to utilize, either directly or by analogy, traditional first amendment principles of analysis. Under this approach, a state may curtail freedom of speech or the press only when it can demonstrate a compelling state interest in doing so.85 Further supporting this interpretation of the court’s opinion is the fact that the court had earlier cited Branzburg v. Hayes86 as allowing disclosure of a reporter’s source “when the public interest in the information is sufficiently compelling.”87

If the court’s opinion is interpreted in this manner, then the question of whether “information sought is essential to the protection of the public interest involved” would be resolved by weighing the importance of protecting the reporter’s right to gather and disseminate information against the importance of the public interest.

83. Id. at 425.
84. See supra note 29.
85. See infra note 106 and accompanying text.
86. 408 U.S. 665 (1972).
87. Warden, 104 Ill. 2d at 424.
to be served by disclosure. Under the facts of *Warden*, this would involve balancing the state's interest in discovering the source of confidential juvenile court transcripts in a grand jury proceeding against the social utility of protecting a journalist's source for information highly relevant to the public's right to be informed about the behavior of its judiciary. As discussed below, this is the same test used to determine the scope of a reporter's privilege under the first amendment.88

Utilizing a balancing test regarding the public interest would effectuate the legislature's intention in enacting the Illinois shield law. The Reporter's Privilege Act was designed to "assure a better informed public . . . ."89 In *Warden*, the court relied on this legislative objective in creating a balancing test to determine whether the "all available sources" requirement under the Act was met.90 It seems logical to conclude that this same legislative intention is applicable in interpreting the "essential to the public interest" standard for divestiture. A balancing test is more consistent with the goal of assuring a better informed public than a statutory test which would require compelled disclosure of a reporter's source upon a mere showing that some public interest in the information is involved.

IV. *FIRST AMENDMENT AND COMPULSORY DISCLOSURE*

The Illinois Supreme Court's opinion in *Warden* leaves unresolved the degree of overlap between protections afforded reporters under the state shield law and the federal constitution. If the Illinois Reporter's Privilege Act is interpreted as providing journalists a qualified privilege which can be divested upon showing a lack of alternative available sources and an articulable public interest in the information sought, it is necessary to determine whether reporters are entitled to any greater protection under the free press guarantee of the first amendment.91

88. See infra notes 100-07 and accompanying text.
89. See comments of Governor Ogilvie, supra note 51.
90. *Warden*, 104 Ill. 2d at 424. See supra note 38 and accompanying text.
91. Conceivably, *Warden* itself may come again before the court. The grand jury might call the four attorneys, not discover the source of the transcripts from them, and again seek to divest Warden of his privilege under the Act. Presumably, Warden would continue to refuse to disclose his source and the circuit court would have to decide whether the legal requirements for divestiture had been met. If the courts were to determine that the requirements for divestiture under the statute were met, it would be required to address whether the first amendment protects Warden's sources. The possibility of this occurring is more than conjectural. Robert Cummins, chairman of the Illinois Judicial Inquiry Board, was recently subpoenaed to appear before a special grand
A. The Branzburg Decision

The starting point for such a discussion is the United States Supreme Court's decision in *Branzburg v. Hayes.* As various commentators have noted, it is not easy to decipher even the holding in *Branzburg.* The plurality opinion, in which Justice White was joined by three other members of the court, rejected the claim that the first amendment protects reporters from compelled disclosure of confidential sources. For the plurality, the only circumstance which would limit the ability of the state to force disclosure would be if the demand were made in bad faith or for the purpose of harassment. Four members of the Court dissented. Three dissenters took the position that the first amendment creates a qualified privilege for reporters; Justice Douglas argued that the Constitution erects an absolute barrier against forced disclosure.

Justice Powell, concurring, cast the deciding vote and, as it turns out, articulated the test now used by the majority of courts when deciding whether a reporter must disclose a source. This test calls for a case by case assessment of the competing interests in requir-

---

92. 408 U.S. 665 (1972). At common law, no reporter's privilege existed. *Id.* at 685. *Contra Warden,* 104 Ill. 2d at 424. The first case in which a reporter asserted a constitutional privilege to protect a source was a civil case, in which the court rejected the assertion. *See* Garland v. Torres, 259 F.2d 545, 549-50 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958).


94. The plurality view of the issue and holding in *Branzburg* was succinctly summarized by Justice White: "The issue in these cases is whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment. We hold that it does not." 408 U.S. at 667.

95. *Id.* at 707-08.

96. Before the government could compel disclosure, Justices Stewart, Brennan, and Marshall would have required the government to:

1. show that there is probable cause to believe that the newsmen have information that is clearly relevant to a specific probable violation of the law;
2. demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

*Id.* at 743 (Stewart, J., dissenting) (footnotes omitted).

97. Justice Douglas recognized one exception to his absolute privilege rule. If a reporter were alleged to be personally involved in the crime under investigation by the grand jury, he or she would enjoy no first amendment immunity. Douglas reasoned that the reporter suspected of wrongdoing could invoke the fifth amendment if called to testify. Because the first and fifth amendment rights would, in Douglas's view, create an absolute privilege, he would not require a reporter even to appear before a grand jury. *Id.* at 712 (Douglas, J., dissenting).
ing or not requiring disclosure: "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." \(^98\)

Most early interpretations of \textit{Branzburg} focused on Justice White's plurality opinion and consequently rejected the idea of constitutional protection for reporters called to testify in criminal investigations. \(^99\) Later cases emphasized the pivotal role of the Powell concurring opinion and interpreted \textit{Branzburg} as having recognized a qualified reporter's privilege. \(^100\) As a recent commentator on the topic has written: "The now widely accepted view of \textit{Branzburg} . . . is that it was limited by the specific facts presented to the Justices in the consolidated cases and that the case-by-case analysis must be used by trial judges in 'balancing freedom of the press against a compelling and overriding public interest in the in-

\(^{98}\) Id. at 710 (Powell, J., concurring).

\(^{99}\) See, e.g., Lewis v. United States, 501 F.2d 418, 422 (9th Cir. 1974), cert. denied, 420 U.S. 913 (1975) (\textit{Branzburg} provides a qualified privilege in grand jury proceedings only in situations of harassment or bad faith); \textit{In re Bridge}, 120 N.J. Super. 460, 467, 295 A.2d 3, 6 (1972), cert. denied, 410 U.S. 991 (1973) (\textit{Branzburg} stated broad rule that the first amendment provides no privilege to a reporter against appearing before a grand jury); Lightman v. State, 15 Md. App. 713, 726, 294 A.2d 149, 157, aff'd per curiam, 266 Md. 550, 295 A.2d 212 (1972), cert. denied, 411 U.S. 951 (1973) (no federal constitutional guarantee against compelled disclosure). For later cases, see also Pankratz v. District Court, 609 P.2d 1101, 1102 (Colo. 1980) (first amendment does not protect newsman's agreement to protect his source); \textit{In re Farber}, 78 N.J. 259, 266, 394 A.2d 330, 333, cert. denied, 439 U.S. 998 (1978) (Supreme Court has "clearly" rejected claim of privilege and has squarely held that no such first amendment right exists).

\(^{100}\) See, e.g., United States v. Cuthbertson, 630 F.2d 139, 146 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981) (\textit{Branzburg} recognized the existence of a first amendment privilege for newsgathering); U.S. v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976) (district court must balance the interest of confidentiality against needs of criminal justice system); United States v. Blanton, 534 F. Supp. 295, 296 (S.D. Fla. 1982) (state must make showing of sufficient interest to overcome reporter's constitutional privilege); \textit{In re Pennington}, 224 Kan. 573, 575, 581 P.2d 812, 814-15 (1978) (reported \textit{sub nom} State v. Sandstrom), cert. denied, 440 U.S. 929 (1979) (\textit{Branzburg} acknowledged qualified privilege in criminal cases); State v. Siel, 122 N.H. 254, 259, 444 A.2d 499, 502 (1982) (\textit{Branzburg} justices recognized qualified first amendment privileges for reporters); Brown v. Commonwealth of Virginia, 204 S.E.2d 429, 431 (Va. 1974) (newsman's privilege is related to first amendment). These were all criminal cases in which a reporter was asked to reveal a source.

formation sought."

The plurality in *Branzburg* stressed that the reporters in the cases before it had been called to testify before grand juries investigating serious crimes. Some courts have cited *Branzburg* for the proposition that the state's interest in receiving testimony at a grand jury proceeding always presents a compelling circumstance which outweighs competing first amendment interests. A smaller number of courts, however, have rejected any blanket assertion that the first amendment is inapplicable in the grand jury setting. These courts view the fact that a reporter is called to

---

102. Three cases were consolidated for decision in *Branzburg*. In Caldwell v. United States, a New York Times reporter was called to testify before a grand jury investigating the activities and plans of the Black Panther Party. In particular, the grand jury wanted to question Caldwell about a reported conversation he had with a high level Black Panther who allegedly said he wanted to kill the President of the United States. In *Branzburg*, a reporter who watched and wrote about hashish production was summoned before a grand jury investigating the use and sale of drugs. In *In re Pappas*, a grand jury subpoenaed a television newsman who had been allowed to enter Black Panther headquarters during a period of civil disorder in New Bedford, Massachusetts. Pappas never wrote a story or otherwise revealed what he saw or heard in the building. For a detailed discussion of the facts, see *Branzburg*, 408 U.S. 665, 667-79 (1972).
103. See, e.g., Reporter's Committee v. American Telephone and Telegraph Co., 593 F.2d 1030, 1049 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979); *In re Bridge*, 120 N.J. Super. 460, 467, 295 A.2d 3, 6 (1972), *cert. denied*, 410 U.S. 991 (1973). Many non-grand jury cases distinguish *Branzburg* on the ground that its holding is limited to grand jury investigations of crime. Invariably, the court is confronted with a request to recognize the privilege, and its subsequent decision rests on its classification of the proceedings as either criminal or civil. See, e.g., Zerilli v. Smith, 656 F.2d 705, 711 (D.C. Cir. 1981) (*Branzburg*, which involved grand jury proceedings, is not controlling in civil cases); *Loadholtz v. Fields*, 389 F. Supp. 1299, 1301 (M.D. Fla. 1975) (*Branzburg* is limited to the confines of the criminal justice system); State v. St. Peter, 132 Vt. 266, 269, 315 A.2d 254, 255 (1974) (*Branzburg* confines itself to grand jury proceedings and trials); Zelenka v. State, 83 Wisc. 2d 601, 618, 266 N.W.2d 279, 286 (1978), *overruled on other grounds*, State v. Dean, 103 Wisc. 2d 228, 307 N.W.2d 628 (1981), (*Branzburg* applies to grand jury proceedings where the reporter has witnessed a crime). Because they did not involve grand jury proceedings, these cases typically contain no analysis of the role of the first amendment in grand jury proceedings.
104. In *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972), the court rejected the government's argument that persons engaged in newspaper work cannot invoke the first amendment when called to testify before a grand jury:

> No governmental door can be closed against the Amendment. No governmental activity is immune from its force. That the setting for the competition between rights secured by the First Amendment and antagonistic governmental interests is a grand jury proceeding is simply one of the factors that must be taken into account in striking the appropriate constitutional balance.

*Id.* at 1082. See also United States v. Burke, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 104 S. Ct. 72 (1983) (same test applied in civil and criminal proceedings); Morgan v. State, 337 So. 2d 951, 954 (Fla. 1976) (limited to grand jury investigations of crime, not grand jury investigations generally).
testify before a grand jury as one of the factors to be placed in the balance.

The latter position represents the preferable approach. First, it is the approach taken by a majority of the Justices in *Branzburg*.

Second, it comports with traditional first amendment principles which require the state to demonstrate that its interest in disrupting the free flow of information is of the highest order. To establish a conclusive presumption that grand jury investigations are always of the highest order diminishes the heavy burden placed on the state to articulate reasons why there is no alternative short of suppressing speech or the press which will satisfy the state’s interest.

In analyzing the scope of the reporter’s first amendment privilege in *Warden*, this article adopts the view that *Branzburg* requires balancing the press’ and public’s interest in the free flow of information about public officials against the state’s interest in enforcing its policy of juvenile confidentiality.

105. Justice Powell made it clear that he would apply a balancing test even in the grand jury context: “The Court does not hold that newsmen, *subpoenaed to testify before a grand jury*, are without constitutional rights . . . .” (emphasis added). 408 U.S. at 709.

In a footnote, Justice Powell explained his objection to the dissenter’s view. *Id.* at 710. With respect to reporter Caldwell, Powell rejected his assertion that he need not even appear before the grand jury prior to a court determination of absolute need. He likewise rejected the dissenters’ position that a reporter could not be required to disclose a source until after the government had proven certain preconditions. Instead, Powell envisioned a simple balancing of the “competing interests on their merits in the particular case.” *Id.*

106. The first amendment has a preferred position on the list of freedoms protected by the Constitution; whenever government action limits first amendment rights, the government bears the burden of proving that its interests are legitimate, compelling, and designed to infringe on the area of protected activity no more than absolutely necessary. See *NAACP v. Button*, 371 U.S. 415, 439-41 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). See generally J. NOWAK, R. ROTUNDA & J.N. YOUNG, CONSTITUTIONAL LAW, 864-73 (2d ed. 1983).

107. The plurality in *Branzburg* rejected the concept of a balancing test in the grand jury context on the grounds that the courts would become “inextricably involved in distinguishing between the value of enforcing different criminal laws.” *Id.* at 706-07. Outside the grand jury context, however, the Court has frequently imposed this precise burden on courts where first amendment values are at issue. See, e.g., *Cohen v. California*, 403 U.S. 15, 25 (1971) (state law prohibiting malicious and wilful disturbing the peace by offensive conduct held unconstitutional); *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (upholding state law prohibiting trespass with a malicious and mischievous intent upon the premises of a county jail).

108. Although the Illinois Supreme Court did not address *Warden*’s first amendment argument, it cited *Branzburg* in its determination of the reporter’s rights under the Illinois shield law. See *Warden*, 104 Ill. 2d at 424-28. The court interpreted *Branzburg* as “permitting forced disclosure of the reporter’s source when the public interest is sufficiently compelling.” *Id.* at 424.
B. The Role of a Free Press

The information published in the Chicago Lawyer concerned allegedly inappropriate behavior by a juvenile court judge in the performance of his duties. The press has traditionally acted as the agent of the people in providing information about the workings of government and its legal system. A privilege for reporters to refuse to disclose sources reflects an understanding that the ability of the press to provide newsworthy information to the public is lessened if a reporter cannot guarantee confidentiality to sources. For that reason, the first amendment accords substantial protection to reporters and publications addressing the conduct of public officials. The Supreme Court has emphasized that the publication of information relating to the conduct of judges or other public officials "lies near the core of the \[f]irst \[a]mendment. . . ." The amendment was fashioned to protect against official interference with criticism of government or public officials. This idea is so entrenched that the Supreme Court has interpreted the amendment as providing a measure of protection even for untruthful speech directed against government officials.

In the context of reporting on the operations of the courts, the press serves not only as a principal conduit of information essential to an informed citizenry, but also as a check on abuses of governmental power in the administration of justice. All members of the Court in Branzburg agreed that the first amendment must pro-

---


Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve. Id. at 219. See also Justice Douglas's dissent in Branzburg v. Hayes, 408 U.S. 665, 721 (1972). ("The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know.").

110. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838 (1978). In Landmark, the Court struck down a statute prohibiting publication of proceedings before a state judicial review commission. See infra notes 190-93 and accompanying text.

111. See, e.g., Meiklejohn, The First Amendment Is An Absolute, 1961 S. CT. REV. 245 (1961). For Meiklejohn, one of the responsibilities of citizenship is to "pass judgment upon the decisions which our agents make upon those issues [which face the nation]." Id. at 255. Full knowledge of the actions by the government agent is essential in carrying out that responsibility. Id. at 257.

112. See New York Times v. Sullivan, 376 U.S. 254 (1964). A public official who is defamed must prove that the allegedly damaging information is untrue and that it was knowingly or recklessly published with disregard for its truth or falsity.

vide some protection to the newsgathering process if the press is to carry out effectively its intended functions.\textsuperscript{114} Five of the Justices, the dissenters and Justice Powell, include freedom from compelled disclosure of confidential sources as falling within this zone of protection.\textsuperscript{115} For these Justices, it is only when the state establishes a compelling need which outweighs the burden placed on the free flow of information that forced disclosure may be constitutionally required.\textsuperscript{116}

V. JUVENILE COURT CONFIDENTIALITY IN THE BALANCE

In \textit{Warden}, the Illinois Supreme Court was asked to weigh the interest of the public and press in preserving the anonymity of a confidential news source against the state’s interest in protecting the confidentiality of juvenile court records. In attempting to understand and evaluate the state’s interest in juvenile anonymity in \textit{Warden}, the following sections examine the philosophy and history of juvenile courts, the changing role of confidentiality in that system, and the current Illinois statutory scheme with regard to juvenile anonymity. The section finishes with a review of several cases decided by the Supreme Court in the last decade in which the Court, like the Illinois Supreme Court in \textit{Warden}, was asked to elevate the state’s concern with preserving juvenile confidentiality over competing constitutional claims.\textsuperscript{117}

A. Philosophy and History of Juvenile Justice

Although the American juvenile justice system has traditionally emphasized the importance of confidentiality in juvenile proceedings, Illinois and other states are in the process of reevaluating their commitment to the concept of anonymity.\textsuperscript{118} To understand

\textsuperscript{114} Even the plurality opinion in \textit{Branzburg} recognized that the first amendment provides some measure of protection for newsmen called on to disclose confidential sources in grand jury proceedings:

\textit{[N]ewsgathering is not without its First Amendment protections, and grand
jury investigations if instituted or conducted other than in good faith, would
pose wholly different issues for resolution under the First Amendment.}
\textit{Branzburg v. Hayes, 408 U.S. 665, 707 (1972). For further discussion of the constitutional
right of the press to gather newsworthy information, see Richmond Newspapers,
Inc. v Virginia, 448 U.S. 555, 576 (1980).}

\textsuperscript{115} \textit{Branzburg v. Hayes, 408 U.S. 665, 709-52 (1972).}

\textsuperscript{116} \textit{Id. See supra notes 96-98.}

\textsuperscript{117} Because of the basis for reversal, the Illinois Supreme Court did not discuss the balancing of these two competing interests. It did note in dictum, however, that it considered the public interest advanced by the state as sufficiently “compelling” to merit disclosure under the Illinois Act. \textit{Warden}, 104 Ill. 2d at 425.

\textsuperscript{118} \textit{See infra} notes 167-82 and accompanying text.
this reassessment, it is important to consider briefly the history of juvenile courts and their philosophical underpinnings.

Since the early nineteenth century, two principles have guided legislators, jurists, and child welfare advocates faced with the challenge of transforming "unfortunate" children into productive members of society. The first principle is that children should be rehabilitated to prevent future misconduct rather than punished for past transgressions; the second is that these children are more likely to be reformed if they are separated from corrupting influences.\footnote{119. Fox, Philosophy and the Principles of Punishment in the Juvenile Court, 8 Fam. L.Q. 373, 374 (1974).}

The operative theory for accomplishing these goals has been, and continues to be, the doctrine of parens patriae.\footnote{120. Literally translated as "parent of the country," in the United States the term parens patriae refers to the state's power to act as a guardian for persons under a disability. \textit{Black's Law Dictionary} 1003 (rev. 5th ed. 1979). The doctrine was used as a justification for juvenile court intervention for the first time in \textit{Ex Parte Crouse}, 4 Whart. 9, 11 (Pa. 1838).} This doctrine recognizes that while natural parents have a right to parental control, it is the obligation of the state to intercede and assume the duties of the parents when they cannot or do not exercise that right.

In 1899, the Illinois legislature established the first court system devoted exclusively to children.\footnote{121. Act of April 21, 1899, 1899 Ill. Laws 131.} The concept of a separate system of justice for children, grounded in the ideology of parens patriae and marked by a goal of rehabilitation rather than punishment, was quickly seized upon by other states.\footnote{122. By 1925, all but two states had established a juvenile court system. Today, all states have a separate system of justice for minors. \textit{See} Geis, \textit{Publicity and Juvenile Court Proceedings}, 30 Rocky Mtn. L. Rev. 101, 105 (1958).}
The first Illinois Juvenile Court Act incorporated theories of child treatment which had been developed over the course of the nineteenth century. These included the desirability of procedural informality and broad judicial discretion, the need for individualized treatment, the inapplicability of concepts of retribution and deterrence, the importance of social science professionals in the juvenile process, and the corresponding absence of a role for lawyers.123

While many hailed the development of a separate system of justice for children,124 others argued that the system created for minors what Justice Fortas was later to call "the worst of both worlds . . . neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."125 In 1967, a presidential commission highlighted many of the factors which have kept juvenile courts from accomplishing their long stated rehabilitative mission.126 That same year, in In re Gault,127 the United States Supreme Court cited the disparity between the philosophy and the reality of American juvenile justice, and ruled that many of the procedural safeguards available to adults in criminal cases are equally applicable in juvenile delinquency proceedings.128


124. For a collection of materials by early exponents of the juvenile court, see THE PROBLEMS OF JUVENILE COURTS AND THE RIGHTS OF CHILDREN 1-32 (M. Paulsen, ed. 1975).

125. Kent v. United States, 383 U.S. 541, 556 (1966). In Kent, the Court, relying on the District of Columbia juvenile statute and judicial precedent, held that the minor was entitled to a hearing in connection with a prosecutor’s petition to transfer the minor's case to adult court. In addition, the Court ruled that counsel for the minor had a right of access to any written materials relied on by the court in its decision and that the juvenile had a right to a written statement of reasons for the decision to waive juvenile court jurisdiction. See generally Antieau, Constitutional Rights in Juvenile Courts, 46 CORNELL L.Q. 387 (1961); Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 WIS. L. REV. 7 (1965).

126. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 1, 7-9 (1967). The Task Force attributed the failure of the juvenile courts to achieve their goal of rehabilitating children and decreasing delinquency to lack of adequate knowledge about the phenomenon of delinquency, an inadequate commitment by states to provide resources to accomplish the mission of the courts, and the lack of procedural safeguards for ensuring a fair outcome in juvenile proceedings.


128. Id. In Gault, the Court held that due process requires that, in the adjudicatory phase of a delinquency proceeding, a child is entitled to notice of the charges, the right to
Since 1966, the Supreme Court has decided six major cases which establish a constitutional framework within which juvenile delinquency proceedings must operate.\textsuperscript{129} In addition to the procedural reforms announced in \textit{Gault}, the Court has held that the state has the burden of proving delinquency beyond a reasonable doubt,\textsuperscript{130} and that the concept of double jeopardy applies in delinquency as well as in criminal proceedings.\textsuperscript{131}

Although the reasoning of these opinions suggested that all procedural rights guaranteed to an adult offender might also be available to minors charged in delinquency petitions,\textsuperscript{132} the Supreme Court in \textit{McKeiver v. Pennsylvania}\textsuperscript{133} rejected the theory that a wholesale transference of rights was mandated by the Constitution. Rather, the Court held that questions of due process in juvenile cases should be decided on a case by case basis, weighing the detriment to the child in not requiring a given procedure against the harm to the nonadversarial nature of juvenile proceedings if the procedure were required.\textsuperscript{134} In applying this balancing test, the Court in \textit{McKeiver} held that the right to trial by jury is not constitutionally required in juvenile cases. The Court reasoned that the primary purpose of a jury is to assure an unbiased factfinder and that to assume that bias is a serious problem in juvenile court ignores "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates."\textsuperscript{135}

The Supreme Court's introduction of criminal procedure into delinquency proceedings has not been the only response to the perceived failure of the juvenile court system. Academicians and policymakers have also reacted by questioning the ongoing validity of a court system grounded in the concepts of rehabilitation and

---


\textsuperscript{130} \textit{In re Winship}, 397 U.S. 358, 368 (1970).


\textsuperscript{132} The rationale for the opinions was summarized by Justice Fortas in \textit{Gault}: "A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. . . . In view of this, it would be extraordinary if our Constitution did not require the procedural regularity . . . implied in the phrase 'due process.'" 387 U.S. 1, 27-28 (1967).

\textsuperscript{133} 403 U.S. 528 (1971).

\textsuperscript{134} \textit{Id.} at 545.

\textsuperscript{135} \textit{Id.} at 550.
These concerns have been translated into a variety of concrete suggestions, some of which are currently being adopted in revised juvenile codes. Many states, for example, are in the process of abolishing or reducing juvenile court jurisdiction over status offenses on the theory that the courts have done more harm than good in this area. Others have tightened their definitions of abuse and neglect, thereby ensuring court intervention only in serious cases of parental misconduct.

In delinquency cases, increased statutory attention is being paid to the rights of the public in juvenile cases. This development is in response to the general alarm expressed over statistics which reveal a disproportionate percentage of serious crime committed by youthful offenders. The Illinois Juvenile Court Act contains several provisions which exemplify the increased attention being given to public safety concerns in state legislative enactments. For example, dispositional provisions in the Act were recently amended to introduce criminal justice concepts of sentencing into the delinquency process. Under traditional principles of juvenile justice, only the rehabilitative needs of the child could determine what dispositional alternative a court should select. The Illinois Act now provides that a child who has been adjudicated a delinquent and made a ward of the court may be committed to the Department of Corrections if such a commitment is in the best interests of the child or if "it is necessary to insure the protection of the public from the consequences of criminal activity of the delinquent."

Additionally, Illinois, like most states, permits transfer of a case to adult criminal court for trial if the best interests of the child or

136. Current critics base their objections on one of two premises: (1) juvenile courts continue to abuse, to an unacceptable degree, the children and families they were designed to help; and (2) the present juvenile system has failed to protect adequately the interests of society. See Fox, supra note 119, at 375; Guggenheim, A Call to Abolish the Juvenile Justice System, 11 CHILDREN'S RTS. REP. NO. 9 (June, 1978).

137. Illinois, for example, recently amended its Act to provide for a cooling-off period during which the youth is offered services before the juvenile court obtains jurisdiction over the child. ILL. REV. STAT. ch. 37, § 702-3 (1983). See also Utah Code Ann. § 9A:78-3a-19 (1977). For a discussion of the pros and cons of abolishing juvenile court involvement in status offense cases, see S. Fox, Modern Juvenile Justice, 507-35 (2d ed. 1981).


139. National Crime Survey and FBI arrest statistics indicate that approximately one in five violent crimes committed between 1974 and 1979 were committed by juveniles. For a detailed survey on juvenile violent crime statistics, see Snyder, Violent Juvenile Crime: The Problem in Perspective, 1 TODAY'S DELINQUENT 7 (1982).

140. ILL. REV. STAT. ch. 37, § 705-10 (1) (1983).
In cases involving certain serious crimes, the legislature has divested the juvenile court of all jurisdiction. The serious nature of the alleged offense itself warrants trial as an adult, without regard to the rehabilitative prognosis or individualized treatment needs of the particular child.

In a recent case, the United States Supreme Court sanctioned the use of public safety factors in the juvenile process. At issue in Schall v. Martin was the constitutionality of a New York statute which permits a child to be held in preventive detention awaiting trial in order to protect the child and society from the possibility that the child will commit another crime. The Court conceded that it has never held that it would be constitutionally permissible to detain an adult criminal defendant awaiting trial for any reason other than to ensure the defendant's appearance at trial, but nonetheless upheld the New York scheme for protecting the public and the child from future criminal activity, emphasizing that it is the parens patriae role of the juvenile court which authorizes differential treatment for adults and children.

Schall will undoubtedly be read by many as a return to a pre-Gault philosophy which permits the state to deprive a child of his or her liberty under circumstances which would not justify detention if the accused were an adult. Before Gault, however, only the child's best interest could justify differential treatment; after Schall, the public's interest in safety can apparently be constitutionally considered by the state as long as adequate procedural protections are provided.

141. ILL. REV. STAT. ch. 37, § 702-7(3) (1983) provides, in relevant part:
If a petitioner alleges commission by a minor 13 years of age or over of an act which constitutes a crime. . . and, on motion of the State's Attorney, a Juvenile Judge. . . after investigation and hearing. . . finds that it is not in the best interest of the minor or of the public to proceed under this Act, the court may enter an order permitting prosecution under the criminal law.

142. ILL. REV. STAT. ch. 37, § 705-10(6)(a) (1983). A case is automatically transferred from juvenile court for trial in criminal court if the minor is older than 15 and is charged with murder, rape, deviate sexual assault, or armed robbery with a firearm. The Illinois Supreme Court recently upheld the constitutionality of this statute. People v. J.S., 103 Ill. 2d 395 (1984).


144. N.Y. FAM. CT. LAW § 320.5(3)(b) (McKinney 1983).


147. See supra notes 123-27 and accompanying text.

148. Under the New York detention statute, when a probation officer decides to refer a case to juvenile court, his or her petition must include a recommendation as to whether the child should be detained pending adjudication. Within 24 hours of being detained, the child is entitled to a hearing similar to an arraignment hearing in adult court.
B. The Role of Anonymity in the Juvenile System

1. The History of Confidentiality

Although the Illinois Act of 1899 mandated creation of juvenile records and provided for court hearings, it made no reference to confidentiality in juvenile cases. As the system of juvenile justice was implemented on a larger scale, however, anonymity of juvenile proceedings was advocated as an essential ingredient of rehabilitation. By the 1920’s, both the federal government’s Children’s Bureau and the National Probation and Parole Association adopted standards calling for closed proceedings and sealed records. In the 1950’s, the press and law enforcement officials began asserting the right of the public to know who was committing crime on the nation’s streets and what was happening in the nation’s courtrooms. The campaign against juvenile court anonymity met with measured success. Some states opened their juvenile records and proceedings to public or press scrutiny, while others moved from a policy of mandatory closure to a system giving the judge discretion over the question of publicity. Today, a wide variety of statutory schemes exist for implementation of the policy of confidentiality in juvenile cases.

minor is advised of the charges and of his or her rights; the judge may make inquiries of the child’s appointed counsel, prosecutor or probation officer. The judge then announces his or her decision and makes a statement of reasons for the record. If a child is detained, a trial on the merits is scheduled to take place within three to six days. If the trial is not held within that period, a probable cause hearing must be held within the three days of the detention hearing. N.Y. Fam. Ct. Law § 320.5(3)(b) (McKinney 1983).

149. Act of April 21, 1899, 1899 Ill. Laws 131, § 3:
   A special court room to be designated as the juvenile court room, shall be provided for the hearing of such cases, and the findings of the court shall be entered in a book or books to be kept for that purpose and known as the “Juvenile Record.”


151. Geis, supra note 150, at 120. According to Geis, FBI Chief J. Edgar Hoover was at the forefront of the movement to publicize the names and crimes of juvenile delinquents and to make public juvenile records. Id.

152. Id. at 121.

153. Id.

2. The Illinois Statutory Scheme

The Illinois Juvenile Court Act has long given expression to the belief that involvement in the juvenile court system should confer no badge of infamy. Until 1965, however, it made only oblique reference to the confidentiality of juvenile records and no reference at all to the confidentiality of court proceedings. In that year, Illinois made major revisions in its juvenile code and enacted two new provisions aimed specifically at publicity in juvenile cases. The first excluded the public but permitted the press to attend all court proceedings; the second required the impoundment of records and prior court approval before access would be allowed. An amendment in 1977 empowered the court to bar those present at a hearing from disclosing the minor's identity. These provisions remain the cornerstones of the Illinois Act.

The remaining provisions regarding anonymity include those relating...
ing to law enforcement records and expungement of juvenile formation is essential to executing an arrest or search warrant or other compulsory process, or to conducting an ongoing investigation.

(3) Judges, prosecutors, probation officers, social workers, or other individuals assigned by the court to conduct a pre-adjudication or pre-disposition investigation, and individuals responsible for supervising or providing temporary or permanent care and custody for minors pursuant to the order of the Juvenile Court when essential to performing their responsibilities.

(4) Judges, prosecutors, probation officers:
   (a) In the course of a trial when institution of criminal proceedings have been permitted under Section 2-7 [footnotes omitted] or required under Section 2-7; or
   (b) When criminal proceedings have been permitted under Section 2-7 or required under Section 2-7 and a minor is the subject of a proceeding to determine the amount of bail; or
   (c) When criminal proceedings have been permitted under Section 2-7 or required under Section 2-7 and a minor is the subject of a pre-trial investigation, pre-sentence investigation, fitness hearing, or proceedings on an application for probation; or
   (d) When a minor becomes 17 years of age or older, and is the subject of criminal proceedings, including a hearing to determine the amount of bail, a pre-trial investigation, a pre-sentence investigation, a fitness hearing, or proceedings on an application for probation.

(5) Adult and Juvenile Prisoner Review Boards.

(6) Authorized military personnel.

(7) Victims, their subrogees and legal representatives; however, such persons shall have access only to the name and address of the minor and the disposition of the Juvenile Court proceeding.

(8) Persons engaged in bona fide research, with the permission of the presiding judge of the Juvenile Court and the chief executive of the agency that prepared the particular records; provided that publication of such research results in no disclosure of a minor's identity and protects the confidentiality of the record.

B. Juvenile court records shall not be made available to the general public but may be inspected by representatives of agencies, associations and news media or other properly interested persons by general or special order of court. The State's Attorney, the minor, his parents, guardian and counsel shall at all times have the right to examine court files and records.

C. Nothing in this Section shall affect the right of a Civil Service Commission or appointing authority examining the character and fitness of an applicant for a position as a law enforcement officer to ascertain whether that applicant was ever adjudicated to be a delinquent minor, and, if so, to examine the records of disposition or evidence which were made in proceedings under this Act.

D. Following any adjudication of delinquency for a crime which would be a felony if committed by an adult, the State's Attorney shall ascertain whether the minor respondent is enrolled in school and, if so, shall provide a copy of the dispositional order to the principal or chief administrative officer of the school. Access to such juvenile records shall be limited to the principal or chief administrative officer of the school and any guidance counselor designated by him.


See also ILL. REV. STAT. ch. 37, ¶ 702-10 (1983), detailing the use of juvenile court evidence and adjudications in other judicial proceedings.

161. ILL. REV. STAT. ch. 37, ¶ 702-8 (1983). Law enforcement records are generally
3. Present Status of Confidentiality

The policy of anonymous juvenile proceedings and records has always been closely tied to the rehabilitative premise of the juvenile courts. Proponents of confidentiality have identified several ways in which a policy of protecting children from public scrutiny aids the regenerative efforts of the system. By hiding "youthful errors from the full gaze of the public and bury[ing] them in the graveyard of the forgotten past," children and their families are not stigmatized by their involvement in the juvenile court. Stigma impedes development of a child's self-esteem and imposes a form of punishment in a system of justice supposedly free from retribution. Anonymity also eases a child's reintegration into his own community and deters future employers and others from denying the minor benefits and opportunities on the basis of a juvenile "record." Finally, confidentiality prevents a delinquent child who craves attention from achieving heightened status as a result of his or her publicized involvement in criminal activity.

These articulated advantages of anonymity are grounded in a juvenile justice philosophy which sees rehabilitation of the child as the major goal of the system. As the rehabilitative model has come under attack from liberals and conservatives alike, the debate over the value of confidentiality has been rekindled. The tradi-

---


166. In drafting the Unif. Juvenile Court Act, the Commissioners declined to follow the trend toward increased publicity in juvenile court, citing their belief that publicity rewards a delinquent child with the recognition he or she sought when originally committing the delinquent act. 9A U.L.A. 33 (1979).

tional policy of anonymity has always hampered efforts by the press to observe and report on the activities of the juvenile court. This impediment has in part been justified on the theory that confidentiality fosters the informal, "just between you and me" vision of juvenile justice. Now that juvenile adjudications substantially resemble criminal trials, arguments supporting open trials and records in criminal cases seem equally applicable in juvenile proceedings. Further, the public's interest in juvenile court has accelerated in recent years as a result of increased attention to the problem of juvenile crime. A policy of juvenile court confidentiality, however, denies the public access to its most ready source of information about juvenile justice.

Aside from arguments which favor openness from a public and press perspective, "law and order" critics who favor introduction of criminal law concepts of retribution and deterrence into the juvenile process also see publicity as an effective technique for controlling anti-social behavior. According to these critics, publicizing the names of juveniles would subject minors who commit crimes to the same adverse exposure which adult criminals

---

169. One commentator noted:
   Open trials 'permit' the public to participate in and serve as a check upon the judicial process,' [footnote omitted] thereby discouraging decisions based on partiality or secret bias. Moreover, public trials serve as a forum of legal education for the public, providing an understanding of the legal system in general and the procedures and rules of law in a particular case. Finally, open trials provide an outlet for community concern over crime and increase respect for the law and the judicial process. All of these benefits of public scrutiny in criminal trials are equally applicable to juvenile hearings.

The Supreme Court has recognized a constitutionally protected right of access based on the value of open criminal trials. See Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 825 (1984) (the court held that the guarantees of an open trial extend to voir dire examinations); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611 (1982) (Massachusetts statute which required closure of a rape trial during the testimony of a minor rape victim held unconstitutional); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (in a plurality opinion with seven separate opinions the Court upheld the right of the public and press to attend criminal trials). But see Gannett Co. v. DePasquale, 443 U.S. 368, 385, 394 (1979) in which the Court refused to permit the press or public to attend a pretrial suppression hearing after the defendant, prosecutor and judge agreed to a closed hearing to protect the accused's right to a fair trial.
170. See supra notes 139, 164-66 and accompanying text.
now face. Other juveniles might be deterred from criminal activity if they knew the consequences of their actions, and embarrassed parents might place greater controls on the behavior of their children in order to save the family from public humiliation.

Along with other states, the Illinois General Assembly has responded to the mounting pressure to lift the veil of secrecy surrounding juvenile proceedings. Although juvenile court and law enforcement records are still shielded from general public scrutiny, they are now available for inspection and copying, without prior court approval, to a greatly expanded list of persons or groups with institutional or personal interest in the information contained in a minor’s file. Included on this roster are victims and their legal representatives, military personnel, and probation officers. Under recent amendments, state’s attorneys are now under an affirmative duty to send a copy of a dispositional order to school officials in any case in which a child has been found involved in a crime which would be a felony if committed by an adult.

Press access has constituted a recognized exception to the confidentiality policies of the juvenile courts since 1965. In that year, the Illinois General Assembly amended the Juvenile Court Act to allow the press access to all stages of all juvenile court proceedings. The Illinois Attorney General has commented on this statutory provision:

It is implicit from the legislative authorization to news media to attend juvenile proceedings that the reporters in attendance would report what they saw and heard. Any attempt by the juvenile court to restrict publication would amount to a prior restraint on publication, which can only be exercised where a substantive evil would result.

Illinois case law has also acknowledged the fundamental role of the press in the juvenile justice system. Although Illinois gives leg-

---

172. Id. at 86.
175. Id. at ¶ 702-9(A)(3), (4), (6), (7).
176. Id. at ¶ 702-9(D).
islative recognition to the benefits of anonymity in the rehabilitative process, the policy of the state in fact favors accessibility over anonymity in the juvenile courts. For instance, in In re Jones, the Illinois Supreme Court considered a case involving a conflict between the public’s right to be informed about the operations of its juvenile courts and a juvenile’s right to protect himself or herself from adverse publicity. In Jones, a sixteen year old delinquent asked the juvenile court to close his hearing to the press. When the court refused, the juvenile entered an admission rather than run the risk of further negative publicity. On appeal, he challenged the court’s decision allowing the press to remain. Citing the statutory provision on press access to juvenile hearings, the Illinois Supreme Court indicated:

[I]t is clear that the legislature intended that openness should prevail throughout the proceedings. We are of the opinion that Section 1-20(6) serves the dual function of not only protecting a respondent’s right to a 'public trial' but also preserves the right of the general populace to know what is transpiring in its courts.

C. The Supreme Court and Juvenile Anonymity

In Gault, the State of Arizona argued that if it were forced to provide detailed written charges against a minor, the state’s goal of preserving the anonymity of the child would be thwarted. Although recognizing the potential rehabilitative value in shielding a juvenile from adverse publicity, the United States Supreme Court nonetheless held that due process requires that a child be given timely and adequate notice of the charges filed.

On several occasions in the last decade, the Court has weighed the state’s interest in confidentiality against other constitutional claims. Significantly, on each occasion the Court, although recognizing the validity of the state’s interest in confidentiality, has subordinated that interest to the constitutional claim asserted.

The first of these cases, Davis v. Alaska, involved an effort by a defendant in a criminal case to impeach a key prosecution witness on the basis of the witness’s juvenile delinquency record. The trial court, citing the state’s juvenile anonymity statute, blocked the

181. Id. at 508, 263 N.E.2d at 864.
182. Id. at 509, 263 N.E.2d at 864 (emphasis in original).
183. 387 U.S. 1 (1967).
184. Id. at 33.
Confidentiality Policies

proposed line of questioning. The Supreme Court reversed, holding that the ruling violated the defendant's sixth amendment right of confrontation of witnesses. The state's interest in protecting the witness from the "temporary embarrassment" which might follow from public disclosure of his juvenile court involvement could not overcome this right.

In *Oklahoma Publishing Co. v. District Court*, the Court weighed the state's interest in shielding the identity of a child charged with second degree murder against the first amendment right of the press to publish the name and picture of the minor. The Oklahoma statute closed juvenile hearings unless the trial judge specifically ordered that a case be opened to the public. Although no express order opening the proceedings was entered, neither the court nor the parties objected to the presence of the press at a detention hearing. After the hearing, the child's name and photograph appeared in several newspapers and television reports. The juvenile judge then issued a restraining order prohibiting the press from further broadcast of the name and picture of the child. Press representatives challenged the order as a prior restraint, and the Court agreed, concluding that the press cannot be restrained from publishing truthful information which it has obtained in open court proceedings. The juvenile hearing was open because the press was present with the knowledge of the court.

*Landmark Communications, Inc. v. Virginia*, while not a case involving juvenile anonymity, is relevant to a discussion of the scope of the state's right to place limits on the distribution of information it considers confidential. In *Landmark*, a criminal charge was brought against a newspaper owner for publishing an article

---

186. *Id.* at 319.
188. *OKLA. STAT. ANN.* tit. 10, § 1111 (West 1979): "The ... hearings shall be private unless specifically ordered by the judge to be conducted in public . . . ."
189. 430 U.S. at 310-11. Relying on its previous decisions in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), the Court held that a state may not suppress evidence obtained in the course of a public proceeding. Although Oklahoma juvenile proceedings are generally closed to the public, the Court noted:

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. No objection was made to the presence of the press in the court room or to the photographing of the juvenile as he left the courthouse. There is no evidence that petitioner acquired the information unlawfully or even without the State's implicit approval.

*Id.* at 311.
which disclosed the name of the judge whose conduct was being investigated in a pending judicial inquiry. State law provided that all records and hearings before the investigating commission were to be kept confidential.\textsuperscript{191} It is unclear how the newspaper obtained the information it published, although the story was accurate and the Court emphasized that the newspaper itself was not accused of purloining the information.\textsuperscript{192} In challenging his conviction, the newspaper owner contended that the first amendment protected his right to publish truthful, lawfully obtained information without the threat of subsequent prosecution. The Court unanimously agreed and reversed the conviction.\textsuperscript{193}

\textit{Smith v. Daily Mail Publishing Co.}\textsuperscript{194} expanded the scope of prior decisions discussing the right of the press to publish information in violation of state confidentiality policies. At issue in \textit{Smith} was the constitutionality of a criminal statute which prohibited publication of a child's name without prior approval from the juvenile court. Newspapers published a fourteen-year old murder suspect's name after learning it from eyewitnesses at the scene of the crime. Reporters had learned of the shooting by listening to a local police band radio frequency. In a proceeding to bar prosecution under the statute, the newspapers claimed that a juvenile court statute which requires prior court approval before a child's name can be published constitutes a violation of the first amendment. The Court declined to decide whether the statute was an unlawful prior restraint or a subsequent punishment, ruling that in either event the state is required to demonstrate an overriding justification for the suppression or sanction of otherwise truthful information.\textsuperscript{195}

\textbf{VI. BALANCING CONFIDENTIALITY AND THE FIRST AMENDMENT IN \textit{WARDEN}}

The United States Supreme Court cases on juvenile confidentiality hold that a state may neither restrain nor punish the media for dissemination of information in the public domain which identifies a juvenile. This is true whether the information came to the media as a result of press attendance at juvenile hearings,\textsuperscript{196} through

\begin{itemize}
\item \textsuperscript{191} \textit{Id.} at 830 n.1.
\item \textsuperscript{192} \textit{Id.} at 837.
\item \textsuperscript{193} \textit{Id.} at 845-46.
\item \textsuperscript{194} 443 U.S. 97 (1979).
\item \textsuperscript{195} \textit{Id.} at 101-02.
\item \textsuperscript{196} Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam).
\end{itemize}
outside investigation, or through improper disclosure to the press by a third party. In \textit{Warden}, of course, the state sought neither to restrain publication of information nor to punish Warden directly for what he wrote. \textit{Warden} represents, however, as strong a case as any heard by the United States Supreme Court to date for weighing first amendment values more heavily than state concerns regarding juvenile anonymity.

In assessing the role of the press and the magnitude of the governmental interest in requiring the reporter in \textit{Warden} to disclose his source, three introductory points are relevant. First, because neither Warden nor Warren revealed the identity of the minors involved in the cases, no specific injury was done to any minor entitled to confidentiality under the Juvenile Court Act. Any harm done by release of the transcripts to the press was to the generalized interest of the state in preventing the disclosure in future cases of a juvenile's identity. Second, \textit{Warden} is not a case where a criminal defendant's sixth amendment right to a fair trial is jeopardized by a reporter's refusal to divulge sources of information. Many cases requiring disclosure have relied heavily on the fact that the rights of the accused were in the balance. Finally, there is no allegation that Warden personally participated in any wrongdoing. He is not accused of having witnessed or joined in criminal activity, nor did he refuse to appear before the grand jury. In \textit{Branzburg}, by contrast, each reporter was allegedly an eyewitness to serious criminal activity under investigation by a grand jury. One reporter refused even to respond to the grand jury's subpoena, arguing that his appearance could be required only after a specific finding of a compelling need for his appearance and testimony.

In \textit{Warden}, the state alleged that the constitutional and statutory right of Illinois citizens to know what is transpiring in juvenile
courts should be subordinated to the state policy favoring confidential juvenile records. Although protecting the anonymity of juveniles is a valid state concern, in the context of *Warden*, where the right of the public to information regarding the conduct of its judiciary is at stake, it is insufficient to overcome that right for two reasons. First, denial of press access to transcripts of juvenile court proceedings is inconsistent with state policy favoring media attendance at juvenile proceedings. Second, the state’s interest in confidentiality is not compelling because its goal can be achieved in ways which cut less intrusively into first amendment freedoms.

As recognized by the Illinois Supreme Court in *In re Jones*, the primary thrust of the statutory provision which invites the press to attend and report about all juvenile court proceedings conducted in the state is to permit the public to scrutinize the activities of its juvenile court system. The records section of the Act, as it relates to a ban on press access to juvenile hearing transcripts, is inconsistent with that objective. Under this provision, the press is denied access to virtually the same information it is encouraged to obtain through court attendance. The state’s interest in juvenile confidentiality, then, does not appear to be compelling because other state policies encourage media access to juvenile proceedings. A reporter’s constitutional privilege to refuse to disclose a confidential source should not be divested in order to pursue violations of a provision which is at odds with fundamental legislative and judicial policy favoring the right of the public to know about its juvenile courts and the children brought before them.

Finally, the state’s interest in preserving confidentiality can be achieved in ways which interfere less with the ability of the press to inform the public about the workings of juvenile courts. One alternative would be to establish a practice of referring to juveniles

---

205. Although the Supreme Court has called state juvenile confidentiality policies “more rhetoric than reality,” (*In re Gault*, 387 U.S. 1, 24 (1967)), it has nonetheless recognized the state’s interest in confidentiality. *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979).


208. When fundamental constitutional rights such as those protected by the first amendment are at issue, the state must show that no reasonable and adequate alternatives are available for accomplishing the state’s objectives. *NAACP v. Button*, 371 U.S. 415, 438 (1963).
in court proceedings by first name and last initial only.\textsuperscript{209} In the unusual instance where the record contains identifying information other than a name, that information could be deleted prior to filing the transcript with the clerk.

A second less restrictive approach to press access to records would be to adopt a process for sealing juvenile transcripts based on a showing in a particular case that press access to the transcript would impede the rehabilitation of a child. In another context, the Supreme Court has approved of this approach to balancing the respective interests of the press and the state when the state seeks to protect the identity or sensibilities of a minor appearing in court.\textsuperscript{210}

Another alternative would be to expedite the process for expunging juvenile records so that breaches of confidentiality are less likely to occur.\textsuperscript{211} Finally, the state can more directly attack the problem of misuse of information regarding a juvenile's "record" by outlawing its improper uses. For example, a state law making it an unfair labor practice for an employer to make an employment decision on the basis of an applicant's involvement in juvenile court is a way of protecting job and educational opportunities for minors without raising first amendment concerns.

\textbf{VII. CONCLUSION}

\textit{Warden} represents the Illinois Supreme Court's first effort at addressing the complex question of when the news media can be compelled to disclose information it has obtained in the course of newsgathering activities. In \textit{Warden}, the court reversed a lower court order divesting a reporter of his privilege under the Illinois shield law. The court concluded that the state failed to comply with the statutory provision which requires that all other available sources of the information sought be exhausted. The court adopted a balancing test to determine the showing required of a party seeking divestiture in order to meet the statutory exhaustion requirement.

\textsuperscript{209} This is, of course, the practice already universally adopted by courts in reporting juvenile court cases.

\textsuperscript{210} In Globe Newspaper Co. \textit{v.} Superior Court, 457 U.S. 596, 608-11 (1982), the Supreme Court struck down a Massachusetts law which required that the press be excluded from a sex offense trial during the testimony of a minor victim. The Court objected to the mandatory nature of the statute, suggesting courts should determine whether state's interest in protecting the minor victim might outweigh the right of the press to be present in court on a case-by-case basis. \textit{See J. NOWAK, R. ROTUNDA AND J.N. YOUNG, CONSTITUTIONAL LAW} 922 (2d ed. 1983).

\textsuperscript{211} \textit{In re} Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act, No. MR-10, slip op. at 3 (Circuit Court of DuPage County May 23, 1984).
Although the narrow issue in Warden appears to have been correctly decided, the court’s opinion fails to give clear guidance for courts called upon in the future to decide whether a reporter can be forced to reveal a source. Specifically, questions remain concerning the appropriate interpretation of the “essential to the public interest” prong of the divestiture statute, and the role of the first amendment in protecting a reporter’s confidential sources.

This article takes the position that the first amendment free press guarantee requires a court to balance the interest of the public in an unfettered press against the need for the information sought whenever a reporter is asked to reveal a source. Use of this approach under the facts in Warden involves weighing the public’s right to information regarding alleged official misconduct by a juvenile court judge against the state’s interest in denying media access to juvenile court records. Although the continued wisdom of protecting the anonymity of children in the juvenile court system is under debate, this article takes no position on the desirability of such a policy. Rather, it focuses on the question of whether the state’s interest in preserving an existing policy of juvenile confidentiality is sufficiently compelling to outweigh the right of the press to receive and report on information of vital interest to the public. It concludes that it is not and suggests ways in which the state’s commitment to assuring juvenile anonymity can be maintained without interfering unduly with the right of the public to know.