

Revictimizing Child Abuse Victims: An Empirical Rebuttal to the Open Juvenile Dependency Court Reform Movement

William Wesley Patton[†]

Copyright © 2005 William Wesley Patton

I. INTRODUCTION

The United States Supreme Court has never considered whether there is a First Amendment right for the press and public to attend civil child dependency proceedings. The Court has, however, determined their right to attend some criminal proceedings. For instance, the press and public have a right to attend the guilt and sentencing phases of adult criminal trials unless there is a compelling governmental interest in closing the trial, and the closing is narrowly tailored to effect that compelling state interest.¹ The Court has held that other criminal proceedings—such as the grand jury proceedings, jury deliberations, in camera hearings, and appellate court conferences—are not presumptively open because they have historically been closed and openness lacks sufficient value to the public to overcome the government's interest in closure.² Although the United States Supreme Court has never determined that there is a First Amendment right of access to civil proceedings like child dependency trials, it has indicated that protecting child abuse victims from the jurogenic psychological damage of testifying in public might be a sufficient compelling interest to support excluding the press and public from such a criminal trial, as long as the closure is narrowly tailored.³

The question of whether civil child abuse trials should be open or closed proceedings remains an issue of policy analysis rather than federal constitutional law because child dependency hearings have been historically private.⁴ The debate, therefore, concerns a cost/benefit analysis between the

[†] William Wesley Patton is a Professor of Law and J. Allan Cook and Mary Schalling Cook Children's Law Scholar at the Whittier Law School. He is also the Founding Director of the Whittier Law School Center for Children's Rights and the school's Legal Policy Clinic.

1. *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607-09 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980).

2. *NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.*, 980 P.2d 337, 360 n.29 (Cal. 1999); *San Bernardino County Dep't of Pub. Soc. Servs. v. Super. Ct.*, 283 Cal. Rptr. 332, 336-39 (Cal. Ct. App. 1991).

3. *Globe Newspaper*, 457 U.S. at 607-609.

4. *San Bernardino County*, 283 Cal. Rptr. at 339.

[I]t is clear and there can be no dispute that the history of the juvenile system has been one of private hearings, not public. This utter lack of any history or tradition of openness in juvenile proceedings

benefit to the public in opening the juvenile proceedings and the potential harm to abused children by being thrust into a public legal maelstrom. A California court discussed the obvious harm to abused children and the effect on the informal rehabilitative nature of child dependency hearings if they are opened to the public:

In our view, there can be little doubt that the embarrassment, emotional trauma and additional stress placed upon the minor by public proceedings and the publicity engendered by public proceedings may well interfere with the rehabilitation and reunification of the family. Further, the parents of a dependent child face a potential social stigma from public proceedings which would interfere with rehabilitation and reunification.⁵

Nonetheless, as of September 19, 2003, nineteen states have opened their child protection/dependency hearings to the press and public.⁶ Three states have opened their systems within the last few years but in two other states, California and Illinois, open dependency court bills were defeated.⁷

This Article will analyze the underlying assumptions and data regarding the

has led a number of state courts to conclude that the constitutional right of access does not extend to juvenile proceedings.

Id.; see also Fla. Publ'g. Co. v. Morgan, 322 S.E.2d 233, 238 (Ga. 1984); *In re T.R.*, 556 N.E.2d 439, 449 (Ohio 1990); Edward A. Sherman Publ'g Co. v. Goldberg, 443 A.2d 1252, 1258 (R.I. 1982); Assoc. Press v. Bradshaw, 410 N.W.2d 577, 578 (S.D. 1987); *In re N.H.B.*, 769 P.2d 844, 849 (Utah 1989); *In re J.S.*, 438 A.2d 1125, 1127 (Vt. 1981).

5. *San Bernardino County*, 283 Cal. Rptr. at 340. Although the California Supreme Court has determined that there is a constitutional right of the press and public to attend most civil proceedings in California, the court left for another day the questions of whether juvenile proceedings involving child abuse and neglect or other "right of access to particular proceedings governed by specific [confidentiality] statutes." *NBC Subsidiary (KNBC-TV)*, 980 P.2d at 361 n.30. In *In re Richard L.*, the court placed the burden on the media to rebut the presumption of closed dependency proceedings. No. B150410, 2002 WL 382523, at *2-3 (Cal. Ct. App. Mar. 12, 2002). Finally, in California, the court in *McClatchy Newspapers v. Keisha T., Inc.*, held that a court has discretion to determine which documents the press and public may inspect, and the cost of evaluating or redacting documents is one factor justifying denying such access. 44 Cal. Rptr. 2d 822, 834 (Cal. Ct. App. 1995).

6. 1 FRED L. CHEESMAN, NATIONAL CENTER FOR STATE COURTS, KEY FINDINGS FROM THE EVALUATION OF OPEN HEARINGS AND COURT RECORDS IN JUVENILE PROTECTION MATTERS 4 (Aug. 2001) [hereinafter NCSC Report Vol. 1]. The following states have open child dependency hearings: Arizona [pilot project 2003], Arkansas, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Nebraska, Nevada, New York, North Carolina, Ohio, Oregon, Texas, and Washington. *Id.* at 1.

7. *Id.* Minnesota opened its dependency proceedings to the press and public in 1998 and Nevada followed in 2003. CHILDREN'S ADVOCACY INSTITUTE, JUDICIAL DISCRETION IN OPEN AND CLOSED JUVENILE PROCEEDINGS 2 (2002). In 2003, Arizona began an open courts pilot project. GREG BROBERG, OPEN COURT PILOT ARIZONA REVISED STATUTES LAWS 2003, CHAPTER 208 INTERIM REPORT 4 (2004). In Illinois, proceedings are presumptively closed. 705 ILL. COMP. STAT. 405/1-5 (2004); *In re A Minor*, 563 N.E.2d 1069, 1074 (Ill. 1990). In 2000, California Senate Bill 1391, which would have changed dependency proceedings to be presumptively open, was defeated. William Wesley Patton, *Pandora's Box: Opening Child Protection Cases To The Press and Public*, 27 W. ST. U. L. REV. 181, 196-97 (2000). Moreover in 2004, California Assembly Bill 2627, which would have presumptively opened California dependency proceedings, failed after receiving only one favorable vote in the Senate Judiciary Committee. Legislative Counsel of California, *Official California Legislative Information*, at http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2601-2650/ab_2627_bill_20040220_introduced.html (last visited Feb. 25, 2005).

open juvenile dependency court reform movement. It will present new pediatric psychiatric data to rebut the assumption that children are not severely harmed by disclosure to the press of the intimate facts surrounding their child abuse. In order to properly understand the current zealotry of this reform movement, one must place it in the appropriate historical context with the dozens of other juvenile court reform packages which have ebbed and flowed since the early Nineteenth Century.

II. A SHORT HISTORY OF JUVENILE COURT REFORM MOVEMENTS

Juvenile law is both cyclical and evolutionary. Fads, trends, movements, and systemic shifts have colored the processes within which child protection has historically taken place in America. For instance, juvenile delinquents were originally tried like adults in adult courts and were meted similar indeterminate sentences in adult prisons.⁸ In 1824, with the creation of the House of Refuge in New York, juvenile delinquency theory began to emphasize rehabilitating minors in facilities separate from adult criminals rather than punishing minors in adult prisons.⁹ Additionally, with the Progressive Movement's establishment of the first juvenile court in Illinois in 1899, the procedural and evidentiary structure of adult criminal court soon gave way to informal processes and liberal evidentiary admissibility rules in juvenile court. Such changes permitted judges to tailor each child's indeterminate sentence.¹⁰ Although the goals of the juvenile delinquency court reformers were laudable, the weaknesses and unfairness of the system surfaced, and a new reform movement emerged. It soon became apparent that the informal rules and unbridled court discretion provided children far less due process than adults. By the 1960s, critics spoke of the demise of the juvenile court and raised "questions about the effect on juveniles of the lack of due process procedures and protection of individual rights."¹¹ The voices of the reformers were echoed by the United States Supreme Court in 1966 in *Kent v. United States*,¹² and later in *In re Gault*,¹³ which determined that "[t]here is evidence,

8. Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interest of Children*, 33 NEW ENG. L. REV. 39, 40-41 (1998); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

9. Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189-90 (1970).

10. Sacha M. Coupet, *What to do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality about Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1308-09 (2000); Fox, *supra* note 9, at 1222-27, 1229; Mack, *supra* note 8, at 107, 119-21; Mason P. Thomas, *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 313-22 (1972).

11. Paul Isenstadt & Rosemary Sarri, *Legal Context and Policy Issues*, in BROUGHT TO JUSTICE? JUVENILES, THE COURTS, AND THE LAW 5 (1976); see Elizabeth S. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 589-90 (2000).

12. 383 U.S. 541, 555-56 (1966).

13. 387 U.S. 1, 17-18 (1967).

in fact, that there may be grounds for concern that the child receives the worst of both worlds [adult and juvenile courts]; that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”¹⁴ The Court rejected the two major bases of the juvenile reformers, determining instead that: the juvenile justice system did not, in fact, accurately determine juveniles’ criminal responsibility; and unrestrained judicial discretion unbounded from formal procedures did not lead to more just determinations because children were entitled to notice of charges, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, and proof beyond a reasonable doubt.¹⁵

A little over a decade later, in the 1980s, a new movement, “Get Tough On Juvenile Delinquents,” began proselytizing the public and legislature regarding the juvenile crime epidemic in which “property crime by juveniles increased 11% nationally between 1983 and 1992, [and] violent crime increased by 57%.”¹⁶ The frequency and content of news coverage of juvenile crime had an enormous impact on the new juvenile court reform movement¹⁷ and state legislatures quickly responded to citizens’ fears by passing “tough on juvenile crime” statutes which provided for judicial and/or prosecutorial discretion to try juveniles in adult court; lowering of the age at which minors may be tried in adult court; and determinate sentences and blended sentences in which minors sentenced to long terms were transferred from juvenile detention facilities to adult facilities upon attaining the age of majority to serve the remainder of the sentence.¹⁸

We are currently awaiting a new juvenile court movement based upon the change in juvenile crime rates. “[T]he juvenile arrest rate for violent crime in 1999 . . . was 36% below its peak in 1994. From 1993 to 1999, the juvenile arrest rate for murder decreased a remarkable 68%.”¹⁹ It is too early to determine whether a new juvenile reform movement will prevail in closing the juvenile delinquency reform cycle by again ushering in a focus on rehabilitation and indeterminate sentences.

14. *Kent*, 383 U.S. at 555-56.

15. *McKiever v. Pennsylvania*, 403 U.S. 528, 533 (1971); *In re Winship*, 397 U.S. 358, 369 (1970) (requiring proof beyond reasonable doubt for juvenile proceeding); *In re Gault*, 387 U.S. at 31 (holding due process protections apply to juvenile delinquency proceeding).

16. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 976 (1995).

17. LORI DORFMAN & VINCENT SCHIRALDI, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS (Apr. 10, 2001), available at <http://www.buildingblocksforyouth.org/media/factsheet.html>. The most sophisticated analysis of juvenile law media coverage disclosed that: (1) the press reports juvenile crime out of proportion to its actual occurrence; (2) violent crime, although representing only 22%-24% of juvenile crime from 1988 to 1997, dominates media coverage; (3) the media present crimes without an adequate contextual base for understanding why the crime occurred; (4) press coverage unduly connect race and crime; and (5) juveniles are rarely covered by the news other than to report on their violent criminal acts. *Id.*

18. Conward, *supra* note 8, at 57-60; Scott, *supra* note 11, at 549, 578-80, 583-86.

19. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, 1999 ANNUAL REPORT iii (2000).

Likewise, the history of child protection has evolved through a parallel series of child protection reform movements. After inheriting the equitable *parens patriae* model of the English Court of Chancery, the American child protection system emphasized the child-care rules of the Elizabethan Poor Laws of 1601 that gave courts jurisdiction to separate abused and/or neglected children from their parents and to place pauper children into involuntary apprenticeships.²⁰ By the 1820s, the first juvenile “Refuge” movement protested the American apprenticeship system and the severance of parents and children based solely upon poverty.²¹ In New York in 1824, some dependency services were privatized by publicly-supported corporations that housed neglected children in poorhouses and orphan asylums, further separating children from their parents.²² By the 1850s, however, a new reform movement argued against placing children in large institutions and instead favored sending poor city children into foster-like placements in country towns.²³ The New York Children’s Aid Society had sent 48,000 children out of New York to live with families in the country by 1879.²⁴ But, by the beginning of the Twentieth Century, a new reform movement protested those numerous family separations and promoted family reunification.

At the 1909 White House Conference on the Care of Dependent Children, a new policy was declared: “Home life is the highest and finest product of civilization. It is the great molding force of mind and of character.”²⁵ Public agency responsibility for keeping families together through structured family services soon replaced private child protection and child removal. This next child protection movement sought substantive and procedural protections for families caught in the child abuse and neglect legal maelstrom. The United States Supreme Court, in cases like *Meyers v. Nebraska*²⁶ held that parents have a fundamental right to rear their children.²⁷ In *Lassiter v. Department of Social Services*,²⁸ the Court decided that some parents have a right to counsel in dependency cases, and in *Santosky v. Kramer*,²⁹ the Court, in order to

20. Kathleen S. Bean, *Changing The Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 12-20 (2001); see also Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 300-03, 313-15 (1971). See generally Sarah Abramowicz, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344 (1999); Thomas, *supra* note 10.

21. Coupet, *supra* note 10, at 1310-11; Rendleman, *supra* note 20, at 216-18, 224-26; Thomas, *supra* note 10, at 306.

22. Coupet, *supra* note 10, at 1308-11; Thomas, *supra* note 10, at 306-07.

23. Thomas, *supra* note 10, at 306-07.

24. Fox, *supra* note 9, at 1210.

25. David S. Tanenhaus, *Growing Up Dependent: Family Preservation in Early Twentieth-Century Chicago*, 19 LAW & HIST. REV. 547, 550 (2001).

26. 262 U.S. 390 (1923).

27. *Id.* at 399 (noting examples of constitutional liberties).

28. 452 U.S. 18 (1981).

29. 455 U.S. 745 (1982).

symbolically elevate the importance of the right to rear children, raised the standard of proof in parental severance hearings from a mere preponderance of the evidence to clear and convincing evidence.³⁰ By the 1980s, however, it had become clear that the reunification model was not working. Not only were few services available to help families cure their problems, but children languished in “foster-care drift” rather than achieving permanent family placements.³¹ Congress passed the first comprehensive federal child protective services act, the Adoption Assistance and Child Welfare Act of 1980,³² to limit the time and number of foster care placements, and issued specific requirements for best efforts in family reunification. By the late 1990s, the contemporary reform movement, as codified in the 1997 Adoption and Safe Families Act,³³ rejected reunification as the sole initial goal of child welfare law and, instead, replaced it with concurrent planning, which simultaneously works toward reunification and permanency through adoption.³⁴ Just five years after the Adoption and Safe Families Act, however, a new anti-expedited adoption movement criticized the needless separation of parents and children and the splitting of bonded siblings into different placements based upon the adoptability of only some of those siblings.³⁵

The new open juvenile dependency court movement shares two major commonalities with the dozens of other historical child reform movements. First, both have members who are passionate in their desire to see that children receive a better quality of life through state intervention and court process. This new movement’s zeal, however, is also the movement’s weakness. Each failed reform effort has been replete with good intentions, hope, faith, and promise, but has lacked any empirical evidence to support those high hopes.

Perhaps the most shocking fact is that none of the states that recently considered the open dependency court question have had pediatric psychiatrists on the appointed committees, and none of the legislative debates included the abundant literature in psychiatric journals on revictimizing child abuse victims. Nevada, for instance, which recently opened hearings following much divided debate among judges, agencies, and legislators, did not consider any of the psychiatric evidence concerning the fragile nature of child abuse victims or the jurogenic effects on them of open hearings.³⁶ The open juvenile court

30. *Id.* at 747-48; *see also Lassiter*, 452 U.S. at 32.

31. *Baker v. Manen County Office of Family and Children*, 810 N.E.2d 1035, 1040 (Ind. 2004) (discussing problem of “foster-care drift”).

32. 42 U.S.C. §§ 610-679 (2004).

33. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of United States Code chapter 42).

34. 42 U.S.C. § 671.

35. William Wesley Patton, *The Status of Siblings’ Rights: A View into the New Millennium*, 51 DEPAUL L. REV. 1, 16 (2001); Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI-KENT L. REV. 1619, 1641 (2001) (acknowledging agencies’ interventions in families potentially harmful).

36. JUDGE GERALD W. HARDCASTLE, LEGISLATIVE COMMITTEE ON CHILDREN, YOUTH & FAMILIES, THE

movement, however, has gathered some empirical evidence regarding its effectiveness. The following analysis will detail the significant unreliability of those empirical studies and will supply much of the missing empirical data regarding the deleterious effect that the gaze of the public and media has upon child abuse victims.

III. THE NATIONAL CENTER FOR STATE COURTS EVALUATION OF THE MINNESOTA OPEN HEARINGS AND COURT RECORDS PROJECT

Proponents of open juvenile court hearings articulate four precepts in support of their position.³⁷ First, public and press access to abused children will not cause unreasonable exacerbation of these child victims' psychological trauma. Second, opening the hearings will provide system accountability which will result in more accurate, fair, and competent decisions in abuse cases. Third, press coverage and attendance by the public will educate voters about the weaknesses in the system and will provide them with an incentive to better fund the child welfare system. Finally, press coverage will disclose newsworthy aspects of the system and will not contain embarrassing and identifying data regarding the abused children.³⁸

This Article will highlight the fundamental biases and empirical flaws in open court empirical studies. The following analysis will demonstrate that children are at significant risk of short and long-term psychological harm from public exposure of their abuse. Additionally, open court study data will show no systemic improvements have resulted from open juvenile court hearings. Empirical evidence will reveal that the press only attend sensational cases and issues stories that are not reflective of the system as a whole. The hope that public at large will attend the open hearings has not proven true, nor has there been greater support for funding child protection courts. Lastly, contrary to what proponents of the open court reform movement suggest, some media do publish identifying and embarrassing data regarding child abuse victims; in fact, some newspapers have a policy of publishing any identifying data that they can discover.

This analysis will focus most specifically on the National Center for State Courts' evaluation of the Minnesota Open Court Project (NCSC Report) because that report is the most sophisticated empirical examination of any open court system ever compiled.

CASE FOR OPEN DEPENDENCY HEARINGS ex. D at D-11 (June 28, 2002) (available from the Nevada Legislative Counsel Bureau Research Library, 401 South Carson Street, Carson City, Nevada 89701-47470; see also Associated Press, *Proposal Would Open Child Abuse Hearings in Nevada* (Mar. 3, 2003), available at <http://www.rgj.com/news/stories/html/2003/03/03/358.38.php>.

37. See generally Leonard P. Edwards, *Confidentiality and the Juvenile and Family Courts*, 55 JUV. & FAM. CT. J. 1 (Winter 2004).

38. Susan Harris, *Open Hearings: A Questionable Solution*, 26 WM. MITCHELL L. REV. 673, 674-75 (2000).

A. Short and Long-Term Psychological Harm to Child Abuse Victims Thrust Into Public Exposure

The Minnesota Open Court Study concluded that there was no evidence that exposing abused children to the press and public caused any “extraordinary harm” to those children. The NCSC Report, however, noted that “[t]he potential exists for the media to exploit open hearings/records to pursue their objective of increased circulation or market share at the expense of the privacy of children and families” and that so far “no one has taken advantage of the opportunity.”³⁹ This conclusion was based upon a survey sent to juvenile court judges, court personnel, case workers, guardians ad litem, government attorneys, and the news press asking for anecdotes and opinions regarding the deleterious effects on abused children by the media publicity.

The NCSC Report is so seriously flawed both in its design and in its conclusion that it has marginal statistical reliability. First, the sample did not question those who would be most likely to perceive abused children’s trauma after the publicity. The sample did not survey abused children, their parents, or private or court appointed psychological therapists. Moreover, because much of the psychological damage to child abuse victims is long-term, the court personnel and counsel who were surveyed did not have an opportunity to observe the child’s psychological path.⁴⁰ In fact, studies have indicated that even the psychological impact on a child abuse victim testifying in court may not manifest for more than seven months after testifying.⁴¹ Second, the NCSC Report is biased because it elevated the nature of the psychological harm required for minimum reporting to “extraordinary harm” rather than all psychological harm experienced by child abuse victims through publicity. This heightened standard is important not only because it eliminated from consideration a number of children who might have been psychologically harmed from the publicity, but also because it significantly skewed the conclusion of whether open courts are an improvement. The NCSC Report, prior to its conclusion, used a cost/benefit analysis in which harm to the child was balanced against system benefits. But that balance was flawed because it only considered “extraordinary harm” to the child and balanced it against hypothesized “potential benefits.” The conclusion was thus questionable because it did not consider many cases of psychological harm to child abuse

39. NCSC Report Vol. 1, *supra* note 6, at 16, 52.

40. Several psychological studies indicate that between 45% and 55% of child sexual abuse victims suffer Post Traumatic Stress Disorder which may not manifest for months or years after the sexual abuse. Susan V. McLeer et al., *Psychiatric Disorders in Sexually Abused Children*, 33 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 313, 313-14 (1994). In addition, Post Traumatic Stress Disorder is “twice as prevalent [in sexual abuse victims] as that found in victims of other crimes.” David Pelcovitz et al., *Posttraumatic Stress Disorder in Physically Abused Adolescents*, 33 J. AM. ACAD. CHILD ADOLESCENT & PSYCHIATRY 305, 306 (1994).

41. Jessica Liebergott Hamblen & Murray Levine, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses*, 21 LAW & PSYCHOL. REV. 139, 167-69 (1997).

victims and because it speculated on “potential benefits” which were not demonstrated by any of the empirical evidence from the NCSC Report. This is the equivalent of comparing the best of a best case scenario against the best possibility of a worst case scenario.

The NCSC Report conclusion that publicity would not unreasonably harm child abuse victims, however, is even more unreliable because it failed to consider any of the extensive pediatric psychiatric evidence demonstrating substantial psychological harm to children due to public exposure of their abuse. The NCSC Report failed to even consider the considerable psychological literature regarding post traumatic stress disorder in abused children or how such disclosure of embarrassing private facts substantially harms a child’s self-concept or peer relationships.⁴² It is very surprising that neither the Minnesota Supreme Court, nor the National Center for State Courts, cited any psychological literature—much of which was available on Westlaw in the American Psychological Association’s *amicus curiae* brief filed in *Maryland v. Craig*⁴³ in 1990—to support their conclusion that open hearings are not harmful to abuse victims because much of that psychological literature. Even thirteen years ago, that *amicus curiae* brief noted that “[a] recent review of studies of child victims of sexual abuse showed that a significant proportion of victims suffer moderate to severe emotional distress after the episode is disclosed Many victims are believed to suffer from Post-Traumatic Stress Disorder.”⁴⁴ In addition, the *amicus curiae* brief indicated that one of the major effects of child sexual abuse on children is “‘stigmatization,’ which ‘refers to the negative connotations—e.g., badness, shame and guilt—that are communicated to the child around the experiences and then become incorporated into the child’s self-image.’”⁴⁵ The validity of the early studies discussed in the *amicus curiae* brief have been recently validated by the United States Department of Justice Report, *Child Physical and Sexual Abuse: Guidelines for Treatment*, which listed the effects of child abuse: “fear, anxiety, posttraumatic stress symptoms, depression, sexual difficulties, poor self-esteem, stigmatization, difficulty with trust, cognitive distortions, difficulty with affective processing, aggression, disruptive behavior, [and] peer socialization deficits”⁴⁶

One must wonder why contemporary psychological data has not been

42. See, e.g., R.E. Culp et al., *Maltreated Children’s Self-concept: Effects of a Comprehensive Treatment Program*, 61 AM. J. ORTHOPSYCHIATRY 114, 114-21 (1991); Pelcovitz, *supra* note 39, at 305-12.

43. 497 U.S. 836 (1990).

44. Brief for Amici Curiae American Psychological Association at 11, *Maryland v. Craig*, 497 U.S. 836 (1990) (No. 89-478).

45. *Id.* at 18 (quoting D. Finkelhor & A. Browne, *The Traumatic Impact of Child Sexual Abuse, A Conceptualization*, 55 AM. J. ORTHOPSYCHIATRY 530, 532-33 (1985)).

46. BENJAMIN E. SAUNDERS ET AL., NATIONAL CRIME VICTIMS RESEARCH AND TREATMENT CENTER & CENTER FOR SEXUAL ASSAULT AND TRAUMATIC STRESS, *CHILD PHYSICAL AND SEXUAL ABUSE: GUIDELINES FOR TREATMENT* 25 (Jan. 15, 2003).

presented in the ongoing open juvenile dependency court debate. One answer is that the law insufficiently relies on empirical research in rendering policy decisions. "Psychology and law are strange bedfellows. Psychological science is based on empiricism and the scientific method. Law grows from experience and logic."⁴⁷ Another explanation is that task forces and study groups have not included any pediatric psychiatrists who would have disclosed that psychological research.⁴⁸ Two other possibilities are that psychiatric experts were unavailable or that the open court proposal or study was not sufficiently publicized in a manner which would have alerted psychiatrists to the need for their expertise. The NCSC Report is not alone in its paucity of pediatric psychiatric evidence. The two most recent jurisdictions to provide for open juvenile dependency court proceedings, Arizona and Nevada, also did not include any of that pediatric psychiatric data in their legislative hearings.⁴⁹

1. Post Traumatic Stress Disorder

The American Psychiatric Association first acknowledged Post Traumatic Stress Disorder (PTSD) in 1980, and as early as 1985, psychiatrists determined that child sexual abuse victims frequently suffer from PTSD,⁵⁰ which is characterized by "post-traumatic symptoms . . . (i.e., fear, startle reactions, reenactment of the trauma, flashbacks, sleep disturbance, and depressive symptoms)" in addition to phobias, separation anxiety, and eating disorders.⁵¹ Contrary to popular belief, children suffer more severe and longer-lasting psychological trauma from abuse than do adults, and sexually abused children demonstrate "greater frequency of psychotic symptoms, major depressive disorder, and somatic complaints than . . . [do] physically abused . . . and nonabused children."⁵² Additionally, some children who do not manifest initial trauma develop PTSD months or years after the abuse.⁵³ Even over a year after

47. John E.B. Myers et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science*, 65 LAW & CONTEMP. PROBS. 3, 45 (2002).

48. For example, the Minnesota study by the National Center on State Courts did not have a single pediatric psychiatrist on the research panel. Mary Jo Brooks Hunter, *Minnesota Supreme Court Foster Care and Adoption Task Force*, 19 HAMLINE J. PUB. L. & POL'Y. 1, 2-6 (1997).

49. S. 1304, 46th Leg., 1st Reg. Sess. (Ariz. 2003); Assemb. 132, 72nd Reg. Sess. (Nev. 2003).

50. Arthur H. Green, *Child Sexual Abuse: Immediate and Long-Term Effects and Intervention*, 32 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 890, 892 (1993); Laura Ann McCloskey & Marla Walker, *Posttraumatic Stress in Children Exposed to Family Violence and Single-Event Trauma*, 39 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 108, 108 (2000).

51. Green, *supra* note 50, at 892; see David B. Herzog et al., *Childhood Sexual Abuse in Anorexia Nervosa and Bulimia Nervosa: A Pilot Study*, 32 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 962, 964 (1993); McCloskey, *supra* note 50, at 114.

52. McLeer, *supra* note 40, at 314.

53. A similar symptomology has been observed in children traumatized by testifying in abuse proceedings. One study demonstrated that after a three-month period there was no psychological difference between abused children who testified and those who did not. After seven months, however, "results indicated that testifying did have an impact on children's psychological adjustments." Hamblen & Levine, *supra* note 40, at 167.

the abuse, “[a]pproximately 56% [of abused children] exhibited significantly lower levels of self-esteem, 35% showed signs of depression, and 48% displayed behavior problems.”⁵⁴ A 2003 study by the U.S. Department of Justice indicated that 8.1% of abused children had met the criteria for PTSD at some point in their lives.⁵⁵ The number of abuses experienced during childhood is a significant determining factor of physical health in adulthood.⁵⁶

It is no wonder that open court surveys, such as the NCSC Report, undervalue the psychological damage to children thrust into the public arena by the press and public. None of those studies has investigated PTSD in child abuse victims and no open court study has included a longitudinal analysis of the abused children’s mental health after the legal proceedings have concluded.⁵⁷ Open court studies have merely relied, instead, on anecdotal evidence of short-term psychological trauma observed by some court personnel and advocates.

2. Developmental Victimology

Developmental Victimology is a relatively new branch of psychological analysis of traumatic abuse which is characterized under “four ‘traumagenic dynamics’: (a) traumatic sexualization, (b) betrayal, (c) powerlessness, and (d) stigmatization.”⁵⁸ Perhaps the most important finding of developmental

The impact of the emotional distress involved in court testimony can stay with a child into adulthood. The child is likely to develop at a slower rate than his or her peers [T]hose children who testified were shown to have notably greater distress both seven months after testifying and after the conclusion of the legal process.

L. Christine Brannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. the Accused’s Right to Confrontation*, 18 LAW & PSYCHOL. REV. 439, 445 (1994).

54. Malgorzata Ligenzinska et al., *Children’s Emotional and Behavioral Reactions Following the Disclosure of Extrafamilial Sexual Abuse: Initial Effects*, 20 CHILD ABUSE & NEGLECT 111, 121 (1996).

55. DEAN G. KILPATRICK ET AL., U.S. DEP’T OF JUSTICE, YOUTH VICTIMIZATION: PREVALENCE AND IMPLICATIONS 7 (2003).

56. Tamerra P. Moeller & Gloria A. Bachman, *The Combined Effects of Physical, Sexual, and Emotional Abuse During Childhood: Long-Term Health Consequences For Women*, 17 CHILD ABUSE & NEGLECT 623, 636 (1993).

57. For instance, the National Center For State Courts Study merely asked dependency court participants for their impressions regarding whether children had been psychologically harmed, and the report’s conclusions were based upon those anecdotes, not upon the expert opinions of child psychologists. The NCSC study asked, “What are the negatives of open child protection proceedings and records?” 2 CHEESMAN, *supra* note 6, app. B at 7 [hereinafter NCSC Report Vol. 2]. Although the NCSC Report did find that the media published abused children’s photographs in 6.82% of the news reports and that they published abused children’s names in 6.9% of news accounts, the NCSC Report did not include any psychological expert opinion regarding harm from these disclosures. NCSC Report Vol. 1, *supra* note 6, § II(D).

58. Elissa J. Brown & David J. Kolko, *Child Victims’ Attributions about Being Physically Abused: An Examination of Factors Associated with Symptom Severity*, 27 J. ABNORMAL CHILD PSYCHOL. 311, 311 (1999) (stating one model explains symptomology as a result of child abuse). “There is considerable evidence that a small minority of children are persistently targeted for physical and verbal maltreatment by their peers. Most of these chronically victimized children are characterized by social behavior that is submissive or passive in nature.” David Schwartz, *Subtypes of Victims and Aggressors in Children’s Peer Groups*, 28 J. ABNORMAL CHILD PSYCHOL. 181, 181 (2000) (citations omitted).

victimology is that the duration and severity of a child's psychological pathology is more closely correlated with the child's subjective evaluation of the abusive event than with the frequency or severity of the physical invasion.⁵⁹ Children's self-blame for the abuse, which is often created by the public's reaction to the assault, contributed "twice as much to the magnitude of psychological distress as did more objective characteristics of the [assaultive] event."⁶⁰ "African American children reported higher levels of self-blame/guilt for the abuse and a more negative general attributional style than did Caucasian children. Girls reported higher levels of self-blame for the abuse than did boys."⁶¹

Victimology is most important in relation to open juvenile court reform because it has drawn the correlation between social exposure and stigma and the severity and duration of abused children's psychopathology. Victimology posits two potential sources of psychological effects from abusive events.

The first order corresponds to the objective aversive aspects of trauma which encompass different characteristics of the abuse (i.e., duration, frequency, relationship of the perpetrator, degree of coercion). The second order event, the subjective experience . . . [is based upon] the meaning a person gives to the stressful event, and not simply the event itself, [and] determine[s] the reaction to the event. The child's processing of the abuse includes social-cognitive, environmental, and emotional behavioral dimensions.⁶²

Child abuse victims who suffer the greatest guilt and shame have the strongest and longest lasting psychological debilitation.⁶³ One of the major effects of child abuse is stigmatization, which can be reflected in a child's self-image.⁶⁴ Additionally, researchers have found that because guilt and shame are "internalized symptoms," it is difficult for lay persons to determine the degree of psychological trauma an abused child might be suffering.⁶⁵ Victimologists describe the psychological essence of shame as fear of public exposure because "[t]he concept of privacy seems to be bound to shame . . . [and] [s]hame may reflect an apprehension about one's perceived limitations or defects and their possible disclosure or involuntary display."⁶⁶ Moreover, children are not alone

59. Brown & Kolko, *supra* note 58, at 320.

60. Brown & Kolko, *supra* note 58, at 312.

61. Brown & Kolko, *supra* note 58, at 320.

62. Ligenzinska, *supra* note 54, at 113.

63. Ligenzinska, *supra* note 54, at 121.

64. Brief for Amici Curiae American Psychological Association, *supra* note 44, at 18 (quoting D. Finkelhor & A. Browne, *The Traumatic Impact of Child Sexual Abuse, a Conceptualization*, 55 AM. J. ORTHOPSYCHIATRY 530, 532-33 (1985)).

65. See McLeer, *supra* note 40, at 313. McLeer estimates that between 35%-38% of children have internalized psychological disturbance. *Id.*

66. Clarice J. Kestenbaum, *Childhood Trauma Revisited: Interruption of Development*, 20 ADOLESCENT PSYCHIATRY 125, 135 (1995); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL. & L. 645, 665 (1997).

in their fear that their abuse will be disclosed to the public. In a poll by the National Women's Study, 69% of adult rape victims feared the public's reaction "that the rape was their fault or that they were responsible for it" and 68% feared that the public would discover that they were raped.⁶⁷ The National Women's Study also reported that these feelings of shame and guilt do not quickly dissipate, but rather endure in a substantial number of abused children into adulthood.⁶⁸

The treatment regime developed in PTSD and Developmental Victimology research are antithetical to the central mechanisms of the open dependency court movement. Treatment for psychologically injured child abuse victims entails creating a safe haven for them in which they can receive positive reinforcement from the therapist, family, community, and peers.⁶⁹ "Social support, positive regard, and feelings of competence on the part of children are important in shaping the self," and it comes as no surprise that such a caring ethos is even more critically important to abused children who have lost a sense of control over their world and who have internalized the betrayal, powerlessness, and stigma often associated with inappropriately disclosed child abuse.⁷⁰ Social support is not just a web of services, but rather it is "a buffer to stress" and is one of the strongest predictors of whether an abused child will suffer severe and/or extended psychopathology.⁷¹ If the press is permitted to report on the child's abuse or to interview the child regarding the abuse, the therapeutic success can be substantially diminished because the psychological trauma may be intensified and become chronic "by exposure to events evoking the sexual victimization."⁷² In addition, because abused children's resilience and defense mechanisms are not as strong as those of adults, children are more likely to suffer renewed episodes of PTSD when questioned about the abuse.⁷³

67. Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 *FORDHAM L. REV.* 1113, 1125 (1993). A branch of feminist theory has identified other negative psychological impacts of sexual abuse on young girls.

[S]exual abuse has an impact on development through the subjugation and abuse which teaches that females are less valued, less important, and for sexual use. The effects of sexual abuse are further complicated by a patriarchal system which tends to blame the victim (and her mother) and to exonerate the abusing father . . . which [enhances] denial, disbelief, and victim blame.

David Gerard Beeman, *Child Abuse History and its Effects on Affect and Social Cognition as Mediated by Social Support* (1992) (unpublished Ph.D. dissertation, Iowa State University) (on file with author).

68. Jean M. Goodwin & Nandini Talwar, *Group Psychotherapy for Victims of Incest*, 12 *PSYCHIATRIC CLINICS N. AM.* 279, 282-85 (1989).

69. Pamela C. Alexander, *The Differential Effects of Abuse Characteristics and Attachment in the Prediction of Long-Term Effects of Sexual Abuse*, 8 *J. INTERPERSONAL VIOLENCE* 346, 359 (1993).

70. Brown & Kolko, *supra* note 58, at 311; Culp, *supra* note 41, at 114. Even non-abused "children who receive inadequate empathic responses from their parents . . . can become adults in whom shame manifests itself as serious depression, anxiety, anger, or withdrawal . . . including a reduced capacity for empathy." Massaro, *supra* note 66, at 664.

71. Beeman, *supra* note 67, at 117, 271.

72. Green, *supra* note 50, at 895.

73. Green, *supra* note 50, at 896.

Psychiatric treatment focuses on “decreasing environmental factors” that evoke negative reactions to the abuse while at the same time creating an ethos in which the child has a belief that support is available from their family, friends and community.⁷⁴ “Among the general outcomes of treatment are protection of the child from repeated abuse . . . and inoculation against adverse community and social reactions.”⁷⁵

It is also interesting that the open juvenile dependency court movement never gives citation to other organizations that have determined, as has the psychiatric literature, that child abuse victims will be seriously psychologically re-abused by public disclosure of their abuse. For instance, the second principle of the *UNICEF Principles and Guidelines for the Ethical Reporting on Children and Young People Under 18 Years Old*, states that “[i]n interviewing and reporting on children, special attention is to be paid to each child’s right to privacy and confidentiality.”⁷⁶ The sixth principle states: “Do not publish a story or an image which might put the child, siblings or peers at risk even when identities are changed, obscured or not used.”⁷⁷ Finally, the *UNICEF Guidelines* instructs journalists “not [to] further stigmatize any child [or report facts which will result in] rejection by their local communities.”⁷⁸

The psychiatric evidence on the effect of public disclosure of intimate identifying data regarding child abuse victims clearly reveals that disclosure will not only exacerbate the child’s psychological trauma, but that it will interfere with therapy meant to create a safe and confidential environment for the child to heal, grow, reintegrate into society, and develop interpersonal relationships based upon trust. As child abuse victims’ exposure to the public increases, so does the potential that their fragile psychological and emotional health will worsen. “The social reaction to the disclosure of the child’s sexual assault is critical to the child’s recovery from the psychological trauma of the attack.”⁷⁹ “[C]hild victims may find peer reaction to the assault one of the greatest impediments to their recovery.”⁸⁰

74. Ligenzinska, *supra* note 54, at 121-22; see also Steven J. Collings, *The Long-Term Effects of Context and Noncontact Forms of Child Sexual Abuse in a Sample of University Men*, 19 CHILD ABUSE & NEGLECT 1, 5 (1995).

75. David J. Kolko, *Treatment of Child Sexual Abuse: Programs, Progress, and Prospects*, 2 J. FAM. VIOLENCE 303, 315 (1987).

76. UNICEF, PRINCIPLES AND GUIDELINES FOR THE ETHICAL REPORTING ON CHILDREN AND YOUNG PEOPLE UNDER 18 YEARS OLD (Feb. 2002), available at http://www.unicef.org/media/media_tools_guidelines.html; see also Sally Castell-McGregor, *Children and the Media*, APC NEWS (Australian Press Council, Sydney, Australia), May 1995, available at <http://www.presscouncil.org.au/pcsite/apcnews/may95/children.html>.

77. UNICEF, *supra* note 75.

78. UNICEF, *supra* note 75.

79. Charles R. Petrof, *Protecting the Anonymity of Child Sexual Assault Victims*, 40 WAYNE L. REV. 1677, 1688 (1994) (citing Richard Tsegay-Spates, *The Mental Health Needs of Victims*, in RAPE & SEXUAL ASSAULT 35, 40-43 (Ann W. Burgess ed., 1985)).

80. ANN W. BURGESS & LYNDA L. HOLSTROM, RAPE, CRISIS AND RECOVERY 203 (William Gibson &

3. Survey Results of Pediatric Psychiatrists' Opinions About Opening Dependency Proceedings

In November and December of 2003, I conducted a survey of forty, randomly selected California pediatric psychiatrists concerning their professional opinions regarding the likely effects on child abuse victims of opening the child dependency system to the press and public.⁸¹ The survey results are striking because of the relative unanimity in the pediatric psychiatrists' views that opening the dependency courts will cause serious psychological damage to child abuse victims. The following charts indicate that a full 100% of the pediatric psychiatrists surveyed opposed opening the proceedings to the press and public, 90% of whom strongly opposed opening the hearings.⁸² Ninety-seven percent felt that the effects on abused children suffering PTSD would be moderate to severe.⁸³ Seventy-nine percent opined that publicity would have a strong to dramatic negative impact on their ability to provide successful psychotherapy to the abused children.⁸⁴

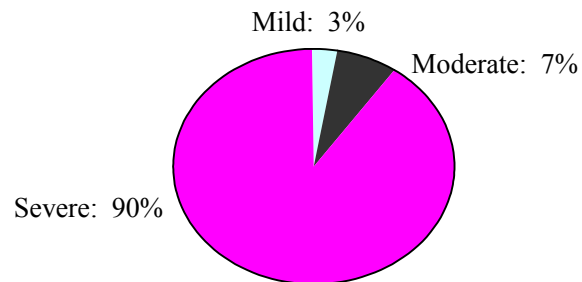
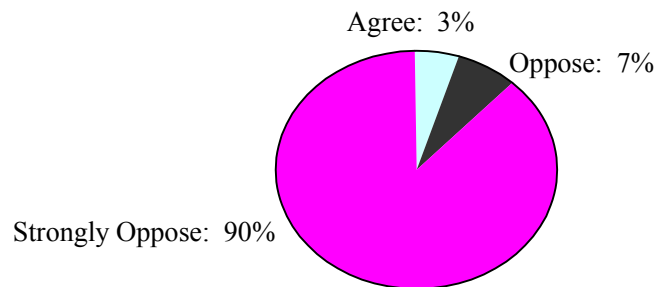
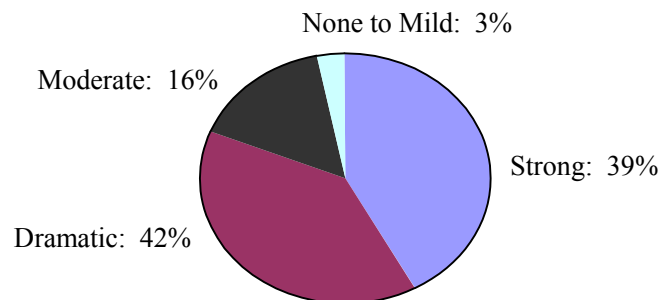
Mario Patrizio eds., 1979); see Patton, *supra* note 7, at 195.

81. I designed the survey to learn the views of a wide range of pediatric psychiatrists in as many clinical settings as possible. Ninety surveys were mailed to randomly selected pediatric psychiatrists chosen from telephone directories, hospital doctor lists, university professor lists, and licensing board data. This process ensured a collection of pediatric psychiatrists chosen from private practice, large hospital practice, and university teaching/practice/research. Of the ninety surveys mailed, thirty were returned as undeliverable for a variety of reasons, such as retirement, unable to locate, or stale address. Of the sixty surveys presumably delivered to correct addresses, forty were returned and form the basis of the following data. Even though forty responses may seem a small sample, in reality, a sample of forty is significant because there are very few pediatric psychiatrists in California.

82. The survey question asked: "If you were to express your views to the Legislature regarding legislation to open child abuse hearings to the press and public, which response most closely describes your opinion?: (1) no opinion; (2) agree hearings should be open; (3) mildly agree; (4) disagree; (5) strongly disagree."

83. The survey question asked: "If the child abuse victim is suffering from clinically diagnosed PTSD, what is the likely effect of learning that his/her name was published in the media?: Rate on a scale of 1-5." The lower end of the scale indicates little or no short- or long-term effects; severe short- or long-term harm equates to the higher end of the scale. The same scale was used for all the survey questions.

84. The survey question asked: "What likely effect will publication of the abused child's name have on the treatment of that child?" Also, "[w]hat effect will the publication of the details of the child's abuse have on the treatment of that child?"

Table 1: Harm to Children with Post Traumatic Stress**Table 2: Should Dependency Courts be Open?****Table 3: Effect of Publicity on Therapy**

B. The Role of the Press as Public Educator and Watchdog

One can seriously question whether the media has accurately and responsibly educated the public regarding children in our society. “[T]he

media does not cover issues related to children in general very often, but, when it does, it does so with an emphasis on juvenile crime and violence.”⁸⁵ Furthermore, that coverage is often distorted. Television and print news media have infrequently attempted to educate the public that the juvenile crime explosion ended years ago, that in 1999 the juvenile murder arrest rate fell 68% to the lowest level since the 1960’s, and that juvenile arrests for violent crime dropped 23% since 1995.⁸⁶ Despite the media’s distortion and/or omission of critically important data necessary for educated public opinion and policy regarding children, these failures are not sufficient grounds for denying the media access to court processes.

States’ compelling interest in the health and safety of its children, however, is, according to the United States Supreme Court, a sufficient ground for excluding the media from child dependency hearings.⁸⁷ The question, therefore, is whether media coverage is sufficiently dangerous to abused children to warrant closed hearings.⁸⁸

1. The Open Dependency Court Reform Movement Vision of the Media

Those who argue for open juvenile dependency hearings posit a media that will attend child protection proceedings, report accurately on specific cases, and investigate systemic problems inherent in the child abuse system. “The benefits public access would have on the dependency court process can be considered in terms of three broad categories: fact-finding benefits, process benefits, and community benefits.”⁸⁹ In addition, proponents of open hearings argue that if dependency proceedings are presumptively open, the press will attend a substantial percentage of those trials so that the public will no longer

85. Ernestine S. Gray, *The Media—Don’t Believe the Hype*, 14 STAN. L. & POL’Y REV. 45, 45 (2003).

86. See HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 120 (Sept. 1999), available at <http://www.ncjrs.org/html/>; see also Patton, *supra* note 7, at 188-91.

87. See *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607-09 (1982); *Okla. Publ’g Co. v. Dist. Ct.*, 430 U.S. 308, 310 (1977); Samuel Broderick Sokol, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. REV. 881, 928 (1998).

88. States have recognized the jurogenic effects on abused children and have passed a host of prophylactic protections for child witnesses such as allowing children to testify out of the presence of the accused abuser and reducing the number of interviews that abused children must go through. See, e.g., CAL. PENAL CODE § 11164(b) (West 2004) (directing investigation to “do whatever is necessary to prevent psychological harm to the child victim”); FLA. STAT. ch. 914.16 (2003) (authorizing chief judge to “order reasonable limits on the number of interviews that a victim . . . must submit [to] . . . [protecting] the victim from the psychological damage of repeated interrogations”); HAW. REV. STAT. § 588-1(b)(3) (2003) (providing for reduction of interviews “to minimize revictimization of the child”); MINN. STAT. § 626.561 (2003) (discouraging victim interviews if “unnecessary, duplicative, or otherwise not in the best interests of the child”); OKLA. STAT. tit. 10, § 7110 (2003) (attempting “to minimize the number of interviews necessary with a child-victim”); TEX. FAM. CODE ANN. § 264.403(b)(2) (Vernon 2004) (attempting “to minimize the negative impact of the investigation on the child”); *Maryland v. Craig*, 497 U.S. 836, 855 (1990) (allowing child to testify out of presence of accused abuser).

89. Sokol, *supra* note 87, at 912.

receive a distorted perception of the system based upon the reporting of only “sensational cases.”⁹⁰ It is especially important to raise public awareness regarding the dependency system “because cases that strike a public chord tend to be the cases that spur legislative action.”⁹¹ The members of the open court movement also hypothesize that open dependency courts will bring accountability to the dysfunctional court processes.⁹² Some of the dependency court ailments that opening the court supposedly will cure are: overcrowded calendars without “[t]ime for thoughtful consideration of issues;”⁹³ “informal but ingrained customs of the regular participants;” “imbalance of power between the parties;” limited “[s]upport services for families;” inadequately trained court personnel; and “old and dilapidated” facilities and judges that “draw the lowest judicial salaries,” resulting in the “low esteem of the juvenile dependency court.”⁹⁴

The open court reformers further suggest that the media will not publish any identifying data that could place already abused children in danger of being re-abused by the media process or by media disclosure.⁹⁵ In other words, they posit that the press has children’s best interests at heart and will not publish data that is likely to psychologically harm children.

2. *Empirical Evidence of the Media’s Coverage of Abused Children and Systemic Dependency Court Problems and Improvements*

There is currently no empirical evidence supporting the open court movement’s claims of systemic improvement in child protection in states that have opened hearings to the press and public. Although speculation and hypotheses are excellent for brain-storming sessions, when we consider whether to place children at risk to public opprobrium or calumny, our inquiry

90. Sokol, *supra* note 87, at 920.

91. Sokol, *supra* note 87, at 919-21.

92. Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 1 (2001).

93. *See id.* at 47, 63. Because those hearings would substantially increase the courts’ workload, it is somewhat ironic that the same advocates for open dependency courts argue for a rule permitting the closure of hearings on a case-by-case basis. *Id.* Bean argues that “[t]rauma, stigma, embarrassment, and similar concerns for children in dependency court can all be addressed on a case-by-case basis” even though she bemoans the courts’ “[i]ncreased caseloads, increased complexity of cases, and inadequate resources.” *Id.*

94. *Id.* at 38-43 (discussing ailments caused by open court). Some of the closed courtroom jurisdictions, however, have the most state-of-the-art children’s courts. For instance, in Los Angeles, which has presumptively closed dependency hearings, a new \$59.7 million Children’s Court was constructed with “child and family-sensitive features,” including an “L-shaped building that opens onto a courtyard,” a “facade [which] resembles a house,” an outdoor playground for children and shelter care areas that separate younger from older children awaiting hearings where there are games, movies, and art projects. Paul Boland, *The Los Angeles County Children’s Court: A Model Facility for Child Abuse and Neglect Proceedings*, 18 PEPP. L. REV. 247, 248-52 (1991). In addition, to make children feel more comfortable, the courtrooms in the Los Angeles Children’s Court are smaller than most courts, and the “judge’s bench will be raised only six inches above the standard table height, instead of the typical eighteen to thirty-six inches.” *Id.* at 251.

95. *See generally* Bean, *supra* note 92.

should focus on “a proper, detailed logic inquiry.”⁹⁶ The following analysis will discuss the empirical results of the NCSC Report, as well as other empirical evidence. The media’s reluctance to participate in the NCSC Report is curious because it would seem that a party seeking access to court proceedings would feel either obliged to respond to a survey or might determine that participation would increase the court’s confidence in permitting them access. Of the initial 116 surveys sent by the National Center for State Courts, only approximately 10% were even returned by the media.⁹⁷

a. Lower Caseloads and Improved Fact Finding

Ninety percent of those surveyed indicated that after opening the Minnesota dependency courts, hearings were no longer than when tried in the previously closed courtrooms, and the survey indicated that the average time taken in a dependency proceeding was between three and ten minutes.⁹⁸ Although the NCSC Report indicated that it was a positive outcome that case load time management had not been deleteriously affected by opening the court, the results clearly belie the hypothesis that opening the proceedings would either reduce case loads or provide more time and sophisticated trial advocacy which had been postulated as necessary for improving the quality of fact finding.⁹⁹ In fact, there is no empirical evidence to demonstrate that opening dependency proceedings has led to a substantial reduction in attorneys’ or judges’ case loads or to an increase in the quality of fact finding.¹⁰⁰ The NCSC Report Executive Summary best characterizes the open court project in Minnesota. The Executive Summary found that the professional accountability of that dependency system “has changed little” since the courts were opened to the media and public.¹⁰¹ Esther Wattenberg, a member of the Minnesota Supreme Court Task Force, noted that opening the courts did not have a reformative effect because such reform is costly, and because the public’s fiscal response, even after being educated to some extent by the press, has been “[n]o, thank you.”¹⁰² She further noted that “[t]here is not a shred of evidence to support these assumptions” that open courts improve the quality of judging, advocacy,

96. Sokol, *supra* note 87, at 912.

97. NCSC Report Vol. 2, *supra* note 57, at 58.

98. NCSC Report Vol. 1, *supra* note 6, at 8.

99. NCSC Report Vol. 1, *supra* note 6, at 6-10.

100. *See generally* Bean, *supra* note 92 (discussing value of opening dependency hearings but offering no evidence it would reduce case loads). For instance, although Kathleen S. Bean bemoans the Chicago judges’ case loads of “3000 cases at any given time” and the Chicago attorneys’ representation of “an average of 350 children,” she points to no empirical evidence that opening that court would lead to a case load reduction. *Id.* at 39.

101. NCSC Report Vol. 1, *supra* note 6, at ii-vii.

102. Esther Wattenberg, *Open Hearings Don’t Make Children Safer*, STAR TRIB. (St. Paul, Minn.), Feb. 15, 1997, at 23A.

social work, or reduce an overloaded system.¹⁰³

b. The Reality of the Media's Coverage of Dependency Court

The goal of the open court movement is to have the media routinely cover the dependency courts so that a complete, accurate, and representative view of the system is communicated to the public, such that they can use the community and political processes to improve the quality of the child protection system. The data suggests, however, that this goal has not been realized. The media rarely covers dependency court hearings, and if it does, it only covers “sensational cases.”¹⁰⁴ In addition, the NCSC Report determined that by focusing only on sensational cases that the press has created “a seriously distorted public image” of the child dependency system.¹⁰⁵ The Minnesota experience was identical to that of Michigan’s open court system where Michigan Juvenile Court Judge Donald Owens observed that “[o]ther than notorious cases, like babies found in dumpsters, the public and the media just don’t tend to follow child protection So the practical effect of [open hearings] hasn’t been all that great.”¹⁰⁶ One open court reformer suggests that regular reporting may not be economically feasible.

The decision to assign a reporter to cover juvenile court on a regular basis is an expensive decision for any newspaper If a newspaper does not assign a reporter to cover juvenile court on a regular basis, its reporter may misreport cases because of insufficient familiarity with the procedures and substantive events taking place at child protection hearings.¹⁰⁷

Thus, one of the principal purposes of opening the system to reporters—educating the public with an accurate description of the system—has not been realized. In addition, the irony of opening the proceedings is that the cases most likely to be closed by the judge based upon a showing of extraordinary harm to the child from the media coverage are in fact the sensational cases the media wishes to cover.¹⁰⁸

103. *Id.*; see Patton, *supra* note 7, at 194.

104. NCSC Report Vol. 1, *supra* note 6, at v. “However, a review of newspaper articles found that the media reporting of child protection subjects tends to be dominated by sensational cases, as was the case before open hearings/records.” *Id.*

105. NCSC Report Vol. 1, *supra* note 6, at 18.

106. H. J. Cummins, *Child Privacy in Court at Issue: More Accountability Suggested in Protection Cases*, STAR-TRIB. (St. Paul, Minn.), Jan. 29, 1997, at 1B; see Patton, *supra* note 7, at 193.

107. Heidi S. Schellhas, *Open Child Protection Proceedings in Minnesota*, 26 WM. MITCHELL L. REV. 631, 665 (2000). Ms. Schellhas indicated that media reluctance was based, in part, upon the uncertainty of the Minnesota Pilot Project. *Id.*

108. Patton, *supra* note 7, at 193-95; Sokol, *supra* note 87, at 919-20. States with open dependency court statutes permit the proceedings to be closed based upon either the best interests of the child or upon a demonstration of extraordinary circumstances. See generally CAL. WELF. & INST. CODE § 676 (West 2004).

3. *The Media's Protection of Child Victims and the Publication of Embarrassing Private Facts Concerning the Abused Child*

Folklore has spawned two significant misconceptions about media editorial policy. First, many believe that all media have agreed not to publish identifying data regarding child abuse victims, especially sexually abused children. Second, an attitude has developed that publication of embarrassing data of non-sexually abused children does not cause those children severe psychological trauma.¹⁰⁹ That media "safety model," however, is predicated on an outdated early Twentieth Century model in which a few major newspapers were the primary source for the dissemination of news. Today, abuse cases are covered not only by major newspapers, but also by foreign papers, television and radio "reality journalism," and by internet media sources that are not necessarily tied to the same editorial ethics.¹¹⁰ Publication by a lesser or foreign media has a synergistic effect, because once published, no matter the source, the traditional media sources often conclude that re-publication would not cause significant additional psychological damage to the victim. For example, in the William Kennedy Smith rape trial, the *Sun Mirror*, a British newspaper, and *The Globe*, a local paper in Boca Raton, each published the adult rape victim's name.¹¹¹ Based upon that prior publication, NBC Nightly News also decided to publish the name of the rape victim.¹¹² Thus, we have entered a new era of "the least ethical standard" of reporting in which a minor media source can, by publishing embarrassing confidential information, trump the higher editorial ethics of major media sources. The most recent example of the naming of a rape victim occurred in the Kobe Bryant case. "A nationally syndicated radio talk show host [Tom Leykis] recently identified the alleged victim in the Kobe Bryant sexual assault case by name and continues to use her name on the air . . ." ¹¹³ Even more frightening for the rape victim's psychological health, an internet search for "Kobe Bryant's accuser" recently topped the internet search engine Lycos' Top 50 searches and "more than 1150 people a day are searching for the phrase "kobe victim picture." Geneva Overholser, past editor of the *Des Moines Register*, indicated that times have changed and the major media should no longer shield rape victims' names because such data is "being bandied about by shock jocks and on the Net

109. See Denno, *supra* note 67, at 1113-14. For instance, Ms. Denno states that "[t]he great majority of news organizations in this country do not publish the names of alleged rape victims . . ." *Id.*

110. See Ellen Hume, *The New Paradigm for News*, 546 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 142 (1996). One must also question whether the press has the same educational force that it once had when a larger percentage of the population either read the daily newspaper or listened to network news. "[O]nly 48 percent of those surveyed said they had watched network news the night before, down from 60 percent in 1993. Only 43 percent said they had read a newspaper the day before, down from 58 percent the previous year." *Id.*

111. Denno, *supra* note 67, at 1114 n.7.

112. Denno, *supra* note 67, at 1114.

113. Chris Frates, *Radio Host Names Accuser*, PHILADELPHIA DAILY NEWS, July 24, 2003, available at <http://www.philly.com/ml/dailynews/news/local/6371524.htm>.

netherworld.”¹¹⁴ In Los Angeles, even though the *Los Angeles Times* decided not to include articles on the rape victim’s history, two rival newspapers, *The Daily News* and *The Orange County Register*, published such stories.¹¹⁵

Whether the ethical prohibition by the main stream press against publishing identifying juvenile victim data is an urban legend or an historical fact, it is no longer the issue if dependency courts are presumptively open. The reality today is that foreign, independent, and internet news services are publishing such damaging data. One commentator has noted the contemporary ethical ladder in which the least ethical editorial policies shape, through economic competition, the editorial policies of major press outlets:

[T]he internet has no editor, so everything gets out there. Then it gets picked up by talk radio, which also has no filtering system. Then that process puts pressure on more traditional news outlets, like local newspapers, to pick up the story because it’s out there and people are talking about it . . . [t]hese newspapers are in competitive situations. Once they pick it up, there is pressure on more responsible organizations to [make use of] these rumors, if not publish them as fact.¹¹⁶

Furthermore, as one of the strongest proponents of the open court reform movement, Barbara White Stack, says, “[t]here is no universal media policy against identifying [non-sexually abused] children Newspapers big and small, from Albuquerque to New York City, routinely publish children’s name and photographs.”¹¹⁷ The *Pittsburgh Post-Gazette*, Stack’s own paper, ran the name and photograph of a thirteen-year-old girl who was found by police with a thirty-eight-year-old Virginia man charged with “transporting her across state lines for sexual purposes.”¹¹⁸

The media, through their actions, has demonstrated time and again that without statutorily closed proceedings they will publish details of child abuse victims. For instance, in a federal civil rights action in which child abuse victims are not shielded from public disclosure, the *New York Law Journal* published a federal court opinion, that was further published in electronic format on the internet. That case, *Tennebaum v. Williams*,¹¹⁹ included information that, “[f]ive-year-old Sarah Tenenbaum, a kindergartner at P.S. 230 in Brooklyn, was ‘developmentally delayed’ . . . [and taken] to the hospital for tests for possible sexual abuse . . . [in which] the gynecological examination included the insertion of a cotton swab in Sarah’s vagina and anus.”¹²⁰

114. Geneva Overholser, *Naming Rape Victims*, ALTERNET (July 31, 2001), at <http://www.alternet.org/story.html?StoryID=16519>.

115. Bob Baker, *The Internet is Reshaping Bryant Story*, L.A. TIMES, July 26, 2003, at A1, A14.

116. *Id.*

117. Barbara White Stack, 90 QUILL 32, *3 (2002).

118. *Id.*

119. 193 F.3d 581 (2d Cir. 1999).

120. *Id.* at 587.

Even though the open court reform movement assures that the press does not print such matters, the following examples illustrate that the press' actions speak louder than their articulated editorial ethics. The following list of newspaper articles includes reports on child dependency, family law, and criminal cases. It is important to look at the press' current reporting on child abuse victims trapped in the criminal process because it demonstrates the press' actual coverage of child victims in a system which is constitutionally open. If the press already discloses sensitive information about child victims in the criminal system, it provides the best indicator of how they will report on sensitive child victim information once dependency proceedings are presumptively open. The press' current reporting is the best indicator of their future actions reporting on child dependency cases. In many of these cases the children's names are used, and in others, the children are easily identifiable from the details disclosed in the news stories such as their parents' names, siblings' names, address, school, and church attended.

- In *Kleman v. Charles City Police Department and Press, Inc.*,¹²¹ the press published confidential child abuse data from a confidential central child abuse registry.¹²²
- In a child sexual abuse case, the reporter disclosed both parents' names, their town, and the following information about the child victims: the thirteen-year-old boy had "learning and physical disabilities and has to wear a diaper;" the boy was "sodomized . . . with a four-foot long cable as punishment;" and the aunt "handcuffed the boy to a railing in the bathroom and beat him with a wooden paddle." In addition, the reporter also detailed his sixteen-year-old sister's statements to Child Protective Services in which she informed them that her brother was "sodomized by their biological father" and that when her brother screamed, his aunt "would put a sock or rag in his mouth."¹²³
- In *In re Minor*,¹²⁴ the trial court prohibited the *Campaign News-Gazette* from revealing the identities of two minors after finding that the children's mental health was a compelling state interest.¹²⁵
- In *In re Matter of Application of VV Publishing Corp.*,¹²⁶ the court denied the press request to publish the child victims' "names, addresses or other identifying characteristics."¹²⁷
- The *Post Gazette* newspaper asked the court to open a custody hearing,

121. 373 N.W.2d 90 (Iowa 1985).

122. *Id.* at 91.

123. Associated Press, *Police Couple Charged With Beating, Child Sexual Abuse* (Tex.), LUBBOCK AVALANCHE-J. (Apr. 13, 2000), available at http://www.lubbockonline.com/stories/041300/sta_041300017.shtml.

124. 595 N.E.2d 1052 (Ill. 1992).

125. *Id.* at 1055.

126. 552 A.2d 661, 664-65 (N.J. 1989).

127. *Id.*

- and named the fourteen-year-old involved in the proceeding.¹²⁸
- Detailed data regarding a sexually abused boy was published in an opinion-editorial piece. “Evidence was also introduced at trial showing that Fuster’s own seven-year-old son, Noel, had tested positive for gonorrhea of the throat—a disease contracted only through sexual contact. Nauseating photographs were introduced, including a posed snapshot showing Noel lifting the skirt of an adult woman to reveal her dirty underwear.”¹²⁹
 - A report in the *New York Law Journal* omitted the child abuse victim’s name, but included sufficient data for his easy identification, including his school, his teacher’s name, and his mother’s fiancée’s name. The *New York Journal* also reported that his “[m]other had placed his penis in her mouth . . . [and] on his butt and ‘titties’ . . . [and] his mother had hit him on the penis with a belt and caused him to bleed.”¹³⁰
 - An article in the *Journal Sentinel* gave the full names of a father and his girlfriend, and stated that they physically abused a nine-year-old boy by hitting him on the legs with a baseball bat, twice stapling the boy’s hands to a wooden board. The article also listed the name of the boy’s elementary school.¹³¹
 - The *Boston Herald* printed a mother’s full name in its description of her beating her ten-year-old child with a belt. The article also included an attorney’s statement that the boy “has been in and out of trouble and did a stint in Department of Youth Services custody.”¹³²
 - In a non-criminal case in which a teacher was fired, a newspaper gave the full name of a first grade girl, the city and school district in which she attended school, and the details of the teacher taping her mouth shut with tape.¹³³
 - In a custody case in which the mother’s full name was used in relation to her three children who ranged in age from four to nine years old, it was alleged that the church they attended permitted corporal

128. William Shane Stein, Editorial, *Open Minds-and Courts; Out West, Officials Rethink Closed Custody Hearings*, PITTSBURGH POST-GAZETTE, July 31, 2002, at A10.

129. Ross E. Cheit, *PBS ‘Frontline’ Dismisses the Evidence and Embraces a Child Molester*, BROWN NEWS SERVICE, Apr. 2002, available at http://www.brown.edu/Administration/News_bureau/2001-2002/01-119.html.

130. *Court Decisions: Signs of Sexual Abuse of Child Are Shown But Mother is Not Proven to be Likely Abuser*, N.Y. L.J., July 11, 2000, at 25.

131. Meg Jones, *Baraboo Couple Accused of Beating Boy: 9-Year-Old was Punished with Bat, Had His Hands Stapled to Board, Complaint Says*, MILWAUKEE J. SENTINEL, Dec. 7, 1999, at M1.

132. Michael Lasalandra, *Strapping Unruly Son Lands Mom in Court*, BOSTON HERALD, July 15, 1999, at B5.

133. Sarah Tully Tapia, *Tustin Substitute is Fired and Reported to Police, State Panel for Allegedly Taping Shut Child’s Mouth*, ORANGE COUNTY REG. (Cal.), Mar. 21, 2001. Another article gave the name of the student and school she attended after a teacher allegedly illegally paddled her. Emmett George, *Police Look Into Paddling Complaint, 2nd in Dermott Schools*, ARK. DEMOCRAT-GAZETTE, June 16, 2000, at B2.

punishment with “telephone wire and an eighteen-inch-long wooden paddle” and that they were forced to pray so long and so loud that “a pink bucket is placed in front of . . . [them] for them to vomit in.”¹³⁴

- In a case in which the name of the father was given, the story not only told of the abuse to a three-year-old daughter by chaining the girl and shaving her hair, but also included facts about her siblings who were forced to “drag the bucket so their sister could go to the bathroom.”¹³⁵
- Another report listed the parents’ names, the city, the age of the child, and criminal charges against his parents, which included being forced to sleep outside where he was denied the right to go to the bathroom and where his parents poured water on him as he slept.¹³⁶
- A article named the parents, their city of residence, and disclosed not only of excessively beating their child with a belt, but also reported confidential medical information that the child suffered “attention deficit disorder and epilepsy” as the parents’ rebuttal evidence to the bruises.¹³⁷
- A named father was alleged to have beaten his eleven-year-old son fifty to seventy-five times, and the article described the son’s arrival at his named school “with bruises and torn flesh on his face, head, back, and arms.”¹³⁸
- In a case in which the named parents had forced their seven-year-old daughter to sleep in a doghouse, the report went even further and disclosed evidence that the girl and her ten-year-old sister had earlier been taken from their natural mother who lived in a “garbage-strewn, rodent-infested home” in California.¹³⁹
- A reporter used a twelve-year-old’s full name and a description of his injuries of being “purple and black . . . like carpet burns” in a report regarding excessive corporal punishment in the Dermott School District.¹⁴⁰
- An article used the child’s and parents’ full names, and the reporter described the daughter’s injuries as “a black eye, a swollen lip, 20 marks from being beaten with a belt, and some of her internal organs

134. John Woestendiek, *Mom Can Keep Kids in Church Enclave but Judge Critical of Spindale Community*, CHARLOTTE OBSERVER, Sept. 14, 2000, at 1B.

135. Associated Press, *Man Charged With Chaining Toddler*, Oct. 3, 2001, available at <http://www.nospank.net/n-i56.htm>.

136. Jack Leonard, *Sheriff's Sergeant Accused of Child Abuse*, L.A. TIMES, Sept. 12, 2001, at B5.

137. Marla A. Goldberg, *Officer Convicted of Assaulting Son*, UNION-NEWS (Springfield, Mass.), Feb. 10, 2001, at B3.

138. Celeste Ward, *Stepfather Arrested in Boy's Beating*, CONTRA COSTA TIMES (Cal.), Feb. 9, 2001, at A5.

139. *Dad Jailed for Dog-Housed Daughter*, N.Y. TIMES (Feb. 1, 2001), available at <http://www.nospank.net/n-h10.htm>.

140. George, *supra* note 133, at B2.

were swollen.”¹⁴¹

- In a report of previous and new child abuse allegations, a reporter used the parents’ names, the county of residence, and one of the children’s full name regarding an almost two-year-old case in which the child was “recorded screaming on a 911 tape as he was struck 60 times with a board.”¹⁴²
- A reporter listed the child’s full name in an article about the boy being “struck hundreds of times with a tree branch in a single beating, causing him to be in danger of kidney failure.”¹⁴³
- In a New York dependency case, the court permitted a reporter to attend and ordered the reporter not to report any facts discovered in the hearing for at least twenty-two hours. The reporter, however, violated the court’s order and printed the story in the next morning’s paper.¹⁴⁴
- In a 1996 New York case, *In the Matter of Ruben R.*,¹⁴⁵ an article published disclosed the identities of the surviving children and a photograph of a surviving sibling with a caption describing his wait outside the funeral home.¹⁴⁶

This sample of indicents of the press’ publication of details about child abuse victims were intentionally culled from a time period from 1985 to 2003 in order to demonstrate that there has never been a uniform pact among the media prohibiting the publication of identifying details of child abuse victims. In some of the older open juvenile court jurisdictions, such publications are routine. For example, “[i]n Michigan, which has had open hearings since 1988, numerous Detroit newspaper articles publish children’s names and photographs.”¹⁴⁷ There is little doubt that the greater the press’ access to child protection hearings, the greater the risk that the press will publish children’s identifying data. In a world in which the media source with the least ethical editorial policy drives the media frenzy, in which no code of ethics rules in internet publication, and in which foreign papers’ editorial policies conflict with local American social mores, no one—not the courts nor any of the open court reformers—can assure us that children will not be revictimized by public exposure.

The public benefit from the media’s access to dependency hearings, however, need not be sacrificed by an overbroad preclusion of reporters. The

141. Kevin Mayhood, *Man Sentenced to 7 Years for Abusing His Daughter*, COLUMBUS DISPATCH, May 17, 2002, at O48.

142. Cindy Horswell, *Abusive Mom Will Regain 6 Kids*, HOUSTON CHRONICLE, Dec. 12, 2003, at A37.

143. Claire Osborn, *Boy Was Struck Hundreds of Times, Doctor Says*, AUSTIN AM. STATESMAN, Dec. 9, 2003, at B1.

144. *In re “S” Children*, 532 N.Y.S.2d 192, 193-96 (N.Y. Fam. Ct. 1988).

145. 641 N.Y.S.2d 621, 622-23 (N.Y. App. Div. 1996).

146. See Patton, *supra* note 7, at 192-93 (discussing additional cases which published identifying data regarding child abuse victims and/or their siblings).

147. Harris, *supra* note 38, at 677.

best system is one, like that in many states, that grants the juvenile court discretion to admit the press on a case-by-case basis. If the media publishes identifying and psychologically damaging data about child abuse victims gleaned at the hearing, the judge can protect the child by denying that reporter's subsequent requests for access. In addition, in order to guarantee that a recalcitrant juvenile court judge does not abuse his discretion by banning all media from his court, state legislatures are free to pass a Model Press Act, which permits a certain number of media to attend dependency hearings if they undergo a few hours of educational training on dependency law and on the psychological harm of disclosure.¹⁴⁸ This is the best compromise because reporters do not have a right to attend the hearings unless they agree to abide by the court's confidentiality restriction. Although the court cannot punish reporters who violate the confidentiality policy, the juvenile court can refuse to admit that offending media representative, even if the court admits a different reporter from the same media source who has undergone the court's training session.

C. The Effect of Open Proceedings on Public Attitudes

If a central goal of the open court reform movement is to increase the general public's attendance at dependency proceedings, the experiment has been a dismal failure. The NCSC Report found that citizens in Minnesota did not attend the dependency hearings. "The general public has generally declined to participate in open hearings"¹⁴⁹ In addition, the NCSC Report found that most of the general public's increase in attendance consisted "of members of the extended family, foster parents, or service providers interested in a specific case."¹⁵⁰ What the NCSC Report did not disclose, however, is that there is no evidence whether the Minnesota open court policy increased the attendance of family members or whether that attendance was attributable to a new statute. The new statute requires the court to give notice of dependency hearings and to notify parents, prospective parents and relatives of their right to be heard.¹⁵¹ Admitting relatives, foster parents, and prospective adoptive parents to dependency court does not require an open dependency court rule that permits the press and general public to attend because "closed hearing states," like California, have admitted those individuals for years.¹⁵² Therefore, the NCSC Report found no direct nexus between opening the court system and the attendance by the general public or even by relatives.

General public attendance, however, was never really the primary goal of the

148. Patton, *supra* note 7, at 199-212.

149. NCSC Report Vol. 1, *supra* note 6, at vi.

150. NCSC Report Vol. 1, *supra* note 6, at vi.

151. MINN. STAT. § 260C.152 (2004).

152. CAL. WELF. & INST. CODE §§ 361.2, 827 (West 2004); CAL. CT. R. 1420.

open court movement. Rather, the purpose was to educate the public about the system so that the public would bring political pressure to increase the child protection budget which might lead to a higher quality and more accurate system of protecting children and curing family problems. The NCSC Report, found that the experiment failed in that respect. The “evidence suggests that open hearings/records, to date, have had virtually no effect on general public awareness of child protection issues.”¹⁵³ It is not surprising that the public’s perceptions remain unchanged because the media has provided “little coverage of major child protection issues” and few members of the public have attended the hearings.¹⁵⁴ Esther Wattenberg, a member of the Minnesota Supreme Court Task Force, stated that opening the dependency courts “did not bring a wave of child protection reform” because such change costs a great deal of money and she noted that the taxpayers’ response has been, “No, thank you.”¹⁵⁵

D. The Impact of Open Courts on System Accountability

One theme consistently forwarded by the open court reform movement is that the child abuse and neglect system lacks accountability because it is a “secret” court sealed from the critical eyes of the press and public. Reformers hypothesize that opening the court will lead to system accountability and an improved quality and trustworthiness of fact finding.¹⁵⁶ Ironically, however, many of the nation’s most recent scandals have occurred in open dependency court jurisdictions.¹⁵⁷ In addition, contrary to the predictions of the child open court reformers, the public has not petitioned legislators to better fund child protection systems. In Florida, for example, “[l]egislators . . . gutted \$1.6 million for attorneys to represent foster children in court,” and in Michigan, the Federal Children and Family Services Review “ordered the state to reform the foster care system in two years or be fined \$2.5 million.”¹⁵⁸ “A majority of the [Minnesota] Task Force believed that the juvenile protection system was a ‘closed system’ that was not accountable to the public.”¹⁵⁹ But, again, these speculations proved to be groundless. Although there were subjective anecdotes in the survey of some incremental improvement in the quality of professionalism in Minnesota’s open court system, the NCSC Report concluded that “most professionals feel that the accountability of the principal actors in

153. NCSC Report Vol. 1, *supra* note 6, at vi.

154. NCSC Report Vol. 1, *supra* note 6, at vi.

155. Wattenberg, *supra* note 102, at 23A; *see* Patton, *supra* note 7, at 194.

156. NCSC Report Vol. 1, *supra* note 6, at ii; Sokol, *supra* note 87, at 912.

157. *See* Megan O’Matz, *DCF Sees Progress in Budget Legislators Could Have Done Better, Critics Say*, S. FLA. SUN-SENTINEL, June 4, 2003, at 1B. “A year ago [in 2002], the state’s most powerful officials, including the governor, promised to fix a child welfare system [in Florida] that lost track of more than 500 children . . .” *Id.*

158. *Id.*; *see* Jack Kresnak, *Workers Charged in Foster Child’s Beating Death*, DETROIT FREE PRESS, May 13, 2003, at 1A.

159. Schellhas, *supra* note 107, at 658.

the child protection system has not been impacted.”¹⁶⁰ The NCSC Report found “little evidence that child protection hearings had changed significantly after having been opened to the public.”¹⁶¹ “[T]here is little evidence that the duration of hearings was appreciably affected nor is there compelling evidence that the nature of in-court discussions has changed.”¹⁶² Further, “[i]n the opinion of the child protection professionals surveyed, opening hearings and records in child protection proceedings to the public has had very little impact on the content of courtroom documents, exhibits, and statements.”¹⁶³ The bottom line is that there is no demonstrable empirical evidence that the accountability claims of the open court reformers have been realized.

E. The Treatment of Child Victims in Criminal Law Proceedings

Some proponents of the open dependency court movement might argue that because child victims have no confidentiality in an adult criminal court, confidentiality in dependency court is meaningless. There are a number of reasons for rejecting this proposition. First, in an adult criminal proceeding, as opposed to a dependency proceeding, there is a constitutional right to a public trial under the Sixth Amendment.¹⁶⁴ Therefore, the presumption must be that criminal trials are open to the public and press. States recognize, however, that child abuse victims’ participation in adult criminal proceedings is extremely traumatic to those children, and attempt, as best as they can, to ameliorate that psychological harm. For instance, California has not only minimized the number of interviews that parties can conduct with child victims, it has also attempted to ameliorate that harm by permitting concerned adults to be present with the child. The California Penal Code § 11164(b) provides that “[t]he intent and purpose . . . is to protect children from abuse. In any investigation of suspected child abuse, all persons participating in the investigation of the case shall consider the needs of the child victim and shall do whatever is necessary to prevent psychological harm to the child victim.”¹⁶⁵ States have created a number of ways of reducing the trauma to child victims because they cannot presumptively close all adult criminal trials involving child abuse. In Florida, the “chief judge . . . shall provide by order reasonable limits on the number of interviews that a victim . . . must submit to for law enforcement or discovery

160. NCSC Report Vol. 1, *supra* note 6, at vi.

161. NCSC Report Vol. 1, *supra* note 6, at vii.

162. NCSC Report Vol. 1, *supra* note 6, at vii.

163. NCSC Report Vol. 1, *supra* note 6, at vii.

164. U.S. CONST. amend. VI. “[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” *Id.*

165. CAL. PENAL CODE § 11164(b) (West 2004). The Code also provides that an interested adult must be present during criminal investigations at schools “to lend support to the child and enable him or her to be as comfortable as possible.” *Id.* § 11174.3(a); *see also* KINGS COUNTY CAL. CT. R. 612 (limiting number of interviews with abused children).

purposes. The order shall, to the extent possible, protect the victim from the psychological damage of repeated interrogations”¹⁶⁶ In Hawaii, the courts attempt to “[r]educe to the absolute minimum the number of interviews of child sex abuse victims so as to minimize revictimization of the child”¹⁶⁷ Similar statutes have been promulgated in Minnesota, Oklahoma, and Texas.¹⁶⁸

In addition to states’ attempts to mollify the pre-trial discovery trauma to child victims in criminal cases, courts have developed additional prophylactic trial protections. For instance, the United States Supreme Court held in *Maryland v. Craig*¹⁶⁹ that a court can permit the child victim to testify via closed-circuit television from the judge’s chambers.¹⁷⁰ Moreover, states have not only followed the *Maryland v. Craig* rule, but also promulgated prophylactic protections for child abuse witnesses based upon independent state constitutional grounds.¹⁷¹ Therefore, it is clear, that even though states lack the ability to presumptively exclude the press and public from adult criminal trial, they have taken numerous steps to protecting, as best they can, the exacerbation of psychological trauma to child abuse victims.

The analogy to open adult criminal trials also fails empirically. One might argue that because a child rape victim’s identity will be disclosed in an adult criminal trial, closing child dependency hearings is meaningless. That conclusion, however, is based upon the false assumption that most abused children who are part of the dependency court machinery will also be involved in the criminal courts. The following California data on rape arrests and dispositions refutes that assumption when compared with the Department of Justice’s estimate that 45.8% of forcible rape victims are children:¹⁷²

166. FLA. STAT. ANN. § 914.16 (West 2004).

167. HAW. REV. STAT. ANN. § 588-1(b)(3) (Michie 2004).

168. See MINN. STAT. ANN. § 626.561 (West 2004); OKLA. STAT. ANN. tit. 10, § 7110 (West 2004); TEX. FAM. CODE ANN. § 264.403(b)(2) (Vernon 2004).

169. 497 U. S. 836 (1990).

170. *Id.* at 852.

171. See *In re Jennifer J.*, 10 Cal. Rptr. 2d 813, 819 (Cal. 1992); *Hicks-Bey v. United States*, 649 A.2d 569, 573-74 (D.C. 1994); *Thornton v. State*, 449 S.E.2d 98, 109-10 (Ga. 1994); *State v. Larsen*, 849 P.2d 129, 132-33 (Idaho 1993); *State v. Schultzen*, 522 N.W.2d 833, 835-36 (Iowa 1994); *State v. Rowray*, 860 P.2d 40, 42-43 (Kan. 1993); *State v. Peterson*, 530 N.W.2d 843, 846-47 (Minn. 1995); *Smith v. State*, 894 P.2d 974, 975-77 (Nev. 1994); *Commonwealth v. Ludwig*, 594 A.2d 281, 282-85 (Pa. 1991).

172. HOWARD N. SNYDER, U.S. DEP’T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 2 (2000) (compiling data from twelve states).

CALIFORNIA RAPE ARREST AND DISPOSITION DATA 1995-2001¹⁷³

Year	Arrests	Complaints	Dismissed	Trials
1995	1966	1321	239	1082
1996	2115	1472	233	1239
1997	2147	1411	206	1205
1998	2241	1502	224	1278
1999	2103	1443	234	1209
2000	1860	1316	238	1078
2001	1806	1238	234	1004

These rape statistics are critically important in the open dependency court debate. First, the California data when compared to the national data rebuts the argument that most child abuse rape victim's confidentiality will be exposed during adult criminal trials. Even if we assume that all 45.8% of the cases involving child rape victims resulted in criminal trials in California, there would have only been 459 trials in 2001 that involved child rape victims.¹⁷⁴ The number of trials is relatively small because in both federal and state court criminal filings 95% of cases include guilty pleas.¹⁷⁵ In 2001, however, California supervised 100,876 child abuse victims in out-of-home placements.¹⁷⁶ Therefore, less than .05% of children who are under state wardship due to abuse are forced to testify in an adult criminal rape trial. If child dependency proceedings are opened to the press and public, however, each of those 100,876 children is potentially subject to at least seven public hearings: the detention hearing, the adjudication, the disposition, and review hearings held every six months. Therefore, to require tens of thousands of abused children to undergo the same psychological trauma experienced by a few hundred child victims in adult court is unconscionable.

173. Telephone interview with Bonnie Collins, Cal. Dep't of Justice (Nov. 5, 2003) (supplying data based on annual reports from 1995-2001).

174. SNYDER, *supra* note 172, at 2; Telephone interview with Bonnie Collins, *supra* note 173.

175. MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS 1 (2000) (surveying sentences received by felons in state court). Nationally in 2001, 95% of the 68,533 defendants who were convicted pleaded guilty. U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2 (2001); *see* U.S. DEP'T OF JUSTICE, CRIMINAL CASE PROCESSING STATISTICS 1 (2000). In California in 2001, rapes constituted 4.7% of violent crimes. DIV. OF CAL. JUSTICE INFO. SERVICES, CAL. DEP'T OF JUSTICE, CRIME & DELINQUENCY IN CAL. vi (2001) (discussing changing crime rates in California). This reduction of litigation in court trials is nationwide. For instance, in 1962, 11.5% of all civil cases in federal court went to trial compared to only 1.8% in 2002. Adam Liptak, *Federal Trials Are Dropping, Study Shows*, N.Y. TIMES, Dec. 16, 2003, at 3. In addition, federal prosecutions resulting in trials decreased from 15% in 1962 to 5% in 2002. *Id.*

176. RESEARCH & DEV. DIV., CAL. DEP'T OF SOC. SERV., TOTAL CHILDREN IN SUPERVISED OUT OF HOME PLACEMENTS BY PLACEMENT (2001), at http://www.dss.cahwnet.gov/research/CWS-CMS1-C_408.htm.

F. The Cost and Difficulty of Closing Presumptively Open Hearings

One would intuitively expect that when a presumptively closed dependency system changes to a presumptively open system that children's attorneys would frequently move to close the hearings in order to protect the psychological health of their child clients. It is interesting that most open court systems have not even studied this issue. Existing empirical evidence, however, demonstrates that courts grant few motions by children's counsel to close the hearings. The National Center for State Courts examination of the change to a presumptively open system in Minnesota found that courts almost never closed cases in order to protect child abuse victims. The Study found that "[c]losures of open child protection hearings occurred very infrequently." The high failure rate of motions to close the proceedings is extraordinary, especially in light of children's advocates "in some [Minnesota] counties [that] motioned to close almost all child protection proceedings."¹⁷⁷ Perhaps more troubling than these statistics was the attitude of the judges who considered those closure motions. According to the NCSC Report, "several judges expressed a reluctance to close hearings out of concern for the integrity of the open hearings pilot project."¹⁷⁸

Even if the success rate of closing presumptively open dependency court hearings is very low, that failure rate does not mean that children's attorneys will decide not to file those motions. An informal survey of forty-nine children's attorneys who are members of the National Association of Council for Children, Southern California, the largest group of children's attorneys in California, found that forty-eight out of forty-nine attorneys stated that they would bring closure motions in every case in which they determined that publicity could harm their child clients.¹⁷⁹ In addition, forty-two of the forty-nine children's attorneys indicated that they would request the appointment of a child psychologist and/or present live testimony to demonstrate the potential psychological damage from the publicity if the case were kept open.

Two cases are illustrative of the increased court and attorneys costs in litigating an open/closed court motion. In *In the Matter of Ruben R.*,¹⁸⁰ the child advocate presented evidence from the child's social worker and a psychologist in attempting to meet the burden required to close a dependency proceeding of demonstrating sufficient psychological harm to the child.¹⁸¹ In another case, *In re T. R.*,¹⁸² not only did the child's advocate present testimony

177. NCSC Report Vol. 1, *supra* note 6, at vii, 6-7.

178. NCSC Report Vol. 1, *supra* note 6, at vii, 6-7.

179. The survey was conducted at the Edmond Edelman Juvenile Courthouse on March 10, 2004 at an NACC attorney in-service training program on the issue of whether dependency courts should be opened or closed to the press and public. Supervising Juvenile Court Judge Michael Nash and the author debated the open court question.

180. 641 N.Y.S.2d 621 (N.Y. App. Div. 1996).

181. *Id.* at 623.

182. 556 N.E.2d 439 (Ohio 1990).

from the child's social worker and clinical psychologist, but the managing editor of the newspaper seeking admittance also testified.¹⁸³ These new motions and requests for expert fees will substantially increase the cost of litigating routine child dependency actions.¹⁸⁴ That additional cost will result in the necessity of a substantial increase in the dependency court budget when it is tied to the cost of training court and social worker personnel regarding how and when to protect child abuse victims by redacting confidential identifying data from records introduced before the press and public in court.¹⁸⁵

None of the states that have opened their juvenile dependency hearings have calculated the cost of shielding confidential witnesses and legislatively mandating confidential documents in public trials. For instance, the Minnesota study found that the open hearings were not substantially longer than the earlier closed hearings. The analysis did not even study the cost and impact of introducing confidential records and witnesses in the publicly open hearings because the Minnesota statute not only opened the dependency proceedings, but also opened the previously confidential juvenile court records.

In states like California, in which the dependency court records, social worker reports, child abuse reports and investigations are confidential, the cost of removing the press and public during a discussion of those confidential records could considerably lengthen the proceedings.¹⁸⁶ Increased court time means increased judicial resources and budgets. First, in California, children are entitled to competent legal representation.¹⁸⁷ Second, the minimal requirement of legal representation for children includes the ethical duties of

183. *Id.* at 443-44.

184. Patton, *supra* note 7, at 184. One trial court judge in California states that he "has been conducting such hearings [to open court proceedings] for more than 15 years, and has never spent more than five minutes on such a motion. Moreover, such hearings occur rarely, less than once a month." Edwards, *supra* note 37, at 19 n.38. Motions to close proceedings brought by a party, especially by a child's attorney, however, are substantially different than motions to open presumptively closed proceedings brought by a media representative. First, few media attend dependency proceedings. For instance, the National Center for State Courts study found that the media rarely attend dependency proceedings and therefore, they generate few motions to open presumptively closed proceedings. NCSC Report Vol. 1, *supra* note 6, at vi. As demonstrated by the NCSC study and a poll of National Association of Counsel for Children conducted by the author at the Los Angeles Dependency Courts on March 10, 2004, children's attorneys frequently seek closure of hearings. In addition, most children's attorneys indicated that they would call expert and/or lay witnesses to testify regarding the psychological harm to child abuse victims from opening the proceedings. *Id.* at 7. These hearings will take considerably longer than the routine hearings described by the judge.

185. When New York shifted from a closed to an open dependency court system with open court records, the state estimated the transition cost for 1996 and 1997 to be "approximately \$5.6 million." GOVERNOR GEORGE PATAKI, GOVERNOR'S PROGRAM BILL 65R, at 7 (1996). If a jurisdiction merely changed from a closed to an open system without also opening its juvenile records, the cost might be lower; however, the New York figure would need to be discounted to present value since that estimate is now almost eight years old. *Id.*

186. See Child Abuse and Neglect Reporting Act, CAL. PENAL CODE § 11167 (West 2004).

187. See CAL. WELF. & INST. CODE § 317.5 (providing "[a]ll parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel . . . [and] [e]ach minor who is subject of a dependency proceeding is a party to that proceeding").

zealousness and competence.¹⁸⁸ In addition, California Rules of Court, Rule 1438 mandates that superior courts establish competency standards for children's counsel for, among other things, establishing "minimum standards of experience, training, and education."¹⁸⁹

The Minnesota Study found that administrative costs of opening the hearings fell most severely upon court administrators. "There has been a significant impact on the workload of administrative staff resulting from the record keeping requirements in the court order and the need to address public requests for documents."¹⁹⁰ One of the biggest bureaucratic burdens for the court administrative staff was to "redact documents, separate files, prepare written materials to protect the child's identify, and deal with requests for documents."¹⁹¹ However, the Minnesota Study also indicated that other parties in dependency court have additional costs, "especially children and parents (and foster parents), who risk losing privacy."¹⁹² In addition, public defenders indicated that "more of their time is required to prepare clients for open hearings."¹⁹³ Public defenders also reported that under the open court system it had become "more difficult to work with children."¹⁹⁴

In order to determine the potential increase in the cost of competent dependency court representation under an open hearing/confidential records regime, the following analysis of a typically adjudicated dependency case will highlight the differences between the existing closed hearing model and the open court model.

1. *The Initial Detention Hearing*

The California Welfare and Institutions Code § 317(c) and (e) require children's counsel "to advocate for the protection, safety, and physical and emotional well-being of the child," so counsel now have to consider the totality of the circumstances of each dependency case *before appearing at the detention hearing* because the child's confidentiality and emotional equipoise will otherwise be potentially harmed at the first open hearing.¹⁹⁵ A new motion practice to close the dependency hearing, therefore, will routinely become part

188. See *Silberg v. Anderson*, 786 P.2d 365, 370 (Cal. 1990); *People v. Wade*, 750 P.2d 794, 809 (Cal. 1988) (Broussard, J. dissenting); *People v. McKenzie*, 668 P.2d 769, 778-79 (Cal. 1983); *Davis v. State Bar*, 655 P.2d 1276, 1279 (Cal. 1983); *Maxwell v. Super. Ct.*, 639 P.2d 248, 253 n.4 (Cal. 1982); see also MODEL CODE OF PROF'L RESPONSIBILITY 1.1 (requiring attorney competence); ABA STANDARDS FOR CHILD ABUSE CASES A-1 (providing child's attorney "owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due to an adult client").

189. CAL. CT. R. 1438.

190. NCSC Report Vol. 1, *supra* note 6, at 11.

191. NCSC Report Vol. 1, *supra* note 6, at 9.

192. NCSC Report Vol. 1, *supra* note 6, at 32.

193. NCSC Report Vol. 1, *supra* note 6, at 95.

194. NCSC Report Vol. 1, *supra* note 6, at 98.

195. CAL. WEF. & INST. CODE § 317(c) (West 2001).

of the detention proceeding. We can presume that a substantial number of detention hearings will involve motions to close the proceedings because the Minnesota experience demonstrated that children's attorneys brought motions to close the hearings to the press and public in a very high number of cases, and because the supervisors of California's most prolific children's attorneys office indicate that they will challenge open hearings any time it is in their minor clients' best interest.¹⁹⁶

In addition, if the hearings are presumptively open, the burden of closing the hearings is upon the parents' or children's counsel. Moreover, because the judge's primary grounds for closing the hearing will be potential psychological harm to the child, children's attorneys will need to present such evidence to the court. In order to provide both zealous and competent representation, children's counsel will often need to seek the appointment of a psychiatrist or psychologist to determine the potential emotional harm to the child in having a public hearing. Thus, the motion to close the hearings will not only require that the courts supply additional resources because of the length of the hearing, but will also increase the current cost of court-appointed psychological experts.

It is also possible that confidential documents like the social worker's report will be discussed at the detention hearing because the department bringing the child dependency petition must prove a prima facie case of child abuse and/or neglect at the detention hearing,¹⁹⁷ based upon competent and relevant evidence.¹⁹⁸ The California Welfare and Institutions Code § 827, however, provides that all juvenile records are confidential.¹⁹⁹ Moreover, § 827(B) provides that "[p]rior to the release of the juvenile case file or any portion thereof, the court shall afford due process, including a notice of and an opportunity to file an objection to the release of the record or report to all

196. See generally Cummins, *supra* note 105, at 1B.

197. CAL. WELF. & INST. CODE § 319(b) (providing courts required to release child unless prima facie showing made that child comes within court's child abuse jurisdiction); see also BLACK'S LAW DICTIONARY 1228 (8th ed. 2004) (defining prima facie case as "(1) [t]he establishment of a legally required rebuttable presumption . . . (2) A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor"). Although the term "prima facie" is not legislatively defined, one court has indicated that it means "a state of facts as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." *Edsel P. v. Super. Ct.*, 211 Cal. Rptr. 869, 878 n.10 (Cal. Ct. App. 1985).

198. *Edsel P.*, 211 Cal. Rptr. at 878 (discussing juvenile delinquency detention hearing standards). The California Supreme Court has noted that the prima facie evidence standard is similar to other civil code standards such as the California Civil Procedure Code § 425.13, which requires a demonstration of "a legally sufficient claim which is . . . supported by competent, admissible evidence." *Evans v. Unkow*, 45 Cal. Rptr. 2d 624, 628 n.1 (Cal. Ct. App. 1995) (quoting *College Hosp. Inc. v. Super. Ct.*, 882 P.2d 894, 903 (Cal. 1994)). In addition, in *In re Gloria A.*, the court held that a parent or child can make a motion to dismiss or for nonsuit pursuant to the California Welfare and Institution Code § 350, in which the dependency court judge must weigh the parties' competing evidence and permit parties to rebut the evidence. *In re Gloria A.*, No. 1037593, 2002 WL 1924916, at *8 (Cal. Ct. App. Aug. 21, 2002) (discussing California Welfare & Institutional Code § 350). In addition, the court may refuse "to believe witnesses." *Id.*

199. CAL. WELF. & INST. CODE § 827.

interested parties.”²⁰⁰ Therefore, neither the court, nor any of the parties in the detention hearing, have the right to disclose the contents of any of those confidential social worker or court records to the press or public attending the detention hearing without first providing a due process hearing to the parties. One must ask how, therefore, the department will present sufficient evidence from its investigative files and/or social worker’s report to sustain a prima facie case without violating the confidentiality provisions of § 827?

The problems do not stop with confidential juvenile court records. What if the parents or children challenge confidential hearsay declarants whose statements are contained in the social worker’s report? For instance, the social worker’s report is often based upon allegations from a mandated child abuse reporter such as a teacher. What if the parents or children’s counsel wish to subpoena that witness for a hearing to cross examine her concerning the child’s possible recent fabrication of abuse and/or neglect? Although there is currently no problem in the closed juvenile dependency proceedings, once the public and press are presumptively admitted, a serious problem is created. California Welfare & Institutions Code § 827(A) provides that the juvenile court confidentiality rules do not preempt other state or federal confidentiality laws.²⁰¹ In our hypothetical, the teacher, pursuant to California Penal Code § 11167, is shielded from publicity because “[t]he identify of all persons who report under this article shall be confidential and disclosed only among agencies receiving or investigating mandated reports . . . or to counsel appointed pursuant to subdivision (c) of section 317 of the Welfare and Institutions Code.”²⁰² Therefore, again, any time that a mandated reporter is questioned, the press and public must be excluded from the hearing. In addition, the Legislature drafted two provisions in the mandatory child abuse reporting act to create an incentive for percipient witnesses to disclose child abuse.²⁰³ The first, confidentiality, shields the mandated reporter from public scrutiny.²⁰⁴ The second, civil and criminal immunity, provides further incentives to report abuse.²⁰⁵ If mandated reporters are subject to public scrutiny in open dependency hearings, it could affect their willingness to participate in child abuse investigations.

Another problem with permitting all press and the public to attend dependency hearings is that criminal prosecutors investigating a criminal case based upon the same facts underlying the dependency petition may indirectly discover the parents’ and children’s testimony. Parents, but not children, who testify in dependency court are granted “use immunity” pursuant to California

200. CAL. WELF. & INST. CODE § 827(a)(3)(B).

201. CAL. WELF. & INST. CODE § 827(a)(3)(A) (West 2004).

202. Child Abuse and Neglect Reporting Act, CAL. PENAL CODE § 11167.

203. *Id.*

204. *Id.* § 11167(a).

205. *Id.* § 11167(d)(1).

Welfare and Institutions Code § 355.1(f).²⁰⁶ They are not granted “derivative immunity,” however, which involves the use of the parents’ statements to uncover other evidence that could be used against them in criminal court. In addition, § 355 use immunity does not cover dependency parties’ statements made before or after testifying. Thus, if a criminal prosecutor introduces these dependency parties pre-trial statements through the introduction of documents or through hearsay declarants, then use immunity is inapplicable. This is not a problem when hearings are presumptively closed because the criminal prosecutor will rarely, if ever, have access to the live dependency court testimony. If the prosecutor can attend the open hearing, however, then parties can claim that the limited use immunity of § 355 does not shield them to the same extent as the Fifth Amendment of the Constitution. Even recent liberalized criminal reciprocal discovery statutes do not require a criminal defendant to inform the prosecutor of the defendant’s prior statements or admissions because it would constitute a direct violation of the privilege against self-incrimination.²⁰⁷ Therefore, by opening dependency hearings to the press and public, parents and siblings who have allegedly abused a brother or sister are more at risk in the dependency case. Any spectator or any prosecutor could turn that evidence over to the district attorney for fact investigation in a criminal child abuse case. This new risk of self-incrimination either through parents’ or children’s testimony, or from the department’s testimony concerning pre-trial statements which are included in confidential social worker reports, may have a distinct effect upon the voluntary cooperation of parties in the dependency case. It is possible that parents’ and/or children’s attorneys will counsel them not to take the dependency witness stand because of the Fifth Amendment implications. Creating such a courtroom atmosphere would not be in the best interest of children or families because it would frustrate the Legislature’s intent pursuant to California Welfare and Institutions Code § 350 that dependency proceedings be as informal and cooperative as possible so that reunification and/or permanency planning for children can be quickly realized.²⁰⁸

If the dependency courts are to become presumptively open, then two statutory changes are needed to affect the Legislature’s goal of expedited and informal decision making. California Welfare and Institutions Code §355.1(f)

206. CAL. WELF. & INST. CODE § 355.1(f).

207. William Wesley Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 U. LOUISVILLE J. FAM. L. 37, 44 n.26 (1992).

208. CAL. WELF. & INST. CODE § 350 (West 2004) (discussing testimony of minors in chambers).

The judge of the juvenile court shall control all the proceedings . . . with a view to the expeditious and effective ascertainment of the jurisdictional facts . . . [and] [e]xcept where there is a contested issue of fact or law, the proceedings shall be conducted in an informal nonadversary atmosphere with a view of obtaining the maximum cooperation of the minor . . . and all persons interested in his or her welfare

Id.

needs to be modified in two ways. First, the use immunity provision should be expanded to include derivative immunity so that parents and children can feel free to cooperate by testifying in dependency proceedings. Second, that section should be modified to grant children use and transactional immunity so that they may freely testify regarding any abuse that they have done to a sibling.

IV. THE ARIZONA OPEN COURT EXPERIMENT

In 2003, the Arizona Legislature passed an open dependency court pilot project unlike any other in the nation.²⁰⁹ The lynchpin of this system is a formal waiver by the press and public of their right to disclose any confidential data gleaned while in the hearing. The statute provides for presumptively open dependency proceedings in the pilot project, provided that at the beginning of each proceeding the court:

shall admonish all attendees that they are prohibited by order of the court from disclosing outside the hearing personally identifiable information about the child, the child's siblings, parents, guardians or caregivers and any others mentioned in the hearing. A person who knowingly and voluntarily remains in the courtroom after the admonition submits to the jurisdiction of the court and shall abide by the orders of the court prohibiting disclosure of that information. Failure to abide by the orders shall be deemed contempt of court . . . '[P]ersonally identifiable information' includes name, address, date of birth, social security number, tribal enrollment number, telephone or telefacsimile number, driver license number, places of employment, school identification or military identification number or any other distinguishing characteristic that tends to identify a particular person.²¹⁰

The Arizona statute is interesting for several reasons. First, without any specific finding by the court regarding the attendees' capacity to knowingly and voluntarily waive their free speech rights, the court assumes by their continuing presence that they have waived those rights. This is problematic because the audience may include young children who might be presumptively incompetent to waive constitutional rights or adults of limited mental ability. If the spectators did not voluntarily and/or knowingly waive their free speech rights, then any contempt citation by the court would be illegal and the statute's protection for children's privacy rights and emotional health would be meaningless.

The Court has long held that "[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights."²¹¹ The United States Supreme Court's most famous First Amendment waiver case,

209. ARIZ. REV. STAT. § 8-526 (2004).

210. *Id.*

211. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *see also Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *Ohio Bell Tel. Co. v. Pub. Util. Comm'n of Ohio*, 301 U.S. 292, 307 (1937).

Snepp v. United States,²¹² involved an employment contract between a former agent and the CIA. The agent had signed two contractual agreements to not disclose any confidential data or to publish material about the CIA without CIA review.²¹³ The Court noted that the agent had “deliberately misled CIA officials into believing that he would submit the book for prepublication clearance.”²¹⁴ In upholding the trial court’s establishment of a constructive trust for the government of all profits made from the agent’s book, the Court focused on the unique relationship between agents and the CIA, and on the special role of trust in that particular government operation. The Court indicated that an agent’s publication of even unclassified data could cause those in the CIA’s operative web to have doubts about the government’s ability to protect their identity and such disclosures could be “detrimental to vital national interests.”²¹⁵ It was in light of this special trust relationship, the two specific contracts in which the agent waived his First Amendment rights, and what the Court termed the CIA’s role as “essential to the security of the United States and—in a sense—the free world” that the Court upheld the trial court’s finding that the agent violated the terms of his employment contract with the CIA and upheld the constructive trust.²¹⁶ As important as the anonymity of parents and children in dependency proceeding is, it does not rise to the level of national security found in the *Snepp* case. In addition, the underlying rationale of the close and long-term “trust-relationship” in *Snepp* does not exist between the juvenile court judge and mere spectators in the courtroom. Unlike the two contracts that the agent signed waiving his First Amendment rights for the benefit of securing his job, the blanket group admonition and the presumption that all courtroom spectators have waived their First Amendment rights under the Arizona statute provide no similar assurance of the voluntariness or knowing waiver found in *Snepp*.

Further, the court is only mandated to issue the admonition at the beginning of each hearing, and this single admonition insufficiently protects children’s privacy rights because people frequently enter dependency hearings well after a case is first called to bench.²¹⁷ Assuming, arguendo, that a legislature can craft a blanket waiver that meets constitutional muster, one of two additional procedures is necessary to sufficiently protect children’s privacy. The rule must either provide that no one may enter a dependency hearing after the judge has given the blanket waiver notice, or the judge must be required to give the waiver notice each time a person enters the courtroom after the judge’s initial blanket waiver. Anything less is meaningless because someone with intent to

212. 444 U.S. 507 (1980).

213. *Id.* at 510.

214. *Id.* at 508.

215. *Id.* at 510-13.

216. *Snepp*, 444 U.S. at 512 n.7.

217. See Patton, *supra* note 205, at 58-59.

disclose confidential identifying data need only enter the trial after the group admonition in order to avoid the court's contempt power.

In addition, an overbroad or vague statute which contains a waiver provision is still arguably constitutionally infirm because the government is prohibited from "do[ing] what it may not do."²¹⁸ Thus, the government may not promulgate a statute that chills the right to free speech by its vagueness, and then justify that statute by having citizens waive their First Amendment rights. The Arizona statute's definition of "personally identifiable information" is constitutionally suspect because it is at once both under inclusive and vague.²¹⁹ It is under inclusive because its catalogue does not list all factual disclosures that might enable the general public to identify the child abuse proceeding participants. For instance, some of the data that the press disclosed in the examples above included the name of a relative not attending the hearing, the name of the child's school and/or teacher, the church attended, or unusual facts discovered in a parallel criminal case based upon the same child abuse allegations.²²⁰ Does the Arizona statute prohibit publication of that data?

The Arizona statute is vague because there is no way for a court spectator to know whether "any other distinguishing characteristic" will tend "to identify a particular person."²²¹ How can someone who attended the hearing know of other data that another source has released, which when added to the spectator's disclosure, could lead to the identification of a party in the dependency case? The Arizona standard is unfair, unworkable, and unconstitutionally vague. A number of United States Supreme Court opinions have stricken statutes that restrict speech based upon the vagueness of the definition of the conduct prohibited. For instance, in *Miller v. California*,²²² the Court analyzed a vague definition of "obscenity," and in *Federal Communications Commission v. Pacific Found*,²²³ the Court was troubled with the vagueness of the term "indecent." The Court has also found that vagueness violates procedural due process because it is fundamentally unfair to punish a person based upon a statute that is "so vague, indefinite and uncertain" that one cannot determine what is prohibited.²²⁴

Vagueness on the face of the statute can void the law if people "of common intelligence must necessarily guess at its meaning and differ as to its

218. *Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976); *see also Parke v. Raley*, 506 U.S. 20, 28-29 (1992) (noting living on Indian reservation insufficient waiver of constitutional rights); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 949 (1984).

219. ARIZ. REV. STAT. § 8-526 (2004).

220. *See supra* notes 122-146 and accompanying text (providing examples of information press has disclosed).

221. ARIZ. REV. STAT. § 8-526.

222. 413 U.S. 15, 23-24 (1973).

223. 438 U.S. 726 (1978).

224. *Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939).

application.”²²⁵ There are two evils that vague statutes permit: (1) unfairness due to a lack of specific notice; and (2) arbitrary and discriminatory governmental enforcement.²²⁶ In the free speech area, a third evil, namely the chilling of free speech, is another consideration of vague legislative proclamations.²²⁷ As the Court has stated, “[t]hose . . . sensitive to the perils posed by . . . indefinite language, avoid the risk . . . only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.”²²⁸ Moreover, Professor Tribe has noted, “the Supreme Court requires more specificity of a statute potentially applicable to expression sheltered by the First Amendment than in other contexts.”²²⁹

One might argue that Arizona’s open court statute is inapplicable to First Amendment analysis because spectators only have a conditional right to attend the dependency hearing, not a presumptive right as in criminal proceedings. Such an analysis is too simplistic. First, as discussed above, the vagueness of the statute might “chill” an attendee’s desire to publish facts that might not be prohibited under the statute and that are therefore part of that attendee’s First Amendment Right. In addition, the statute does not differentiate between confidential facts that an attendee might have carried into the dependency hearing and facts discovered independent of the hearing, but that were also disclosed in the proceeding. Does the Arizona statute proscribe the publication of data gleaned from other sources even though the attendee heard identical identifying data in the hearing? If so, it runs afoul of other United States Supreme Court opinions that have held that the government may not punish confidential facts discovered outside of confidential judicial proceedings.²³⁰ If not, the statute is infirm because its vagueness might be interpreted as denying attendees the right to publish any identifying data gathered in the hearing even if they independently discover that same information; this would create an illegitimate chilling effect.

For instance, in *Oklahoma Publishing Co. v. District Court*,²³¹ the Court struck down a state court injunction prohibiting publication of the name and photograph of a young boy being tried as a delinquent.²³² The Court permitted some media to attend the hearing even though hearings were closed to the

225. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *see Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Lambert v. California*, 355 U.S. 225, 229 (1957).

226. *Grayned v. Rockford*, 408 U.S. 104, 108 (1972); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972).

227. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1034 (2d ed. 1988).

228. *Id.* (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

229. *See id.*

230. *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001); *Okla. Publ’g Co. v. Dist. Ct.*, 430 U.S. 308, 309 (1977).

231. 430 U.S. 308 (1977).

232. *Id.* at 308.

public by a state statute.²³³ The Court found the injunction unconstitutional because “once the truthful information was ‘publicly revealed’ or ‘in the public domain’ [as it was when the media learned the juvenile’s name from other sources] the court could not constitutionally restrain its dissemination.”²³⁴ Additionally, in the Court’s most recent opinion on constitutional overbreadth, *Virginia v. Hicks*,²³⁵ the Court renewed its earlier holdings that “[t]he showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute’s plainly legitimate sweep . . . suffices to invalidate *all* enforcement of that law.”²³⁶ The Court noted that the problem with a case-by-case test of a statute versus a facial challenge based on overbreadth is that many people will just “choose simply to abstain from protected speech.”²³⁷ The Court in *Hicks* did not find the trespassing statute overbroad because it did not deal with a curtailment of speech, but rather with “nonexpressive conduct,” that is, a trespass.²³⁸ The Arizona statute, however, clearly concerns a curtailment of speech.

Another major deficiency with the Arizona statute’s attempt to protect the confidentiality of child abuse victims is that it does not protect against a courtroom spectator giving information gleaned at the hearing to a media source who can then legally publish that data. Assume for the moment that the Arizona statute can withstand attacks based upon inadequate waivers of First Amendment rights, under-inclusiveness, and vagueness, what can the state do to prevent the disclosure of information which is illegally gained from the child dependency proceeding? The Court’s most recent answer is found in *Bartnicki v. Vopper*,²³⁹ in which anonymous persons who illegally intercepted cellular telephone conversations delivered that information to a newspaper that published the it.²⁴⁰ Several factual conclusions were critical to the Court’s holding that the press could not be punished for publishing this information. These conclusions were that: the press “played no part in the illegal interception;” the press obtained the data “lawfully, even though the information itself was intercepted unlawfully by someone else;” the data concerned “a matter of public concern;” and the statute was “content-neutral” because it forbid the interception of all data, not just data concerning a specific content.²⁴¹ In holding the application of the statute to the media

233. *Id.* at 309-10.

234. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979) (quoting *Okl. Publ’g Co.*, 430 U.S. at 311). The Court has upheld protective orders that have expressly excluded statements “gained by means other than” the court process. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984).

235. 539 U.S. 113 (2003).

236. *Id.* at 119 (internal quotation omitted) (renewing prior holdings involving punishment of free speech).

237. *Id.* (noting problem with case-by-case approach).

238. *Id.* at 123 (reiterating *Hick*’s conduct—not speech—punished).

239. 532 U.S. 514 (2001).

240. *Id.* at 518 (setting forth facts surrounding intercepted cellular call).

241. *Id.* at 514-25 (discussing factors attributed to Court’s holding). *See generally* Jennifer Nichole Hunt,

unconstitutional, the Court concluded that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”²⁴²

The hypothetical under the Arizona statute in which a spectator to the dependency proceeding passes along information discovered at the hearing to the press raises a few interesting issues under the *Bartnicki* test. As in *Bartnicki*, the hypothetical press received illegally obtained data and the press was not involved in the illegal interception of that data. The issue of whether the dissemination of identifying information about child abusers and abused children is data that concerns “a matter of public concern” is a closer matter. Clearly, the public has an interest in knowing whether child abusers live in their community. In fact, in criminal child abuse trials the public has a right to attend, and if the parent in the same child dependency case is criminally prosecuted, the public and press can learn their identity in the criminal trial.²⁴³ The state’s attempt to shield the identity of the abused child, however, should at least be strong evidence of the state’s determination that the information is not of public concern. Therefore, if the identity of the abused child is held not to be of public interest, there is a colorable argument that under the first three elements in *Bartnicki* that the press could be held in contempt for publishing the identifying data.

The Illinois Supreme Court in *In re Minor*,²⁴⁴ held that a statute forbidding the news from publishing the name of a juvenile derived from watching the dependency proceeding did not constitute a prior restraint.²⁴⁵ The court reasoned that the protection of the abused child from the “probability of irreparable adverse [psychological] effects” constituted a “compelling State interest” that outweighed the public importance of having abused children’s names published.²⁴⁶ The *Minor* opinion, however, was based upon the independent state constitutional right of children’s right to privacy, which the court found to be a compelling one.²⁴⁷ The Illinois Supreme Court found that an independent state constitutional provision provided that every person has a constitutional right to “find a certain remedy” to protect one’s privacy, and held

Bartnicki v. Vopper: Another Media Victory or Ominous Warning of a Potential Change in Supreme Court First Amendment Jurisprudence?, 30 PEPP. L. REV. 367 (2003); *Leading Cases*, 115 HARV. L. REV. 406 (2001); Paul M. Smith & Nory Miller, *When Can the Courts Penalize the Press Based on Newsgathering Misconduct?*, 19 COMM. LAW 1 (2001) (discussing *Bartnicki* case).

242. *Bartnicki*, 532 U.S. at 516.

243. *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 10 (1986); *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984); *Globe Newspapers Co. v. Super. Ct.*, 457 U.S. 596, 606-07 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

244. 595 N.E.2d 1052 (Ill. 1992). Courts in Connecticut and Maryland have also had cases concerning whether court orders forbidding publication of identifying juvenile dependency data constitutes prior restraint.

245. *Minor*, 595 N.E.2d at 1056-67. See generally *In re Brianna B.*, 785 A.2d 1189 (Conn. 2001); *Baltimore Sun Co. v. Maryland*, 667 A.2d 166 (Md. 1995).

246. *Minor*, 595 N.E.2d at 1056.

247. *Id.*

that the statute prohibiting the publication of abused children's names was a constitutionally permissible remedy to perfect the independent state constitutional right to privacy.²⁴⁸ Although *Minor* has little from which other states may generalize because of its grounding in the Illinois Constitution, it does provide support for the minimal public importance of publishing child abuse victims' names.

It is the fourth element of *Bartnicki*, content neutrality, that takes our hypothetical and the Arizona statute out of *Bartnicki*'s applicability. *Bartnicki*, unlike previous cases, focused so heavily on the public concern of the content of the media's disclosure because the statute was content neutral, and therefore only required intermediate scrutiny in determining its constitutionality.²⁴⁹ "With intermediate scrutiny, the court need only inquire as to whether the regulation is 'narrowly tailored to serve a significant government interest, and [whether it] leave[s] open ample alternative channels of communication [of the information].'"²⁵⁰ Thus, if the Arizona statute were content neutral, the finding that the state's interest in protecting the anonymity of child abuse victims might be sufficient to uphold a statute that holds the press in contempt for publishing that data even if it had no role in illegally procuring it.

The Arizona statute, however, is not content neutral because it singles out particular data that is prohibited from being published. Therefore, rather than the intermediate level of scrutiny, the Arizona statute is subject to the strict scrutiny test, requiring the statute to be: "(1) narrowly tailored, to serve (2) a compelling state interest."²⁵¹ Under the strict scrutiny standard, the Court has on several occasions held that states' attempts to protect the identity of rape victims and juveniles are unconstitutional, and *Bartnicki* indicated that those earlier cases were distinguishable from its newly announced standard in content neutral intermediate scrutiny cases.²⁵² Chief Justice Rehnquist, in his dissenting opinion, listed the Court's earlier content specific cases overruling such state statutes based upon strict scrutiny:

[T]ruthful information—the name of a rape victim, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 . . . (1975), the confidential proceedings before a state judicial review commission, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 . . . (1978), and the name of a juvenile defendant, *Daily Mail* [443 U.S. 97 (1979)]; *Oklahoma*

248. *Id.*

249. RODNEY A. SMOLLA, LAW OF DEFAMATION § 10:56.50 (2d ed. 2001). See generally *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (affirming appeals court decision that relied on only intermediate scrutiny).

250. Katy J. Lewis, *Bartnicki v. Vopper: A New Bully in the Schoolyard of Private Expression*, 70 TENN. L. REV. 859, 879 (2003) (quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)).

251. *Republican Party of Minn. v. White*, 536 U.S. 765, 775 (2002); see *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 188 (5th Cir. 2000).

252. *Bartnicki*, 532 U.S. at 524-26; *id.* at 545-47 (Rehnquist, C.J., dissenting).

Publishing Co. v. District Court, Oklahoma Cty., 430 U.S. 308 . . . (1977).²⁵³

Therefore, because the Arizona statute is content directed, unlike the case in *Bartnicki*, it must meet strict scrutiny. However, as demonstrated above, the statute is not “narrowly tailored” because it chills permissible speech through vagueness, and proscribes all disclosures by those attending the hearing regarding “identifying information” even if that data is discovered independent of the juvenile dependency proceedings. Finally, the Arizona statute provides insufficient protection to abused children because the press can constitutionally publish illegally obtained data from the child abuse proceeding as long as the media is not involved in the illegal acquisition of the confidential court data.

IV. CONCLUSION

The decision whether or not to open juvenile dependency proceedings to the press and public is a serious public policy question that requires, at a minimum, a cost/benefit analysis.²⁵⁴ The following chart summarizes the cost/benefit variables discussed in the National Center for State Courts’ Report of the Minnesota Open Court Project:

COST/BENEFIT ANALYSIS	
BENEFITS	BURDENS
<p>1. SYSTEM ACCOUNTABILITY: Little or no change</p> <p>2. PUBLIC AWARENESS & EDUCATION: A. “Virtually No Effect” B. Little Attendance</p> <p>3. PRESS COVERAGE: A. Little Attendance B. Distorted/Sensational Reports C. Few Public Policy Issues</p> <p>Result: VERY FEW BENEFITS</p>	<p>1. PSYCHOLOGICAL HARM TO CHILD ABUSE VICTIMS: A. Post Traumatic Stress Disorder: 39%-54% B. Developmental Victimology: 1. Guilt 2. Shame 3. Stigmatization 4. Hinder therapy</p> <p>Result: SERIOUS PSYCHOLOGICAL HARM</p>

More than two-thirds of states have closed juvenile dependency courts, and

253. *Id.* at 545 (Rehnquist, C.J., dissenting).

254. In *United States v. Carroll Towing Co.*, Judge Leonard Hand gave popular expression to legal cost/benefit analysis. 159 F.2d 169, 173 (2d Cir. 1947). Judge Hand postulated a system of multiplying the likelihood of harm (P) times the foreseeable result (L) and comparing it with the burden of avoiding the harm(B): P X L > B. *Id.* Only if P X L is greater than B would the action be worth the cost to undertake it. *See id.*

most grant the court discretion to admit the press and other legitimately interested persons.²⁵⁵ A statutory scheme that creates a presumption of closed dependency hearings but which grants the parties and the court discretion to admit interested individuals is the best model for at least three reasons. First, it empowers the abused child by providing the child with an active part in deciding whether the media will publicly disclose his or her abuse. Second, it requires interested parties seeking access to articulate their rationale so that only legitimately interested individuals will be permitted access. Finally, unlike a presumptively open system that strips courts' power to prevent disclosure of embarrassing private facts gleaned in the hearing, a presumptively closed system provides the court with a deterrent mechanism should a media representative publish identifying details regarding an abused child. As such, the next time such a journalist applies for court admittance, the trial judge may deny admittance, and instead place the burden on that reporter or on that media source to send a more responsible substitute reporter to court. Therefore, considering the costs and benefits, the presumptively closed hearings provide the public and press access to dependency proceedings in a way that holds the system accountable and provides abused children needed protection. This has been exemplified in California, whose presumptively closed court system has produced many prize winning media reports which have brought the facts necessary for accountability to the public without sacrificing the psychological health of that state's abused children.²⁵⁶

One branch of government that has seldom been mentioned in the open juvenile dependency court debate is the judiciary. First, we should determine why a majority of judges support closed hearings. The NCSC Report found

255. See CAL. WELF. & INST. CODE § 346 (West 2004).

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

Id.

256. A number of prize-winning features on the dependency system by California journalists include articles by the Daily Journal Staff writer, Cheryl Romo. See Associated Press News Executive Council, *The 2003 APNEC Winners*, at http://www.haleisner.com/from_field/0512_apnec.htm (last visited Feb. 25, 2005); Children's Advocacy Institute, University of San Francisco School of Law, *Price Child Health and Journalism Awards*, at <http://www.cachildlaw.org/Awards.htm> (last visited Feb. 25, 2005). In addition, dozens of investigative stories have been written about California's child protection system based upon giving responsible media access to the court. Numerous other prize-winning articles and books have been written in other presumptively closed or usually closed systems. For instance, the *South Florida Sun-Sentinel* "received top honors in a national journalism contest for its series of stories last year examining the failures of Florida's child welfare agency in keeping track of hundreds of foster children." *Sun-Sentinel Wins Award For Foster Care Investigation*, S. FLORIDA SUN-SENTINEL, May 4, 2003, at 3B. "Dorothy Rabinowitz of the Wall Street Journal won the Pulitzer Prize in 2001" for a discussion of child abuse and child abuse accommodation syndrome. Interview by Scott Simon, National Public Radio, with Dorothy Rabinowitz (May 31, 2003), available at 2003 WL 9200505; see also Howard Kurtz, *Sept. 11 Attack Coverage Dominates Pulitzer Prizes*, WASH. POST, Apr. 9, 2002, at A01 (identifying Sari Horwitz, Scott Higham and Sarah Cohen as winners of 2002 Pulitzer Prize for series of stories on neglect and death of children in child care system).

that fewer than half of the judges polled favored an open court system, and only five judges changed their opinion based upon a year of litigating cases in the Minnesota Open Court Pilot Project.²⁵⁷ We need further research to discover the underlying reasons for these judges' conclusions. It is clear that some support for an open court system is based upon judges' frustration at being the target of public ire, and over the inability to explain cases based upon confidentiality rules. The California Judicial Council, a constitutional body responsible for California court procedures, stated the basis of its support for open hearings was that "[i]t would instill the perception that there is nothing to hide and therefore place the court (and the entire child welfare system) in a more favorable light."²⁵⁸ But it is not enough for a judge to merely accept or reject an open or closed court model, judges have an ethical responsibility to educate the public about the child dependency system. The American Bar Association's Model Code of Judicial Conduct Canons 4(B) and 4(C) state that judges have an affirmative duty to speak to the public on "the law, the legal system, [and on] the administration of justice" and to comment on possible revisions to the juvenile justice system.²⁵⁹ When was the last time you heard a juvenile court judge on television, the radio, or in a general circulation newspaper explain the nature of the dependency system and the reasonable modifications and budget supplements that would substantially improve the system? There are only two reasons for the juvenile court's absence from the media: judges have failed to fulfill their ethical responsibility to educate the public or the media has refused judges access to news sources.²⁶⁰

Finally, a better working relationship between the juvenile dependency courts and the press is in children's best interest. Even though judges may be conflicted between their duty to educate the public and fear and/or embarrassment of systemic disclosures, and even though the press is conflicted between ethical reporting and financial solvency and personal fame, there is no reason why a better working relationship cannot be fostered. If the press really wants access to help the public improve the plight of abused children, the answer is not to open all the hearings. Rather, the answer is to create a close reciprocal working relationship between juvenile court judges and the press. In that way the press will become sufficiently expert in the legal process and will be admitted to the hearings when necessary to view and report upon that system. Abused children will benefit both from such confidentiality and from the investigative press reports. Whichever system a state chooses, the media should adopt the UNICEF Principles: "Do not publish a story or image which

257. NCSC Report Vol. 1, *supra* note 6, at vii, 92.

258. Mike McKee, *An Eye on the Kids*, RECORDER, Aug. 21, 2003.

259. MODEL CODE OF JUDICIAL CONDUCT Canon 4(B)-(C) (2003).

260. See Judge Leonard Edwards, *Confidentiality and the Juvenile and Family Courts*, 55 JUV. & FAM. CT. J. 1, 10-11 (2004) (describing Los Angeles Superior Court's attempts to promote interaction between judges and media).

might put the child, siblings or peers at risk even when identities are changed, obscured or not used . . . [and] do not further stigmatize any child [or report facts which will result in] rejection by their local communities.”²⁶¹

261. UNICEF, *supra* note 75.