Who Should Hold the Key?
An Analysis of Access and Confidentiality in Juvenile Dependency Courts

I. Introduction

A small child enters a courtroom to face the people that have subjected her to sexual and physical abuse. As she takes a seat she steals a glance at her abusers. She cannot help but look, for her abusers are her parents. She turns her head to hide her tears, and also, the stove coil-shaped burn marks that have been branded upon her face. Should the public and the media be permitted to enter the courtroom to capture this heart-wrenching scene? Or should the proceeding be cloaked in confidentiality? The answer depends on the state in which the proceeding is being held.[1] In recent years a debate has been raging among scholars and practitioners as to whether states should adopt a presumption of open access or confidentiality in juvenile dependency courts.[2] The policy adopted by a particular state has a distinct impact on its dependency proceedings.[3] Whether the impact is positive or negative is at the very core of the debate. Allowing the public access to dependency court hearings removes the cloak of confidentiality but at what cost to the child?

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[1] Barbara White Stack, *The Trend Toward Opening Juvenile Court is Now Gaining Momentum*, Pittsburgh Post-Gazette, Sept. 23, 2001, at A1. Rules governing access to juvenile proceedings vary by state. *Id.* For example, California's juvenile dependency proceedings are presumed closed while Oregon's proceedings are presumed open. *Id.*

[2] *Id*.

[3] Lynne Tucker, *Open or Closed: A survey of the opinions and the realities of opening Juvenile Court dependency proceedings*, Nov. 2000, http://www.childwelfare.net/activities/interns/2000summer/OpenCourts/. If proceedings are open, the media and community members have access to viewing the difficult and often traumatic issues dealt with in dependency courtrooms. It has been noted that opening proceedings to the public did not disrupt the flow of the court system as many had feared. *Id.* at 1. A Michigan judge worried that if the system was opened, "the sky would fall" but noted that once it was opened "it didn't." *Id.* Witness of open proceedings in Minnesota noted that members of the public are only "interested in high-profile cases." *Id.*

Too often, in scholarly debates over the most efficient court procedures, the focus is taken off of those for whom dependency proceedings were created.[4] The children and their needs are too easily forgotten. When developing court access procedures is important to bear in mind the tragic circumstances that bring children into dependency courtrooms. As former foster child and current lawyer Andrew Bridge said, "[w]e ought to remember what we asked of the children along the way: we expected them to endure unfathomable loneliness, possess courage few of us have, and in the end, outlast every assault a heart can take."[5]

The purpose of this comment is to take an in-depth look at each side of the debate; analyzing states that have open court proceedings in juxtaposition with those that have proceedings that are presumed closed. Part II discusses the structure and history of dependency courts.[6] Part III sets out the limited federal law in this area.[7] Part IV analyzes different state approaches to juvenile court access.[8] Part V describes the impact of court access rules on the area of juvenile law [9] and Part VI concludes the comment.[10]

II. The Dependency Court System

Before undertaking an analysis of the preferred system of access to juvenile dependency courts, it is important to discuss what transpires within dependency courtrooms. Dependency

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[4] *See Id.*

[5] Andrew Bridge, Address at the 2001 Adoption Day in Los Angeles County (July 28, 2001), *available at* http://www.courtkids.org/adoption/index.html.

[6] *See infra* notes 11-19 and accompanying text.

[7] *See infra* notes 20-46 and accompanying text.

[8] *See infra* notes 47-232 and accompanying text.

[9] *See infra* notes 232-83 and accompanying text.

[10] *See infra* notes 284-88 and accompanying text.

proceedings are those involving children under eighteen years of age who have been the subject of physical or sexual abuse, neglect, or abandonment.[11] In dependency cases, it is the child's parent or guardian that has allegedly committed the acts of abuse or neglect.[12] To initiate a dependency proceeding, a petition is filed by the local child welfare department against at least one parent or guardian and the child becomes a dependent of the court.[13]

The specific manner in which dependency proceedings are conducted depends largely on state laws and run the gamut from hearings held in a designated courtroom within the main courthouse to an entirely separate court dedicated solely to dependency cases.[14] Los Angeles County was the first in the nation to develop a separate, "child-sensitive" courthouse to hear dependency matters.[15] The courthouse in Los Angeles is a recent development in the history of juvenile dependency courts.

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[11] L. Ernestine Fields, *What is Dependency Court?*, COMFORT FOR COURT KIDS, INC., http://www.courtkids.org/whatisdependcourt.html (last visited Jan. 4, 2006). Dependency court proceedings are distinctly different from juvenile offender proceedings. In dependency court, the child is the victim, not the offender. The terms "juvenile court" and "children's court" are often used to describe both dependency and delinquency hearings. *Id.*

[12] *Id.*

[13] *Id.* Petitions are filed by the local child welfare department and describe the alleged abuse or neglect and the particular state statute that the parent or guardian is accused of violating. Pending the disposition of the petition, the child may or may not be removed from the parent or guardian's home depending on the nature and severity of the situation. *See* Los Angeles County Department of Children and Family Services, *Frequently Asked Questions*, http:// http://dcfs.co.la.ca.us/faq.html (last visited Feb. 10, 2006).

[14] *See* Los Angeles Almanac, http://www.laalmanac.com/crime/cr57.htm (last visited Jan. 6, 2006).

[15] *Id.* Edmund D. Edelman Children's Court was opened in Monterey Park, California in 1992. The facility features courtrooms designed on a more child-friendly scale, colorful murals, and play areas. *Id.* In an attempt to further minimize the trauma associated with attending a court hearing, teddy bears are given to each child each time they attend a hearing in the courthouse. L. Ernestine Fields, COMFORT FOR COURT KIDS, INC., http://www.courtkids.org/mission.html (last

The first juvenile court in the United States was created in Illinois in 1899 and grouped delinquent and dependent children together.[16] The Illinois state statute that created the court mandated that a special courtroom be designated for juvenile proceedings.[17] This provision was understood as a type of confidentiality requirement and other states followed suit creating juvenile courts with confidentiality rules.[18] Today, juvenile dependency hearings may be open or closed depending on the state in which the case is being heard.[19]

III. Federal Law and Juvenile Dependency Courts

Dependency law is largely a creature of state statute.[20] However, certain federal acts such as the Child Abuse Prevention and Treatment Act[21] and the Adoption Assistance and Child Welfare Act[22] set out rules that affect the way that matters are conducted in dependency courts. These acts and their effect on confidentiality in dependency proceedings will be analyzed in turn.

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visited Jan. 4, 2006). The teddy bears are used as a source of comfort for the children and also by court officers to aid the child in testifying. *Id.*

[16] Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 30 (2001).

[17] *Id*. at 31. The decision to create a separate courtroom in the first juvenile court reflected the belief that "confidentiality was critical to rehabilitation and treatment. Only if children escaped the stigma of public knowledge, the juvenile court founders reasoned, could they leave behind their troubled pasts." Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155 (1999).

[18] *Id.* "By 1939, a substantial number of states had some confidentiality provisions concerning their juvenile courts." *Id*. at 32.

[19] Stack, *supra* note 1, at A1.

[20] Tucker, *supra* note 3. "The laws governing court confidentiality within the child abuse and neglect system are almost exclusively governed by state statutes." *Id.*

[21] Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5101 (2003).

[22] Adoption Assistance and Child Welfare Act (AACWA), 42 U.S.C. § 670 (2003).

A. Child Abuse Prevention and Treatment Act

The Child Abuse Prevention and Treatment Act (CAPTA) was enacted in 1974.[23] The Act was born out of concern of a child abuse epidemic in the United States and fueled by a Congressional finding that approximately 900,000 children in America are victims of abuse and neglect each year.[24] CAPTA provided for the establishment of an Office on Child Abuse and Neglect to oversee and carry out the functions of the Act.[25] In addition, the Act mandated the establishment of an advisory board to make recommendations to lawmakers concerning child abuse and neglect issues[26] and a national clearinghouse for information relating to child abuse.[27]

States may apply for grant monies under CAPTA to be used to fund child abuse prevention and treatment programs and to train volunteers and employees of such programs.[28] In order to receive such funds from the federal government, CAPTA requires that the state make a showing that they maintain complete record confidentiality "in order to protect the rights of the child and of the child's parents or guardians."[29] From this language it is apparent that the

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[23] 42 U.S.C. § 5101 (2003). The Act has been amended six times since its enactment, most recently in 2003. *Id.*

[24] *Id.*

[25] *Id.*

[26] 42 U.S.C. § 5102 (2003).

[27] 42 U.S.C. § 5104 (2003). The National Clearinghouse on Child Abuse and Neglect Information that was mandated by CAPTA can now be accessed by the public on the internet. National Clearinghouse on Child Abuse and Neglect Information, *Gateways to Information: Protecting Children and Strengthening Families*, http://nccanch.acf.hhs.gov (last visited Jan. 16, 2006).

[28] 42 U.S.C. § 5106(a) (2003).

[29] *Id*. Under this provision, records shall only be made available to: persons in the report; child abuse citizen review panels; child fatality review panels; government agencies which need such

drafters of the Act were concerned with possible harmful effects on the child if information contained in his or her court records were to be made public.

Though CAPTA makes a clear requirement of record confidentiality, it was not always so clear on the issue of public access to juvenile proceedings.[30] Before the 2003 amendments were in place, the Act was silent on the issue of the confidentiality of court proceedings.[31] This statutory silence allowed states to "continue receiving federal funding while conducting open hearings."[32] In 2003, the statutory silence was shattered by an amendment that made it clear that it is up to the states to determine whether the public should be allowed access to child abuse and neglect proceedings.[33] The Act now states that "[n]othing in subparagraph (A) shall be construed to limit the State's flexibility to determine State policies relating to public access to court proceedings to determine child abuse and neglect, except that such policies shall, at a minimum, ensure the safety and well-being of the child, parents, and families."[34] Though the ball is placed firmly in the state's court to decide whether proceedings should be open or closed,

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information to carry out their duty to protect children from abuse and neglect; grand jury or court upon a finding that the information is needed to determine an issue before the court; other individuals or entities authorized by state statute to receive the information pursuant to a legitimate state purpose. *Id*. This record confidentiality provision illustrates the federal position that only those immediately concerned with the protection of children from abuse should be given access to the records of such cases.

[30] Tucker, *supra* note 3.

[31] *Id.*

[32] *Id.*

[33] 42 U.S.C. § 5106(a) (2003).

[34] *Id*. The quoted portion of the statute refers to subsection (A) which outlines the requirements that a state must meet in order to receive funds under the Act. *Id.*

the drafters included specific language to emphasize that the well-being of the child and his or her family should be of paramount importance.

B. Adoption Assistance and Child Welfare Act

The Adoption Assistance and Child Welfare Act (AACWA) is another federal act which places some restriction on the confidentiality of child abuse and neglect issues.[35] AACWA was enacted in 1980 with the goal of providing sufficient resources to the foster care system and ensuring that children did not languish for years in the system without a permanent plan or placement.[36] The Act emphasizes family preservation and reunification and requires that the state make "reasonable efforts" to reunify children with their families when possible or to move them to permanent adoptive homes.[37] The Act also provides for state funding if the state develops a plan for foster care and adoption assistance in accordance with the guidelines set out in the Act.[38]

In order to receive funding under the Act, the state must put into place safeguards "which restrict the use of or disclosure of information concerning individuals assisted under the State plan."[39] This confidentiality safeguard ensures that information about children and families

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[35] 42 U.S.C. § 671 (2003).

[36] MaryLee Allen & Mary Bissell, *Safety and Stability for Foster Children: The Policy Context*, 14 CHILDREN, FAMILIES, AND FOSTER CARE 1, 50 (2004), *available at* http://www.futureofchildren.org/usr_doc/vol_14_no_1_no_photos.pdf.

[37] *Id.* Following the enactment of AACWA, the term "reasonable efforts" was the source of much confusion as some took it to mean that a child must remain in his or her home even if the situation was far from ideal. *Id.* at 53-54. In 1997, the Adoption and Safe Families Act was passed which clarified the term "reasonable efforts" emphasizing that "nothing in federal law requires a child to remain in or be returned to an unsafe home." *Id.* at 53.

[38] 42 U.S.C. § 671 (2003).

[39] *Id.*

served by the Act is not disseminated to the general public.[40] The information may only be released for purposes directly connected with the administration of the state's foster care plan, for purposes of criminal investigations, and as part of investigations of reported child abuse.[41] This confidentiality provision is another example of the drafters of a federal act taking care to put the safety and well-being of the child at the forefront.[42] By restricting the release of information, the Act ensures that states do not place the identities and personal information of children before the public eye.[43] If a state wishes to forego these requirements they risk losing their federal funding for foster care programs due to non-compliance with the Act.[44]

Furthermore, though this Act does not specifically mention whether the proceedings themselves may be made public, the confidentiality provision provides some insight into the drafter's intent.[45] Because confidential identifying information about the child and his or her family is read at abuse and neglect proceedings, it follows that the public should not be present to hear such information. It seems contradictory to adhere to a requirement of record confidentiality yet allow the public access to the courtroom during dependency proceedings. Because both the AACWA and CAPTA do not specifically prohibit open court proceedings,

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[40] *Id.*

[41] *Id.* The Act explicitly notes that states are free to create more restrictive confidentiality requirements and "in the case of adoptions, prevent disclosure entirely." *Id.*

[42] *See id.*

[43] *Id.*

[44] Tucker, *supra* note 3. "It is not likely that any state would find it financially feasible to relinquish their federal funding as these monies usually comprise a substantial part of the state's operating budget for the child welfare system." *Id.*

[45] 42 U.S.C. § 671 (2003).

states have been able to open the doors of their dependency courtrooms yet continue to receive federal funding under these acts.[46]

IV. State Approaches to Juvenile Dependency Court Access

Because federal law does not specifically address the issue of access to dependency court proceedings, states have been free to develop their own systems.[47] Analyzing several of the diverse state approaches will provide a framework from which to analyze which system provides the most protection for abused and neglected children.[48]

A. Let the Sunshine In: States with Open Court Provisions

1. Florida

For members of the public seeking access to dependency court proceedings, Florida truly is the Sunshine State.[49] In Florida, juvenile dependency proceedings, except those to terminate custody, are presumed open to the public.[50] The section that follows will analyze the development of Florida's open court policy and its impact on the state and its children.

a. Here Comes the Sun: The Florida Open Court Policy

[46] *Id.*

[47] Tucker, *supra* note 3.

[48] Protection of abused and neglected children will be the central focus of such analysis. The federal acts described above make it clear that the health, safety, and emotional well-being of the child is paramount and should be taken into account by states when developing specific policies and procedures governing child abuse and neglect proceedings. *See supra* text accompanying notes 23-46.

[49] Florida is one of twelve states with open proceedings. *See* Barbara White Stack, *States That Have Open or Closed Hearings*, Pittsburgh Post-Gazette, Sept. 23, 2001, at A1. The other states with presumptively open proceedings are: Colorado, Illinois, Iowa, Michigan, Minnesota, Nebraska, New Mexico, New York, North Carolina, Oregon, and Texas. *Id.* This article will discuss Florida and Oregon as representative examples of open court systems. *See infra* notes 49-155 and accompanying text.

[50] Stack, *supra* note 1, at A1.

Prior to a 1994 statutory amendment, Florida court hearings on the matters of unwed mothers, sexual abuse, and child custody were confidential and closed to the public.[51] However, legislators moved to remove the dependency system's veil of confidentiality and drafted an amendment which shifted Florida's policy to a presumption of openness.[52] The revised statute dictates:

> [a]ll hearings . . . shall be open to the public, and a person may not be excluded except on special order of the judge, who may close any hearing to the public upon determining that the public interest or the welfare of the child is best served by so doing.[53]

Though this amendment gives the public, including the media, much broader access to dependency proceedings, access is not absolute. It is important to note that the judge retains the discretion to close proceedings after a finding that it is in the best interest of the child or the public to deny public access.[54] Because the statute does not set out specific factors for judges to

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[51] 1994 Fla. Laws 164. Among the material deleted from the older version of the statute was the rule that "[a]ll hearings involving unwed mothers, custody, sexual abuse, or permanent placement of children shall remain confidential and closed to the public." *Id.* For other categories of hearings, it was within the judge's discretion whether to close it to the public.

[52] FLA. STAT. § 39.507(2) (2005).

[53] *Id.*

[54] *Id.* The 1994 amendment to this statute changed the language to emphasize that the judge must make a determination that the welfare of the child or public interest would be served by closing the proceeding. 1994 Fla. Laws 164. The inclusion of such language implies that the judge must make a particularized finding based on the facts of the case instead of basing the decision to close the proceedings on her own desire or opinion. This language likely was included to address the concern that judges may disagree with the open policy and close their proceedings at will. Requiring the judge to make a separate, on the record, determination takes some of the control out of the hands of the individual judge and makes the determination dependent on the facts of the case.

weigh in determining exactly when it would be in the best interest of the public or child to close the proceeding, some judicial discretion is permitted.[55]

In certain Florida cases, the public sun shall not shine at all. An exception to the presumption of openness is carved out by another section of the Florida statutes.[56] The statute declares that "[a]ll hearings involving termination of parental rights are confidential and closed to the public."[57] This statute does not provide for any judicial discretion or opportunity to open such hearings to the public.[58] The language is absolute and unwavering; hearings terminating parental rights are closed to the public.[59] Why has Florida decided to treat such hearings differently from other dependency proceedings? The answer to this question can best be explained by looking at a case that challenged this disparate classification.

In *Natural Parents of J.B. v. Florida Department of Children & Family Services*,[60] parents who were the subject of a dependency petition claimed that the Florida statute requiring

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[55] FLA. STAT. § 39.507(2) (2005). Because no such guidelines are given to judges in the statute, a case by case determination is necessary to protect the welfare of the child and the best interest of the public. Some situations may cry out for court closure because of their severity and the potential impact of public access on the child, while others may be more suited to public observation.

[56] *See* FLA. STAT. § 39.809(4) (2005).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] 780 So. 2d 6, 8 (Fla. 2001). The parents in this case initially moved to close all proceedings and to prevent any information about the case from being released. *Id*. at 7. They argued that it was "against the child's best interests to be exposed to the press and media." *Id.* At a later point, for reasons unreported, the parents reversed their position and began to argue that the statute closing TPR proceedings was unconstitutional. *Id*. at 8.

termination of parental rights (TPR) hearings to be closed was unconstitutional.[61] In affirming the validity of the statute, the Florida Supreme Court noted that the goal of a TPR hearing is to ensure the health and safety of the child and is not designed to punish parents.[62] The court emphasized that the interest in protecting the child takes precedence over any interest the state may have in punishing the parents.[63] Because TPR hearings may lead to the dissolution of the parent-child relationship, the mental state of the child may be especially delicate and in need of further protection.[64]

Another restriction on access in Florida can be seen in the state's records laws. By statute, all court records required to be kept for proceedings relating to children "shall not be open to inspection by the public."[65] The records may only be inspected upon an order of the court and only by "persons deemed by the court to have a proper interest" in the records.[66] The child, his parents, attorneys, and other similar parties to the case may always inspect and copy any record pertaining to the child.[67] The restriction on public access to case records serves as a protective barrier between the public and the child. While the public and the news media may be

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[61] *Id.*

[62] *Id*. at 11.

[63] *Id.*

[64] While the court does not elaborate on the nature of TPR hearings, one does not have to stretch very far to imagine the difficult issues faced by families in such hearings. Because TPR hearings dissolve "the legal ties between parent and child" they are informally referred to as the "death sentence" in Florida dependency courts. Amy Bennett Williams, *Shining Light on Child-court Cases: Campaigns to Make Kids' Plight Public*, NEWS-PRESS (FLA.), Jan. 8, 2006.

[65] FLA. STAT. § 39.0132(3) (2005).

[66] *Id.*

[67] *Id.*

entitled to attend certain dependency court proceedings,[68] this records provision ensures that they will not be able to scour the documents related to each case.[69]

In addition to hearings to terminate parental rights, adoption hearings under the Florida Adoption Act are to be closed to the public.[70] The statute requires that all adoptions hearings under the Act "shall be held in closed court without admittance of any person other than essential officers of the court, the parties, witnesses, counsel, persons who have not consented to the adoption and are required to consent, and representatives of the agencies who are present to perform their official duties."[71] Not only are the doors of these hearings closed to the public and to the media, the records of these hearings are similarly sealed.[72] An order of the court is necessary to inspect adoption records and birth certificates.[73] If the court denies an adoption petition, the statute does allow the petitioner to make public the reasons why the petition was denied.[74] This statute is another exception to Florida's open court policy and, like the statute closing TPR hearings, was the subject of litigation.

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[68] FLA. STAT. § 39.507(2) (2005).

[69] FLA. STAT. § 39.0132(3) (2005). Children come into the dependency court system because they are victims of some type of abuse or neglect. It follows then that the records of their cases contain intimate details of their lives.

[70] FLA. STAT. § 63.162(1) (2005).

[71] *Id.* This statute closes courtroom doors to the public during adoption hearings and limits access to those directly involved with the adoption.

[72] FLA. STAT. § 63.162(2) (2005).

[73] *Id.*

[74] *Id*.

In one case, a bitter custody battle ensued between the maternal and paternal grandparents of an orphaned girl.[75] The case, which had been covered extensively by the media, initially resulted in an adoption order in favor of the paternal grandparents.[76] However, because the child was unrepresented by counsel in earlier proceedings, the adoption order was set aside and an attorney ad litem appointed for the child for future hearings.[77] The child's attorney moved to close the proceedings and the trial court denied the motion holding that Florida Statute section 63.162(1) was unconstitutionally overbroad.[78] The case was eventually heard by the Florida Supreme Court which reversed the trial court and found the statute to be constitutional.[79] In reaching this decision, the court explained why the Florida legislature has treated adoption proceedings differently from other types of cases.[80] The court noted that in typical litigation, the court is a disinterested observer, given the task of resolving competing interests of the parties.[81]

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[75] *In re* Adoption of H.Y.T., 458 So. 2d 1127, 1128 (Fla. 1984).

[76] *Id.* Per Florida's open court law, the media and public had been allowed access to the initial dependency court proceedings. *See* FLA. STAT. § 39.507(2) (2005).

[77] *In re Adoption of H.Y.T.,* 458 So. 2d at 1128.

[78] *Id.* When the child's attorney moved to close the proceedings, the media protested claiming that "the policy underlying the statute was inapplicable to the facts of this case and that any right of privacy the child might claim had been waived." *Id.* The trial court sided with the media but reasoned its decision on constitutional grounds. *Id.* It held the statute closing adoption proceedings overbroad because it did not allow for discretion in its application. *Id.* The trial court declared that the media had a First Amendment right to access and should not be barred from the courtroom unless the constitutional right to a fair trial outweighed the media right to access. *Id.* The child's attorney appealed the decision and the Fifth District Court of Appeal certified the issue to be of great public importance and passed it directly on to the Florida Supreme Court. *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

In adoption cases, the court is not disinterested as it is charged with serving the best interests of the child.[82] This difference in court function and the statutes developed to handle adoption proceedings reflect "an overriding public policy of protecting from harmful publicity parties to and the subject to adoption proceedings."[83] In reaffirming the protectionist policy, the court drew a careful distinction between public interest and true public concern.[84] The court noted that public interest refers to issues that generate wide reader curiosity and satisfy the reader or viewer's desire for fascinating, or even scandalous, bits of information.[85] Matters of public interest may generate customers for the news media, but they are not equivalent to matters of true public concern. The court held that the Florida statute, as applied in this case, had the effect of minimally impairing the media's access to a story of public interest, but had no effect on its freedom to cover a matter of actual public concern.[86] The court ordered all proceedings to be conducted in compliance with the Florida statute.[87] According to this decision, a slight impairment of the media's ability to tell the next salacious story does not rise to the level of constitutional concern.

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[82] *Id.*

[83] *Id.* The parties to the adoption and the news media argued that any harm to be done to the child through media exposure had already been done by the coverage of the earlier proceedings. *Id.* at 1129. This is an interesting argument to say the least. In essence they attempt to justify further intrusion into the child's life by the fact that the intimate details of the case had already been exposed. It can be strongly argued that it is never too late to step in and try to protect a child from further exposure and the harm that may result from continued media coverage.

[84] *Id.*

[85] *In re Adoption of H.Y.T.,* 458 So. 2d at 1128 (citing Firestone v. Time, 271 So. 2d 745 (Fla. 1972)).

[86] *Id.*

[87] *Id.*

b. Are Florida Children Getting Sunburned?

The amount of Florida sunshine that is shed on a dependency proceeding depends largely on the nature of the case.[88] As we have seen, adoption proceedings, TPR hearings, and court records are presumptively closed to the public.[89] With these expansive exceptions to the rule, Florida's open court policy now resembles something close to legislative Swiss cheese. Florida legislators have declared it necessary to protect the children from the public eye when they are being adopted and when their parents lose their rights to them.[90] They have also determined that it is important to shield the children's records from the outside world.[91] It is clear from the exceptions carved into the rule that Florida lawmakers want to protect children. Why then, must the pain on the children's faces be open for viewing?

The Florida Supreme Court even presents a compelling argument for closed juvenile dependency proceedings.[92] In *Natural Parents of J.B.*, the court devotes much of its opinion to discussing closed court policies.[93] The court says, "we do not agree that the presumption of openness in criminal proceedings is or should be extended to juvenile proceedings. The foundation of the juvenile system is to 'preserve and promote the welfare of the child,' which makes a juvenile proceeding fundamentally different from an adult criminal trial."[94] The court

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[88] *See* FLA. STAT. §§ 39.0132(3), 39.507(2), 39.809(4), 63.162(1) (2005).

[89] FLA. STAT. §§ 39.0132(3), 39.809(4), 63.162(1) (2005).

[90] FLA. STAT. §§ 39.809(4), 63.162(1) (2005).

[91] FLA. STAT. § 39.0132(3) (2005).

[92] *Natural Parents of J.B.*, 780 So. 2d at 9.

[93] *Id.*

[94] *Natural Parents of J.B.*, 780 So. 2d at 9 (quoting Schall v. Martin, 467 U.S. 253, 263 (1984)).

applies this analysis to justify closing TPR hearings, but the language used can also be used to support closing all juvenile dependency proceedings. The court strengthens its argument by pointing to history declaring that "[i]t is a hallmark of our juvenile justice system in the United States that virtually from its inception at the end of last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity."[95]

The court's discussion in *Natural Parents of J.B.* seems to be at odds with the legislative policy of open court access. In explaining the constitutionality of closing TPR hearings, the court conveys a message that closed proceedings are not only constitutional, but may be in the best interest of the child.[96] While Florida continues to be known in dependency circles as a very open door state, the exceptions that dot its code books and the opinions handed down by its courts seem to be telling a very different story.

2. Oregon

The state of Oregon provides another example of an open door approach to juvenile dependency proceedings.[97] Unlike Florida, the key that has unlocked Oregon's courts was the

[95] *Id.* at 9.

[96] *Id.* The court hints at its belief that closed proceedings may be in the best interest of the child when it states that "the history of the juvenile justice system indicates . . . that it is in the best interest of the child to protect the child from publicity in certain proceedings and that this protection outweighs the public's right to access." *Id.* The court makes no specific mention of which types of cases it believes should be presumptively closed.

[97] Barbara White Stack, *Oregon's Constitution Unlocks Juvenile Courts*, Pittsburgh Post-Gazette, Sept. 23, 2001, at A1.

state constitution.[98] Though both Florida and Oregon have some form of open court access, the path leading to Oregon's policy is unique.

a. The Oregon State Constitution and Open Court Access

Oregon was among the first states in the nation to open its juvenile courts to the public.[99] However, it was a judicial not a legislative decision that opened the courts. The doors were opened by the Oregon Supreme Court case of *State ex rel. Oregonian Publishing Company v. Deiz.*[100]

In this case, the Oregonian Publishing Company petitioned for a writ of mandamus against a circuit court judge after the judge excluded a reporter from a juvenile hearing.[101] The Oregonian first claimed that the judge abused her discretion by excluding the reporter because Oregon law allowed a judge to admit those who have a direct interest in the case or the work of the court.[102] The court rejected this argument stating that the judge had broad authority to

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[98] *Id.* As seen above, Florida has a special statutory provision that opened juvenile dependency proceedings to the public. *See* FLA. STAT. § 39.507(2) (2005). Though Oregon does not have such a specific provision, a general open court statement in the state constitution was used to open the doors of dependency courtrooms. *See* OR. CONST. art. I, § 10.

[99] Stack, *supra* note 1, at A1. Oregon juvenile dependency courts were opened to the public in 1980. *Id.*

[100] 613 P.2d 23 (Or. 1980).

[101] *Deiz*, 613 P.2d at 25. The Oregonian newspaper learned and published the identity of a thirteen year old girl who was in custody in connection with the drowning death of another child. *Id.* After a judge barred the press from the courtroom, the Oregonian filed a motion to be permitted to attend the hearings. *Id.* The juvenile who was the subject of the case and the media stories opposed the motion. *Id.* The defendant judge denied the Oregonian's motion and barred the reporter from the courtroom. *Id.* Though the facts in this case concern a juvenile delinquency proceeding, the decision by the Court established open court proceedings for all juvenile cases (both delinquency and dependency).

[102] *Id.* The Oregonian claimed that they had a "'proper interest' in the case because it is important for the public to be informed about the workings of the juvenile justice system and the press informs the public." *Id.*

control courtroom access.[103] The Oregonian next argued that the application of the statute giving the judge discretion to close the courtroom was invalid as contrary to the Oregon Constitution.[104] The Constitutional phrase at issue in this case states, "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay."[105]

The Oregonian argued that this language should be construed literally and therefore all courts should be open to the public.[106] The defendant countered that argument claiming that the language of the constitution grants the litigant the right to an open trial, but no such right is granted to the public.[107] The court rejected the defendant's argument saying that "the sweeping language with which the prohibition is written makes it unreasonable to interpret it to be merely a grant of a right to an individual."[108]

Also arguing against opening the proceedings of the court was the Attorney General, appearing as amicus curiae.[109] He argued that the generation that adopted that portion of the

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[103] *Id*. at 26. The court found that the media are members of the public and therefore "may be excluded when the juvenile court is of the opinion that privacy would promote the goals of juvenile justice." *Id.*

[104] *Id. See* OR. CONST. art. I, § 10.

[105] *Deiz*, 613 P.2d at 26. The court notes that this language was enacted as part of the original constitution in 1859 but has not been authoritatively construed. *Id.*

[106] *Id.*

[107] *Id.* Under the defendant's logic, the Oregon court could close the courtroom if the child requested, or did not object. *Id.*

[108] *Id.* The court also rejected defendant's further contention that the public has no interest in juvenile proceedings because the parents play the role of judicial monitor. *Id.* at 27. The court notes that the language in the Oregon Constitution does not distinguish between various types of court proceedings; rather, it applies to all. *Id.*

[109] *Id.* at 27.

Constitution did not intend for the language to be applied literally.[110] In support of this proposition he points to section 898 of the original Oregon Code of Civil Procedure which provided that the court could close proceedings to the public.[111] The court responded by saying that it was of no consequence that the provisions were enacted around the same time and may have been written by some of the same drafters as legislators are concerned with the immediate, while constitutional drafters look long-term.[112] Accordingly, the court gave deferential weight to the words of the constitutional drafters and held that the judge's order barring the plaintiffs from the courtroom was contrary to the Oregon Constitution.[113]

In its holding, the court was careful to note that it was not guaranteeing a right of access to all aspects of all judicial proceedings.[114] The court declared that court conferences and jury deliberations were to continue to be held in private in accord with longstanding tradition.[115] Furthermore, the court declined to address the issue of whether certain people may be excluded from certain court proceedings.[116] The court limited its holding to directing the trial judge to

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[110] *Id.*

[111] *Id. See* OR. REV. STAT. § 1.040 (2003).

[112] *Deiz*, 613 P.2d at 27. The court cites as an example the fact that some of the same people who drafted the First Amendment to the United States Constitution also drafted the Alien and Sedition Acts in an attempt to suppress current political criticism. *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* The court admits that the Constitution does not expressly exclude jury deliberations from the prohibition against secret deliberations but notes that the "tradition that such proceedings be held in private was so long and so well established in 1859 that the tradition should be read into the section." *Id.*

[116] *Id.* The court likewise notes that they will not address whether the Fourteenth Amendment may be used to limit access to court proceedings. *Id.*

permit the media to attend the hearings in question.[117] In concluding, the court opined that the "public has a right of access co-extensive with the press."[118] Though this decision essentially removed all locks from Oregon courtroom doors, the court did make clear that courts retain the right to limit access if members of the media or public would interfere with or obstruct the proceedings, or overcrowd the courtroom.[119]

In his dissenting opinion, Justice Howell points to a statute enacted by the Oregon legislature that allows for private proceedings "in the interests of justice."[120] He notes that issues of paternity in filiation proceedings are to be determined by the court in a private hearing.[121] He also places great emphasis on the section of the Oregon Code of Civil Procedure which allows the court proceeding to be closed upon agreement of the parties.[122] Justice Howell stresses the fact that this code section was enacted a mere five years after article I, section 10 of the Oregon Constitution was adopted.[123] He believes that the adoption of this code section was meant as a

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[117] *Id.*

[118] *Id.*

[119] *Id.* The court did not indicate what actions will be sufficient for the trial judge to find that interference or obstruction has or may occur. It leaves one to wonder whether the prospect of severe emotional harm to the child may be construed as an interference with the proceeding. However, because the court does refer to overcrowding, it is likely that they meant this limitation to apply to interference with the mechanics of the court proceeding itself rather than the emotional status of the parties.

[120] State ex rel. Oregonian Publ'g Co. v. Deiz, 613 P.2d 23, 32 (Or. 1980) (Howell, J., dissenting).

[121] *Id.* Note that filiation proceedings are those conducted by courts to determine paternity. *See* OR. REV. STAT. § 109.155(1) (2003).

[122] OR. REV. STAT. § 1.040 (2003).

[123] State ex rel. Oregonian Publ'g Co. v. Deiz, 613 P.2d 23, 31 (Or. 1980) (Howell, J., dissenting).

limitation on the general statement about open courts contained in the Constitution.[124] As logical and compelling as Justice Howell's arguments may be, they did not command a majority of the court.[125] Because the majority's decision stands, the doors of Oregon's courts were opened to the public.[126]

b. Oregon Juvenile Courts Welcome You: Unless You are From the Media?

After the Oregon Supreme Court's decision in *Deiz*,[127] it appears fairly clear that the media possesses a right of access to juvenile proceedings in the state. The court was careful not to set many limits on their holding.[128] However, since this case was handed down, the current Oregon Supreme Court has placed a limitation on the *Deiz* holding.[129] For this limitation, one needs to look no further than the Oregon Uniform Trial Court Rules.[130] Amended in 1999 by consent of the Oregon Supreme Court, Oregon Uniform Trial Court Rule 3.180 provides that "public access coverage shall be allowed in any courtroom."[131] This rule appears to be in perfect

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[124] *Id.*

[125] *Id.* at 30.

[126] *Deiz*, 613 P.2d at 27.

[127] 613 P.2d 23 (Or. 1980).

[128] *Id.* at 27. The Court noted, "we do not address the question of whether certain persons can be excluded from certain court proceedings. *Id.*

[129] OR. U.T. CT. R. 3.180(2).

[130] *Id.*

[131] *Id.*

accord with the court's decision in *Deiz.*[132] However, the rule places a limitation on *Deiz* as it exempts juvenile proceedings.[133]

It is important to analyze exactly what the Uniform Trial Court Rule is forbidding. The Rule is not placing a complete restriction on media and public access to juvenile proceedings; rather it closes such proceedings only to "public access coverage."[134] The Rule defines public access coverage as coverage by means of "television equipment; still photography equipment; audio, video, or other electronic recording equipment."[135] It appears that as long as the member of the media is not recording the proceeding in any way, they will be allowed access to juvenile proceedings. Though this does not completely bar the media from juvenile dependency proceedings, it may have a profound impact on the way that the media covers such stories. If a reporter is not allowed to record the proceeding she will be forced to take notes by hand which could result in a less than accurate depiction of more complex court proceedings.[136] In addition,

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[132] *Deiz*, 613 P.2d at 27. In this case the Oregon Supreme Court allowed a reporter from The Oregonian access to a juvenile dependency proceeding. *Id.*

[133] OR. U.T. CT. R. 3.180(2)(C). "There shall be no public access coverage of . . . [d]issolution, *juvenile*, paternity, adoption, custody, visitation, support, mental commitment, trade secrets, and abuse, restraining and stalking order proceedings." *Id.* (emphasis added).

[134] OR. U.T. CT. R. 3.180(2)(C). If this rule were read as entirely barring the media from juvenile court proceedings, it would be in direct opposition to the Oregon Supreme Court's holding in *Deiz. Deiz*, 613 P.2d at 27. This would indeed be an ironic situation as the same court that handed down the decision in *Deiz* is responsible for approving and promulgating the Oregon Uniform Trial Court Rules. Welcome to Oregon Judicial Department, http://www.publications.ojd.state.or.us/RULE20.htm (last visited Jan. 26, 2006) (stating that the Uniform Trial Court Rules were originally adopted by the Oregon Supreme Court and can only be amended with the consent of said court).

[135] OR. U.T. CT. R. 3.180(6).

[136] If a member of the media is jotting down cursory notes by hand, it is quite possible that they will only capture a glimpse of the proceeding. This may result in a skewed public perception of what occurred during a given court proceeding. However, reporters may argue to the contrary that they are skilled at note-taking and the ban on recording devices will in no way hinder their

members of the media may be less inclined to cover juvenile proceedings if they cannot accurately record the events. In this way, the rule may be seen to push the doors of Oregon's juvenile dependency proceedings slightly closed.

c. For Your Eyes Only: Oregon's Record Confidentiality Provision

Despite the language in the Oregon Constitution requiring open courts, the records of juvenile court proceedings in Oregon are closed to the public.[137] The applicable statute states that the "[r]ecord of the case shall be withheld from public inspection but is open to inspection by the child, ward, youth, youth offender, parent, guardian, court appointed special advocate, surrogate or a person allowed to intervene in a proceeding involving the child, ward, youth or youth offender, and their attorneys."[138] In addition to case records, reports about the child's history and prognosis are similarly privileged.[139] These materials, unless requested by the child, cannot be released to anyone other than the judge, and those similarly involved in the case.[140] However, not all information is restricted. The statute does allow for the release of the basis of

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ability to tell a fair and accurate story. The ease of covering a court proceeding by solely taking notes may depend somewhat on the complexity of the issue before the court. Furthermore, the style of the particular judge may affect note-taking. If the judge is prone to using "legalese" the reporter may find herself struggling to jot down all of the details.

[137] OR. REV. STAT. § 419A.255(1) (2003).

[138] *Id.*

[139] OR. REV. STAT. § 419A.255(2) (2003). This provision affords confidentiality to all reports and materials relating to a child's history and prognosis. *Id.*

[140] *Id.*

court jurisdiction over the youth, the name and date of birth of the youth, and the date, time, and place of the hearings.[141]

The contradiction present in Florida law also exists in Oregon.[142] The public, including the media, is allowed to attend court proceedings, but cannot access the records of these same events. Theoretically, a person could attend a juvenile dependency hearing, take extensive notes and have their own record of the case.[143] If records provisions are developed to protect the confidentiality of the case and the child's well-being, why then are the courtrooms open for all to see? Like Florida, the State of Oregon is sending out a mixed message. On one hand, the state's record provisions seem to indicate a concern for confidentiality, while on the other hand, the state's open access rules turn their backs to such protection. These mixed signals lead one to conclude that Oregon only opened its courts in response to a lawsuit.[144] Perhaps, if The Oregonian had also sued for access to the records of juvenile proceedings, we might see more consistent legislation. Until such a lawsuit is brought, the State of Oregon will continue to talk

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[141] OR. REV. STAT. § 419A.255(2) (2003). This provision allows the public to gain the information necessary to attend a court hearing on a certain case, but does not allow access to the complete case file. *Id.*

[142] *See* FLA. STAT. § 39.0132(3) (2005); OR. REV. STAT. § 419A.255(1) (2003).

[143] In this modern era of extensive internet use, a court attendee could type notes of the proceeding and post it directly onto an online journal. With the surge in popularity of internet journals known as "blogs", posting information on line has become increasingly easier. In 2004, twenty seven percent of American adults reported reading blogs. CBS News, *Popularity of 'Blogs' Surges*, Jan. 4, 2005, http://www.cbsnews.com/stories/2005/01/04/ tech/main664638.shtml. According to Lee Rainie, Director of the Pew Internet and American Life Project, "Awareness of blogs will grow dramatically. There's so much attention to the coverage on blogs and Web sites and first-person video as primary news sources." *Id.* Under current Oregon law, it would be perfectly legal for a person to attend a dependency hearing, take notes, and post those notes on the internet for the world to see.

[144] *See Deiz*, 613 P.2d at 25.

out of both sides of its mouth; allowing the public to witness court proceedings, but denying access to the records of those proceedings.

d. The Effects of Open Court in Oregon

Since the Oregon Supreme Court's decision in *Deiz*,[145] juvenile dependency proceedings have been open to the public.[146] What has been the effect of the open access policy? Since the doors have been opened, has the public rushed through them?

According to Oregon Circuit Court Judge Daniel Murphy, public access to juvenile proceedings is just "an accepted part of our way of doing things."[147] This relaxed statement indicates that the impact of open court access, at least from a judge's point of view, has been far from monumental. Perhaps the reason why people are not flooding courtrooms is that they are not aware that they have a right to be there. A group of Oregon citizens is working to change this.[148] Open Oregon claims that in the decades since Oregon's open access to government laws were passed, "public meeting and records laws have faded from public consciousness."[149] They

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[145] *Id.* at 27.

[146] White-Stack, *supra* note 97, at A1.

[147] Stack, *supra* note 1, at A1.

[148] Open Oregon: A Freedom of Information Coalition, http://www.open-oregon.com (last visited Jan. 27, 2006).

[149] *Id.*

assert that "many citizens don't know they have a right to open government."[150] Part of Open Oregon's mission is to educate the public on their right to access.[151]

While judges and watchdog groups may believe that the public has not had a profound impact on dependency proceedings in Oregon, it does not appear that anyone has stopped to ask the children how they have been impacted.[152] Though the public has not been pouring into dependency courtrooms in droves, the presence of a single member of the public or media could have a significant effect on a child's well-being.[153] It is not enough to justify open access rules on the fact that the public hasn't swamped courtrooms. One person, one set of ears, and one set of eyes is all it takes to damage a child.[154]

As we have seen from analyzing the examples of Florida and Oregon, certain states have adopted an open access policy for their juvenile courts. However, the reality is that the policies

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[150] *Id.* Open Oregon deals with a wide range of freedom of information issues, not limited to open access to juvenile courts. *Id.* However, the group does specifically discuss access to juvenile proceedings. Open Oregon, *Access to Juvenile Court*, http://www.open-oregon.com/New_Pages/JuvenileCourtAccess.htm (last visited Jan. 27, 2006).

[151] Open Oregon: A Freedom of Information Coalition, http://www.open-oregon.com (last visited Jan. 27, 2006).

[152] As of the date of this writing, it does not appear that there has been a study conducted or published documenting the effect of Oregon's open court policy on the children who are the victims of child abuse and neglect and are the subject of dependency proceedings.

[153] The Dragon: Voice of the Union, *Child Welfare Alert! What is SB 1391?*, Jul. 18, 2000, http://www.rb68.com/socialwork/1391alert.htm.

[154] Imagine a scenario in which a child is testifying about sexual abuse and is being asked to describe her father's private parts in great detail (not an usual occurrence in sexual abuse proceedings). If a member of the child's community is in attendance, the child may be afraid of testifying truthfully because of sheer embarrassment or fear of retribution from an angry and equally embarrassed parent. *See id.*

are not as clear cut as advertised.[155] Because of the numerous exceptions carved into the rules, the public may have to navigate a labyrinth of rules before they can even set foot in the courtroom. Furthermore, because of a serious dearth of information on the effects of open courts on the children of dependency hearings, it seems imprudent for states to attempt to thrust open their doors.

B. Keep Out: California's Closed Court Provision

In contrast to the states discussed above, California dependency proceedings are presumptively closed to the public.[156] California Welfare and Institutions Code dictates that:

> "[u]nless 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."[157]

This statute stands in direct contrast to the laws we have seen thus far. It is fascinating to see that states within the same country, charged with the same task of protecting dependent children, can take such diverse approaches to remedying the same types of problems. The following section will analyze the development and current state of California policy as well as efforts by some Californians to change the rules.[158]

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[155] *See, e.g.,* FLA. STAT. § 39.0132(3) (2005); FLA. STAT. § 63.162(1) (2005); OR. REV. STAT. § 419A.255(1) (2003).

[156] In addition to California, thirty seven states have some form of closed dependency court proceedings. *See* Barbara White Stack, *States That Have Open or Closed Hearings*, Pittsburgh Post-Gazette, Sept. 23, 2001, at A1. For purposes of this comment, California will be discussed as the example of a closed court system because of its impact on the author's course of study and eventual practice of law. Furthermore, California is notable as there have been recent legislative attempts to change the law. *See infra* notes 206-32 and accompanying text.

[157] CAL. WELF. & INST. CODE § 346 (Deering 2001).

[158] *See infra* notes 159-232 and accompanying text.

a. Development of California Law and Its Current State

i. California Welfare and Institutions Code section 346

Before 1976, juvenile dependency and delinquency proceedings were treated as one in the same and their confidentiality was governed by Welfare and Institutions Code section 676.[159] In 1976, dependency proceedings in California were separated from delinquency proceedings.[160] Accordingly, California Welfare and Institutions Code was amended to add section 346 pertaining to the exclusion of the public in dependency proceedings.[161] The addition of section 346 both ensured that dependency proceedings would remain private, and that judges retained the discretion to admit persons having a "direct and legitimate interest in the particular case or the work of the court."[162] Because this statutory language is rather ambiguous, it was only a matter of time before a court was called upon to interpret and define it.[163] In 1991, the language of the statute was the subject of litigation which pitted a newspaper against the parties in a dependency action.[164]

ii. Litigating the Language of the Statute

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[159] CAL. WELF. & INST. CODE § 346 note (Deering 2001) (Notes of Decisions). Section 676 was the equivalent of section 346, but also applied to delinquency cases. *Id.*

[160] *Id.* In some counties, such as Los Angeles County, dependency hearings are conducted in a completely separate court facility. *See supra* note 15 and accompanying text.

[161] CAL. WELF. & INST. CODE § 346 (Deering 2001).

[162] CAL. WELF. & INST. CODE § 346 note (Deering 2001) (Notes of Decisions). The amendment provided judges with the same discretion in dependency cases that section 676 provided them in delinquency cases. *Id.*

[163] San Bernardino County Dep't of Pub. Soc. Servs. v. Superior Court, 283 Cal. Rptr. 332 (Cal. Ct. App. 1991).

[164] *Id.*

In *San Bernardino County*, a dependency petition was filed against the seven minor children of Joseph and Sandra S.[165] The petition alleged that the parents had locked their daughter Rose in a closet for the majority of her ten years.[166] When Rose was found by child protective authorities, she was lying in her own feces in urine-stained clothing.[167] The local newspaper, The Sun, began to cover the story and filed a request with the court for access to the court records.[168] The minors, parents, and the Department of Public Social Services (DPSS) all opposed access by the newspaper.[169] After holding a hearing on the issue, the juvenile court denied the Sun's request for access to court records but granted permission to attend court proceedings with certain restrictions.[170]

The petitioners, unsatisfied with this ruling, filed a petition for writ of mandate or prohibition claiming that the juvenile court "abused its discretion in allowing the Sun to attend

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[165] *Id.* at 335.

[166] *Id.*

[167] *Id.*

[168] *Id.* It is unclear from the record of the case whether The Sun also initially asked for access to court proceedings or whether the court raised this issue on its own. *Id.* at 335 n.2. The appellate court decides that this factual disparity has no bearing on the decision of the case. *Id.*

[169] *Id.* These parties shall be hereinafter referred to as "the petitioners."

[170] *Id.* The restrictions kept the Sun from: publishing the names and any likeness, cartoons, or photographs of the minors; interviewing any minor without her attorney present; interviewing the minors' caretakers in the presence of the minors; interviewing any mental health professional to whom the minors had been referred; and doing any act in the future "which might interfere with reunification or have a negative impact upon the providing of reunification services." *Id.*

the court proceedings."[171] The Sun also contested the restrictions imposed on it by the juvenile court judge claiming them to be unconstitutional.[172]

In deciding the case, the appellate court first rejected the petitioners' contention that Welfare and Institutions Code section 346 does not allow a juvenile court to admit members of the press to dependency proceedings.[173] The court in reaching this conclusion noted that section 346 was added when dependency proceedings were separated from delinquency proceedings and was intended to allow the judge discretion to admit the press.[174] Because the judge retains such discretion, it cannot be said that the press will never be permitted to attend juvenile dependency proceedings.[175]

Before handing down a ruling in this case, the court found it necessary to decide whether "the press and the public have a constitutional right to attend juvenile dependency proceedings."[176] In reaching a conclusion on this issue, the court surveyed past pertinent cases

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[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.* at 336. Specifically, the Court points to the statutory language allowing the judge to admit those with a "direct and legitimate interest" in the work of the court. *Id.*

[175] *Id.* In effect, the court is refusing to interpret the statutory language in such a way that would impose a complete access barrier to the media. The court is clear to note that the juvenile court judge retains discretion in such matters. *Id.* The extent of the judge's discretion is another point of contention to be analyzed by the court in this case.

[176] *Id.* If the media and the public possessed a constitutional right of access, the appellate court and the State of California would have no power to restrict such access. If the Court had found access to such proceedings to be a constitutional right, the entire state of the law in California would have been thrown into turmoil as California's dependency access laws proceed under the assumption that the state has the power to restrict dependency courtroom access. *See* CAL. WELF. & INST. CODE § 346 (Deering 2001).

and the history of juvenile dependency courts in the United States.[177] The court noted that juvenile proceedings are fundamentally different from traditional adversarial proceedings and have a long history of closure.[178] According to the court, "[h]earings in the juvenile court originally were intended to be informal, nonadversarial and private in the belief that this was more consistent with the rehabilitative goals of the juvenile court than were the traditional adversarial proceedings employed in the adult criminal court."[179] The court went on to state that, "one of the hallmarks of the juvenile justice system has been confidentiality ensured by private hearings."[180] This analysis led the court to conclude that the right of access seen in adult criminal proceedings "does not extend to juvenile dependency proceedings."[181]

Because the right of access to juvenile dependency hearings is not constitutionally protected, courts are permitted to exclude the public and the media in certain instances. The court in this case had to determine whether the juvenile court judge abused his discretion in allowing the Sun access to the proceedings.[182] After concluding that the juvenile court's decision was based on a misguided belief, the court directed the juvenile court to vacate its order

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[177] *San Bernardino*, 283 Cal. Rptr. at 336-43.

[178] *Id.* at 338. Specifically the court said, "because the history of juvenile courts is one of closed proceedings, the constitutional right of access does not extend to these proceedings." *Id.*

[179] *San Bernardino*, 283 Cal. Rptr. at 338 (citing In re Gault, 387 U.S. 1, 26-27 (1967)).

[180] *San Bernardino*, 283 Cal. Rptr. at 338.

[181] *Id.* at 343. In support of its assertion that juvenile cases are to be treated differently than adult cases, the court points out that the United States Supreme Court has "refused to compel the states to afford the juvenile in a delinquency proceeding all of the same rights to which he or she would be entitled in the adult criminal setting." *Id.* at 342.

[182] *Id.* at 343.

granting the Sun a conditional right of access.[183] The juvenile court's error was its belief that allowing the Sun access to the proceedings would provide an avenue by which the court could control the press surrounding the case.[184] The court declared that the juvenile court was without power to "restrict the press's right to investigate and publish information which it has lawfully obtained."[185] The court pointed to the condition imposed by the juvenile court, restricting the Sun's ability to interview participants in the proceedings, as an "egregious interference with the freedom of the press."[186]

The court struck the conditions imposed by the juvenile court but left it to that court's discretion whether to admit the media at all.[187] The court concluded by offering a non-exclusive factors for the juvenile court to consider in determining whether to admit the Sun.[188] According to the court, juvenile courts should look first to whether admitting the press and the public is in

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[183] *Id.* at 343-44.

[184] *Id.* at 344. The juvenile court felt that if the media was not granted any access to the proceedings, they would be beyond the scope of the court's power to sanction the material published. By allowing the Sun to cover the proceedings, the juvenile court incorrectly believed that they could control the content of the reports. *Id.*

[185] *San Bernardino*, 283 Cal. Rptr. at 344 (citing Oklahoma Publ'g Co. v. District Court, 430 U.S. 308 (1977)).

[186] *San Bernardino*, 283 Cal. Rptr. at 344.

[187] *Id.* In imposing conditions on the Sun, the juvenile court extended its reach into the forbidden arena of freedom of the press. *Id.* However, because access to juvenile dependency proceedings is not a constitutional right, the juvenile court may make the determination whether to admit the public and the media to the proceedings at all. *Id.* It becomes clear from this opinion that courts may not impose unreasonable restraints on the media as conditions to access, but may completely restrict access if found to be in the interest of the case and the court.

[188] *Id.* at 345.

the best interests of the minors.[189] The juvenile court should also take into consideration the social values which may be fostered by allowing public and media access.[190] Finally, in determining which of these interests should take precedent, the court should consider such things as the "age of each child, the nature of the allegations, the extent of the present and/or expected publicity and its effect, if any, on the children and on family reunification."[191] After considering such factors, the court should "allow press access unless there is a reasonable likelihood that such access will be harmful to the child's or children's best interest."[192]

iii. Putting the law into practice: Who is allowed and when?

The basic framework for interpreting California's access law was set out by the California Court of Appeal in *San Bernardino.*[193] While this case provides useful overall guidelines, it is important to analyze the way in which California's dependency courts deal with access on a daily basis. The California Rules of Court govern the procedure of dependency courtrooms and prescribe separate rules for juvenile proceedings.[194] Though these rules contain the same general legal concepts as can be found in the statutes, they differ in that they act as a

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[189] *Id.* The court asserted that determining the best interests of the minors is the "primary concern at all times in the juvenile proceeding." *Id.*

[190] *Id.* "[T]he press can assist juvenile courts in becoming more effective instruments of social rehabilitation by providing the public with greater knowledge of juvenile court processes, procedures, and unmet needs." Brian W. v. Superior Court, 574 P.2d 788, 790-91 (Cal. 1978).

[191] *San Bernardino*, 283 Cal. Rptr. at 345 (citing Div. of Youth & Family Servs. v. J.B., 576 A.2d 261, 269 (N.J. 1990)). The court is careful to remind the juvenile court that it must take into account the effect on the child first and foremost before addressing other concerns. *Id.*

[192] *San Bernardino*, 283 Cal. Rptr. at 345 (citing *Brian W.*, 574 P.2d at 792). The court refers to this standard as the "reasonable likelihood" standard. *Id.*

[193] *San Bernardino*, 283 Cal. Rptr. at 345.

[194] *See* Cal. Rules of Court R. 1410.

practitioner's guide by setting out the law with specificity.[195] Instead of a general statement on court access, such as contained in the statutes,[196] the California Rules of Court lay out exactly who can be present in a juvenile proceeding.[197] Under these rules, access to juvenile hearings is limited to the child, parents,[198] counsel, social worker, court appointed special advocate, a representative of the child's Indian Tribe, court clerk, court reporter, and a bailiff.[199]

These court rules also reflect the California statutory and case law discussed above.[200] According to Rule 1410(e), "the public shall not be admitted to a juvenile court hearing. The court may admit those the court deems to have a direct and legitimate interest in the case, or in the work of the court."[201] In addition, the court may admit others to be present if requested by a parent or guardian and consented to or requested by the child.[202] These rules reflect the message

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[195] *See Id.*

[196] *See* CAL. WELF. & INST. CODE § 346 (Deering 2001).

[197] Cal. Rules of Court R. 1410(b).

[198] The term "parents" includes de facto parents, Indian custodians, and guardians of the child. Cal. Rules of Court R. 1410(b)(2). If the residences of parents or guardians are unknown, or they do not reside within the state, adult relatives residing within the county can be admitted. *Id.* If there are no relatives residing within the county, any adult relatives residing nearest to the court may be admitted. *Id.* The references to Indian custodians and tribe representatives are in accordance with the Indian Child Welfare Act of 1978 (ICWA) which governs dependency proceedings in which the minor subject is found to be an Indian child. *See* 25 U.S.C. § 1903 (2001).

[199] *Id.* This list of persons entitled to be present reflects California's position that only those with a direct interest in the case should be present. All titles listed either directly affect the operation of the courtroom or have a direct interest in the case. *See* CAL. WELF. & INST. CODE § 346 (Deering 2001).

[200] *See supra* notes 156-92 and accompanying text.

[201] Cal. Rules of Court R. 1410(e).

[202] *Id.*

contained in the statutory codebook and in past case law, but beyond the printed word, how do they operate on a daily basis?

As seen in the *San Bernardino* case, the media may petition for access to a dependency proceeding by claiming that they have a "direct and legitimate interest in the work of the court."[203] This leaves the court substantial discretion in determining whether to admit the media and other members of the public unconnected with the case. It would seem from this language, and from the guide provided by the court in *San Bernardino*, that any citizen could petition for access to a dependency hearing. Theoretically, one could claim an interest in the work of the court based on the taxes each citizen pays to fund the court system.[204] Whether this argument would succeed if placed before a dependency court judge is unclear. What is clear however is that this hypothetical taxpayer could not be admitted to the hearing if his presence was found to be in conflict with the child's best interest.[205] The child's best interest can only be determined on a case by case basis with reference to the specific allegations in the case, the past harm suffered by the child, and the likelihood of this random taxpayer spreading his newfound knowledge all over town.

b. Since It Isn't Broken, Let's Fix It: Efforts to Change California Law

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[203] CAL. WELF. & INST. CODE § 346 (Deering 2001); *San Bernardino*, 283 Cal. Rptr. at 345.

[204] This argument is premised on the assumption that one possesses an interest in the public utilities and services funded by his tax dollars. Because one cannot trace dollar for dollar where his tax money is spent, it appears unlikely that one would knock on the door of the local dependency court asking to see what is being done with his hard earned money. However, because all things are possible, the proposition is worth analyzing.

[205] *San Bernardino*, 283 Cal. Rptr. at 345. "First, and foremost, the court's discretion must be directed at determining what is in the best interests of the minors, for that obviously is the primary concern at all times in the juvenile proceeding." *Id.*

As a general proposition, things that are different get noticed. If you walked into class on the first day of law school wearing a suit while all the other students were in jeans, you would get noticed. The other students may act quickly to change you by telling you the importance of fitting in with the rest of the law school crowd.[206] California is the kid in the suit. California's dependency court access laws differ from other states so they get noticed.[207] Because California courts and legislators decided to limit access to juvenile courts, legislators have rushed to tell them how to improve and how to fit in with the rest of the crowd.[208] This section will look at efforts to change the law in California.[209]

i. California Senate Bill 1391

In 2000, California Senators Adam Schiff and Richard Polanco introduced a senate bill aimed at opening the doors to California's juvenile dependency courts.[210] The bill proposed that all dependency hearings be open to the public unless there was a direct motion to close the proceedings.[211] The motion would only be granted upon a specific finding that opening the proceedings would harm the child's best interest.[212] This bill would have changed the

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[206] The other feasible scenario is that the students would laugh behind your back and wonder why you decided to dress as the professor's twin. In this day and age, your suit-wearing plight may instantly become the subject of frenzied instant messenger conversations.

[207] *See supra* notes 49-155 and accompanying text for a discussion of the law in other states.

[208] *See* S.B. 1391, 2000 Sess. (Cal. 2000); A.B. 2627, 2004 Sess. (Cal. 2004).

[209] *See infra* notes 210-32 and accompanying text.

[210] S.B. 1391, 2000 Sess. (Cal. 2000).

[211] *Id.*

[212] *Id.* The bill provided that if the motion for closure was made by a party other than the child or child's attorney, it must be shown that opening the proceedings would seriously harm the child's best interest. *Id.* This language imposed a higher burden on non-child parties. For example, if a parent wanted to move to close the proceedings, she would have to meet the higher

presumption in California to one of closure and would have placed the burden on the child to move to close the proceedings.[213] In addition, the bill set a sunset date of January 1, 2006.[214] Until that date, dependency courts were to be opened to the public.[215] If, during that time, California was notified that its policy was out of compliance with federal confidentiality requirements and was in danger of losing its federal funding, the program would be discontinued.[216]

California never got the opportunity to test this proposed program because the bill was not passed.[217] The bill survived the test of the state senate but stalled in the assembly.[218] Though the reason for the bill's failure was not officially stated, according to the Los Angeles Times, "[e]fforts to change the law to allow public access to juvenile dependency hearings failed in

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standard of showing that opening the proceedings would *seriously* harm the child's best interest. This difference in language appears to give some deference to a child's desire to close the proceeding.

[213] The bill did include a provision requiring the child's attorney to notify the child of the right to move to close the proceedings. *Id.* However, closure would not be automatic upon the child's motion. If the child wished the proceedings closed, the burden would fall on the child to prove that opening the proceedings would harm his or her best interests.

[214] S.B. 1391, 2000 Sess. (Cal. 2000).

[215] *Id.*

[216] *Id.* The legislative process seems to be out of sync in this case. It would seem prudent to have researched whether the program would cause a loss of federal funding before implementing it. Instead, Senator Schiff proposed implementing the program first, and finding out the program's fate later.

[217] S.B. 1391 Complete Bill History, Nov. 30, 2000, http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1351-1400/sb_1391_bill_20001130_history.html.

[218] *Id.*

2000 amid heavy opposition from children's rights groups."[219] Because children's rights groups opposed the bill, it can be inferred that they did not feel that the bill provided sufficient protection to the child victims. This fear was echoed by social workers who worried that children may be subject to exploitation under the bill.[220] Whatever their motivations, the opposition scored a victory in this case as S.B. 1391 is now a distant memory.

ii. California Assembly Bill 2627

Though Senate Bill 1391 failed before it ever opened the courtroom doors, open court proponents decided to propose a similar bill in the State Assembly. In 2004, Assemblyman Darrell Steinberg proposed California Assembly Bill 2627.[221] Though this bill contained very similar language to Senate Bill 1391, there were some notable differences. First, this bill proposed the development of a pilot program in no more than three California counties.[222] In these counties, dependency proceedings would be opened to the public unless a specified motion

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[219] Stuart Pfeifer, *On the Law: Pleading for Less Secrecy in Juvenile Courts*, L.A. TIMES, Jul. 5, 2002, at CA Metro 2.

[220] The Dragon: Voice of the Union, *Child Welfare Alert! What is SB 1391?*, Jul. 18, 2000, http://www.rb68.com/socialwork/1391alert.htm. This union of social workers worried that children may be intimidated by the presence of the public in the courtroom and may even be at risk of pedophiles attending their court proceedings. *Id.*

[221] A.B. 2627, 2004 Sess. (Cal. 2004). The bill was supported by Michael Nash, presiding judge of the Los Angeles County Dependency Court and Dr. David Sanders, the director of the Los Angeles County Department of Children and Family Services. California Newspaper Publishers Association Legislative Bulletin, *Assembly Committee to Hear Measure That Would Allow Access to Dependency Courts*, Mar. 29, 2004, http://www.cnpa.com/Leg/GA/legbularchive/03-04/032904.htm. Before coming to Los Angeles, Dr. Sanders was involved in developing Minnesota's pilot program to open dependency courtrooms. *Id.*

[222] *Id.* The counties were to be selected by the California Judicial Council and were to include counties that represented a cross section of California counties. *Id.* The human resources director in the proposed county would have had to agree to participate in the pilot program in order for it to be implemented in that county. *Id.*

for closure was made.[223] The judge would only be able to grant the motion for closure on a finding that "admitting members of the public would cause harm to the child's best interest."[224] Second, this bill would have required the court to admonish all nonparty court attendees to refrain from divulging identifying information about the child.[225] Third, the bill would have permitted the county's child welfare department to communicate with the media or public regarding dependency proceedings.[226] This change appears to have been included to quell one of the major fears behind S.B. 1391. When that bill was introduced, social workers feared that the media would portray a skewed version of the proceedings and they would not be able to set the record straight due to confidentiality restrictions.[227] In the words of a union organizing body, "[u]nder this bill, social workers would continue to be the scapegoats for Judges' bad decisions

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[223] *Id.*

[224] *Id.* This language is very similar to that seen above in S.B. 1391. However, this bill would not require a showing of "serious" harm to the child's best interest as was required in some instances under S.B. 1391. *See* S.B. 1391, 2000 Sess. (Cal. 2000). A.B. 2627 also included a provision requiring the child's attorney to advise the child of his or her right to move to close the proceedings. A.B. 2627, 2004 Sess. (Cal. 2004). The bill provided that if no attorney was present with the child, the court was required to advise the child of the right. *Id.*

[225] *Id.* Identifying information was defined by this bill to include the child's name, date of birth, address, social security number, telephone number, and similar information. *Id.* Anyone found to have violated this order of the court would be held in contempt. *Id.* This provision pays lip service to the notion that children should be protected. However, it ignores the fact that a child may be harmed psychologically by the mere presence of an outsider in the courtroom, not only by outsiders spreading identifying information. While this provision would have provided some measure of protection to the child, it stopped well short of total protection.

[226] A.B. 2627, 2004 Sess. (Cal. 2004). Presumably, because current law requires closure and confidentiality, child welfare departments do not routinely speak with the media and public about the cases they deal with daily.

[227] The Dragon: Voice of the Union, *Child Welfare Alert! What is SB 1391?*, Jul. 18, 2000, http://www.rb68.com/socialwork/1391alert.htm.

and would still not be able to defend their positions outside the courtroom."[228] This bill attempted to address this concern by allowing the child welfare department to have more open communication with the media about dependency cases.[229]

Though A.B. 2627 differed from S.B. 1391, it was doomed to meet the same fate. It was passed by an assembly committee, but, on June 22, 2004, it failed to pass in a senate committee.[230] Reconsideration was granted by the committee but the bill has since stalled in the state senate.[231]

Because both major efforts to open California's dependency courtrooms have failed, the law mandates that the doors be kept closed.[232] For now, California's child abuse and neglect victims can find safe haven before judges in dependency hearings. At least until a campaign to open courtrooms succeeds in California, the children can take comfort in the fact that their tears will not be witnessed by the world and their tragic stories will not become headlines in their local newspapers.

V. Impact

[228] *Id.* The same union, representing California social workers, asked its members to actively oppose S.B. 1391. *Id.* The union provided a sample letter for its members to send to their local senators and assemblymen. *Id.* This letter said in part, "[a]s a social worker, I see families every day that would be seriously harmed if their personal life circumstances were displayed in the community." *Id.*

[229] A.B. 2627, 2004 Sess. (Cal. 2004). This bill did not specify whether individual social workers would have been permitted to speak to the media, or rather, the communication was required to proceed through an official child welfare department representative. No definitive answer was written into the bill text as it read that the "county department of child welfare" could communicate with the media. *Id.*

[230] A.B. 2627 Complete Bill History, Nov. 30, 2004, http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2601-2650/ab_2627_bill_20041130_history.html.

[231] *Id.*

[232] CAL. WELF. & INST. CODE § 346 (Deering 2001).

As we have seen, states differ in their approaches to dependency court access and there are compelling arguments to be found on both sides of the debate. This section will break down the arguments in favor of opening dependency hearings and will show not only that there are alternative ways of tackling the concerns raised, but also that the rights of the child victims are often forgotten in the rush to open courtroom doors.[233]

A. For the Children: Why Opening the Doors Opens the Children Up to Harm

The principal argument raised by open court supporters is that closed courtrooms cloak the dependency system in secrecy and allow judges, lawyers, and social workers to be shielded from public scrutiny.[234] Stories of judges snatching children away from desperate parents fuel the fire behind this argument.[235] Some feel that closed courts allow judges and other court officials to act as they please without ever having to answer "tough questions."[236] The general premise behind such an argument is that "public scrutiny would force all parties working on the child's behalf to be more accountable for their actions."[237] As one Pennsylvania attorney argued, "[t]here is no reason to hide things under a shadow."[238]

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[233] *See infra* notes 234-83 and accompanying text.

[234] Stack, *supra* note 1, at A1.

[235] *Id.* According to this article, "In a secret hearing . . . a Beaver County judge terminated the custody rights of a 19-year-old Allegheny County woman so that her baby could be adopted by a pharmacist and his wife." *Id.* Though a compelling story at first glance, the article does not mention anything about what this young mother may have done to her child in order for the court to terminate her parental rights. Media portrayals such as this give off the impression that judges act as baby snatchers taking children from poor parents and passing them off to the waiting arms of the wealthy. However, this ignores the terrible truth behind these stories. Parental rights simply are not terminated under the law unless the child has been subject to abuse or neglect and efforts at family reunification have failed.

[236] Barbara White Stack, *Open Justice: Little Girl's Murder Brought New York's Juvenile Court Proceedings into the Light*, Pittsburgh Post-Gazette, Sept. 24, 2001, at A1.

[237] Tucker, *supra* note 3.

It is not in dispute that the nation's child welfare systems could benefit from some type of reform.[239] However, opening the courtroom doors is not the answer.[240] When broken down, the public scrutiny argument that has carried the open court supporters simply falls apart. Such arguments are full of hyperbole and are designed to strike fear into citizens so that they act before they think.[241] However, it is crucial that we think before we act. Before we rush to open courtroom doors, we must ask how open courts will bring reform to the child welfare system. How does shedding light on a child's suffering change the system?[242] This is the crucial link missing in the public scrutiny argument. Allowing the public and the media to access the system does not guarantee that the system will be improved.[243] What if the police were to let the public

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[238] Stack, *supra* note 1, at A1. As the following section will show, there are indeed many reasons to keep courtroom doors closed. *See infra* notes 239-80 and accompanying text. Open court proponents tend to use ominous language to describe closed court systems, but it is important that we look past the elaborate semantics and place the focus on the impact that open courtrooms may have on the children. *Id.*

[239] A.B. 2627, 2004 Sess. (Cal. 2004). The bill introduction notes that the juvenile dependency and foster care systems in California have not adequately met the needs of children. *Id.* Similar arguments are made for states all across the nation. Tucker, *supra* note 3. A social worker union organizing committee wrote, "Local 535 child welfare workers could not agree more that the child welfare system in Los Angeles is a disaster!" Richard Bermack, *Sacrificing Families to Reveal the System's Failings*, http://www.rb68.com/Dragon/issue6-3/sb1391-editorial.htm.

[240] Bermack, *supra* note 239. Bermack discusses California Senate Bill 1391 and concludes that opening courtroom doors would not solve the system's problems but instead, would further victimize the children. *Id.*

[241] *See* Barbara White Stack, *Open Justice: Little Girl's Murder Brought New York's Juvenile Court Proceedings into the Light*, Pittsburgh Post-Gazette, Sept. 24, 2001, at A1. This articles uses dramatic imagery of child abuse to incite outrage in the reader. *Id.*

[242] Tucker, *supra* note 3. The public scrutiny argument is contentious "because those opposed to opening the courts maintain that public observation will not actually result in the needed reform." *Id.*

[243] Bermack, *supra* note 239.

stop and gawk at a bloody car accident scene? This would do absolutely nothing to save the accident victims, or to clean up the accident site. Instead it would merely satisfy the public hunger for the next sensational story.[244] Opening up the courtroom is tantamount to allowing the public to view the accident scene. Nobody is helped, nothing is improved, and the accident sufferers risk humiliation.

Open court supporters argue that public scrutiny would possibly lead to pressure upon child welfare agencies to reform.[245] However, they cannot reform without increased funding and decreased caseloads.[246] Child welfare systems will not be miraculously improved by allowing the public to witness the sad stories of the system's children.[247] Professor William W. Patton, a closed court proponent, states that "[t]he benefits to the public in opening dependency hearings are illusory."[248] Looking at a state that has already implemented open court rules shows that

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[244] Social workers in favor of closed courts worry that their decisions would be exposed to public scrutiny "without the benefit or knowledge of the applicable laws and codes pertinent to the matter before the Court." The Dragon: Voice of the Union, *Child Welfare Alert! What is SB 1391?*, Jul. 18, 2000, http://www.rb68.com/socialwork/1391alert.htm.

[245] Tucker, *supra* note 3.

[246] Bermack, *supra* note 239.

[247] *Id.*

[248] William Wesley Patton, *Pandora's Box: Opening Child Protection Cases to the Press and Public*, 27 W. ST. U. L. REV. 181, 186 (2000). Professor Patton argues that allowing the media access to dependency proceedings will not educate the public, but rather, will provide a skewed and sensationalized look into the dependency system. *Id*. at 187. An example of Professor Patton's fear can be seen in this newspaper excerpt: "Elisa Izquierdo's mother slammed the 6-year-old's head against a concrete wall, causing the child's brain to swell and press against the unyielding walls of her skull. It was Thanksgiving 1995. Elisa's years of torture, starvation and humiliation were over." Barbara White Stack, *Open Justice: Little Girl's Murder Brought New York's Juvenile Court Proceedings into the Light*, Pittsburgh Post-Gazette, Sept. 24, 2001, at A1. This is merely one illustration of the media's flair for the dramatic, and their desire to highlight the most gruesome and heart wrenching scenes. If little Elisa had survived her mother's abuse, she would have endured more suffering as a result of her story being spread to the public. In this sad case, her memory is exploited in a media attempt to grab readers.

allowing the public access to hearings does not magically improve the system.[249] In Michigan, "media scrutiny . . . did not bring a wave of child protection reform" because reform costs money and the public was not willing to allow for the increased spending necessary to improve the system.[250]

In order to implement effective change within our nation's child welfare systems, we must allocate the resources necessary to realize this change.[251] Social workers, attorneys, and judges cannot function effectively if they are drowning in enormous caseloads.[252] "Workers have repeatedly testified to legislative bodies and at press conferences that they are unable to provide services to clients or fulfill court mandates."[253] Instead of opening courtrooms at the expense of the child, we must work to implement large-scale change to improve the quality of the nation's child welfare systems.[254] We should not feel compelled to take the drastic and potentially damaging step of allowing the public to witness dependency proceedings in order to

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[249] Esther Wattenberg, *Open Hearings Don't Make Children Safer*, STAR-TRIBUNE (MINNEAPOLIS-ST. PAUL), Feb. 15, 1997, at 23A.

[250] *Id.*

[251] *See* Bermack, *supra* note 239.

[252] *Id.*

[253] *Id.*

[254] *Id.* "[U]nless caseloads are lowered, it is physically impossible for the system to provide the legally-required services to safeguard children and families. Opening the court will do nothing to solve this problem; it will just increase the workload of social workers and drive more workers out of the system." *Id.*

recognize that the system is in need of repair. "It is not necessary to sacrifice a family's privacy to reveal to the public the failings of the child welfare system."[255]

Another argument in support of opening courtroom doors claims that public confidence in the judicial process will be increased if taxpayers can attend dependency court hearings.[256] The claim is that taxpayers have a right to see where their money is being spent and could act to change the system if they did not like what they witnessed.[257] However, taxpayer access does not come without its costs.[258] Public scrutiny may cause judges and child welfare officials to become preoccupied with protecting themselves politically rather than protecting the children in their courtroom.[259] Also, the public may gain a skewed perception of the dependency system and "will continue to be confused about the judicial processed because the only cases that will receive attention are high-profile cases that may represent the exception rather than the rule."[260]

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[255] *Id.* This union spoke out against California Senate Bill 1391, which attempted to open California courtroom doors. *Id.* They said that opening the doors will not address the problems underlying the system rather "it will further victimize children and families by subjecting them to public scorn and ridicule." *Id.* In the rush to let the public in, we must bear in mind the potential damage that open access can have on the children. "[T]hink of the child who would be forced to testify in front of the media knowing his or her classmates could be watching. Even if the case were dismissed . . . irreversible damage would have been done." *Id.* The union also notes that dependency courts were intended to be comforting, non-adversarial settings but have become adversarial arenas "where cases are decided by legal strategies and technicalities." *Id.* They argue that "[m]edia access will just intensify this problem." *Id.*

[256] Tucker, *supra* note 3.

[257] *Id.*

[258] *Id.*

[259] *Id.* It is a fact of life that judges are concerned with maintaining their status and may find that their courtroom decisions change depending on who is in the room to witness the proceeding. If a political heavyweight was in attendance, the judge may feel pressure to decide the case based on this witness' wishes rather than on the merits of the case. This places the children at further risk of exploitation and abuse. *See* Tucker, *supra* note 3.

[260] Tucker, *supra* note 3.

So, while taxpayers may feel more comfortable having access to dependency court proceedings, their presence may do more harm than good.[261] Looking for alternative means of satisfying the goal of public scrutiny may be the most prudent course of action.

There is an alternative that could be less damaging to the child. Instead of allowing the general public to see the proceedings, oversight bodies made up of child welfare experts could be required to monitor dependency courts and provide detailed reports to the public explaining the successes and failures of the system. This way, the child would not have to suffer from the gaze of the public, but taxpayers could gain information on the dependency court process.

The fear underlying the opening of dependency courtrooms doors is that the children will suffer harm. The arguments in favor of opening the courtrooms claim that public scrutiny will help the children, but evidence in support of this proposition is scant.[262] Children come into the dependency system because they have been the victims of abuse or neglect.[263] In addition to the physical scars, these children bear emotional and psychological scars that will only be exacerbated by allowing the public to witness their plight. Alan Watahara, the president of the California Children's Lobby stated, "These kids have been victimized once; I don't want them to be victimized again."[264]

There are several concrete concerns raised when opening juvenile dependency proceedings. First, child abuse victims may be intimidated by the prospect of public attendees

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[261] *Id.*

[262] *See* supra notes 234-55 and accompanying text.

[263] Fields, *supra* note 11.

[264] Stuart Pfeifer, *On the Law: Pleading for Less Secrecy in Juvenile Courts*, L.A. TIMES, Jul. 5, 2002, at CA Metro 2. Watahara indicates that a complete ban may not be necessary but emphasizes that "we have to be very thoughtful about who, how, where and when." *Id.*

and may feel compelled to change their stories.[265] The issues that children in dependency hearings must testify about are very personal and the presence of a non-party attendee may be enough to cause the child to recant. In order to protect child victims, it is imperative that the court is able to get to the truth of the allegations and recantation is a common obstacle when dealing with young and impressionable children. Children may be intimidated by the public or media presence in the courtroom and may refuse to cooperate in the proceedings and the investigation into the alleged abuse.[266] If a child is too afraid to cooperate, the court will not have sufficient evidence for detainment and may be forced to send the child back to the abusive environment.[267] Furthermore, "[a]busive parents could intimidate their children not to report child abuse with the threat that the family would be ruined by widespread TV coverage."[268] The family reputation may be held over a child's head as a threat and prevent the child from telling the truth about the abuse he or she has suffered.[269]

Second, in addition to concerns of recantation, the child may suffer psychological harm merely by having his or her story shared in public.[270] If word of the abuse suffered reached the

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[265] The Dragon: Voice of the Union, *Child Welfare Alert! What is SB 1391?*, Jul. 18, 2000, http://www.rb68.com/socialwork/1391alert.htm.

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.* In response to these allegations, open court proponents may argue that children can be sufficiently protected by statutory language that provides for closure of the proceedings when deemed to be in the child's best interest. *See, e.g.,* A.B. 2627, 2004 Sess. (Cal. 2004); S.B. 1391, 2000 Sess. (Cal. 2000). However, as this comment will show, such statutory language does not fully protect the child. *See infra* notes 281-83 and accompanying text.

[270] The Dragon: Voice of the Union, *Child Welfare Alert! What is SB 1391?*, Jul. 18, 2000, http://www.rb68.com/socialwork/1391alert.htm.

child's peers this may open the door for teasing and taunting at school and in the community.[271] Personal information shared during the court hearing could be turned into a sword to be used against the child.[272] Furthermore, the child may feel a sense of shame and embarrassment merely knowing that others in the community are aware of the abuse suffered. This sense of shame and possible taunting by peers may have a downward spiral effect causing the child's academic performance to suffer and his or her social development to be stifled.[273]

Third, allowing the public into dependency proceedings opens up the possibility that child predators and pedophiles could become hearing attendees.[274] As we have seen, Florida and Oregon allow the public into dependency court hearings, yet their laws contain no provisions barring sex offenders from attending.[275] Because such laws allow the entire public into the courtroom, they do not provide for any type of screening process that may filter out people who pose a potential danger to the children inside the courtrooms.[276] It is not beyond the realm of possibility that pedophiles may attend dependency hearings to gain access to children that they wish to molest.[277]

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[271] *Id.*

[272] *Id.* Children may be intimidated by "family or friends of a perpetrator who could sit in on the court hearings and then use the court information to verbally threaten the child before, during or after a hearing." *Id.*

[273] *Id.*

[274] *Id.*

[275] *See* FLA. STAT. § 39.507(2) (2005); OR. CONST. art. I, § 10.

[276] The Dragon: Voice of the Union, *Child Welfare Alert! What is SB 1391?*, Jul. 18, 2000, http://www.rb68.com/socialwork/1391alert.htm.

[277] *Id.* Though it may be argued that courthouse security is tight enough to keep children from being abused or harassed, it is what may happen outside the courthouse that is of utmost concern. Pedophiles may use their access to dependency court hearings to profile their potential victims.

Finally, dependency courts were developed with the goal of focusing on rehabilitation and family reunification.[278] Private hearings have been an essential part of the therapeutic atmosphere and "have been considered an important tool in the juvenile court system, both in terms of eliminating or reducing any stigma which might attach and, more broadly, in assisting in the rehabilitative process."[279] By exposing the child to such stigma, open proceedings have the potential to interfere with the rehabilitative nature of dependency courts and destroy their very purpose.[280]

B. The Saving Grace? Statutory "Motion for Closure" Provisions:

Open court proponents argue that the child can be sufficiently protected from harm as long as the open court law contains a provision allowing for closure if in the child's best interests.[281] Though such provisions are a step toward child protection, they are certainly not guarantees. In order for the proceedings to be closed, there must be a motion for closure.[282] Stating that such a provision protects the child requires many illogical assumptions. In my opinion, in order for that argument to work we must begin by assuming that the child recognizes

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Id. Then, once the child is away from the confines of the courthouse, the pedophiles may attempt to harm the child. *Id*. Furthermore, because children in dependency proceedings have often been sexually abused, pedophiles may find them to be especially enticing targets for further abuse. *Id.*

[278] *San Bernardino*, 283 Cal. Rptr. at 339.

[279] *Id.*

[280] *Id.* "[T]here can be little doubt that the embarrassment, emotional trauma and additional stress placed on the minor by public proceedings and the publicity engendered by public proceedings may well interfere with the rehabilitation and reunification of the family." *Id.* at 340.

[281] Tucker, *supra* note 3.

[282] *See* FLA. STAT. § 39.507(2) (2005); A.B. 2627, 2004 Sess. (Cal. 2004). Though A.B. 2627 was not passed, it is still relevant as it reflects the common provision in open court laws requiring a motion to close the courtroom.

the possible harm to his or her interests from open courts. Though harm may result from public access, it is naïve to assume that every child will recognize this harm. Second, we must assume that the child will have the wherewithal to alert his or her attorney of the potential harm. Third, we must assume that the child's attorney will take the child's concern seriously and will move in court to close the proceedings. Fourth, we must assume that the dependency court judge will also recognize the harm to the child and close the proceedings. Four unlikely assumptions provide too tenuous a base for the argument. In order for the closure provision to protect children, all of the above scenarios must play out perfectly. Though the statute may allow the judge to move *sua sponte* to close the proceedings, the judge may not make such a motion if she does not recognize the potential harm to the child.[283] If a child chooses to internalize his or her fear of open court proceedings, the judge may never be aware of the need for closure. This possibility means that children may wish the proceedings closed, but because they fail to verbalize this desire, the doors of the court are left open. Placing the burden for closure on the child ignores the reality that children may be too afraid to speak up and assert their right to move to close the proceedings. Instead, the burden should be removed from the child and a presumption of confidentiality should be adopted.

VI. Conclusion

As the small child enters the courtroom she tries to hide her tears and her burns from the newspaper reporters seated in the back row. The tears begin to flow more steadily as she realizes that she is going to have to tell her story to the world. How will she explain that her mother pressed her face against the hot kitchen stove because she missed the bus to school? Will they believe her when she describes how her daddy touched her in her private parts? All of these

[283] *See*, *e.g.,* S.B. 1391, 2000 Sess. (Cal. 2000) (providing that judges could move to close proceedings).

fears come rushing to the forefront because she is in a Florida courtroom where the media is present.[284] If this same scene played out in California, she would not be subject to the same scrutiny because California's dependency courtrooms are presumptively closed to the public.[285]

Though closed courtroom policies leave the public and the media out in the cold, they are beneficial in that they maintain a protective watch over the children and their emotional needs.[286] In states that have closed court policies, child victims of abuse and neglect can take comfort in the fact that their stories will not be broadcast before the world.[287] These children are in dependency court because their caretakers have failed them and they need the protection of the state.[288] The state, their only source of protection, should not exacerbate their emotional injuries by allowing the public and the media to witness and report on the tears running down their cheeks.

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[284] *See, e.g.,* FLA. STAT. § 39.507(2) (2005).

[285] *See* CAL. WELF. & INST. CODE § 346 (Deering 2001).

[286] *See supra* notes 240-80 and accompanying text.

[287] *See* CAL. WELF. & INST. CODE § 346 (Deering 2001).

[288] Fields, *supra* note 11.