

# THE MOVEMENT TO OPEN JUVENILE COURTS: REALIZING THE SIGNIFICANCE OF PUBLIC DISCOURSE IN FIRST AMENDMENT ANALYSIS

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## INTRODUCTION

At first glance, the public's right of access to legal proceedings seems to be slipping away. The September 11 terrorist attacks have led indirectly to the closing of hundreds of deportation hearings under the rationale of national security.<sup>1</sup> News organizations have discovered "secret court" dockets in which entire cases have disappeared from public view.<sup>2</sup> These cases are not limited to national security or foreign intelligence issues. Such "super-sealing" has included the criminal conviction of a drug smuggler in Florida<sup>3</sup> and a Connecticut paternity suit involving a saxophonist in Bruce Springsteen's E Street Band.<sup>4</sup>

At the same time, for the last fifteen years or so, a quiet revolution has been spreading in juvenile and family courts across the country. The juvenile justice system has largely operated behind closed doors for much of its 107-year history.<sup>5</sup> Yet, in recent decades, a number of states—either through their legislatures or by court rule—have opened juvenile proceedings with favorable results.<sup>6</sup> In some cases, investigative news reports provided the impetus. More often, and significantly, juvenile judges and juvenile justice officials brought about the change. They have been frustrated by the absence of accountability within the

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1. See, e.g., Linda Greenhouse, *Supreme Court Roundup: Justices Allow Policy of Silence on 9/11 Detainees*, N.Y. TIMES, Jan. 13, 2004, at A-1; Laurie Kelliher, *The I.N.S. Test: What's the Price of Not Fighting for Access?*, COLUM. JOURNALISM REV., Nov.-Dec. 2003, at 6.

2. Dan Christensen, *America's Underground Legal System*, 28 NEWS MEDIA & THE LAW 11, 11 (Winter 2004).

3. *Id.*

4. Eric Rich & Dave Altimari, *Elite Enjoy 'Secret File' Lawsuits*, HARTFORD COURANT, Feb. 9, 2003, at A1.

5. See, e.g., Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155 (1999); Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1 (2001); Stephan E. Oestreicher, Jr., Note, *Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings*, 54 VAND. L. REV. 1751 (2001).

6. See, e.g., Hon. Heidi S. Schellhas, *Open Child Protection Proceedings in Minnesota*, 26 WM. MITCHELL L. REV. 631 (2000); Committee on Communications and Media Law, "Open to the Public": *The Effect of Presumptive Public Access to New York State's Family Courts*, 55 THE RECORD 236 (Mar./Apr. 2000) [hereinafter Committee].

system, the shortage of funding from legislators, and the lack of public attention to known problems.<sup>7</sup> By and large, they have concluded that secrecy benefits adults, such as welfare officials and parents—not children.<sup>8</sup>

The revolution is young. Yet the arguments favoring opening proceedings in juvenile courts suggest an element missing, or at least underemphasized, in traditional constitutional and legal analysis of the public's right of court access. This element is the importance of access in contributing to the public discourse. Problems occur when this element is missing. As family court judges discovered, out of sight is out of mind.

This Note argues that the traditional analysis of access issues, whether by courts, legislators, or legal scholars, should be broadened to include an appreciation for the contribution of open court proceedings to the public discourse—that thread of values, perspectives, and experiences that helps define who we are.<sup>9</sup> Through this interaction, we establish our concerns, our priorities, and our views about the proper order of society.

Part I reviews the development of the two-prong analysis used by the Supreme Court to decide whether a court proceeding should be open: (1) historical experience, and (2) the functional goal or logic of allowing access. Part II describes the still evolving history of juvenile court proceedings. Part III shows how a broader analysis sprang from the pragmatic concerns of juvenile judges and others involved with the juvenile justice system, as well as journalists. Part IV briefly concludes on how this broader analysis, incorporating the importance of access to the public discourse, might apply to other court access issues.

## I. CONSTITUTIONAL UNDERPINNINGS

For most of this country's history and stretching back to its English roots, public attendance at court proceedings was taken for granted. As the Supreme Court noted in *In re Oliver*:

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty.<sup>10</sup>

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7. See, e.g., Barbara White Stack, *Opening Juvenile Courts: Children Should Not Be Numbers*, COLUM. JOURNALISM REV., May-June 2002, at 62; Terry Horne (the author of this Note), *Reformists: Public Scrutiny Is Essential: Indiana Law Keeps Lid on Information That Might Help Children if Disclosed*, INDIANAPOLIS STAR, Oct. 26, 2003, at A1.

8. See, e.g., Schellhas, *supra* note 6, at 633.

9. For a discussion of the relationship between story telling, trials, and the formation of norms and values, see Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987).

10. 333 U.S. 257, 268-69 (1948).

Even at the country's start, public trials were more than a protection of liberty. They were entertainment. They were part of the public discourse that captured the imagination of the people and underlaid each generation's discussions. A painting by artist Henry Hintermeister of Andrew Hamilton defending newspaper editor John Peter Zenger in 1735 shows a packed gallery of spectators looking down upon the trial.<sup>11</sup> One hundred and seventy two years later, Irvin S. Cobb described for readers of the *New York Evening World* how a crowd of 10,000 gathered outside the Criminal Court Building and how "a sufficient number" gained admittance to the trial of New York playboy Harry K. Thaw, accused of murdering the seducer of his wife.<sup>12</sup>

Trials were presumed to be open, and the strength of that presumption could be seen in the off-handed way in which Supreme Court justices treated the issue in two cases from the 1940s. Both concerned journalists found guilty of criminal contempt after publication of articles critical of a court's action. In *Pennekamp v. Florida*,<sup>13</sup> Justice Felix Frankfurter remarked in his concurring opinion, "Of course trials must be public and the public have a deep interest in trials."<sup>14</sup> Similarly, in *Craig v. Harney*,<sup>15</sup> Justice William O. Douglas, writing for the Court, declared, "A trial is a public event. What transpires in the court room is public property."<sup>16</sup> Chief Justice Warren Burger would later take notice of both remarks when, in *Richmond Newspapers, Inc. v. Virginia*,<sup>17</sup> the Court considered whether the First Amendment gave the public a right of public access to criminal trials.<sup>18</sup>

The public access issue arose from the due process reforms of the 1960s, as trial courts began to seek ways to protect the rights of defendants from the effects of adverse publicity.<sup>19</sup> By 1979 the conflict between a defendant's rights and public access to a criminal trial came to a head in *Gannett Co. v. DePasquale*.<sup>20</sup> A Rochester, New York, judge closed a pre-trial suppression hearing in a murder case after the defendants argued that the extensive publicity was affecting their

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11. Image available at <http://www.law.umkc.edu/faculty/projects/ftrials/zenger/hamilton.jpg> (last visited Jan. 21, 2006).

12. Irvin S. Cobb, "You Have Ruined My Wife!", N.Y. EVENING WORLD, Feb. 7, 1907, reprinted in A TREASURY OF GREAT REPORTING 285 (Louis L. Snyder & Richard B. Morris eds., 2d ed. 1962).

13. 328 U.S. 331 (1946).

14. *Id.* at 361 (Frankfurter, J., concurring).

15. 331 U.S. 367 (1947).

16. *Id.* at 374.

17. 448 U.S. 555 (1980).

18. *Id.* at 573 n.9.

19. In a series of cases, the Supreme Court began considering the effects of publicity on the rights of criminal defendants to a fair trial. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

20. 443 U.S. 368 (1979).

right to receive a fair trial. The Gannett newspaper company argued that the judge's order was unconstitutional because the Sixth Amendment guarantee of a public trial gave the public a right to attend. Gannett also argued that the First Amendment gave the public a right of access, but the Court focused on the Sixth Amendment claim.

Citing the amendment's wording, the Court concluded that the Sixth Amendment right to a public trial was limited to the accused.<sup>21</sup> It also suggested that the historical tradition of public access to trials had no relevance to whether a constitutional right was implicated.<sup>22</sup> "This history . . . ultimately demonstrates no more than the existence of a common-law rule of open civil and criminal proceedings."<sup>23</sup> In a lengthy dissent, however, Justice Harry A. Blackmun argued that the Sixth Amendment had to be interpreted in light of historical traditions and that it was indeed a guarantee of public access.<sup>24</sup> Less than a year later, the Court adopted Blackmun's historical analysis but applied it instead to a First Amendment claim.

#### A. *Grounding a Right of Access to Criminal Trials in the First Amendment*

*Richmond Newspapers* began the Court's new approach, under which the existence of a right of access was decided by determining whether the particular proceeding carried the "long tradition of openness"<sup>25</sup> or "gloss of history."<sup>26</sup> As the Court developed its analysis, a second prong was added: whether public access served the goals of the particular court proceeding at issue.<sup>27</sup>

The facts in *Richmond Newspapers* were not remarkably different than those in *DePasquale* except that *Richmond Newspapers* concerned the closure of a trial itself, rather than a pre-trial suppression hearing. The defendant's earlier conviction had been overturned on the improper admission of a blood-stained shirt, and his second and third trials had ended in mistrial. At the defendant's request, after holding a closure hearing, the judge ordered the fourth trial closed. He subsequently sustained a motion to strike the state's evidence and found the defendant not guilty.<sup>28</sup> Although he then made tapes of the trial available to the public,<sup>29</sup> seven of the eight justices who heard *Richmond Newspapers* found the closure unwarranted.<sup>30</sup> They splintered, though, on the reasons why.

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21. *Id.* at 381.

22. *See id.* at 384.

23. *Id.*

24. *Id.* at 406-48.

25. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 n.11 (1980).

26. *Id.* at 589 (Brennan, J., concurring).

27. Samuel Broderick Sokol, Comment, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. REV. 881, 888-90 (1998).

28. *Richmond Newspapers*, 448 U.S. at 559-62.

29. *Id.* at 562 n.3.

30. The court's opinion, written by Chief Justice Burger and joined by Justices White and Stevens, held that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case

Chief Justice Warren Burger wrote the Court's plurality opinion. Drawing on Blackman's dissenting opinion in *DePasquale*, he retraced the long tradition of open trials. English moots, which heard cases in the days before the Norman Conquest, were town-hall meetings which were not only open; attendance by freemen was compulsory.<sup>31</sup> "Looking back, we see that when the ancient 'town meeting' form of trial became too cumbersome, 12 members of the community were delegated to act as its surrogates, but the community did not surrender its right to observe the conduct of trials[.]" Burger noted.<sup>32</sup> As the jury system evolved, English and Colonial proceedings remained public. William Blackstone and other legal scholars declared that open proceedings helped assure impartiality, discouraged perjury, and served as a check on judicial misconduct.<sup>33</sup> Burger noted also that public trials were prophylactic, "providing an outlet for community concern, hostility, and emotion."<sup>34</sup>

Unlike the Court in *DePasquale*, Burger found that this long tradition of openness, and the functions that openness served, made public attendance at criminal trials more than just a common-law rule. It was a right "implicit in the guarantees of the First Amendment."<sup>35</sup> Free speech was, at least in some contexts, a right to receive information. The government could not close courtroom doors that had been open when the First Amendment was adopted.<sup>36</sup>

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must be open to the public." *Id.* at 581. Burger's position is discussed further in this Note. Justice White wrote a brief note separately to state his support for grounding the public's right to access in the Sixth Amendment. *Id.* at 581-82 (White, J., concurring). Justice Stevens added a separate comment to emphasize the court's view that the right was not absolute. *Id.* at 582-84 (Stevens, J., concurring). "[T]he Court unequivocally holds that *an arbitrary interference* with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 583 (emphasis added). Requiring a court to refrain from an arbitrary interference is, of course, different than requiring a court to articulate an overriding interest. Justice Brennan concurred only in the judgment and wrote a separate opinion, joined by Justice Marshall. *Id.* at 584-98 (Brennan, J., concurring). For reasons discussed further in this Note, he concluded that a statute authorizing "the unfettered discretion" to close courtrooms violates the First and Fourteenth Amendments. *Id.* at 598. Justice Stewart concurred only in the judgment and wrote separately to state his views that trials, both civil and criminal, are "by definition" open to the press and public, subject to time, manner, and place restrictions. *Id.* at 599-600 (Stewart, J., concurring). Justice Blackman concurred only in the judgment and wrote separately to state his view that the public has a right to open courtrooms under the Sixth Amendment and "as a secondary position" under the First Amendment. *Id.* at 603-04 (Blackmun, J., concurring). Justice Rehnquist dissented, finding no basis in the First, Sixth, or any other Amendments to override a state's decision on how to administer its judicial system. *Id.* at 606 (Rehnquist, J., dissenting). Justice Powell did not participate in the case. *Id.* at 581 (majority opinion).

31. *Id.* at 565.

32. *Id.* at 572.

33. *Id.* at 569.

34. *Id.* at 571.

35. *Id.* at 580.

36. *Id.* at 576.

It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a “right of access,” or a “right to gather information” for we have recognized that “without some protection for seeking out the news, freedom of the press could be eviscerated.”<sup>37</sup>

Burger also argued that the right to attend public trials shared an “affinity”<sup>38</sup> with the right of peaceful assembly, also guaranteed by the First Amendment. “[A] trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.”<sup>39</sup>

*B. History and Function: A Two-Prong Test for Determining a Right of Access*

In a concurring opinion in *Richmond Newspapers* and in the majority opinion in *Globe Newspaper Co. v. Superior Court*,<sup>40</sup> Justice William Brennan rearranged Burger’s analysis into two parts.<sup>41</sup> This framework became known as the logic and experience test or, alternatively, the history and function test.<sup>42</sup> Like Burger, Brennan believed that access to information was part of the structure of democracy. The First Amendment protected not just speech but “the indispensable conditions of meaningful communication.”<sup>43</sup> Brennan was concerned, however, that such a “structural” argument could be applied to any request for information.<sup>44</sup> “For so far as the participating citizen’s need for information is concerned, [t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.”<sup>45</sup>

In Brennan’s concurring opinion, the right of public access became a balancing test. On one side were logic, which was the advantages that the public’s presence lends to a proceeding, and historical practice, which “implies the favorable judgment of experience” about the advantages of public access.<sup>46</sup> On the other side were specific factors favoring closure, such as the need to

37. *Id.* (citations omitted).

38. *Id.* at 577.

39. *Id.* at 578.

40. 457 U.S. 596 (1982).

41. See, e.g., *Richmond Newspapers*, 448 U.S. at 579 (Brennan, J., concurring); *Globe*, 457 U.S. at 605-06.

42. See *Globe*, 457 U.S. at 606 (declaring “the institutional value of the open criminal trial is recognized in both logic and experience”).

43. *Richmond Newspapers*, 448 U.S. at 588 (Brennan, J., concurring).

44. See Sokol, *supra* note 27, at 888.

45. *Richmond Newspapers*, 448 U.S. at 588 (Brennan, J., concurring) (quoting *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965)).

46. *Id.* at 589.

protect state secrets important to national security.<sup>47</sup>

In both *Richmond Newspapers* and *Globe*, however, the structural factors favoring access to the court proceedings remained much the same. Public proceedings help maintain public confidence by assuring impartiality.<sup>48</sup> They provide an effective restraint on the abuse of judicial power.<sup>49</sup> They help ensure accurate fact-finding and honest testimony of witnesses.<sup>50</sup> They may bring matters to the attention of witnesses yet unknown to the court.<sup>51</sup>

In *Globe*, Brennan held that a Massachusetts statute violated the Constitution when it required a judge to close the courtroom during the trial of a sex crime involving a minor victim.<sup>52</sup> The defendant in the trial at issue had been charged with the rape of three teenagers, and the judge ordered the trial closed even though the victims had indicated their willingness to allow the press into the courtroom so long as their names, photographs, or personal information were not used. Brennan's opinion tracked his earlier analysis in *Richmond Newspapers*. Favoring openness were the long history of criminal trials being open and structural factors: the need for public scrutiny, the appearance of fairness, and the provision of a check against abuses of the judicial process.<sup>53</sup>

The balancing test turned specific, however, as the Court examined the interests favoring closure. As in nearly all cases implicating constitutional rights, the Court's measure was the strict scrutiny test, which requires a compelling governmental interest to be served by narrowly tailored means.<sup>54</sup> Brennan rejected the state's arguments that automatic closure was necessary to protect minor victims from further trauma and embarrassment.<sup>55</sup> In such cases, he said, trial courts should consider such factors as the victim's age, psychological maturity, the nature of the crime, the victim's desires, family interests, and the additional trauma resulting not from testifying but from testifying in public.<sup>56</sup> He also dismissed the state's contention that a rule of automatic closure would encourage minor victims to come forward.<sup>57</sup> The state had offered no empirical support for the claim, the closure rule would not guarantee privacy, and the same claim could be made about crime victims.<sup>58</sup> "The State's argument based on this interest therefore proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers*: namely, 'that a presumption of openness inheres in the very nature of a criminal trial under our

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47. *Id.* at 598 n.24.

48. *Id.* at 595.

49. *Id.* at 592, 596.

50. *Id.* at 596.

51. *Id.* at 596-97.

52. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610-11 (1982).

53. *Id.* at 605-06.

54. *Id.* at 606-07.

55. *Id.* at 608.

56. *Id.* at 607 n.19, 608.

57. *Id.* at 609-10.

58. *Id.*

system of justice.”<sup>59</sup>

While the *Globe* court, with a more solid majority of justices,<sup>60</sup> affirmed the reach of *Richmond Newspapers*, it also opened the door to arguments favoring closure of at least some court proceedings or portions of proceedings. Chief Justice Burger’s dissent made that clear. He accepted Brennan’s characterization of the public access analysis as a balancing test involving “an assessment of the specific structural value of public access in the circumstances.”<sup>61</sup> However, he castigated the majority for ignoring “the weight of historical practice . . . of exclusion of the public from trials involving sexual assaults, particularly those against minors.”<sup>62</sup> Burger, the architect of *Richmond Newspapers*, also found the state’s interests in closing the proceedings sufficiently compelling. Citing studies about the traumatic effects of court proceedings on minor rape victims, he criticized the Court for ignoring the “undisputed problem of the underreporting of rapes and other sexual offenses.”<sup>63</sup> “There is no basis whatever for this cavalier disregard of the reality of human experience.”<sup>64</sup> As Burger’s dissent made clear, the case-by-case approach placed the public right of access to court proceedings on shakier ground.

By the time the Court decided *Globe*, at least three different versions of the history prong had emerged. One was the *Richmond Newspapers* version, in which the court analyzed history to determine if the court proceeding was a public place at the time of the First Amendment’s adoption.<sup>65</sup> The third version was the use of historical analysis to decide whether public access was a deeply rooted tradition, as in a fundamental liberties analysis.<sup>66</sup> In Chief Justice Burger’s historical analysis in *Globe*, for example, he cited cases decided from 1922 to 1969 and did not depend on practices at the time of the First Amendment’s founding.<sup>67</sup> With three different measures available, the history prong had become a tool for either side.

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59. *Id.* at 610.

60. Justices White, Marshall, Blackmun, and Powell joined the Court’s opinion; Justice O’Connor concurred in the result; Chief Justice Burger and Justices Rehnquist and Stevens dissented.

61. *Globe*, 457 U.S. at 614 (Burger, C.J., dissenting) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 597-98 (1980)).

62. *Id.*

63. *Id.* at 617.

64. *Id.*

65. See *Richmond Newspapers*, 448 U.S. at 575-80.

66. *Globe*, 457 U.S. at 605.

67. See *id.* at 614 (Burger, C.J., dissenting) (discussing whether the history revealed an unbroken and uncontradicted history of open proceedings). The line between these versions is not always a bright one, as different justices sometimes incorporate two or more versions in their analysis. For example, Justice Brennan pays homage to the first version in noting that the Constitution carries the “gloss of history.” *Id.* at 605 (majority opinion).

C. Conclusion: *The Lingering Legacy of Uncertainty of the Two-Prong Test*

The Supreme Court returned to the issue of public access to criminal proceedings twice more before it was finished. Both times Burger wrote the majority opinion, and the confusion over the historical prong remained. In *Press-Enterprise Co. v. Superior Court* (“*Press I*”),<sup>68</sup> the Court held that voir dire proceedings, like the main part of a criminal trial, were entitled to a presumption of openness.<sup>69</sup> As in *Richmond Newspapers*, Burger traced the roots of juror panels to the pre-Norman moots. In *Press-Enterprise Co. v. Superior Court* (“*Press II*”),<sup>70</sup> the Court held that a right of public access attached to preliminary hearings as conducted in California.<sup>71</sup> Here, however, Burger looked to more recent history: the practice of California and other states as well as the 1807 treason trial of Aaron Burr.<sup>72</sup> Dissenting, Justice Stevens found this approach unconvincing. It was “uncontroverted that a common-law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted.”<sup>73</sup>

The dissenting opinions in *Globe* and *Press II*, while gathering only limited support, underscored the uncertainty that would remain about the right of public access in other court proceedings, at least those in which the historical record was less certain. As one judge and scholar noted, the two-prong test led lower courts to contradictory conclusions. “Practices in the past were not as uniform as one Justice or another occasionally has claimed,” U.S. District Judge Kimba Wood remarked in a 1995 lecture.<sup>74</sup> History can also be irrelevant to court proceedings that have no historical counterpart.<sup>75</sup> The functions of some proceedings have changed dramatically, perhaps requiring access where none was formerly needed.<sup>76</sup> Wood notes, for example, that many cases are resolved by plea bargaining.<sup>77</sup> “[T]hus, it is there that most of the workings of justice occur for the overwhelming majority of criminal defendants.”<sup>78</sup>

The structural prong also falls short of providing a certain answer to the access inquiry. As supporters of confidential proceedings have sometimes pointed out, the structural goals of public oversight, checking judicial abuse, and providing information can be met in other ways.<sup>79</sup> Disciplinary commissions

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68. 464 U.S. 501 (1984).

69. *Id.* at 513.

70. 478 U.S. 1 (1986).

71. *Id.* at 13.

72. *Id.* at 10.

73. *Id.* at 22 (Stevens, J., dissenting).

74. Hon. Kimba M. Wood, *The 1995 Justice Lester W. Roth Lecture: Reexamining the Access Doctrine*, 69 S. CAL. L. REV. 1105, 1111-15 (1996).

75. *Id.* at 1115.

76. *Id.*

77. *Id.* at 1113.

78. *Id.*

79. See, e.g., Kathleen M. Laubenstein, Comment, *Media Access to Juvenile Justice: Should*

provide a check on abuse and some measure of oversight.<sup>80</sup> Transcripts can fulfill the goal of information and oversight. None of these procedures provides the immediacy or public impact that an open courtroom may bring. The Court's test fails to take full measure of the importance of public proceedings.

## II. ONCE AROUND THE BLOCK: A BRIEF HISTORY OF JUVENILE COURT PROCEEDINGS

On a constitutional level, history sheds little light on whether juvenile court proceedings should be open. Most scholars trace the beginning of a separate justice system for children to the Illinois Court Act of 1899, which established a juvenile court in Cook County.<sup>81</sup> Prior to that, delinquent or suffering children usually appeared before the same courts overseeing adult conduct.<sup>82</sup> Supporters of open courts often begin their historical analysis in colonial America or as far back as thirteenth century England. Supporters of closed courtrooms usually begin their analysis in the last century<sup>83</sup> with the creation of a separate juvenile judicial system, which was civil rather than criminal, sought to treat rather than punish, and, more often than not, operated behind closed doors. Yet even over this last 100 years, the judgment of history is not settled. In Chicago, for example, the very birthplace of this civil, medical treatment model, juvenile courts were, and remained, open by law to the press and the victim.<sup>84</sup> At best, the history of juvenile justice is a record of changing concerns and values.

### A. *Early Roots: England and America*

The 1839 case of *Ex parte Crouse*<sup>85</sup> illustrates the ambiguity of historical analysis. The 1839 Pennsylvania Supreme Court decision, some sixty years before juvenile courts began, is often cited as an early American case upholding *parens patriae*.<sup>86</sup> This English doctrine, which juvenile court supporters would use to justify the authority of juvenile courts, loosely translates as "country as the parent" and stands for the government's authority as the ultimate guardian of the

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*Freedom of the Press Be Limited to Promote Rehabilitation of Youthful Offenders?*, 68 TEMPLE L. REV. 1897, 1906 (1995).

80. *Id.*

81. Bean, *supra* note 5, at 30; see 1899 Ill. Laws § 3.

82. CLIFFORD E. SIMONSEN & MARSHALL S. GORDON III, JUVENILE JUSTICE IN AMERICA 9 (1979).

83. See, e.g., *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring) ("It is a hallmark of our juvenile justice system . . . that virtually from its inception . . . its proceedings have been conducted outside of the public's full gaze . . .").

84. 705 ILL. COMP. STAT. 405/1-5(6) (2004); see also Sokol, *supra* note 27, at 910 (citing Hon. Richard S. Tuthill, *History of the Children's Court in Chicago*, INT'L PRISON COMM'N, CHILDREN'S COURTS IN THE UNITED STATES, H.R. DOC. No. 58-701, at 3 (1904)).

85. 4 Whart. 9 (Pa. 1839).

86. See, e.g., Bean *supra* note 5, at 24.

country's children.<sup>87</sup> The *Crouse* court affirmed this doctrine in upholding the commitment of sixteen-year-old Mary Ann Crouse to the Philadelphia House of Refuge, a juvenile reform school.<sup>88</sup> The court held that *parens patriae* allowed the termination of the rights of parents unable or unworthy of taking care of their children.<sup>89</sup>

Of more importance to historical inquiry is what the court left unsaid. The case arose when Crouse's father filed a habeas corpus petition to free his daughter from the reformatory.<sup>90</sup> The court's opinion indicates that the sixteen-year-old girl had been committed to the House of Refuge merely because her mother filed a complaint with a justice of the peace.<sup>91</sup> In *Ex parte Crouse*, questions about public access as well confidentiality were irrelevant.

Early English and American history is equally ambiguous. In England through the early nineteenth century, children as young as seven years were treated little differently than adults when they committed crimes.<sup>92</sup> Youth in London appeared in Old Bailey for trial.<sup>93</sup> Ten-year-old girls were sent to the infamous Newgate Prison.<sup>94</sup> Pre-adolescent thieves were shipped to Australia.<sup>95</sup> In America, juvenile offenders were treated just as harshly.<sup>96</sup> Given the lack of disparate treatment between adults and children, the appearance of such children in open courts provides little guidance about the "favorable judgment of experience."

Social welfare also was applied with little distinction between adults and children. Under the Elizabethan Poor Laws, the poor who were unable or unwilling to provide for themselves were shipped to workhouses,<sup>97</sup> which were designed to be "so psychologically devastating and so morally stigmatizing that only the truly needy would request it."<sup>98</sup> Children were not spared. The record of one English workhouse in 1779 listed thirty-eight children under ten years old

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87. ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 63 (1978).

88. *Crouse*, 4 Whart. at 11.

89. *Id.*

90. *Id.* at 9.

91. *Id.*

92. See, e.g., SIMONSEN & GORDON, *supra* note 82, at 9-13.

93. *Id.* at 9. The authors note that many children were even sentenced to death. However, records do not show how many were actually executed, and the number of children tried at Old Bailey was small compared to the number of adults.

94. *Id.* at 13.

95. *Id.* at 10-13.

96. *Id.* at 16-20.

97. William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 100-03 (1996).

98. Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract*, 24 J. LEGAL STUD. 283, 310 (1995).

among its 136 paupers.<sup>99</sup> Unemployed or neglected children could be bound out as apprentices upon a finding by two justices of the peace that their parents were unfit.<sup>100</sup> American colonists also “relied on forced apprenticeships and institutional ‘houses’ to deal with the children of the poor.”<sup>101</sup>

Finding little similarity between English poor laws and modern juvenile court proceedings, some scholars looked to the history of English chancery courts exercising jurisdiction over guardianships, but the “gloss of history” is uncertain here as well. Some scholars characterized early guardianship proceedings as family law for the wealthy.<sup>102</sup> Others have pointed out that these chancery proceedings, at least initially, were more concerned with the disposition of property than the welfare of children.<sup>103</sup>

Even by the nineteenth century, most child advocates worried little about whether court proceedings should be open even as they sought better ways to deal with delinquent and neglected children. Some were motivated by both humanitarianism and fear.<sup>104</sup> In 1825, the Society for the Prevention of Pauperism of New York established the New York House of Refuge,<sup>105</sup> a juvenile reform school. Similar houses were established in most large cities over the next twenty-five years.<sup>106</sup> Other “child-saving” groups, such as societies for the prevention of cruelty to children, formed “cottage reform schools,” and organized programs to place delinquent or vagrant children on western farms.<sup>107</sup> To these Jacksonian reformers, children were innocent but imbued with moral capacity that could be developed by removing them from the evils of their surroundings.<sup>108</sup> Yet many of the institutions these reformers launched became known for the same harshness and cruelty that had marked the workhouses. As one scholar noted, “[T]he fusion of social control with greater humaneness is a tenuous one which typically dissolves, leaving the machinery for social control firmly entrenched—even if it is ineffective—after the spirit of humanitarianism has departed.”<sup>109</sup>

### B. *Separate Justice: American Juvenile Courts*

In 1904, Cook County Circuit Court Judge Richard S. Tuthill described for

99. Quigley, *supra* note 97, at 111.

100. *Id.* at 102.

101. Bean, *supra* note 5, at 23.

102. See, e.g., Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, JUVENILE AND FAMILY COURT J. (Fall 1998), reprinted at <http://naccchildlaw.org/documents/evolutionofthedependencycourt.doc>.

103. Bean, *supra* note 5, at 18.

104. *Id.* at 27-30.

105. SIMONSEN & GORDON, *supra* note 82, at 20.

106. *Id.* at 21.

107. See *id.* at 20-24; Bean, *supra* note 5, at 24-29; RYERSON, *supra* note 87, at 27-30.

108. RYERSON, *supra* note 87, at 28-30.

109. *Id.* at 33.

the International Prison Commission the operation of the nation's first juvenile court, established just five years earlier:

The hearing of the case is in the open court, but with little of the formality usually observed in court proceedings. I have always felt and endeavored to act in each case as I would were it my own son that was before me in my library at home charged with some misconduct. . . . I first speak to him in a kindly and considerate way, endeavoring to make him feel that there is no purpose on the part of anyone about him to punish, but rather to benefit and help, to make him realize that the State—that is the good people of the State—are interested in him, and want to do only what will be of help to him now and during his entire life.<sup>110</sup>

Such was the beginning of a separate juvenile court system. Little formality. A goal of instruction rather than punishment. Open to the public. By 1925, forty-six of the forty-eight states had established juvenile courts.<sup>111</sup> While most shared Tuthill's fondness for informality and therapy, most also operated behind closed doors, even in the face of state constitutions mandating open courts.<sup>112</sup> In Indiana, for example, the 1903 act creating the state's first juvenile court required all trials to be held in the juvenile court or in chambers and empowered the judge to exclude "any and all persons that in his opinion are not necessary for the trial of the case."<sup>113</sup> Court officials and legislators came to view confidentiality as necessary.

1. *The Progressive Model.*—The emphasis upon secrecy stemmed partly from the middle class moralism underpinning much of the Progressive movement<sup>114</sup> and partly from the Progressive faith in the newly emerging social sciences of psychology, sociology, and education.<sup>115</sup> The Progressives were fascinated by the promise of the industrial revolution and the attending growth of American cities even as some were repelled by what they saw as its evils.<sup>116</sup> To some, city government too often was a corrupt system that exploited the immigrant underclass for its own ends, and that ruled by political chicanery rather than merit.<sup>117</sup> Such politics offended middle class sensibilities about honesty,

110. Tuthill, *supra* note 84, at 3.

111. Kara E. Nelson, Comment, *The Release of Juvenile Records Under Wisconsin's Juvenile Justice Code: A New System of False Promises*, 81 MARQ. L. REV. 1101, 1119-20 (1998).

112. In Chicago, the juvenile courts remained open, by statute, to the victim and news media. 705 ILL. COMP. STAT. 405/1-5(6) (2004); *see also* Barbara White Stack, *In Illinois, Acceptance*, PITTSBURGH POST-GAZETTE, Sept. 24, 2001, at A4.

113. 1903 IND. ACTS 519-20.

114. *See* ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877-1920*, at 59-62 (1967).

115. *See id.* at 127-32, 166, 169-70.

116. Frederic C. Howe, *The City*, in *THE PROGRESSIVE YEARS: THE SPIRIT AND ACHIEVEMENT OF AMERICAN REFORM*, 25, 25-26 (Otis Pease ed., 1962).

117. *Id.*; *see, e.g.*, ANTHONY M. PLATT, *THE CHILD SAVERS—THE INVENTION OF DELINQUENCY* 91 (1969).

hard work, and family.<sup>118</sup> Early advocates of juvenile courts wanted a juvenile system removed from the noisy, rumble-tumble politics associated with adult courts.<sup>119</sup>

From the first, these courts and child advocates worried about the effects of stigmatization,<sup>120</sup> an extension of their belief that the source of the child's problems was external. Removing the stigma of criminality was seen as a goal in itself, as Judge Julian W. Mack wrote in 1909:

To get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma,—this is the work which is now being accomplished by dealing even with most of the delinquent children through the court that represents the *parens patriae* power of the state, the court of the chancery.<sup>121</sup>

This emphasis upon “stigmatization” as a major evil, if not the cause of bad behavior, was perhaps the strongest reason secrecy came to envelop many juvenile courts. It was far easier for these Progressives to erase public “stigma” by removing offending juveniles from public view than by reforming public sentiment. Even language was used to disguise or obscure.<sup>122</sup> Youth who broke laws became “delinquents.”<sup>123</sup> Officials sought to portray the proceedings as civil, rather than criminal.<sup>124</sup> This Progressive rhetoric remains today. When “delinquent” developed a pejorative ring, welfare officials began using terms such as “children in need of services,” “persons in need of supervision,” or a similar term.<sup>125</sup> A Maryland juvenile court website declares that delinquency proceedings are civil, not criminal.<sup>126</sup> It provides a list of the special terms used to avoid the “taint of criminality.”<sup>127</sup> As the Supreme Court remarked, the Progressives launched our juvenile court system with “the highest motives and the most enlightened impulses.”<sup>128</sup> But the closed “civil” system they created was

118. See WIEBE, *supra* note 114, at 167-68.

119. See, e.g., Tuthill, *supra* note 84, at 1.

120. See, e.g., Oestreicher, *supra* note 5, at 1767-68.

121. Hon. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909).

122. See IRA M. SCHWARTZ, (IN)JUSTICE FOR JUVENILES, RETHINKING THE BEST INTERESTS OF THE CHILD 150-52 (1989); Carrie T. Hollister, *The Impossible Predicament of Gina Grant*, 44 UCLA L. REV. 913, 920 (1997); Oestreicher, *supra* note 5, at 1763-64.

123. See, e.g., Hollister, *supra* note 122, at 920.

124. See, e.g., Nelson, *supra* note 111, at 1115.

125. See *In re Gault*, 387 U.S. 1, 24, 24 n.31 (1967). Although some states distinguish between dependency (neglect or abuse) cases and juvenile criminal cases, other states use the same terms interchangeably or with slight variation.

126. COURT INFORMATION OFFICE, JUVENILE COURT IN MARYLAND 3 (2003), available at <http://www.courts.state.md.us/juvenile.pdf>.

127. *Id.*

128. *Gault*, 387 U.S. at 17.

a “peculiar system for juveniles, unknown to our law in any comparable context.”<sup>129</sup>

2. *The Due Process Movement: Constitutional Concerns About the Quasi-Criminal Court.*—From the start, observers and even participants in this new juvenile court system questioned its ability to fulfill its goals and the validity of its rhetoric.<sup>130</sup> These doubts did not come to a head, however, until the 1960s when the Supreme Court examined whether “this peculiar system” was immune to due process concerns about fundamental fairness.<sup>131</sup> In a series of cases, the Court rejected the Progressive model of an “informal” court that could play by its own rules.<sup>132</sup> It stopped short of finding that juvenile courts had to mirror adult courts in all respects. It did not consider whether proceedings had to be open. Yet underpinning the Court’s rulings was a pragmatic realization that the juvenile system, which had maintained its tradition of informality and secrecy, was suffering.<sup>133</sup>

In *Kent v. United States*,<sup>134</sup> a District of Columbia juvenile judge had waived a sixteen-year-old rape suspect to adult court without holding a hearing, as requested by the boy’s attorney.<sup>135</sup> Nor did the judge provide any findings showing that he considered evidence that the boy was mentally ill. The Supreme Court held “there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.”<sup>136</sup>

The Court noted the shortcomings of the juvenile court system in practice, despite its “laudable” social welfare purpose.<sup>137</sup> “[S]tudies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults.”<sup>138</sup> Children caught in the juvenile system were getting “neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”<sup>139</sup> Despite such statements, the Court ruled that the juvenile in *Kent*

129. *Id.*

130. RYERSON, *supra* note 87, at 138.

131. *See, e.g.*, Oestreicher, *supra* note 5, at 1787-92.

132. In *McKeiver v. Pennsylvania*, 403 U.S. 528, 531 (1971), the Supreme Court traced a line of six due process cases involving juveniles: *Haley v. Ohio*, 332 U.S. 596 (1948); *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Kent v. United States*, 338 U.S. 541 (1966); *Gault*, 387 U.S. 1; *DeBacker v. Brainard*, 396 U.S. 28 (1969); and *In re Winship*, 397 U.S. 358 (1970).

133. In *McKiever*, the Court remarked on this motivation, quoting a state court’s gloss that *Gault* “evidences a fundamental and far-reaching disillusionment with the anticipated benefits of the juvenile court system.” 403 U.S. at 538 (quoting *In re Terry*, 265 A.2d 350, 352 (Pa. 1970)).

134. 383 U.S. 541 (1966).

135. *Id.* at 546.

136. *Id.* at 554.

137. *Id.* at 555.

138. *Id.*

139. *Id.* at 556.

was entitled to a hearing not because of constitutional guarantees, but because the District's juvenile court statute required one.<sup>140</sup>

Only a year later, however, the Court found that juvenile courts did have to abide by the Fifth and Sixth Amendment rights to notice, counsel, to confront and examine witnesses, and to maintain a privilege against self-incrimination in *In re Gault*.<sup>141</sup> *Gault* concerned a juvenile judge who had sent a fifteen-year-old boy to a juvenile reformatory for "the period of his minority."<sup>142</sup> The boy was already on probation for another offense when the judge determined, on the basis of two exceedingly informal hearings, that the boy had called a neighbor and made lewd comments over the telephone. It was, as the Court noted, effectively a six-year sentence on a crime for which the adult penalty was a maximum of a \$50 fine or two months in jail.<sup>143</sup> As it had in *Kent*, the Court contrasted the noble goals of juvenile court with the reality of an overworked system often lacking in professionalism.<sup>144</sup> "[T]here is substantial question as to whether fact and pretension, with respect to the separate handling and treatment of children, coincide."<sup>145</sup> The Court reasoned that such a system would certainly not be hurt "by constitutional domestication."<sup>146</sup>

The Court's willingness to hold juvenile courts to the same standard as adult courts soon came to a screeching halt. The Court had declared in *Gault* that its juvenile court cases "unmistakably indicate that, whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."<sup>147</sup> Yet in *McKeiver v. Pennsylvania*,<sup>148</sup> decided just four years later and involving a group of juvenile cases from Pennsylvania and North Carolina, the Court held that the Sixth Amendment right to a jury trial, through the Fourteenth Amendment, did not apply to juvenile proceedings.<sup>149</sup> The Court clearly stated that it was not yet ready to abandon entirely the Progressives' lofty goals for a therapeutic system that would treat rather than punish.<sup>150</sup> "The juvenile concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise . . ."<sup>151</sup>

Although the Court appeared indifferent, or at times ambivalent,<sup>152</sup> about

140. *Id.*

141. 387 U.S. 1 (1967).

142. *Id.* at 7-8.

143. *Id.* at 29.

144. *Id.* at 17-18. The Court cited a study, for example, that half of the 2987 juvenile court judges in 1964 lacked an undergraduate degree. *Id.* at 15 n.14.

145. *Id.* at 22 n.30.

146. *Id.* at 22.

147. *Id.* at 13.

148. 403 U.S. 528 (1971).

149. *Id.* at 551.

150. *Id.* at 547.

151. *Id.*

152. Compare *Gault*, 387 U.S. at 25, with *Kent v. United States*, 383 U.S. 541, 564 n.32 (1966).

public access, these cases, *Gault*, *Kent*, and *McKeiver*, betrayed its concern about systemic problems arising from the lack of funding, public participation, and public awareness. “The community’s unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment.”<sup>153</sup> In coming decades, juvenile court judges lodged similar complaints as they argued that the time had come to let the public see what was going on.

### III. OPEN JUVENILE COURTS: REALIZING THE IMPORTANCE OF PUBLIC DISCOURSE

The secrecy enveloping most American juvenile courts can come as a shock to people when they first experience it—even judges. Heidi Schellhas, now a district judge<sup>154</sup> in Hennepin County, Minnesota, was struck by the closed nature of the proceedings the first or second time she appeared in a juvenile court after being appointed to an ad litem panel in 1989.<sup>155</sup> She wondered if the welfare department policies reflected public concerns and values, and, if not, how the public would ever find out.<sup>156</sup> “I just remember standing in the courtroom thinking this was horrible that it was shrouded in secrecy. . . . I was really very angry about it.”<sup>157</sup> For a former Indiana judge, James W. Payne,<sup>158</sup> the eye-opener was a phone call he made to a welfare worker shortly after he became judge of the Superior Court’s juvenile division in Marion County, which includes all of Indianapolis, the state’s largest city.<sup>159</sup>

I called the caseworker just to ask a question. Twenty-five minutes later, someone finally came on the phone and told me nothing. I found out later, you’re not supposed to talk to those people, and while I was on hold, they had had a hurried meeting to figure out what they were going to say. . . . It was my first understanding of what this issue of confidentiality was about. It turns out that it’s really not so much about

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153. *McKeiver*, 403 U.S. at 544.

154. Schellhas previously served as judge in the criminal division from 1996-97 and in the juvenile division from 1998-2002. See Hennepin County Bar Association, A View of the Hennepin County Bench, Judge Heidi Schellhas, <http://www.hcba.org/District%20Court/Schellhas-Heidi.htm> (last visited May 18, 2006).

155. Telephone Interview with Hon. Heidi Schellhas, District Judge, Hennepin County (Feb. 28, 2005) [hereinafter Schellhas Telephone Interview].

156. *Id.*; E-mail from Hon. Heidi Schellhas, Fourth Judicial District Judge, Hennepin County, Minn., to the author (Mar. 22, 2005) (on file with author).

157. Schellhas Telephone Interview, *supra* note 155.

158. Payne took office on January 11, 2005, as director of the Indiana Department of Child Services. Tim Evans, *Child Services Chief Says He's Committed to Reforming System*, THE INDIANAPOLIS STAR, Jan. 12, 2005, at B1.

159. Telephone Interview with Hon. James W. Payne, former Superior Court Judge, Marion County (Oct. 2003) [hereinafter Payne Telephone Interview].

kids or their identity. It's about protecting the system.<sup>160</sup>

Over the last twenty-five years, a growing number of juvenile court judges, such as Schellhas and Payne, have concluded that the secrecy harms children and the juvenile court system. They have become advocates of an open court movement that has led to substantive changes in several states and influenced judges in other states to open their courtrooms to the extent allowed by law. They have justified these changes through traditional Supreme Court analysis about the benefit of open proceedings to the judicial process. Yet juvenile court judges' concerns go deeper. The impetus for change has been their frustration about stagnation. Secrecy allowed juvenile issues to fall from the public's radar. They began to appreciate the interplay between conflict in a public setting such as the courtroom and the formation of community concerns. They learned the importance of story-telling in shaping and reflecting public awareness and debate.

### A. *The Open Courts Movement*

The movement began slowly. One of the first ripples came in 1980 when the Oregon Supreme Court struck down a state law requiring the closure of juvenile hearings unless an open forum was requested by the child or the child's parents.<sup>161</sup> The catalyst, as in subsequent reforms, was a newspaper seeking courtroom access to the hearing of a thirteen-year-old girl accused of killing a four-year-old.<sup>162</sup> The Oregon court struck down the law because a provision in the state's 1859 constitution prohibited secret courts.<sup>163</sup> Aside from a few news stories,<sup>164</sup> though, the decision attracted little attention from the legal community.<sup>165</sup> The open courts movement was still young. In 1987, reacting to a newspaper series about juvenile crime, the Michigan legislature and supreme court amended state law and court rules respectively to allow public access to juvenile court hearings and some court records.<sup>166</sup> The change, which took effect in 1988,<sup>167</sup> received little notice outside of Michigan.

Not until the next decade did the open court movement gain momentum. In 1995, a six-year-old New York City girl, Elisa Izquierdo, was beaten to death by her mother while under the protection of child welfare officials, who had received

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160. *Id.* Part of this quotation also appears in Horne, *supra* note 7.

161. *State ex rel. Oregonian Publ'g Co. v. Deiz*, 613 P.2d 23 (Ore. 1980).

162. *Id.* at 25.

163. *Id.* at 26-27; *see also* ORE. CONST. art. I, § 11.

164. *See, e.g., Around the Nation, Oregon Court Voids Law Closing Juvenile Hearings*, THE N.Y. TIMES, June 19, 1980, at A16.

165. A Lexis search conducted March 19, 2006, turned up only eight law review articles citing *Oregonian Publishing Co. v. Deiz*, the earliest of which was published in 1984.

166. Jack Kresnak, *Juvenile Justice: How Journalists Can Negotiate the Juvenile Justice System*, in COVERING CRIME AND JUSTICE (Criminal Justice Journalists ed., 2003), available at [http://www.justicejournalism.org/crimeguide/chapter02/chapter02\\_pg05.html](http://www.justicejournalism.org/crimeguide/chapter02/chapter02_pg05.html).

167. KAY FARLEY, NATIONAL CENTER FOR STATE COURTS, ISSUE BRIEF: PUBLIC ACCESS TO CHILD ABUSE AND NEGLECT PROCEEDINGS 12 (2003).

allegations of prior abuse.<sup>168</sup> The extensive media coverage about this case led the New York legislature to pass Elisa's Law, allowing the disclosure of information about child abuse investigations when the child dies or abuse charges are filed.<sup>169</sup> Seven other states had already adopted similar rules.<sup>170</sup> Even more significantly, however, the New York Court of Appeals in 1997 and the Minnesota Supreme Court in 1998 adopted new rules that effectively opened most juvenile hearings in New York and juvenile protection hearings in Minnesota.<sup>171</sup> In both states, juvenile or family court judges were among those who recognized the importance of access.

In New York, the rule changes were prompted at least in part by three highly publicized cases in which family court judges decided to open their courtrooms only to see their decisions overturned at the appellate court level.<sup>172</sup> One was the child protection hearings involving Elisa's siblings.<sup>173</sup> The others were the 1993 child protective hearing involving Katie Beers, a ten-year-old Long Island girl who was kidnapped, abused, and held by a neighbor in an underground dungeon and the 1995 custody hearing concerning teen-aged movie star Macauley Culkin and his siblings.<sup>174</sup>

All three trial judges offered similar reasons for allowing public access. Closure would undermine public confidence.<sup>175</sup> The identities and circumstances of the cases were already public knowledge.<sup>176</sup> Open courtrooms help educate the public about the workings of the family court.<sup>177</sup> All three appellate courts ruled that closure was required to protect the children from further psychological harm

168. David Firestone, *Two Child Welfare Employees Are Suspended in Abuse Death*, N.Y. TIMES, Apr. 30, 1996, at A1; *see also* Committee, *supra* note 6, at 250.

169. Liam Plevin, *No More Elisas, Albany Deal to Loosen Secrecy in Child Abuse Case Files*, NEWSDAY (New York), Feb. 1, 1996, at A3; N.Y. SOC. SERV. § 422-a (Consol. 2006).

170. *States End Deadly Silence That Has Cost Kids' Lives*, USA TODAY, Feb. 8, 1996, at A10.

171. N.Y. COMP. CODES R. & REGS. tit. 22 §205.4 (2006); Order Mandating Public Access to Hearings and Records in Juvenile Protections Matters, Minnesota Supreme Court, File No. C2-95-1476 (Dec. 26, 2001). Minnesota began a trial project in 1998. Order Promulgating Rule on Public Access to Records Relating to Open Juvenile Protection Proceedings, Minnesota Supreme Court, File No. C2-95-1476 (Jan. 22, 1998); *see also* James Walsh, *New Chief Justice's First Act Rekindles Debate over Kids' Cases*, STAR TRIBUNE (Minneapolis), Jan. 29, 1998, at B1 [hereinafter Walsh, *New Chief Justice's First Act*]; James Walsh, *Child-Protection Hearings to Open to Public Today; Proponents of Opening the Process Say It Will Help Children. Doubters Say Privacy Is More Important Than Publicity. In Reality, Little May Change*, STAR TRIBUNE (Minneapolis), July 1, 2002, at B1 [hereinafter Walsh, *Child-Protection Hearings to Open to Public Today*].

172. Committee, *supra* note 6, at 244.

173. *In re Ruben R.*, 219 A.D.2d 117, 129 (N.Y. App. Div. 1996).

174. *In re Katherine B.*, 189 A.D.2d 443, 452 (N.Y. App. Div. 1993); *P.B. v. C.C.*, 223 A.D.2d 294, 298 (N.Y. App. Div. 1996); *see also* Committee, *supra* note 6, at 244-45; Jonathan Rabinovitz, *Kidnapper Says He Built Cell for Girl*, N.Y. TIMES, June 17, 1994, at B1.

175. Committee, *supra* note 6, at 245-53.

176. *Id.*

177. *Id.*

that could result from a public hearing.<sup>178</sup> The cases prompted New York Court of Appeals Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman to appoint a committee to study the Family Court access issues.<sup>179</sup> In 1997, Kaye and Lippman announced new rules: New York's family courts would be open absent a compelling reason for closure that could not be satisfied by less restrictive alternatives.<sup>180</sup>

In Minnesota, the rule changes resulted from more than a year of study by a task force appointed by the state supreme court to study foster care and adoption issues.<sup>181</sup> A subcommittee, chaired by Schellhas, recommended that juvenile hearings be open.<sup>182</sup> When the state legislature failed to pass bills authorizing a pilot project, the newly appointed Chief Justice Kathleen Blatz, a former juvenile court judge herself, urged the Minnesota Supreme Court to act.<sup>183</sup> The court authorized a three-year pilot project allowing the state's judicial districts to select counties where most abuse and neglect proceedings and records would be presumed open.<sup>184</sup> In 2002, the court made the rules permanent for all Minnesota counties.<sup>185</sup>

Following the lead of New York and Minnesota, a combination of child welfare advocates, juvenile judges, prosecutors and their respective officials, as well as the media, have pressed for access to juvenile proceedings in other states.<sup>186</sup> In 1997, according to one survey, fifteen states allowed access to, or gave a judge discretion to open, court proceedings in abuse and neglect cases.<sup>187</sup> By 2003, the number had grown to twenty-three.<sup>188</sup> More importantly, in fourteen

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178. *Id.*

179. *Id.* at 254.

180. N.Y. Comp. Codes R. & Regs. tit. 22, § 205.4 (2005).

181. Schellhas, *supra* note 6, at 657.

182. *Id.* at 659-60.

183. Walsh, *New Chief Justice's First Act*, *supra* note 171; James Walsh, *New Justice Holds Children and Their Welfare as Highest Priority*, STAR TRIBUNE (Minneapolis), Nov. 4, 1996, at A1.

184. MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON OPEN HEARINGS IN JUVENILE PROTECTION MATTERS, INTRODUCTION TO FINAL REPORT OF NATIONAL CENTER FOR STATE COURTS 13 (2001).

185. Order Mandating Public Access to Hearings and Records in Juvenile Protections Matters, Minnesota Supreme Court, File No. C2-95-1476 (Dec. 26, 2001); *see also* Walsh, *Child-Protection Hearings to Open to Public Today*, *supra* note 171.

186. *See, e.g.*, Barbara White Stack, *States Lifting Veil of Secrecy in Juvenile Court; Trend for Openness Gains Momentum Nationwide, and Pennsylvania Could Be at the Forefront*, PITTSBURGH POST-GAZETTE, Sept. 23, 2001, at A-1; Matthew Franck, *Opening Family Courts Would Help Foster Care System, Proponents Say; Level of Accountability Will Rise if Public Can View Proceedings, They Say*, ST. LOUIS POST DISPATCH, Jan. 16, 2003, at B-1; Sewell Chan, *Proposal Would Open D.C. Juvenile Cases*, WASH. POST, Jan. 12, 2004, at B1.

187. FARLEY, *supra* note 167, at 3 (citing Linda Szymanski, *Confidentiality of Abuse/Neglect/Dependency Hearings*, National Center for Juvenile Justice (1997)).

188. *Id.* at 3-4 (listing twenty-three jurisdictions, counting the Virgin Islands and the Northern Mariana Islands, providing at least some access to abuse and neglect proceedings).

of those states abuse or neglect proceedings were required or presumed to be open.<sup>189</sup> Similarly, a 2004 survey reported that delinquency hearings were open to at least some degree in thirty-five states, at least for juveniles of a certain age or for certain offenses.<sup>190</sup> These surveys likely overstated the reach of the open court movement. In some states, despite statutory or even state constitutional language appearing to require a presumption of open court proceedings, journalists reported in 2003 that juvenile judges frequently barred access to court proceedings.<sup>191</sup>

### *B. Moving Beyond Traditional First Amendment Analysis*

The lines of debate over open court proceedings are well drawn. Even at their simplest, the arguments extend beyond the Supreme Court's "logic" or "functional" analysis of the benefits of public access. The principal reasons usually offered for public access can be characterized as "sunshine," practicality, and validation.

Sunshine, a term frequently used by open court advocates,<sup>192</sup> is a play on Justice Louis Brandeis's oft-quoted remark, "Sunlight is said to be the best of disinfectants."<sup>193</sup> The term encompasses the benefits of public access that the Supreme Court has articulated for adult criminal trials, such as witness reliability and a guard against judicial abuse. But it also embraces a broader realization that secrecy breeds public distrust, ignorance, and apathy about the issues affecting juveniles.

Many juvenile court judges have come to see a direct link between their lack of funding and closed hearings. Attention brings dollars. The New York trial

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189. Required to be open: Oregon; presumed open: Arizona, Florida, Indiana, Iowa, Maryland, Michigan, Minnesota, Nebraska, New York, North Carolina, Texas, Utah, and Washington. *Id.*

190. Fourteen states that permitted or required juvenile delinquency hearings to be open to the public were Arizona, Arkansas, Colorado, Florida, Iowa, Michigan, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oregon, Texas, and Washington. Linda A. Szymanski, National Center for Juvenile Justice, *Confidentiality of Juvenile Delinquency Hearings (2004 Update)*, 9 NCJJ SNAPSHOTS 1 (Feb. 2004), available at <http://ncjj.servehttp.com/ncjjwebsite/pdf/Snapshots/ssconfidentiality902.pdf>. Twenty-one states that allowed the public to attend least some hearings were Alaska, California, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, Virginia, and Wisconsin. *Id.*

191. Author's correspondence in 2003 with reporters in Alaska, Arkansas, Delaware, Indiana, New Jersey, Texas, and Washington. For example, a Dallas reporter writes, "Judges here can close [juvenile] courtrooms whenever they want. They usually don't in Dallas, but do in surrounding counties." E-mail from Jennifer Emily, Reporter, DALLAS MORNING NEWS, to Terry Horne, Reporter, INDIANAPOLIS STAR (Oct. 9, 2003) (on file with author).

192. See, e.g., Anne E. Kornblut, *Light Shines on Legal Shadowland*, DAILY NEWS (New York), Sept. 14, 1997, at 7.

193. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

judge overseeing the child protection hearing for Elisa's siblings, for example, saw complacency as a natural consequence of closure. "[S]o long as citizens suppose that a judge can make rehabilitative services materialize with the bang of a gavel, our society will come no closer to its proclaimed goal of meaningful child protection."<sup>194</sup> Likewise, Judge Payne, who oversaw the juvenile system in Marion County, Indiana, for about two decades, recalled the problems his court had in obtaining even minor additional funds from the elected officials who controlled his budget. "If the message doesn't get out, then you can't sell it. . . . Law enforcement officials have no problem getting \$3 million for this and that . . . , [but] if someone from my system goes in and asks for \$20,000, we get grilled for half an hour."<sup>195</sup>

Practicality is the notion that in many instances closing the courtroom has little utility in protecting the child from harm. As the New York judge in the case involving Elisa's siblings remarked, any decision that she made would not affect the degree of privacy afforded the family.<sup>196</sup> Details about the family had already become public. More details would become public as the mother's criminal case proceeded.<sup>197</sup> In other cases, circumstances are already known to friends, neighbors, school officials, and authorities—the community that is of concern to the victim or offender.<sup>198</sup>

When incidents involving juveniles do rise to the level of general public interest, the privacy afforded juvenile victims and offenders often depends more on media policies than on the accessibility of any subsequent proceedings. In twenty-five years as a journalist, this author has reported on numerous stories involving juveniles. Without exception, these stories became newsworthy because private details concerning the children, including their identities, were already known, either through police reports involving the children or adults, other court records, or interviews with witnesses. Somebody is talking. Often it is a family member. Closure may protect privacy, but sometimes it is only the privacy of adults.

In 1994, for example, an Indianapolis couple seeking to adopt a four-year-old girl turned to the media when Maryland child welfare workers, who had placed the child, decided to remove her from the home.<sup>199</sup> The couple had already returned the girl's two brothers, whom the couple had initially agreed to adopt as well.<sup>200</sup> The couple claimed that all three children had been abused in a former

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194. Committee, *supra* note 6, at 247 (quoting *In re Ruben R.*, unpublished Family Court decision of Dec. 11, 1995).

195. Payne Telephone Interview, *supra* note 159; part of this quote also appears in Horne, *supra* note 7.

196. Committee, *supra* note 6, at 247 (quoting from *In re Ruben R.*, unpublished Family Court decision of Dec. 11, 1995).

197. *Id.*

198. Payne Telephone Interview, *supra* note 159.

199. Terry Horne, *Media Is Couple's Last Defense in Fight*, INDIANAPOLIS NEWS, May 27, 1994, at E12.

200. *Id.*

foster placement, that they had returned the boys to protect the girl, and that Maryland child welfare workers were retaliating against them for raising such issues.<sup>201</sup> Citing privacy laws, Maryland child welfare workers repeatedly refused to comment. Court documents later revealed that Maryland authorities were concerned about what welfare workers perceived as a harsh parenting style, independent though unsubstantiated complaints of neglect, and the extent of the couple's willingness to work with the social workers assigned to their case.<sup>202</sup>

More often, in jurisdictions with a tight reign on court access, documents do not emerge to provide a balanced account. As Judge Schellhas noted, closure in Minnesota also allowed some parents to manipulate the system.<sup>203</sup> Parents could portray child welfare workers and the court as oppressors.<sup>204</sup> The public received a distorted account of events.<sup>205</sup> "Relatives who never entered the courtroom tended to rally around the parents, not the children who suffered mistreatment."<sup>206</sup>

Schellhas observed a practical side benefit as well. Public access brought family and friends into the courtroom and made them allies of the court.<sup>207</sup> They volunteered to serve as placements for removed children; they kept watch on parents who retained custody.<sup>208</sup> "The more eyes watching and ears listening in a child's life, the greater the chance that a child will be rescued from abuse or neglect."<sup>209</sup>

In the few cases in which there is media interest, court access may turn out to be less intrusive than the alternative. In the case of Katie Beers, the ten-year-old girl who had been imprisoned in a dungeon, the trial judge noted, most reporters concentrated on the courtroom rather than dispersing to the victim's home, neighborhood, and school, "where the disruption of the infant who is involved in these proceedings could occur unfettered by any guideline or limitations."<sup>210</sup> The judge acknowledged a stark reality of news gathering in the modern age. As the visibility and news worthiness of an event increases, so does the demand for information.

At the 2001 federal execution of Timothy McVeigh, for example, an estimated 1400 journalists or members of their support crews descended on the

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201. *Id.*; see also Terry Horne, *Couple Seeks Order for Girl's Return*, INDIANAPOLIS NEWS, June 2, 1994, at A2.

202. See Def.'s Resp. to Verified Mot. for T.R.O., *Newman v. Worcester County Soc. Serv.*, IP94-C-0868 (S.D. Ind. 1994); Terry Horne, *Parenting Styles Clashed, Laura Clem's Rearing Upset Agency's Aides*, INDIANAPOLIS NEWS, June 3, 1994, at A1.

203. Schellhas, *supra* note 6, at 633.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 666.

208. *Id.*

209. *Id.*

210. *In re Katherine B.*, 596 N.Y.S.2d 847, 849 (App. Div. 1993) (quoting Family Court, Suffolk County, trial order of Mar. 5, 1993).

U.S. Penitentiary at Terre Haute, Indiana, where McVeigh was executed.<sup>211</sup> Several hundred also flew to Oklahoma City to record the reactions of family and survivors of the 1995 bombing of the federal building there.<sup>212</sup> The crush of reporters became manageable through pre-arranged plans for the flow of information. Bureau of Prison officials held regular briefings in Terre Haute; Oklahoma City officials allowed television crews to erect tents, scaffolding, and portable studios surrounding the Oklahoma City Memorial, where survivors and family members who wished to talk to the media could gather.<sup>213</sup> Many did.<sup>214</sup>

Validation is the realization that, while retelling of children's stories in open court may be stressful, it may also bring a sense of relief and confirm the seriousness of the injury they have suffered.<sup>215</sup> When proceedings are held behind closed doors, the implication is that victims should be embarrassed about letting people know what has happened to them. Schellhas refers to this as a hidden cruelty.<sup>216</sup>

The notion that publicity can be healing is familiar to journalists. Psychologists coax patients to talk about troubling experiences. Crisis teams debrief first responders to the scenes of airplane crashes and gruesome car accidents.<sup>217</sup> Six years after the Oklahoma City bombing, many survivors and even rescuers still wanted to tell their stories.<sup>218</sup> Others had finished talking and moved on. Some had never talked and never would. The assumption that public attention is invasive and a further trauma is far too simplistic to cover the myriad ways in which people respond and heal. In a case involving a child victim of abuse, the natural impulse of caregivers is to shield and protect. However, as the trial judge in the child protection hearing for Elisa's siblings noted, the major damage has already been done. "Victims of abuse often experience the torment of self-blame. It is one of the saddest consequences of all forms of domestic violence. This sense of guilt arises from within, however, and not from the press."<sup>219</sup>

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211. See, e.g., Mary McCarty, *Terre Haute a "Reluctant Participant" of World Focus*, COX NEWS SERVICE, June 9, 2001.

212. Terry Horne, *In Oklahoma City: Strength in Numbers; Memorial Offers Calm Before the Emotional Storm*, INDIANAPOLIS STAR, June 11, 2001, at A1.

213. Author's recollections from various interviews conducted in 2001.

214. *Id.*

215. See, e.g., Schellhas, *supra* note 6, at 667.

216. *Id.*

217. Terry Horne, *Rescuers Often Need Help to Recover from Trauma*, INDIANAPOLIS STAR, May 6, 2001, at A1.

218. Terry Horne, *As the Oklahoma City Bomber Lives out His Final Days, Still-Struggling Survivors Take Some Solace in Knowing . . . "Evil Did Not Triumph,"* INDIANAPOLIS STAR, Apr. 15, 2001, at A1.

219. Committee, *supra* note 6, at 248 (quoting *In re Ruben R.*, unpublished Family Court decision of Dec. 11, 1995).

*C. The Counterview: Still Grounded in Progressive Values*

Opponents of greater public access to juvenile courts have arguments to counter each of the above rationales. Many acknowledge, for example, the role that the public or press can play in bringing greater scrutiny, fairness, and consistency to the juvenile court system.<sup>220</sup> However, they contend that, when balanced against the needs of children who have been brought into court, whether as victims or offender, the value of a public presence pales. Other mechanisms such as appellate review, disciplinary commissions, guardian ad litem, court-appointed child advocates, child protection teams, and citizen panels exist or can be adopted to serve as a check on judicial abuse, insurance of consistency, and a conduit for public awareness.<sup>221</sup>

Those who would keep the doors closed, or at least hard to open, insist that the harm to juveniles from publicity and stigma is real, measurable, and long-lasting. Requiring courtroom testimony can be another form of trauma, and they argue that the harm is accentuated when the testimony must be given in court.<sup>222</sup> In the Katie Beers case, social workers seeking to close the case had submitted an affidavit from the ten-year-old girl, stating in part, "I Don't Want People to Know What HAPPEND to ME, Because It's None of THERE BISINES. A MEAN Little Boy Was Saying Things About ME Last Week and It Made ME Sad."<sup>223</sup> A psychologist, in an affidavit accompanying the statement, declared that the possibility of future disclosure would likely interfere with Katie's therapy.<sup>224</sup> The appellate court, in overturning the decision to open the case, agreed with the psychologist's conclusion that admitting the public and press would "revictimize" Katie.<sup>225</sup>

The Progressive goal of treatment remains the primary concern of advocates of closed courtrooms. Today, treatment generally implies some form of psychological or psychiatric therapy, and in this arena, the need for confidentiality is assumed. "Effective psychotherapy, unlike most conventional medical treatment, requires an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears."<sup>226</sup>

Opponents of the open court movement also argue that the stigma of criminality, mental illness, or mental disability can cause long-lasting, even

220. See, e.g., Laubenstein, *supra* note 79, at 1907.

221. *Id.*; see also Bazelon, *supra* note 5, at 176-77; William Wesley Patton, *Pandora's Box: Opening Child Protection Cases to the Press and Public*, 27 W. ST. U. L. REV. 181, 199 (1999-2000).

222. Charles R. Petrof, Note, *Protecting the Anonymity of Child Sexual Assault Victims*, 40 WAYNE L. REV. 1677, 1687-88 (1994).

223. *In re Katherine B.*, 596 N.Y.S.2d 847, 850 (App. Div. 1993) (errors in original).

224. *Id.*

225. *Id.* at 853.

226. David R. Katner, *Confidentiality and Juvenile Mental Health Records in Dependency Proceedings*, 12 WM. & MARY BILL OF RTS. J. 511, 528 (2004).

permanent harm to children.<sup>227</sup> As most parents intuitively realize, labeling a child can affect his relationship with his teachers, peers, and other adults in his immediate community, as well as his own self esteem.<sup>228</sup> Publicity, by rewarding some juveniles with attention, may encourage them to act out.<sup>229</sup> News stories can be a permanent record that prevents a juvenile's re-assimilation—even years later and hundreds of miles away, as the story of Gina Grant points out. Harvard University had admitted the straight A-student in early 1995 but then rescinded its offer after learning that she had killed her abusive mother five years earlier.<sup>230</sup> By all accounts, Grant's rehabilitation had been as successful as any rehabilitation could be, and the record of her conviction had been sealed.<sup>231</sup> However, someone anonymously mailed Harvard news clippings about her arrest and subsequent court proceedings.<sup>232</sup>

The stigma does not just attach to the child; it can attach to the family.<sup>233</sup> As one commentator pointed out, disclosure affects poor families more harshly because they lack the resources to get a fresh start by moving to another community, changing schools, or obtaining therapy to offset the harm of publicity.<sup>234</sup>

#### *D. Differing Views About the Role of the Press and How It Works*

Despite these disagreements, both sides of the open court movement are not so far apart as they sometimes seem. Opponents accept that public issues may be so paramount in at least some cases that they require an open door. Advocates are equally concerned about the best interests of children. Most acknowledge the potential for the release of embarrassing information and would allow judicial discretion to close proceedings at certain times or even in some cases.

New York's court rules, for example, allow judges to exclude "some or all observers" if necessary to protect children from harm.<sup>235</sup> Moreover, the rule that courts employ less restrictive alternatives has led most judges to routinely condition access on agreement by the press not to identify the victims.<sup>236</sup> In Minnesota, open access applies only to dependency hearings and even Schellhas, a staunch supporter of access to those proceedings, has reservations about access

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227. Laubenstein, *supra* note 79, at 1904-05; *see also* Katner, *supra* note 226, at 525.

228. Laubenstein, *supra* note 79, at 1904-05.

229. Nelson, *supra* note 111, at 1149-51.

230. Alice Dembner & Jon Auerbach, *Pupil's Past Clouds Her Future; Harvard Rescinds Offer After Learning That Honors Student Killed Her Mother*, BOSTON GLOBE, Apr. 7, 1995, at Metro/Region 1.

231. *Id.*

232. *Id.*; *see also* Hollister, *supra* note 122, at 913-17.

233. Katner, *supra* note 226, at 527.

234. *Id.*

235. N.Y. Comp. Codes R. & Regs, tit. 22, § 205.4(b)(3).

236. Committee, *supra* note 6, at 259.

to delinquency hearings.<sup>237</sup> In Michigan, where juvenile court proceedings have been open for nearly two decades, court rules effectively require the maintenance of two record systems. One is the public file containing allegations, subpoenas, and other routine information; the other is the closed “social file” holding mental health records, school files, and other evaluations.<sup>238</sup> Even in Oregon, where the state’s supreme court held that the state constitution required all court proceedings to be open, the court’s opinion left unresolved the question whether access could be limited if required to assure a fair trial and whether certain individuals could be excluded.<sup>239</sup>

The fundamental disagreement is generally about whether states should adopt a rebuttable presumption that proceedings are closed or open. Underlying this disagreement, however, are competing views about the nature of the media and its relationship to the judicial system.

Those who would keep juvenile courts mostly closed often see the media in a static role that, while varied, is academic and bureaucratic. The specifics may differ. However, the general notion likely parallels this description by the Illinois Supreme Court that a newspaper’s constitutional role is to “act[] as a conduit for the public in generating the free flow of ideas, keep[] the public informed of the workings of governmental affairs, and check[] abuses by public officials.”<sup>240</sup>

Few journalists would disagree that their role includes at least this much,<sup>241</sup> but it seems a dry formulation of the job that reporters often do. Interviewing the mother of a five-year-old child who has just been shot dead by the neighborhood drunk seems, at first glance, to have little to do with the free flow of ideas, the workings of governmental affairs, and checking abuses by public officials.<sup>242</sup> Nor do details that the mother had just bought her son his clothes for his first day of school. Or that the drunk had been pounding on the door, trying to collect a five dollar debt, when he fired his gun and killed the boy on the other side. These are the very sort of details that resonate with readers and, on occasion, propel them to act. Yet their importance is minimized in the conduit model.

This view of the media as merely informer and watchdog has led to suggestions that public access to juvenile courts can be satisfied by various alternatives, such as participation in media panels<sup>243</sup> or contractual agreements to

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237. Schellhas Telephone Interview, *supra* note 155.

238. Mich. Ct. R. 3.925 (2006); *see also* Kresnak, *supra* note 166.

239. *State ex rel. Oregonian Publ’g Co. v. Deiz*, 613 P.2d 23, 27 (Ore. 1980).

240. *In re Minor*, 595 N.E.2d 1052, 1057 (Ill. 1992).

241. *See, for example*, this excerpt from the Society of Professional Journalists’ mission statement: “To ensure that the concept of self-government . . . remains a reality . . . , the American people must be well informed . . . . It is the role of journalists to provide this information in an accurate, comprehensive, timely and understandable manner.” Society of Professional Journalists, SPJ Missions, [http://www.spj.org/spj\\_missions.asp](http://www.spj.org/spj_missions.asp) (last visited Jan. 26, 2006).

242. Author’s recollections from researching a news story in the early 1980s while working as a reporter for the *Birmingham Post Herald*.

243. *See, e.g.*, Patton, *supra* note 221, at 199-204.

inspect juvenile files without releasing identifying details.<sup>244</sup> Subscribers to the conduit model encourage reporters to educate and reform.<sup>245</sup> One scholar instructs, "Reform should not come about because '[t]he bright lights of the media shine on a dead child's battered body, and for a short time the system kicks into high gear.'"<sup>246</sup>

Moreover, when courtrooms are opened and reporters fail to appear on a regular basis, as indeed happened in Minnesota,<sup>247</sup> conduit adherents suggest that the press is not fulfilling its end of the bargain. As one noted open-court critic, Professor William Wesley Patton, remarked, "The press' claims that they want to enter the child abuse system to educate the public regarding systemic abuse and inefficiency has proven to be nothing more than a hollow platitude."<sup>248</sup>

When the media's role is so narrowly defined, then the press is likely to come up short when the value of its general functions are balanced against the potential but specific harm to a sympathetic child victim who has already been traumatized. This is particularly true, Professor Patton suggests, if the media's interest is merely in cases involving celebrities or particularly gruesome abuse.<sup>249</sup> "Thus we would be left with this paradox: the press would not be admitted to the hearings they most want to report on and they would not report on the hearings in which they would be entitled to attend."<sup>250</sup>

This has not happened. In states such as Minnesota, Michigan, and New York, open door policies have brought reporters into the courtrooms even if the frequency is sometimes not as high as reformers had hoped.<sup>251</sup> What many judges realized was that although the media's attention is episodic, even fitful, some coverage is better than none. As Judge Payne noted, "It brings attention to the system."<sup>252</sup> Moreover, some cases resonated with the public in a way that others, even those that were as gruesome or more so, did not.<sup>253</sup> For Judge Sara Schechter overseeing the Elisa sibling child protection hearing, it was "the underlying tragedy, and the ensuing public debate (which) provided an appropriate opportunity to educate the public."<sup>254</sup>

What these judges understood is that courtrooms are a public forum where interests, norms, and social values conflict. Cases did not capture the public's

244. See, e.g., Shannon F. McLatchey, *Media Access to Juvenile Records: In Search of a Solution*, 16 GA. ST. U. L. REV. 337, 356-58 (1999).

245. Jennifer L. Rosato, *The Future of Access to the Family Court: Beyond Naming and Blaming*, 9 J.L. & POL'Y 149, 158 (2000).

246. *Id.* (quoting Jerry Harris, *Postmortem: After Elisa. CWA Shifts Gears Following Another Abused Child's Death*, VILLAGE VOICE, Dec. 12, 1995, at 14).

247. See Walsh, *Child-Protection Hearings to Open to Public Today*, *supra* note 171.

248. Patton, *supra* note 221, at 193.

249. *Id.* at 193-95.

250. *Id.* at 194.

251. See, e.g., Committee, *supra* note 6, at 259-61.

252. Payne Telephone Interview, *supra* note 159.

253. *Id.*

254. *In re Ruben R.*, 641 N.Y.S.2d 621, 624 (App. Div. 1996).

attention. Stories did. And they captured the public's eye usually because they symbolized fundamental conflicts or concerns that the public cared about. As Judge Schellhas notes, "What happens in the courtroom generates discussion, and exchanges, and discourse about norms and policies and values."<sup>255</sup>

### *E. Public Discourse and the Importance of Storytelling*

The open court movement—the realization of judges that the juvenile justice system was stagnating from secrecy—is an affirmation of a concept that some sociologists, cultural historians, and anthropologists refer to as the "public sphere,"<sup>256</sup> that law Professor Judith Resnik terms the "public dimension,"<sup>257</sup> and this Note labels the "public discourse." It is a concept that tries to capture the shifting interplay of events, culture, and politics; of water-cooler conversations and the six o'clock news; of court room trials, street protests, and sporting events.<sup>258</sup>

In this shifting collage of values, norms, and ideas, the news media is not entirely rudderless. For a quarter-century, a group of teachers at the University of Missouri School of Journalism have offered their students a list of six news values that American journalists tend to consider in evaluating the newsworthiness of an event.<sup>259</sup> The factors are proximity, impact, timeliness, prominence, uniqueness (now labeled novelty), and conflict.<sup>260</sup> A local murder, for example, is more newsworthy than a murder abroad. A car accident involving the mayor gets better play than a car accident involving an ordinary citizen.

The most common of these values may be conflict, an element that is present in most news stories in some fashion. It is also the element that is ever present in courtrooms. Courts are public places where conflicts between people, values, and interests are resolved. In this sense, the happenings in a courtroom are almost always news to some extent. Whether that news becomes part of the public discourse will depend on the degree of that conflict and the presence of other news values.

It will also depend, however, on narrative power. As Professor Resnik notes, "[trials] have the capacity to generate emotion."<sup>261</sup> News stories from the courtroom resonate because of story lines that touch upon common values, ideas, or concerns. The story of Gina Grant's rescinded admission to Harvard, for example, had narrative power because of multiple story lines: the ability of

255. Schellhas Telephone Interview, *supra* note 155.

256. See, e.g., JURGEN HABERMAS, JURGEN HABERMAS ON SOCIETY AND POLITICS, A READER 231-36 (Steven Seidman ed. 1989).

257. See Resnik, *supra* note 9, at 407.

258. Some have suggested that modern political democracy began with the development of the public sphere in the eighteenth century. See HABERMAS, *supra* note 256, at 232-36.

259. THE MISSOURI GROUP—BRIAN BROOKS, GEORGE KENNEDY, DARYL MOEN & DON RANLY, NEWS REPORTING AND WRITING 5-6 (8th ed., Bedford/St. Martins 2005).

260. *Id.*

261. Resnik, *supra* note 9, at 413.

society to forgive and for what crimes, the rights of potential classmates to information about a woman's past, the consideration of character as a basis for admission to a prestigious university, the right to erase one's past, and more.

Journalists learn quickly the power of narrative. Reporters are trained "to show, not tell." Even stories written in the traditional inverted pyramid style, so-called because the facts are given in order of importance, often contain mini-narratives. Stories may be organized around "actors," each of whom contributes an idea that helps move the story along.<sup>262</sup> Stories resonate when they evoke images, emotions, or memories in readers. They do this through detail, not generalities. As the Seventh Circuit recognized, "Reporting the true facts about real people is necessary to 'obviate any impression that the problems . . . are remote or hypothetical.'"<sup>263</sup>

Reporter Jack Kresnak, who has been covering juvenile issues for the *Detroit Free Press* since 1988, has written about hundreds of children in the juvenile court system.<sup>264</sup> He says he cannot remember a single one who was harmed by the publicity.<sup>265</sup> "The vast majority of them are helped by the little attention paid to their case. They don't get lost in the system."<sup>266</sup> Yet Kresnak had long held the hope of writing a story or stories that set out how the juvenile system really worked.<sup>267</sup> That was, he acknowledged, a dry topic. So his solution was "a narrative series, with cliff hangers and stuff."<sup>268</sup>

The series, which ran the week of December 4, 2000, began this way:

The emergency room doctor had never seen a body so badly beaten.

The victim, already dead when she was carried into Port Huron Hospital on Jan. 31, weighed just 26 pounds.

Her skull was cracked. Her right elbow was broken. Bruises, fresh and old, covered her arms, legs, feet, back, chest and head.

Her name was Ariana Swinson. She was 2 years old.<sup>269</sup>

The narrative series connected with readers with a force that other stories lacked.<sup>270</sup> On January 3, 2005, more than four years later, Kresnak watched as

262. See, e.g., WILLIAM E. BLUNDELL, *THE ART AND CRAFT OF FEATURE WRITING: BASED ON THE WALL STREET JOURNAL GUIDE* 20, 110 (1988).

263. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1233 (7th Cir. 1993) (quoting *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 308 (10th Cir. 1981)).

264. Telephone Interview with Jack Kresnak, Reporter, *Detroit Free Press* (Oct. 2003).

265. *Id.*

266. *Id.*

267. Telephone Interview with Jack Kresnak, Reporter, *Detroit Free Press* (Feb. 4, 2005) [hereinafter 2005 Kresnak Telephone Interview].

268. *Id.*

269. Jack Kresnak, *Murder by Neglect: Ariana's Story, A 2-Year-Old Girl Dies at Her Parents' Hands After the System Meant to Protect Her Fails*, *DETROIT FREE PRESS*, Dec. 4, 2000, at A1.

270. 2005 Kresnak Telephone Interview, *supra* note 267.

Governor Jennifer Granholm signed “Ariana’s Law.”<sup>271</sup> The act gave the state’s Children’s Ombudsman Office access to child welfare reports and records, which had remained secret even after the juvenile courts had opened most of their own records and proceedings.<sup>272</sup>

Courtrooms, like newspapers or television, employ narrative power. As Professor Resnik has observed, stories are told at trial.<sup>273</sup> “As the success of soap operas suggests, the unfolding of a story in bits and pieces can capture our interest and perhaps can even provide a sense of vicarious participation.”<sup>274</sup> Courtroom stories often have more power because they are told in a forum with rules and procedure that, rightly or not, imbue these narratives with credibility. Legal cases have become a staple of national broadcast news, not because these stories are easy to obtain, but because such stories are “shared tales”<sup>275</sup> told in a familiar forum.<sup>276</sup> As open courts advocates realized, stories that “strike a chord tend to be the cases that spur legislative action.”<sup>277</sup> When high-profile narratives such as the stories of Katie Beers, Elisa Izquierdo, and Ariana Swinson capture the nation’s attention, it makes little sense to deny the public admission to the most credible forum.

#### CONCLUSION

Opening juvenile courts is not a solution to the recurring problems this country has faced in trying to address the needs of children. As former Minnesota Chief Justice Kathleen Blatz noted, change is likely to be measured in decades.<sup>278</sup> “Opening up juvenile court is a conduit for change. It’s not substantive change. It’s a window.”<sup>279</sup> Yet the juvenile court experience has immediate significance for the analysis of court access issues.

First, courts are public places where society’s values, ideas, and concerns are continually tested. When access to the courts, or their records, is denied, then society loses the value of those decisions. Social policies and institutions can stagnate.

Second, public presence is not merely a conduit for the flow of information

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271. *Id.*; see *Gov. Granholm Signs Ariana's Law to Protect Children in Michigan*, US FED NEWS, Jan. 3, 2005.

272. *Id.*; see also 2004 Mich. Pub. Acts 560 (codified as amended at Mich. Comp. Laws §§ 722, 922-930 (2005)).

273. Resnik, *supra* note 9, at 413.

274. *Id.*

275. *Id.*

276. Schellhas Telephone Interview, *supra* note 155.

277. Sokol, *supra* note 27, at 920.

278. Telephone Interview with Kathleen Blatz, Chief Justice, Minnesota Supreme Court (Oct. 2003) [hereinafter Blatz Telephone Interview]. Blatz retired from the bench on Jan. 10, 2006. See David Phelps & Janet Moore, *Inside Track, Blatz Goes Back to School*, STAR TRIBUNE (Minneapolis), Jan. 16, 2006, at D1.

279. Blatz Telephone Interview, *supra* note 278.

or means of ensuring scrutiny of government actors. Rather, the public's presence, usually through the media, is a means of participating in the public discourse.

Third, court proceedings have an impact on the public discourse not simply because conflicts are resolved, but because those conflicts are resolved in a structured setting for storytelling.

As new court access issues emerge, such as access to electronic court records, or as courts reexamine the need for access to existing proceedings, the participants in these debates should remember that the consequences are not limited to the judicial system alone. The stories that are told, or not told, will affect who we are as individuals, as a community, and a society. They will help determine our capacity for change, our ability to learn, and our growth as a people. The importance of public discourse is not new. As James Madison remarked more than 200 years ago, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy, or, perhaps both."<sup>280</sup>

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280. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 518 (1984) (Stevens, J., concurring) (quoting 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed., 1910)).