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Striking a Balance: Freedom of the Press Versus Children's Privacy Interests in Juvenile Dependency Hearings

*Kelly Crecco**

I. INTRODUCTION

In the fall of 2012, Jerry Sandusky, the now infamous former Penn State defensive football coach, was sentenced to thirty to sixty years in prison after being convicted on forty-five counts of child sexual abuse.¹ Over the course of fifteen years, Sandusky sexually abused ten young boys, all of whom had trusted him as a coach and mentor.² While it was later revealed that for several years many people from Penn State had some level of knowledge of Sandusky's actions, it was not until 2011 that the public began to learn of his deplorable conduct after Sandusky was arrested on charges of sexually abusing eight boys.³ Unsurprisingly, the Sandusky scandal garnered substantial media attention.⁴

During Sandusky's trial, the press was granted access to the courtroom, as criminal adult proceedings are presumptively open under the First Amendment, but was restricted in engaging in live

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1. Josh Levs & Laura Dolan, *Sandusky Gets at Least 30 Years for Child Sex Abuse*, CNN (Oct. 9, 2012, 6:17 PM), <http://www.cnn.com/2012/10/09/justice/pennsylvania-sandusky-sentencing/index.html>. The judge ruled that Sandusky would not be eligible for parole for thirty years and set his maximum sentence at sixty years. *Id.*

2. *See id.*

3. Justin Sablich, Ford Fessenden, & Alan McLean, *Timeline: The Penn State Scandal*, N.Y. TIMES, <http://www.nytimes.com/interactive/2011/11/11/sports/ncaafootball/sandusky.html> (last visited Feb. 4, 2013).

4. Larry Cohen & Pamela Mejia, *Reporters Can Do Better: New Report on Media Coverage of Sandusky*, HUFFINGTON POST (Jan. 12, 2012, 1:35 pm), http://www.huffingtonpost.com/larry/reporters-can-do-better-m_b_1199497.html.

reporting, such as tweeting, updating websites, or communicating via text or email with those outside the courtroom.⁵ The coverage of the trial was extensive, and, at times, accounts of the courtroom proceedings were shaded with hyperbole.⁶ One constant throughout the reporting though was the press' protection of the privacy rights of Sandusky's victims who were only ever identified as Victim No. 1, Victim No. 2, and so on,⁷ despite the fact that their names were readily available to the press.⁸ The involvement of the press not only shed light on Sandusky's crimes, but also raised significant awareness on the sensitive topic of child sexual abuse.⁹ Commentators on the media coverage of the Sandusky trial noted "[t]he Penn State scandal is just the most recent and public instance of a crime that happens every day," and having the press cover this type of case can help bring preventive reform.¹⁰

Although the Sandusky case involved adult criminal proceedings, the subject matter was very similar to that typically

5. Sara Ganim, *Live Reporting Not Allowed from Courtroom in Jerry Sandusky Case After Media Question Judge Order*, PATRIOT-NEWS, http://www.pennlive.com/midstate/index.ssf/2012/06/tweeting_no_longer_allowed_in.html (last updated June 4, 2012, 9:51 AM) ("Judge John Cleland reversed his own ruling that would have allowed such transmissions, as long as they weren't direct quotes, after media organizations asked him to reconsider citing concern about what a direct quote meant and how reports would remain accurate.").

6. George Solomon, *Slow to React*, AMERICAN JOURNALISM REVIEW (Nov. 21, 2011), <http://www.ajr.org/article.asp?id=5178>. In his review of the press coverage of the Penn State scandal, Solomon notes that "[i]t's been compared to the priest scandal that has rocked the Catholic Church for the last 25 years," and "[i]n the world of sports, the child sexual abuse story embroiling Penn State has drawn parallels to the death of superstar basketball player Len Bias, Magic Johnson testing HIV positive and the steroid controversy that engulfed Major League Baseball players." *Id.*

7. See Levs & Dolan, *supra* note 1.

8. Daniel Heimpel, *A Time for Trust*, CHRONICLE OF SOCIAL CHANGE (July 2, 2012), <http://chronicleofsocialchange.wordpress.com/2012/07/02/a-time-for-trust/> ("A clear example of the press respecting confidentiality was throughout the recent Jerry Sandusky saga. Journalists had access to the names of Sandusky's victims, but did not release them to the public.").

9. Cohen & Mejia, *supra* note 4.

10. *Id.*

involved in juvenile dependency proceedings.¹¹ Sandusky's victims were children at the time of the abuse, and this same type of scenario is present in dependency proceedings every day.¹² Often the children involved in dependency cases were either abused, sexually or otherwise, by their own parents, or were abused by someone else due to the neglect of their parents.¹³ The reporting response to the Sandusky case, which was both ethical and informative, demonstrates how the press can still report the facts while simultaneously respecting the confidentiality of the victims.¹⁴

11. See *What are the Charges Against Jerry Sandusky?*, CNN (June 12, 2012, 10:17 PM), <http://www.cnn.com/2012/06/21/justice/pennsylvania-sandusky-charges/index.html> (reporting that Sandusky was charged with "48 counts of child sexual abuse involving 10 alleged victims").

12. *Jerry Sandusky*, N.Y. TIMES (Oct. 9, 2012), http://topics.nytimes.com/top/reference/timestopics/people/s/jerry_sandusky/index.html. The jury ultimately found that Sandusky had sexually abused "10 young boys, all of them from disadvantaged homes." *Id.*

13. In the Juvenile Code section of the North Carolina General Statutes, which provides laws governing juvenile dependency proceedings, the first definition in the definitions subchapter of the statute is the definition of "abused juveniles." N.C. GEN. STAT. § 7B-101(1)(a)-(b) (2012). An abused juvenile is "[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker [i]nflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means," or "[c]reates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means." *Id.*

14. For instance, when the public learned that the eight victims that agreed to testify at trial would have to state their names for the record before the entire courtroom, *The Patriot-News*, a central Pennsylvania-based media outlet that comprehensively reported on the Sandusky trial through its website PennLive, vowed not to repeat the victims' names. *The Patriot -News* announced:

Throughout our coverage of the former Penn State coach's criminal trial, we will stand by our long-held policy to not identify alleged victims of sexual assault, whatever their age or gender, unless they themselves choose to go public. We also will try to avoid providing any details about their lives that could readily lead to them being uncovered. We will take precautions to avoid photographing any of the eight, who are now young men.

When reporters do their jobs correctly, the benefit to the public can be enormous. The press is able to shed light on issues, like the horrors of the Sandusky case, that otherwise would go unnoticed by the public, potentially leading to positive societal changes.¹⁵ This Note argues that like adult criminal proceedings, *all* juvenile dependency proceedings should, under the guarantees of the First Amendment, be presumptively open to the press¹⁶ unless there are legitimate, compelling reasons why the courtroom should be closed, including the child's request that the proceeding be closed. As will be detailed further below, there are two competing interests that are at the forefront of the debate over press access to juvenile dependency proceedings.¹⁷ On one side, opponents argue that allowing press access to the courtroom infringes upon the privacy rights of the children, while on the other side, proponents argue that the press enjoys a First Amendment right to report on these proceedings.¹⁸ The solution proposed above of presumptive openness serves to satisfy both the proponents and the opponents of open dependency hearings.

In order to effectively formulate this argument for presumptively open juvenile dependency proceedings, the remainder of this Note is divided into five parts. Part II addresses the history of the dependency court and the history of press access to the courtroom. Part III discusses the state of open dependency courtrooms in California, one of the most recent states to confront the debate over openness. Part IV presents the arguments for and against open juvenile dependency proceedings. Part V explains why juvenile dependency courtrooms should be open with certain

Jerry Sandusky Trial: Why We Won't Identify Alleged Sex-Crime Victims, PATRIOT-NEWS (June 11, 2012, 1:02 AM), http://www.pennlive.com/midstate/index.ssf/2012/06/jerry_sandusky_trial_why_we_wo.html.

15. Heimpel, *supra* note 8. There is a strong argument "that the news media's ability to promote positive social change amount to a 'legitimate interest' in the proceedings and thus sanction journalist access." *See id.*

16. As will be discussed in more detail below, some jurisdictions already permit presumptively open juvenile dependency proceedings, but this Note argues that *all* jurisdictions should be presumptively open.

17. *See infra* Part IV.

18. *See infra* Parts IVA–B.

conditions imposed in order to preserve the interests of the children involved. Lastly, Part VI concludes this Note by summarizing why presumptively open juvenile dependency hearings provide the most favorable option for both the children involved and the press.

II. HISTORICAL BACKGROUND

A. History of Dependency Courts

In 1899, the State of Illinois established the United States' first juvenile court.¹⁹ The purpose of the early juvenile court was to provide legal assistance to delinquent children as well as pre-delinquent children, and typically, this latter category encompassed dependent children.²⁰ Dependent children are children under eighteen years old who have been physically or sexually abused, neglected, or abandoned by their parent or guardian.²¹ Thus, all children—whether delinquent, abused, neglected, or abandoned—were grouped together in one court.²² The U.S. juvenile court system adopted the nineteenth century *parens patriae*²³ system, functioning as protector of both delinquent and dependent children.²⁴ Under this *parens patriae* authority, the early juvenile court was designed to “function as a centralized agency responsible

19. See Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17, 26 (1998) (citing Act of Apr. 21, 1899, [1899] Ill. Laws 131). The Illinois Legislature implemented “An Act to Regulate the Treatment and Control of Dependent, Neglected and Delinquent Children,” which led to the creation of the juvenile court. Illinois Juvenile Court Act, 1899 Ill. Laws 131 (repealed 1965).

20. Kathleen S. Bean, *Changing the Rules: Public Access to Dependency Court*, 79 DENV. U. L. REV. 1, 30–31 (2001).

21. Jennifer Flint, Comment, *Who Should Hold the Key?: An Analysis of Access and Confidentiality in Juvenile Dependency Courts*, 28 J. JUV. L. 45, 46 (2007).

22. See Bean, *supra* note 20, at 30.

23. *Parens patriae* is defined as “the state in its capacity as provider of protection to those unable to care for themselves.” BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

24. Ventrell, *supra* note 19, at 27.

for all such children from start to finish,” and the court was commonly thought to maintain a “child saving” mission.²⁵

However, the scope of a court’s *parens patriae* authority drastically changed following the U.S. Supreme Court’s decision in *In re Gault*.²⁶ The case came before the Court after Gerald Gault, a fifteen-year-old boy, was arrested and taken to the Children’s Detention Home due to a complaint from a neighbor that Gerald and one of his friends made indecent remarks to her over the telephone.²⁷ During the course of his arrest, his time at the detention center, and his court hearings, Gerald was denied many procedural due process rights that are normally afforded adults.²⁸ Among other claims, the Court addressed the procedural due process rights of juveniles as compared to those of adults.²⁹ In a majority opinion delivered by Justice Abe Fortas, the Court found that “the Juvenile Court Judge’s exercise of the power of the state as *parens patriae* was not unlimited” and that due process applies to children just as it applies to adults.³⁰

One commentator describes the impact of this case in his article: “[w]hile *Gault* did not instruct juvenile courts across the country to wholly substitute adult criminal procedure for juvenile practice, that is very much what happened.”³¹ Following the Court’s decision in *Gault*, *parens patriae* authority essentially disappeared from the delinquency court context, separating the delinquency

25. *Id.* (noting that although it was the intention of the court to exercise *parens patriae* authority over dependent juveniles, there were many shortcomings in the system—especially given that dependent and delinquent children were all under the authority of one court—that consequently hindered the court in effectively carrying out its “child saving” philosophy).

26. 387 U.S. 1 (1967).

27. *Id.* at 4–5.

28. *Id.* at 10. The Court was asked to consider whether Gerald was denied various due process rights, including notice of charges, right to counsel, right to confrontation and cross-examination, privilege against self-incrimination, right to transcript of the proceedings, and right to appellate review. *Id.*

29. *Id.* at 13–14.

30. *Id.* at 30–31.

31. Ventrell, *supra* note 19, at 28 (emphasis added).

court from the dependency court.³² This separation was necessary, as delinquent children and dependent children fall under different legal classifications and have different legal interests, and, as such, they should have separate legal courts.³³ While delinquent children are the offenders who have violated the law, dependent children are the victims of law violations, including neglect and abuse.³⁴

Once the dependency court became its own entity, dependent children remained the beneficiaries of the court's *parens patriae* authority, but society no longer saw these children as pre-delinquents. Instead, they saw them instead as children in need of protection from maltreatment.³⁵ With this new perspective, federal and state legislatures passed new statutes related to dependent children,³⁶ and as a result, the juvenile dependency court became, and remains today, the principal setting for addressing child abuse and neglect cases.³⁷ The most common types of hearings that take place in dependency courtrooms are adjudications,³⁸ dispositions,³⁹ reviews,⁴⁰ permanency planning,⁴¹ and termination of parental

32. *Id.*

33. See Veena Srinivasa, Note, *Sunshine for D.C.'s Children: Opening Dependency Court Proceedings and Records*, 18 GEO. J. ON POVERTY L. & POL'Y 79, 82–83 (2010).

34. *Id.* at 82.

35. See *id.*

36. See John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 455–60 (2008) (discussing many important pieces of legislation, including the Child Abuse Prevention and Treatment Act of 1974, the Adoption Assistance and Child Welfare Act of 1980, and the Adoption and Safe Families Act of 1997).

37. Ventrell, *supra* note 19, at 30.

38. See Kella W. Hatcher, Janet Mason & John Rubin, ABUSE, NEGLECT, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA 1, 158 (2011) (“‘Adjudication’ refers both to the hearing at which the court determines the existence or nonexistence of the facts alleged in the petition, and to the court’s action when it concludes as a matter of law that a child is an abused, neglected, or dependent juvenile.”).

39. *Id.* at 207 (“The disposition hearing takes place immediately after or within 30 days of the adjudication hearing.”).

40. *Id.* (“When custody is removed from a parent, guardian, custodian, or caretaker, a review hearing must take place within 90 days of the disposition. Subsequent review hearings are required at maximum intervals of 6 months

rights.⁴² The main goal of the modern dependency court is to serve the best interests of the child involved in these proceedings while also, to the extent reasonably possible, preserving the autonomy of the family.⁴³

Since the formation of the first juvenile court in 1899, the dependency court has evolved considerably. In general, modern adult criminal courts are open to the public under the guarantees of the First Amendment,⁴⁴ but the Supreme Court has never directly addressed whether juvenile courts should be open to the public as well. Despite the Court's silence on this matter, there are many strong arguments for why juvenile dependency courts should be presumptively open.⁴⁵ A brief examination of the history of press and public access to both adult and juvenile courtrooms is a helpful guide for articulating these arguments. Throughout this history, the press has "enjoy[ed] the same right of access as the public."⁴⁶

for as long as the child remains out of the home, and review hearings may be held at any time on motion of a party.").

41. *Id.* ("Within 12 months of a child's initial removal from the home, which may have been pursuant to a nonsecure custody order before adjudication, a special review hearing designated as a 'permanency planning hearing' must be held in order to ensure that a plan is in place to return the child home or achieve another safe, permanent home for the child within a reasonable period of time.").

42. *Id.* at 235 ("Termination of parental rights (TPR) is the state's ultimate interference into the constitutionally protected parent-child relationship, severing all legal ties between the parent and the child. TPR may occur only if the court finds by clear, cogent, and convincing evidence that at least one statutory ground for termination exists and also finds that terminating the parent's rights is in the child's best interest. All TPR proceedings are in juvenile court, before a district court judge without a jury.").

43. *Id.* at 31.

44. See generally *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

45. See *infra*, Part IV.B.

46. See *Richmond Newspapers*, 448 U.S. at 572–73 (The Court prefaces that: "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public."); see also Lawrence J. Morris, *Constitutional Law – Closure of Trials – The Press and the Public*

B. History of Press Access to the Courtroom

1. Press Access to Adult Proceedings

While the issue of public access⁴⁷ to juvenile hearings remains an open debate,⁴⁸ the issue of public access to adult proceedings has long been settled.⁴⁹ In *Richmond Newspapers, Inc. v. Virginia*,⁵⁰ the U.S. Supreme Court considered whether the public

Have a First Amendment Right of Access to Attend Criminal Trials, Which Cannot Be Closed Absent an Overriding Interest. *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980), 64 MARQ. L. REV. 717, 730 (1980 – 1981) (“The clear consensus of cases dealing with ‘fair trials – free press’ issues is that even though the press can be limited in certain (usually clearly outlined) circumstances, the Court begins with a presumption of maximum protection of the press in its role as conduit of information for the people.”).

47. While the central focus of this Note is press access to juvenile dependency proceedings, many courts and legal scholars refer to this access more generally as public access since public access typically comes with press access. For instance, the press has been referred to as the public’s “surrogate.” See *Richmond Newspapers*, 448 U.S. at 572–73; see also Samuel Broderick Sokol, Comment, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. REV. 881, 883 (1998). Therefore, for purposes of this Note, press access and public access refer to the same concept.

48. Again, this Note focuses on press and public access to juvenile dependency proceedings, but it is important to point out that just as the U.S. Supreme Court has never recognized a public right of access to juvenile dependency proceedings, it has also never recognized this right of access to juvenile delinquency proceedings. Courtney R. Clark, Note, *Collateral Damage: How Closing Juvenile Delinquency Proceedings Flouts the Constitution and Fails to Benefit the Child*, 46 U. LOUISVILLE L. REV. 199, 201 (2007) (“[T]he Supreme Court has ruled on several related topics, barely sidestepping the issue of the constitutionality of limiting public access to juvenile courtroom proceedings. Skirting the issue of whether banning public and media access to juvenile court hearings compromises the media or the public’s constitutional rights, the Court has methodically extended the media’s right to witness criminal trials over recent decades. . . . [T]he absence of a Supreme Court holding and national legislation has allowed each state to legislate and enforce its own variation of juvenile court proceedings, which vary greatly from state to state and are flooded with ambiguity.”).

49. See Sokol, *supra* note 47, at 884; see also *supra* note 46 and accompanying text.

50. 448 U.S. 555 (1980).

has a constitutionally guaranteed right to attend criminal trials.⁵¹ The case was brought before the Court after two reporters for Richmond Newspapers, Inc., were excluded from attending a murder trial after the trial judge granted a motion to have the trial closed to the public.⁵² The reporters argued that their constitutional rights to attend the trial should have been considered before the lower court ordered closure.⁵³

The Court held that the right of the public to attend criminal trials “may be seen as assured by the amalgam of the First Amendment guarantees of speech and press.”⁵⁴ The plurality opinion provided two important justifications for the public’s right to attend criminal trials. First, the opinion argued that historically, courts have been open to the public.⁵⁵ Second, the opinion recognized that public attendance helps to ensure fairness in the courtroom.⁵⁶ This latter reason for openness is particularly relevant in the context of juvenile dependency proceedings, as described more thoroughly below.⁵⁷

Just two years after its decision in *Richmond Newspapers*, the Court again upheld the First Amendment right of public access to criminal trials in *Globe Newspaper Co. v. Superior Court*.⁵⁸

51. *Id.* at 564.

52. *Id.* at 559–62.

53. *Id.* at 560.

54. *Id.* at 577.

55. *Id.* at 569 (plurality opinion) (“[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open.”).

56. *Id.* at 578 (plurality opinion). Chief Justice Warren Burger described the courtroom as 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.” *Id.*

57. See *infra* Parts IV.B.1–2.

58. 457 U.S. 596 (1982). In this case, the Massachusetts Supreme Judicial Court interpreted a Massachusetts statute as requiring “trial judges, at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim.” *Id.* at 598. In response, *Globe Newspaper Company*, a media outlet that tried and failed to gain access to the entire trial, including the portion

Following the precedent of *Richmond Newspapers*, the Court emphasized that “the criminal trial historically has been open to the press and general public” and that “the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole.”⁵⁹ Not only did the *Globe* opinion reaffirm *Richmond Newspapers*, but it also specified that public access to criminal trials cannot be barred unless “the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”⁶⁰

In *Globe*, the state interests presented to support the Massachusetts statute that barred press and public access to criminal sex-offense trials when minor victims took the stand were twofold: (1) “the protection of minor victims of sex crimes from further trauma and embarrassment” and (2) “the encouragement of such victims to come forward and testify in a truthful and credible manner.”⁶¹ The Court found the State’s first asserted interest compelling, but reasoned that although compelling, this interest did not necessitate a mandatory closure rule since the significance of the interest will vary from case to case.⁶² As for the State’s second asserted interest, the Court found that “[n]ot only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense.”⁶³ Ultimately, the Court held that the statute’s mandatory closure provision violated the First Amendment.⁶⁴ Since its decisions in *Richmond Newspapers*

where the victim testified, appealed the case to the U.S. Supreme Court. *Id.* at 601–02. The Court found that the Supreme Judicial Court’s construction of the statute violated the First Amendment. *Id.*

59. *Id.* at 605–06. The Court went on to add that “[p]ublic scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process” and that “public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.” *Id.* at 606.

60. *Id.* at 607.

61. *Id.*

62. *Id.* at 607–08 (holding that “as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that circumstances of the particular case may affect the significance of the interest”).

63. *Id.* at 609–10.

64. *Id.* at 610–11.

and *Globe*, the Supreme Court has only ruled specifically on the right of access three other times, most recently in 1993, and each time the Court upheld the public's right to access under the First Amendment.⁶⁵

From this Supreme Court precedent, it is unambiguous that the public has a First Amendment right of access to criminal trials, except in those rare circumstances where there is a compelling state interest in denying access and denial is narrowly tailored to serve the state's interest. The Supreme Court has never extended this right of access to civil trials, but several circuit courts have extended the right of access in those proceedings.⁶⁶ For instance, in *Publicker*

65. See *Press-Enterprise Co. v. Super. Ct. of Cal. (Press-Enterprise I)*, 464 U.S. 501 (1984). In this case, only three days of *voir dire* were held open to the public while the remaining six weeks were closed. *Id.* at 510. The Court held that this was unconstitutional, highlighting that “[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Id.* The Court concluded that “[e]ven with findings adequate to support closure, the trial court’s orders denying access to *voir dire* testimony failed to consider whether alternatives were available to protect the interests of the prospective jurors that the trial court’s orders sought to guard,” and by failing to do so, closure was unconstitutional. *Id.* at 511. See also *Press-Enterprise Co. v. Super. Ct. of Cal. (Press-Enterprise II)*, 478 U.S. 1 (1986). This case involved a lower court’s decision to keep a forty-one day preliminary hearing of a capital murder trial closed. *Id.* at 4. The Court found that the First Amendment right of access to criminal trials applies to preliminary hearings and held that complete closure of this forty-one day proceeding was unconstitutional. *Id.* at 13. In reaching this holding the Court reasoned that a “conclusory assertion that publicity might deprive the defendant” of the right to a fair trial was not a compelling interest, and that even if it was compelling, “any limitation must be ‘narrowly tailored to serve that interest.’” *Id.* at 15 (citing *Press Enterprise I*, 464 U.S. at 510.). See also *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993). Following *Press-Enterprise II*, the Court stated that although the lower court’s worry that publicity would prejudice the defendant’s fair trial rights was legitimate, “this concern can and must be addressed on a case-by-case basis.” *Id.* at 151. The Court then determined that the Puerto Rico Supreme Court’s decision to deny press access to the preliminary hearing of an accused felon was improper in this case. *Id.*

66. See Sokol, *supra* note 47, at 895–97 (citing *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988); *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Westmoreland v. Columbia Broad Sys.*,

Industries, Inc. v. Cohen,⁶⁷ the Court of Appeals for the Third Circuit found that the reasoning supporting open criminal trials was correspondingly pertinent to civil trials.⁶⁸ During a district court hearing involving petitions for temporary injunctions, the court ruled to exclude reporters from the *Philadelphia Inquirer*, which is published by Philadelphia Newspapers, Inc. (“PNI”), and the *Wall Street Journal*, which is published by Dow Jones & Company, Inc. (“Dow Jones”).⁶⁹ In response to this ruling, PNI and Dow Jones argued that this exclusion of the public and press “deprived them of their common law and First Amendment rights of access to a civil trial without due process of law.”⁷⁰ Finding for the press, the Third Circuit concluded that “the public and the press possess a First Amendment and a common law right of access to civil proceedings; indeed, there is a presumption that these proceedings will be open.”⁷¹

This Third Circuit’s decision has been expressly followed by the Second Circuit,⁷² as well as by district courts within the First,⁷³ Fifth,⁷⁴ Ninth,⁷⁵ and D.C. Circuits.⁷⁶ Additionally, the Sixth⁷⁷ and

Inc., 752 F.2d 16 (2d Cir. 1984); *Brown v. Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); *In re Continental Ill. Sec. Litig.* 732 F.2d 1302 (7th Cir. 1984); *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647 (S.D. Tex. 1996)).

67. 733 F.2d 1059 (3d Cir. 1984).

68. *Id.* at 1069–70.

69. *Id.* at 1063.

70. *Id.* at 1064.

71. *Id.* at 1071.

72. See *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984) (“[W]e agree with the Third Circuit in *Publicker Industries, supra*, that the First Amendment does secure to the public and to the press a right of access to civil proceedings in accordance with the dicta of the Justices in *Richmond Newspapers.*”).

73. See *Nat’l Org. for Marriage v. McKee*, No. 09-538-B-H, 2010 U.S. Dist. LEXIS 90749, at *10-11 (D. Me. Aug. 24, 2010) (citing to *Publicker*, the court found that “there can be little doubt that civil trials have traditionally been open to the public and that the public’s right of access to trial evidence pertaining to the vindication of First Amendment rights is comparable to the right of access to criminal trials”).

74. See *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647, 650 (S.D. Tex. 1996) (concluding that in light of the holdings reached by other Circuit Courts, including the Third Circuit in *Publicker*, “the right of the public to

Seventh Circuits⁷⁸ have recognized a public right to access in civil proceedings, and the Fourth Circuit has implicitly recognized the same right.⁷⁹ However, the Eighth,⁸⁰ Tenth,⁸¹ and Eleventh Circuits have not yet directly addressed this issue.⁸² While not every federal court has weighed in on this question, it is clear that those courts that have agreed that civil proceedings, like criminal proceedings, should be presumptively open to the press and the public. It is time for this presumption of openness that has become widely accepted in both criminal and civil courtrooms to apply in juvenile dependency courtrooms as well.

attend civil trials is grounded in the First Amendment as well as the common law”).

75. See *U.S. v. Garvey Schubert Barer*, No. 06-MC-9021-BR, 2007 U.S. Dist. LEXIS 8627, at *9-10 (D. Or. Feb. 2, 2007) (citing to *Publicker* the court concluded that “the policy reasons for granting public access to criminal proceedings also apply to a proceeding such as this one, and, therefore, the Court applies the standards for criminal proceedings to determine whether the described materials should remain sealed”).

76. See *In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d 1, 9 (D.C. Cir. 2009) (citing to *Publicker* to remark that “[w]hile the D.C. Circuit has been silent on the issue, other Circuits have opined and uniformly held that the public has a First Amendment right of access to civil proceedings and records”).

77. See *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983) (“The Supreme Court’s analysis of the justifications for access to the criminal courtroom apply as well to the civil trial.”), *cert. denied*, 465 U.S. 1100 (1984).

78. See *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (6th Cir. 1984) (“[W]e agree with the Sixth Circuit that the policy reasons for granting public access to criminal proceedings apply to civil cases as well. These policies relate to the public’s right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.”) (citations omitted).

79. *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (citing to *Publicker* and *In re Continental*, the court found that “the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case”).

80. See Sokol, *supra* note 47, at 897 (citing *Webster Groves Sch. Dist. v. Pulitzer Publ’g Co.*, 898 F.2d 1371, 1374 (8th Cir. 1990)).

81. See *id.* (citing *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 832 F.2d 1180 (10th Cir. 1987)).

82. See *id.* (citing *Simmons v. Conger*, 86 F.3d 1080, 1087 n.3 (11th Cir. 1996)).

2. Press Access to Juvenile Dependency Proceedings

Unlike the cases clearly supporting a public right of access to adult court proceedings, the case law surrounding public access to juvenile court proceedings, particularly dependency hearings, is much less straightforward. In *San Bernardino County Department of Public Social Services v. Superior Court*,⁸³ the San Bernardino County Department of Public Social Services (“DPSS”) filed a petition to have the minor children of two parents deemed dependent due to reports of abuse and neglect inflicted by the parents.⁸⁴ Upon hearing about the case, the *Sun Newspaper* (“the *Sun*”) requested access to the juvenile court’s records regarding the minor children.⁸⁵ While the court denied the *Sun* access to the court records, it did allow the *Sun* to attend the dependency proceedings.⁸⁶ Subsequently, DPSS filed a petition for a writ of mandamus, claiming that the court abused its discretion in permitting the *Sun* to attend the proceedings.⁸⁷ In deciding whether the juvenile court abused its discretion, the California Court of Appeals had to determine “whether the press and the public have a constitutional right to attend juvenile court dependency proceedings.”⁸⁸ The court answered this question in the negative, reasoning that because there is not an extensive history of open hearings in juvenile court, there is no First Amendment guarantee of access to juvenile proceedings.⁸⁹

Despite this holding,⁹⁰ the *San Bernardino* court by no means prohibited the possibility of open dependency proceedings.⁹¹ Rather, the court asserted that California courts have the discretion

83. 283 Cal. Rptr. 3d 332 (Cal. Ct. App. 1991).

84. *Id.* at 335.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 336.

89. *Id.* at 339–40 (citing *Florida Pub. Co. v. Morgan*, 253 Ga. 467 (Ga. 1984); *In re T.R.*, 556 N.E.2d 439 (Ohio 1990); *Matter of N.H.B.*, 769 P.2d 844 (Utah Ct. App. 1989); *In re J.S.*, 140 Vt. 458 (Vt. 1981)).

90. *Id.* at 343.

91. *Id.* at 344–45.

to allow the press to attend these hearings and recognized that there are significant benefits to open dependency proceedings.⁹² For instance, the court agreed with the *Sun*'s argument that public access can have a positive impact on the operation of the juvenile court.⁹³ The court explained that "[t]o the extent public proceedings serve the twin goals of assuring fairness and giving the appearance of fairness, the societal values of public access first recognized in the criminal context can be beneficial to juvenile court proceedings as well."⁹⁴ In addition, the court reasoned that "[a]ccess may also serve to check judicial abuse."⁹⁵ In the last full paragraph of its opinion, the court reasoned that though the juvenile court is not constitutionally required to permit press access, "the court should allow press access unless there is a reasonable likelihood that such access will be harmful to the child's or children's best interest in this case."⁹⁶

Although *San Bernardino*, which was decided in 1991, held that there is not a constitutional right of public access to juvenile proceedings, it nonetheless expressed the premise that courts could, in their discretion, still allow press and public access to the proceedings.⁹⁷ Since the time that case was decided, there has been a gradual movement towards allowing more access to dependency courts.⁹⁸ This shift has been occurring on a state-by-state, and sometimes a court-by-court, basis over the past thirty years.⁹⁹

92. *Id.* at 345.

93. *Id.* at 340.

94. *Id.*

95. *Id.* at 341. The court went on to say that "[b]ecause juvenile proceedings, in particular dependency proceedings, are civil in nature and intended to be rehabilitative instead of punitive, admittedly there is less concern of unjust convictions against which public access might serve as a check." *Id.*

96. *Id.* at 345 (citing *Brian W. v. Super. Ct.*, 20 Cal. 3d 618, 624 (Cal. 1978)).

97. *Id.* at 343.

98. See *infra* notes 90–101 and accompanying text.

99. As detailed in the subsequent paragraphs, Oregon became the first state to expressly adopt a presumption of openness in 1979, and many states soon followed suit. See *infra* notes 83–101 and accompanying text.

One of the first states to apply an open-door approach to juvenile proceedings was Oregon.¹⁰⁰ The Oregon Supreme Court addressed the issue of public access to juvenile courts in *State ex rel Oregonian Publishing Co. v. Deiz*.¹⁰¹ In that case, a juvenile court judge barred a reporter employed by *The Oregonian* from attending a juvenile hearing of a thirteen-year-old girl who was possibly involved in the drowning of a younger child.¹⁰² *The Oregonian* argued that “the press should be found to have a ‘proper interest’ in the case because it is important for the public to be informed about the workings of the juvenile justice system and the press informs the public.”¹⁰³ The issue left for the Oregon Supreme Court to consider was whether the press had a right to attend all hearings in connection with the case.¹⁰⁴ The court found that the judge’s complete exclusion of the press from the proceedings was invalid under the state’s constitution.¹⁰⁵ At the end of the opinion, the court made certain to note that its holding “should not be interpreted as guaranteeing the right of public access to all judicial proceedings;” rather, “the trial court retains the right to control access by members of the press or public who would overcrowd the courtroom, attempt to interfere in the proceedings or otherwise obstruct the proceedings.”¹⁰⁶ Even with these limitations, the court’s decision was a significant step forward, as the holding essentially “removed all locks from Oregon courtroom doors.”¹⁰⁷

100. Flint, *supra* note 21, at 57 (citing Barbara White Stack, *Oregon’s Constitution Unlocks Juvenile Courts*, POST-GAZETTE.COM Sept. 23, 2001, <http://old.post-gazette.com/headlines/20010923challenges0923P9.asp>).

101. 613 P.2d 23 (Or. 1980).

102. *Id.* at 24–25.

103. *Id.* at 25.

104. *Id.* at 24.

105. *Id.* at 26–27. Article I, Section 10 of the Oregon Constitution states: “No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay....” Or. Const. art. I, § 10.

106. *Deiz*, 613 P.2d at 27.

107. Flint, *supra* note 21, at 59.

Almost two decades after Oregon presumptively opened all of its juvenile courts, New York opened its family courts.¹⁰⁸ In 1997, the Chief Judge of New York ordered that all family courts in the state, which handle dependency cases among other matters, be presumptively open to the press and the public.¹⁰⁹ In announcing the new rules to be adopted by all the family courtrooms in the state, the Chief Judge explained “that the Family Court had played an increasingly prominent role in recent years and that as an important public institution, it required public scrutiny.”¹¹⁰ Under this new presumption of openness, judges would still maintain the discretion to close the courtroom in certain cases, but only if compelling reasons existed for doing so.¹¹¹ The New York City Bar agreed with this decision, finding that it brought “the state’s family courts into alignment with the Supreme Court decisions over the last twenty years regarding public access.”¹¹²

Then, in 2003, six years after New York opened its family courts, the Pennsylvania Superior Court,¹¹³ relying on its state constitution, expressly declared that “the constitutional presumption of openness applies to juvenile dependency

108. See Alan Finder, *Chief Judge in New York Tells Family Courts to Admit Public*, N.Y. TIMES, June 19, 1997, <http://www.nytimes.com/1997/06/19/nyregion/chief-judge-in-new-york-tells-family-courts-to-admit-public.html>.

109. *Id.*

110. *Id.*

111. *Id.* One such compelling and specific reason for closing hearings would be “insuring the privacy of a child who was the victim of sexual abuse.” *Id.*

112. See Emily Metzgar, *Neither Seen Nor Heard: Media in America’s Juvenile Courts*, 12 COMM. L. & POL’Y 177, 186 (2007) (citing Association of the Bar of the City of New York, Committee on Communications and Media Law, *Open to the Public: The Effect of Presumptive Public Access to New York State’s Family Courts*, 22 COMM. & THE LAW 4 (2000)).

113. The Pennsylvania Superior Court is one of two intermediate appellate courts in the state that falls right below the highest court in the state, the Pennsylvania Supreme Court. *The Superior Court of Pennsylvania, THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA*, <http://www.pacourts.us/T/SuperiorCourt/default.htm> (last visited Jan. 20, 2013).

matters.”¹¹⁴ The court provided that in order for the party attempting to keep the dependency proceedings closed to rebut the presumption of openness, that party must demonstrate “that: (1) the denial of public access serves an important governmental interest, and (2) no less restrictive means to serve that interest exists.”¹¹⁵

In keeping with the trend toward openness, Florida “acted to remove the dependency system’s veil of confidentiality.”¹¹⁶ However, instead of relying on the judiciary to remove this veil, Florida’s legislature passed a statute providing for a presumption of openness in dependency proceedings.¹¹⁷ Specifically, the current Florida law provides that:

All hearings, except as provided in this section, shall be open to the public, and a person may not be excluded except on special order of the judge, who may close any hearing to the public upon determining that the public interest or the welfare of the child is best served by so doing.¹¹⁸

The statute clearly articulates that dependency hearings in the state are presumed to be open unless the judge, in her discretion, decides that closure is appropriate for protecting the best interests of the child or the public interest.¹¹⁹

Rather than automatically adopting open proceedings—either by judicial decision or by state statute—a few states initiated pilot programs to decide whether to implement statewide open juvenile dependency proceedings.¹²⁰ In 1998, Minnesota became the first state to employ a pilot program following an order from the

114. *In re M.B.*, 819 A.2d 59, 62 (Pa. Super. 2003).

115. *Id.* at 63.

116. Flint, *supra* note 21, at 51.

117. *Id.* (citing FLA. STAT. §39.507(2) (2006)).

118. FLA. STAT. § 39.507(2) (2012).

119. *Id.*

120. BLAINE ABATE, SOUTHERN AREA CONSORTIUM OF HUMAN SERVICES, LITERATURE REVIEW: OPEN JUVENILE DEPENDENCY COURTS 14 (2011), *available at* <http://theacademy.sdsu.edu/programs/SACHS/literature/SACHS%20Lit%20Review-Open%20%20Courts%20FINAL.pdf>.

Minnesota Supreme Court.¹²¹ The program was executed by the National Center for State Courts (“NCSC”), and its purpose was “to provide decision-makers with relevant information to assist their deliberations regarding whether open hearings/records should be expanded statewide.”¹²² In 2001, after three years of conducting the pilot program, the NCSC reported that while many professionals expressed concerns that open dependency hearings would have harmful effects on the children or parents involved, the project team witnessed no such harm.¹²³ Since the completion of the pilot project, Minnesota has maintained its status as a presumptively open dependency hearings state.¹²⁴

Two years after the conclusion of the Minnesota pilot project, Arizona initiated its own open court pilot program “to evaluate the number of court hearings that were open or closed to the public and to survey courtroom participants on their attitudes surrounding the open hearing process.”¹²⁵ The program permitted

121. *Id.* at 15. The Minnesota Supreme Court authorized “each of Minnesota’s ten judicial districts to identify one or more counties in which to conduct a three-year pilot project where child protection hearings and court file records would be accessible to the public,” and twelve counties agreed to participate in the project. *Id.*

122. *Id.*

123. *Id.* at 18 (citing FRED L. CHEESMAN, NATIONAL CENTER FOR STATE COURTS, KEY FINDINGS FROM THE EVALUATION OF OPEN HEARINGS AND COURT RECORDS IN JUVENILE PROTECTION MATTERS, FINAL REPORT 1 (2001)).

124. Following the submission of the NCSC report, the Minnesota Supreme Court issued a court order instituting presumptively open dependency courtrooms throughout the state beginning in 2002. See JAMIE KAPALCO, FOSTERING MEDIA CONNECTIONS, A WATCHED SYSTEM: SHOULD JOURNALISTS BE GRANTED ACCESS TO JUVENILE DEPENDENCY COURT PROCEEDINGS? 7 (2012), available at http://chronicleofsocialchange.files.wordpress.com/2012/09/a-watched-system-report_sept-17-2012.pdf. Then, in 2008, the Minnesota legislature amended the juvenile protection statute to reflect the court order. *Id.* The most recent version of the statute addressing access to juvenile protection proceedings reads: “Absent exceptional circumstances, hearings in juvenile protection matters are presumed to be accessible to the public.” MINN. R. JUV. PROT. P. 27.01 (2012).

125. GREGORY BROBERG & VERA LOPEZ, ARIZONA OPEN DEPENDENCY HEARING PILOT STUDY: FINAL REPORT 15 (2006), available at

public access in five percent of Maricopa County's¹²⁶ dependency cases.¹²⁷ After eighteen months, the final report compiled by Arizona State University stated that the "impacts of the pilot program have been minimal, though caution must be exercised in assuming too much into this fact based on the low volume of non-party courtroom attendance."¹²⁸ Though, as the final report noted, the program's results did not conclusively show that open courtrooms had either a positive or a negative effect on dependency proceedings, the pilot program was subsequently adopted statewide.¹²⁹ Like Minnesota, Arizona has since kept its courts open to the press and public.¹³⁰

The most recent state to test whether it should transition to open juvenile dependency proceedings through a pilot program was Connecticut.¹³¹ In February 2010, the State of Connecticut initiated the Connecticut Juvenile Access Pilot Program, which was overseen by an internal Advisory Board.¹³² After a year of studying its own program as well as the open-court systems of other states (focusing most closely on Minnesota and New York), the Advisory Board

<http://www.azcourts.gov/LinkClick.aspx?fileticket=MIqR1UH59Q4%3D&tabid=2023> (submitted to the Arizona Department of Economic Security/Division of Children, Youth and Families, and the Administrative Office of the Courts).

126. Maricopa County is the fourth largest county in the United States with a population nearing four million. *100 Largest Counties*, UNITED STATES CENSUS BUREAU (July 1, 2011), <http://www.census.gov/popest/data/counties/totals/2011/index.html>.

127. ABATE, *supra* note 120, at 18.

128. *Id.* (quoting GREGORY BROBERG & VERA LOPEZ, ARIZONA OPEN DEPENDENCY HEARING PILOT STUDY: FINAL REPORT 16 (2006), available at <http://www.azcourts.gov/LinkClick.aspx?fileticket=MIqR1UH59Q4%3D&tabid=2023> (submitted to the Arizona Department of Economic Security/Division of Children, Youth and Families, and the Administrative Office of the Courts)).

129. *Id.*

130. KAPALCO, *supra* note 124, at 23. See also ARIZ. REV. STAT. ANN. § 8-525 (2012).

131. ABATE, *supra* note 120, at 22.

132. *Id.*

decided to end the program.¹³³ The Board stated that: “Recognizing that there is some benefit to limited expanded access, the Board recommends amending the statute to permit the court to grant access to individuals or entities with an established legitimate interest in the proceedings.”¹³⁴ The Board then concluded that: “A legitimate interest rule will provide for the best expression of responsible access which balances both sides of the public access debate.”¹³⁵ Since the conclusion of the pilot program, the plain language of the most recent Connecticut statute addressing juvenile court matters expresses that juvenile hearings are presumptively open, but the judge may elect to exclude any person whose presence is not necessary.¹³⁶

Currently, according to a 2012 report published by Fostering Media Connections, an organization dedicated to harnessing the power of journalism to improve the well-being of children that has extensively studied the debate over open juvenile proceedings, there are twenty-four states with “presumptively open” juvenile dependency courts¹³⁷ and twenty-seven states plus

133. JUVENILE ACCESS PILOT PROGRAM ADVISORY BOARD, REPORT TO THE CONNECTICUT GENERAL ASSEMBLY 13-15, 28 (2010), available at http://www.jud.ct.gov/committees/juv_access/Final_report_123010.pdf.

134. *Id.* at 28.

135. *Id.* at 30.

136. CONN. GEN. STAT. § 46b-122(c) (2012). The statute provides that “any judge hearing a juvenile matter may, during such hearing, exclude from the room in which such hearing is held any person whose presence is, in the court’s opinion, not necessary....” § 46b-122(b). Furthermore, “[a]ny judge hearing a juvenile matter, in which a child is alleged to be uncared for, neglected, abused or dependent or in which a child is the subject of a petition for termination of parental rights, may permit any person whom the court finds has a legitimate interest in the hearing or the work of the court to attend such hearing,” and that “[s]uch person may include . . . a representative of the news media.” § 46b-122(c).

137. KAPALKO, *supra* note 124, at 4, 23–27. “Presumptively open” means that the court permits the press to attend by default, but the judge has the discretion to close hearings when she sees fit, particularly when doing so is in the child’s best interests. *Id.* Today, the twenty-four presumptively open states are: Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Texas, Utah, and Washington. ALASKA STAT. ANN. § 47.10.070 (West 2012); ARIZ.

the District of Columbia¹³⁸ with “presumptively closed”¹³⁹ juvenile dependency courts.¹⁴⁰ Nevada is included in both groups because in

REV. STAT. ANN. § 8-525 (2012); COLO. REV. STAT. ANN. § 19-1-106(2) (West 2012); CONN. GEN. STAT. ANN. § 46b-122(c) (West 2012); FLA. STAT. ANN. § 39.507(2) (West 2012); GA. CODE ANN. § 15-11-78 (West 2012); 705 ILL. COMP. STAT. 405/1-5(7) (West 2012); IND. CODE ANN. § 31-32-6-2 (West 2012); IOWA CODE ANN. § 232.92 (West 2012); KAN. STAT. ANN. § 38-2247 (West 2012); MD. CODE ANN., CTS. & JUD. PROC. § 3-810(b) (West 2012); MICH. COMP. LAWS § 712A.17(7) (West 2012); MINN. STAT. ANN. § 260C.163(1)(c) (West 2012); NEB. REV. STAT. § 24-1001 (2012); NEV. REV. STAT. ANN. § 432B.430(1); N.J. STAT. ANN. § 9:6-8.43(b) (West 2012); N.M. STAT. ANN. § 32A-4-20 (West 2012); N.Y. R. CT. § 205.4 (West 2012); N.C. GEN. STAT. ANN. § 7B-801 (West 2012); OHIO REV. CODE ANN. § 2151.35(A)(1) (West 2012); OR. REV. STAT. ANN. § 419B.310 (West 2012); TEX. FAM. CODE ANN. § 105.003(b) (West 2012); UTAH CODE ANN. § 78A-6-114(1)(a) (West 2012); WASH. REV. CODE ANN. § 13.34.115 (West 2012).

138. See Srinivasa, *supra* note 33, at 100 (arguing that there are compelling reasons why the District of Columbia should follow the example of the presumptively open states and allow the general public to access dependency court proceedings). See also D.C. CODE § 16-2316(e)(2) (2012) (The District of Columbia statute addressing proceedings regarding delinquency, neglect, or need of supervision states that: “Except in hearings to declare an adult in contempt of court, the general public shall be excluded from hearings arising under this subchapter.”).

139. KAPALKO, *supra* note 124, at 3. “Presumptively closed” means that journalists may not have access to hearings by default, and if journalists want to attend, they have the burden of proving to the court that they should be granted access. *Id.* Today, the twenty-seven presumptively closed states are: Alabama, Arkansas, California, Delaware, Hawaii, Idaho, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See ALA. CODE § 12-15-129 (2012); ARK. CODE ANN. § 9-27-325(i)(1) (West 2012); CAL. WELF. & INST. CODE § 346 (West 2012); DEL. CODE ANN. tit. 10, § 1063 (West 2012); HAW. REV. STAT. § 571-41(b) (West 2012); IDAHO CODE ANN. § 16-1613 (West 2012); KY. REV. STAT. ANN. § 610.070(3) (West 2012); LA. CHILD. CODE ANN. art. 407 (2012); ME. REV. STAT. ANN. tit. 22, § 4007(1) (2012); MASS. GEN. LAWS ch. 119, § 65 (West 2012); MISS. CODE ANN. § 43-21-203(6) (West 2012); MO. ANN. STAT. § 211.171(6) (West 2012); MONT. CODE ANN. § 41-3-205 (2012); NEV. REV. STAT. ANN. § 432B.430(2) (West 2012); N.H. REV. STAT. ANN. § 169-C:14 (2012); N.D. CENT. CODE § 27-20-24(5) (West 2012); OKLA. STAT. ANN. tit. 10A, § 1-4-503(A)(1) (West 2012); 42 PA. CONS. STAT. ANN. § 6336 (West 2012); R.I. GEN. LAWS ANN. § 14-1-30 (West 2012); S.C. CODE ANN. § 63-3-

that state, the openness of a dependency proceeding is contingent upon the population of the judicial district where the case is being heard, such that some counties have presumptively open courts while others have presumptively closed courts.¹⁴¹

590 (2012); S.D. CODIFIED LAWS § 26-7A-36 (2012); TENN. R. JUV. PROC. art. III, Rule 27 (2012); VT. STAT. ANN. tit. 33, § 5510 (West 2012); VA. CODE ANN. § 16.1-302(C) (West 2012); W. VA. R. PROC. FOR CHILD ABUSE & NEGLECT PROCEEDINGS 6A (2012); WIS. STAT. ANN. § 48.299 (West 2012); WYO. STAT. ANN. § 14-3-424(b) (West 2012).

140. Hawaii's law provides a good example of what a presumptively closed state statute looks like. The Hawaii statute provides that in proceedings for children's cases:

[T]he general public shall be excluded and only such persons admitted whose presence is requested by the parent or guardian or as the judge or district family judge finds to have a direct interest in the case, from the standpoint of the best interests of the child involved, or in the work of the court.

HAW. REV. STAT. § 571-41(b) (2012).

A more restrictive example of a presumptively closed state statute is that of Maine, which only allows a proceeding to be open if there is a court order granting public access. ME. REV. STAT. tit. 22, § 4007 (2012). The statute states that: "All child protection proceedings shall be conducted according to the rules of civil procedure and the rules of evidence, except as provided otherwise in this chapter. All the proceedings shall be recorded. All proceedings and records shall be closed to the public, unless the court orders otherwise." *Id.*

141. Subsection (1) of the Nevada statute pronounces a presumption of open dependency proceedings, providing:

in each judicial district that includes a county whose population is 700,000 or more . . . [a]ny proceeding . . . must be open to the general public unless the judge or master, upon his or her own motion or upon the motion of another person, determines that all or part of the proceeding must be closed to the general public because such closure is in the best interests of the child who is the subject of the proceeding.

NEV. REV. STAT. ANN. § 432B.430(1) (West 2012). However, subsection (2) of the statute enunciates a presumption of closed dependency proceedings, providing:

in each judicial district that includes a county whose population is less than 700,000 . . . [a]ny proceeding . . . must be closed to the general public unless the judge or

Collectively, the case law, legislation, and pilot studies described above illustrate that press access to juvenile dependency proceedings has gradually increased over the past several years. This trend is encouraging, but until *all* states adopt a presumptively open approach to these proceedings, members of the press will continue to be denied one of the central guarantees of the First Amendment.¹⁴² Over the past few years, the debate over public access to dependency hearings has quieted; however, earlier this year, it resurged again in a state that has seen efforts to open its dependency courts for over a decade.

III. THE STATE OF THE MATTER IN CALIFORNIA¹⁴³

In contrast to most states, which have general statutes that address court access, California has its own Rules of Court that apply to juvenile court proceedings and specifically govern who can and cannot be present during juvenile dependency and delinquency

master, upon his or her own motion or upon the motion of another person, determines that all or part of the proceeding must be open to the general public because opening the proceeding in such a manner is in the best interests of the child who is the subject of the proceeding.

Id. § 432B.430(2).

142. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, *or of the press*; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”) (emphasis added).

143. This Note focuses more closely on California because Los Angeles County, the largest county in the state and more notably, in the nation, is the most recent jurisdiction to adopt a presumption of openness in its juvenile dependency courts. Early last year, a prominent juvenile court judge in Los Angeles County ordered that the county’s dependency courts transition from presumptively closed to presumptively open. This decision was met with both considerable support and considerable opposition. *See infra* Part III.B; *see also* *100 Largest Counties*, U.S. CENSUS BUREAU (July 1, 2011), <http://www.census.gov/popest/data/counties/totals/2011/index.html>.

hearings.¹⁴⁴ Those who can be present under the Rules include: (1) the child; (2) the parents or guardians; (3) the attorney representing the child, parent, or guardian; (4) the probation officer or social worker; (5) the prosecuting attorney; (6) any Court Appointed Special Advocate (CASA) volunteer; (7) a representative of the Indian children's tribe; (8) the court clerk; (9) the official court reporter; (10) a bailiff, if needed; and (11) any other persons entitled to notice of the hearing.¹⁴⁵ Furthermore, the Rules explicitly state that the public cannot be admitted to a juvenile court proceeding unless the court deems that a person has "a direct and legitimate interest in the case or in the work of the court."¹⁴⁶ Given the restrictive nature of these rules, multiple efforts have been mounted to change California's laws regarding public access to juvenile proceedings.¹⁴⁷ As will be outlined in the following

144. Flint, *supra* note 21, at 68–69 (citing CAL. RULES OF COURT R. 5.530).

145. CAL. RULES OF COURT R. 5.530(b).

146. CAL. RULES OF COURT R. 5.530(e). This same qualification is enunciated in California's Welfare and Institutions Code, which provides:

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

CAL. WELF. & INST. CODE § 346 (West 2012). The state statute and court rules make it clear that California is characterized as a presumptively closed state.

147. One metaphor helps to explain the trouble with California's juvenile court access laws:

If you walked into class on the first day of law school wearing a suit while all the other students were in jeans, you would get noticed. The other students may act quickly to change you by telling you the importance of fitting in with the rest of the law school crowd. California is the kid in the suit. California's dependency court access laws differ from other states so they get noticed. Due to the fact that California courts and legislators decided to limit access to juvenile courts, legislators have rushed to tell them how to improve and how to fit in well with the rest of the crowd.

section, the two major legislative bodies in the state took action to “open[] the doors to California’s juvenile dependency courts” in a manner that allowed the press and public greater access but also protected the confidentiality of the children involved in the proceedings.¹⁴⁸

A. Two Main Pieces of Attempted Legislation

In 2000, two members of the California Senate proposed California Senate Bill 1391, seeking to make all juvenile dependency proceedings presumptively open to the public.¹⁴⁹ Though the bill passed in the state senate, it was not approved by the state assembly,¹⁵⁰ largely due to opposition from children’s rights groups and social workers.¹⁵¹ Four years later, a member of the California Assembly proposed California Assembly Bill 2627.¹⁵² Like Senate Bill 1391, Assembly Bill 2627 pushed for presumptively open juvenile dependency proceedings.¹⁵³ But unlike the earlier bill, this bill recommended a pilot program to test the effectiveness of open hearings.¹⁵⁴ Again, though, this bill did not survive both the assembly committee and the senate committee.¹⁵⁵ To this day, juvenile dependency courtrooms in California remain presumptively closed to the public, unless the child or the child’s parent requests otherwise or the judge finds it necessary to admit

Flint, *supra* note 21, at 70.

148. *Id.* at 70–73.

149. *Id.* at 70–71 (citing S.B. 1391, 2000 Sess. (Cal. 2000)).

150. The California legislature is divided into two legislative bodies: the State Assembly and the State Senate. CAL. CONST. art. IV, § 1. All legislative power in the state is vested in these two bodies. *Id.* The Assembly is comprised of eighty members, and the Senate is comprised of forty members. *Id.* art. IV, § 6. Each member represents a different legislative district in California. *Id.*

151. Flint, *supra* note 21, at 71–72 (noting that those groups thought that the bill would not adequately protect the children involved in dependency proceedings).

152. *Id.* at 72 (citing A.B. 2627, 2004 Sess. (Cal. 2004)).

153. *Id.*

154. *Id.*

155. *Id.* at 73.

certain individuals.¹⁵⁶ However, in early 2012, Los Angeles County's dependency hearings were opened to the press, marking a significant step towards opening all dependency courts throughout California.¹⁵⁷

B. Momentous Change for Los Angeles County

In February 2012, Judge Michael Nash, the longest serving Juvenile Court judge in the State of California, effectively opened juvenile dependency proceedings in Los Angeles County to the public.¹⁵⁸ Judge Nash ordered that “[m]embers of the press shall be allowed access to Juvenile Dependency Court hearings unless there is a reasonable likelihood that such access will be harmful to the child’s or children’s best interests.”¹⁵⁹ The order went into effect immediately, and subsequently, reporters began attending hearings.¹⁶⁰ Judge Nash’s decision was quickly confronted with opposition from attorneys, social workers, elected officials, and others.¹⁶¹ These opponents argued that “the order overreaches and intrudes on the privacy of children who have already suffered mistreatment.”¹⁶² Just one week after the courts were opened, the Children’s Law Center of California, a public firm which represents the majority of children in the system, filed a lawsuit, arguing that

156. See CAL. WELF. & INST. § 346 (West 2012).

157. See Rachel M. Zahorsky, *LA Judge Orders Greater Media Access to Juvenile Court*, ABA JOURNAL (Feb. 2, 2012), http://www.abajournal.com/news/article/l.a._judge_orders_greater_media_access_to_juvenile_court/.

158. See *id.*

159. Blanket Order Re: WIC 346 and Public and Media Attendance at Dependency Court Hearing, Super. Ct. of Cal., Cnty. of L.A. (Jan. 31, 2012), at 4.

160. See KAPALCO, *supra* note 124, at 6 (citing Garrett Therolf & John Hoeffel, *Media Gain Access to L.A. County Children’s Courts*, L. A. TIMES (Feb. 7, 2012), <http://articles.latimes.com/2012/feb/07/local/la-me-open-child-court-20120207>).

161. Garrett Therolf & John Hoeffel, *Media Gain Access to L.A. County Children’s Courts*, L.A. TIMES, Feb. 7, 2012, <http://articles.latimes.com/2012/feb/07/local/la-me-open-child-court-20120207>.

162. *Id.*

Nash's order violates state law and seeking that the order be overturned.¹⁶³ On February 15, 2012, the California Court of Appeals denied the Children's Law Center's petition to overturn Judge Nash's order.¹⁶⁴

Since Judge Nash's ruling went into effect, dependency proceedings in Los Angeles County have remained open to the press, a positive sign for supporters of open courts.¹⁶⁵ Despite the most recent transition from closed to open courtrooms in Los Angeles County and the growing number of presumptively open states and jurisdictions, the debate still continues as professionals with significant roles in dependency proceedings, legal scholars, members of the press, and concerned citizens weigh in on whether courts should be open not just in Los Angeles County, but nationwide.

IV. THE COMPETING INTERESTS AT PLAY

The debate over open juvenile dependency proceedings is an important matter impacting many facets of the juvenile court system.¹⁶⁶ As briefly mentioned before, the two competing interests at the center of the debate are the privacy rights of children involved in dependency proceedings and the First Amendment rights of the press to access those proceedings.¹⁶⁷ States, under their

163. *See id.*; KAPALCO, *supra* note 124, at 6 (noting that the Center "filed a writ [with the California Court of Appeals] seeking a stay of the order on the grounds that Judge Nash exceeded his authority in issuing it").

164. *Children's Law Ctr. of Cal. v. Super. Ct. of L.A. Cnty.*, No. B238899 (Cal. Ct. App. Feb. 15, 2012).

165. Heimpel, *supra* note 8, at 3 (remarking that "Judge Michael Nash famously opened juvenile dependency hearings in Los Angeles County earlier this year").

166. *See generally* KAPALCO, *supra* note 124 (presenting the main reasons asserted in support of and in opposition to presumptively open dependency courtrooms).

167. *Compare* Flint, *supra* note 21, at 81 ("Though closed courtroom policies leave the public and the media out in the cold, they are beneficial in that they maintain a protective watch over the children and their emotional needs. In states that have closed court policies, child victims of abuse and neglect can take comfort in the fact that their stories will not be broadcast before the world."), *with* Sokol, *supra* note 47 (arguing that "statutes

traditional *parens patriae* authority, have a legitimate interest in protecting the children affected in dependency proceedings because these children are the victims of abuse or neglect whose parents or guardians have allegedly failed them.¹⁶⁸ Typically, the nature of dependency cases is quite sensitive, and it may be necessary only to allow persons intricately involved in the cases into the courtroom.¹⁶⁹ Nevertheless, states also have a legitimate interest in preserving the First Amendment right of freedom of the press, and by prohibiting press access to juvenile dependency proceedings, courts may be infringing upon this long-recognized fundamental right.¹⁷⁰ In order to adequately defend this latter position, it is beneficial to examine the opposing position first.

A. Arguments in Favor of Closed Dependency Proceedings

Although the number of states with presumptively open juvenile dependency courts is steadily rising, many states still have presumptively closed juvenile dependency courts,¹⁷¹ and there are several valid reasons for keeping the courts closed from the press and the public.

1. Protecting the Privacy Interests of the Child

The primary reason for maintaining closed dependency courtrooms is to protect the privacy interests of the children

mandating closure of dependency court proceedings violate the First Amendment of the United States Constitution”).

168. Flint, *supra* note 21, at 81 (commenting that “[t]hese children are in dependency court because their caretakers have failed them and they need the protection of the state”); Ventrell, *supra* note 19, at 31 (noting that “*parens patriae* continues as the underlying authority for intervention”).

169. Flint, *supra* note 21, at 78–80 (arguing that allowing the press and the public into dependency courtrooms will only serve to intensify the harm that these children have already suffered).

170. As aforementioned, for many years, the Supreme Court and several federal courts have recognized the First Amendment right of the press and public to attend adult criminal and civil proceedings. *See supra* Part II.B.1.

171. *See supra* note 57 and accompanying text.

involved in the cases.¹⁷² The concern is that press access to the courtroom will place the privacy of children at risk by allowing members of the press to observe and report on some of the most difficult, intimate details of their lives.¹⁷³ One critic of open proceedings states that “[a]lthough a substantial percentage of the contemporary press still views its role as the traditional educator and protector of the public, one must consider the lowest common denominator when determining the risk that less scrupulous journalists will unreasonably violate the privacy interests of families in the dependency system.”¹⁷⁴

Some courts have agreed with this view, finding that the privacy interests of the child outweighed any interests the press may have in attending particular court proceedings.¹⁷⁵ In the case *Ex rel M.B.*,¹⁷⁶ PG Publishing Company (“PG Publishing”) appealed an order of the lower court denying the press access to the juvenile dependency proceedings of M.B. and J.B., siblings who were removed from their parents’ custody after the murder of their eight-year-old sister.¹⁷⁷ The murder of their sister gained immediate publicity, and for months, local news outlets published numerous stories about her homicide and the parents’ struggle in family court to regain custody of M.B. and J.B.¹⁷⁸ Given all of the press attention that this case had already received, the Pennsylvania Superior Court agreed with the trial court’s finding that in this particular

172. Andrea Poe, *Foster Care: Why the Debate Over Open Courts Matters*, THE WASHINGTON TIMES (Sept. 4, 2012) <http://communities.washingtontimes.com/neighborhood/red-thread-adoptive-family-forum/2012/sep/4/foster-care-why-debate-over-open-courts-matters/>.

173. *Id.* (pointing out that presumptively open dependency hearings, particularly those involving incidents of abuse, can expose the most personal and humiliating details of the children’s lives to the public).

174. William Wesley Patton, *Pandora’s Box: Opening Child Protection Cases to the Press and Public*, 27 W. ST. U. L. REV. 181, 187 (2000).

175. See *Natural Parents of J.B. v. Fla. Dep’t of Children & Family Servs.*, 780 So.2d 6, 11 (Fla. 2001); *Ex rel M.B.*, 819 A.2d 59, 60 (Pa. Super. Ct. 2003).

176. 819 A.2d 59 (Pa. Super. Ct. 2003).

177. *Id.* at 60.

178. *Id.* at 60–61 (“In many of these reports, the children’s names were used.”).

case,¹⁷⁹ “there is no less restrictive means to serve the compelling interest in protecting the children’s privacy rights than total closure of the proceedings.”¹⁸⁰

Similarly, in *Natural Parents of J.B. v. Florida Department of Children & Family Services*,¹⁸¹ the Supreme Court of Florida held that closure of a termination of parental rights (TPR) proceeding was necessary to protect the privacy of the child involved.¹⁸² After J.B. a minor child, was found to be dependent due to her parents’ inability to care for her, the Department of Children and Family Services moved to permanently terminate parental rights, at which point Florida law mandated that dependency hearings become closed to the public.¹⁸³ The parents argued that this mandatory closure provision in the statute was unconstitutional, and instead, TPR proceedings should be presumptively open.¹⁸⁴ However, the

179. In a more recent Pennsylvania Superior Court case that involved juvenile delinquency proceedings rather than juvenile dependency proceedings, the court addressed “[w]hether this Court’s finding in *In re M.B.* created a brightline distinction between juvenile dependency and juvenile delinquency proceedings as to the right of members of the media to access juvenile delinquency proceedings.” *In re J.B.*, 39 A.3d 421, 425-26 (Pa. Super. Ct. 2012) (citation omitted). The court determined that *In re M.B.* did not create “any ‘brightline’ distinction between the privacy interests of a juvenile in a dependency proceeding and a juvenile in a delinquency proceeding.” *Id.* at 429. The court followed the test employed in *In re M.B.* that there is a constitutional presumption of openness, but if a party seeks to keep the proceedings closed that party “may rebut the presumption of openness by demonstrating that: (1) the denial of public access serves an important governmental interest, and (2) no less restrictive means to serve that interest exists” *Id.* at 430 (citing *In re M.B.*, 819 A.2d at 63). Applying this test, the court found that “the denial of public access to the juvenile proceedings at hands serves an important governmental interest,” specifically the “compelling state interest in protecting the privacy of juveniles.” *Id.* at 432.

180. *In re M.B.*, 819 A.2d at 65.

181. 780 So. 2d 6 (Fla. 2001).

182. *Id.* at 12. Relying on precedent, the court stated that: “We held that the best interest of the child and the public policy of protecting the parties’ privacy in adoption proceedings outweighed the interest the public might have in having access to the proceedings.” *Id.* at 10–11. The court went on to apply this same reasoning to TPR proceedings. *Id.* at 10–12 (citing *In re Adoption of H.Y.T.*, 458 So. 2d 1127 (Fla. 1984)).

183. *Id.* at 7–8 (citing FLA. STAT. § 39.467 (1997)).

184. *Id.* at 8, 11.

court rejected this argument, reasoning that in TPR proceedings, the “paramount concern of the Court and the Legislature is the health and safety of the child or children involved,” and “[b]ecause of this overriding concern, the mandatory closure of certain proceedings involving children is not an unconstitutional limitation on First Amendment freedoms.”¹⁸⁵

Opponents of open proceedings express a distrust of the press that is not entirely unfounded, as they feel some media outlets have overstepped ethical boundaries by reporting on information obtained from the dependency courtroom that runs contrary to the best interests of the child the court seeks to guard.¹⁸⁶ Though these incidents have occurred infrequently,¹⁸⁷ the presence of the media in the courtroom raises the possibility that confidential information could be released to the public, resulting in harm to the children involved in the case.¹⁸⁸

185. *Id.* at 11.

186. See, e.g., Heimpel, *supra* note 8, at 2.

187. See, e.g., *In re “S” Children*, 532 N.Y.S.2d 192 (N.Y. Fam. Ct. 1988). In the case of *In re “S” Children*, the court invited *The Times Herald Record* (“the *Record*”), a local media outlet, to present arguments at a child dependency proceeding as to whether the press “should be conditionally allowed to cover these ‘closed’ proceedings.” *Id.* at 193. At the end of the hearing, the court instructed the *Record* that it would not reach a final decision on press access until the parties submitted legal briefs and further ordered that the *Record* not publish any of the facts of the legal arguments for at least twenty-two hours to protect confidential information pertaining to the children involved in the case. *Id.* However, the very next morning, the *Record* printed a story about the case, which the court determined to be a direct violation of its order. *Id.*

188. One journalist and social work student considered the impact of press access on “the actual court participants: the youth” by asking a group of teenagers in foster care how they felt about the idea of reporters in the courtroom. Anna Jacobi, *Journalist vs. Social Worker: My Internal Conflict About Access to Dependency Court Proceedings*, THE CHRONICLE OF SOCIAL CHANGE (July 16, 2012), <http://chronicleofsocialchange.wordpress.com/2012/07/16/journalist-vs-social-worker-dependency-court-proceedings/>. One teen, representing the consensus of the group, replied: “My business out there for everyone? You crazy!” *Id.* The teens went on to explain that “their ‘business’ is already public enough without needing any reporter to make it more so.” *Id.*

The central focus of juvenile dependency proceedings is to preserve the best interests of the children involved and achieve an outcome that satisfies those interests.¹⁸⁹ One legal scholar argues that there is a “mantra” often asserted in support of closed proceedings that “the interests of the juvenile . . . are most often best served by anonymity and confidentiality.”¹⁹⁰ The children in these proceedings have legitimate privacy interests in keeping the intimate details of their familial relationships free from outside eyes, and allowing the press and public into the courtroom could invade these privacy interests.¹⁹¹ In some instances, protecting the privacy of the children involved in these proceedings *is* in their best interests.¹⁹² When this is the case, courts, in safeguarding the best interests of the children, may be required to exclude the press and the public from dependency hearings to assure that all information exchanged in the courtroom is kept confidential.¹⁹³

2. Detrimental to the Child’s Mental Health

Another related argument against open juvenile dependency proceedings is that not only could press access negatively impact the children’s privacy interests, but also their psychological well-being.¹⁹⁴ Some dependency cases involve severe instances of sexual abuse, such as rape. The child victims may be ashamed of the trauma they have suffered, and opponents of open

189. Ventrell, *supra* note 19, at 31 (“The best interests standard is the governing principle of the modern dependency court.”).

190. *See* Bean, *supra* note 20, at 59 (quoting Edward A. Sherman Publ’g Co. v. Goldberg, 443 A.2d 1252, 1258 (R.I. 1982)).

191. *Id.* at 3 (“[W]hen the issue is neglect or abuse, it is hard to deny the appeal of protecting a child from the public gaze.”).

192. Flint, *supra* note 21, at 74–75 (asserting that “the rights of the child victims are often forgotten in the rush to open courtroom doors” and urging that states consider these rights before they allow open dependency courtrooms).

193. *Id.* at 78.

194. *See id.* at 78–79 (“[T]he child may suffer psychological harm merely by having his or her story shared in public.”); *see also* Patton, *supra* note 174, at 195 (“[T]he likelihood and severity of emotional injury to the child abuse victim who is exposed to the public and peers is great.”).

dependency courts argue that openness would expose the abuse suffered by the children to their peers and the public, further embarrassing the children.¹⁹⁵ The concern is that this public disclosure would impede the children in their recovery from the emotional injuries they suffered, which could detrimentally affect their social development and their ability to cope with challenging situations in the future.¹⁹⁶

3. Negative Influence on the Child's Courtroom Participation

Additionally, critics of open hearings contend that media presence may affect the children's participation in the proceedings.¹⁹⁷ The press and the public are strangers to these children, and when children have to testify about highly personal and often embarrassing matters, the prospect of doing so in front of total strangers can be daunting.¹⁹⁸ As one commentator argues, when children have to testify with the press in attendance, it is highly possible that the child will either refuse to cooperate in the proceeding by not testifying at all, or the child will repudiate his or her account of the events that led to the proceeding.¹⁹⁹ The concern is that if a child is too afraid to cooperate, "the court will not have sufficient evidence for detainment and may be forced to send the child back to the abusive environment."²⁰⁰

Many of these arguments in favor of maintaining closed dependency proceedings, while understandable, are grounded in a

195. See Flint, *supra* note 21, at 79.

196. See *id.* ("This sense of shame and possible taunting by peers may have a downward spiral effect causing the child's academic performance to suffer and his or her social development to be stifled."); see also Patton, *supra* note 174, at 195 ("[C]hild victims may find peer reaction to the assault one of the greatest impediments to their recovery." (citing Charles R. Petrof, *Protecting The Anonymity of Child Sexual Assault Victims*, 40 WAYNE L. REV. 1677, 1688 (1994))).

197. See Flint, *supra* note 21, at 78.

198. See *id.*

199. *Id.* ("Children may be intimidated by the public or media presence in the courtroom and may refuse to cooperate in the proceedings and the investigation into the alleged abuse.").

200. *Id.*

mistrust of the press.²⁰¹ Furthermore, they disregard the capabilities of all of the other essential people who are always permitted in the courtroom to look out for the best interests of the children, including judges, social workers, guardian *ad litem* attorneys, and family members who are present to support the children.²⁰² While the arguments for presumptively closed proceedings are legitimate, they are not as thoroughly supported as those for presumptively open proceedings.

B. Arguments in Favor of Open Dependency Proceedings

The First Amendment of the U.S. Constitution states “Congress shall make no law . . . abridging the freedom . . . of the press.”²⁰³ The Supreme Court has never specifically addressed whether this right includes access to juvenile dependency proceedings.²⁰⁴ The Court has, however, upheld the First Amendment right of the public to attend adult criminal proceedings.²⁰⁵ In following the Court’s reasons for preserving this right of access, there is a strong argument for why this right should also extend to juvenile proceedings.²⁰⁶ The premise is that closed juvenile dependency court proceedings, like closed adult criminal proceedings, generally violate the First Amendment.²⁰⁷ Therefore, under the First Amendment, “the public and its surrogate, the press, [should] have a constitutional right to attend dependency court proceedings.”²⁰⁸ Thus under the test developed by the Court in *Globe*, “any party seeking to close such a proceeding must bear

201. Heimpel, *supra* note 8, at 2 (pointing out that those in favor of closed courtrooms are guided by “fear and mistrust” of the news media).

202. Flint, *supra* note 21, at 75 (admitting that the child welfare system is in need of repair, but arguing that the problem is not the work ethic of the judges, attorneys, social workers, and others involved, but rather the system’s lack of resources).

203. U.S. CONST. amend. I.

204. *See supra* Part II.A.

205. *See supra* Part.II.B.1 (discussing the Supreme Court’s holdings in *Richmond Newspapers* and *Globe*).

206. *See generally* Sokol, *supra* note 47.

207. *Id.*

208. *Id.* at 883.

the burden of demonstrating that closure is ‘necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.’”²⁰⁹

A significant argument raised in support of open dependency proceedings is centered on increasing the level of transparency in the courtroom, which can only be achieved by permitting the press to exercise its First Amendment right to attend such proceedings.²¹⁰ The argument is essentially that “transparency leads to better decisions by putting a spotlight on judges, exposes the blunders of child welfare workers and gives the public a better understanding of how the system works.”²¹¹

1. Accountability

One of the primary benefits of transparency in dependency proceedings is that it increases accountability in the courtroom.²¹² Dependency court judges are responsible for answering questions that will change the lives of the children involved in the proceedings, such as: should the children be reunited with their parents, should the parents’ parental rights be terminated, or should the children be adopted?²¹³ Social workers, attorneys, guardians *ad litem*, court-appointed special advocates, and others are essential in helping judges answer these vital questions.²¹⁴ Both separately and collaboratively, judges, social workers, attorneys, advocates, and other court officials have significant professional responsibilities in dependency hearings. To achieve the most

209. *Id.* (quoting *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982)).

210. See Bean, *supra* note 20, at 51–52; Sokol, *supra* note 47, at 913; Srinivasa, *supra* note 33, at 83–84.

211. *Are Foster Kids Helped, Harmed by Open Hearings*, FOXNEWS (May 28, 2012), <http://www.foxnews.com/us/2012/05/28/are-foster-kids-helped-harmed-by-open-hearings/>.

212. See Srinivasa, *supra* note 33, at 86–90.

213. *Id.* at 87 (highlighting that federal legislation has largely expanded the juvenile dependency judge’s role, allowing the judge “to determine what support services a family needs and if a child can remain at home”).

214. See Hatcher, Mason & Rubin, *supra* note 38, at 23.

desirable results for the children involved in these cases, they all must work diligently to fulfill their duties.²¹⁵

One scholar asserts that openness “promotes more accountability and combats any appearance of bias or abuse of power by the judges and attorneys in the courtroom.”²¹⁶ As such, it creates a “checks-and-balances” type of system,²¹⁷ which has been considered a significant justification for open courts in adult criminal proceedings for decades.²¹⁸ With so much at stake in dependency proceedings, it is critical to ensure that judges, social workers, court-appointed advocates, and all those closely involved in the dependency court system are performing their jobs with the intention of achieving the best possible outcomes for the children.²¹⁹

2. Proper Practice

In addition to holding court authorities accountable, open courts also work to improve the functionality of the dependency court process.²²⁰ Traditionally, dependency court proceedings are more informal than other court proceedings in order to minimize

215. *Id.* at 23–26 (explaining the different roles of all of the “players” involved in the juvenile dependency system).

216. Srinivasa, *supra* note 33, at 83–84.

217. *Id.* at 84 (“The ‘checks-and-balances’ philosophy behind open courts fits with the democratic principles of due process and transparency in government systems.”) (citation omitted).

218. As Veena Srinivasa points out, in his majority opinion in *Press-Enterprise I*, Chief Justice Warren Burger noted that “the ‘value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.” *Id.* at 84 (quoting *Press-Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 508 (1984) (emphasis in original)).

219. Bean, *supra* note 20, at 54 (“Because dependency courts are charged with making major decisions about children’s lives, the potential for misuse of power is great.”).

220. *See id.* at 52–53; *see also* Sokol *supra* note 47, at 912; Srinivasa, *supra* note 33, at 86.

the adversarial environment of the typical courtroom.²²¹ But some argue that a lack of formality may actually create more problems than it prevents, and proponents of open courtrooms suggest that allowing press and public access to courtrooms may lead to a more appropriate, formal process.²²² Sometimes informality can lead to procedural errors that would otherwise be avoided in a more formal environment.²²³ Just as open courtrooms may help to ensure that judges, social workers, attorneys, and others who play a role in dependency proceedings are fulfilling their professional and ethical obligations in the courtroom, open courtrooms may also prompt more procedural caution to be taken to ensure greater accuracy and consistency in the courtroom.²²⁴

3. Public Awareness and Reform

A final argument frequently emphasized in support of open dependency proceedings focuses on educating the public.²²⁵ Public scrutiny can trigger reform when the social welfare system is

221. Srinivasa, *supra* note 33, at 86.

222. Bean, *supra* note 20, at 53 (“While informality was central to the original vision of juvenile court, and while both familiarity and informality can and likely do contribute to some beneficial outcomes in dependency court, an open courtroom can provide a check to their possible negative effects.”); Sokol, *supra* note 47, at 918 (“Public access would heighten procedural regularity in dependency cases, just as it currently does in criminal and other civil cases.”); Srinivasa, *supra* note 33, at 86–87 (“Presumptively closed dependency courts reinforce the ‘clubby’ atmosphere and informality of the court, where the judges, lawyers and social workers are all repeat players in the courtroom process [Contrary to traditional beliefs,] countervailing evidence supports the conclusion that formal proceedings produce more accurate fact-finding and decision-making.”) (citation omitted).

223. Bean, *supra* note 20, at 53 (arguing that dependency proceedings should more closely mirror those of trial proceedings since the “formal rules that govern trial procedure also help to assure accuracy.” (quoting Amy Sinden, “Why Won’t Mom Cooperate?”: A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM, 339, 379–80 (1999))).

224. *Id.* (“[O]penness should operate to minimize procedural errors.”); Sokol, *supra* note 47, at 915 (“While public access would only moderately enhance dependency court fact finding, it would significantly enhance dependency court procedure.”).

225. See Bean, *supra* note 20, at 55–56.

failing.²²⁶ When courtrooms are closed, the public is entirely unaware of any problems that occur due to power discrepancies, overworked and underpaid social welfare workers, procedural errors, or other issues.²²⁷ Unfortunately, the individuals harmed the most by these shortcomings are the children the dependency court is supposed to protect.²²⁸ Often though, these consequences could be prevented or at least alleviated through public action, but this is impossible unless the public knows what is happening.²²⁹ Under the ambit of the First Amendment, the press can, and should, have access to dependency proceedings in order to “educate the public about the norms of the child welfare system,” which can, in turn, “empower public advocacy for appropriate reforms.”²³⁰

Over the past few years, reporters in presumptively closed states have negotiated their way into dependency court hearings, and what they discovered was shocking.²³¹ In the fall of 2005, the

226. *Id.*

227. *See id.* at 56.

228. *Id.* at 58 (maintaining that “[p]ublic disclosure might assist in drawing attention to the terrible plight of children in this country and to the ever shrinking resources allocated to both them and the system which is designed to protect them” (quoting James Brelsford & Roger Myers, *Juvenile Courts; Part II: The Value of Access*, 12 COMM. LAW 14, 14 (1994))).

229. One scholar encompasses the essence of this argument:

Public action can occur if the public can see for itself the inadequacies of the system, such as the need for better facilities; the need for more staff, better trained staff, better paid staff, and better qualified staff; the need for daycare subsidies, more healthcare support, more home support services, and better support for foster families; and the overall need for substantially more financial resources. The action may be as pointed and immediate as voting a judge out of office or applying public pressure to remove a lawyer from court appointments; it may be as broad as demanding more funding to attract better personnel, train better personnel, and retain better personnel. But knowledge is the prerequisite to action, and the public first needs access to the system.

Id. at 56.

230. Srinivasa, *supra* note 33, at 84.

231. *See id.* at 85 (citing Deborah Yetter, Special Report, *Children in Crisis*, COURIER-JOURNAL.COM (Dec. 13-15, 2009)). *See also* Heimpel, *supra*

San Francisco Chronicle agreed to collaborate with several child advocacy groups in California as part of a year-long foster care reform campaign.²³² Pati Poblete, an editorial writer for the *Chronicle*, gained access to dependency courtrooms throughout California where she learned of the immense inadequacies in California's foster care system.²³³ Some of the deficiencies in the system included inability to find permanent placements for children, to assure that children are receiving an appropriate education, to provide Supplemental Security Income for children with disabilities, and to find long-term housing for children who will soon be emancipated from the system.²³⁴

Based on Poblete's initial findings, the *Chronicle* editorial board started reporting for the campaign, dedicating the first of many articles on California's foster care system to recounting the troubling story of one teenage girl Poblete met in a California dependency courtroom.²³⁵ The girl had been in the system since she was thirteen years old and, in the four years since she entered the system, she had been shuffled through several group homes where she frequently lived in substandard conditions and was the victim of physical abuse.²³⁶ The girl described how she had no one to rely on — "[n]ot the social workers, who would only appear when it was time to move her again, then never return her calls;" "[n]ot the attorney, who was supposed to represent her, but whom she never even met;" "[n]ot her mother or her father;" "not the state or the

note 8 (referring to editorials written by two California reporters, Karen de Sa of the *San Jose Mercury News* and Pati Poblete of the *San Francisco Chronicle*).

232. Tracy Schroth, *Creating a Climate for Reform: Working with the Media to Improve Foster Care in California*, 28 JOURNAL NAT'L CTR. FOR YOUTH LAW 9, 11 (Jan.-Mar. 2007).

233. Heimpel, *supra* note 8.

234. Editorial, *First Steps on Foster Care*, S.F. CHRONICLE (Sept. 14, 2005), <http://www.sfgate.com/opinion/editorials/article/First-steps-on-foster-care-2577701.php>.

235. See Editorial, *No Refuge: How California is Failing its Foster Children*, S.F. CHRONICLE (Sept. 11, 2005, 4:00 AM), <http://www.sfgate.com/opinion/article/NO-REFUGE-How-California-is-failing-its-foster-2577887.php>.

236. *Id.*

county, both of which became her official guardians once she was brought into the foster-care system.”²³⁷ As the *Chronicle* reported, she was yet another child in California’s foster care system who “fell through the cracks.”²³⁸

Since the publication of the first article, the *Chronicle* published dozens more editorials, articles, and letters to the editor, exposing the major shortcomings in the California social welfare system.²³⁹ At the end of many of its pieces, the *Chronicle* avowed: “[w]e will continue to pursue this issue until the state of California reforms its foster-care system to ensure that it can provide more resources and more consistent care for the 80,000 children whose biological parents are unwilling or unable to assume the responsibility.”²⁴⁰ Reforms emerged in response to these media advocacy efforts, including the addition of almost \$100 million to the state’s child welfare budget and the signing of eight bills by then Governor Arnold Schwarzenegger to ensure improvements in the system.²⁴¹ The actions of Poblete and the *Chronicle* editorial board demonstrate how media access to juvenile dependency proceedings can garner public attention, which can lead to much-needed reform.

Although the press frequently exposes the bad, it also exposes the good; just as the public should be informed of the negative aspects of juvenile dependency proceedings, it should also have the opportunity to learn of the positive aspects. For instance, Ryann Blackshere, a reporter who observed a presumptively closed juvenile dependency court in San Mateo, California, learned from one of the social workers in court that “while she doesn’t want all of her cases open to the media, she would like some cases covered so that people have a better idea of the more positive things that

237. *Id.*

238. *Id.*

239. See Schroth, *supra* note 232, at 10.

240. Editorial, *No Refuge: The Courts: Where will Our Children Land? Inside the Courtroom: Decisions of a Lifetime*, S. F. CHRONICLE, Dec. 4, 2005, <http://www.sfgate.com/opinion/editorials/article/NO-REFUGE-THE-COURTS-Where-will-our-children-2590777.php#page-1>.

241. See Schroth, *supra* note 232, at 10.

happen within the court—like lives being repaired.”²⁴² Sometimes, juvenile dependency proceedings are the forum for happy endings, especially when children are reunited with their now healthy and responsible parents or when children are adopted by a loving family.²⁴³ There are many hard-working and passionate social workers, attorneys, children’s advocates, judges, and other court officials who diligently strive to attain the best possible outcomes for children who have been forced into dependency proceedings; the public should be allowed to see this side of the system as well.²⁴⁴

V. ALLOWING OPEN COURTS WHILE APPEASING THE ADVERSARIES

Based upon the First Amendment’s guarantees, juvenile dependency courtrooms, like adult criminal courtrooms, should be presumptively open to the press and public. However, this access should not be absolute and should adhere to the strict scrutiny standard for adult criminal proceedings set forth by the Supreme Court in *Globe*.²⁴⁵ That standard provides that access may be denied if “the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”²⁴⁶

In the context of juvenile dependency proceedings, one such compelling governmental interest would be to protect the best interests of the child.²⁴⁷ Therefore, for children who are mature enough to express their own interests in court,²⁴⁸ the decision of

242. Ryann Blackshere, *Covering Juvenile Dependency Courts: Journalists’ Responsibility*, THE CHRONICLE OF SOCIAL CHANGE (July 12, 2012), <http://chronicleofsocialchange.wordpress.com/2012/07/12/covering-juvenile-dependency-courts-journalists-responsibility/>.

243. See Myers, *supra* note 36, at 462.

244. *Id.* at 463 (“The child protection system is far from perfect, and much remains to be done, but, at the same time, much has been accomplished.”).

245. See *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607 (1982).

246. *Id.*

247. See KAPALKO, *supra* note 124, at 12–13.

248. In juvenile dependency proceedings, a determination as to when a child is mature enough to make his or her own decisions regarding his or her case depends upon the age of the child and the nature of the issues involved in

open access should largely lie with them.²⁴⁹ In all other cases, this decision should be at the discretion of the judge.²⁵⁰ The decision involves a balancing test to be performed on a case-by-case basis, between preserving the privacy rights and the emotional well-being of the child and upholding the First Amendment rights of the press and the public.

Although achieving this balance can be challenging, some states have adopted laws that satisfy the competing interests in the debate over press access to juvenile dependency hearings.²⁵¹ North Carolina is one such state.²⁵²

the case. Often, the child's lawyer or guardian *ad litem* may decide that the child is mature enough to express his or her own interests in court when he or she is able to make reasonable decisions about the issues in question and is able to logically communicate these decisions. See generally *Giving the Children a Meaningful Voice: The Role of the Child's Lawyer in Child Protective, Permanency and Termination of Parental Rights Proceedings*, THE LEGAL AID SOCIETY (2008), available at <http://www.legal-aid.org/media/68451/role%20of%20jrp%20lawyer%2010-08.pdf>.

249. KAPALKO, *supra* note 124, at 13 ("The children in the child welfare system . . . should have the right to determine whether the media or any other member of the public is allowed into the proceedings.").

250. *Id.* at 4 (explaining that presumptively open courts typically give the judge the discretion to close dependency proceedings, if doing so is deemed to be in the child's best interests) (citation omitted).

251. Other states that have laws very similar to that of North Carolina include: Alaska, Arizona, Georgia, Iowa, Kansas, New York, and Utah. See *id.* at 23–27 (noting the balanced approach of Alaska, Arizona, Georgia, Iowa, Kansas, New York, North Carolina, and Utah). See ALASKA STAT. ANN. § 47.10.070(a) (West 2012) ("Except as provided in (c) of this section, and unless prohibited by federal or state law, court order, or court rule, a hearing is open to the public." Section (c)(3) provides that a hearing may be closed to the public if: "allowing the hearing, or part of the hearing, to be open to the public would reasonably be expected to (A) stigmatize or be emotionally damaging to a child; (B) inhibit a child's testimony in that hearing; (C) disclose matters otherwise required to be kept confidential by state or federal statute or regulation, court order, or court rule; or (D) interfere with a criminal investigation or . . . a criminal defendant's right to a fair trial in a criminal proceeding."). ARIZ. REV. STAT. ANN. § 8-525 (2012) ("Except as otherwise provided pursuant to this section, court proceedings relating to dependent children, . . . are open to the public. . . . For good cause shown, the court may order any proceeding to be closed to the public. In considering whether to close the proceeding to the public, the court shall consider:" (1) "[w]hether

doing so is in the child's best interests;" (2) "[w]hether an open proceeding would endanger the child's physical or emotional well-being or the safety of any other person;" (3) "[t]he privacy rights of the child, the child's siblings, parents, guardians and caregivers and any other person whose privacy rights the court determines need protection;" (4) "[w]hether all parties have agreed to allow the proceeding to be open;" (5) "[i]f the child is at least twelve years of age and a party to the proceeding, the child's wishes;" (6) "[w]hether an open proceeding could cause specific material harm to a criminal investigation."); GA. CODE ANN. § 15-11-78 (West 2012) ("The general public shall be admitted to . . . [a]ny hearing in a deprivation proceeding, except as otherwise provided in subsection (c) of this Code section. . . . The court may close the hearing in a deprivation proceeding only upon making a finding upon the record and issuing a signed order as to the reason or reasons for closing all or part of a hearing in such proceeding and stating that: (A) The proceeding involves an allegation of an act which, if done by an adult, would constitute a sexual offense . . . or (B) It is in the best interest of the child. In making such a determination, the court shall consider such factors as: (i) The age of the child; (ii) The nature of the allegations; (iii) The effect that an open court proceeding will have on the court's ability to reunite and rehabilitate the family unit; and (iv) Whether the closure is necessary to protect the privacy of a child, of a foster parent or other caretaker of a child, or of a victim of domestic violence."); IOWA CODE ANN. § 232.92 (West 2012) ("Hearings under this division are open to the public unless the court, on the motion of any of the parties or upon the court's own motion, excludes the public. The court shall exclude the public from a hearing if the court determines that the possibility of damage or harm to the child outweighs the public's interest in having an open hearing. Upon closing the hearing to the public, the court may admit those persons who have direct interest in the case or in the work of the court."); KAN. STAT. ANN. § 38-2247 (West 2012) ("Proceedings prior to and including adjudication under this code shall be open to attendance by any person unless the court determines that closed proceedings would be in the best interests of the child or is necessary to protect the privacy rights of the parents. . . . Proceedings pertaining to the disposition of a child adjudicated to be in need of care shall be closed to all persons except the parties, the guardian ad litem, interested parties and their attorneys, officers of the court, a court appointed special advocate and the custodian. (1) Other persons may be permitted to attend with the consent of the parties or by order of the court, if the court determines that it would be in the best interests of the child or the conduct of the proceedings, subject to such limitations as the court determines to be appropriate. (2) The court may exclude any person if the court determines that such person's exclusion would be in the best interests of the child or the conduct of the proceedings."); N.Y. R. CT. § 205.4 (West 2012) ("Members of the public, including the news media, shall have access to all courtrooms, lobbies, public waiting areas and other common areas of the Family Court otherwise open to individuals having business before the court . .

A. North Carolina: A Presumptively Open Example

North Carolina's approach to access to juvenile dependency hearings is a model example of a presumptively open dependency hearing law that effectively balances the competing privacy and First Amendment interests at stake in dependency hearings.²⁵³ Under the juvenile code chapter of the North Carolina General Statutes, "[a]t any hearing authorized or required under this Subchapter, the court in its discretion shall determine whether the hearing or any part of the hearing shall be closed to the public."²⁵⁴ There are several factors that the court shall consider in deciding whether to close all or any part of the hearing, including:

- (1) The nature of the allegations against the juvenile's parent, guardian, custodian or caretaker;
- (2) The age and maturity of the juvenile;
- (3) The benefit to the juvenile of confidentiality;
- (4) The benefit to the juvenile of an open hearing; and
- (5) The extent to which

. . . The general public or any person may be excluded from a courtroom only if the judge presiding in the courtroom determines, on a case-by-case basis based upon supporting evidence, that such exclusion is warranted in that case. In exercising this inherent and statutory discretion, the judge may consider, among other factors, whether: (1) the person is causing or is likely to cause a disruption in the proceedings; (2) the presence of the person is objected to by one of the parties, including the attorney for the child, for a compelling reason; (3) the orderly and sound administration of justice, including the nature of the proceeding, the privacy interests of individuals before the court, and the need for protection of the litigants, in particular, children, from harm requires that some or all observers be excluded from the courtroom; (4) less restrictive alternatives to exclusion are unavailable or inappropriate to the circumstances of the particular case."); UTAH CODE ANN. § 78A-6-114(1)(a) (West 2012) ("In abuse, neglect, and dependency cases the court shall admit any person to a hearing, . . . unless the court makes a finding upon the record that the person's presence at the hearing would: (A) be detrimental to the best interest of a child who is a party to the proceedings; (B) impair the fact-finding process; or (C) be otherwise contrary to the interests of justice.").

252. KAPALKO, *supra* note 124, at 26 (citing N.C. GEN. STAT. § 7B-801 (2012)).

253. See N.C. GEN. STAT. § 7B-801 (2012).

254. *Id.* § 7B-801(a).

the confidentiality afforded the juvenile's record pursuant to G.S. 132-1.4(I) and G.S. 7B-2901 will be compromised by an open hearing.²⁵⁵

Additionally, the statute makes clear that "[n]o hearing or part of a hearing shall be closed by the court if the juvenile requests that it remain open."²⁵⁶

Thus, the North Carolina statute allows for juvenile dependency hearings to be presumptively open, but the presumption may be overcome if the judge finds that closing the hearing to the public is necessary in light of the various factors listed above.²⁵⁷ The statute enables courts to employ a balancing test to determine if the privacy interests of the child outweigh the First Amendment interests of the press and public, or vice versa.

Hypothetically, the judge could find that the nature of the allegations against the child's parents are rather minimal, the child is of a mature enough age to permit public attendance at the proceeding, the benefit of confidentiality is not significant, the child may actually benefit from an open hearing, and the child's record would not be largely affected by an open hearing. In this scenario, it is likely that a judge would decide that the First Amendment interests of the press and public outweigh the privacy interests of the child, and therefore, the proceeding should remain open. Additionally, if the child requested that the hearing remain open, this alone would be sufficient for the judge to permit press and public access. On the other hand, if the scale tipped the other way, such that the nature of the allegations were severe, the child was very young, the child could greatly benefit from confidentiality, the child would likely be harmed from an open hearing, and the child's record would be compromised by an open hearing, then it is probable that a judge would determine that the privacy interests of the child far outweighed the First Amendment interests of the press and public. As a result, the judge would be inclined to close the proceeding to the press and public.

255. *Id.*

256. *Id.* § 7B-801(b).

257. *Id.* § 7B-801.

A court's careful consideration of all of the factors listed in the North Carolina statute would undoubtedly help to lessen the three major concerns voiced by opponents of open proceedings: the harmful impact of openness on the privacy, mental health, and courtroom participation of the child.²⁵⁸ By applying a balancing test, courts will be able to properly determine whether these rationales for keeping the courtroom closed outweigh the reasons for keeping the courtroom open. If the judge does indeed find that an open proceeding would negatively affect the child's privacy, mental health, and courtroom participation, the statute allows the judge to close the proceeding. In contrast, if the possible adverse effects of open proceedings on the child are rather minor or nonexistent, the court may choose to maintain an open courtroom.

In order to increase accountability in juvenile dependency proceedings, ensure that courtroom procedures are efficiently and effectively executed, and facilitate public education, which can often lead to societal reform,²⁵⁹ states should adopt statutes similar to that of North Carolina, and grant a presumption of open access rebuttable upon the showing of certain factors that justify the court closing the proceedings.

B. Ethical Considerations

Simply amending statutory language, however, will not always be enough to shift the mindsets of those opposed to open juvenile dependency courtrooms.²⁶⁰ A central component of the issue—particularly evident in the rationales set forth in favor of presumptively closed courtrooms—is a common preconceived mistrust of the media.²⁶¹ While concerns that the press may overstep

258. *See supra* Part IV.A.

259. *See supra* Part IV.B.

260. Heimpel, *supra* note 8 (positing that: "Regardless of whether or not state law opens the courts to the news media, the judges, commissioners and referees that oversee these hearings have the power to do so. So what would it take to make them feel comfortable enough to allow a journalist in?").

261. *Id.* (noting that "[i]n the six years that I have covered the foster care system and worked along its fractious point of contact with the news media, an

their boundaries and report on confidential information are reasonable, it is rare that intrusive reporting actually occurs in the juvenile dependency setting.²⁶² Nonetheless, to reduce any such risk, a code of ethics has been proposed by a group of journalists to ensure that the press respects the privacy interests of the children in their reporting.²⁶³ The essential purpose of this code is to ensure that “[w]hen courts do allow members of the press to attend hearings, journalists must behave ethically in order to earn trust, improve coverage, and avoid harming children and families.”²⁶⁴ This draft code of ethics consists of three sections: (1) professional protocol for hearings; (2) working with children and families; and (3) system-wide understanding.²⁶⁵ Each section is intended to guarantee that the media acts ethically when reporting on juvenile dependency proceedings.²⁶⁶

Recently, the effectiveness of this draft code of ethics was tested by Daniel Heimpel, a journalist and the Executive Director of Fostering Media Connections, an organization dedicated to bringing awareness and positive change to the foster care system

all-too-common theme has been one of mistrust, fear and subsequent misinformation”).

262. See KAPALKO, *supra* note 124, at 13 (“The risks are not as significant as opponents claim. Journalists, particularly those who cover the child welfare system, are sensitive to children’s vulnerabilities and are not the exploitative ‘vultures’ opponents describe.”) (citation omitted).

263. See generally JAMIE KAPALKO, FOSTERING MEDIA CONNECTIONS: CODE OF ETHICS FOR JOURNALISM ON THE DEPENDENCY COURT SYSTEM, A WATCHED SYSTEM, 2012 (2012), available at <http://fosteringmediaconnections.org/wp-content/uploads/2012/09/A-Watched-System-Code-of-Ethics.pdf>.

264. *Id.* at 2.

265. *Id.* at 3–5.

266. *Id.* at 2 (“This code of ethics seeks to define ethical behavior with respect to some of the common issues faced by journalists attending dependency court hearings. It requires journalists to treat their subjects with respect and compassion. It prioritizes the needs of children ahead of the journalist’s story. It demands a great deal of research and encourages journalists to establish relationships with other individuals working in the system.”).

with the assistance of journalism and media outlets.²⁶⁷ Heimpel was permitted to attend the juvenile dependency proceedings in Marin County, California,²⁶⁸ which is a presumptively closed state—with Los Angeles County being the most recent exception.²⁶⁹ After giving a copy of the code of ethics to the clerk of court and explaining his intent to abide by the code of ethics, Heimpel was granted access to the courtroom.²⁷⁰

Despite Heimpel's successful attempt to gain access to the courtroom, the question remains: "should [journalists] have to negotiate this access every time?"²⁷¹ The answer for Heimpel and others in favor of presumptively open proceedings is "no."²⁷² If journalists and other media sources adhere to strict ethical standards, then their reporting will reflect this.²⁷³ As a result, it is probable that the public will begin to lose their skepticism and acquire more trust for the media.²⁷⁴ As Heimpel emphasizes:

With a consensus-built code of ethics in our hand, we will have created an opportunity to make an important bargain between the foster care system and the news media. Both professions will be improved for it: child welfare shedding fear and journalism raising its ethical standards, offering the chance for everyone to do their best work in the best interest of children.²⁷⁵

For members of the press, consistently following legitimate moral principles when reporting on juvenile dependency proceedings may negate the traditional mistrust of the news media and spark more

267. Heimpel, *supra* note 8; see also *About Us*, FOSTERING MEDIA CONNECTIONS, <http://fosteringmediconnections.org/about-us/> (last visited Feb. 5, 2013).

268. Heimpel, *supra* note 8.

269. See *supra* Part III.B.

270. Heimpel, *supra* note 8.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

states to move from presumptively closed courtrooms to presumptively open courtrooms.²⁷⁶

VI. CONCLUSION

The First Amendment of the United States Constitution guarantees freedom of the press.²⁷⁷ Until the Supreme Court determines whether the First Amendment's press protections and right of public access to adult criminal proceedings correspondingly applies to juvenile dependency proceedings, the decision will be one for each individual state to make.²⁷⁸ Each state should adopt an approach that allows for juvenile dependency courtrooms to be presumptively open to the press and public. However, this presumption should come with a balancing test, conducted on a case-by-case basis, in which the court weighs several factors, including the privacy interests of the child and the First Amendment rights of the press, in order to determine whether the courtroom should remain open.

Recent events have shown that when the press is granted access to the courtroom, it is capable of reporting accurately on the court proceedings without exposing the most private aspects of individuals' lives.²⁷⁹ As long as the press maintains a set of ethical reporting standards in the courtroom and judges are afforded discretion in assessing whether a courtroom should be closed due to the effects on children involved in the cases,²⁸⁰ there is no genuine reason why juvenile dependency proceedings should not adhere to

276. See KAPALCO, *supra* note 263, at 2.

277. U.S. CONST. amend. I.

278. See generally KAPALCO, *supra* note 124 (reporting on the variance among state laws regarding press access to juvenile dependency proceedings).

279. See discussion *supra* Part I.

280. This is assuming that the child involved in the case is not old or mature enough to make this decision herself. If the child is capable of deciding and expresses that the press and public not be allowed in the courtroom, this should be sufficient for a judge to deny access to the press and public. If, on the other hand, the child is capable of deciding and requests that the press and public be present during the proceedings, then, as articulated under North Carolina's statute, the hearing should remain open to the press and public. See N.C. GEN. STAT. § 7B-801 (2012).

one of the central facets of the First Amendment by embracing a presumption of openness.