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## PANEL 3: Secrecy and the Juvenile Justice System

Hon. Michael Gage

Bonnie Rabin

Eve B. Burton

Nicholas Scoppetta

Jennifer L. Rosato

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*Hon. Michael Gage\**

Thank you. First, when I saw in the description of this conference the terms “Secret” and “Behind Closed Doors,” I thought they added a pejorative tone to the inquiry and the discussion. I think perhaps in this segment, I at least will be talking a little more about privacy and the privacy interests of the people who come to family court.

Second, certainly the juvenile justice and juvenile delinquency issues in family court are among the easier cases to deal with in terms of what can and should be made public. I think that because Commissioner Scoppetta is here, as well as Bonnie Rabin, who has litigated many child protective proceedings, we will talk a lot about neglect and abuse cases and the truly innocent victims who are the subject of these proceedings.

I think perhaps I should just mention that the family court in New York State as we know it, and the statute providing for it, are less than forty years old.<sup>1</sup> And since I have been more or less directly involved in family court since the late 1960s, I have a rather good historical context and recollection of the way it was and what it has become, and perhaps ideas on where it should go in the future.

I remember that when I was a law guardian in the late 1960s and early 1970s, we were operating under the same statute and a similar rule. But there is no question that the culture of the institution was one of closure and as a result, the press and the media, with very few exceptions, just assumed that they could not get information, that they did not have access to the family court. That is how the idea developed that it was a closed proceeding, which clearly presents certain dangers.

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\* Former Administrative Judge for the New York City Family Court.

<sup>1</sup> See N.Y. FAM. CT. ACT § 113 (McKinney 1999) (noting that the original Family Court Act was enacted in 1962).

The current Rule 205.4, which deals with access to family court proceedings, has only been in effect for about two and a half years.<sup>2</sup> The old rule was actually not that different. Because it provided that in exercising its inherent and statutory discretion, the court could exclude a person or the general public, certain factors should be considered. The factors that the old rule referred to are exactly the first three factors in the current rule.<sup>3</sup> We can discuss those factors a little in a few minutes.

That culture of letting people assume that the court was closed perked along through the early 1990s. There were exceptions. Reporters came to court if they were doing a long-term story. It was, however, very carefully controlled, and depending on who the judge was, the press could be excluded entirely.

Then came the tragic case of Elisa Izquierdo, in November of 1995.<sup>4</sup> I believe it is safe to say that the case resulted in a fire-storm of criticism and inquiry about court practices and child welfare practices, and resulted in the change in the rule.

The family court, of course, was intended to provide a forum and procedures to resolve very intimate kinds of cases, whether they be neglect and abuse cases, paternity cases, or juvenile delinquency cases. And all throughout Rule 205.4 there are references to the fact that the general public may be excluded from

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<sup>2</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4 (1997).

<sup>3</sup> See *id.* § 205.4(b)(1)-(3) (listing the factors a judge may consider as whether a person having access to the courtroom “is causing or is likely to cause a disruption in the proceedings,” whether “the presence of the person is objected to by one of the parties, including the law guardian, for a compelling reason,” or whether “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, require that some or all observers be excluded from the courtroom”).

<sup>4</sup> See Marc Peyser, *The Death of Little Elisa*, NEWSWEEK, Dec. 11, 1995, at 42 (reporting that even after school officials at PS 126 called the state and city child-welfare offices for the fifth time, that Elisa Izquierdo had been abused, the state refused to investigate because there was insufficient evidence, and the Child Welfare Administration would not comment on what action, if any, was taken, because of confidentiality laws); see also *In re Ruben R.*, 641 N.Y.S.2d 621 (App. Div.1996) (constituting the legal proceedings relevant to the situation of Elisa’s siblings after Elisa died as a result of her mother’s abuse).

certain proceedings, such as delinquency, paternity, or child welfare proceedings.<sup>5</sup> But the decision whether to exclude the press and the public was always left to the discretion of the judge. And, of course, in exercising that discretion, the judge was to be guided by certain considerations.

After all, it was always understood that the privacy interests of the families, particularly the children, who are the subjects of these proceedings, needed to be weighed against the public's interest in knowing how the court operated and what was happening in these high profile or not so high profile cases.

The case of Elisa Izquierdo really cried out for a review of the court practices. The loudest, strongest, and most reasoned crier was the *Daily News*, as represented by Eve Burton.<sup>6</sup> Shortly after that case, and at the suggestion of Chief Judge Judith Kaye, I put together a very small group of people — Eve Burton representing the media, the then head of the Juvenile Rights Division of the Legal Aid Society, a representative of ACS appointed by Commissioner Scoppetta, and myself — to really try and advise what interests were involved, how the press could be allowed into proceedings more readily, and what factors should be considered. We had numerous meetings and certainly did not come to a total consensus, but our efforts resulted in a change in the rule. I think we would all agree that the first declarative sentence at the beginning of this rule is notable in that it states that the “Family Court is open to the public.”<sup>7</sup> That was a rather radical change from the old rule.

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<sup>5</sup> N.Y. FAM. CT. ACT § 1043 (McKinney 1999) (providing that the general public may be excluded from any hearing); *id.* § 531 (excluding the general public from any courtroom where paternity proceedings are taking place); *id.* § 341.1 (excluding the general public from juvenile delinquency proceedings). See generally N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4.

<sup>6</sup> See, e.g., Barbara Ross, *Sex Abuse of Girl Is Cited in Autopsy*, DAILY NEWS, Feb. 1, 1996, at 19 (reporting that Eve Burton, a lawyer representing the *Daily News* and the *New York Post*, argued that the media should have access to the courtroom during the custody hearing of the Lopez family since evidence of abuse in the Lopez home was already disclosed in the criminal court proceeding of the murder of their daughter, Elisa Izquierdo).

<sup>7</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4(a).

The rule then provides that “[t]he public, including the press, is permitted in all the public areas.”<sup>8</sup> Rule 205.4 has had the laudable effect of changing the standard practice. Now, a request to exclude the press requires a hearing, supportive evidence must be introduced, and an exercise of discretion excluding anyone must be preceded by findings made by the judge.

I will not address the Izquierdo litigation extensively because I think one or two other members of the panel may concentrate on that. It is sufficient to say that one can hardly imagine a more sensitive case, a case in which the interest and the purpose of family court — a court, the purpose of which, by operation of statute, is to protect children from injury and maltreatment, and to help safeguard their physical, mental and emotional well-being — would come more strongly into play. Although the trial judge in that case wrote what I thought was a very reasoned decision to allow the press in, as a result of an appeal by Legal Aid representing the children, the First Department Appellate Division also wrote a reasoned analysis as to why the press should not be let in.<sup>9</sup> I think these decisions show how difficult and sensitive these issues are.

At a recent event where I spoke, I queried whether *Ruben R.*,<sup>10</sup> which is the name of the appellate division decision, and the analysis therein is still good law. In my view, all the statutory provisions in the Family Court Act allowing a judge to exclude the public are still valid, as they have not been amended or repealed. However, I believe that adoption of new Rule 205.4<sup>11</sup> on access resulted in a true change, one that judges were ready and most were eager for, since so many of the judges felt their hands were tied. Judges wanted people to come in and see what they were trying to accomplish but, as has been mentioned this morning, often every one of the parties and their attorneys wanted the press excluded. That resulted in a battle between the judge and the media against the parties. As a result of the new rule, proceedings have become much more open.

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<sup>8</sup> *Id.*

<sup>9</sup> *In re Ruben R.*, 641 N.Y.S.2d at 623-29.

<sup>10</sup> Ruben is one of Elisa's five half-siblings. *Id.* at 622.

<sup>11</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4.

We may have time a little later to talk about whose interests really need protecting. Clearly there exists an interest in a fair trial for someone accused of juvenile delinquency. But I think more in need of protection are the interests of children who have no say and no responsibility for what goes on in the court. That is, the children who are victims of abuse, be it sexual, physical or neglect. Is it simply the identity of the child or of the family? No, because in many cases that identity is known. Then what needs protection is the discussion of the behavior and circumstances of the abuse. Another issue that presents itself is at what point in family court proceedings we should strive to protect privacy interests. Often these cases come up as a result of an arrest. This translates into the fact that there is police information, prosecutor's information, and the court's information. All of this information is already public.

But, as often also happens, the case becomes of interest after the fact, after the proceeding has occurred, when something disastrous happens.<sup>12</sup> What then should the right of the press be to access old information? In addition, one must take into consideration the future of the child five or ten years down the line. It used to be that family court could guarantee that once a juvenile delinquency case was concluded, the records were sealed; no one had to state that they had been convicted or even arrested for anything, and they could have a second chance. I think we have reason to know that juvenile court records are sometimes the subject of all kinds of uses.<sup>13</sup>

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<sup>12</sup> See, e.g., *Anonymous v. Anonymous*, 705 N.Y.S.2d 339, 340 (App. Div. 2000) (stating that the court must balance the interest of keeping the courtroom open to the public "against the court's special interest in protecting minors from harm where sensitive matters are involved"); *People v. Riggins*, 678 N.Y.S.2d 469, 475 (Sup. Ct. 1998) (stating that reports of child abuse and maltreatment in possession of social services — including photographs and other information — are confidential and may only be made available to specified entities if the court is satisfied that information contained in those records is necessary for determination of charges before such body).

<sup>13</sup> See *In re Steven R.*, 467 N.Y.S.2d 545, 547 (Fam. Ct. 1983) (discussing Section 375.1 of the Family Court Act, which requires the sealing of all documents brought into a juvenile delinquency proceeding that resulted in favor of the juvenile); see also Shannon F. McLatchey, *Media Access to Juvenile Records: In Search of a Solution*, 16 GA. ST. U. L. REV. 337, 342 (1999) (noting

The last thing I want to say is that I think from a judge's perspective, the change has gone remarkably smoothly. It is true that there were a few glitches and perhaps what Eve Burton would think of as someone trying to gag the press in certain areas. But it has worked really well. I think the next frontier, which will most likely be the subject of further discussion if not litigation, is access to other kinds of information, that is, records and reports from family court.

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that "modern society is less inclined to protect the confidentiality of juvenile offenders at the expense of the public's right to be informed about juvenile crime and the manner by which the system handles the wrongdoers").

I have asked myself a similar question to that of Judge Gage, whether the Izquierdo case would have been treated differently or whether the appellate division would have decided it differently in light of the new rules.

I have struggled with this question a little, knowing the debate or balance that the litigator has to focus on and whose interest we are trying to protect in the family court. From my practice and my feeling about the Family Court Act, and from the cases I have read, the subject of every proceeding in family court is the child. In the tragic case of Elisa Izquierdo, had there not been any other children remaining, there would have been no child protective proceeding.

In a certain way, that case really was not about Elisa. The case was about Ruben R. and his siblings: what they would face, what their needs would be, who would provide them with foster care, and how the psychological issues that needed to be dealt with would be addressed.

For those of you who do not know, most of the hearings in the family court are bifurcated. There is a fact-finding hearing where the allegations have to be proved by a preponderance of the evidence, and there is a dispositional hearing where hearsay evidence comes in.<sup>1</sup> The information that is part of the disposition-

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\* Member, Cohen Hennessey & Bienstock.

<sup>1</sup> Cases involving a child's interest are frequently complex, involving multiple issues. The cases are often adversarial. Almost every proceeding in family court requires a hearing, that is, the admission of documentary and testimonial evidence. Many of the relevant statutes dictate bifurcated hearings, including preliminary hearings and separate fact-finding and dispositional hearings. It is not unusual for a family court proceeding to encompass more than one evidentiary hearing requiring different standards of proof. *See* N.Y. FAM. CT. ACT §§ 340.01-347.1 (McKinney 1999 & Supp. 2000) (providing for a fact-finding hearing in juvenile delinquency proceedings); *id.* §§ 350.01-355.5 (providing for a dispositional hearing in juvenile delinquency proceedings); *id.* §§ 744-46 (defining proceedings concerning whether a person is in need of supervision); *id.* § 832 (defining a fact-finding hearing in family offense proceedings); *id.* § 833 (defining a dispositional hearing in family offense



al hearing is actually extremely significant. It is often the product of mental health reports, psychological reports, reports from foster care agencies, statements from case workers, school reports, and a background investigation and report that addresses all the facts and circumstances of a particular family.

The reason I am bringing that up in this context is because, unlike a criminal court proceeding, the family court really must look at what a child's individual needs are. As a result, the family court has unique information not only about the child who is before the court, but also about the child's extended family members. Within those reports, which I think are presumed to be confidential, there would be information such as employment, the identity of the true biological parent of a particular child, whether there has been an adoption in that particular family, and details of any sexual abuse. No matter what has happened at the fact-finding level, information that does not exist in other types of hearings will come into evidence: for example, the details of the sexual abuse of a child, and perhaps abuses suffered by other members of that child's family, the details of the physical abuse, and information concerning a family member's sexual orientation, even if that person is not before the court.<sup>2</sup>

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proceedings); *id.* § 1044 (defining a fact-finding hearing in child protective proceedings); *id.* § 1045 (defining a dispositional hearing in child protective proceedings); *id.* § 1046 (pertaining to evidence in child protective proceedings); *see also In re Jose R.*, 83 N.Y.2d 388, 393-94 (1994) (discussing speedy adjudication of the fact finding phase); *In re Dorothea B.*, 611 N.Y.S.2d 749, 750 (Fam. Ct. 1991) (discussing Family Court Act Section 350.1(2), which provides that "in all cases where the respondent is not detained, 'the dispositional hearing shall commence not more than fifty days after . . . [the fact finding phase]"); *In re Randy G.*, 487 N.Y.S.2d 967, 969 (Fam. Ct. 1985) (discussing the different evidentiary standards for each proceeding).

<sup>2</sup> *See In re Yolanda D.*, 673 N.E.2d 1228, 1230 (N.Y. 1996) (discussing whether Yolanda's uncle met the statutory definition of a legal guardian for the child and the disclosure of details of sexual abuse by her uncle); *In re Jessica R.*, 581 N.E.2d 1332, 1333 (N.Y. 1991) (remitting case to family court to determine if respondent's motion for a psychological examination was needed to enhance procedural fairness); *In re Karen Machukas*, 667 N.Y.S.2d 817, 820 (App. Div. 1998) (noting that an amended petition for an order of protection set forth numerous acts of mental and physical abuse allegedly committed by respondent, not all of which were proven at the hearing); *In re Joseph A.*, 664 N.Y.S.2d 393,

I think the existence of such information is part of what makes me the lone person up here who feels quite protective about child protective proceedings. I actually think that even in the juvenile delinquency cases that are heard, the children are often innocent victims. Having represented quite a few of them in a multitude of different types of cases, I know that counseling a child in a delinquency proceeding — a child who has been accused of committing an act that, if he or she had been an adult, would be a crime — calls for some special safeguards.

The cases you all probably know about are most likely the better known cases of Malcolm X's grandson<sup>3</sup> and similar cases.<sup>4</sup>

393 (App. Div. 1997) (stating that an order adjudicating a juvenile as a delinquent provided details about acts that would constitute a class D felony for sexual abuse in the first degree if committed by an adult); *In re Female Infant F.*, 594 N.Y.S.2d 303, 304 (App. Div. 1993) (involving a contested private adoption placement proceeding in which details about the circumstances leading to the adoption as well as the relationship between the biological parents were revealed); *In re Adoption of Jessica XX*, 434 N.Y.S.2d 772, 773 (App. Div. 1980) (appealing the denial of an unwed natural father's motion to have an adoption order vacated in which details of the father's separate paternity action were revealed); *In re Lori M.*, 496 N.Y.S.2d 940, 940-41 (Fam. Ct. 1985) (discussing a petition filed by the mother of a juvenile daughter alleging the daughter was a person in need of supervision and including details about the daughter's sexual orientation, her personal feelings about her orientation, and her mother's response to her orientation); see also Rachel L. Swarns, *Three Years After A Girl's Murder, Five Siblings Lack Stable Homes*, N.Y. TIMES, Aug. 4, 1998, at A1 (detailing the abuse suffered by Elisa Izquierdo and her siblings before the little girl's death).

<sup>3</sup> *In re News Media Coverage*, 662 N.Y.S.2d 207, 207, 210-11 (Fam. Ct. 1997) (granting the press limited access to the courtroom in a juvenile delinquency proceeding where a twelve-year-old boy was accused of setting the fire that killed his grandmother).

<sup>4</sup> See, e.g., *In re Katherine B.*, 596 N.Y.S.2d 847, 853 (App. Div. 1993) (holding that child protective proceedings be closed to the public and the media due to the possible harm to the child from public disclosure of parental neglect and abuse even though a prior kidnapping and imprisonment of the child by an adult friend received substantial publicity); *In re Keisha T.*, 38 Cal. App. 4th 220, 225-26 (Ct. App. 1995) (holding that the juvenile court had discretion in granting media access to confidential court records in juvenile dependency cases and that the conflict between allowing public access and protecting children was a matter courts must resolve on a case-by-case basis).

Those, however, are not the typical cases. My fear has always been that the sensationalism of these aberrational cases is what ends up affecting reform. I cannot say that I have yet to see the law reform we are talking about really affecting the day-to-day lives of the children I have represented, or of the way the cases are handled in court. It is true that many more judges are now allowing more people into the courtroom. With respect to whether the same arguments are being made about how to protect the children, I do not think *Ruben R.*<sup>5</sup> actually would be decided very differently today. I think the psychological harm that was discussed in the affidavits submitted to the court gave the appellate division quite a cause for concern.<sup>6</sup> The court also, I believe, looked to what the child advocate would need to focus on in terms of representing that particular child.

One of the clear chilling effects to a litigator is what information can be brought up to help the client with what the client actually needs and what information may actually harm the child more than help her.

For example, in a case like *Ruben R.*, where the child advocate probably wanted a specific finding and wanted the court to know all the relevant facts and details, there may have been a kind of restraint on letting the public know facts that the remaining children, who were alive and had to go on with the rest of their lives, would have to be confronted with. These children still had to go to school, had to get into foster homes, and had to go to different camps and programs. They had to deal with the community. They would have to deal with their peers when the most

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<sup>5</sup> 641 N.Y.S.2d 621, 622, 629 (App. Div. 1996) (discussing the abuse and neglect suffered by Ruben R. and Elisa Izquierdo's other surviving siblings, and ordering the proceeding "closed to the public and the press").

<sup>6</sup> *Id.* at 628. The affidavits of the psychologist and the social worker averred that "the children's therapy would be severely undermined because of fears concerning the divulgement of information to the public; further emotional scarring would occur; and further erosion of family bonds and rejection of their parents would be inevitable." *Id.* In addition, the increased publicity "would undoubtedly exacerbate the children's anxiety and fear of rejection by friends, teachers and schoolmates [and thus] heavily impact . . . their sense of self-esteem." *Id.* This potential "revictimization" of the "already emotionally fragile [children] . . . would result in irreparable harm." *Id.*

intimate details of their family life had been thrown into the headlines of the *Daily News*,<sup>7</sup> the *Post*,<sup>8</sup> and other papers.<sup>9</sup> The child advocate faces those concerns. They are important concerns because I think one of the issues that has been raised by a number of different courts around the country is whether, when we get to the information that we are concerned about revealing, we should just stop the proceeding, have an argument about it, and then go on

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<sup>7</sup> See, e.g., Sheila Anne Feeney, *Little Murders Though Society Focuses on Manic Moms, Research Is Lacking on Those Responsible for Child Homicides*, DAILY NEWS, Nov. 28, 1995, at 45 (discussing Elisa Izquierdo case as an example of manic mothers who kill their offspring); Alice McQuillan & Paul Schwartzman, *Slain 6-year-old Is Laid to Rest in Death, Child Not Abandoned*, DAILY NEWS, Nov. 30, 1995, at 3 (displaying Ruben's full name with an alleged quote from the crying child that read: "Will my sister go to Heaven?" and noting that "Elisa Izquierdo is finally at peace. May her mother never find a moment of it again.").

<sup>8</sup> See, e.g., Sandy Gonzalez, *Mom Indicted as Hundreds Mourn Tragic Little Girl*, N.Y. POST, Nov. 29, 1995, at 5 (describing the funeral service).

<sup>9</sup> See, e.g., Lizette Alvarez, *A Mother's Tale: Drugs, Despair and Violence; A Life Mired in Urban Ills Ends in a Daughter's Death*, N.Y. TIMES, Nov. 27, 1995, at B1 (reporting that Awilda Lopez of Brooklyn, mother of five, was accused of beating her six-year-old daughter, Elisa Izquierdo, to death while she was addicted to crack cocaine); Samuel Maull, *Mother Indicted in Death of Girl*, 6, RECORD (N. N.J.), Nov. 29, 1995, at A04 (reporting that Lopez abused Elisa until she died, once allegedly using Elisa's head to mop the floor, and that Lopez was charged not only with first degree manslaughter, but also with endangering the welfare of Lopez's other children when she exposed them to the abuse inflicted on Elisa); *Mom Faces Murder Count in Daughter's Abuse Death*, GREENSBORO NEWS & REC., Nov. 29, 1995, at A5 (noting that though there was no evidence of physical abuse of Elisa's siblings, Lopez singled out Elisa, believing the girl to be possessed by satan, slamming Elisa's head into a concrete wall two days before her death, and causing her to die from a brain hemorrhage); *Mother Indicted as Child Is Mourned; Murder Charged in Fatal Battering of 6-Year-Old New York Girl*, WASH. POST, Nov. 29, 1995, at A22 (reporting that child welfare officials, though warned about Elisa's parental abuse, defended their decision to leave Elisa with her mother even though the child was born with cocaine in her blood, because they said the child wanted to live with her mother, not her father's relatives, after her father's death); David Van Biema, *Abandoned to Her Fate; Neighbors, Teachers and the Authorities All Knew Elisa Izquierdo Was Being Abused. But Somehow Nobody Managed To Stop It*, TIME, Dec. 11, 1995, at 32 (featuring a cover story including a color photograph of three Izquierdo children).

with the proceeding. Fortunately, the appellate division found that would be incredibly disruptive to the case,<sup>10</sup> especially if the public access advocates, for example, wanted a stay of the proceeding each and every time there was going to be a ruling on whether or not information concerning a certain child should be elicited or come into evidence.

It is not as though we have not seen the effects of media access to children's cases even recently. I know the case of a fourteen-year-old girl who was accused of killing her mother and spent some eight months in a juvenile detention facility.<sup>11</sup> There were a number of articles on her case.<sup>12</sup> She did very well once she left the facility, and it turned out she had been a victim of very extensive abuse. She also did extremely well in high school and was admitted to Harvard for college. Someone found out about her past and anonymously sent some information to Harvard, including newspaper articles about the trial, and Harvard rescinded its offer.<sup>13</sup> I am not saying that happens in every case, but I am

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<sup>10</sup> *In re Ruben R.*, 641 N.Y.S.2d 621, 626 (App. Div. 1996) (stating that interrupting the proceeding "would . . . continually disrupt the proceedings and result in an unduly protracted hearing").

<sup>11</sup> See Carrie T. Hollister, *The Impossible Predicament of Gina Grant*, 44 UCLA L. REV. 913 (1997) (discussing the ongoing effects of media coverage of juvenile proceedings on juveniles, using Gina Grant as an example). Gina Grant, while living with her abusive mother in South Carolina, allegedly bludgeoned her to death with a crystal candlestick. After attempting to make the death look like a suicide and then trying to blame her boyfriend, Gina claimed self-defense, pleaded no contest to voluntary manslaughter, and served eight months, including her pretrial detention time, in a South Carolina detention facility. *Id.* at 914.

<sup>12</sup> See, e.g., Jon Auerbach, *Teenager's Case Left Many Puzzled*, BOSTON GLOBE, Apr. 7, 1995, at 20 (reporting that Gina Grant, a fourteen-year-old honors student, was accused of bludgeoning her mother to death with a candle holder and that, even though the teenager first said an intruder murdered her mother, she later pleaded no contest to manslaughter and maintained that she acted out of self-defense from an alcoholic mother who verbally abused her); Lynda Gorov, *Support, and Doubts, Follow Student; South Carolina Town Still Divided Over Teenager's Killing of Mother in 1990*, BOSTON GLOBE, Apr. 10, 1995, at 1 (noting that Grant served six months in a juvenile prison for her mother's death and was then transferred to a special school for juvenile offenders in Boston, Massachusetts, which was close to her relatives).

<sup>13</sup> See Fox Butterfield, *Woman Who Killed Mother Denied Harvard*

saying we cannot think for a moment that just because the case is over, past issues will not follow these children around, perhaps for the rest of their lives.

Judge Gage mentioned an article she read in *New York Magazine* that addressed public access and the change in the law.<sup>14</sup> I also recall very vividly the sensationalism, the exploitation at the time of the Izquierdo matter. I was not surprised to hear that, although there were thousands of cases reported in thousands of articles, two years later, when there were a couple other notorious cases, they were reported in *half* the number of articles.<sup>15</sup> My point is that few people follow the children in these cases and few changes have actually occurred for the original children in these cases as a result of the law reform. I am not saying public access can never be beneficial. I actually think that if the child's lawyer wants media access because the lawyer thinks some harm is occurring as a result of, for example, the bureaucracy of the court or a particular judge, or a particular district attorney's office, or the lawyer wants to show something about the Administration for Children's Services, then that is a different matter. But as I understand the statute and the case law, the interests that need to be protected are those of the child. Thus, unless the child's advocate wants the proceeding to be open, I think it should be closed.

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*Admission*, N.Y. TIMES, Apr. 8, 1995, at 1 (reporting that Harvard's decision to rescind the early admission offer to Gina Grant was based on Ms. Grant's failure to disclose her manslaughter act, which brought into question her honesty and was, at a minimum, a misrepresentation on her application); Alice Dembner & Jon Auerbach, *Pupil's Past Clouds Her Future: Harvard Rescinds Offer After Learning That Honors Student Killed Her Mother*, BOSTON GLOBE, Apr. 7, 1995, at 1 (describing Gina Grant's successes following her mother's death and how Harvard learned of the actual events that occurred when Gina was a juvenile).

<sup>14</sup> Michael Shapiro, *Death Be Not Proud*, N.Y. MAGAZINE, Nov. 29, 1999, at 46 (noting that cases of child abuse arising after Elisa Izquierdo's tragedy attracted less media attention than Elisa's case and stating that Elisa's case contributed to the opening of family court proceedings).

<sup>15</sup> See *In re K. R.*, N.Y.L.J., Nov. 14, 1997, at 29 (N.Y. Fam. Ct.); *In re Augustus C.*, N.Y.L.J., July 31, 1997, at 22 (N.Y. Fam. Ct.).



*Eve B. Burton\**

I do not disagree at all with Bonnie Rabin that these are difficult issues. I think they are very difficult issues, actually. I would hate to see this debate become one of pro-children or anti-children because I really do not think that is the case. I think the debate is whether or not you believe the children are harmed more by media coverage of judges who are making decisions and reviewing difficult issues about solutions for very fragile members of our community often with very tragic lives; or harmed more by a system of sustained secrecy, where sometimes city bureaucracies, and other times guardians who are accountable only to the children they serve, and courts, make decisions behind closed doors. I think that is how the debate needs to be framed. No one answer is right. This is similar to the abortion debate: everyone feels strongly about it and there is no right answer.

Interestingly, however, and Judge Gage pointed this out, the family court judges who sat on these cases for thirty-five years behind closed doors ultimately were the judges granting the applications we were making to open proceedings. Those judges ultimately know about the lives of these children probably as well as anybody else who has been working in the system. I also give tremendous credit in this whole process to Commissioner Scopetta, who fairly early on came to conclude that it was a reasonable debate on both sides and, with a long history of being pro-child, also came to conclude that proceedings should not be closed, and worked very diligently with his staff to educate them about opening the proceedings.

Legal guardians, for the most part, still prefer the shades to the sunlight. I do not criticize them for that because that is their role. I do not take the position that every proceeding in every case should be open, although I will say that the guardians, with very

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\* Former Vice President and Deputy General Counsel for Daily News, L.P., publisher of the *Daily News*. Ms. Burton is currently the Vice President and Chief Legal Officer for CNN.



few exceptions, have taken the position that everything should be closed. Bonnie Rabin will probably disagree with that, but that is my experience.

We must remember that there are three types of cases, so that we just do not discuss this broadly, and different people feel differently about different types of cases. First, there are abuse cases, illustrated by the *Ruben R.* case we discussed.<sup>1</sup> Second, there are custody cases, such as *Brentrup v. Culkin*,<sup>2</sup> which was the original case litigated. In that case we won in the trial court but lost in the appellate division. This has for all practical purposes been reversed in what I would call a brilliant decision by the appellate division just last week, distinguishing the *Culkin* case.<sup>3</sup> Third, there are delinquency proceedings, illustrated by the Shabbaz case, where, again, we prevailed.<sup>4</sup>

I believe there is very little legal debate that the prevailing precedent would allow the media in the courtroom in most delinquency proceedings and virtually all custody proceedings. Perhaps, however, there may be some differences in the *Ruben R.* category. I think I do agree with Bonnie Rabin that the case would probably have been decided the same way today, and I am not sure that it should not have, although I am not privy to all the information. Again, it is somewhat difficult to litigate cases when they are entirely sealed. I may have appeared more unreasonable in litigating that case than I would have if I had been able to see all the facts. But based on the little knowledge I have, I think it probably would have been decided the same way today.

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<sup>1</sup> 641 N.Y.S.2d 621 (App. Div. 1996).

<sup>2</sup> 679 N.Y.S.2d 820 (App. Div. 1998).

<sup>3</sup> *Anonymous v. Anonymous*, 705 N.Y.S.2d 339, 343 (App. Div. 2000) (holding that child custody and support proceedings may only be closed to the public if the child's interest requires that such proceedings not be public).

<sup>4</sup> *In re News Media Coverage*, 662 N.Y.S.2d 207, 208-09 (Fam. Ct. 1997) (granting the press limited access to the courtroom in a juvenile delinquency proceeding where a twelve-year-old boy was accused of setting the fire that killed his grandmother); *In re Chase*, 446 N.Y.S.2d 1000, 1009 (Fam. Ct. 1982) (rejecting a closure motion by reason of failure to overcome the presumption of openness and allowing a reporter access to a fact-finding trial in a juvenile delinquency proceeding).

Again, for almost two and a half years, the family court has basically been open to the press and the public. The new rule, which states, that the family court is open, is subject to a strict scrutiny constitutional test — as the courts have later interpreted it to mean — and the burden is now on anyone seeking to close it rather than keeping it open.<sup>5</sup> New York has joined Florida<sup>6</sup> as one of only two states in the nation that are now presumptively open. Other states are working in that direction, for example Ohio in a case decided recently by its highest court.<sup>7</sup> California, for its part, believes that delinquency cases should almost always be sealed, but that perhaps protective proceedings should be open because these children are victims and thus there is nothing really embarrassing to them to hide.<sup>8</sup> In fact, California takes virtually the opposite position from the New York courts and the New York mentality, probably as in most other subjects. It is interesting to note, however, that California may be joining the trend with a slightly different analysis, but nonetheless towards openness.

In these first two and a half years since Rule 205.4 was amended,<sup>9</sup> there has not been a single case on record where the public has been barred from the family court, and I really give tremendous credit for that to Chief Judge Judith Kaye, to Judge

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<sup>5</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4 (1997).

<sup>6</sup> FLA. STAT. ANN. § 39.507(2) (West 2000) (providing that “all hearings . . . shall be open to the public, and a person may not be excluded except on special order of the judge”).

<sup>7</sup> *In re T.R.*, 556 N.E.2d 439, 451 (Ohio 1990) (holding that juvenile court proceedings are neither presumptively open nor presumptively closed to the public, and that the juvenile court may restrict public access if it finds that there exists a reasonable and substantial basis for believing that public access could harm the child or endanger adjudication fairness).

<sup>8</sup> CAL. FAM. CODE § 214 (West 2000); CAL. WELF. & INST. CODE § 676 (West 2000); *see also* San Bernardino County Dep’t of Pub. Soc. Servs. v. Superior Court, 283 Cal. Rptr. 332, 334 (Ct. App. 1991) (holding that the First Amendment right of access does not extend to juvenile dependency proceedings); *Cheyenne K. v. Superior Court*, 256 Cal. Rptr. 68, 71 (Ct. App. 1989) (holding that juveniles have no right to exclude the public from a hearing to determine competency to stand trial on charge of murder).

<sup>9</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4.

Gage, and to Commissioner Scopetta. As a result, we can look at some trends to see whether the change is positive or negative.

Although I appreciate Bonnie Rabin's point that fewer cases are being reported on, pieces about family court proceedings are reported every single day. Nina Bernstein of *The New York Times* certainly has pieces about the family court in many of her articles.<sup>10</sup> So does Joanne Wasserman in the *Daily News*.<sup>11</sup> We may not be promoting institutional change, but I am not sure that is our role. We report the facts and there is more reporting daily than there used to be. Most would agree, I believe — although I do not

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<sup>10</sup> See, e.g., Nina Bernstein, *In Suffolk Shelter Rules Force Two Into Foster Care*, N.Y. TIMES, Dec. 20, 1999, at B5 (discussing the case of the first parent in Suffolk County to lose custody of her children as a direct result of regulations that make work and other welfare rules a condition of shelter); Nina Bernstein, *New York Faults Hospital for Denying Checkup to Baby Who Starved*, N.Y. TIMES, Oct. 26, 1998, at B1 (discussing the New York State Department of Health blaming a hospital, which turned away a mother and her one-week-old infant because they lacked money or a Medicaid card, for the infant's death five weeks later of malnutrition); Nina Bernstein, *Prosecutor Drops Charges in Case of Infant's Death*, N.Y. TIMES, July 16, 1998, at B3 (noting that the Brooklyn District Attorney dropped charges against a woman in a previous case who was breast feeding her child when it died of malnutrition, and that the case evoked protests from women's advocates and critics of healthcare); Nina Bernstein, *Work-for-Shelter Enforcement to Begin Dec. 1*, N.Y. TIMES, Nov. 18, 1999, at B9 (describing the Giuliani administration's enforcement of work requirements and other welfare rules, which would force parents with children out of shelters if they fail to comply).

<sup>11</sup> See, e.g., Joanne Wasserman, *Custody Battles Worsen - And Kids Are Casualties*, DAILY NEWS, May 25, 1997, at 4 (noting the effect of increasingly long and bitter custody cases on children); Joanne Wasserman, *Cutoff of Parental Rights Climbs*, DAILY NEWS, Jan. 19, 2000, at 10 (including discussion of federal Adoption and Safe Families Act and its impact on family court proceedings to strip negligent mothers of their parental rights); Joanne Wasserman, *Haven for the Kids: While Parents Battle Over Lives Gone Wrong in Family Court, Their Children Can Play in a Cheerful, Caring Center*, DAILY NEWS, Sept. 28, 1997, at 36 (discussing the Manhattan Family Court Children's Center, a facility where children are cared for while their parents are in family court); Joanne Wasserman, *Judge Tries To See Past Pain: Family Court Duty Is a Trial, He Writes*, DAILY NEWS, July 19, 1997, at 15 (describing family court judge's memoir chronicling his experiences while on the bench); Joanne Wasserman, *Tot Abuse Charge a Family Ordeal*, DAILY NEWS, Sept. 24, 1995, at 27 (noting the legal ordeal faced by a couple wrongly accused of child abuse).

speak for Bonnie Rabin and the position of advocates — that the information printed now is probably more accurate than in the past. Looking at the Elisa Izquierdo coverage as a starting point, I am confident that what we are writing now is more accurate. I think most people would agree that what we are writing now is probably more accurate than when the entire system was sealed. I think openness encourages better thinking about solutions to children's problems, both among policymakers and children's advocates and, frankly, also in newsrooms. Openness has generated a tremendous amount of discussion in our newsroom. When a six-year-old was killed recently, we discussed whether the other six-year-old who pulled the trigger should appear on the front page of the *Daily News* with a headline.<sup>12</sup> I suggested we put the child who died on the front page instead and, after some debate, that occurred.<sup>13</sup> In fact, I do not think this sort of debate would have happened so naturally had we not had some experience in dealing with children in family court. I do not know whether that solves these children's problems, but it is probably better for the killer that he was not on the cover of the *Daily News*.

Before courts were open, the key pieces of stories being reported relied heavily on confidential sources. I cannot emphasize enough to the reading public how unhelpful that is to them and also, frankly, probably to Bonnie Rabin's clients. Often difficulties exist with confidential sources. That is the nature of a situation where someone really should not be talking and is not always giving the full story or has a specific agenda. I also think openness makes judges and advocates more careful.

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<sup>12</sup> See Ben Balog et al., *Michigan Girl Is Shot Dead: Youngest School Gunman Kills First-Grader*, DAILY NEWS, Mar. 1, 2000, at 3 (reporting on a six-year-old shooting a classmate with a gun he found at home and brought to school); Robert Ingrassia, *Dad Recalls Boy's Hate-Filled Rages*, DAILY NEWS, Mar. 1, 2000, at 2 (recounting a pattern of abnormally violent behavior); Paul H.B. Shin, *Gun Access Makes Deadly Difference*, DAILY NEWS, Mar. 1, 2000, at 2 (questioning whether a six-year-old can form the criminal intent to commit murder, and suggesting that the real culprit was easy access to a gun).

<sup>13</sup> *Her Killer Was Six: 1st Grade Boy Guns Down Girl In Classroom After Fight*, DAILY NEWS, Mar. 1, 2000, at 1 (displaying picture of victim, Kayla Rollands, on the front page).

Thoughtful press coverage from openness has resulted in some good results for children. In the Shabazz case there was a discussion about where Malcolm should go for treatment once he pled guilty.<sup>14</sup> The press did a lot of digging into the various institutions that were mentioned. One result from what the press found about one of the places where the court considered sending him, was the realization that it had no rehabilitation programs for someone with an arson background. Subsequently, that information was used by the judge, for better or for worse, and Malcolm was sent somewhere else, to a place that I think by most accounts has been good for him.<sup>15</sup> Even his advocates have acknowledged recently to our reporters that the outcome of the media's investigation has been positive for the juvenile.<sup>16</sup>

In addition, although Bonnie Rabin might take issue with this, I think openness leads to less sensational reporting. Compare the Elisa Izquierdo case with the *Everett* case, where a Mets player was charged with abusing his children.<sup>17</sup> *Everett* was as high profile a case as the Izquierdo case in terms of the parties and issues involved. Again, I think most people would say the *Everett* reporting was much better.

Often the press coverage of a case is the only way a child wrongly charged with a crime can be cleared in the eyes of a

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<sup>14</sup> *In re News Media Coverage*, 662 N.Y.S.2d 207, 210 (Fam. Ct. 1997).

<sup>15</sup> *Id.* See also Jane Gross, *Grandson of Betty Shabazz Is Sentenced to a Juvenile Center*, N.Y. TIMES, Aug. 9, 1997, at A1 (describing the juvenile's transfer from a Westchester County juvenile detention center to the Hilcrest Center in Lenox, Massachusetts, which is one of the few in the nation that accepts juvenile arsonists, over objections of his attorneys); Associated Press, *Malcolm Shabazz Moved to Center to Serve Term*, N.Y. TIMES, Aug. 26, 1997, at B4 (detailing Malcolm Shabazz's transfer from a juvenile detention center to a "home that specializes in young arsonists").

<sup>16</sup> See *Trains, Cranes & Hardheads*, DAILY NEWS, Aug. 12, 1997, at 38 (commenting on how new rules of openness in family court create accountability, and in this particular case, exposed both the ludicrousness of Malcolm Shabazz's attorneys' suggestions and the prudence of Judge Spitz's ultimate decision to send the boy to this particular facility).

<sup>17</sup> *In re Everett*, N.Y.L.J., Apr. 23, 1998, at 30 (N.Y. Fam. Ct.) (describing how Carl Everett, a player on the New York Mets baseball team, was charged with beating his children).

community. There was a case in Schenectady where there was reporting all the way through. The child was ultimately acquitted and the press wrote about that.<sup>18</sup> The defense lawyer for the child said that the press report of his acquittal made it possible for this child to live in that community again. So, again, what the reporting does is not all negative.

Also, parents and grandparents, who have often felt that they are the lonely and unheard voices in the family court system, and that the child guardian has far too much say over what is good or bad for the child, in many instances, have welcomed the coverage and the ability to speak candidly and have the press covering cases that involve them, feeling that sometimes the decisions were biased against them and that they now have more of a voice in the process.<sup>19</sup>

Since the establishment of the new rule in favor of openness, the issue has been whether the media can have access to documents that are submitted to the court. The rule is silent on that issue.<sup>20</sup>

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<sup>18</sup> The media were allowed unlimited access to the family court trial of a fifteen-year-old boy for the accidental shooting of his ten-year-old friend. See Carol DeMare, *Teen Slaying Suspect to Get Psychological Testing*, TIMES UNION (Albany, N.Y.), Sept. 19, 1998, at B1 (including detailed descriptions of the hearing obviously written by a reporter who was allowed inside); Bob Gardinier, *Teen Who Killed Pal Given Probation*, TIMES UNION (Albany, N.Y.), Apr. 28, 1999, at B1 (describing interview outside courtroom with victim's father, who advocated that the case be held in criminal court instead of family court so that the public could have more access to proceedings); Brendan Lyons, *Teen Admits Accidental Slaying*, TIMES UNION (Albany, N.Y.), Mar. 11, 1999, at B1 (including quotations from the teen's confession and reaction from family members of the victim who were present in the courtroom); Kimberly Martineau, *Father of Slain Boy Describes His Grief*, TIMES UNION (Albany, N.Y.), Mar. 14, 1999, at D1 (including personal reaction of teenagers who were present at speech given in courtroom by victim's father).

<sup>19</sup> See Eve B. Burton, *Reflections on Open Family Courts: The First 100 Days*, N.Y.L.J., Dec. 31, 1997, at 1 (stating that the media act as agents through which children's issues can be brought to the public's attention, leading to "better care for children and families").

<sup>20</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 205.5 (1997). Though the revision of § 205.4 specifically provides for increased public access to family court proceedings, the revised version of § 205.5 fails to make any similar provisions for family court records and documents. *Id.*; see Burton, *supra* note

I would merely argue that you have to read the new rule in a logical way, that it could be argued that the only instance in which you do not get documents is if the court proceeding has been sealed. Otherwise, you should. But again, the language is not clear. The result in litigating the issue of access to documents in three cases that we have litigated over the last year is that we get the documents, including documents entered into evidence and transcripts.<sup>21</sup> Not a single document or transcript we have sought in the family court has been sealed. Again, there have been arguments against letting us have access to documents, but I would only suggest that access has made the reporting more accurate.

An interesting side note to what happens when we go into court and seek access to information is that I have started to get subpoenas from litigants involved in family court proceedings and they have taken the position that if we want to be in their business, they want to be in ours. There exists a statute in New York protecting journalists from having to turn over notes and interviews.<sup>22</sup> However, in one of the delinquency proceedings, I had to go all the way up to the appellate division to get a subpoena quashed because the family court litigators were not familiar with the New York statute and its strength in protecting confidential sources and reporters' notes.<sup>23</sup> Again, it was an interesting twist

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19, at 1 (stating that the language of § 205.5 conflicts with the spirit of increased public access as expressed in § 205.4 by suggesting that courtroom transcripts are not to be made public under any circumstances).

<sup>21</sup> For an example of recent litigation on the question of public access to documents in family court proceedings, see *Anonymous v. Anonymous*, 705 N.Y.S.2d 339 (Sup. Ct. 2000). See also Editorial, *Free Press Needs Free Access*, DAILY NEWS, May 6, 2000, at 16 (reporting that seven news organizations challenged a court ruling that prevented the news media from reviewing court exhibits already shown to the jury during the Amadou Diallo shooting trial).

<sup>22</sup> N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992).

<sup>23</sup> See *Krase v. Graco Children Prods.*, 79 F.3d 346, 351 (2d Cir. 1996) (holding that under § 79-h of the New York Shield Law, a court cannot compel disclosure/production of unpublished news unless the party seeking such news makes a clear and specific showing that the sought material is unavailable from any other source and that such party's claim "virtually rises or falls" without such news).

to be suddenly in the defending position, and it brought some humility to my litigating.

The one area where the media and the court have had some disagreements, as mentioned by Judge Gage, has been in the prior restraint area. From time to time courts have issued orders whereby to gain access to all portions of court proceedings, the press has to promise the judge not to publish names or addresses of participants that are disclosed in court.<sup>24</sup> I have taken the position that as long as a judge does not issue an order that is too broad, as a matter of contract I can agree for my reporters that we want to access the information and we will behave ourselves. *The New York Times* takes a more principled view and deems these orders prior restraints.<sup>25</sup>

Again, the use of children's names has created much discussion in the media. At the *Daily News* we have been particularly vigilant in trying not to be inappropriate. In the Shabbaz case, we first ran the child's photo on page seventy-two while most other newspapers displayed it on the front page. When the editor-in-chief mentioned after three days that every other paper in New York City had used the child's name and photo and now she wanted to move it up from page seventy-two, I felt that we should still not do so.<sup>26</sup> I lost that argument. But again we were three days into the story as opposed to the Elisa Izquierdo story, where the photo was on the front page the very first day.<sup>27</sup>

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<sup>24</sup> See, e.g., *In re Ruben R.*, 641 N.Y.S.2d 621 (App. Div. 1996); *In re Ulster County Dep't of Soc. Serv.*, 621 N.Y.S.2d 428 (Fam. Ct. 1993); *In re S. Children*, 532 N.Y.S.2d 192 (Fam. Ct. 1988).

<sup>25</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (holding that the heavy burden imposed as a condition to securing a prior restraint was not met); *New York Times Co. v. United States*, 403 U.S. 713, 726-27 (1971) (holding that only allegation and proof that publication must inevitably, directly, and immediately cause national harm will support issuance of a restraining order).

<sup>26</sup> Michele McPhee et al., *Malcolm X Widow Burned: Grandson Held in Blaze Horror*, DAILY NEWS, June 2, 1997, at 3 (reporting that the twelve-year-old grandson of Malcolm X was charged in the fire that left his grandmother with third degree burns over eighty percent of her body).

<sup>27</sup> Patrice O'Shaughnessy et al., *Child's Doomed Life*, DAILY NEWS, Nov. 26, 1995, at 5 (accompanying a photograph on page one of Elisa Izquierdo, the



In all, openness has had many positive ancillary effects and for that reason I cannot see that Bonnie Rabin would hold it against us.

*Ms. Rabin*

May I get a chance to respond?

*Professor Rosato*

After Commissioner Scoppetta gets a chance to speak. Commissioner?

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article reports Elisa's death after being held prisoner, beaten, sexually abused and starved by her mother).

*Commissioner Nicholas Scoppetta\**

I have been instructed to try to speak about access to the family court, discuss Elisa's Law,<sup>1</sup> respond to the other speakers, and leave time for questions, all in five to ten minutes. I will try.

We at the Administration for Children's Services have supported access to the family court. I view the access and confidentiality issues in two ways: it is about an open family court and access to the family court, and an open ACS and access to what is going on at ACS. Elisa's Law was born as much out of the demand to know what is happening in the child welfare agency as it was out of the demand to know what is going on in the family court.

I believe the spectacle of my predecessor, testifying before legislative committees and being forced to refuse to answer question after question as to how Elisa's and other cases were investigated because of confidentiality restrictions, so frustrated the legislators that they decided it was time for a change in the law. Only two states, New York<sup>2</sup> and Florida,<sup>3</sup> have an open family court, and California<sup>4</sup> is considering a law that would open it up as well. Thus, this was a radical departure in the process.

It is interesting to hear Judge Gage refer to the fact that it has always been permissible to open the family court. It was always

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\* Commissioner for the City of New York's Administration for Children's Services.

<sup>1</sup> N.Y. SOC. SERV. LAW § 422-a (McKinney 1992 & Supp. 2000) (codifying the disclosure of information pertaining to the "abuse or maltreatment of a child" under certain circumstances).

<sup>2</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4 (1997).

<sup>3</sup> FLA. STAT. ANN. § 39.507(2) (West 1999) (providing that court proceedings shall be open to the public except under circumstances enumerated in the statute); *see also* Florida Publ'g Co. v. Brooke, 576 So. 2d 842, 845-46 (Fla. Dist. Ct. App. 1991) (holding that limits exist as to the information a judge can keep confidential from the press after asserting his discretionary authority to close a hearing).

<sup>4</sup> S.B. 1391, 1999 Reg. Sess. (Cal. 2000) (providing that the public shall be admitted to juvenile dependency court hearings unless the child's interest would be harmed).

within the discretion of family court judges to do so.<sup>5</sup> The culture of secrecy grew out of a desire to protect children from disclosure of sensitive information in abuse and neglect cases. As a result, over the years it just was assumed that family court proceedings were closed. Chief Judge Judith Kaye then said that family court is presumed to be open and now it is.<sup>6</sup>

Our lawyers, for a period of time, felt very protective of the confidentiality of proceedings in the family court. When that came to my attention, I instructed our legal staff that, as a matter of policy, they should presume the court is open. It is the exception to request a judge to exercise his or her discretion and close the court. Circumstances that would argue for closing the court would be extremely personal, highly confidential matters. For example, I know of one case where the judge, at least for a portion of the trial or hearing, closed the court because the testimony referred to the child's prior juvenile delinquency contacts with the family court. It happened that the child had a history of prostitution and the judge just did not allow that to be open and available to the public.

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<sup>5</sup> See N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4(b) (providing that the general public or any person may be excluded from a courtroom *only* if the judge presiding “determines on a case-by-case basis . . . that such exclusion is warranted in that case,” based upon specifically enumerated factors) (emphasis added); N.Y. FAM. CT. ACT § 166 (McKinney 1999) (prohibiting only “indiscriminate public inspection” and empowering the court with discretion to allow inspection of “any” record or papers); see also Department of Soc. Servs. v. Land, 443 N.Y.S.2d 351, 352-53 (Fam. Ct. 1981) (stating that family court judges may exercise discretion on a case-by-case basis); People v. Price, 419 N.Y.S.2d 415, 419-20 (Sup. Ct. 1979) (stating that the “[l]egislature has explicitly given the Court discretion in any case to permit inspection of any papers or record” and refusing to quash subpoena duces tecum ordering production of probation intake records of juvenile).

<sup>6</sup> See N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4; Press Release, New York State Unified Court System, New Rules on Public and Press Access to Family Court (June 18, 1997) (on file with the *Journal of Law and Policy*) (releasing the announcement by Chief Judge Judith Kaye and Chief Administrative Judge Jonathan Lippman that “a new set of rules providing public access, including access by the media, to proceedings in the New York State Family Court [were] approved, effective September 2, 1997, by the Administrative Board of the Courts”).

With respect to other information, however, Elisa's Law is a statute providing that the child welfare commissioner, at his discretion, may reveal facts about investigations and how they were conducted in abuse or neglect cases, with certain caveats.<sup>7</sup> The usual circumstance in which the issue comes up is in the case of a child fatality or one of serious abuse. The statute is specific about that.<sup>8</sup> Another situation is where someone was arrested for a crime against a child. There are other circumstances under which the child welfare commissioner might want to make public information that is otherwise confidential, but that happens very rarely, such as in cases where a grand jury gives a report on a certain activity or an accused puts forth, as a defense, his or her version of events, in a case of abuse or neglect. Sometimes that will come up as a defense when they are under investigation or have been arrested. But usually it is in the event of an arrest or a fatality, and even then it is entirely within the commissioner's discretion as to whether or not information will be revealed. The commissioner must evaluate the particular circumstances and consider, for example, whether or not the siblings of the child in question might be hurt by revealing certain information.<sup>9</sup> If so, the commissioner should not disclose that information. Other conditions are provided for in the statute, but in every case, the statute states that even

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<sup>7</sup> N.Y. SOC. SERV. LAW § 422(4)(B) (McKinney 1992). The statute provides:

Notwithstanding any inconsistent provision of law to the contrary, a city or county social services commissioner may withhold, in whole or in part, the release of any information which he or she is authorized to make available to persons or agencies identified in subparagraphs (a), (k), (l), (m), (n), (o), (p) and (q) of paragraph (A) of this subdivision if such commissioner determines that such information is not related to the purposes for which such information is requested or when such disclosure will be detrimental to the child named in the report.

*Id.*

<sup>8</sup> *Id.* § 422-a(1)(d) (McKinney 1992 & Supp. 2000) (providing that disclosure of child abuse or maltreatment information is allowed if the child named has died or suffered a serious or critical condition).

<sup>9</sup> *Id.* § 422-a(1) (providing for disclosure "if [the commissioner] determines that such disclosure shall not be contrary to the best interests of the child's siblings"); *id.* § 422-a(5) (providing that the "Commissioner shall consider the interest in privacy of the . . . child's family").

though conditions are present that allow for the release of information, it is still within the commissioner's discretion as to whether or not the information will be made public.<sup>10</sup>

I believe we have successfully resisted the temptation to exercise our discretion in order to withhold information that would mute criticism of the agency. This is particularly true in cases where the child's family has a history with ACS or its predecessor agencies. We are, of course, keenly aware of the media's interest in disclosing deficiencies in the execution of government obligations. So, for example, if a child dies, we are usually asked whether we have had a prior history with the child and whether ACS "knows" the child or the child's family. If the answer is no, that is almost always the end of the media's interest. There will be little or no mention of the event by the media. If the answer is yes, it is almost always a very big story because the media can portray that as a failure by ACS. The story will be that ACS had some contact with the family and still let the child die. This is generally the way it plays even though the prior contact might have been ten years before the child in question was even born. (Our definition of "known to ACS" is whether we ever had a case with the family.) It could have been ten years ago. The case may have been closed a long time ago, and now a new child arrives in the family and something terrible happens to that child. The media will still hold ACS presumptively responsible for that fatality because journalism 101 teaches that it is a newsworthy story if you can blame a person or entity for the terrible event. However, even when there is an arrest for a child fatality, it is still within the discretion of the commissioner to release or withhold the information known to ACS. Therefore, despite the statute, if you had a less enlightened administration than the present one, you might never get any information about the performance of child welfare agencies. Of course, I say that tongue in cheek, but in fact, we have, from the creation of ACS, been accessible to the media. The family court was closed and confidentiality rules allowed child

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<sup>10</sup> *Id.* § 422-a(1) (stating that the commissioner "may disclose information . . . if he or she determines that such disclosure shall not be contrary to the best interests of the child").

welfare administrators to simply refuse to answer questions about the performance of the agency, no matter how deficient that performance had been. From the very beginning we have taken the position that any publicity would be good for reform, in that publication of deficiencies would force reform. I think this policy has served us rather well, though it has sometimes caused us pain. We have learned to live with it.

Elisa's case, which has been referred to several times here today, did indeed generate a firestorm of publicity — more about the management of the Child Welfare Administration than about the family court.<sup>11</sup> It did, however, contribute to the opening of the family court. That was a case in which, pursuant to the statute, we issued a very comprehensive report and described in detail what had happened in that investigation.<sup>12</sup> It seems to me it was the most positive thing we could do about a case that had captured the public's attention and was diligently and aggressively followed by the media. Elisa was about as extreme an example as you could find of the system malfunctioning — and malfunctioning may be too kind a characterization. In Elisa's case, twenty-two separate agencies were in touch with that family over Elisa's short, six-year

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<sup>11</sup> See *NYC to Hire 200 for Child Welfare*, TIMES UNION (Albany, N.Y.), Dec. 19, 1995, at B2 (reporting that the "Child Welfare [agency] has come under scrutiny after the death of 6-year-old Elisa Izquierdo"); Marc Peyser, *The Death of Little Elisa*, NEWSWEEK, Dec. 11, 1995, at 42 (reporting that even after school officials at PS 126 called the state and city child-welfare offices for the fifth time, that Elisa Izquierdo had been abused, the state refused to investigate because there was insufficient evidence, and the Child Welfare Administration would not comment on what action, if any, was taken, because of confidentiality laws); Michael Shapiro, *Death Be Not Proud*, N.Y. MAGAZINE, Nov. 29, 1999, at 46 (noting the hundreds of stories written on Elisa Izquierdo's case and the resulting focus on child welfare); David Van Biema, *Abandoned to Her Fate: Neighbors, Teachers and the Authorities All Knew Elisa Izquierdo Was Being Abused. But Somehow Nobody Managed To Stop It*, TIME, Dec. 11, 1995, at 32 (reporting that Elisa Izquierdo's death resulted from repeated failures of the Child Welfare Agency to respond to notifications from Izquierdo's school about her deteriorating condition).

<sup>12</sup> See Press Release, Administration for Children's Services, ACS Commissioner Scoppetta Announces Completion of the New York City Child Fatality Review Panel's Findings Concerning Circumstances of the Death of Elisa Izquierdo (Apr. 8, 1996) (on file with the *Journal of Law and Policy*).

life.<sup>13</sup> Twenty-two agencies had an opportunity to offer services, to detect the danger to the child. Without recounting all the shocking details, you will remember that this poor child was tortured, beaten, burned, and starved by her mother before she finally died. It is unfortunate, in the extreme, that twenty-two agencies could have had contact with that family and not have detected, at some point, that this child was in imminent danger.

It is difficult to look at cases like that without wanting to turn a spotlight on the system and examine how the child welfare system and hospitals, agencies, churches, individual caseworkers, and supervisors failed. That is what our report did.

Let me say something else, however. The child welfare system is a system that has been judged by its failures. The failures, however, are not the norm. The successes are the norm, but they clearly do not make big news anywhere. The child welfare system is very large. We have 34,000 children in foster care right now.<sup>14</sup> At one point, when I first came to the agency, there were 43,000 children in foster care.<sup>15</sup> We investigate over 50,000 complaints of abuse and neglect every year.<sup>16</sup> In that whole mix there are tens of thousands of successes, but those, of course, are not considered newsworthy. I do not contest that. We all know what the public wants to read and what attracts our attention. It is difficult to fault the media for focusing on what the public really

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<sup>13</sup> *Id.*

<sup>14</sup> See Press Release, Administration for Children's Services, Advisory Panel Issues Fourth Report Under Reform Efforts Underway at ACS (Mar. 10, 2000) (on file with the *Journal of Law and Policy*) (stating that there were 34,099 children in foster care in January 2000); NEW YORK CITY ADMIN. FOR CHILDREN'S SERV., STATUS REPORT 1: OUTCOME AND PERFORMANCE INDICATORS, app. A at 81 (1998) [hereinafter STATUS REPORT 1] (noting that, as of the June 1998 status report from ACS, the number of children in the foster care system has decreased annually since 1991 from a total of 49,000 children); see also Somini Sengupta, *Number of Foster Children in City at Lowest Levels Since 1980's*, N.Y. TIMES, Dec. 6, 1999, at A1.

<sup>15</sup> Press Release, Administration for Children's Services, Advisory Panel Issues Fourth Report Under Reform Efforts Underway at ACS (Mar. 10, 2000) (on file with the *Journal of Law and Policy*) (stating that there were 42,789 children in foster care in May 1997).

<sup>16</sup> *Id.*; see also STATUS REPORT 1, *supra* note 14, at 68, 73.

does want to know. If you want a well-considered examination of the child welfare system and the family court, then you should examine professional journals, I suppose, but not the daily newspapers or the six o'clock news.

I have found that ACS's lawyers are really quite comfortable with an open family court. I hear very little about violations of children's or family's privacy. Remarkably, I think, the media very often simply do not print the names of children, and when they do, they use first names only. And I think the media's sensitivity today to such issues is more heightened than ever before. When I was looking through some materials to think about what I would say here this afternoon, I came across one of our old cases from 1991. There, prominently displayed in a newspaper, was a picture of the siblings of a child who had been sexually abused. They were photographed head on, named, and identified. All the information about those children was displayed right there in the paper.<sup>17</sup>

Ultimately, in trying to reform a system like the child welfare system, which has been terribly dysfunctional for so many years, openness and attention focused on the system are extremely important. The media, paying attention to what is not working in government, can make a real difference. Whether one agrees or not with a particular paper's version of what is happening, the debate, the airing of it, is generally productive. I do not look forward to those calls from the media because I know that, as a general proposition, they are not calling to compliment me. But that goes with the turf and media attention has been extremely helpful to us in implementing reform at ACS.

While ACS has been really quite comfortable with the fact of an open family court, what some of our people complain about is what one lawyer calls the "trajectory" of cases in the family court. Most days in the life of a case do not lend themselves to daily coverage or the six o'clock news sound bite. The case can take many weeks, over four or five adjournments, before all the facts are out.<sup>18</sup> The media are usually there on the day when the

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<sup>17</sup> Celia W. Dugger, *10 Children Taken From Father in Sex Case*, N.Y. TIMES, Aug. 3, 1991, at 21.

<sup>18</sup> See Karen Freifeld, *A Family Crisis*, NEWSDAY, Mar. 21, 1999, at A5 (noting the frequency, range, and severity of delays in family court).



anticipated sensational testimony will take place. Then the media do not seek out ACS's response nor attempt to put the "newsworthy" testimony in some context. That is what my lawyers complain about. We must recognize that it is not Court TV and the media will not cover the case from start to finish, get the direct, the cross-examination and the redirect so that all parties may fully explain their positions. We can only hope that ultimately all the wonderful things we are doing at ACS will come out. Occasionally we do get those kinds of stories. It happened that the most favorable coverage most recently was in Eve Burton's paper.

## **THE FUTURE OF ACCESS TO THE FAMILY COURT: BEYOND NAMING AND BLAMING**

*Jennifer L. Rosato\**

The language of the new court rule governing the family court seems unequivocal: “The Family Court is open to the public. Members of the public, including the news media, shall have access to all courtrooms.”<sup>1</sup> Under this rule, which was promulgated in 1997, exclusion from New York’s family courts is permitted only in limited circumstances, and only after the family court judge has made specific findings as to why an exception to the general rule applies.<sup>2</sup>

### **I. THE MEANING OF ACCESS**

The consensus seems to be that, so far, the rule is fulfilling its intended purpose of openness. The family court has become

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\* Professor of Law, Brooklyn Law School. Thanks to these research assistants, who provided their quick and able assistance: Melissa Gable, Noelle Guerin, Stephanie Reich, and Audrey Woo. Special thanks to the esteemed panelists – Judge Michael Gage, Eve Burton, Bonnie Rabin, and Commissioner Nicholas Scopetta – for bringing needed attention to these issues. Final thanks to Professor Joel Gora who provided guidance and support in planning the symposium and writing this commentary.

<sup>1</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4 (1997). This section is consistent with Section Four of the Judiciary Act, which reads: “The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce . . . the court may, in its discretion, exclude therefrom all persons who are not directly interested therein.” N.Y. JUD. LAW § 4 (McKinney 1983).

<sup>2</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4 (1997). This section appears in tension with Sections 341.1, 741 and 1043 of the Family Court Act, which seem to allow more discretion to limit access. N.Y. FAM. CT. ACT §§ 341.1, 741, 1043 (McKinney 1999).

symbolically open in that most perceive the new law as permitting more opportunities to observe family court proceedings.<sup>3</sup> The court also has become practically open. For example, “public access to Family Court proceedings has never been denied in any reported matter.”<sup>4</sup> It is also notable that a number of recent news articles have been based on first-hand observations in the family court.<sup>5</sup>

*But beyond propping open the doors to the courtroom, what is the future of access?* The issue was not directly addressed by the panelists, but it warrants greater attention. This brief commentary considers the issue and concludes that the laws to increase access should be designed to serve two important and related purposes: to educate the public and to reform the existing justice system. Specifically, this commentary discusses how the law of access developed in New York and how the current media coverage tends toward what I term “naming and blaming” coverage rather than educating and reforming. It then proposes two changes in the law that would facilitate better coverage: permitting greater access to records and easing the ban on audio-visual coverage in the courtroom.

#### A. Access to the Courtroom

Most family law cases fall into one of three categories: child abuse or neglect, custody and visitation, or juvenile delinquency.<sup>6</sup>

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<sup>3</sup> See *supra* Panel Discussion remarks of Judge Gage, at p. 105; see also *Open to the Public: The Effect of Presumptive Public Access to New York State's Family Courts*, COMMITTEE ON COMMUNICATIONS AND MEDIA LAW, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1-4 [hereinafter Bar Report] (on file with the *Journal of Law and Policy*).

<sup>4</sup> Bar Report, *supra* note 3, at 3; see also *supra* Panel Discussion remarks of Eve Burton, at p. 132.

<sup>5</sup> See, e.g., Lynnell Hancock, *Families in the Balance*, N.Y. TIMES, Sept. 10, 2000, §14 (The City Weekly Desk), at 1; Somini Sengupta, *Despondent Parents See Foster Care as Only Option*, N.Y. TIMES, Sept. 1, 2000, at B1. Somini Sengupta, *In Court, Families Sit Waiting on the Law*, N.Y. TIMES, Aug. 20, 2000, at A36 [hereinafter *In Court*].

<sup>6</sup> See, e.g., N.Y. SOC. SERV. LAW §§ 371-392 (McKinney 1992 & Supp. 2000) (addressing, *inter alia*, child custody and care, visitation, and guardianship issues); N.Y. FAM. CT. ACT §§ 301.1-385.2 (McKinney 1999 & Supp. 2000)

Historically, these cases have proceeded under a veil of secrecy. With respect to child protection and child custody cases,<sup>7</sup> there is concern that releasing information about the parents' actions and the children's life circumstances could further traumatize them and invade their privacy, and such harm would occur through no fault of their own.<sup>8</sup>

For example, in *In re Ruben R.*, the Appellate Division reversed the family court and denied access to the media in a child protection proceeding involving the surviving siblings of Elisa Izquierdo, a six-year-old who had died as a result of a horrific pattern of abuse by her mother.<sup>9</sup> The appellate court was concerned that publicly revealing the details of the siblings' abusive home life would cause the children greater emotional harm, particularly since they already had been identified in the press.<sup>10</sup>

Family court proceedings involving juvenile delinquents also have been traditionally closed to the press and the public,<sup>11</sup> but

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(addressing juvenile delinquency issues); *id.* §§ 1021-1069 (addressing child abuse and child protective proceedings); N.Y. DOM. REL. LAW § 240 (McKinney 1999 & Supp. 2000) (addressing child support, child custody and protective orders).

<sup>7</sup> Historically, states have allowed more openness in child custody cases than other types of proceedings involving children. See Mary McDevitt Gofen, Comment, *The Right of Access to Child Custody and Dependency Cases*, 62 U. CHI. L. REV. 857, 871-74 (1995) (arguing that the press should always be able to attend child custody proceedings provided that limited reporting restrictions are put in place when necessary); see also *In re Ruben R.*, 641 N.Y.S.2d 621, 629 (App. Div. 1996); cf. *Olesh v. Olesh*, 540 N.Y.S.2d 123, 124 (Sup. Ct. 1989) (discussing the private nature of divorce proceedings).

<sup>8</sup> See *supra* Panel Discussion remarks of Bonnie Rabin, at pp. 112-14; Samuel B. Sokol, Comment, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. REV. 881 (1998).

<sup>9</sup> *In re Ruben R.*, 641 N.Y.S.2d at 624; see also Nina Bernstein & Frank Bruni, *Seven Warnings: A Special Report*, N.Y. TIMES, Dec. 24, 1995, at A1.

<sup>10</sup> *In re Ruben R.*, 641 N.Y.S.2d at 622-23, 627. Specifically, some of the children were identified by their full names and ages, and photographs of some of the children were published. *Id.* at 623.

<sup>11</sup> See, e.g., N.Y. FAM. CT. ACT §§ 341.1, 375.1(1), 381.2(2) (McKinney 1999). Section 341.1, for example, allows the "general public" to "be excluded from any proceeding" concerning juvenile delinquency adjudication. *Id.* § 341.1. Moreover, upon the conclusion of a delinquency adjudication the Family Court Act mandates that "the records of such proceeding . . . shall be sealed" when the

for reasons different from those of child protective proceedings. Although these children are not innocent victims because they have allegedly committed adult crimes,<sup>12</sup> they are not considered entirely blameworthy. They are still children, without the ability to fully appreciate the consequences of their actions.<sup>13</sup> They should not be stigmatized throughout their lifetime by a public record of their acts.<sup>14</sup> Otherwise, the rehabilitative ideal of family court could not be realized.

Notwithstanding these strong reasons for limiting access to proceedings involving children, equally strong reasons justify openness. These reasons were well-articulated by the family court in *In re M.S.*,<sup>15</sup> a juvenile delinquency proceeding involving a twelve-year-old boy who set an apartment fire that killed his grandmother.<sup>16</sup> The case was newsworthy in large part because the victim was the widow of a former civil rights leader and was

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proceeding has been resolved in favor of the respondent. *Id.* § 375.1(1). Once these records are sealed, a court possibly imposing an adult criminal sentence in the future may not make use of these records and consider them to impose a proper sentence. *Id.* § 381.2(2); see also Laura Cohen, *Kids, Courts and Cameras: New Challenges for Juvenile Defenders*, 18 QUINNIAC L. REV. 701, 712 (1999) ("It is the hallmark of our juvenile justice system in the United States that virtually from its inception at the end of last century its proceedings have been conducted outside of the public's full gaze and the youths brought before our juvenile courts have been shielded from publicity.") (footnote omitted).

<sup>12</sup> See N.Y. FAM. CT. ACT § 301.2(1) (McKinney 1999 & Supp. 2000). See generally Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927 (1995).

<sup>13</sup> See, e.g., Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 71-72 (1997) (outlining the historical justifications behind the juvenile court system).

<sup>14</sup> See Emily Bazelon, Note, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155, 156-57 (1999); Jan L. Trasen, Note, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. THIRD WORLD L.J. 359, 371 (1995).

<sup>15</sup> 662 N.Y.S.2d 207 (Fam. Ct. 1997), *aff'd sub nom. In re Malcolm S.*, 663 N.Y.S.2d 979 (App. Div. 1997).

<sup>16</sup> *Id.* at 207.

known for her own accomplishments.<sup>17</sup> The press petitioned for access and for audio-visual coverage. Although the family court considered the stigma that might result if the details of the proceedings were revealed, it concluded that “higher values” were served by opening the courtroom, including “preserv[ing] the integrity of public proceedings, avoid[ing] the dissemination of misinformation, enhanc[ing] public confidence in the court system, and promot[ing] a better understanding of the Family Court.”<sup>18</sup> In my view, the highest of these values are educating the public about the justice system and reforming the law.<sup>19</sup>

The values of educating and reforming are not necessarily reflected in the recent news coverage of family law issues. Instead of educating and reforming, many stories involve naming and blaming. If this continues to be the focus of coverage, the positive effects of opening courtrooms to the public and the press will be limited.

### *B. Naming and Blaming*

Naming and blaming seem to be the reasons for most stories related to the family court. By “naming” I mean that access to the

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<sup>17</sup> *Id.* at 208. The court also noted the public’s concern about increased juvenile violence and the secrecy of family court proceedings. *Id.* at 209; *see also* Bazelon, *supra* note 14, at 189.

<sup>18</sup> *In re M.S.*, 662 N.Y.S.2d at 210; *see also In re S. Children*, 532 N.Y.S.2d 192, 198 (Fam. Ct. 1988).

<sup>19</sup> *In re M.S.*, 662 N.Y.S.2d at 210 (rejecting a closure motion and maintaining that open proceedings “promote a better understanding of the Family Court”). *See generally* Bazelon, *supra* note 14, at 157, 177-78, 192 (arguing that public education as to the operation of government and the courts is essential to good citizenship and is a catalyst of reform); Gofen, *supra* note 7, at 875 (citing the need for public scrutiny of dependency and custody proceedings so as to “promote[] free discussion of governmental affairs by educating and informing the public about the judicial system”); Karla G. Sanchez, *Barring the Media From the Courtroom in Child Abuse Cases: Who Should Prevail?*, 46 BUFF. L. REV. 217, 225 (1998) (recognizing that open trials educate the public about the workings of the criminal justice system, and that when a trial proceeds fairly, the public gains confidence in the system as a whole); Trasen, *supra* note 14, at 377 (recognizing the laudable aim of closed dependency proceedings, but insisting that public awareness promotes public confidence in government).

court is sought to satisfy our society's collective curiosity about a famous person or our prurient interest in a sensational set of facts.<sup>20</sup> The cases are neither typical nor do they involve a particularly difficult issue of family law. In New York, these naming cases have involved the likes of Macaulay Culkin,<sup>21</sup> Malcolm Shabbazz,<sup>22</sup> Woody Allen's children,<sup>23</sup> the child of "well-known public figures of great wealth and prominence,"<sup>24</sup> and Katie Beers, the child who was sexually abused in a "dungeon."<sup>25</sup>

For the most part, these cases do not teach us much about the law governing child abuse, child custody or juvenile delinquency – let alone how that law should be changed. For example, the Macaulay Culkin case was worth covering because the case involved the star of the motion picture "Home Alone,"<sup>26</sup> not

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<sup>20</sup> See, e.g., Cohen, *supra* note 11, at 702 (emphasizing society's curiosity with juveniles committing crimes); Gofen, *supra* note 7, at 866 (emphasizing that curiosity in child custody cases due to bizarre facts by the public is not beneficial to society or the juvenile justice system); see also *supra* Panel Discussion remarks of Commissioner Scoppetta, at p. 138.

<sup>21</sup> P.B. v. C.C., 647 N.Y.S.2d 732 (App. Div. 1996).

<sup>22</sup> *In re M.S.*, 662 N.Y.S.2d 207 (Fam. Ct.), *aff'd sub nom. In re Malcolm S.*, 663 N.Y.S.2d 979 (App. Div. 1997).

<sup>23</sup> *Allen v. Farrow*, N.Y.L.J., Dec. 23, 1992, at 25 (Sup. Ct. N.Y. County) (seeking audio-visual coverage).

<sup>24</sup> *Anonymous v. Anonymous*, 705 N.Y.S.2d 339 (App. Div. 2000).

<sup>25</sup> *In re Katherine B.*, 596 N.Y.S.2d 847, 848 (App. Div. 1993).

<sup>26</sup> P.B., 647 N.Y.S.2d at 734. *Home Alone*, released in 1990 is about Kevin, an eight-year-old boy, who is left home during a Christmas weekend when his family is running late to the airport for a trip to Paris. Once Kevin wakes up to find his family missing, he makes the best of the situation by having his run of an empty house and successfully fending off two would-be thieves. *Home Alone* was Macaulay Culkin's claim to fame as his first feature role. See Caryn James, *Holiday Black Comedy for Modern Children*, N.Y. TIMES, Nov. 16, 1990, at C12. *Home Alone* is currently twelfth on the all-time list of movie box office revenue generators. *The Top Grossing Movies of All Time at the USA Box Office*, at <http://us.imdb.com/Charts/usatopmovies.html> (last visited Oct. 19, 2000). As a result, of his role in the movie, Macaulay Culkin became the highest paid child actor in movie history. *Home Alone's* success spawned two sequels as well as other hit movies starring Macaulay Culkin. James A. Martin, *Mac Attacks in Home Alone*, (Nov. 14, 1997), available at <http://ew.com/ew/archive/0,1798,1|21732|1|home%2balone,00.html>.

because the public would learn about the shortcomings of the “best interests of the child” standard that governs custody determinations.<sup>27</sup> The Katie Beers case was notable in large part because it involved the gruesome image of a child being sexually abused in a dungeon, not because it pushed the edges of child neglect law.<sup>28</sup> These kinds of cases teach the public as much about family law as the O.J. Simpson case taught us about criminal law – not very much.<sup>29</sup>

The other type of case in which access is often sought is one that focuses on “blaming.” Here, a case or story is newsworthy because it seeks to blame some person or entity for a child’s tragedy.<sup>30</sup> The best example of such a case is that of Elisa Izquierdo, a six-year-old who died from severe parental abuse even though a number of agencies had contact with Elisa’s family before her death.<sup>31</sup> The question that occupied the press was “Whose neglect caused her death?”<sup>32</sup> Other examples of naming and

<sup>27</sup> *P.B.*, 647 N.Y.S.2d at 734. The case involved allegations of alcohol and drug abuse, and domestic violence, allegations similar to those made in many custody cases involving not-so-famous children. *Id.*

<sup>28</sup> *See, e.g., Kidnapped Girl Was Imprisoned in Coffinlike Chamber in Dungeon*, ARIZ. REPUBLIC, Jan. 16, 1993, at A3. This case also appeared to be newsworthy because it involved an extensive search for the young victim after she disappeared. *Id.*

<sup>29</sup> Compare Christo Lassiter, *The Appearance of Justice: TV or Not TV - That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 973-77 (1996) (opining that despite enormous media coverage of the O.J. Simpson trial, the public was provided with no greater insight into the workings of the criminal justice system), with Roger Cossack, Commentary, *What You See is Not Always What You Get: Thoughts on the O.J. Trial and the Camera*, 14 J. MARSHALL J. COMPUTER & INFO. L. 555, 559-62 (1996) (discussing what the public learned from watching the O.J. Simpson case).

<sup>30</sup> *See* Bazelon, *supra* note 14, at 181; *see also supra* Panel Discussion remarks of Commissioner Scoppetta at pp. 138-41.

<sup>31</sup> *See In re Ruben R.*, 641 N.Y.S.2d 621 (App. Div. 1996); *see also* Mychal L. Feldman, *The Child Welfare System and Its Implications on the Best Interests of the Children*, 14 N.Y.L. SCH. J. HUM. RTS. 615, 626-30 (1998); Bernstein & Bruni, *supra* note 9, at A1.

<sup>32</sup> *See, e.g.,* Bernstein & Bruni, *supra* note 9, at A3 (documenting a pattern of “error, omission and illegality”); Russ Buettner, *Elisa’s Death is System’s Shame: Blistering Probe by State, City Cast Wide Net of Blame*, DAILY NEWS, Apr. 9, 1996, at 5 (explaining findings of reports).



blaming abound.<sup>33</sup> In a more recent case, one prominent newspaper published a number of articles about a five-year-old child with cerebral palsy who died even though her family had been in contact with welfare caseworkers, a psychologist, and two private agencies.<sup>34</sup> Much of the coverage focused on determining how blame for the girl's death should be apportioned.<sup>35</sup>

In general, blaming stories are more valuable than naming stories in that they are more likely to lead to education and reform. The coverage of the Elisa Izquierdo case is a good example of this positive effect because much of the coverage was focused on exposing significant deficiencies in the existing confidentiality laws. These laws prevented agencies from revealing vital informa-

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<sup>33</sup> See, e.g., Celia Dugger, *Litany of Signals Overlooked in Child's Death*, N.Y. TIMES, Dec. 29, 1992, at A1 (reporting that the high rate of caseworker turnover was partially responsible for not revealing a mother's prior abuse and boyfriend prone to violence); Michele McPhee et al., *City Said B'klyn Girls Were Fine, Court Sez*, DAILY NEWS, July 3, 1998, at 4 (reporting that city officials repeatedly told a judge that two teenage girls were doing well after being taken out of foster care and returned to their home, months before their parents were arrested for committing rape and incest); Joe Sexton, *Officials Fault City's Inaction in Abuse Case*, N.Y. TIMES, Feb. 16, 1996, at B1 (discussing city agencies' failure to protect an eleven-year-old child from his abusive father).

<sup>34</sup> See, e.g., Somini Sengupta, *Contact With a Web of Agencies Failed to Prevent a Disabled Girl's Death*, N.Y. TIMES, May 30, 2000, at B1.

<sup>35</sup> See Nina Bernstein, *Girl's Death Underscores Complexity of Child Welfare*, N.Y. TIMES, May 21, 2000, at A37 (discussing the difficulty involved in changing administration policy in reaction to highly publicized cases); Nina Bernstein & C.J. Chivers, *Disabled Girl is Found Dead, Amid Signs of Malnutrition*, N.Y. TIMES, May 19, 2000, at B1 (reporting that a grandmother of a child killed as a result of malnutrition blames the Administration for Children's Services for failing to respond to an e-mail and phone call reporting the neglect by parents); John Marzulli, *Gran: City at Fault in Girl's Death*, DAILY NEWS, May 20, 2000, at 19 (reporting that child welfare officials ignored repeated complaints from the child's grandmother); Graham Rayman, *Examiner Rules "5-year-old" Died of Neglect*, NEWSDAY, June 15, 2000, at A17 (reporting that a coroner's determination that a child's death was caused by neglect and that there is a continuing probe as to the culpability of city child welfare officials); Amy Waldman, *Mother's Account Conflicts With Grim Details of Severely Disabled Girl's Death*, N.Y. TIMES, May 20, 2000, at B2 (reporting the results of a child welfare investigation concluding that the child was receiving "adequate care").

tion about children at risk or children who had died from abuse.<sup>36</sup> Following the extensive coverage of the Izquierdo case, the laws in New York were changed.<sup>37</sup>

The problem with a focus on blaming is that it has a distorting effect. Specifically, it has a tendency to exaggerate the systemic problems reflected in a particular case and fails to recognize other more fundamental problems with the system. It also fails to recognize the positive attributes of the system, which are not considered sufficiently newsworthy.<sup>38</sup>

Of course, the law cannot dictate to the press what it considers newsworthy. And it is debatable whether journalists have any duty to tell stories that are intended to educate the public or lead to meaningful legal reform.<sup>39</sup> But laws can be enacted to encourage

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<sup>36</sup> See, e.g., Feldman, *supra* note 31, at 628-35 (detailing New York law prior to the enactment of Elisa's Law).

<sup>37</sup> Elisa's Law has been codified in a variety of statutory provisions. See, e.g., N.Y. SOC. SERV. LAW § 20(5)(a) (McKinney 1992 & Supp. 2000) (mandating the creation and disclosure of child fatality reports); *id.* §§ 372(4)(a), 409-a(9)(a), 409-f(2), 442 (mandating that reports be made available for city and state audit purposes); *id.* § 422-a (providing for investigations of abuse and neglect and their disclosure); N.Y. DOM. REL. LAW § 240 (McKinney 1999 & Supp. 2000) (dealing with "unfounded" registry reports in custody and visitation in custody and visitation disputes); N.Y. FAM. CT. ACT § 651-a (McKinney 1999) (same); see also Lizette Alvarez, *Report in Wake of Girl's Death Finds Failures in Child Agency*, N.Y. TIMES, Apr. 9, 1996, at A1 (reporting that the Mayor of New York "called Elisa's death a catalyst for reform"). Changes not only included greater openness, but also hiring more caseworkers and providing more training. *Id.*

<sup>38</sup> See *supra* Panel Discussion remarks of Commissioner Scoppetta, at p. 140.

<sup>39</sup> See *supra* Panel Discussion remarks of Eve Burton, at p. 128. The American Society of Newspaper Editors' Statement of Principles announces that "[t]he primary purpose of the gathering and distributing news and opinion is to serve the general welfare by informing people and enabling them to make judgments on the issues of the time." Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449, 474 n.122 (1984) (quoting Statement of Principles (American Society of Newspaper Editors 1975), reprinted in W. RIVERS ET AL., RESPONSIBILITY IN MASS COMMUNICATION 289-91 app. A (1980)). The statement of principles further provides that "[j]ournalists should respect the rights of people involved in the news, observe common standards of decency and stand accountable to the public

media coverage that will more regularly educate and reform. Reform should not come about because “[t]he bright lights of the media shine on a dead child’s battered body, and for a short time the system kicks into high gear.”<sup>40</sup>

## II. TOWARDS EDUCATING AND REFORMING

Overall, journalists need meaningful access to legal proceedings that will allow them to tell stories that are more truthful, nuanced, and representative of the system – so that ultimately the stories will educate and reform. To begin accomplishing these goals, I suggest changes in the existing New York rules governing the confidentiality of records in the family court<sup>41</sup> and governing the use of cameras in the courtroom. Specifically, I suggest a more nuanced approach of different rules for different types of records and a cautious retreat from the ban against cameras in the courtroom.

### A. Access to Records

Under the current law – a patchwork of statutes and rules – access to records seems to embody a presumption of confidentiality. According to Section 166 of the Family Court Act, “[t]he records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or records.”<sup>42</sup> Also, the New York court rules implicitly curb disclosure of records in family court by specifically delineating the types of persons who may obtain access to “papers” there.<sup>43</sup>

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for the fairness and accuracy of their news reports.” *Id.*

<sup>40</sup> Jerry Harris, *Postmortem: After Elisa. CWA Shifts Gears Following Another Abused Child’s Death*, THE VILLAGE VOICE, Dec. 12, 1995, at 14.

<sup>41</sup> Such changes also should extend to custody matters decided in New York Supreme Court.

<sup>42</sup> N.Y. FAM. CT. ACT § 166 (McKinney 1999).

<sup>43</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 205.5 (1997). For example, the rule permits access only to persons caring for the child, persons representing the child, the authorized representative of the child protective agency or probation service, and the agency granted custody of the child and its attorney. *Id.* §§ 205.5(b)(1),(4).

Papers are defined broadly and include “pleadings, legal papers formally filed in a proceeding, findings, decisions and orders and . . . transcribed minutes [of hearings.]”<sup>44</sup> Similarly, in divorce proceedings, the confidentiality of court papers is presumed.<sup>45</sup> Other provisions limiting access to records relate to particular kinds of proceedings, such as child protection,<sup>46</sup> juvenile delinquency,<sup>47</sup> and adoption.<sup>48</sup>

The reasons for limiting access to documents – such as protecting children’s privacy, reducing stigma, and avoiding further trauma – do not justify the breadth of the existing limitations on access to records. The law should better distinguish between different kinds of documents that pose different degrees of risk to children: transcripts, documents actually introduced into evidence, and other documents (such as psychological reports) that have not been introduced into evidence. The first category, transcripts, deserve the same presumption of openness as access to the physical courtroom.<sup>49</sup> A transcript is a written record of the day’s proceedings. Affording the press access to a transcript actually may increase accurate reporting because there is less reliance on the reporter’s notes. It also may facilitate reporting of a newsworthy proceeding when the physical limitations of the courtroom would not easily permit media presence, or when the importance of the case does not become evident until after a proceeding already has

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<sup>44</sup> *Id.* § 205.5.

<sup>45</sup> N.Y. DOM. REL. LAW § 235(1) (McKinney 1999). Under this section, papers include “pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination or perusal thereof.” *Id.*

<sup>46</sup> *See, e.g.*, N.Y. SOC. SERV. LAW § 422 (McKinney 1999 & Supp. 2000) (providing for a state-wide child abuse registry); *id.* § 424-a (providing for access to information in state registry); *id.* § 424-c (outlining duties of commissioner regarding reports); *id.* § 444 (providing for confidentiality of records).

<sup>47</sup> *See, e.g.*, N.Y. FAM. CT. ACT § 306.1 (McKinney 1999) (fingerprinting); *id.* § 375.1 (outlining the procedure for sealing delinquency records when the proceeding terminates in favor of the respondent); *id.* § 375.2 (sealing of court findings); *id.* § 381.2 (use of juvenile records in other courts).

<sup>48</sup> N.Y. DOM. REL. LAW § 112 (McKinney 1999) (adoption from agencies); *id.* § 114 (adoption orders); *id.* § 115 (private placement orders).

<sup>49</sup> *See* Bar Report, *supra* note 3, at 34-36.

begun. This may be particularly applicable in family court where trials often proceed on a piecemeal basis, with a number of adjournments. Moreover, harm to a child caused by the release of a transcript is commensurate to that caused by permitting physical access to the courtroom. It should be governed by the Rule 205.4 standard requiring that the harm be demonstrated in a particular case.

The second category, documents that have been introduced into evidence in the proceeding, do not deserve the same deference as transcripts, but should be obtainable by the press when procedural safeguards can adequately protect the children's interests. If the reporter is to tell a truthful story that ultimately will educate and reform, she needs to be more than a passive observer in the courtroom. The documents may help illuminate weaknesses in a witness' story, and may even deepen the meaning of the story because the document is material to the issues in the case.

Children's countervailing interests affected by the release of admitted records often can be accommodated through protective orders that limit dissemination but do not prevent it altogether.<sup>50</sup> Such orders may include redaction of identifying and sensitive material.<sup>51</sup> In the *Ruben R.* case, a protective order would not have been effective because the children already had been identified by name and through photographs.<sup>52</sup> But now that situation should be the rare rather than the usual case, because the press ordinarily does not reveal children's identities or other identifying information.<sup>53</sup>

Only in the third category of documents, those not introduced into evidence, should the presumption against access be applied.

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<sup>50</sup> See generally N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4(b)(4) (1997) (showing a preference for protective orders over general exclusion); *In re Ulster County Dep't of Social Services*, 621 N.Y.S.2d 428, 432 (Fam. Ct. 1993) (finding that a protective order best protects competing interests).

<sup>51</sup> See *In re Ulster County*, 621 N.Y.S.2d at 432; see also *In re S. Children*, 532 N.Y.S.2d 192, 193 (App. Div. 1988).

<sup>52</sup> *In re Ruben R.*, 641 N.Y.S.2d 621, 627 (App. Div. 1996).

<sup>53</sup> Such a restriction may be court-imposed, see Bar Report, *supra* note 3, at 32-34, or assumed voluntarily by the press, see *supra* Panel Discussion remarks of Eve Burton, at p. 133.

For example, in *Augustus C.*, the court limited access to psychological reports and other private documents, even though the court agreed to open the courtroom.<sup>54</sup> The presumption in favor of confidentiality for these types of documents should be overcome in exceptional circumstances, when the need is great and privacy can be preserved.

Distinguishing between different types of records is not the only way to encourage educating and reforming. Reconsidering New York's current ban on cameras in the courtroom is another way, albeit with more potential for abuse.

### *B. Cameras in the Courtroom*

Currently, cameras are banned in New York courts (including family court) under Section 52 of the Civil Rights Law.<sup>55</sup> Although a general ban on cameras in the courtroom has been in effect since 1952,<sup>56</sup> cameras were permitted on an experimental basis between 1987 and 1997.<sup>57</sup> Under this program, which was governed by court rules,<sup>58</sup> a trial court reviewed the appropriateness of audio-visual coverage in a particular case, after considering a number of factors. These factors, specifically delineated in Rule 131.4, include the type of case involved; whether the coverage would cause harm to any participant; whether the coverage would interfere with the fair administration of justice; whether the proceedings would involve lewd or scandalous matters; the objections of the parties and prospective witnesses; and the physical limitations of the court.<sup>59</sup> Rule 131.4 also requires that the trial judge "give great weight to the fact that any party, prospective witness, victim, or other participant in the proceeding

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<sup>54</sup> *In re Augustus C.*, N.Y.L.J., July 31, 1997, at 22 (N.Y. Fam. Ct.).

<sup>55</sup> N.Y. CIV. RIGHTS LAW § 52 (McKinney 1992).

<sup>56</sup> *People v. Boss*, 701 N.Y.S.2d 891, 893 (Sup. Ct. 2000); *see also* *Coleman v. O'Shea*, 707 N.Y.S.2d 308, 310 (Sup. Ct. 2000).

<sup>57</sup> *Boss*, 701 N.Y.S.2d at 893. This lengthy experiment was authorized by N.Y. JUD. LAW §§ 218(1), (11) (McKinney Supp. 2000).

<sup>58</sup> *See* N.Y. COMP. CODES R. & REGS. tit. 22, §§ 131.1-131.8 (McKinney 1993).

<sup>59</sup> *Id.* § 131.4(c).

is a child.”<sup>60</sup> Although the rules do not seem to favor broadcasting in the way that Rule 205.4 favors access,<sup>61</sup> they do provide authority for such coverage and require the trial judge to consider modifying the proceedings with a protective order rather than denying the public access to this medium altogether.<sup>62</sup>

Permission for audio-visual coverage ceased in June 1997, when the legislature failed to renew the authority to continue and the Section 52 ban was reinstated.<sup>63</sup> As a result of this reinstatement, New York remains one of the few states with such a broad ban.<sup>64</sup>

It appears to be only a matter of time before this ban is lifted, as a number of New York courts have recently found its constitutionality suspect.<sup>65</sup> Most notably, Judge Teresi of the New York Supreme Court permitted audio-visual coverage of the Amadou Diallo case after finding Section 52 unconstitutional under the federal and state constitutions.<sup>66</sup> The court emphasized how much had changed since the ban had first been enacted.<sup>67</sup> The court noted the changes in technology, the absence of a ban in most jurisdictions, and the success of New York’s ten-year experiment

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<sup>60</sup> *Id.* § 131.4; *see also Olesh*, 540 N.Y.S.2d at 123-24 (noting that the applicable rule allows for the consideration of whether the coverage of the case would cause harm to any participant).

<sup>61</sup> *Cf. Olesh*, 540 N.Y.S.2d at 123 (observing that “[t]he tone of the rules is undoubtedly that in the average case such coverage should be permitted with limitation, if any, as set by the court and those further limitations which the rules impose”).

<sup>62</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 131.4(e) (1993).

<sup>63</sup> *Boss*, 701 N.Y.S.2d at 893.

<sup>64</sup> *Id.* at 894-95; *see also Jay C. Carlisle, An Open Courtroom: Should Cameras Be Permitted in New York State Courts?*, 18 PACE L. REV. 297 (1998).

<sup>65</sup> *See Boss*, 701 N.Y.S.2d at 894; *Coleman v. O’Shea*, 707 N.Y.S.2d 308, 310 (Sup. Ct. 2000); *cf. People v. Santiago*, 712 N.Y.S.2d 244, 256-57 (App. Div. 2000) (noting trial courts that have allowed cameras in their courts), *overruled on procedural grounds sub nom. Santiago v. Bristol*, 709 N.Y.S. 724 (App. Div. 2000) (ruling that the trial court acted outside its authority in allowing media to intervene).

<sup>66</sup> *Boss*, 701 N.Y.S.2d at 895.

<sup>67</sup> *Id.* at 893-94; *see also Coleman*, 707 N.Y.S.2d at 310 (observing that Section 52 was enacted at “television’s dawn”).

with cameras.<sup>68</sup> The court concluded: "The quest for justice in any case must be accomplished under the eyes of the public. [Broadcast coverage] will further the interests of justice, enhance public understanding of the judicial system, and maintain a high level of public confidence in the judiciary."<sup>69</sup> The New York legislature has recently introduced bills that would lift the broadcast ban.<sup>70</sup>

Assuming that Section 52 is found unconstitutional, or that the legislature decides to lift the broadcast ban, the question remains whether audio-visual coverage should be permitted in family court proceedings. One proposed bill would contain a presumption against audio-visual coverage in most proceedings related to children, allowing it only where the benefits to the public would "substantially outweigh" the risks.<sup>71</sup>

A more restrictive access standard is arguably justified by the different nature of the access sought and the heightened privacy interests in family law matters. Television is considered to be more prejudicial and less educative than the print media. Visual imagery has a greater potential to distort, especially when the images are chosen primarily for their salacious value.<sup>72</sup> And unlike the access

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<sup>68</sup> *Boss*, 701 N.Y.S.2d at 893.

<sup>69</sup> *Id.* at 895.

<sup>70</sup> S. 6382, 1999 Leg., 223rd Sess. (N.Y. 1999); Assemb. 9071, 1999 Leg., 222d Sess. (N.Y. 1999).

<sup>71</sup> S. 6382(3)(c), 1999 Leg., 223rd Sess. (N.Y. 1999). The relevant language of the pending legislation in the New York State Senate reads as follows:

The presiding trial judge shall not grant permission for audio-visual coverage in any of the following types of cases unless the court finds that the benefits to the public of audio-visual coverage substantially outweigh the risks presented by such coverage: (I) a family court proceeding, other than one brought pursuant to Article Three of the Family Court Act; (II) any proceeding where audio-visual coverage is likely to have a substantial adverse effect on the welfare of a child, other than a criminal proceeding . . . (III) any proceeding involving allegations of domestic violence, child abuse or neglect, or sexual abuse; (IV) a proceeding to which audio-visual coverage has been objected to by the victim of a crime that is the subject of such proceeding.

*Id.*

<sup>72</sup> Lassiter, *supra* note 29, at 998; see also Melissa Corbett, Comment, *Lights, Camera, Trial: Pursuit of Justice or the Emmy?*, 27 SETON HALL L. REV.



right possessed by the print media, the right to audio-visual coverage has never been constitutionally recognized.<sup>73</sup>

But even a presumption against coverage limited to cases involving children and families would be counter to the spirit of access embodied in Rule 205.4. The Rule seems to tell us that family court cases should be treated essentially like other cases, with discretion to the court to consider the privacy interests of the children<sup>74</sup> and other considerations such as the size of the courtroom.<sup>75</sup> Part 131 of the administrative rules already permits a carefully crafted balance of interests that can be applied in a variety of different cases.<sup>76</sup> A more restrictive rule would fail to give the broadcast media the tools needed to tell their stories, as the print media is given theirs through access to the courtroom.

In keeping with the spirit of openness embodied in Rule 205.4,<sup>77</sup> and considering the goals of educating and reforming, I would make two modifications to the discretionary factors set forth in Rule 131.4.<sup>78</sup> First, I would not make the involvement of children an entirely separate inquiry deserving "great weight," as the rule currently does, but would consider it with the other factors, such as "whether the coverage would cause harm to any participant."<sup>79</sup> Second, I would make an explicit consideration the degree to which broadcasting the proceedings would further the public interest. Although this factor already can be considered under one of the other existing factors – such as "the type of case involved"<sup>80</sup> – it is not enough. The consideration should be more explicit to emphasize the desire to satisfy the goals of educating and reforming.

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1542, 1565-68 (1997).

<sup>73</sup> Lassiter, *supra* note 29, at 956.

<sup>74</sup> See *supra* Part I.A (discussing the need to balance privacy interests with the public interest when closure of the courtroom is sought).

<sup>75</sup> Cf. *In re Howie*, 526 N.Y.S.2d 727, 728 (Civ. Ct. 1998) (allowing for a consideration of the physical limits of the small claims court on a case-by-case basis).

<sup>76</sup> See *supra* Part I.

<sup>77</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 205.4 (McKinney 1997).

<sup>78</sup> N.Y. COMP. CODES R. & REGS. tit. 22, § 131.4 (McKinney 1993).

<sup>79</sup> *Id.* § 131.4(c)(2).

<sup>80</sup> *Id.* § 131.4(c)(1).

### C. Looking to the Future

Some of the recent coverage of family court proceedings reflects the benefit of open access that the press and public now enjoy. More importantly, it reflects on how reporting on these proceedings can educate the public and eventually lead to legal reform. For example, recent stories have covered, in intimate detail, the inner workings of the family courts in Kings County<sup>81</sup> and in Bronx County.<sup>82</sup> The articles have a “day-in-the-life” feel to them, which allows the public to get a more complete and contextual view of family court proceedings. The stories reflect the human drama as well as the weariness that embodies this court.

Other recent stories have highlighted specific problems in the existing system that need to be solved. For example, a recent case discussed the problem of a court finding child abuse or neglect when a mother, who is a battered woman herself, fails to protect her children by failing to protect herself from the batterer.<sup>83</sup> Perhaps, by exposing this problem to the public, a problem that is well-known to those who work with battered women and their children,<sup>84</sup> changes in the law would be more likely to occur.

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<sup>81</sup> *In Court*, *supra* note 5, at A36.

<sup>82</sup> Hancock, *supra* note 5, at 1.

<sup>83</sup> Somini Sengupta, *Tough Justice: Taking a Child When One Parent is Battered*, N.Y. TIMES, July 8, 2000, at A1.

<sup>84</sup> Kim Ahearn et al., *Charging Battered Mothers With “Failure to Protect”*: *Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 849-50 (2000) (observing that the increased awareness of the harm that domestic violence causes women has resulted in increasing the number of abuse and neglect proceedings being brought against battered mothers for their children’s exposure to domestic violence; arguing for a change in policy and practice to prevent battered mothers from being punished for the risks to their children’s well being caused by the batterer); G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN’S L.J. 89, 91-92 (1999) (discussing the failures of state abuse and neglect statutes that hold battered mothers responsible by removing children from their custody for failing to stop the abuse to themselves and thereby causing harm to their children who are forced to witness the continual abuse).

The newly enacted Adoption and Safe Families Act (“ASFA”)<sup>85</sup> provides additional opportunities for reporting that both educates and reforms. Already, the press has covered one of the most problematic provisions of ASFA, the provision that requires all foster parents to be fingerprinted. ASFA, as originally enacted, mandated the removal of children from foster homes if a foster parent previously had been convicted of certain felonies, and created an irrebuttable presumption of unfitness.<sup>86</sup> For example, if a foster or adoptive parent had a record of one of these felony convictions, such as homicide, he or she would be deemed per se ineligible to care for the child regardless of how long the child had lived with the foster family or how long ago the crime was committed. The wisdom and constitutionality of this provision was called into question by the courts and by the press.<sup>87</sup> Sub-

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<sup>85</sup> Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.). The Congressional legislation provides that in order for states to continue to receive further funding, each state must enact its own version of the ASFA. The federal government, for example, reimburses states for certain adoption and foster care outlays pursuant to Title IV of the Social Security Act. 42 U.S.C. § 674(c) (1994 & Supp. III 1997). In order to avoid a loss of funding, New York has passed its own ASFA scheme. N.Y. SOC. SERV. LAW § 358-a (McKinney Supp. 2000).

<sup>86</sup> ASFA, even in its current amended form, mandates that all prospective foster or adoptive parents provide fingerprints to authorized agencies. N.Y. SOC. SERV. LAW § 378-a (McKinney 1992 & Supp. 2000), *amended by* S.B. 7892, 1999-2000 Reg. Sess. N.Y. 1999. These fingerprints are then used to “perform a criminal history record check.” *Id.* § 378-a(2)(A). ASFA further provides that all applications for foster or adoptive parenthood be summarily denied where the criminal history check reveals a previous criminal conviction for child or spousal abuse, any crime perpetrated against a child, or crimes having to do with “violence, including rape, sexual assault, or homicide” unless the parent makes the requisite showing. *Id.* § 378-a(e)(1)(A). Whereas the original ASFA created an irrebuttable presumption that a foster or adoptive parent was unfit, the amended version establishes a rebuttable presumption with the burden of proof now placed on the parent.

<sup>87</sup> *See, e.g., In re Adoption of Corey*, 707 N.Y.S.2d 767, 773 (Fam. Ct. 1999) (finding that § 378-a(2)(e)(1) of ASFA violates the procedural due process rights of foster children, as it fails to protect them from “arbitrary State decisions which significantly impact their custody and welfare”) (citation omitted); *In re Adoption of Jonee*, 695 N.Y.S.2d 920, 925 (Fam. Ct. 1999) (holding that ASFA’s statutory per se presumption of unfitness violates the federal due process

sequently, Governor Pataki signed into law a number of amendments to ASFA, in part to ameliorate the constitutional infirmities in the initial fingerprinting provision.<sup>88</sup> The press should take advantage of other opportunities to discuss the significant effects of ASFA on children and families. It appears that such coverage has already begun.<sup>89</sup>

## CONCLUSION

The recently enacted rule opening family courts to the press and public is a significant first step towards educating and reforming instead of naming and blaming. With this redefined role, the press can act not only as a “watchdog,” but also as a “fly on the wall.” And the new stories that are told, as well as the laws that are eventually changed because of the telling of these stories, will inure to the benefit of children and families throughout the state.

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clause absent an “individual determination”) (quoting *Cleveland Bd. of Educ. v. LaFluer*, 414 U.S. 632 (1974)); see Andrew Schepard, *Child Protection Revolution: Adoption and Safe Families Act*, N.Y.L.J., Mar. 11, 1999, at 3; see also *supra* Panel Discussion remarks of Commissioner Scoppetta, at pp. 146-47.

<sup>88</sup> For a general overview of the law as currently constituted, see Douglas H. Reiniger, *Amending the Adoption and Safe Families Act*, N.Y.L.J. July 18, 2000, at 1.

<sup>89</sup> See, e.g., Somini Sengupta, *Pataki Urges Relaxing of Ban on Felons as Foster Parents*, N.Y. TIMES, Mar. 31, 2000, at B9 (reporting on proposed amendments to the ASFA offered by Governor Pataki); Joanne Wasserman, *Cutoff of Parental Rights Climbs*, DAILY NEWS, Jan. 19, 2000, at 10 (reporting that restrictions aimed at speeding up the adoption process have led to an increase in parental terminations).

