William Mitchell Law Review

Volume 26 | Issue 3 Article 2

2000

Open Child Protection Proceedings in Minnesota

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OPEN CHILD PROTECTION PROCEEDINGS IN MINNESOTA

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I. INTRODUCTION

From 1989 to 1996, I provided legal counsel to guardians *ad litem* in child protection proceedings in Hennepin County. This aspect of my private practice gave me an opportunity denied to the general public and most private attorneys—a glimpse into the Hennepin County child protection system. The child protection system includes the Department of Children and Family Services (DCFS) and its social workers; assistant county attorneys who represent DCFS; assistant public defenders; disposition advisors; private attorneys; court-appointed guardians *ad litem* who advise the court of the children's best interests; service providers who contract with DCFS to provide preservation and reunification services to families and children; and juvenile court judges who preside over the child protection court proceedings and are responsible for monitoring DCFS. All these individuals constitute "stakeholders" in the system.

Upon initial exposure to Hennepin County's child protection system, I was struck by the startling circumstances affecting the families and children. Before my involvement in child protection work, I considered myself an informed citizen and an active participant in my surrounding community. I soon discovered my ignorance of the child protection system and the issues faced by families and children in the system. For example, children often languished in foster care for years without any action taken to terminate their parents' rights, or to achieve permanent living arrangements for them. The laws in effect prior to the current permanency law[1] effective August 1, 1993, were largely ignored. Continuances were routinely granted, causing some children to remain in foster care for years without judicial determination of their need for protection or services or permanency. DCFS practices sometimes failed to prevent or even enabled the abuse and neglect of children while in the custody of DCFS or in the custody of parents subject to supervision by DCFS.

I especially was struck by the secrecy of the system. Since 1959, public access to Minnesota juvenile court proceedings has been limited by statute, which states: "[T]he court shall exclude the general public from hearings under this chapter and shall admit only those persons who, in the discretion of the court, have a direct

1. *See* MINN. STAT. § 260.012(a)(2)(1998).

interest in the case or in the work of the court."[2] The practical effect of this law in Hennepin County has been exclusion of the public, press and anyone not a party to the case. In Hennepin County, any party could exclude extended family members who appeared outside the courtroom with the hope of observing or providing support or information. Based on objections from the parties, judges have excluded children's grandparents and other relatives and, routinely, foster parents, even when they had cared for the children for years and had substantial information about the children's needs and the parents' history of visitation. As interpreted, the Minnesota statute essentially guaranteed that a parent's behavior would not be subject to scrutiny by the public, the press or interested members of the extended family. The social service agency also could and did seek to exclude persons from the courtroom by simply referring to the statute and the use of the word "shall." This invariably resulted in the requested exclusion.

My experiences suggested that such secrecy did not protect the children, but rather served only to protect stakeholders in the system and parents accused of child abuse or neglect. Such parents could use closed courtroom proceedings to exclude any relatives, friends or neighbors who had information about or were interested in the children's welfare. Later, parents could depict DCFS, the court and other stakeholders as the oppressors. Secrecy prevented newspapers from reporting the circumstances and events affecting the children's lives. Those excluded from the proceedings could not hear first-hand the allegations of abuse and neglect of the children, the corrective action required of the parents or decisions about the children's placement. Most importantly, those excluded lost the opportunity to offer the court relevant information about the parents' and children's circumstances. Relatives who never entered the courtroom tended to rally around the parents, not the children who suffered mistreatment. Moreover, these relatives may have been less inclined to step forward as a possible placement for the children because misinformation from parents encouraged mistrust of the system.

Secrecy surrounding the child protection system prevented many private attorneys from penetrating the system. Court proceedings sometimes deviated from the Rules of Juvenile

2. MINN. STAT. § 260C.163, subd. 1(c) (1998) (formerly codified as MINN. STAT. § 260.155, subd. 1(c)).

Procedure and the relevant statutes. Insiders used numerous acronyms, their meanings known only to the insiders. Outside attorneys were at a clear disadvantage unless they learned the special rules and language.

This essay discusses the background of and recent departure from the traditional secrecy enveloping child protection hearings. Part II presents a brief history of the juvenile protection system. Part III discusses the constitutional and legal basis for open and public trials. Part IV presents the development of Minnesota's Pilot Project for open child protection proceedings. Part V discusses the reception of the Pilot Project and discusses successes of the Pilot Project. Part VI presents arguments for continuing and expanding the open hearings. Part VII concludes that, so far, opponents' fears are unfounded and that open hearings are necessary to protect children and hold accountable the system charged with protecting them.

II. A BRIEF HISTORY OF JUVENILE COURT PROCEEDINGS

A. *Early Development*

Though the Puritans of Massachusetts enacted laws against "unnatural severity" to children as early as the seventeenth century, these laws offered only limited protection against child abuse.[3] Before the twentieth century, family and religious institutions played the strongest role in controlling, disciplining and protecting minors.[4] Americans' overriding concern about family privacy discouraged the state from intervening to protect or rescue children from their families.[5] Although courts recognized "public matters" such as drunkenness or criminality as grounds for removal of children, many considered "physical cruelty to the child" a private matter not justifying removal.[6] Moreover, the United States

3. *See* Wright S. Walling & Gary Debele, *Private CHIPS Petitions in Minnesota: The Historical and Contemporary Treatment of Children in Need of Protection or Services*, 20 WM. MITCHELL L. REV. 781, 785 (1994) (noting that these seventeenth-century laws formed the first response in America to deal with child abuse and neglect).

4. *See* Gary A. Debele, The Origins and Early Years of American Juvenile Courts: The Impact of Changes in American Domestic Relations Law and Criminal Procedure from 1880 to 1920 1 (1991) (unpublished M.A. thesis, University of Minnesota) (on file with author).

5. *See* Walling & Debele, *supra* note 3, at 796 n.98.

6. *See id.* at 790-91.

did not have special courts to address children's problems.[7] Children generally received "special treatment" from courts of general jurisdiction but the children did not enjoy special procedural or substantive rights based on their youth.[8]

From 1877 to 1920, rapid changes occurred in American society such as the closing frontier, growth of cities, growth of monopolies and large-scale reform movements such as Populism[9] and Progressivism.[10] At the same time, community autonomy eroded and political authority grew increasingly centralized.[11] As the nation evolved from a rural, homogeneous nation into an industrial and urban nation, growing sectors of American society concerned themselves with the treatment of juveniles.[12] In 1889, a reformatory for boys opened in St. Cloud, Minnesota, and in 1911, a "school for delinquent girls" started in Sauk Centre.[13] According to historian Robert Wiebe, if reformers "had a central theme, it was the child," who "united the campaigns for health, education, and a richer city environment, and . . . dominated much of the interest in labor legislation."[14] In the law, a major indication of new attitudes was "the establishment of specialized juvenile and domestic relations courts which came to emphasize counseling and mediation as much as pronouncements of law . . . ."[15] The creators of juvenile court intended that it "be operated by professionals and without all of the due process intricacies" found in the adult criminal court.[16]

Minnesota established a juvenile court system near the start of

7. *See* Debele, *supra* note 4, at 1.

8. *See id.* at 1.

9. Populism refers to the nineteenth-century political movement that championed local loyalties, direct democracy, nationalization of monopolies and a silver-based currency. *See* ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920 84 (1967).

10. Progressivism was a late nineteenth, early twentieth-century political reform movement that advocated state protection of laborers and the poor, and pushed for "regulation of oligopolistic industries, antitrust enforcement, labor union organization, and social insurance." DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 144-45 (1991).

11. *See* Debele, *supra* note 4, at 28.

12. *See* Walling & Debele, *supra* note 3, at 796.

13. *See* THEODORE C. BLEGEN, MINNESOTA: A HISTORY OF THE STATE 435 (2d ed. 1975).

14. WIEBE, *supra* note 9, at 169.

15. *Id.* at 150.

16. Debele, *supra* note 4, at 3-4.

the twentieth century.[17] In 1899, the state legislature passed "An Act Establishing a Protection System for Juvenile Delinquents,"[18] requiring counties with more than 50,000 residents to provide probation for children under the age of eighteen, at the discretion of the trial judge. Minnesota's Juvenile Court Act followed in 1905.[19] In counties with more than 50,000 residents, the 1905 Act provided for a special judge and courtroom for juvenile delinquency matters where a "juvenile record" would be maintained.[20] The goal of the early juvenile courts "was to take the place of an absent, nurturing family under the hands of maternal morality. The best interests of the child was the justification of the court's very existence."[21]

In the later nineteenth century and early twentieth century, the state primarily relied on a "law enforcement" approach for addressing the needs of abused and neglected children.[22] State agents exercised broad police powers, "including the power to separate children from their parents and prosecute parents who could be subsequently sentenced to prison."[23] Many reformers criticized this punitive approach, arguing that the government should launch "preventive, remedial, and economic efforts to improve the home" so that children could remain at home.[24] Nevertheless, states enacted laws providing for summary procedures to commit children to institutions.[25] In many instances, children legally were removed from their parents and placed in institutions without any hearing or notice to the parents.[26] Courts justified such actions under the medieval English doctrine of *parens patriae* (parent of the nation), "which permitted the crown, through Chancery court proceedings, to intervene on behalf of a child whose welfare was threatened."[27] Based on the notion that juvenile courts would be kinder and more loving toward children than adult courts, early juvenile courts engaged in "preventive

17. *See* BLEGEN, *supra* note 13, at 439.
18. 1899 Minn. Laws ch. 154.
19. 1905 Minn. Laws ch. 285, § 1.
20. *See id.*; Debele, *supra* note 4, at 83.
21. Debele, *supra* note 4, at 120.
22. *See* Walling & Debele, *supra* note 3, at 795-97.
23. *Id.* (citing Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 312 (1972)).
24. *See id.* at 796.
25. *See* Thomas, *supra* note 23, at 315.
26. *See id.*
27. Walling & Debele, *supra* note 3, at 797.

penology that associated poverty and neglect with crime, disregarded notions of procedural due process, and vigorously employed the *parens patriae* philosophy to justify state intervention in private families."[28] As Debele remarks:

> [T]he rise of the American juvenile courts during this period reveals a darker side of American law. During this period of great social and cultural tumult, the white, middle and upper class Protestants long dominant in American society prior to the 1880's turned to the time-tested tool of American problem resolution—the rule of law. Under the cloak of the rule of law, controls were maintained by this group over urban and immigrant children—the very future of the republic.[29]

By the 1950s, the preventive penology and law enforcement approaches gave way to a social work methodology known as "protective services."[30] This methodology sought to strengthen the child's home instead of punishing or institutionalizing members of the child's family.[31] Mandatory child abuse reporting laws were enacted in light of the widely accepted belief that what "protective services offered to a family in its own home was usually a sufficient way to protect the child."[32] Most states increased services and protection available to dependent, abused and neglected children,[33] and sought to identify and redress a family's problem instead of punishing the parents.[34]

As the protective services methodology spread, many reformers developed a greater apprehension about state interference.[35] They came to recognize that state intervention endangers individual rights and often produces negative results toward children.[36] In the 1950s and 1960s, the juvenile court experienced a due process revolution in juvenile court

28. *Id.* at 798.
29. Debele, *supra* note 4, at 120.
30. *See* Walling & Debele, *supra* note 3, at 798.
31. *See id.*
32. *Id.* at 802.
33. *See* ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 4 (1987).
34. *See* Walling & Debele, *supra* note 3, at 801.
35. *See id.* at 802.
36. *See id.*

procedures.[37] Many reformers grew convinced that criminal sanctions against abusive or neglectful parents only made matters more difficult for families.[38] All fifty states now provide statutory mechanisms for protecting children from parents whom the state deems neglectful or abusive.[39]

B. Federal Intervention

The passage of the Adoption Assistance and Child Welfare Act of 1980 (Act),[40] significantly changed child welfare law in the United States.[41] The Act passed in response to widespread criticism of the child welfare system.[42] The Act is based upon three principles: (1) preventing unnecessary foster care placements, (2)

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37. *See id.* at 800.

38. *See id.* at 801.

39. *See* ALA. CODE § 26-15-3 (1999), ALASKA STAT. § 11.51.100 (Michie 1999), ARIZ. REV. STAT. § 13-3623 (1989), ARK. CODE ANN. § 5-27-204 (Michie 1999), CAL WELF. & INST. CODE § 361 (West 1998), COLO. REV. STAT. ANN. § 19-3-508 (West 1999), CONN. GEN. STAT. § 53-21 (1999), DEL. CODE ANN. tit. 11, § 1102 (1999), D.C. CODE ANN. § 6-2105 (1999), FLA. STAT. ANN. § 39.806 (West 1999), GA. CODE ANN. § 16-5-70 (1999); HAW. REV. STAT. § 709-904 (1999), IDAHO CODE § 18-1501 (1997), 720 ILL. COMP. STAT. 5/12-21.6 (West 1999), IND. CODE 35-46-1-4 (1999), IOWA CODE § 726.6 (1996), KAN. STAT. ANN. § 38-1527 (1998), KY. REV. STAT. ANN. § 530.060 (Michie 1998), LA. CHILDREN'S CODE ANN. art. 621 (West 1995), ME. REV. STAT. ANN. tit. 17, § 554 (West 1999), MD. CODE ANN. art. 27, § 35C (1996); MASS. GEN. LAWS ch. 119, § 24 (1999); MICH. COMP. LAWS. ANN. § 750.136b (West 1999), MINN. STAT. § 609.378 (1998), MISS. CODE ANN. § 43-21-301 (1999), MO. REV. STAT. § 568.045 (1998), MONT. CODE ANN. § 45-5-622 (1997), NEB. REV. STAT. § 43-292 (West 1999), NEV. REV. STAT. § 200.508 (1997), N.H. REV. STAT. ANN. § 639:3 (1999), N.J. STAT. ANN § 2C:24-4(a) (West 1998), N.M. STAT. ANN. § 30-6-1 (Michie 1997), N.Y. PENAL LAW § 260.10(1)(McKinney 1999), N.C. GEN. STAT. § 7B-1111 (1999); N.D. CENT. CODE § 27-20-44 (1999), OHIO REV. CODE ANN. § 2151.03 (West 1996), OKLA. STAT. tit. 10 § 7106 (1998), OR. REV. STAT. § 163.547 (1997), 18 PA. CONS. STAT. ANN. § 4304 (West 1995), R.I. GEN. LAWS § 11-9-5 (1998), S.C. CODE ANN. § 20-7-490 (Law. Co-op. 1999), S.D. CODIFIED LAWS § 26-10-1 (Michie 1998), TENN. CODE ANN. § 39-15-401 (1998), TEX. PENAL CODE ANN. § 22.041 (West 1999), UTAH CODE ANN. § 76-5-109 (1999), VT. STAT. ANN. tit. 33, § 4915 (1999), VA. CODE ANN. § 63.1-248.6 (Michie 1998), WASH. REV. CODE § 13.34.050 (1999), W. VA. CODE § 61-8D-4 (1996), WIS. STAT. § 948.03 (1996), WYO. STAT. ANN. § 14-3-208 (Michie 1999); *see also* Samuel Broderick Sokol, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. REV. 881, 882 (1998) (citing Wanda Ellen Wakerfield, Annotation, *Validity of State Statute Providing for Termination of Parental Rights*, 22 A.L.R. 4th 774 (1983)).

40. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified in scattered sections of 42 U.S.C., including sections 670 and 675).

41. *See* Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980*, 45 JUV. & FAM. CT. J. 3, 3 (1994).

42. *See id.* at 4.

timely and safe reunification of children in foster care with their biological parents when possible, and (3) expeditious adoption of children unable to return home.[43] The Act was the "first Federal statute to discourage excessive reliance on foster care placement and promote greater use of services to assist and rehabilitate families, preventing out-of-home placements. It introduced the concept of permanency planning and incorporated specific time frames for decision making for children and families."[44] The Act "created responsibilities for juvenile court judges, making them an integral part of the operation of the law."[45] The Act *requires* juvenile court judges to monitor the activities of social service agencies before, during and after the state removes children from the custody of parents or guardians.[46] Additional legislative initiatives supporting or promoting permanency followed the Act.[47]

Unfortunately, the Act has not been fully implemented within the child protection system.[48] Throughout the United States, juvenile court oversight of social service agencies has remained ineffective or nonexistent[49] due to several implementation problems. Implementation has been hampered by inadequate funding of social service agencies and public disagreement regarding the removal of children.[50] Moreover, some judges either misunderstand or refuse to exercise their power "to rule on social service failures."[51]

Minnesota's statutory scheme has been described as a "model for consideration" with regard to implementing the Adoption Assistance and Child Welfare Act.[52] In 1988, the Minnesota legislature revised its child protection laws and designated all

43. *See id.* at 4-5.

44. CHILDREN'S BUREAU, DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: THE PRESIDENT'S INITIATIVE ON ADOPTION AND FOSTER CARE, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN, I-4 (June 1999) [hereinafter ADOPTION 2002].

45. Edwards, *supra* note 41, at 3.

46. *See* 42 U.S.C. § 670 (1994).

47. *See* ADOPTION 2002, *supra* note 44, at I-4. "These included the Family Preservation and Family Support Services Program (FPFS) established in 1993 and amended in 1997, the Multiethnic Placement Act of 1994 (MEPA) with its 1996 Interethnic Placement Provisions (IEP), and the Adoption and Safe Families Act (ASFA) enacted in November of 1997." *Id.*

48. *See* Edwards, *supra* note 41, at 7.

49. *See id.* at 4, 7.

50. *See id.* at 4.

51. *See id.*

52. *See id.* at 12-13.

dependent and neglected children as "children in need of protection or services," now known as "CHIPS" children.[53] The legislative changes reflected the philosophy "that children should remain in their home or a reasonable facsimile of their home."[54] Though the statutory bases have expanded for finding that a Minnesota child is a CHIPS child, the move away from punishing parents and toward providing services continues.[55]

The Adoption and Safe Families Act of 1997[56] (ASFA) reinforces and extends the policies promoted by the Adoption Assistance Act. This new federal legislation:

> most comprehensively addresses critical permanency issues in child welfare and the law. The law was a bipartisan action to ensure that children's safety would be the paramount concern of all child welfare decision-making and to promote the adoption of children who cannot return safely to their own homes.[57]

ASFA includes the following principles:

- Safety is the paramount concern that must guide all child welfare services.
- Foster care is temporary.
- Permanency planning efforts should begin as soon as a child enters care.
- The child welfare system must focus on results and accountability.
- Innovative approaches are needed to achieve the foals of safety, permanency and well-being.[58]

C. *Need For Further Progress*

Much progress has been made. Increased public awareness has resulted in more attention to children's needs, reunifying children with their parents when possible and closer judicial

53. *See* Act of Apr. 26, 1988, ch. 673 § 2, 1988 Minn. Laws 1031, 1032-33; *see also* Walling & Debele, *supra* note 3, at 809.

54. *See* Walling & Debele, *supra* note 3, at 813 (citing MINN. STAT. § 260.011, subd. 2(a) (1992)).

55. *Id.* (citing Minn. Stat. § 260.011, subd. 2(a) (1993)).

56. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, §§ 101-501, 111 Stat. 2115-2136 (1997).

57. ADOPTION 2002, *supra* note 44, at I-5.

58. *See id.* at I-5–I-6.

scrutiny of agencies. Still, as a matter of course, juvenile courts largely remain closed. Without open hearings, juvenile court proceedings generally remain secretive affairs. Public access to courts, a long-recognized tradition in American jurisprudence, provides information the public needs to properly assess the quality of protection to children and serves as an appropriate monitor of government.

III. LEGAL SUPPORT FOR OPEN AND PUBLIC TRIALS

Historically, both federal and state case law support open hearings, even when those hearings involve highly sensitive issues. The First Amendment to the U.S. Constitution guarantees public access to most court proceedings under its free speech and press clauses.[59]

A court proceeding is presumed open if it traditionally has been public and if public access would benefit its operation.[60] In applying this test, most courts have denied the public the right of access to court proceedings involving child protection matters.[61] States are obliged to reunify parents and children, but when reunification fails, states have the power to terminate parental rights.[62] The U.S. Supreme Court has stated "[f]ew forms of state action are both so severe and so irreversible,"[63] yet the public and media are generally excluded from the court proceedings in which these "severe and irreversible" actions occur.[64] Some legal scholars argue that laws that mandate closing dependency court proceedings violate the First Amendment.[65] If true, the public and

59. *See* U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .").

60. *See* Jack B. Harrison, *How Open is Open? The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. CIN. L. REV. 1307, 1310-12 (1992) (discussing the evolution of the presumption in America that all should have access to the courts and that court proceedings should be open to the public).

61. *See* Jan L. Trasen, *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, 373-74 (1995) ("The vast majority of states have statutes within their juvenile codes that grant the juvenile court judge the discretion to admit or exclude the public from juvenile proceedings.").

62. *See* Santosky v. Kramer, 455 U.S. 745, 758-59 (1982) (holding that states must show more than a fair preponderance of evidence to terminate parental rights).

63. *Id.* at 759.

64. *See* Sokol, *supra* note 39, at 883 (describing the extent to which courts are closed in various states).

65. *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982)

the media have a constitutional right to attend dependency court proceedings and any party seeking to close such a proceeding would bear the burden of demonstrating that closure is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[66]

The U.S. Supreme Court in four cases in the 1980s, defined the public's right to attend criminal court proceedings.[67] The Court held that the public has a right to attend all criminal trials, including jury selection,[68] preliminary hearings[69] and witness testimony.[70]

A. *Federal Case Law*

1. Richmond Newspapers v. Virginia

In *Richmond Newspapers, Inc. v. Virginia,*[71] the public's First and Fourteenth Amendment rights to attend criminal trials outweighed the defendant's concern about adverse effects. The case involved a trial court's order to close a murder trial to the public and press.[72] The defendant argued that publicity of the case would adversely affect the trial process.[73] Richmond Newspapers brought mandamus and prohibition petitions, but the Virginia Supreme Court dismissed them.[74] The U.S. Supreme Court reversed, holding that the First and Fourteenth Amendments guarantee the presumptive right of the public and the press to attend criminal trials.[75]

In justifying its holding, the Court listed several benefits to the public of public attendance at criminal trials: community catharsis, education, increased public understanding of the rule of law,

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(striking down a statute that excluded the general public from a trial involving a minor victim of a sexual offense).

66. *Id.* at 607.

67. Sokol, *supra* note 39, at 884 n.13.

68. *See* Press Enter. Co. v. Superior Court, 464 U.S. 501, 510 (1984) [hereinafter *Press I*].

69. *See* Press Enter. Co. v. Superior Court, 478 U.S. 1, 10 (1986).

70. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 575-81 (1980); *Globe Newspaper,* 457 U.S. at 610 (striking down a statute excluding the general public from minor sex victim trials).

71. 448 U.S. 555 (1980).

72. *See id.* at 560.

73. *See id.* at 561.

74. *See id.* at 562.

75. *See id.* at 581.

increased comprehension of the functioning of the entire criminal justice system and public confidence in the administration of justice.[76] The Court also described several benefits to the proceeding itself: enhanced performance, protection of the judge, and possibly bringing a proceeding to the attention of persons who might be able to furnish relevant evidence or contradict evidence already admitted.[77]

Tracing the history of the public's right to attend criminal trials, Chief Justice Burger approvingly quoted Jeremy Bentham's proposition that "[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."[78] The Chief Justice also emphasized Bentham's idea that "open proceedings enhanc[e] the performance of all involved, protec[t] the judge from imputations of dishonesty, and serv[e] to educate the public."[79] Burger's opinion pointed out that public trials have a "significant community therapeutic value"[80] and provide "an opportunity both for understanding the system in general and its workings in a particular case."[81] He noted that public exposure to trials, even through the media, "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system."[82] The Chief Justice stated:

> When a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated . . . . [N]o community catharsis can occur if justice is "done in a corner [or] in any covert manner."[83]

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76. *See id.* at 569-72.
77. *See id.* at 569.
78. *Id.* at 569 (quoting 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827)).
79. *Id.* at 569 n. 7.
80. *Id.* at 570.
81. *Id.* at 572.
82. *Id.* at 573 (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976).
83. *Id.* at 571 (citations omitted).

Justice Brennan agreed with the Chief Justice, noting that "debate on public issues should be uninhibited, robust, and wide-open," as well as "informed."[84] Justice Brennan, however, expressed concern that the logic of his argument might be used to require public access to any judicial proceeding, and he warned that "access to a particular government process" depends on the function of the particular proceeding.[85] To Justice Brennan, the relevant issue was not the benefit of access for a particular citizen, but rather the benefit of access to the proceeding itself.[86]

2. Globe Newspaper Co. v. Superior Court

Globe Newspaper Co. v. Superior Court[87] further expanded *Richmond Newspapers* to allow the public into a trial even when minor rape victims testify. The Massachusetts Supreme Judicial Court held that a state statute required closing sex-offense trials during the testimony of juvenile sex crime victims. The statute in question provided an automatic bar to all cases in which minor victims of sex offenses testified, even if the victim, defendant, and prosecutor raised no objections to an open trial.[88] Representatives of the *Globe* sought to attend a rape trial in which two minor rape victims were expected to testify.[89] The U.S. Supreme Court ruled that closing the court proceeding for even a limited time during testimony of a very sensitive nature violated the First Amendment.[90] Writing for the majority, Justice Brennan stated that "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole."[91]

Richmond Newspapers made clear that the right of access to criminal court proceedings could be restricted only upon a showing that the restriction was "necessitated by a compelling

84. *Id.* at 587 (Brennan, J., concurring) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

85. *Id.* at 589 (noting that access to a government process must be "important in terms of that process").

86. *See id.* (comparing *In re* Winship, 397 U.S. 358, 361-62 (1970)).

87. 457 U.S. 596 (1982).

88. *See id.* at 611 (O'Connor, J., concurring).

89. *See id.* at 598.

90. *See id.* at 610-11. "We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm." *Id.* at 611 n.27.

91. *Id.* at 606.

governmental interest and [was] narrowly tailored to serve that interest."[92] *Globe Newspaper* extended the analysis and provided an important qualification. Massachusetts argued that safeguarding the physical and psychological well being of testifying minor rape victims was a compelling interest necessitating a restriction of the public's access to the proceeding.[93] Though a majority of the justices agreed that this interest was "potentially compelling," the Court held that the statute mandating closure whenever such minors testified was not "narrowly tailored."[94] In order to meet the requirement that the restriction be "narrowly tailored," Massachusetts trial courts were required to decide on a case-by-case basis whether a minor actually would be harmed by testifying in public and whether any available alternatives to restricting public access to the proceeding existed.[95] Massachusetts also claimed that closing the proceedings would encourage minor victims of sex crimes to come forward and provide accurate testimony and that this result constituted a compelling interest sufficient to justify the restriction on the public's right of access.[96] Because the state provided no support for its claim, however, the Court did not decide this question.[97]

3. Press-Enterprise Co. v. Superior Court

Press-Enterprise Co. v. Superior Court (Press I)[98] presented compelling issues—protecting jurors' right to privacy and sealing a transcript from a preliminary hearing for murder—but compelling issues alone are not sufficient. The courts also must consider alternatives to closing a hearing that address both the compelling issues and the public's right to know. A California trial court closed to the public all but three days of a six-week voir dire of a capital jury.[99] The trial court asserted two interests to justify the closure: the defendant's right to a fair trial and the jurors' right to

92. *Id.* at 607.
93. *See id.* at 607 n.19.
94. *See id.* at 609.
95. *See id.* at 608. The court listed factors to be weighed in determining harm. The factors included the minor victim's age, psychological maturity, the crime, the victim's desires, and the interests of parents and relatives. *See id.*
96. *See id.* at 609.
97. *See id.* at 609-10.
98. 464 U.S. 501 (1984).
99. *See id.* at 503.

privacy.[100] Noting that the public right of access to jury selection was common practice in the United States when the Constitution was adopted, the Court restated the applicable standard that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[101] The Court found California's asserted interests to be insufficient to justify closure because the trial court failed to make adequate findings and did not consider alternatives to closure.[102]

In *Press-Enterprise Co. v. Superior Court (Press II)*,[103] the Supreme Court reversed a magistrate's order sealing the transcript of a forty-one day preliminary hearing in a capital murder trial.[104] The hearing was a recent development of the California criminal law, making historical analysis difficult for the Court. Seven of the justices likened the proceeding to preliminary hearings for criminal trials, which historically were open to the public;[105] two of the justices likened it to a grand jury, which historically was closed to the public.[106] Because the California courts had not considered alternatives to closure, the Supreme Court held that the order was neither "essential to preserve higher values" nor "narrowly tailored to serve that interest."[107]

4. Lower Court Rulings

The U.S. Supreme Court has not considered the First Amendment beyond its application to criminal proceedings,[108] but some lower courts have considered the issue. In *Publicker Industries, Inc. v. Cohen*,[109] the Third Circuit held that "the First Amendment embraces a right of access to [civil] trials" and that "public access to civil trials 'enhances the quality and safeguards the integrity of the factfinding process.'"[110] The Second, Sixth and Seventh Circuits

100. *See id.*
101. *Id.* at 510.
102. *See id.* at 510-11.
103. 478 U.S. 1 (1986).
104. *See id.* at 4-6.
105. *See id.* at 15.
106. *See id.* at 26.
107. *Id.* at 13-14 (quoting *Press I*, 464 U.S. 501, 510 (1984)).
108. *See* Sokol, *supra* note 39, at 895.
109. 733 F.2d 1059 (3d Cir. 1984).
110. *Id.* at 1070 (citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982)).

likewise approved this reasoning.[111] The Fifth Circuit Court of Appeals has not addressed the issue but a Fifth Circuit district court has held that the First Amendment guarantees public access to civil trials.[112] By implication, the Fourth Circuit has approved the existence of the right of access to civil trials.[113] The First, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits have not specifically addressed the issue.[114]

B. State Case Law

1. Minnesota Adult Court Cases

The Minnesota Supreme Court has held that excluding the public from adult criminal proceedings violates the defendant's constitutional right to a public trial.[115] In *State v. Schmit,*[116] a sodomy case, the trial judge excluded over the defendant's objections all but members of the bar and press and the defendant's relatives and friends.[117] Reversing the trial court decision, the supreme court offered numerous arguments for the importance and necessity of public trials. The court stated that "the right to a public trial can scarcely be regarded as less fundamental and essential to a fair trial than the right to assistance of counsel, also granted by the Sixth Amendment."[118] The court explained that right to a public trial is a "limited privilege" subject to the court's power to exclude persons "for the preservation of order and decorum in the courtroom and to protect the rights of parties and witnesses."[119] The court added that:

> Where it appears that minors are unable to testify

111. *See* Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23 (2d Cir. 1984); In re Continental Ill. Sec. Litig., 732 F.2d 1302, 1308 (7th Cir. 1984); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1178 (6th Cir. 1983).

112. *See* Doe v. Santa Fe Indep. Sch. Dist., 933 F. Supp. 647, 651 (S.D. Tex. 1996) (stating, upon review of other circuits, that closed trials are a "serious impairment of the public's ability to scrutinize governmental activity . . . .").

113. *See* Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988) (affirming a right of access to documents filed in a summary judgment motion in a civil defamation case, barring compelling government interest).

114. *See* Sokol, *supra* note 39, at 897.

115. *See* State v. Schmit, 273 Minn. 78, 80-81, 139 N.W.2d 800, 802 (1966).

116. 273 Minn. 78, 139 N.W.2d 800 (1966).

117. *See id.* at 79, 139 N.W.2d at 802.

118. *Id.* at 80, 139 N.W.2d at 803.

119. *Id.*

> competently and coherently before an audience because of embarrassment or fright, temporary exclusion of the public is permissible. Our prior decisions hold that an adult witness may also be protected by temporary exclusion of the public when it appears that embarrassment prevents a full recital of the facts.[120]

The *Schmit* court observed that a majority of jurisdictions defined a "public trial" to mean "a trial which the general public is free to attend."[121] Noting that "[t]he doors of the courtroom are expected to be kept open," the court referenced cases from other states that "reversed convictions obtained at trials where the public was excluded solely on account of the salacious nature of the crime or testimony likely to be given."[122] Though the exclusion orders made exceptions for friends, designated reporters or members of the bar, the orders were struck down in each case.[123] Addressing the case at hand, the supreme court noted that the presence of reporters at the trial would not guarantee "such complete, accurate, and impartial reporting as is necessary to safeguard defendant's rights or protect against judicial oppression . . . ."[124] Moreover, the court was not persuaded that "members of the bar, relatives, and friends can assume either to represent or speak for the entire community interest in securing that kind of judicial administration which is fair both to the accused and the prosecution."[125]

The *Schmit* court stated that "there is a vast difference between a trial from which everyone but a special class of persons is excluded and one which everyone except a designated few is free to attend."[126] The court noted that:

> [The Constitution] contemplates that an accused be afforded all possible benefits that a trial open to the public is designed to assure. Unrestricted public scrutiny of judicial action is a meaningful assurance to an accused that

120. *Id.* at 81-82, 139 N.W.2d at 803-04 (footnotes omitted).
121. *Id.* at 83-84, 139 N.W.2d at 804.
122. *Id.*
123. *See id.* at 83-84, 139 N.W.2d at 804-05; *see also* Davis v. United States, 247 F. 394 (8th Cir. 1917).
124. *Schmit,* 273 Minn. at 83-83, 139 N.W.2d at 804-05.
125. *Id.* at 85-86, 139 N.W.2d at 806.
126. *Id.* at 84, 139 N.W.2d at 804.

> he will be dealt with justly, protected not only against gross abuses of judicial power but also petty arbitrariness. The presence of an audience does have a wholesome effect on trustworthiness since witnesses are less likely to testify falsely before a public gathering. Further, the possibility that some spectator drawn to the trial may prove to be an undiscovered witness in possession of critical evidence cannot be ignored.[127]

In *State v. McRae*,[128] the Minnesota Supreme Court reversed a trial court order closing an adult criminal trial during testimony of a teenage complainant.[129] The complainant was a fifteen-year-old girl who was sexually assaulted after she left a bus in Minneapolis and tried to find a friend's apartment.[130] The trial judge had based the order on Minnesota Statutes section 631.045,[131] which permitted exclusion of the public when the minor is victim and "closure is necessary to protect a witness or ensure fairness in the trial."[132] It held that closing the courtroom was "appropriate in these circumstances, given the fact that she's 15 years old and that she did appear to the Court [in an off-the-record hearing] to be extremely apprehensive about her appearance here today."[133] In overturning the trial court, the supreme court noted that the trial court did not record its interview of the minor and thus "[t]he record does not disclose evidence or findings of a showing that closure was necessary to protect the witness or ensure fairness in the trial."[134]

In *State v. Fageroos*,[135] the defendant was convicted of first degree burglary and first degree criminal sexual conduct. The trial court closed the courtroom during the testimony of the complainant and her sister, both minors.[136] The defendant

127. *Id.* at 806-07 (footnotes omitted).
128. 494 N.W.2d 252 (Minn. 1992).
129. *See id.* at 259.
130. *See id.* at 253.
131. *See id.* at 258.
132. MINN. STAT. § 631.045 (1990). The language of this statutory section has not changed except to update statutory sections referenced therein. *See* MINN. STAT. § 631.045 (1998).
133. *McRae*, 494 N.W.2d at 258.
134. *Id.* at 259.
135. 531 N.W.2d 199 (Minn. 1995).
136. *See id.* at 201.

appealed contending that the trial court committed error.[137] The Minnesota Court of Appeals affirmed on all other issues but remanded to the trial court for "findings to support the closure" of the trial.[138] After the trial court made findings, the defendant again appealed contending that the findings were inadequate to support closure.[139] The court of appeals affirmed.[140] The defendant appealed to the Minnesota Supreme Court, which held that the findings were inadequate to support closure but also decided that the case should be remanded to the trial court so that the state could have the opportunity to try to establish that closure was necessary.[141] If the state could not establish that closure was necessary, the court stated that the defendant would be entitled to a new trial.[142] Justice Tomljanovich dissented, stating that she would have remanded the case for a new trial.[143] She wrote: "I can appreciate that it will be embarrassing and awkward for the alleged victim and her sister to testify with spectators present at the trial; however, that alone is not a sufficient basis on which to deny a public trial."[144]

In *State v. Biebinger*,[145] the defendant appealed from a conviction for criminal sexual conduct in the first degree and sentence as a patterned sex offender. The court of appeals reversed and remanded the case for a new trial holding that the closure had occurred without adequate findings of necessity and availability of other, better alternatives to closure.[146] Citing *State v. Fageroos*,[147] the Minnesota Supreme Court held that the appropriate remedy for the defendant was a remand for an evidentiary hearing regarding the necessity of closure because this hearing might remedy the violation.[148]

The courts have been more restrictive in otherwise open court

137. *See id.* at 200.
138. *See* State v. Fageroos, No. C0-92-1896, at *1 (Minn. Ct. App. July 20, 1993).
139. *See* State v. Fageroos, No. C1-93-2453, at *1 (Minn. Ct. App. May 17, 1994).
140. *See id.*
141. *See Fageroos*, 531 N.W.2d at 203.
142. *See id.*
143. *See id.* (Tomljanovich, J., dissenting).
144. *Id.*
145. 585 N.W.2d 384 (Minn. 1998).
146. *See id.* at 385.
147. 531 N.W.2d 199 (Minn. 1995).
148. *See Biebinger*, 585 N.W.2d at 385.

proceedings when juveniles testify. In *Austin Daily Herald v. Mork*,[149] the Minnesota Court of Appeals upheld an order excluding the public from a criminal trial during the testimony of juveniles, even though reporters were permitted to attend on condition that they not report the names of juveniles or information about previous confidential juvenile proceedings.[150] Mower County District Court Judge James L. Mork ruled that during cross-examination the defendant would be given wide latitude to inquire into the juveniles' prior contacts with the juvenile court system,[151] and thus the cross-examination would result in disclosure of information not generally accessible to the public. The court of appeals held that "[t]he state's interest in protecting the confidentiality of juvenile records and proceedings, while not unlimited, is 'important and substantial.'"[152] Further, the court held "[c]oupled with the compelling governmental interest in safeguarding the physical and psychological well-being of juvenile witnesses, this interest supports the decision to limit access."[153]

In *State v. Bashire*,[154] the state moved for closure of the courtroom during the testimony of two juvenile victims. The defendant did not object and instead agreed to a limited closure.[155] The trial court made no findings of necessity for closure but the court of appeals held that the defendant's failure to object and his agreement waived any error that could be predicated on the lack of findings.[156]

2. *Minnesota Juvenile Court Cases*

The Minnesota Supreme Court considered public access to a juvenile court proceeding in In re *R.L.K., Jr. and T.L.K. v. Minnesota*.[157] Petitions to terminate parental rights of G.T.K. and R.L.K. were filed in December 1977 and February 1978.[158] A

149. 507 N.W.2d 854 (Minn. Ct. App. 1993) (order denying writ of prohibition).
150. *See id.* at 858.
151. *See id.* at 856.
152. *Id.* at 858 (citing Minneapolis Star & Tribune Co. v. Lee, 353 N.W.2d 213, 215 (Minn. Ct. App. 1984)).
153. *Id.*
154. 606 N.W.2d 449 (Minn. Ct. App. 2000).
155. *See id.* at 450.
156. *See id.* at 454-55.
157. 269 N.W.2d 367 (Minn. 1978).
158. *See id.* at 368.

reporter for the *Minneapolis Star and Tribune* attended the start of the juvenile court proceeding.[159] When the parents questioned the reporter's presence, the court replied that "the rules of court allow the press to observe any hearings of that court and . . . that the reporter had agreed not to identify the children in any story."[160] The court added that "the public has a right to know how this Court conducts its business, especially in a Court having as much power as this one."[161]

The parents' attorney objected to the reporter's presence and requested that the hearing be private because "what might come out of this trial might be rather difficult for certain people in this courtroom emotionally."[162] The children's attorney took no position on the reporter's presence but the assistant Hennepin County attorney said that the hearing should be private.[163] The juvenile court responded that the proceedings "should be private but not secret," and the reporter promised on the record not to use the name of anyone and to mask all addresses.[164] The court overruled the parents' objection "on the basis of the 'public's right to know its business' which 'overrides the potential injury that's been mentioned to me.'"[165]

Subsequent to this discussion, the attorneys and court addressed Minnesota Statute section 260.155, subdivision 1.[166] The court stated that "one of the very basic cornerstones of American democracy is the public's right to know how governmental power is being exercised."[167] The court added that "the press, as representative of the general public, does have a direct interest in the work of the Court. It would seem to me the press is clearly under the intent of the Legislature."[168] The court then denied a further motion by the parents to exclude the reporter and the matter was continued so that the parents' attorney could apply for

159. *See id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *See id.*
164. *See id.*
165. *Id.*
166. *See* MINN. STAT. § 260C.163, subd. 1(c) (1998) (formerly codified as Minn. Stat.§ 260.155, subd. 1(c)) (permitting exclusion of all individuals without a direct interest in the case).
167. *In re R.L.K. and T.L.K.*, 269 N.W.2d at 369.
168. *Id.* at 369.

a writ of prohibition with the Minnesota Supreme Court.[169] The day after the above-noted hearing, an article appeared in the newspaper describing the events at the hearing. The article did not identify the children or parents' names or addresses.[170]

On appeal, the Assistant County Attorney took no position on the issue; the children's attorney for the first time argued in favor of excluding the reporter.[171] The newspaper was allowed to proceed *amicus curiae* and participate in oral argument before the supreme court.[172] The issue presented to the court was "whether the juvenile court erred pursuant to Minn. St. 260.155, subd. 1, in denying petitioners' motion to exclude the news media from the juvenile proceeding."[173] Petitioners argued that "the cornerstone of [juvenile court] policy of protecting family ties is the privacy accorded juvenile records and proceedings."[174] They claimed that "to allow news media representatives to attend a juvenile proceeding over the objections of the parties would render the Minnesota juvenile court system indistinguishable from the adult criminal adjudicative process."[175] Petitioners also argued that the juvenile proceedings should be private unless the permission of everyone concerned was obtained.[176]

The Minnesota Supreme Court noted that the juvenile court possessed discretion to admit those who "have a direct interest [in the case] or in the work of the court."[177] It held that "[t]he weight of authority is that the news media have a 'direct interest' in the work of a juvenile court and it is not an abuse of discretion to allow a reporter to be present at a juvenile proceeding."[178] The court noted that:

> The news media have a strong interest in obtaining information regarding our legal institutions and an interest in informing the public about how judicial power in juvenile courts is being exercised. The news media thus

169. *See id.*
170. *See id.*
171. *See id.*
172. *See id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *See id.* at 370.
177. *Id.* at 37.
178. *See id.*

> clearly have "a direct interest . . . in the work of the court" within the meaning of Minn. St. 260.155, subd. 1 . . . .[179]

In 1993, the Minnesota Court of Appeals issued an unpublished opinion denying a writ of mandamus sought by Northwest Publications against the district court judge Anne V. Simonett.[180] The petitioner sought to compel the trial court "to admit a reporter to a hearing on the termination of parental rights, where the reporter's attendance was requested by the mother whose rights were at issue."[181] Ruling against the petition, the court held that the trial court possessed discretion to admit or deny reporters to termination hearings,[182] and that "mandamus may not be used to control judicial discretion."[183]

In *Minneapolis Star and Tribune Co. v. Schmidt*,[184] the Minnesota Court of Appeals granted a writ of prohibition in a case in which the juvenile court: 1) denied the paper's motion to open the pending proceedings; 2) denied the paper's access to juvenile court records about the pending proceeding; 3) prohibited the news media generally from publishing information about the matter; and 4) forbade trial participants from discussing or releasing information about the matter to the media.[185] The *Star Tribune* contested only the third portion of the juvenile court's order, which stated:

> [N]o representatives of the news media shall identify in any story or any news report in any way the identities of any juvenile connected with this case, whether as a party or as a witness; nor, the identity of the Respondent parents involved in this case. That this shall include prohibition on the disclosure or identification of any such person or minor by name, residence, occupation, place of school attendance, foster placement, photographs, sketches, or any reference to previously identified

179. *Id.* at 370-71.

180. *See* Northwest Publications, Inc. v. The Honorable Anne V. Simonett, Judge of District Court, No. C7-93-1968 (Minn. Ct. App. Oct. 6, 1993) (order denying petition for writ of mandamus) (citing Minn. Stat. § 586.01 (1992)).

181. *See id.* at 1.

182. *Id.* (citing *In re* Welfare of R.L.K., Jr., 269 N.W.2d 367, 370 (Minn. 1978)).

183. *Id.* (citing MINN. STAT. § 586.01 (1992)).

184. 360 N.W.2d 433 (Minn. Ct. App. 1985).

185. *See id.* at 434.

characteristics.[186]

Subsequently, the juvenile court amended this provision to include "'the names of all attorneys of record in this case among those persons whose identity shall not be revealed in any story or news report.'"[187]

The issue before the court of appeals was whether the juvenile court erred in prohibiting the news media from publishing information about a pending juvenile court matter when the information was obtained legally from "public records and independent sources."[188] The Minnesota Court of Appeals began its analysis by noting that "the main purpose of the first amendment guarantee of freedom of the press was 'to prevent previous restraints upon publication.'"[189] The court emphasized that "[a]ny prior restraint of speech is reviewed 'bearing a heavy presumption against its constitutional validity.'"[190] Though the juvenile court justified its order by the compelling interest that "one of the children involved would be traumatized by further publicity,"[191] the child's psychiatrist testified that the primary causes of the child's anxiety were "recurrent interrogation and removal from the home."[192]

The court of appeals held that the juvenile court's order was an unconstitutional prior restraint of publication because it "was not 'narrowly tailored' to protect the purported compelling interest."[193] The court stated that a potential increase in a child's anxiety does not constitute a compelling state interest sufficient to justify "a restraint on the publication of information obtained from public records and independent sources."[194] The court stated:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby served. Public records by their very nature are of interest to those

186. *Id.*
187. *Id.*
188. *See id.*
189. *Id.* at 435 (citing Near v. Minnesota, 283 U.S. 697, 713 (1931)).
190. *Id.* (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).
191. *Id.*
192. *See id.*
193. *Id.* at 436.
194. *Id.*

> concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.[195]

3. Other States' Case Law

The Ohio Supreme Court, New Jersey Supreme Court and a panel of the California Court of Appeal have considered public access to dependency court hearings. The Ohio Supreme Court[196] and a panel of the California Court of Appeals[197] considered and rejected a First Amendment right to attend dependency court proceedings. The New Jersey court, however, expressly held that the public's right to attend civil trials encompasses the qualified right to attend dependency cases.[198]

4. Conclusion

Federal and state cases strongly support open public trials. Even limited restrictions upon public attendance are met with vehement objections by defense counsel and strong disapproval by appellate courts. If adults deserve the protection offered by a public trial, why should children not be afforded the same safeguards? If we assume that the foremost function of juvenile court child protection proceedings is the protection of children, it follows that the proceedings themselves should be geared to serve children above everyone else. We should not assume that closed proceedings run by the child protection stakeholders adequately protect children, when we insist that only public trials will protect adult criminal defendants from judicial oppression and prosecutorial abuse.

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195. *Id.* (citing Cox Broad. Corp. v. Cohn. 420 U.S. 469, 495 (1975)).

196. *See In re* T.R., 556 N.E.2d 439, 447 (Ohio 1990).

197. *See* San Bernadino County Dep't of Pub. Soc. Servs. v. Superior Court, 283 Cal. Rptr. 332, 334 (Ct. App. 1991).

198. *See* New Jersey Div. Of Youth & Family Servs. v. J.B., 576 A.2d 261, 270 (N.J. 1990).

IV. MINNESOTA'S PILOT PROJECT FOR OPEN JUVENILE PROCEEDINGS

In summer 1995, the Minnesota Supreme Court established the Foster Care and Adoption Task Force,[199] comprised of thirty-one members and several unofficial adjunct members to consider, among other issues, whether Minnesota should open its child protection hearings.[200] The Task Force was chaired by Judge Edward Toussaint, Jr., Chief Judge of the Minnesota Court of Appeals, and Chief Justice Kathleen A. Blatz of the Minnesota

199. *See* Minn. S. Ct. Order No. C2-95-1476 (Oct. 1995).

200. The members included: Gail D. Baker, Assistant Public Defender, Third Judicial District; Honorable David R. Battey, District Court Judge, Seventh Judicial District; Honorable Robert A. Blaesser, District Court Judge, Fourth Judicial District; John Blahna, Guardian Ad Litem, United Way; Gail Chang Bohr, Executive Director, Children's Law Center of Minnesota; Susan Carlson, Referee, Fourth Judicial District, and First Lady of Minnesota; Gary A. Debele, Walling and Berg, Minneapolis; Anita Fineday, Attorney, Walker, Minnesota; Julie K. Harris, Assistant Minnesota Attorney General; Susan Harris, Assistant Washington County Attorney; Mary Jo Brooks Hunter, Adjunct Professor and Clinical Instructor, Hamline Law School; Chief Justice for the Ho Chunk Nation Supreme Court; Sheryl Ramstad Hvass, Rider, Bennett, Egan and Arundel, Minneapolis (now Minnesota Commissioner of Corrections); Kristine Kolar, Chief Public Defender, Ninth Judicial District; Senator David L. Knutson, Minnesota Senate; Dr. C. L. Moore, Pediatric and Family Psychology Center; Irene Opsahl, Attorney, Legal Aid of Minneapolis; Chris Reardon, Assistant Ramsey County Attorney; Denise Revels Robinson, Director, Family and Children's Services Division, Minnesota Department of Human Services; Donald F. Ryan, Crow Wing County Attorney; Dr. David Sanders, Director, Hennepin County Child and Family Services; Honorable Heidi S. Schellhas, District Court Judge, Fourth Judicial District; Representative Wes Skoglund, Minnesota House of Representatives; Susanne Smith, Hennepin County Guardian Ad Litem Program Supervisor; Erin Sullivan Sutton, Interim Director, Family and Children's Services Division, Minnesota Department of Human Services; Representative Barbara Sykora, Minnesota House of Representatives; Professor Esther Wattenberg, Center for Urban Affairs. The unofficial adjunct members included: Mark R. Anfinson, Attorney, Minneapolis; Honorable Lindsay Arthur, Retired District Court Judge; Susan Bownes, Hennepin County Juvenile and Family Courts Manager; Diane Daehlin, Executive Director, Children's Home Society; Don Gemberling, Minnesota Department of Administration; Honorable Roland Faricy, District Court Judge, Second Judicial District; Susan Gegen, Assistant Public Defender, First Judicial District; Jacquelyn Hauser, Executive Director, W.A.T.C.H.; Michael Johnson, Staff Attorney, State Court Administration; John Kane, Assistant Hennepin County Public Defender; Honorable Leslie M. Metzen, District Court Judge, First Judicial District; Andrew Mitchell, Assistant Hennepin County Attorney; Warren Sagstuen, Assistant Public Defender, Fourth Judicial District; Marian Saksena, Law Clerk, Children's Law Center of Minnesota; Ted Stamos, Children's Home Society; Mark Toogood, Guardian Ad Litem, Hennepin County Guardian Ad Litem Program. *See* MINNESOTA SUPREME COURT FOSTER CARE & ADOPTION TASK FORCE, FINAL REPORT 1-3 (1997) [hereinafter TASK FORCE REPORT].

Supreme Court.[201] Justice Sandra Gardebring of Minnesota Supreme Court served as the Supreme Court liaison. The task force was divided into two committees and eight subcommittees. I served as chairperson of the "Open Hearings" subcommittee.[202]

In January 1997, a majority of the Task Force recommended that hearings involving children in need of protection or services (CHIPS) and termination of parental rights be open to the public, similar to criminal proceedings.[203] In other words, they should be presumed open to the public in the absence of "exceptional circumstances."[204] The Task Force also recommended public access to the corresponding juvenile file, except for certain documents and reports.[205] A majority of the Task Force believed that the juvenile protection system was a "closed system" that was not accountable to the public.[206] A majority also believed that the closed system concealed abuses and insufficient funding within the system.[207]

Four Task Force members who opposed open child protection hearings submitted a minority report.[208] The minority believed that children would suffer "emotional harm and embarrassment" from media exposure of family secrets.[209] Minority members worried that incest victims would be more reluctant to report abuse because of embarrassment with family and friends.[210] Those members also expressed fears that exposure of family dysfunction might deter rehabilitation and reunification of families, and that parents would be reluctant to make admissions in court.[211] The minority also

201. TASK FORCE REPORT, *supra* note 200, at 2. At the time of the Chief Justice Blatz's service on the Task Force, she served as a district court trial judge in the Fourth Judicial District (Hennepin County). She was appointed to the Minnesota Supreme Court as Justice in April 1996 and promoted to Chief Justice in January 1998.

202. *See id.* at 2. One of the Task Force's charges was to assess "whether open hearings in juvenile court matters (other than delinquency) protection cases are desirable and suggest models for these hearings." *Id.* at 4.

203. *See id.* at 120.

204. *Id.* at 123.

205. *See id.* at 124. The Final Report recommended excluding documents that would cause the child emotional or psychological harm or would reveal the identity of informants. *See id.*

206. *See id.* at 120.

207. *See id.*

208. *See id.* app. at D-1.

209. *See id.*

210. *See id.*

211. *See id.* app. at D-2.

expressed concern that the media would not portray an accurate picture of cases or the child protection system, and that special interest groups and disenfranchised family members might use the media to further their purposes at the expense of the children.[212]

The Task Force issued its recommendations to the supreme court[213] and bills were introduced in the House and Senate.[214] The House Judiciary Committee, chaired by Rep. Wes Skoglund, DFL-Minneapolis, heard testimony and recommended a pilot project.[215] Although the House passed a bill by a substantial majority to include all districts in a pilot project, the Senate passed a bill allowing only limited access.[216] Before the House bill passed, the Conference of Chief Judges voted to recommend against a pilot project opening child protection hearings to the public. Ultimately, the legislature did not pass legislation authorizing open child protection hearings on a permanent basis or through a pilot project.

Shortly thereafter, the Minnesota Supreme Court asked the Conference of Chief Judges to revisit the issue of a pilot project. The Conference of Chief Judges did revisit the issue and recommended that the court establish rules for a pilot project in certain limited jurisdictions in which child protection proceedings would be presumed open. This recommendation was made subject

212. *See id.*

213. The timing of the final report of the Task Force, January 1997, is noteworthy, especially for the purpose of dispelling what appears to be a widespread erroneous belief that the impetus to open child protection proceedings resulted from the death of a three-year-old girl, Desi Irving. Prior to her death, a child protection proceeding involving Desi had been dismissed. Desi died at the hands of her mother on February 7, 1997. At the time of her death, she was covered with cuts and cigarette burn marks and had a bruised forehead. According to a neighbor who tried to resuscitate Desi, she was so thin, her ribs could be seen. *See* Jim Adams, *Mother is Held in Slaying of 3-year-old Girl*, STAR TRIB. (Minneapolis-St. Paul), Feb. 8, 1997, at B1. The Task Force issued its final report in January 1997, before Desi's death, and without any knowledge of her circumstances. However, it might be true that "Desi's murder [in 1997] and unanswered questions about whether the system had failed her, whether social workers should have known about the failures of a mother who had failed before, became a catalyst for [the open child protection hearings pilot project]." Chris Graves, *A Child's Death Opens Window to Child Protection*, STAR TRIB. (Minneapolis-St. Paul), June 14, 1998, at A1.

214. *See* JOURNAL OF THE HOUSE, 80th Legis. Sess. 89 (Minn. 1997) (introducing H.F. 254, 80th Legis. Sess. (Minn. 1997)); JOURNAL OF THE SENATE, 80th Legis. Sess. 371 (Minn. 1997) (introducing S.F. 855, 80th Legis. Sess. (Minn. 1997)).

215. *See* JOURNAL OF THE HOUSE, 80th Legis. Sess. 329-30 (Minn. 1997).

216. *See* JOURNAL OF THE HOUSE, 80th Legis. Sess. 3451-52, 3929 (Minn. 1997); JOURNAL OF THE SENATE, 80th Legis. Sess. 1718 (Minn. 1997).

to the conditions that: 1) Hennepin County would be included in the pilot project and other jurisdictions to be included would be representative of urban, rural, metro and out-state, with the advice of the Conference of Chief Judges; 2.) the pilot project would last three years with an independent evaluation to commence after one year; 3.) the independent evaluation would focus on whether the pilot project succeeds in greater accountability and public awareness, whether children have been adversely affected by the open CHIPS proceedings or public access to court files, and whether the media have been responsible in reporting CHIPS files in the name of parents, not the children; 4.) names, contents and public accessibility of files would be dealt with in certain defined ways; and 5.) child protection hearings would be presumed open and could be closed or partially closed by a judge only in exceptional circumstances with a request by all parties to close a hearing to be a factor to be used by presiding judges in determining whether exceptional circumstances exist. On January 6, 1998, the Conference of Chief Judges approved the recommendations of the Subcommittee on Open CHIPS Report and Recommendations.

The Minnesota Supreme Court authorized each of the ten judicial districts to conduct a three-year pilot project in one or more counties designated by the chief judge of the district,[217] using open hearings in juvenile court proceedings involving: child in need of protection or services, including permanent placement proceedings, termination of parental rights proceedings and subsequent state ward reviews.[218] The pilot project would begin June 1, 1998, and continue until June 2001.[219] The Minnesota Supreme Court ordered that "[o]pen proceedings authorized pursuant to this order shall be presumed open and may be closed or partially closed by the presiding judge only in exceptional

217. *See* Amended Order Establishing Pilot Project on Open Hearings in Juvenile Protection Matters, File No. C2-95-1476 (Minn. S. Ct., filed Feb. 5, 1998), *in* BENCH & B. OF MINN., Mar. 1998, at 41 [hereinafter Pilot Project Order]. The counties participating in the pilot project are: Goodhue and LeSueur (First Judicial District); Houston (Third Judicial District); Hennepin (Fourth Judicial District); Watonwan (Fifth Judicial District); St. Louis (Sixth Judicial District); Clay (Seventh Judicial District); Stevens (Eighth Judicial District); Marshall, Pennington and Red Lake (Ninth Judicial District); and Chisago (Tenth Judicial District). *See* REQUEST FOR REVISED PROPOSALS: EVALUATION OF OPEN HEARINGS IN JUVENILE PROTECTION MATTERS, STATE CT. ADMIN'R, MINN. SUP. CT. 6 (1998).

218. *See* Pilot Project Order, *supra* note 217, at 41.

219. *See id.*

circumstances."[220] The court discussed evaluation of the pilot projects and established the Minnesota Supreme Court Advisory Committee on Open Juvenile Protection Hearings[221] "to consider and recommend rules regarding public access to records relating to open juvenile protection hearings."[222] The advisory committee filed its recommendations by the April 15, 1998 deadline[223] and on May 28, 1998, the supreme court adopted a Rule on Public Access to Records Relating to Open Juvenile Protection Proceedings.[224]

In summer 1998, the Minnesota Supreme Court asked the advisory committee to assist in the selection of an independent evaluator of the pilot project and serve as consultant to the chosen evaluator.[225] In February 1999, the National Center for State Courts (NCSC) was chosen to conduct the evaluation.[226] In July, August and September, 1999, the NCSC conducted site visits to review

220. *Id.*

221. The members of the Supreme Court Advisory Committee on Open Juvenile Protection Hearings are: Honorable Heidi S. Schellhas (chair), District Court Judge, Fourth Judicial District; Mark Anfinson, Esq.; Candace J. Barr, Niemi & Barr, PA; Kate Fitterer, President, Minn. Assoc. of Guardians *Ad Litem*; Honorable Donovan W. Frank, District Court Judge, Sixth Judicial District (Judge Frank has since been appointed to the federal bench in the District of Minnesota and has resigned from the Advisory Committee); Susan Harris, Assistant Washington County Attorney; Mary Jo Brooks Hunter, Adjunct Professor and Clinical Instructor, Hamline School of Law; Tom Hustvet, Social Servs. Director, Houston County; Honorable Gregg E. Johnson, District Court Judge, Second Judicial District; Marietta Johnson, Deputy Court Administrator, St. Louis County; Deb Kempi, Ct. Manager, Juvenile Court, Fourth Judicial District (now replaced by her successor, Anna Lamb); Honorable Thomas G. McCarthy, District Court Judge, First Judicial District; Honorable Gary J. Meyer, Chief Judge of District Court, Tenth Judicial District; Richard Pingry, Section Supervisor, Protection and Intervention Servs., St. Louis County Soc. Servs. Dep't; Warren Sagstuen, Assistant Pub. Defender in Hennepin County; Dr. David Sanders, Dir. of Hennepin County Dep't of Children and Family Servs.; Honorable Terri J. Stoneburner, District Court Judge, Fifth Judicial District; Erin Sullivan Sutton, Minn. Dep't of Human Servs.; and Mark Toogood, Hennepin County Guardian *Ad Litem* Program. *Id.*

222. *Id.*

223. *See* Order Promulgating Rule on Public Access to Records Relating to Open Juvenile Protection Proceedings, File No. C2-95-1476 (Minn. S. Ct., filed May 28, 1998), *in* BENCH & B. OF MINN., July 1998, at 40 [hereinafter Access Order]. The Access Order and Advisory Committee comments have been reprinted in the following two sources: MINN. JUV. CT. R., Rule on Public Access to Records Relating to Open Juvenile Protection Proceedings (1998); MINN. STAT. ch. 260 (1998).

224. *See* Access Order, *supra* note 223, at 40.

225. *See* Pilot Project Order, *supra* note 217, at 41.

226. *See* Order Authorizing Access to Records and Proceedings of Open Hearings Pilot Project, File No. C2-95-1476 (Minn. S. Ct., filed July 6, 1999), *in* BENCH & B. OF MINN., Aug. 1999, at 47-48.

court files, observe hearings and interview judicial system stakeholders such as judges, county attorneys, public defenders, social workers, guardian *ad litems* and court administrators. The NCSC has collected data from early October 1999 and will submit a progress report to the advisory committee in February 2000. Data collection will continue through the end of the three-year pilot project on June 18, 2001.

V. RECEPTION OF THE PILOT PROJECT

Commencement of the pilot project aroused controversy among professionals involved in child protection hearings.[227] Watonwan County District Judge Terry Dempsey worried that exposure of "the gory details" of child abuse cases would harm children in small communities.[228] Watonwan County Public Defender John Docherty believed that open child-protection hearings would expose families whose main offense was poverty: "These people are at a vulnerable point in their lives.... Embarrassing them will not be helpful."[229] On the other hand, Le Sueur County child protection investigator Victor Atherton argued that publicity would inform local communities of the problems in their midst: "[P]eople can't fathom some of the things that occur.... Our whole department is in favor of open hearings."[230] Atherton noted that he has investigated children of the children he investigated years ago.[231] Watonwan County Attorney Todd Kosovich also supported open hearings, arguing that they would help recruit neighbors and relatives to assist children by offering to serve as foster parents or guardians.[232]

On the first day of the pilot project, the *Star Tribune* reported that "[t]he day overflowed with grim, tearful parents and harried officials with dockets far bigger than the available hours."[233] Judge John Stanoch, then Chief Judge of Juvenile Court in Hennepin County, responded: "That's just a daily fact of life down here—and it's getting worse.... It won't be a bad thing at all if we get some

227. *See* James Walsh, *Open Juvenile Court Raises Concern*, STAR TRIB. (Minneapolis-St. Paul), June 21, 1998, at B1.
228. *See id.*
229. *Id.*
230. *Id.*
231. *See id.*
232. *See id.*
233. Bob von Sternberg, *Juvenile Court Proceedings Open to Public Scrutiny*, STAR TRIB. (Minneapolis-St. Paul) June 23, 1998, at A1.

publicity and the public gets a sense of the volume and nature of the work we have to do."[234]

On the second day of the pilot project, a Hennepin County judge expelled reporters from a parental rights hearing of a Chicago woman whose three children died under suspicious circumstances.[235] The case had proceeded behind closed doors for two years and the judge believed that opening the hearing then would prevent journalists from adequately assessing the case.[236] The judge also expressed serious concern about "leaks of confidential information to the *Chicago Tribune* and an attempt by a KSTP-TV, Channel 5, reporter to 'invade the privacy' of the mother and her children by trying to interview her at her apartment [the previous week]."[237] An attorney for the *Star Tribune* requested that the judge delay the hearing to provide an opportunity for objections but the judge declined.[238] Calling the decision "outrageous," the attorney argued that judges should not close hearings on grounds that journalists lack familiarity with the prior history of a case.[239] "They are sitting in the editor's chair when they make a judgment like that. . . . They are substituting their judgment as to whether we can understand the context. That's just out of line."[240]

The *St. Paul Pioneer Press* expressed greater tolerance for the judge's decision to exclude the press.[241] The editor noted that the judge was "a supporter of opening most child protection proceedings" and had "announced that a transcript of the closed hearing [would] be provided, and that future proceedings in this case would be open."[242] The newspaper concluded that the decision should not "distract attention" from the pilot project's goal "to provide more public scrutiny of child protection services

234. *Id.*

235. *See* Randy Furst, *Judge Ejects Media From Child Protection Hearing on Day Two of Court Experiment*, STAR TRIB. (Minneapolis-St. Paul) June 24, 1998, at B1.

236. *See id.*

237. *Id.*

238. *See id.*

239. *See id.*

240. *Id.*

241. *See Open Children's Cases to Scrutiny: Ruling for Secrecy Frustrating but Logical*, PIONEER PRESS (St. Paul), June 26, 1998, at A10. ("Making the transition from a closed to an open system presents temporary challenges, and defining those circumstances where closed proceedings will still better serve the interests of children will take time.").

242. *Id.*

and court proceedings, and to better inform the public about the troubling circumstances faced by many children in our community."[243]

On June 29, 1998, only days after the controversial start of the pilot program, the U.S. Department of Health and Human Services issued a memorandum stating that federal rules prohibited child protection workers from speaking about or disclosing information about troubled families in open court if a hearing was open to the public.[244] The memorandum contained at least a veiled threat that federal funding was at risk if the rules were violated.[245] In July 1998, on the basis of this memorandum, public defenders began arguing that the pilot project threatened approximately $60 million in federal money for child protection, foster care and adoption services.[246] Their argument proved unsuccessful.[247] Judges in Hennepin County responded to the arguments by citing a Minnesota Supreme Court staff memorandum[248] demonstrating that the federal rules permitted release of information about troubled families once it was submitted to a court.[249] On July 16, 1998, the Minnesota Supreme Court issued a press release stating that the pilot project did not violate federal law.[250] The court noted that other states had conducted open child protection proceedings for years without adverse federal funding effects.[251] By July 28, 1998, federal officials backed off of their interpretation of the rules, making it clear that the $60 million in federal funding was not in jeopardy.[252]

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243. *Id.*

244. *See* James Walsh, *Federal Rules May Close Juvenile Court,* STAR TRIB. (Minneapolis-St. Paul) July 16, 1998, at A1.

245. *See id.* (noting that although the memo does not threaten any sanctions, it does state that a violation of federal confidentiality rules will make a state ineligible for federal money).

246. *See* James Walsh, *Judges Refuse to Close Juvenile Hearings,* STAR TRIB. (Minneapolis-St. Paul), July 17, 1998, at B1.

247. *See id.*

248. *See* State Court Administrator's Office, Advisory Committee Briefing Paper: Federal Educational Rights and Privacy Act (FERPA) + Individuals With Disabilities Education Act (IDEA) (1998) (on file with author).

249. *See* Walsh, *supra* note 246, at B1.

250. *See* Rebecca Fanning, Minnesota State Supreme Court Information Officer, Press Release Regarding U.S. DHHS June 29, 1998 Memorandum (July 16, 1998) (on file with author).

251. *See id.*; *see also* James Walsh, *Child Protection Experiment Safe,* STAR TRIB. (Minneapolis-St. Paul), July 28, 1998, at B1.

252. *See* Walsh, *supra* note 246, at B1.

After the pilot project's one-year anniversary, the *Minneapolis Star Tribune* noted that "the greatest fear—that troubled children would be victimized and embarrassed by sensationalized new media coverage and community scorn—has yet to be realized."[253] Participants noted very few problems with the open hearing project, but expressed disappointment about how few people, including members of the media, attended hearings.[254] The decision to assign a reporter to cover juvenile court on a regular basis is an expensive decision for any newspaper, especially during a pilot project. Newspapers are faced with a "Catch 22." If a newspaper does not assign a reporter to cover juvenile court on a regular basis, its reporter may misreport cases because of insufficient familiarity with the procedures and substantive events taking place at child protection hearings. On the other hand, if a newspaper maintains a regular juvenile court reporter who becomes proficient in covering child protection proceedings, it will waste valuable resources if the hearings are closed after the pilot project ends.

Opening child protection hearings has produced numerous changes. All insiders, including the court, know that extra effort must be made to speak in terms understandable to outsiders, such as members of the public, press or a court-monitoring organization. Many additional persons, mostly relatives, now attend child protection proceedings. At a number of hearings, the gallery has looked like a church wedding with the bride's relatives on one side of the aisle and the groom's relatives on the other side. I am heartened to see relatives in the courtroom, even when they are not on speaking terms with each other. Their actions show that that they care so much about the children that they not only have taken the time to come to court, but also have endured contact with people they do not like. Raising healthy and happy children "takes a village," and the more people seated in my courtroom gallery, the better. Furthermore, though a parent might be angry or embarrassed when "dirty laundry" is aired, I have not observed a single case in which that embarrassment or anger caused the parent to abandon a reunification plan.[255]

253. David Chanen, *Child Protection System's Opening Creates Few Ripples,* STAR TRIB. (Minneapolis-St. Paul), June 22, 1999, at A1.

254. *See id.*

255. On the basis of anecdotal information, I understand that one judge in Hennepin County presided over a case involving a death of a child where the

VI. NEED FOR CONTINUED OPEN HEARINGS

Opening the doors to child protection proceedings produces benefits in three areas. First, it serves the best interests of the children who are the subjects of the proceedings. Second, it increases resources—namely witnesses—and encourages them to provide a more accurate picture of the children's circumstances. Third, open hearings provide a monitoring mechanism for the child protection system and it stakeholders, including judges.

A. Best Interests of the Children

Children benefit from the presence of extended family members, neighbors and family friends. Parents are less likely to deny a drug or alcohol addiction if they know that observers are present who can dispute their denials. Additionally, these family and friends often volunteer to serve as placements for children, sparing children the trauma of being placed with strangers. They often are the very people who are able to intervene on behalf of the children when the children are returned to their parents' custody. These people watch for warning signs of a parent's chemical dependency relapse or abusive or neglectful behavior. The more eyes watching and ears listening in a child's life, the greater the chance that a child will be rescued from abuse or neglect.

Open child protection proceedings may also assist the psychological recovery of the abused children.[256] As one commentator notes, "victims of abuse often carry their burden alone, in secret," and closed proceedings simply "continue the notion that something shameful has happened, and that no one should be told."[257] Open hearings can bring a sense of relief to victimized youths. The cathartic effect of disclosure brings to mind discussions among the members of the Minnesota Supreme Court Foster Care and Adoption Task Force in 1997.[258] One task force

media attention allegedly caused a mother to abandon efforts to be reunited with her remaining children. Apparently, a television photographer followed the mother down the sidewalk attempting to elicit comments from the mother. A policy at the Hennepin County Juvenile Justice Center in existence since before the pilot project prohibits the use of cameras, still or video, in the building. Judges and referees routinely waive the prohibition in adoption proceedings, at the request of participants.

256. *See* Sokol, *supra* note 39, at 924 (citations omitted).

257. *Id.*

258. Personal recollection of the author.

member bemoaned recent newspaper publicity of a sexual abuse case because the article, by naming the adult defendant, enabled some readers to determine the identities of the juvenile victims. The task force member, an assistant county attorney, described it as re-victimizing the juveniles. Another member, an attorney who represented the juveniles, explained that the publicity generated support for the victims and validated the seriousness of the wrongs committed against them. About the same time, a suburban Minneapolis high school girl who reported severe sexual and physical abuse by her parents approached a *Minneapolis Star Tribune* reporter and asked to be interviewed about her experience. She wanted other children and the public to know what can happen in a home and to encourage them to report their own experiences. Keeping the courtroom doors closed to the public in child protection proceedings is one of the many hidden cruelties in child-rearing. We become part of the problem, rather than part of the solution, when we perpetuate family secrets about abuse and neglect.

B. Increased, Better Resources

One commentator recognized that factual questions arising in child protection proceedings "are among the most difficult, and most sensitive, litigated in American courtrooms."[259] The U.S. Supreme Court has emphasized the considerable risk of error arising from such cases.[260] However, "public access enhances reliability of judicial fact finding."[261] Witnesses are less likely to testify falsely before the public.[262] Important witnesses unknown to the parties might come forward voluntarily to testify.[263] An unknown, uninvolved spectator may be the defense's vital witness.[264] Public access cases consistently point out that "public attendance

259. *See* Sokol, *supra* note 39, at 913 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987)).

260. *See* M.L.B. v. S.L.J., 519 U.S. 102, 104 (1996) (extending the right to a free transcript to an indigent appealing termination of her parental rights).

261. Sokol, *supra* note 39, at 913.

262. *See* State v. Schmit, 273 Minn. 78, 86-87, 139 N.W.2d 800, 806-07 (1966).

263. *See* United States v. Kobli, 172 F.2d 919, 921 (3d Cir. 1949); *see also* Tanksley v. United States, 145 F.2d 58, 59 (9th Cir. 1944) (stating that one of the main purposes of a public trial is to advertise the event such that persons with knowledge of the facts will come forward to testify).

264. *See Kobli*, 172 F.2d at 923.

discourages perjury and encourages full disclosure by witnesses."[265] Increasing the trustworthiness of witnesses and enhancing the reliability of the system and judicial fact finding are in the best interests of all children who become the subjects of child protection proceedings.

C. *Monitoring Mechanisms*

Public access to child protection proceedings should, over time, significantly enhance the system's responsiveness and court procedure. The key benefit of public access to child protection proceedings is accountability. The child protection system and court proceedings are "currently insulated from informed criticism by the rule of confidentiality, and 'criticism is valuable in direct relation to the degree it is informed.'"[266] When child protection proceedings are not open to the public, the public learns only what the stakeholders choose to disclose. Such disclosure will occur only as a result of the stakeholders' own interests, and not because of "the public's or the child's interest," because the stakeholders "are the individuals with the greatest incentive to maintain the status quo."[267] Public access permits the press and public to observe child protection stakeholders and monitor any abuses. "An injustice committed in private is a very different thing than an injustice committed under the watchful eye of even one disinterested observer," and public access will grant an opportunity for many watchful eyes to safeguard the child protection process.[268]

Although some stakeholders in the child protection system insist that they conduct themselves no differently in the courtroom when people whom they do not know are present, my personal observations suggest otherwise. When the courtroom gallery contains people that the stakeholders believe to be representatives of the media or a court monitoring organization, the stakeholders conduct themselves more professionally, explaining the facts in the cases and their clients' positions with greater thoroughness and care.

Public scrutiny also should serve as a salutary restraint upon the broad discretion possessed by juvenile court judges. Public

265. Sokol, *supra* note 39, at 913.
266. Globe Newspaper Co. v. Fenton, 819 F. Supp. 89, 94 (D. Mass. 1993).
267. Sokol, *supra* note 39, at 921-22.
268. *Id.* at 922.

trials help to prevent not only gross abuses of judicial power but also lesser evils such as indolence or petty arbitrariness.[269] In no other area of the law is the court vested with more decision-making discretion than in child protection proceedings. Child protection proceedings tend to be one-sided contests between a powerful state and parents from the most powerless segments of our society.[270] The danger of discretionary abuse is magnified by the fact that child protection decisions rarely undergo appeal, a major check to judicial error and unfairness.[271] Public access would safeguard parents and children from judicial abuses of discretion. As one decision noted, "[i]n acting under the public gaze, [judges] are more strongly moved to a strict conscientiousness in the performance of duty. In all experience, secret tribunals have exhibited abuses which have been wanting in courts whose procedure was public."[272]

Further, publicity would likely have a salutary effect on judicial and litigant behavior.[273] In modern child protection proceedings, at least in Hennepin County, the state and the parents engage in full adversarial contests. If both sides are aware of the public scrutiny, the adversarial contest also would remain a contest of civility.

State court administrations should mandate that all juvenile court judges receive high-quality training regarding their responsibilities under the federal child protection Acts.[274] In districts where juvenile court cases comprise only a portion of judicial caseloads, all judges should receive this type of education. The training should cover the purposes and requirements of the

269. *See Kobli*, 172 F.2d at 921. "The knowledge that every criminal trial was subject to contemporaneous review in the forum of public opinion was regarded as an effective restraint on possible abuse of judicial power." *Id.*

270. *See* Lassiter v. Department of Soc. Servs., 452 U.S. 18, 30 (1981) ("The parents are likely to be people with little education who have an uncommon difficulty in dealing with life, and who are at the hearing thrust into a distressing and disorienting situation.").

271. *See* M.L.B. v. S.L.J., 519 U.S. 102, 104 (1996) (stating that "appeals are few" in parental status termination cases); *see also* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letter: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 102 (1991) (discussing how open trial proceedings improves the character and judgment of the citizenry).

272. Publicker Indus. Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1983) (quoting 6 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1834, at 438 (J. Chadboum rev. 1976)).

273. *See id.* at 916.

274. *See* Section II.B., *supra.*

Acts, the impact of the Acts on children and families, and the necessity of adequate findings to meet federal requirements for funding.[275] Juvenile court judges possess considerable impact on the delivery of social services to children and families. Judges can advocate additional services as well as timely delivery of existing services. By closely monitoring the performance of social service agencies, juvenile court judges will stave off public criticism of their own work.[276]

D. Conclusion

Minnesota will not be alone if it decides to open child protection hearings on a permanent basis. Many jurisdictions have adopted statutes or court rules that require or permit public access to juvenile courts in child protection hearings, including Arizona, Arkansas, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Michigan, Nebraska, New York, North Carolina, Ohio, Oregon, Texas and Washington.[277]

If juvenile court proceedings are closed to the public, how does anyone know whether social service agencies effectively deliver services to needy children and families or whether juvenile court judges properly monitor the work of the social service agencies? A spectacular case occasionally receives media attention when a reporter obtains information from a related adult criminal proceeding or a party litigant. Such cases, however, provide only narrow and skewed pictures of the child protection system. With that exception, the public virtually has known nothing about juvenile court and social service agencies as they relate to child protection. This lack of knowledge has resulted from the exclusion of the public and press from juvenile court child protection proceedings.

VII. CONCLUSION

On August 18, 1997, prior to commencement of the pilot project for open child protection hearings, the *Star Tribune* published an editorial titled "Abuse and Apathy," which addressed the death of Desi Irving in February 1997.[278] Audrey D. Saxton, a

275. *See* Edwards, *supra* note 41, at 12.
276. *See id.* at 13.
277. *See* Walsh, *supra* note 227, at B1.
278. *See Abuse and Apathy: Looking at a Little Girl's Life*, STAR TRIB. (Minneapolis-

child protection worker since 1985, responded with a "Counterpoint" article published twelve days later.[279] It is one of the most compelling pieces I have read in support of open child protection hearings. Saxton wrote:

> Sometimes decisions that are literally life and death to children are made without full knowledge or deliberation due to the inattention of the judge, the fraternity mentality of the attorneys or the incompetence of the social worker. And sometimes even the brightest, most experienced and dedicated public servants don't know what's best.
>
> . . . .
>
> Until we decide that juvenile court hearings should be open to public scrutiny with protection of the identities of the children, things will continue as they are. Until we decide that funding streams will no longer determine policy within our social institutions, kids will be kept in or returned to homes that are deadly harmful. And until we change the laws that effectively grant parental rights to their children over the children's rights to health and safety, we will have more Desis.[280]

Almost seventeen months have passed since the open child protection hearings pilot project began. Based upon personal observation and experience, it is fair to opine that, at least in Hennepin County, none of the opponents' concerns have come to fruition. Opponents to open hearings believe that it is unethical to subject some children to this pilot while the impact is being studied, especially when the families involved in child protection are primarily poor. Many factors contribute to parental abuse of children, including the parents' own histories of childhood neglect. These parents deserve to be treated with compassion in the child protection system. Our sympathy, however, must not

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St. Paul), Aug. 18, 1997, at A10 ("[There are] preposterous confidentiality rules that govern child-protection cases—rules the Legislature declined to loosen this past session. The secrecy surrounding these cases might shield a few abusive parents or bungling officials from shame, but it does nothing for children like Desi . . . .").

279. *See* Audrey D. Saxton, *The Flaws that Get in the Way of Child Protection*, STAR TRIB. (Minneapolis-St. Paul), Aug. 30, 1997, at A23.

280. *Id.*

extend to excuses for child abuse or neglect. As a civil and decent society, we cannot condone the abuse and neglect of children, regardless of its causes. More importantly, we cannot condone a system that promotes secrecy of that abuse and neglect.

Criticism of the media may have some justification, but it is not sufficient to override the benefit it provides in shedding light on the system. Is the media likely at some point to make an error in judgment that would result in hurting a child? Yes, but even such a mistake should not serve as a reason to terminate the pilot project.

> Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression . . . .[281]

The child protection system is an institution as important, if not more important, than any other public institution. Those involved in the child protection system are responsible for our nation's most precious resource—children. The public and the press must insist upon public access to this system to hold it accountable to society and to the children.

281. Near v. Minnesota, 283 U.S. 697, 718 (1931).