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## The Closed Door: A Need for Reform of the California Mandatory Closure Rule in Child Custody Cases Predicated on Parental Abuse

As a general rule, American jurisprudence requires all judicial proceedings to be accessible and open to the public.<sup>1</sup> This rule is deeply embedded in common-law traditions carried over from England<sup>2</sup> and historically is applicable in both civil and criminal settings.<sup>3</sup> In the civil arena, the open trial policy is guided by common law<sup>4</sup> and statute.<sup>5</sup> Publicity of criminal trials is a common-law tradition<sup>6</sup> with the additional support of the United States and California Constitutions.<sup>7</sup> Under both constitutions, the "public trial" right is expressly guaranteed the criminal defendant.<sup>8</sup> The interest of the criminal defendant, however, is not the only factor considered in determining whether the public may gain access to the proceedings.

Two recent cases decided by the United States Supreme Court, *Richmond Newspapers, Inc. v. Virginia*<sup>9</sup> and *Globe Newspaper Co. v. Superior Court*,<sup>10</sup> have established that the public also has an interest in attending criminal trials, an interest that is protected by the first

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1. See *Kirstowsky v. Superior Court*, 143 Cal. App. 2d 745, 750, 300 P.2d 163, 167 (1956).

2. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-69 (1980); *In re Oliver*, 333 U.S. 257, 266 (1948); *Kirstowsky*, 143 Cal. App. 2d at 749-50, 300 P.2d at 166.

3. 448 U.S. at 580, n.17; *Gannett Co. Inc. v. DePasquale*, 443 U.S. 368, 384 (1979).

4. See *Cembrook v. Sterling Drug Inc.*, 231 Cal. App. 2d 52, 58, 41 Cal. Rptr. 492, 495 (1964).

5. CAL. CIV. PROC. CODE §124. "Except as provided in Sections 226m and 4306 of the Civil Code or any other provisions of law, the sittings of every court shall be public." *Id.*

6. See *Richmond*, 448 U.S. at 564-69, 580, n.17; *Gannett*, 443 U.S. at 384; *Oliver*, 333 U.S. at 266.

7. U.S. CONST. amend. VI; CAL. CONST. art. I, §15.

8. U.S. CONST. amend. VI; CAL. CONST. art. I, §15; see also CAL. PENAL CODE § 686.

9. 448 U.S. 555 (1980).

10. 102 S. Ct. 2613 (1982).

amendment.<sup>11</sup> The net effect of these opinions is that now any order denying public access to criminal trials must be justified by an overriding policy<sup>12</sup> or a compelling state interest.<sup>13</sup> Further, the closure order must be narrowly tailored to serve the state interest.<sup>14</sup>

In light of the rule enunciated by the Supreme Court in *Richmond and Globe*, this comment will analyze the validity of the practice in California that excludes the public from custody proceedings<sup>15</sup> which are predicated on criminal conduct<sup>16</sup> of a parent<sup>17</sup> against his minor child.<sup>18</sup> This analysis will focus on the similarity of the public interests at stake in criminal trials and custody trials predicated on parental abuse. Before addressing the similarities of the public interests at stake in these two types of proceedings, this comment will first examine the historical rationale and policy considerations for the open trial practice in American jurisprudence. This discussion will be followed by a detailed analysis of the three distinct public interests in open trials.

The first of these public interests is in the fair and effective administration of justice, free from potential abuses that might otherwise occur if the proceedings were closed.<sup>19</sup> This interest, in turn, serves two important functions: enhancing the accuracy of the fact finding process,<sup>20</sup> and heightening public respect for the judicial system.<sup>21</sup>

The second public interest in open trials that will be analyzed is having wrongdoers brought to justice.<sup>22</sup> In the context of a criminal prosecution for child abuse or neglect, the appropriate judicial remedy usually involves a fine or imprisonment.<sup>23</sup> In a custody trial, bringing

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11. 448 U.S. at 580 (plurality opinion); *id.* at 585 (Brennan, J., concurring); *id.* at 599 (Stewart, J., concurring); *id.* at 604 (Blackmun, J., concurring); 102 S.Ct. at 2618.

12. 448 U.S. at 581.

13. 102 S. Ct. at 2620.

14. *Id.*

15. CAL. CIV. CODE §235.5 (providing that the public shall not be admitted to any proceeding brought under section 232 of the Civil Code to free a minor from parental custody); CAL. WELF. & INST. CODE §346 (providing that the public shall not be admitted to a hearing brought under Welfare and Institutions Code section 300 to declare a minor a dependent of the juvenile court).

16. Criminal conduct refers to any conduct proscribed by the California Penal Code. For the purposes of this comment the relevant Penal Code sections are 271, 271a, 273a, 273d, 273g, and 288, all of which relate to crimes against children. *See infra* notes 105-10 and accompanying text.

17. For the purposes of this comment, the term "parent" refers to any of the following: biological parent, adoptive parent, guardian, de facto parent, foster parent, or any other adult charged with the custody, care and control of a minor child.

18. The term "child" refers to natural biological child, step-child, adoptive-child, foster-child, or any other child dependent on an adult for care and support.

19. *See infra* notes 42-53 and accompanying text.

20. *See infra* notes 44-47 and accompanying text.

21. *See infra* notes 48-50 and accompanying text.

22. *See infra* notes 54-58 and accompanying text.

23. *See* CAL. PENAL CODE §§271, 271a, 273a, 273d, 273g, 288. Sections 271, 271a and 273g are classified as misdemeanors and authorize a fine of not more than 500 dollars or imprisonment in the county jail for not more than one year, or both. Sections 273a, 273d and 288 are classified as felonies and authorize imprisonment in the state prison for from two to eight years.

the wrongdoer to justice entails depriving him of the custody of his child, either temporarily,<sup>24</sup> or permanently.<sup>25</sup> This comment will demonstrate that notwithstanding the difference between the sanctions imposed in each type of trial, the overall effect on the public is the same. By virtue of having both types of proceedings publicly accessible, the public learns that neither society nor the law will tolerate parental abuse, and further, that wrongdoers meet with appropriate sanctions.<sup>26</sup>

The final public interest in gaining access to judicial proceedings that this comment will address is preserving the first amendment right to attend trials.<sup>27</sup> Any denial of access to trials must be justified by compelling and overriding policy considerations.<sup>28</sup> Further, the preservation of this first amendment interest requires that public exclusion be necessary and narrowly tailored to protect the competing interests of a party involved in the proceeding.<sup>29</sup> Notwithstanding these three important interests, under certain limited circumstances public access to judicial proceedings can be subordinated. To demonstrate this, various common-law exceptions to the open trial policy will be identified.<sup>30</sup>

The discussion of these exceptions to the open trial policy will reveal that under currently recognized judicial principles, trial judges can and do exercise discretion in limiting public access.<sup>31</sup> Despite the existence of this discretionary authority, the present statutory scheme governing custody cases to terminate parental rights and to declare minors dependents of the court *requires* judges to conduct the proceedings in closed session.<sup>32</sup> This requirement frustrates the public's legitimate interests in gaining access to the proceedings. The author will demonstrate that the public interest in custody cases predicated on parental abuse bears a substantial similarity to the public interest in criminal trials.<sup>33</sup> Thus, the impairment of the public interest in gaining access to custody proceedings predicated on parental abuse is particularly onerous. Moreover, the closure requirement completely disregards the ability of judges to determine whether the circumstances of a particular case necessitate closure.

For these reasons, the statutory provisions requiring public exclusion

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24. CAL. WELF. & INST. CODE §300.

25. CAL. CIV. CODE §232.

26. See *infra* notes 54-58, 133-36 and accompanying text.

27. See *infra* notes 59-94 and accompanying text.

28. See *Richmond*, 448 U.S. at 581; *Globe*, 102 S. Ct. at 2620.

29. 102 S. Ct. at 2620.

30. See *infra* notes 173-245 and accompanying text.

31. See *infra* notes 173-245 and accompanying text.

32. See CAL. CIV. CODE §235.5; CAL. WELF. & INST. CODE §346.

33. See *infra* notes 101-40 and accompanying text.

in custody cases must be reformed. The mandatory closure requirement should be eliminated altogether so that judges can weigh all the competing interests before limiting public access. Only in this way can the public's valued interest in perpetuating the open trial policy effectively be preserved.

## GENERAL POLICY CONSIDERATIONS FOR PUBLICITY OF JUDICIAL PROCEEDINGS

### A. *Historical Rationale*

The underlying basis for the open trial policy in American jurisprudence is a fundamental intolerance for secret trials.<sup>34</sup> Traditional Anglo-American distrust of nonpublic proceedings has been ascribed to the notorious use of this practice during the Spanish Inquisition, the English Court of Star Chamber, and the French monarchy's *lettre de cachet*.<sup>35</sup> All of these institutions became instruments by which tyrants and despots suppressed political and religious expression and severely restricted individual liberties.<sup>36</sup> By using the judiciary in this manner, defendants' rights to fair trials were completely and ruthlessly disregarded.<sup>37</sup>

In contrast to these historical abuses, the modern judicial practice guarantees the accused the right to a public trial.<sup>38</sup> The public trial right not only confers a benefit on the defendant but on society as well,<sup>39</sup> by safeguarding against the use of the judiciary as an instrument of persecution.<sup>40</sup> This safeguard, in turn, serves as an effective restraint on potential misuse of judicial power and promotes the fair administration of justice.<sup>41</sup> From the historical standpoint, then, the open trial policy operates first to ensure the defendant a fair trial, and second, to subject the judiciary to public scrutiny as a check on possible judicial abuses. In the modern application of the open trial policy, the "check"

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34. *Oliver*, 333 U.S. at 268.

35. *Id.* The Spanish Inquisition, reorganized in 1478, was a means by which alleged religious heretics were punished. See WEBSTERS NEW WORLD DICTIONARY 1364 (2d. College Edition 1972). The English Court of Star Chamber originally had jurisdiction in cases in which the ordinary course of justice was obstructed. During the reign of Henry VIII and his successors, the jurisdiction of the court was illegally extended, especially in punishing disobedience to the king's arbitrary proclamations, and it was finally abolished. See BLACK'S LAW DICTIONARY 1261 (5th ed. 1979). *Lettres de cachet* were letters issued and signed by the kings of France, and countersigned by a secretary of state authorizing the imprisonment of a person. *Id.* at 815.

36. 333 U.S. at 268; *Cembrook*, 231 Cal. App. 2d at 59, 41 Cal. Rptr. at 496.

37. 333 U.S. at 268.

38. U.S. CONST. amend. VI; CAL. CONST. art. I, §15.

39. 333 U.S. at 270.

40. *Id.*

41. *Id.*; *Gannett*, 443 U.S. at 383.

function has received considerable emphasis by the courts.<sup>42</sup>

## B. Modern Application of the Open Trial Policy

### 1. Fair and Effective Administration of Justice

The primary purpose of the "check" function is to expose abuses such as corruption, incompetence, inefficiency, prejudice, and favoritism.<sup>43</sup> The open trial policy also safeguards the fair administration of justice by actually improving the fact finding process.<sup>44</sup> This result is accomplished in two ways. First, open court proceedings can elicit previously unknown witnesses from interested spectators<sup>45</sup> to come forward with relevant evidence.<sup>46</sup> Second, the mere fact that the proceedings are open to public review induces the officers of the court to perform their duties more conscientiously.<sup>47</sup>

By removing the potential for judicial abuses and enhancing the fact finding process, the open trial practice succeeds in heightening public respect for the judicial process.<sup>48</sup> Moreover, public participation in appropriately conducted proceedings serves the broader purpose of maintaining the confidence of the community in the honesty of governmental institutions<sup>49</sup> and the ability of the law to do justice.<sup>50</sup> Without actual attendance at trials by the public or the public's representative, the news media,<sup>51</sup> the check on possible abuse or ineffective administration of justice would be substantially attenuated.<sup>52</sup> On the other hand, the open trial policy, which promotes public attendance, serves to safeguard the interest in the fair and effective administration of justice.

The importance of perpetuating the valued interest in the fair and effective administration of justice warrants that only strong countervailing public policy justifications will override the open trial practice.<sup>53</sup> The interest in the fair and effective administration of justice,

42. See, e.g., *Globe*, 102 S. Ct. at 2620; *Matter of Estate of Hearst*, 67 Cal. App. 3d 777, 784, 136 Cal. Rptr. 821, 824 (1977); *Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83, 90 (Cal.App.1968) (opinion decertified as moot; hearing granted by the California Supreme Court).

43. *Estate of Hearst*, 67 Cal. App. 3d at 784, 136 Cal. Rptr. at 824.

44. *Globe*, 102 S. Ct. at 2620; *Gannett*, 443 U.S. at 383.

45. 443 U.S. at 383; *Cembrook*, 231 Cal. App. 2d at 59, 41 Cal. Rptr. at 496.

46. 443 U.S. at 383.

47. *Id.*

48. *Globe*, 102 S. Ct. at 2620.

49. *Oxnard*, 68 Cal. Rptr. at 91.

50. *Id.*

51. See *Richmond*, 448 U.S. at 572-73.

52. *Oxnard*, 68 Cal. Rptr. at 96. For this reason, the mere fact that a trial transcript was to become a matter of public record at the culmination of the trial did not suffice to adequately serve the public interest. *Id.*; see also *United States v. Criden*, 648 F.2d 814, 824 (3d Cir. 1981)(following the reasoning in *Oxnard*).

53. *Estate of Hearst*, 67 Cal. App. 3d at 784, 136 Cal. Rptr. at 825.

however, is not the only interest involved in a trial. The more personal societal interest in bringing wrongdoers to justice must also be considered.

### 2. *Interests of Society in Bringing Wrongdoers to Justice*

The open trial policy fulfills an important public purpose by providing interested spectators a firsthand opportunity to observe society's responses to unlawful behavior.<sup>54</sup> In this context, the open trial policy addresses emotional reaction to social misconduct and alleviates the human urge to punish on an individual basis. Public awareness that an innocent victim of wrongful conduct is adequately compensated and that the wrongdoer meets with an appropriate judicial remedy serves to ameliorate community hostility and outrage for a particular social transgression.<sup>55</sup>

The effect of the open trial policy on the interest in bringing wrongdoers to justice is essentially a prophylactic one.<sup>56</sup> Public attendance at judicial proceedings effectively reduces community tension and indignation that might otherwise take the form of vengeful self-help or vigilantism.<sup>57</sup> The societal concern with bringing wrongdoers to justice must be addressed by the legal process to prevent this type of anarchist behavior and to preserve public confidence in the judiciary. This requires public acceptance of both the judicial process and the ultimate result.<sup>58</sup> The open trial practice is strongly supported by these policy considerations of promoting obedience to the law and respect for the legal system. In addition to these policy considerations, a final interest in open trials is the public's first amendment right to attend trials.

### 3. *First Amendment Guarantees*

Two recent cases decided by the United States Supreme Court, *Richmond Newspapers, Inc. v. Virginia*<sup>59</sup> and *Globe Newspaper Co. v. Superior Court*,<sup>60</sup> unequivocally established that the public right of access to criminal trials is a fundamental right guaranteed by the first amendment.<sup>61</sup> *Richmond* presented a case of first impression in which the Court considered whether a criminal trial could be closed upon the unopposed request of the defendant.<sup>62</sup> The underlying facts generating

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54. See *Richmond*, 448 U.S. at 571.

55. *Id.*

56. *Id.*

57. *Id.*; see also *Oxnard*, 68 Cal. Rptr. at 91.

58. 448 U.S. at 571.

59. 448 U.S. 555.

60. 102 S. Ct. 2613.

61. 448 U.S. at 580; 102 S. Ct. at 2619.

62. 448 U.S. at 564.

the constitutional issue involved a prosecution for murder.<sup>63</sup>

The first trial had been reversed on appeal by the state supreme court because the trial court improperly admitted incriminating evidence.<sup>64</sup> Both the second and third trials ended in mistrials.<sup>65</sup> During the fourth trial, the defendant's counsel moved the court to clear the courtroom of all spectators.<sup>66</sup> There being no objection from the prosecution, the judge granted the motion and ordered the proceedings to be conducted in closed court.<sup>67</sup>

Two reporters from Richmond Newspaper, Inc., however, did object. They argued that unless the judge determined that the defendant's fair trial right could not be protected by less drastic measures, constitutional considerations mandated that the proceedings remain publicly accessible.<sup>68</sup> The court rejected this contention and continued the murder trial in closed session.<sup>69</sup> Ultimately, the defendant was acquitted.<sup>70</sup>

Despite the fact that the underlying trial had long since ended, the United States Supreme Court granted the petition of the newspaper for a *writ of certiorari*.<sup>71</sup> The Court held that this was a situation "capable of repetition, yet evading review."<sup>72</sup> In the final resolution of the case, the Court agreed with the contention of the newspaper and reversed the decision of the state court.

Chief Justice Burger, writing the plurality opinion for the Court, observed that the first amendment "can be read as protecting the right of everyone to attend trials."<sup>73</sup> From this premise, the Chief Justice held that the right to attend criminal trials is an implicit guarantee of the first amendment.<sup>74</sup> The importance of this guarantee requires that only an overriding state interest articulated in the findings can justify exclusion of the public.<sup>75</sup> Since the defendant's counsel failed to advance a compelling reason for closure, the exclusion of the public and the media was constitutionally impermissible.<sup>76</sup>

The Court was presented with the opportunity to apply this principle two years later in *Globe*. At issue in this case was a Massachusetts stat-

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63. *Id.* at 559.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 560.

68. *Id.*

69. *Id.*

70. *Id.* at 562.

71. *Id.* at 563.

72. *Id.* (quoting *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911)).

73. *Id.* at 575.

74. *Id.* at 580.

75. *Id.* at 581.

76. *See id.*



ute requiring mandatory closure of specified sex offense trials during the testimony of minor victims.<sup>77</sup> In the underlying controversy, representatives of Globe Newspaper Co. had unsuccessfully petitioned the trial court to remain present during a rape trial involving three minor female victims.<sup>78</sup>

The trial judge construed the statute so as to exclude the public and press from the entire trial.<sup>79</sup> On appeal, the state supreme court modified this broad construction and held that the statute mandated public exclusion only during the testimony of minor victims.<sup>80</sup> Despite this narrowing of the statutory construction, the United States Supreme Court found the mandatory closure rule to be a violation of the first amendment.<sup>81</sup>

Justice Brennan, speaking for the Court, held that although the interest of the state in "safeguarding the physical and psychological well-being of a minor" is compelling, "it does not justify a *mandatory*-closure rule."<sup>82</sup> According to Justice Brennan, the *per se* rule is unnecessary because the interests of the state can be promoted by requiring the trial judge to make a determination on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.<sup>83</sup> Moreover, because the denial of public access to trials implicates the first amendment,<sup>84</sup> the Court concluded that the denial must be necessitated by a compelling governmental interest,<sup>85</sup> and further, that closure must be narrowly tailored to serve the asserted interest.<sup>86</sup> In order to understand the reason why the first amendment is implicated by denying public access to trials, the protected rights encompassed in that amendment must be examined.

The United States Supreme Court has explicitly recognized that a core purpose of the first amendment is to assure free communication and discussion of matters relating to the functioning of government.<sup>87</sup> Further, the guarantees of this amendment provide a means by which the public can effectively participate in the United States republican

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77. 102 S. Ct. at 2615-16.

78. *Id.* at 2616.

79. *Id.*

80. *Id.* at 2617.

81. *Id.* at 2618.

82. *Id.* at 2621 (emphasis in original).

83. *Id.* An additional interest asserted by the Commonwealth was to encourage minor victims of sex crimes to come forward and testify accurately. *Id.* at 2622. This interest was held to be both speculative and illogical, thus incapable of justifying the blanket exclusion of the public during the minor victim's testimony. *Id.*

84. *Id.* at 2619.

85. *Id.* at 2620.

86. *Id.*

87. *Richmond*, 448 U.S. at 575; *Globe*, 102 S. Ct. at 2619.

system of self-government.<sup>88</sup> To ensure the informed communication of government affairs relating to the judicial process, the first amendment necessarily must embrace the public right of access to trials.<sup>89</sup> Any contrary interpretation of the first amendment would substantially dilute the specifically enumerated guarantees of free speech and press as they pertain to judicial proceedings.<sup>90</sup>

Although the foregoing discussion regarding the purpose of the first amendment focuses on the public right of access to trials in general, it should be noted that the actual holdings of the Court in both *Richmond* and *Globe* relate specifically to criminal trials.<sup>91</sup> Nevertheless, the opinions in both cases are devoid of any language suggesting that the first amendment guarantees a right of access only to criminal trials. Since one of the core purposes of the first amendment is to assure free discussion of government affairs,<sup>92</sup> limiting this discussion to criminal trials is illogical. The Court in *Richmond* did not pass on the issue of whether the first amendment also guarantees a right of access to civil trials because the question was not raised.<sup>93</sup> Notwithstanding this fact, Justice Stewart, in his concurring opinion, concluded that the first amendment protects the public right of access to criminal as well as civil trials.<sup>94</sup>

In summary, the policy considerations for publicity of judicial proceedings are historically based on traditional Anglo-American distrust for closed trials due to abuses perpetrated by the European ruling classes in the past.<sup>95</sup> The modern application of the open trial policy serves three important functions. First, it assures the fair and effective administration of justice. Subjecting judicial proceedings to public scrutiny reduces the potential for abuse<sup>96</sup> and improves accuracy in the fact finding process.<sup>97</sup> Secondly, the open trial policy serves a therapeutic function by reducing community outrage and indignation when an innocent person becomes the victim of wrongful conduct.<sup>98</sup> The third function served by a policy of open trials is the protection of the public's first amendment right to communicate on matters relating to the functioning of government.<sup>99</sup>

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88. 448 U.S. at 587 (Brennan, J., concurring); 102 S. Ct. at 2619.

89. 102 S. Ct. at 2619.

90. 448 U.S. at 576-77, 580.

91. *Id.* at 559 (murder trial); 102 S. Ct. at 2616 (rape trial).

92. *See supra* notes 87-90 and accompanying text.

93. 448 U.S. at 580, n.17.

94. *Id.* at 599 (Stewart, J., concurring).

95. *See supra* notes 34-37 and accompanying text.

96. *See supra* notes 39-43 and accompanying text.

97. *See supra* notes 44-47 and accompanying text.

98. *See supra* notes 54-58 and accompanying text.

99. *See supra* notes 87-90 and accompanying text.

As a general proposition, each of these distinct public interests in gaining access to judicial proceedings applies with equal force to all types of actions coming before the courts. In addressing the application of these interests to particular cases, however, courts have emphasized criminal prosecutions rather than civil suits.<sup>100</sup> This emphasis can be explained by the fact that ordinarily more is at stake in a criminal trial. The risk for a criminal defendant who is adjudged guilty of a charged offense is a deprivation of liberty by imprisonment. By the same token, societal concern with bringing wrongdoers to justice is more intense when a shocking and particularly atrocious crime has been committed.

These factors, however, are not necessarily limited to criminal trials. Child custody cases predicated on parental abuse also can incite strong emotional reactions from the community and a concomitant concern with bringing the abusive parent to justice. Since the judicial remedy imposed on the parent can be as serious as the permanent deprivation of the custody of his child and a total termination of parental rights,<sup>101</sup> the parent has quite a large stake in the outcome of the proceedings. Due to the high stakes and public concern in custody cases predicated on parental abuse, the public interest in gaining access to the proceedings is closely analogous to the public interest in attending criminal trials. To fully understand the basis for this analogy, a discussion of custody cases predicated on parental abuse will follow.

#### CUSTODY PROCEEDINGS PREDICATED ON PARENTAL ABUSE

##### *A. Basis for the Action*

California courts review parental abuse and neglect in two separate classes of child custody proceedings: involuntary termination of parental rights<sup>102</sup> and actions to declare minors dependents of the juvenile court.<sup>103</sup> In either class of proceedings, an abused or neglected child can be removed from parental custody.<sup>104</sup> The same conduct giving rise to either of these custody actions also can be the basis of a criminal prosecution. Specifically, this conduct includes: (1) desertion of a child

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100. The interest in the fair and effective administration of justice originally evolved to protect a criminal defendant's fair trial rights. *See supra* notes 34-37 and accompanying text. Similarly, the interest in bringing wrongdoers to justice is a natural component of criminal trials. *See supra* notes 54-58 and accompanying text. Finally, the first amendment protection of the public's right of access to trials has only been extended to criminal trials. *See supra* notes 59-61, 91 and accompanying text.

101. *See* CAL. CIV. CODE §232.

102. *Id.*

103. CAL. WELF. & INST. CODE §300.

104. *See id.* §361(b); CAL. CIV. CODE §232; Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 240 (1975).

under age 14 with intent to abandon;<sup>105</sup> (2) abandonment or failure to maintain a child under age 14 and false representation to authorities that the child is an orphan;<sup>106</sup> (3) willful cruelty or unjustifiable punishment of a child that endangers the child's life or health;<sup>107</sup> (4) corporal punishment or injury of a child resulting in a traumatic condition;<sup>108</sup> (5) indulgence in degrading, immoral, or vicious practices, or habitual drunkenness in the presence of a child;<sup>109</sup> and (6) willful commission of lewd or lascivious acts upon or with the body of a child under age 14.<sup>110</sup>

Although a criminal prosecution for child abuse and a custody trial are independent proceedings, the underlying cause for bringing each type of action — parental abuse or neglect — is the same. To fully appreciate the similarity between criminal child abuse cases and custody cases predicated on parental abuse, the sequence of events leading up to a custody case of this nature must be examined. Once this is accomplished, the identity of the public interest in each type of proceeding will become apparent.

In the most common custody case scenario, a minor child who has been the victim of parental misconduct is adjudged a dependent of the juvenile court at a dependency hearing.<sup>111</sup> The circumstances giving rise to the dependency hearing in the first place normally occur as a result of parental neglect,<sup>112</sup> such as abandonment<sup>113</sup> or desertion,<sup>114</sup> or as a result of parental abuse,<sup>115</sup> such as cruelty,<sup>116</sup> severe corporal punishment,<sup>117</sup> or sexual abuse.<sup>118</sup> Additionally, the child may be adjudged a dependent of the juvenile court if he is deemed to be in an unfit home<sup>119</sup> by virtue of the moral depravity or habitual drug or alcohol abuse of his parents.<sup>120</sup>

When a child is adjudged a dependent of the juvenile court, the judge may order the child's removal from his parents.<sup>121</sup> If removal is

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105. CAL. PENAL CODE §271.

106. *Id.* §271a.

107. *Id.* §273a.

108. *Id.* §273d.

109. *Id.* §273g.

110. *Id.* §288.

111. *See* CAL. WELF. & INST. CODE §300.

112. *See id.* §300(a), (b), (d).

113. *Compare id.* with CAL. PENAL CODE §271a.

114. *See* CAL. WELF. & INST. CODE §300(a), (b), (d). *Compare id.* with CAL. PENAL CODE §271.

115. *See* CAL. WELF. & INST. CODE §300(d).

116. *Compare id.* with CAL. PENAL CODE §273a.

117. *See* CAL. WELF. & INST. CODE §300(d). *Compare id.* with CAL. PENAL CODE §273d.

118. *See* CAL. WELF. & INST. CODE §300(d). *Compare id.* with CAL. PENAL CODE §288.

119. *See* CAL. WELF. & INST. CODE §300(d).

120. *Compare id.* with CAL. PENAL CODE §273g.

121. *See* CAL. WELF. & INST. CODE §361(b).

ordered, the child is remanded to the custody of a probation officer and placed in a temporary accommodation.<sup>122</sup> At this point in the scenario, every effort is made to reunite the child with his parents.<sup>123</sup> Unless the court determines that reunification would create a substantial risk to the child's physical or emotional well-being, the child will be returned to the custody of his parents.<sup>124</sup>

In the event that efforts to reunite the child with his parents fail and the parents continue to be deprived of custody for one year, an action to permanently sever the child-parent relationship may be initiated.<sup>125</sup> While deprivation of custody for one year and the child's dependency status are requirements to maintain this action,<sup>126</sup> the underpinning of the action is parental misconduct. The basis for the termination proceeding is the original cruel treatment, abuse, or neglect that the child suffered prior to being declared a dependent of the juvenile court.<sup>127</sup> This parental misconduct is equivalent to the type of conduct that would give rise to a criminal prosecution.<sup>128</sup> Thus, the underlying cause for a custody trial based on parental abuse and for a criminal prosecution for child abuse — parental misconduct — is the same.

Due to this similarity in the types of proceedings, the public interest that each would generate is also the same. As noted earlier, the public has three distinct interests in gaining access to judicial proceedings.<sup>129</sup> These interests apply with equal force to custody trials predicated on parental abuse.

#### *B. Public Interests in Custody Proceedings Predicated on Parental Abuse*

In the context of a custody trial, the most traditional of the interests in the open trial policy is to assure the fair and effective administration of justice by subjecting the officers of the court to public scrutiny.<sup>130</sup>

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122. *See id.* §362.

123. *See id.* §366.

124. *Id.* §366.2(d).

125. *See* CAL. CIV. CODE §232(a)(2), (3). The action to terminate parental rights may be initiated by the State Department of Social Services, the county welfare department, a licensed private or public adoption agency, a county adoption department or a county probation department for the purpose of freeing the child for adoption. *Id.* §232.9.

126. *Id.* §232(a)(2), (3). *But see id.* §232(a)(1) wherein the one year deprivation requirement and the child's dependency status are *not* prerequisites for maintaining the action. This subsection authorizes the termination of parental rights if the parent has totally abandoned the child and left him without provisions for identification or support. *Id.* *Compare id.* with CAL. PENAL CODE §§271, 271a.

127. CAL. CIV. CODE §232(a)(2), (3). *Compare id.* with CAL. PENAL CODE §§273a, 273d, 273g, 288.

128. *See supra* notes 105-10 and accompanying text.

129. *See supra* notes 43-61, 84-94 and accompanying text.

130. *See supra* notes 39-47 and accompanying text.

This scrutiny, in turn, serves to reduce the potential for abuse<sup>131</sup> and enhances the accuracy of the fact finding process.<sup>132</sup> Closure of the proceedings disserves this interest by insulating the judge and prosecuting attorney from public observation.

When a child has been abandoned or cruelly treated by his parent, the public also has an interest in knowing that the offending parent meets with an appropriate judicial remedy for the wrong committed.<sup>133</sup> Public access serves a prophylactic function by allaying public indignation and community tension.<sup>134</sup> Moreover, public access is a vehicle for informing interested community members that the abused child is being protected from further cruel or neglectful treatment.<sup>135</sup> In this manner, public attendance at custody trials serves an educational purpose by making the public aware of two important facts. First, when a parent abuses his child, that parent must endure the deprivation of the custody of the child.<sup>136</sup> Second, the public becomes aware that society and the law will not tolerate abusive behavior by parents.

The final interest of the public in gaining access to custody trials is the exercise of the first amendment right of communicating on matters concerning the functioning of government.<sup>137</sup> Any intrusion on this right should be justified by a compelling reason,<sup>138</sup> such as serious detriment to the parent's individual security,<sup>139</sup> or the need to protect the well-being of the child from physical or psychological harm.<sup>140</sup> Whatever the compelling reason may be, the necessity for closure should be determined on a case-by-case basis.<sup>141</sup> Only in this way can the public's first amendment right to attend trials be protected.<sup>142</sup> Notwithstanding the importance of these three public interests and the identity of parental misconduct as the underlying cause for both criminal and custody trials predicated on abuse, the public is not permitted to attend the custody proceedings. The current statutory scheme in California excludes the general public from gaining access to custody

131. See *supra* notes 39-43 and accompanying text.

132. See *supra* notes 44-47 and accompanying text.

133. See *supra* notes 54-58 and accompanying text.

134. See *supra* notes 56-57 and accompanying text.

135. When a child is adjudged to be a dependent of the juvenile court under Welfare and Institutions Code section 300, the court may remove the child from the parent's custody. CAL. WELF. & INST. CODE §361(b); see *supra* notes 121-24 and accompanying text. When an abused child is declared free from the custody and control of his parents under civil code section 232, the child is naturally removed from the abusive environment. See CAL. CIV. CODE §232(a)(1)-(3).

136. See CAL. WELF. & INST. CODE §300 (temporary loss of custody); CAL. CIV. CODE §232 (permanent loss of custody).

137. See *supra* notes 87-90 and accompanying text.

138. See *supra* notes 75, 84-86 and accompanying text.

139. See *infra* note 188 and accompanying text.

140. See, e.g., *Globe*, 102 S. Ct. at 2621; see *infra* notes 239, 242-45 and accompanying text.

141. See *infra* notes 240-41 and accompanying text.

142. See *Richmond*, 448 U.S. at 580-81; *Globe*, 102 S. Ct. at 2620.

cases that come before the juvenile court in dependency hearings<sup>143</sup> and custody cases initiated to terminate parental rights.<sup>144</sup>

### C. Mandatory Closure

The mandatory closure requirement sets dependency hearings and termination proceedings apart from other custody cases in California. In all other cases in which the issue of custody of a minor child arises, the Civil Code provides that the "court *may*, in its discretion, exclude the public."<sup>145</sup> A discretionary closure of this nature adequately protects the parties involved from any serious detriment that might otherwise result if the proceedings were open.<sup>146</sup> In addition, the discretionary authority to close custody cases ensures that the court can conduct the proceedings in a manner consistent with the proper administration of justice.<sup>147</sup> The following examination of pertinent legislative history reveals that the current closure requirements are unwarranted.

#### 1. Legislative History

The reason dependency hearings and termination proceedings contain the mandatory closure requirement seems to be more a fluke of legislative history rather than a deliberate attempt to undermine the discretionary authority of judges to limit public access. Originally, both dependency hearings and termination proceedings came under the jurisdiction of the juvenile court.<sup>148</sup> The juvenile court also had jurisdiction over wardship hearings in which delinquent minors are made wards of the court.<sup>149</sup> The provisions of the Welfare and Institutions Code governing these proceedings made no distinction between minors who were uncontrollable delinquents and minors who were merely victims of cruel or neglectful treatment.<sup>150</sup> As a consequence, the closure requirement pertaining to these proceedings was very broad. The provision established that any person alleged or adjudged to come within the jurisdiction of the juvenile court was entitled to a private hearing.<sup>151</sup>

The rationale behind the provision for private hearings in juvenile

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143. CAL. WELF. & INST. CODE §346.

144. CAL. CIV. CODE §235.5.

145. *Id.* §4600(c) (emphasis added).

146. *See infra* notes 229-30, 239 and accompanying text.

147. *See infra* notes 237-45 and accompanying text.

148. *See* 1937 Cal. Stat. c. 369, at 1030, 1032 (repealed by 1961 Cal. Stat. c. 1616, §1, at 3459).

149. Wardship hearings are presently governed by sections 601 and 602 of the Welfare and Institutions Code.

150. *See* 1937 Cal. Stat. c. 369, at 1030-31, (repealed by 1961 Cal. Stat. c. 1616, §1, at 3459).

151. *See* 1937 Cal. Stat. c. 369, at 1037, (repealed by 1961 Cal. Stat. c. 1616, §1, at 3459).

court is that confidentiality is essential for the ultimate rehabilitation of juvenile delinquents.<sup>152</sup> By denying public access to the proceedings and the records of the proceedings, the delinquent minor is protected from future adverse effects of youthful misconduct.<sup>153</sup> When the misconduct is that of the parent rather than the child, however, the rationale for confidential proceedings breaks down.

In 1961, the California Legislature revised the statutory scheme governing juvenile hearings.<sup>154</sup> As a result of this revision, juvenile court jurisdiction over termination proceedings was eliminated.<sup>155</sup> Thereafter, termination proceedings have come within the jurisdiction of the superior court.<sup>156</sup> The 1961 revisions left intact juvenile court jurisdiction over the other juvenile proceedings, but significantly, distinguished dependency<sup>157</sup> from wardship hearings.<sup>158</sup> The closure requirement for these juvenile proceedings, however, still made no distinction between dependency and wardship cases.<sup>159</sup> Distinguishing juvenile court dependents from wards with respect to confidentiality of the proceedings did not come about until 1976, when the Legislature again revised the Welfare and Institutions Code.<sup>160</sup>

When the 1961 revisions were enacted, the California Legislature neglected to include a closure requirement for termination proceedings. Thus, in 1965, the Legislature added section 235.5 to the Civil Code effectuating the closure requirement in termination proceedings.<sup>161</sup> As a result of all the additions and revisions implemented, public exclusion has become a statutory mandate for termination proceedings, dependency hearings, and wardship hearings. The closure requirement, which originally was justified only by a desire to protect juvenile delinquents from the adverse effects of their youthful transgressions, has been inadvertently applied to cases in which the rationale is inapposite. In termination proceedings and dependency hearings predicated on parental abuse, the issue is the parent's misconduct; the child is only a

152. See Comment, *Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of "Conditional Access"*, 13 U.C.D. L. REV. 123, 126-27 (1979).

153. *Id.* at 127.

154. 1961 Cal. Stat. c. 1616, §§1-14, at 3459-3507 (repealing CAL. WELF. & INST. CODE §§550-911, adding CAL. WELF. & INST. CODE §§500-914, CAL. PENAL CODE §272, CAL. CIV. CODE §§232-38).

155. *Id.*, c. 1616, §1, at 3459, §4, at 3504 (adding CAL. CIV. CODE §232).

156. See CAL. CONST. art. VI, §10, (providing in pertinent part, "[s]uperior courts have original jurisdiction in all cases except those given by statute to other trial courts.").

157. See 1961 Cal. Stat. c. 1616, §2 at 3471.

158. See CAL. WELF. & INST. CODE §§601, 602 (enacted by 1961 Cal. Stat. c. 1616, §2, at 3471-72).

159. See CAL. WELF. & INST. CODE §676 (enacted by 1961 Cal. Stat. c. 1616, §2, at 3480).

160. See CAL. WELF. & INST. CODE §346 (enacted by 1976 Cal. Stat. c. 1068, §9, at 4769).

161. 1965 Cal. Stat. c. 1530, §2, at 3623 (adding CAL. CIV. CODE §235.5).



victim. In contrast, wardship proceedings focus on the misconduct of the child. Moreover, termination proceedings and dependency hearings are distinguishable from wardship proceedings in that they bear a substantial relationship to other custody proceedings.

## *2. Comparison with Other Custody Cases*

The standard used to determine whether a child should be removed from parental custody in either a termination or a dependency case is the same standard employed by the courts in all other custody actions. Section 4600 of the Civil Code, which applies to *any proceeding* in which custody issues can be litigated,<sup>162</sup> requires that before custody of a child is awarded to a nonparent, the court must make a finding that parental custody would be detrimental to the child.<sup>163</sup> Despite the similarity of termination proceedings and dependency hearings to other custody actions, the discretionary authority of judges to limit public access under section 4600<sup>164</sup> does not extend to termination and dependency cases.

In order to promote consistency among all custody cases, the statutory provisions governing dependency hearings<sup>165</sup> and termination proceedings<sup>166</sup> should be reformed to allow judges discretionary authority to control public access rather than requiring mandatory exclusion of the general public. More importantly, however, the public's valued interests in having open dependency hearings and termination proceedings<sup>167</sup> mandate that the closure requirements written into the statutes be eliminated. Although the closure provisions, as they currently stand, do permit two very narrow and limited exceptions to the blanket closure requirement,<sup>168</sup> neither exception fully considers the public's legitimate interests in gaining access to the proceedings.

## *3. Exceptions to Mandatory Closure*

The first of the exceptions to the closure requirement permits the public to be admitted to the proceedings only if public attendance is specifically requested by the child and his parents.<sup>169</sup> Under this excep-

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162. CAL. CIV. CODE §4600(a); *see also In re B.G.*, 11 Cal. 3d 679, 695-96, 523 P.2d 244, 255-56, 114 Cal. Rptr. 444, 455-56 (1974). "California has at least eight separate proceedings in which custody questions can be litigated." *Id.*

163. CAL. CIV. CODE §4600(c).

164. *Id.*

165. CAL. WELF. & INST. CODE §346.

166. CAL. CIV. CODE §235.5.

167. *See supra* notes 130-42 and accompanying text.

168. CAL. WELF. & INST. CODE §346; CAL. CIV. CODE §235.5 (with respect to these exceptions, the language in both statutes is substantially the same).

169. *See* CAL. WELF. & INST. CODE §346; CAL. CIV. CODE §235.5.

tion only the desires of the parties involved are considered while the competing interests of the public are ignored. The second exception to the closure requirement is equally restrictive. That provision allows the judge to admit those persons "deemed to have a direct and legitimate interest in the particular case or work of the court."<sup>170</sup> This class of persons, however, represents a very small segment of society. The class includes relatives or close friends of the minor, law enforcement personnel, students, and members of community groups interested in studying court procedures.<sup>171</sup> All persons attending these custody proceedings must promise not to disclose the identity of the minor or the parents, or any details of the case that might reveal the identity of the participants.<sup>172</sup> By comparison, this type of restriction is not placed on members of the general public who attend criminal child abuse trials, even though the underlying theory — parental misconduct — is the same. Clearly, both statutory exceptions to the mandatory closure requirement applicable to dependency hearings and termination proceedings are extremely limited in scope.

In determining whether public exclusion from custody trials is warranted, the courts should apply existing judicial principles rather than adhering to the strict rule of closure. Several common-law exceptions to the open trial policy currently are recognized by the courts in other proceedings to protect trial participants and witnesses. Eliminating the mandatory closure rule in dependency and termination proceedings would leave discretionary authority to limit public access intact. Courts still would weigh the competing interests of the public in gaining access to the proceedings against the considerations embodied in the common-law exceptions. A discussion of these exceptions will facilitate an understanding of the way in which they can be incorporated into custody trials.

## RECOGNIZED EXCEPTIONS TO PUBLICITY OF PROCEEDINGS

### A. *The Right to a Fair Trial*

In the setting of a criminal trial, the defendant's right to a fair trial takes precedence over the public interest in gaining access to the proceedings.<sup>173</sup> The fair trial right is considered to be among the most fundamental freedoms enjoyed by United States citizens,<sup>174</sup> and therefore,

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170. See CAL. WELF & INST. CODE §346; CAL. CIV. CODE §235.5.

171. CAL. R. CT. 1311 (Advisory Committee Comment).

172. *Id.*; see also Comment *supra* note 152 at 136-40, 148-69.

173. See *Richmond*, 448 U.S. at 564 (wherein the Court characterized this interest as "the defendant's superior right to a fair trial." (emphasis added)).

174. See *Estes v. Texas*, 381 U.S. 532, 540 (1965).

is a basic requirement of due process.<sup>175</sup> For this reason, if the defendant demonstrates a substantial probability that his fair trial right would be irreparably damaged<sup>176</sup> by having the proceedings open, an order for closure may be appropriate.

The criminal defendant may not, however, exclude the public merely by waiving his constitutional right to a public trial. The United States Supreme Court, specifically addressing that issue, has held that a defendant's desire to waive the right to a public trial does not carry with it the right to insist on closure.<sup>177</sup> Moreover, courts have been unwilling to grant a defendant's request for closure absent substantial proof that he will otherwise be subjected to prejudice.<sup>178</sup> This is consistent with the stringent requirements set forth in *Richmond* and *Globe* requiring the defendant to bear a heavy burden of establishing the necessity for closure.<sup>179</sup>

### 1. Criteria to Justify Public Exclusion

Justice Blackmun, in his concurring opinion in *Gannett Co. v. DePasquale*,<sup>180</sup> has suggested a three-pronged test that a criminal defendant must satisfy before his request for closure is granted.<sup>181</sup> First, the defendant must establish that conducting the proceedings in public will irreparably damage his fair trial right.<sup>182</sup> Second, he must demonstrate a substantial probability that alternatives to closure will not adequately protect his right to a fair trial.<sup>183</sup> Finally, the defendant must show that closure will be effective in eliminating the perceived harm.<sup>184</sup> Only after Justice Blackmun's proposed criteria justifying closure have been satisfied can the conflict between the defendant seeking closure and the public's interest in open trials be resolved in the defendant's favor.

A similar conflict between the competing interests of the public and an abusive parent can occur in a custody proceeding. When the parent seeks to preclude public attendance from the proceedings, he should be required to advance a compelling justification for closure. The parent's own interests in privacy should not transcend the interests of the gen-

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175. *See id.* at 543.

176. *Gannett*, 443 U.S. at 441 (Blackmun, J., concurring).

177. *Singer v. United States*, 380 U.S. 24, 34-35 (1965).

178. *See San Jose Mercury-News v. Municipal Court*, 30 Cal. 3d 498, 512, 638 P.2d 655, 663, 179 Cal. Rptr. 772, 780 (1982).

179. *Richmond*, 448 U.S. at 581; *Globe*, 102 S. Ct. at 2620.

180. 443 U.S. at 406-48.

181. *Id.* at 441-42 (Blackmun, J., concurring).

182. *Id.* at 441.

183. *Id.*; for examples of alternatives to closure, see *Sheppard v. Maxwell*, 384 U.S. 333, 361-62 (1966); *see infra* notes 194-96 and accompanying text.

184. 443 U.S. at 442.

eral public in having justice fairly and effectively administered,<sup>185</sup> or the interests of community members indignant over a particular wrong committed against a child.<sup>186</sup> Under Justice Blackmun's three-pronged test in *Gannett*,<sup>187</sup> the parent would be required to prove that a substantial probability exists that his right to a fair trial would be jeopardized by public attendance. Alternatively, the parent seeking to have the trial closed should justify this position by demonstrating that public access would lead to events tending to undermine his individual security, personal liberty, or private property.<sup>188</sup> The impairment of these interests conceivably could result from widespread publicity of the proceedings. Because of the potential for publicity to damage the fair trial right, this subject has received considerable attention by the courts.

## 2. Adverse Publicity

Two cases decided by the United States Supreme Court in the mid-1960's, *Estes v. Texas*<sup>189</sup> and *Sheppard v. Maxwell*,<sup>190</sup> addressed the issue of fairness to defendants in light of prejudicial publicity.<sup>191</sup> In both opinions, the Court found that excessive and prejudicial coverage by the news media resulted in a denial of the defendants' constitutional rights to fair trials.<sup>192</sup> Although each case held that the trial judges had failed to protect the defendants' fair trial interests from prejudicial media coverage, the Court nonetheless declined to suggest a total exclusion of the media or public during the new trials ordered.<sup>193</sup> Instead, the Court recommended that when prejudicial news coverage prior to trial threatens the fair trial right, the "judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."<sup>194</sup> The Court also suggested sequestration of the jury<sup>195</sup> and if "publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered."<sup>196</sup>

The above cited remedies are all viable alternatives to closure,<sup>197</sup> which must necessarily be considered by a trial court before an order

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185. See *supra* notes 43-53 and accompanying text.

186. See *supra* notes 54-58 and accompanying text.

187. See *supra* notes 180-84 and accompanying text.

188. *Estate of Hearst*, 67 Cal. App. 3d at 784, 136 Cal. Rptr. at 824.

189. 381 U.S. 532 (1965).

190. 384 U.S. 333 (1966).

191. 381 U.S. at 534-35, 548; 384 U.S. at 335, 362.

192. 381 U.S. at 534-35, 548; 384 U.S. at 335, 362.

193. The possibility of closure was not discussed in either opinion. See 384 U.S. at 333-63; 381 U.S. at 532-52.

194. 384 U.S. at 363.

195. *Id.*

196. *Id.*

197. See *Gannett*, 443 U.S. at 441 (Blackmun, J., concurring).

for closure is made.<sup>198</sup> Under Justice Blackmun's three-pronged test in *Gannett*,<sup>199</sup> the availability of alternatives to closure will defeat the defendant's efforts to exclude the public from the actual trial. Moreover, in the aftermath of *Richmond* and *Globe*, the likelihood that a defendant's motion for closure would be granted is even less probable in light of the public's first amendment right to attend trials.<sup>200</sup> In matters concerning pretrial proceedings, however, the courts have been more lenient in granting defendants' requests for closure.<sup>201</sup>

The issue of whether defendants in a murder prosecution could exclude the public and press from a pretrial suppression hearing was before the United States Supreme Court in *Gannett*.<sup>202</sup> In that case, the Court affirmed the action of the trial court in granting the defendants' request to exclude the public.<sup>203</sup> The decision of the trial court was approved for two reasons. First, since the purpose of suppression hearings is to screen out unreliable and illegally obtained evidence,<sup>204</sup> the closure order was an appropriate method of ensuring the defendants a fair trial by preventing dissemination of inadmissible evidence to potential jurors.<sup>205</sup> Second, the denial of public access to the proceedings and the records was only temporary.<sup>206</sup> Once the danger of prejudice to the defendants had passed, the records were to become available for public review.<sup>207</sup>

A similar situation arose in two California cases, *San Jose Mercury-News v. Municipal Court*<sup>208</sup> and *Cromer v. Superior Court*,<sup>209</sup> in which the criminal defendants requested that the press and public be denied access to the preliminary hearings and hearing transcripts pending their trials.<sup>210</sup> Both reviewing courts held that the defendants' requests for public exclusion were properly granted so as to preserve their fair trial rights by preventing the dissemination of inadmissible or prejudicial

198. See *Richmond*, 448 U.S. at 580-81.

199. See *supra* notes 180-84 and accompanying text.

200. 448 U.S. at 580; 102 S. Ct. at 2618.

201. See, e.g., *Gannett*, 443 U.S. at 378-79 (pretrial suppression hearing); *San Jose Mercury-News*, 30 Cal. 3d at 513-14, 638 P.2d at 664-65, 179 Cal. Rptr. at 781-82; *Cromer v. Superior Court*, 109 Cal. App. 3d 728, 735, 167 Cal. Rptr. 671, 675 (1980) (preliminary hearing); *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 214-15, 124 Cal. Rptr. 427, 443 (1975); *Craemer v. Superior Court*, 265 Cal. App. 2d 216, 225-26, 71 Cal. Rptr. 193, 201 (1968) (sealing grand jury transcripts).

202. 443 U.S. at 375.

203. *Id.* at 394.

204. *Id.* at 378.

205. *Id.* at 379.

206. *Id.* at 393.

207. *Id.*

208. 30 Cal. 3d 498, 638 P.2d 655, 179 Cal. Rptr. 772 (1982).

209. 109 Cal. App. 3d 728, 167 Cal. Rptr. 671 (1980).

210. *San Jose Mercury-News*, 30 Cal. 3d at 501, 638 P.2d at 656, 179 Cal. Rptr. at 773; *Cromer*, 109 Cal. App. 3d at 731, 167 Cal. Rptr. at 672; see also CAL. PENAL CODE §868 (public excluded from preliminary hearings at the defendant's request).

evidence to potential jurors.<sup>211</sup> Moreover, since the orders denying public access were temporary,<sup>212</sup> the intrusion on the public's first amendment right to observe the judicial system<sup>213</sup> was a minor one.<sup>214</sup> The temporary denial of public access in both of these cases was thus in keeping with the rationale of *Gannett*.<sup>215</sup> The defendants were protected from prejudicial publicity and the public eventually was allowed access to the hearing transcripts.

The last type of pretrial proceeding to which the public may not gain access so that the defendant's fair trial right may be preserved is a grand jury hearing. The public is neither allowed to attend these hearings<sup>216</sup> nor permitted to gain access to the hearing transcript if the defendant so requests.<sup>217</sup> Thus, in *Craemer v. Superior Court*<sup>218</sup> and *Rosato v. Superior Court*,<sup>219</sup> both reviewing courts approved the sealing of the grand jury transcripts until the completion of the defendants' trials to prevent the dissemination of prejudicial and inadmissible evidence.<sup>220</sup> In all the circumstances cited above in which public exclusion was authorized, the closure or denial of access was of a limited scope and duration.<sup>221</sup> Moreover, the orders limiting public access were all consistent with the holding in *Globe* in that they were narrowly tailored<sup>222</sup> to serve the interest of protecting the defendant from prejudicial publicity before the trial began. The primary purpose of public exclusion in each case was to ensure the defendants a fair trial by preventing potential jurors from gaining access to prejudicial or otherwise inadmissible evidence. The gravamen of these cases is that public concern and curiosity with judicial proceedings must be controlled by the courts to prevent excessive publicity from jeopardizing the fair trial right. The detrimental effects of publicity, however, are by no means limited to criminal cases.

Just as a criminal trial can generate a great deal of publicity,<sup>223</sup> a

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211. *San Jose Mercury-News*, 30 Cal. 3d at 512, 638 P.2d at 663, 179 Cal. Rptr. at 780; *Cromer*, 109 Cal. App. 3d at 735, 167 Cal. Rptr. at 675.

212. *See Gannett*, 443 U.S. at 393.

213. *See Richmond*, 448 U.S. at 581; *Globe*, 102 S. Ct. at 2618.

214. *Cromer*, 109 Cal. App. 3d at 735, 167 Cal. Rptr. at 675.

215. *See supra* notes 204-07 and accompanying text.

216. *See* CAL. PENAL CODE §891.

217. *See id.* §938.1(b).

218. 265 Cal. App. 2d 216, 71 Cal. Rptr. 193 (1968).

219. 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975).

220. *See Craemer*, 265 Cal. App. 2d at 227, 71 Cal. Rptr. at 201; *Rosato*, 51 Cal. App. 3d at 207, 124 Cal. Rptr. at 438.

221. All of the cases cited in this section pertain only to pretrial proceedings rather than the actual trials. Furthermore, the orders sealing the records were only in effect until the trials had commenced or were completed. *See supra* notes 206-07, 210-11, 220 and accompanying text.

222. 102 S. Ct. at 2620.

223. *See, e.g., Gannett*, 443 U.S. at 371-74; *Sheppard*, 384 U.S. at 338-45; *Cromer*, 109 Cal. App. 3d at 734-35, 167 Cal. Rptr. at 674-75 (public interest and curiosity were substantial).

custody case might also generate considerable publicity, when, for example, the parties involved are celebrities.<sup>224</sup> Similarly, a custody case may induce a heightened degree of public interest when the conduct of the parent is particularly atrocious.<sup>225</sup> The effect of widespread publicity in a custody case, however, is distinguishable from the effect of publicity in a criminal trial.

In the criminal trial setting, widespread publicity can damage the defendant's fair trial right by allowing potential jurors to become acquainted with inadmissible and prejudicial information about the case.<sup>226</sup> The criminal defendant's right to a fair trial would be seriously jeopardized if members of the jury were exposed to inflammatory information by the news media. In custody cases, this danger is substantially reduced because the judge, rather than a jury, is the trier of fact.<sup>227</sup> Since a judge is presumed to consider only competent evidence in arriving at his decision,<sup>228</sup> the parent's fair trial right in a custody proceeding would not be impaired by excessive publicity.

Widespread adverse publicity, however, might create other risks to a parent involved in a custody trial. If these risks to a parent are substantial, the interests of a parent in seeking closure may override the public's competing interest in gaining access to the trial.<sup>229</sup> For example, if a parent can demonstrate that publicity or public attendance will undermine his individual security, personal liberty, or private property,<sup>230</sup> a request for closure might well be granted. Even on a showing of this type of detriment, however, the trial court should still weigh the competing public interests in gaining access to the proceedings before ordering closure.

All of the examples in the foregoing discussion focus on situations in which a party desires the proceedings to be closed.<sup>231</sup> In addition to

224. A notorious example of this type of intense publicity occurred in the 1934 custody battle over Gloria Vanderbilt that was bitterly fought between the child's mother and aunt. *See generally* B. GOLDSMITH, *LITTLE GLORIA. . . HAPPY AT LAST* (1980).

225. The type of child abuse depicted by Christina Crawford in her best seller *MOMMIE DEAREST* (1978) would fit in this category. The author stated that her mother had on occasion denied her solid foods over the course of several days. *Id.* at 42-44. In addition, according to the author, both she and her brother were victims of cruel physical abuse. *Id.* at 36, 47, 51-54, 133-34.

226. *See supra* notes 192-96, 202-22 and accompanying text.

227. Custody trials are special proceedings to which the right to a jury trial does not attach. *See In re David E.*, 85 Cal. App. 3d 632, 635, 150 Cal. Rptr. 790, 791 (1978); *Kinder v. Superior Court*, 78 Cal. App. 3d 574, 581, 144 Cal. Rptr. 291, 296 (1978); *People v. One 1941 Chevrolet Coupe*, 37 Cal. 2d 283, 286-87, 231 P.2d 832, 835 (1951).

228. *See, e.g.*, *Clark v. United States*, 61 F.2d 695, 708 (8th Cir. 1932), *aff'd*, 289 U.S. 1 (1932); *Santos v. Ferreira*, 633 P.2d 1118, 1124 (Haw. Ct. App. 1981).

229. *See Estate of Hearst*, 67 Cal. App. 3d at 784, 136 Cal. Rptr. at 824.

230. *Id.*

231. In the criminal trial setting, a defendant will request that the public be excluded from the proceedings in order to prevent potential jurors from gaining access to inadmissible, prejudicial evidence. *See supra* notes 189-222 and accompanying text. In a custody proceeding, a parent

instances in which a party to an action<sup>232</sup> seeks public exclusion based on a demonstration of personal detriment,<sup>233</sup> the courts may also consider other factors. Trial judges have discretionary authority to limit public access when required for the proper administration of justice.

### B. Proper Administration of Justice

Although trial judges generally are required to admit the public to court proceedings, the judges may do so “with due regard to the size of the court room [and] the conveniences of the court.”<sup>234</sup> Further, since the courtroom is subject to the control of the judge,<sup>235</sup> he may exclude “objectionable characters and youth of tender years.”<sup>236</sup> In addition, to ensure the proper administration of justice as it relates to a trial, a judge may order the exclusion or sequestration of witnesses so the testimony of other witnesses cannot be heard.<sup>237</sup> A judge may also take any action that is required to maintain decorum in the court and preserve the public peace.<sup>238</sup> Finally, trial judges may exercise discretion and exclude the public to protect a witness from embarrassment by reason of having to testify to delicate or revolting facts.<sup>239</sup>

Exclusion of the public in any of these circumstances is determined on a case-by-case basis and must be narrowly tailored to serve the interest of assuring the proper administration of justice.<sup>240</sup> The trial judge’s control over the courtroom provides the necessary discretion to serve this important interest during the course of any type of proceeding.<sup>241</sup> Thus, if the proper administration of justice in a custody trial requires denial of public access, the trial judge could exercise his discretion and order closure.

For example, a custody proceeding initiated to terminate parental rights<sup>242</sup> or to declare a minor a dependent of the juvenile court<sup>243</sup> can

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would seek closure in order to protect his interests in security and property. *See supra* notes 188, 229-30 and accompanying text.

232. This encompasses all types of court cases—both criminal and civil.

233. If the action is a criminal prosecution, the defendant seeking closure will be required to demonstrate a “proved possibility of prejudice.” *San Jose Mercury-News*, 30 Cal. 3d at 512, 638 P.2d at 663, 179 Cal. Rptr. at 780. If the action is a civil trial, including a custody trial, the party or parent seeking closure must demonstrate a threat to individual security. *See Estate of Hearst*, 67 Cal. App. 3d at 784, 136 Cal. Rptr. at 824.

234. *People v. Hartman*, 103 Cal. 242, 245, 37 P. 153, 154 (1894); *see also Richmond*, 448 U.S. at 600 (Stewart, J., concurring) (because every courtroom has a finite physical capacity, not all who wish to attend a trial may do so).

235. *Sheppard*, 384 U.S. at 358, 361; *Rosato*, 51 Cal. App. 3d at 206, 124 Cal. Rptr. at 437-38.

236. *Hartman*, 103 Cal. at 245, 37 P. at 154.

237. *See* FED. R. EVID. 615; CAL. EVID. CODE §777.

238. *Oxnard*, 68 Cal. Rptr. at 93.

239. *See Kirstowsky*, 143 Cal. App. 2d at 754, 300 P.2d at 169.

240. *See* 102 S. Ct. at 2620, 2621.

241. *See Sheppard*, 384 U.S. at 358-63.

242. CAL. CIV. CODE §232.



be predicated on sexual abuse. Should the child who is the subject of the custody trial be called to testify, the state has a strong interest in safeguarding the minor's physical and psychological well-being.<sup>244</sup> When public presence in the courtroom threatens the child's well-being, the judge should exercise his discretion in accordance with the holding in *Globe*,<sup>245</sup> and order closure of the proceedings during the child's testimony.

Despite the existing discretionary authority of judges to limit public access to the proceedings, the present statutory scheme in California requires termination proceedings<sup>246</sup> and dependency hearings<sup>247</sup> to be conducted in closed court.<sup>248</sup> The trial judge has no discretion to determine whether the circumstances of a particular case warrant public exclusion, except as embodied in the two narrow statutory exceptions to the closure requirement.<sup>249</sup> Even with these exceptions, the statutory closure requirement is defective. By authorizing the attendance of only those persons whom the child and his parents request to be present<sup>250</sup> or persons having a "direct and legitimate interest in the particular case or work of the court,"<sup>251</sup> the statutes completely disregard and frustrate the interests of the remainder of society in gaining access to the proceedings.

The present statutory scheme requiring closure is both unnecessary and unjustified. The scheme is unnecessary because a trial judge always has discretionary authority to limit public access in order to effect the proper administration of justice.<sup>252</sup> Requiring closure is unjustified because it unreasonably thwarts the public's legitimate interests in observing judicial proceedings. Together, these two factors mandate that the present statutory scheme be reformed.

#### CONCLUSION

The open trial policy is a long-standing tradition in American jurisprudence which originally was advanced to prevent the use of the judiciary as an instrument of persecution. In the course of history, the open trial policy has been instrumental in augmenting and preserving the public interest in the fair and effective administration of justice, in re-

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243. CAL. WELF. & INST. CODE §300.

244. *See* 102 S. Ct. at 2621.

245. *Id.*

246. CAL. CIV. CODE §232.

247. CAL. WELF. & INST. CODE §300.

248. *See id.* §346; CAL. CIV. CODE §235.5.

249. *See supra* notes 168-72 and accompanying text.

250. CAL. CIV. CODE §235.5; CAL. WELF. & INST. CODE §346.

251. CAL. CIV. CODE §235.5; CAL. WELF. & INST. CODE §346.

252. *See supra* notes 234-45 and accompanying text.

lieving community tension for particular wrongs, and in protecting the first amendment right of communicating on matters relating to the functioning of government. Preservation of these important interests requires that the open trial policy remain firmly rooted in the judicial process.

In light of these various public interests in maintaining the open trial system, this comment has analyzed the California practice of denying public access to custody proceedings predicated on parental abuse. A careful examination of the competing interests at stake in these types of custody proceedings reveals that denial of public access can only be justified by compelling and overriding policy considerations. Only when a party to a custody trial raises a pressing reason for closure, such as personal detriment, should the judge exercise his discretion to limit public access. Moreover, the determination of the necessity for closure should always be made on a case-by-case basis.

The present mandatory closure rule for custody cases based on parental abuse completely frustrates the strong public interest in open trials. The closure rule ignores the trial judge's discretionary authority to limit public access when necessary for the protection of the parties or the proper administration of justice. Accordingly, the statutory provisions requiring closure should be eliminated to allow public access, subject only to the trial judge's discretion.

*Magi Lachuk*

