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CHANGING THE RULES: PUBLIC ACCESS TO DEPENDENCY COURT

KATHLEEN S. BEAN*

Public access to American court proceedings is a metaphor for justice in America. Open courtrooms encourage truthfulness and discourage perjury, they encourage fairness and discourage abuse, and most important, they place our system of justice before the public and thus make it accountable.¹ Open courtrooms, however, are not the norm for America's system of juvenile justice. Since the creation of the juvenile court system at the start of the twentieth century, the juvenile court has been largely closed to the public. Closed proceedings fit with the early juvenile court reformers' philosophy, which was not to punish, but to treat and rehabilitate children who had committed criminal acts. Closed proceedings were seen as protecting children from the trauma of publicity, protecting children from the stigma of being labeled delinquents, and accommodating an informal setting, which was conducive to the parental role reformers envisioned for juvenile court judges.² One hundred years later, there is much debate about the wisdom of closed courtroom proceedings for children who have committed criminal acts.³ As a result, juvenile delinquency hearings have become more open to the public.⁴ There has been limited debate, however, about the practice of the closed courtroom for children in dependency proceedings, a group also subject to the jurisdiction of juvenile courts. Children who are abused or neglected and thus in need of the protective services of the state are also subject to the closed courtroom of the juvenile court system.⁵ The wisdom of closing those child dependency hearings is the subject of this article.

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1. *Infra* text accompanying notes 57-59.

2. *Infra* text accompanying notes 196-212.

3. *E.g.*, C. Thomas Dienes, *Access to Juvenile Proceedings*, 13 COMM. LAW., Winter 7 (1996) (discussing the First Amendment right of access to juvenile proceedings); James F. Brelsford & Rachel A. Silvers, *Juvenile Courts: Part I: The Battle for Access*, 12 COMM. LAW., Summer 7 (1994) (discussing the ways courts strongly resist expanded media access and the potential remedies); James F. Brelsford & Roger Myers, *Juvenile Courts: Part II: The Value of Access*, 12 COMM. LAW., Fall 14 (1994) (focusing on media access to dependency hearings and related governmental records).

4. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW DOCTRINE, POLICY AND PRACTICE 1146-48 (2000) (some states have made proceedings and records more open in juvenile delinquency court).

5. Statutes and court rules, of course, vary. However, most states have legislation mandating closure with language such as the "general public shall be excluded," "the general public must be excluded," the hearings "shall be closed to the general public," the hearings "shall exclude all persons," or the hearings "shall be private." *E.g.*, ALA. CODE § 12-15-65(a) (Supp. 2000); ALASKA

The last two decades of debate about closed-door juvenile hearings has concerned the court's delinquency population. Critics argued, and continue to argue, that the juvenile court's rehabilitative philosophy, including its closure and confidentiality, simply cover up a system that is not working.⁶ In particular, critics charge that confidentiality conceals a "too lenient" system that "coddles" and lets juveniles "get away" with

STAT. § 47.10.070(a) (Michie 2000); HAW. REV. STAT. ANN. § 571-41(b) (Michie Supp. 1999); IDAHO CODE § 16-1608(b) (Supp. 2000); KY. REV. STAT. ANN. § 610.070 (3) (Michie 1999); ME. REV. STAT. ANN. tit. 22, § 4007(1) (West 1964); MASS. GEN. LAWS ANN. ch. 119, § 38 (West 1994); MINN. STAT. ANN. § 260B.163(1)(c) (West Supp. 2001); N.H. REV. STAT. ANN. § 169-C:14 (1994); ; N.M. STAT. ANN. § 32A-4-20.B (Michie 1999); N.D. CENT. CODE § 27-20-24(5) (Supp. 1995); OKLA. STAT. ANN. tit. 10, § 7003-4.1.A.1(a) (West Supp. 2001); R.I. GEN. LAWS § 14-1-30 (2000); S.C. CODE ANN. § 20-7-755 (Law Co-op Supp. 2000); S.D. CODIFIED LAWS § 26-7A-36 (Michie 1999); UTAH CODE ANN. § 78-3a-115(1)(a) (Supp. 2000); VT. STAT. ANN. tit. 33, ch. 55, § 5523(c) (2001); VA. CODE ANN. § 16.1.302(C) (Michie 1999); WIS. STAT. ANN. § 48.299(1)(a) (West Supp. 2000); WYO. STAT. ANN. § 14-3-424(b) (Michie 1999). Any persons admitted in these states must usually have a direct interest in the proceedings. *E.g.*, IDAHO CODE § 16-1608(b) (Supp. 2000); UTAH CODE ANN. § 78-3a-115(1)(a) (Supp. 2000). Occasionally these mandatory statutes provide that the judge may order otherwise, *e.g.*, OKLA. STAT. tit. 10, § 7003-4.1.A.1 (Supp. 2000); S.D. CODIFIED LAWS § 26-7A-36 (1999), or that the hearing shall be open if the child "demand[s] it." WIS. STAT. ANN. § 48.299(1)(a) (Supp. 2000).

A number of states provide that the hearings "may" be private or closed or that the court "may exclude" the public. *E.g.*, ARK. CODE ANN. § 9-27-325(i)(2) (Michie Supp. 1999); DEL. CODE ANN. tit. 10, § 1063(a) (1999); KAN. STAT. ANN. § 38-1552 (2000); MD. CODE ANN., Cts. & Jud. Proc. § 3-812(f)(2) (Supp. 2000); N.J. STAT. ANN. § 9:6-8.43(b) (West Supp. 2001); N.Y. JUD. LAW § 1043 (McKinney 1999). While this type of statutory language might suggest that hearings will usually be open, too often the norm is closure. Doug Besharov addresses this in his Practice Commentary to the New York statute: "On the basis of this section's wording, one might expect court proceedings to be open to the public except in specific cases. However, in practice, the general public is routinely and automatically excluded . . ." N.Y. JUD. LAW § 1043, Practice Commentary 123. Language in other state statutes suggests that closure is also the rule. *E.g.*, NEV. REV. STAT. ANN. § 432B.430 (Michie 2000) ("only those persons having a direct interest in the case . . . may be admitted"); ARIZ. REV. STAT. ANN. § 8-807(A) (West Supp. 2000) (the person "who is the subject of an investigation" may ask for an open hearing and the court "shall order the hearing to be open to the public" unless the court for good cause determines the hearing should be closed); LA. CHILDREN'S CODE ANN. art. 661 (B) (West 1995) ("may admit any other person who has a proper interest in the proceedings or the work of the court"). *But see* N.C. GEN. STAT. § 7B-801 (a)(b)(1999) (the court decides at its discretion, based on a list of factors, whether hearing will be open or closed; "[n]o hearing . . . shall be closed . . . if the juvenile requests that it remain open.").

Only a very few state statutes or court rules affirmatively require or suggest hearings shall be open. *E.g.*, FLA. STAT. ANN. § 39.507(2) (West Supp. 2001) ("shall be open" but judge "may close any hearing . . . upon determining that the public interest or the welfare of the child is best served by so doing."); IOWA CODE ANN. § 232.92 (West 2000) ("open to the public" but on motion of any party or on court's own motion, court can close "if the court determines that the possibility of damage or harm to the child outweighs the public's interest in having an open hearing"); Mich. Rules of Court, R. 5.925 (2001) ("shall be open to the public," although court may close "during the testimony of a child . . . or victim to protect the welfare of either."); IND. CODE ANN. § 31-32-6-4 (Michie 1997) (if the court orders a proceeding closed, the court shall make findings concerning the closure and "place the closure order in the file of the proceedings."); COL. REV. STAT. ANN. § 19-1-106 (Michie 1997) ("general public shall not be excluded unless the court determines that it is in the best interest of the child or of the community to exclude the general public").

6. Dienes, *supra* note 3, at 7.

little punishment for their crimes.⁷ Further compounding the problem, confidentiality also withholds knowledge from the public concerning which juveniles are threats to public safety.⁸ Because the system is not working, argue the critics, neither is the rehabilitation of the delinquents. The closed juvenile delinquency system, then, does “little more than conceal the . . . system’s failures and abuses.”⁹

The same can be said of the dependency system – the closed door of dependency court has too long concealed from the public a system that leads to failure and abuse. Advocates for closed dependency courtrooms can make arguments similar to those made in defense of closed delinquency courtrooms. While juvenile courtrooms were originally closed to the public in order to contribute to the rehabilitation of delinquents, dependency proceedings, like delinquency proceedings, are similarly meant to protect the child and to treat the problem. The state seeks to rehabilitate and preserve the family if possible, not to punish anyone.¹⁰ Advocates can thus argue that open proceedings will inhibit this rehabilitation. Open proceedings can subject children to invasions of privacy by the press and public. Having one’s family story told in public can embarrass, humiliate, traumatize, stigmatize and thus delay the psychological healing that must take place.¹¹ A closed hearing can contribute to an informal atmosphere, making it more conducive to the social work approach that might best heal and protect the child. Indeed, it is argued that the need for confidentiality is more compelling for dependency hearings than it is for delinquency hearings,¹² and when the issue is neglect or abuse, it is hard to deny the appeal of protecting a child from the public gaze. Given these considerations, closed hearings in dependency court certainly appear to be “in the best interest” of the affected child, a standard that reflects the overall charge to courts when dealing with neglected and abused children.¹³ But there is fallacy in a rationale that considers only the immediate and isolated effects of a closed or open hearing in a particular case. The cumulative effects of a dependency court system that is presumptively and customarily closed to public access must also be con-

7. Michelle India Baird & Mina B. Samuels, *Justice for Youth: The Betrayal of Childhood in the United States*, J. L. & POL’Y 177, 181 (1996); Danielle R. Oddo, *Removing Confidentiality Protections and the “Get Tough” Rhetoric: What Has Gone Wrong with the Juvenile Justice System?*, 18 B.C. THIRD WORLD L.J. 105, 117-118 (1998) (Citing *In re Gault*, 387 U.S. 1, 15-16 (1967)); WILLIAM AYERS, *A KIND AND JUST PARENT: THE CHILDREN OF JUVENILE COURT* 25 (1997); Fox Butterfield, *States Revamping Laws on Juveniles as Felonies Soar*, NEW YORK TIMES, May 12, 1996, at 1).

8. Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 368-69 (1996).

9. *Id.* at 370.

10. *San Bernardino County Dep’t. of Pub. Soc. Servs. v. Super. Ct.*, 283 Cal. Rptr. 332, 339-40 (Cal. Ct. App. 1991).

11. See *In re T.R.*, 556 N.E.2d 439, 449-51 (Ohio 1990).

12. *In re T.R.*, 556 N.E.2d at 449-51.

13. See *San Bernardino*, 283 Cal. Rptr. at 340; Mary Mcdevitt Gofen, *The Right of Access to Child Custody and Dependency Cases*, 62 U. CHI. L. REV. 857, 861 (1995).

sidered. These effects are visited upon *all* children in dependency court, as all are subject to the court's justice. The current status of the dependency court suggests that the presumptively closed courtroom has not resulted in a system that serves the best interest of all children.

The health of dependency court is not good. Those who have tried to stir interest in reform search for words to describe what they see. "Crisis[,] shambles,"¹⁴ "terrible plight,"¹⁵ "widespread frustration,"¹⁶ "so troubled,"¹⁷ and, with much frequency, "failure,"¹⁸ are words used time and again to try to communicate to the public the state of dependency court. The reports of participants and others with some access confirm these descriptions. Dependency court facilities are inadequate. Personnel are underpaid, under-appreciated and under-trained. The caseload is massive. The issues are serious and complex and at the same time, state and federal laws require courts to move quickly to determine a permanent home for each child.¹⁹ Most telling, however, are the results of the system, the stories of children harmed and more while under the jurisdiction of the system charged with their protection. The frequent news stories of dependency courts' child protective efforts gone deadly wrong are the easiest evidence to recite. Even closed courtroom doors cannot keep these horrific stories from the media. In Georgia:

Once doctors concluded the child was a victim of battered child syndrome, records show that Miller [the chief of social work at the children's hospital] hounded Fulton [Department of Family and Children Services (DFACS)] not to return the child to the guardian. DFACS went to court to remove the child but failed to subpoena Miller or the doctors. On Feb. 10, 1995, a Fulton Juvenile Court judge returned the child to the guardian without hearing any testimony from hospital staff. By April 1996 Tavelle [the child] was dead.²⁰

In Washington, D.C.:

On Dec. 22, [1999,] D.C. Superior Court Judge Evelyn E.D. Queen ordered Brianna out of foster care and back to her biological mother, who had been found neglectful of Brianna and her seven siblings during a trial last year. Brianna died two weeks later in what was ruled a homicide. D.C. police and a grand jury are investigating.

14. Jennifer R. Gavin, *Child Welfare Law Curricula in Legal Education: Massachusetts' Untried Opportunity*, 7 B.U. PUB. INT. L.J. 9, 10, 13 (1998).

15. Brelsford & Myers, *supra* note 3, at 14.

16. Sandra Anderson Garcia & Robert Batey, *The Roles of Counsel for the Parents in Child Dependency Court Proceedings*, 22 GA. L. REV. 1079, 1080 (1988).

17. Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 639 (1999).

18. *Id.*

19. Discussion *infra*, Parts III.B.

20. Jane O. Hansen, *DA takes up dead child's case; Ruled slaying in 1996, it languished*, THE ATLANTA JOURNAL – THE ATLANTA CONSTITUTION, May 9, 2000, at B1.

....

The attorney representing Brianna said the toddler's social worker told him the mother's house was safe. The social worker denies that. The social worker also hadn't turned in a report on time to Judge Queen urging that Brianna not be returned to her mother²¹

In Florida:

Judge Lockett said Thursday he won't hear any more cases in which DCF [the state Department of Children and Families (DCF)] investigators are unprepared Lockett is the judge who sent Kayla back to her home after getting incomplete information on her case from DCF investigators. Later, after the child was slain, Lockett vowed he would never again send a child home without complete background.²²

We at least know part of what went wrong in Tavelle, Brianna and Kayla's cases. A witness was not subpoenaed, a report was not timely filed, and an investigation was not completed – all possibly deadly mistakes. In many cases we do not even know this much. In Indiana:

Eight-month-old Ashley Whetzel died, prosecutors allege, at the hands of a man who had been hurting her much of her short life. . . . Exactly what happened . . . is unclear – since Indiana law keeps child-protection cases and their records secret, and many of the people involved in the case would not talk about it.²³

In Missouri:

Eight-year-old Larry Bass weighed less than 30 pounds when he died Wednesday. . . . Because case records are closed to the public, the Missouri Division of Family Services would not release any details about the family's case or say whether it had investigated the family.²⁴

These stories, of course, are among the most notorious failures of dependency court – children returned to the homes of their abusers, or children abused by the foster families meant to protect them. But hundreds of thousands of children are subjected to the dependency court process every year,²⁵ in a system that can afford “no longer than five or

21. Sari Horwitz & Scott Higham, *Record Numbers of D.C. Children Go to Foster Care; Briana's Death 'Scared' Caseworkers*, THE WASHINGTON POST, Feb. 28, 2000 at A1.

22. Karin Meadows & Frank Stanfield, *Broken Safety Net Puts Kids in Danger; as DCF, Bridges Go to War, Children are the Casualties*, ORLANDO SENTINEL, Sept. 26, 1999, at A1.

23. Todd Murphy, *Protective System on Trial With Father of Infant Who Died*, COURIER-JOURNAL (Louisville, KY), Oct. 17, 1995, at A1.

24. Christine Vendel, *Mother of Dead Boy Charged With Abuse Some Had Expressed Concerns Children Were Neglected*, KANSAS CITY STAR, Oct. 22, 1999, at A1.

25. Jane Waldfogel, *Rethinking the Paradigm for Child Protection*, in THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 104, 104, 107 Figure 1 (Richard E. Behrman, M.D. ed., 1998). Close to a half million children a day, for example, can be counted in foster care. Gavin, *supra* note 14, at 10.

10 minutes,”²⁶ “about ten minutes,”²⁷ or “an average of 16 minutes”²⁸ to hear and decide a case. While closed doors keep unknown the specific justice or injustice meted out in individual cases, most accounts of dependency court do not inspire confidence. Most describe a system that has learned simply to make do with its grossly inadequate resources, one that focuses on processing cases at the expense of protecting children:

[H]eavy calendars . . . require cases to be moved through quickly. There is no time for thorough and careful consideration of all the facts and concerns. Giving too much time to any one case disrupts the entire calendar. Neither the judges nor the attorneys can be completely familiar with these cases because of the number of cases which they handle. . . . The caseloads maintained by most professionals working in these systems [are] too high to expect quality performance.²⁹

The children who are the subjects of these ten minute hearings in today’s dependency court, will, if they are lucky, never make the headlines of the newspapers. But most assuredly, dependency court is failing many of these children too.

The state of today’s dependency court and the known failures of the court require that we reconsider the wisdom of closed proceedings. First, as a practical matter, to demand accountability from the delinquency proceedings of juvenile court and not to do so with dependency proceedings is shortsighted. The two are linked. Personnel within the juvenile court system frequently comment that they expect to see many of the children now in dependency court – abused, neglected or abandoned children – “down the hall” in delinquency court a few years later.³⁰ Their

26. *Juvenile Court Improvement: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means* 105th Cong. 25, 28 (Feb. 27, 1997) (statement of Kathi L. Grasso, American Bar Association Center on Children and the Law, on behalf of the American Bar Association).

27. ABA Presidential Working Group on the Unmet Legal Needs of Children and Their Families, *America’s Children at Risk: A National Agenda for Legal Action* (Executive Summary), reprinted in, 3 KY. CHILDREN’S RIGHTS J. 18, 22 (1994).

28. Samuel Broderick Sokol, Comment, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. REV. 881, 913 n.232 (1998) (quoting Juvenile Servs. Comm. of L.A. County Grand Jury, *Legal Representation in Dependency Court* 6 (1992)).

29. Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 118-19 (1997). See also Rebecca H. Hertz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Rules to Improve Effectiveness*, 27 FAM. L. Q. 327, 347 (1993).

30. Personal observations of author during two year stint as Court Appointed Special Advocate (CASA). CASA is a well-known and respected example of an organization that trains and coordinates lay volunteers to serve as guardian ad litem (GALs) in dependency proceedings, sometimes alongside the child’s lawyer. Mark Hardin, *Responsibilities and Effectiveness of the Juvenile Court in Handling Dependency Cases*, in *THE FUTURE OF CHILDREN: THE JUVENILE COURT* 111, 113-20 (Richard E. Behrman, M.D. ed., 1996).

suspicions are correct.³¹ Children who end up in juvenile delinquency court often enter the system of juvenile justice first as abused or neglected children. That violence is a predictor of violence, and thus delinquency, is well known. That neglect is a predictor of delinquency, however, is also supported by research.³² Some researchers have concluded that neglect, which constitutes the majority of dependency cases,³³ “may be more harmful to a child’s emotional development than abuse,”³⁴ and that it is the combination of abuse and neglect that often produces “anti-social behavior.”³⁵ Other factors are implicated, including sub-standard housing, sub-standard health care, inadequate education, and there is a strong correlation between poverty and delinquency.³⁶ Most indicators, however, which appear to be linked with the child’s earliest developmental years, implicate family functioning including, most prominently, abuse and neglect.³⁷ The impact is tangible. A child who is subject to abuse or neglect, compared to a child who is not abused or neglected, has “a 53% greater chance of being arrested as a juvenile, a 38% greater chance of being arrested as an adult, and a 38% greater chance of being arrested for a violent crime.”³⁸ Protecting these children now from abuse and neglect will pay off in the long run.

More fundamentally, however, to argue about access and accountability in the delinquency wing of juvenile court in the name of protecting the public, without considering it in the dependency wing, is to relegate to secondary status the protection of our nation’s children. These children are a part of the public that must be protected.

That the system is failing, of course, does not mean public access is the answer, and it does not mean that public access will bring reform. It is possible that a presumption of public access to dependency proceedings would not have made a difference in the quality of the court’s efforts in the cases of Tavelle, Brianna, Kayla, Ashley, or Larry, for example, or in many of the thousands of other cases dependency courts hear. But it seems likely that it would have. Further, if children are dying because of careless mistakes; if courts are consistently deciding in ten minute hearings to take children from parents, or to leave children with parents accused of neglect or abuse; if all of this is going on behind closed doors; and if, as Chief Justice Burger writes, “the presumptive openness

31. See Jane Watson, *Crime and Juvenile Delinquency Prevention Policy: Time For Early Childhood Intervention*, 2 GEO. J. ON FIGHTING POVERTY 245, 246-47 (1995).

32. *Id.* at 247.

33. Diana J. English, *The Extent and Consequences of Child Maltreatment*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 39, 43-46 (1998).

34. Watson, *supra* note 31, at 247.

35. *Id.*

36. Candace Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 426 (1999).

37. *Id.* at 426-27; see also Watson, *supra* note 31, at 246-47.

38. Watson, *supra* note 31, at 247.

of the trial” has long been regarded as “one of the essential qualities of a court of justice,”³⁹ why do we continue to deny public access to dependency proceedings *as a matter of course*? The public needs to see the inadequate system of justice dependency court offers to its children. Whether that opportunity for public accountability will bring reform and a greater measure of justice for the children of dependency court remains to be seen. But the case for creating the possibility is a persuasive one.

I. HISTORY AND FUNCTION

While I argue that public access to dependency proceedings should be legislated because it is in the best interest of children and not because it may be constitutionally required,⁴⁰ the Supreme Court’s constitutional analysis in court access cases is a good starting point. In a series of opinions in the 1980s, the Court recognized the public’s First Amendment right of access to criminal proceedings, beginning with *Richmond Newspapers, Inc. v. Virginia*⁴¹ and *Globe Newspaper Co. v. Superior Court*⁴² (trials) and continuing with *Press-Enterprise Co. v. Superior Court*⁴³ (hereinafter *Press Enterprise I*) (jury selection process) and *Press-Enterprise Co. v. Superior Court*⁴⁴ (hereinafter *Press-Enterprise II*) (preliminary hearings). In each case, the Court relied upon a two-fold analysis, looking first at the history of access to the proceeding and second, at the function served by access to the particular proceeding.⁴⁵ The Court’s analysis suits a policy discussion in two respects. First, the Court’s analytical framework informs the discussion in two essential areas: (1) reviewing the history of access to dependency proceedings provides an opportunity to look at society’s judgment about access to proceedings over time and (2) examining the functional role of access to dependency proceedings provides an opportunity to consider the logic of open proceedings today. In addition, however, the Supreme Court’s analysis in these cases also contributes substantively to a discussion of dependency proceedings. While the cases in which the Court considered access questions all involved criminal proceedings,⁴⁶ the Court’s analysis

39. *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 567 (1980) (plurality opinion) (quoting *Daubney v. Cooper*, 10 B. & C. 237, 240, 109 Eng. Rep. 438, 440 (K.B. 1829)).

40. Some state courts have dealt with the constitutional aspects of access to dependency courts. *San Bernardino County Dep’t. of Pub. Soc. Servs. v. Super. Ct.*, 283 Cal. Rptr. 332, 339 (Cal. Ct. App. 1991); *Natural Parents of J.B. v. Fla. Dept. of Children & Soc. Servs.*, 780 So. 2d 6, 9 (Fla. 2001).

41. 448 U.S. 555, 575-581 (1980) (plurality opinion); *Id.* at 597-98 (Brennan, J., concurring).

42. 457 U.S. 596, 604-06 (1982).

43. 464 U.S. 501, 505-10 (1984).

44. 478 U.S. 1, 10-13 (1986).

45. See also *Waller v. Ga.*, 467 U.S. 39, 46-47 (1984) (using the same analysis as the First Amendment access cases, held that a closed suppression hearing, over defendant’s objection, violated defendant’s Sixth Amendment rights).

46. The Supreme Court has thus far explicitly recognized a right of access only in criminal cases. *But see Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 580 (1980) (“[W]e note that

includes the history and function of access to courtrooms generally, thus also providing an introduction to these aspects of dependency proceedings.

The Court's opinions first consider the history of courtroom access in America.⁴⁷ In Justice Brennan's words, "a tradition of accessibility implies the favorable judgment of experience."⁴⁸ In other words, our historical experience tells us something about how we have valued access. Chief Justice Burger provides the foundational history lesson in the Court's plurality opinion in *Richmond*.⁴⁹ His discussion gives more focus to the criminal trial, the issue before the Court, but also tells the history of trials generally in the Anglo-American justice system, and makes plain that not only criminal, but also civil trials have traditionally been open. In tracking the open trial from England to America, Justice Burger begins "before the Norman Conquest [when] cases in England were generally brought before moots, such as the local court of the hundred or the county court, which were attended by the freemen of the community."⁵⁰ These were courts of general jurisdiction and heard both civil and criminal matters.⁵¹ Justice Burger's discussion moves on to another court of general jurisdiction, "the Eyre of Kent, a general court held in 1313-1314, [which] evince[d] a recognition of the importance of public attendance apart from the 'jury duty' aspect."⁵² From the Eyre of Kent, Justice Burger takes us to the colonies:

historically both civil and criminal trials have been presumptively open."); *Richmond*, 448 U.S. at 599 (Stewart, J., concurring) ("[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 384 (1979) (observing that history demonstrates a "common-law rule of open civil and criminal proceedings").

Lower courts, however, have relied upon *Richmond*, *Globe* and subsequent cases and found that the right of access extends to civil cases also. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 359 (Cal. 1999); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *In re Cont. Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-79 (6th Cir. 1983). A few authors have also argued that the public may well have a constitutional right of access to dependency proceedings. *E.g.*, Jeanne L. Nowaczewski, Comment, *The First Amendment Right of Access to Civil Trials After Globe Newspaper Co. v. Superior Court*, 51 U. CHI. L. REV. 286, 306-10; Sokol, *supra* note 28, at 881; Brelsford & Myers, *supra* note 3, at 14; Gofen, *supra* note 13, at 857.

47. The historical analysis the Court uses can serve two objectives. First, a history of access can suggest a constitutional right. Important to a policy analysis, however, is the second objective, what our experience tells us about the value of access. Nowaczewski, *supra* note 46, at 290-91.

48. *Richmond*, 448 U.S. at 589 (Brennan, J., concurring).

49. *Id.* at 556.

50. *Id.* at 565 (citing Pollock, *English Law Before the Norman Conquest*, 1 SELECT ESSAYS IN ANGLO-AM. LEGAL HIST. 88, 89 (1907)).

51. Nowaczewski, *supra* note 46, at 294. Nowaczewski also notes both criminal and civil trials were open in England and that there was originally no significant distinction between the two. As the two became more distinct, public access remained constant. "[E]arly commentators either expressly or implicitly regarded civil trials as necessarily open to the public." *Id.* at 295.

52. *Richmond*, 448 U.S. at 566.

[W]hen in the mid-1600's the Virginia Assembly felt that the respect due the courts was 'by the clamorous unmannerlyness of the people lost, and order, gravity and decoram which should manifest the authority of a court in the court it self neglected,' the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them.⁵³

And in a footnote, Chief Justice Burger notes that "historically both civil and criminal trials have been presumptively open."⁵⁴

Justice Burger then turns to the second part of the Court's analysis, asking what function is served, what values are gained, by public access to trials.⁵⁵ And again, while the Chief Justice looks specifically at the function public access serves in criminal trials, his rationale extends to civil proceedings.⁵⁶ Presumptive openness, Justice Burger observes, has "long been recognized as an indispensable attribute of an Anglo-American trial."⁵⁷ Hale in the 17th Century, Blackstone in the 18th century, and Bentham in the 19th century all recognized the value of the open trial.⁵⁸ Among those benefits accruing from access Burger discusses were giving assurance of fair proceedings, discouraging perjury, discouraging other misconduct, enhancing the performance of participants, protecting the judge from "imputations of dishonesty," discouraging decisions based on "secret bias or partiality," educating the public, and encouraging public confidence in the system.⁵⁹

The Court's discussions on the history and the functional role of access suggest dependency proceedings should be subject to public access. First, history has valued highly public access to trials, and dependency hearings are trials. The dependency court adjudicates.⁶⁰ Further, the matters adjudicated in dependency court are no less worthy or needful of the benefits access brings – fair proceedings, truthfulness, credibility, an educated public, public confidence in the system – than are the matters adjudicated in criminal court. Dependency courts decide whether a child

53. *Id.* at 567 (internal source omitted).

54. *Id.* at 580 n.17. *See also* *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 387 (1979): For many centuries, both civil and criminal trials have traditionally been open to the public. . . . [And] in the American Colonies . . . [f]rom the beginning, the norm was open trials. . . . Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case [citations omitted]. Thus, in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.

55. *Richmond*, 448 U.S. at 575-78, 580.

56. *Id.* at 569.

57. *Id.*

58. *Id.*

59. *Id.* at 569, 572. These latter observations served as the basis for the "function" prong of the Court's history and function analysis. *See also* *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982) (listing the benefits of public access to criminal trials).

60. *In re T.R.*, 556 N.E.2d 439, 458 (Ohio 1990) (Douglas, J., concurring in part, dissenting in part).

has been abused or neglected; they determine whether a child needs the intervention of the state for protection; they decide the parents' rights to the custody of their children; they separate children and parents; they place children in foster homes. If preliminary hearings and voir dires in criminal cases are, as the Supreme Court has said, as important as the trial itself,⁶¹ and thus subject to public access, then a dependency proceeding, which is the "trial," should be as well.⁶²

The Supreme Court has also recognized that access to proceedings is even more critical when no jury participates and the judge acts as both fact finder and decision maker, as is the case in dependency hearings.⁶³ The Court's statement concerning preliminary hearings applies equally to other proceedings conducted without juries: "[T]he absence of a jury, long recognized as 'an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint [sic], biased, or eccentric judge,' makes the importance of public access . . . even more significant."⁶⁴

Thus, the Supreme Court's general discussion of the history and function of access supports the wisdom of public access to dependency trials. Justice Brennan, in *Richmond*, however, cautions against generalities, and rightly so. Just as the protection of the First Amendment can theoretically be made "endless" by asserting that an action informs the public and thus should be protected,⁶⁵ we need to be cautious in a policy analysis of access to court proceedings. A policy analysis, like a constitutional analysis, "is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process."⁶⁶ Here, trials that they are, one cannot ignore a one hundred year history that has treated America's juvenile proceedings, including dependency, differently, and treated them so for particular policy reasons. Accordingly, it makes sense to examine specifically the history of dependency court proceedings to see if it reveals any "judg-

61. *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 12 (1986) (quoting *San Jose Mercury News v. Mun. Court*, 638 P.2d 655, 663 (Cal. 1982)).

62. The Supreme Court has described the role of preliminary hearings in criminal matters as "often the final and most important step" and often the "sole occasion for public observation of the . . . system." *Press Enterprise Co.* 478 U.S. at 12. Federal and state courts have extended the *Richmond* right of criminal trial access to numerous types of legal proceedings, including bail hearings, change of venue hearings, chambers conferences, and closure proceedings, by interpreting "trial" broadly. Eugene Cerruti, "Dancing in the Courthouse": *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 266-67 (1995).

63. Juries are sometimes involved in termination of parental rights cases. See e.g., WIS. STAT. § 48.31(2) (West Supp. 2000). However, judges almost always decide abuse and neglect dependency proceedings. See Gofen, *supra* note 13, at 857; Sokol, *supra* note 28, at 917-18. But see COLO. REV. STAT. § 19-3-202 (2000) (providing for a right to jury trial).

64. *Press-Enterprise Co.*, 478 U.S. at 12-13 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968)).

65. *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 588 (1980) (Brennan, J., concurring).

66. *Richmond*, 448 U.S. at 589.

ment of experience.” Likewise, we need to analyze specifically the nature of dependency proceedings to determine if the function of access is important in terms of that particular process.

II. THE HISTORICAL JUDGMENT OF JUVENILE DEPENDENCY PROCEEDING

While our country’s modern dependency proceeding, with its confidentiality strictures, is directly traceable to the invention of the juvenile court in 1900, its earlier origins are legitimately traced to English laws and judicial proceedings as far back as the 1300s.⁶⁷ These early statutes and proceedings show that confidentiality was initially not a concern, but then, neither was protection of children. Both concepts came later. The historical starting point includes England’s Poor Laws and to a lesser extent, the English Court of Chancery’s recognition of *parens patriae* in cases concerning children.

A. England’s Poor Laws

Modern dependency proceedings are probably most frequently traced to the English Poor Laws.⁶⁸ The Poor Laws were England’s legal mechanism for dealing with its poor in the 1300s through the 1800s.⁶⁹ Beginning with the Statutes of Laborers of 1349 and 1350⁷⁰ and leading up to the Poor Law Act of 1601,⁷¹ the Poor Laws sought to deal with several economic and social issues that involved the poor and adversely affected the rich and middle classes.⁷² Certainly the earliest legislation was not motivated by a desire to aid the poor or to protect dependent children. The Statutes of Laborers, frequently cited as the beginning of the Poor

67. Some would argue earlier. See William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 AKRON L. REV. 73, 73 n.3 (1996).

68. Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205, 210-11 (1971).

69. *Id.* at 210; William P. Quigley, *Backwards Into the Future: How Welfare Changes in the Millenium Resemble English Poor Laws of the Middle Ages*, 9 STAN. L. & POL’Y REV. 101, 102-03 (1998); Quigley, *supra* note 67, at 125.

70. The Statute of Labourers, 1349, 23 Edw. 3 (Eng.) and A Statute of Laborers, 1350, 25 Edw. 3 (Eng.), reprinted in I THE STATUTES AT LARGE 248-253 (Owen Ruffhead, ed., 1763).

71. An Act for the Relief of the Poor, 1601, 43 Eliz., ch. 2 (Eng.), reprinted in II THE STATUTES AT LARGE 702-05 (Owen Ruffhead, ed., 1763). The exact span of the Poor Laws varies from author to author, but the 1601 law is usually seen as the high mark. See Jacobus TenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 258 (1964).

72. For example, the early acts forced the poor to work for fixed wages; the later acts provided some means of relief for the “impotent” poor. Rendleman, *supra* note 68, at 210-11; Quigley, *supra* note 69, at 102-03. Much of the need for the Poor Laws was triggered by the decline and breakup of the system of feudalism and the resulting social and economic changes. The black plague, famine and the resulting labor shortage, along with various other factors, also contributed. Quigley, *supra* note 67, at 73, 77, 82-83; Rendleman, *supra* note 68, at 210; Quigley, *supra* note 69, at 102.

Laws,⁷³ were designed to accomplish two goals: to keep scarce workers from taking advantage of their position in the labor market by demanding excessive wages, and further, to deal with those poor who would rather live by begging than live by working – a situation becoming increasingly disturbing to the public.⁷⁴ The statutes dealt with these concerns by first keeping the wages of the working poor in check; in effect, the laws established maximum wages.⁷⁵ Second, these maximum wages were coupled with forced labor of the able-bodied poor, who “shall be bound to serve him that doth require him, or else committed to [prison].”⁷⁶ Finally, as added insurance for the labor pool, and as a way to eliminate the scourge of idleness, vagrancy and begging, the public was prohibited from almsgiving to those “able to labour.”⁷⁷

By the 1500s, economic and political changes had resulted in a large number of poor and homeless in England,⁷⁸ resulting in significant economic strain and social disorder,⁷⁹ and, consequently, in a 1535 Poor Law that established a system of public relief.⁸⁰ Once the public assumed the burden of supporting the poor, it also felt the price tag, and one way of keeping the price as low as possible was to put poor children to work, either as indentured servants or apprentices. Under the Elizabethan Stat-

73. TenBroek, *supra* note 71, at 261; Quigley, *supra* note 67, at 82 n.50.

74. See generally A.L. Beier, *MASTERLESS MEN: THE VAGRANCY PROBLEM IN ENGLAND 1560-1640*, 1-13 (1985).

First, they were poor, lacking any regular income apart from wages from casual labor. Secondly, they were able-bodied – ‘sturdy’, ‘valiant’ and fit to work. Thirdly, they were unemployed, or in contemporary terms ‘masterless’ and ‘idle’. Fourthly, they were rootless.; wandering, vagrant, ‘runnagate’ [sic]. Finally, they were lawless, dangerous, and suspected of spreading vice and corruption. . . . [Laws against vagrancy] reflected a conviction of the ruling elites that vagabondage was a hydra-headed monster poised to destroy the state and social order, for of the vagrant’s five characteristics the leitmotiv that ran through them all was disorder.

Id. at 4. See also Quigley, *supra* note 67, at 83-84 (discussing the birth of the Poor Laws pursuant to the Black Plague); TenBroek, *supra* note 71, at 270-71 (describing the rise of the Poor Laws in response to the English labor shortage); *The Statute of Labourers, 1349, 23 Edw. 3 (Eng.)*, reprinted in *I The Statutes at Large 248-49* (Owen Ruffhead, ed., 1763).

75. Quigley, *supra* note 67, at 84-91 (a labor shortage was causing workers to demand “excessive” wages).

76. *The Statute of Labourers, 1349, 23 Edw. 3, ch. 1 (Eng.)*, reprinted in *I The Statutes at Large 249* (Owen Ruffhead, ed., 1763). See also Quigley, *supra* note 69, at 102 (laws establishing maximum wages).

77. *The Statute of Labourers, 1349, 23 Edw. 3, ch. 7 (Eng.)*, reprinted in *I The Statutes at Large 250* (Owen Ruffhead, ed., 1763). See also Quigley, *supra* note 67, at 87 (delineating who was eligible for alms giving). The 1349 statute gave some nod to “helping” the poor by requiring that some necessities be sold at “reasonable prices.” *The Statute of Labourers, 1349, 23 Edw. 3, ch. 6 (Eng.)*, reprinted in *I The Statutes at Large 250* (Owen Ruffhead, ed., 1763).

78. Thirteen to twenty percent of the population in the 1520s was destitute, and the number continued to rise throughout the 1500s. Quigley, *supra* note 67, at 92-93.

79. Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 63 *GEO. L.J.* 887, 894-95 (1975).

80. Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 *CAL. L. REV.* 175, 180 (1955).

utes of Artificers of 1562,⁸¹ children as young as one year and up to age twenty could be involuntarily apprenticed as workers for “seven years at the least.”⁸² In theory, “apprenticeship involved training [in] the master’s ‘craft, mystery, or occupation’”⁸³ Indenture, on the other hand, was “simply a work contract.”⁸⁴ “In practice, both usually involved little training,”⁸⁵ and both involved separating the child from its parents, as the child was required to live with the master for whom the apprenticed or indentured child worked.⁸⁶ Putting children “to service” reduced the drain on the public purse and as a further benefit, kept them off the streets, a particular concern of the Crown’s at the time.⁸⁷ The homeless of these years were called a “new class of poor, the wandering ones,”⁸⁸ triggered by the large number of “wandering, vagrant, [and] ‘runnagate’ [sic]” persons⁸⁹ “terroriz[ing] town and country.”⁹⁰

The next major legislation in the succession of Poor Laws was the Act of 1601. While England continued to revise its laws concerning the poor after this date, the 1601 legislation is the trademark of the English

81. An Act Containing Divers Orders for Artificers, Labourers, Servants of Husbandry & Apprentices (Statute of Artificers), 1562, 5 Eliz., ch. 4 (Eng.), reprinted in II The Statutes at Large 535-43 (Owen Ruffhead, ed., 1763). See e.g., Rendleman, *supra* note 68, at 210 (referring to it as the Statutes of Artificers).

82. An Act Containing Divers Orders for Artificers, Labourers, Servants of Husbandry & Apprentices (Statute of Artificers), 1562, 5 Eliz., ch. 4, § 27, 35, 43 (Eng.), reprinted in II The Statutes at Large 540, 541, 542 (Owen Ruffhead, ed., 1763). See also Quigley, *supra* note 69, at 103 (children one year old to twenty years old were eligible for apprenticeship); TenBroek, *supra* note 71, at 274, 279-82 (defining the apprenticeship).

83. Areen, *supra* note 79, at 895 n.35 (citing G. ABBOTT, THE CHILD AND THE STATE 79-255 (1938)).

84. *Id.*

85. *Id.*

86. *Id.* at 895-96. While the training extended to many children was probably minimal or non-existent, some surely did acquire skills they would not have otherwise had. *Id.* at 896 n.43. Further, child labor “in this pre-child labor law era” was not untoward, nor was sending children away to acquire skills; “upper class families of the time frequently sent adolescents to other families for training.” *Id.* at 894-96. “Adolescents” are a far cry from one year olds, however.

87. *Id.* at 894-96.

88. Quigley, *supra* note 67, at 93. See also Richard J. Ross, *The Commoning of the Common Law: The Renaissance Debate Over Printing English Law, 1520-1640*, 146 U. PA. L. REV. 323, 390 (1998) (discussing “what has been called the ‘crisis of order,’ as population growth outstripped economic opportunities, resulting in growing poverty, vagrancy, social polarization, landlessness . . .”).

89. Beier, *supra* note 74, at 4. See also Quigley, *supra* note 67, at 83-85, 87 (describing how much of the population left the feudal manor in pursuit of better work); Areen, *supra* note 79, at 894-95 (detailing how the “sturdy beggar began to fill the roads”); TenBroek, *supra* note 71, at 270-71 (describing the relationship between Poor Laws and the maintenance of the labor supply).

90. Areen, *supra* note 79, at 895. Children were again addressed in a 1576 act where the value of providing work for children was specifically mentioned – “[t]o the intent youth may be accustomed and brought up in labor and work” – but so was the public concern with the homeless poor – “and then not like to grow to be idle rogues.” Philip Harvey, *Joblessness and the Law Before the New Deal*, 6 GEO. J. ON POVERTY L. & POL’Y 1, 16 (1999) (quoting *An Act for the Setting of the Poor on Work, and for the Avoiding of Idleness, 1575-1576*, 18 Eliz., ch. 3, § 4 (Eng.) (spelling in quotations was modified)).

Poor Laws. It “fixed the character of poor relief for three centuries,”⁹¹ and served as an archetype for early efforts in the American colonies, and later, for legislative efforts in the states.⁹² The Poor Law Act of 1601 continued forced work for children, but also specifically linked forced work and apprenticeships to children of those poor thought not “able to keep and maintain their children.”⁹³ By 1601, then, the Poor Laws had established a pattern that is discernible in today’s dependency court. The legislation empowered the state to deal with children whose parents were unable to support them and part of that legislative model included taking those children from the custody of their parents.⁹⁴

While the obligation of the public to care for the poor became the focus of the Poor Laws, protecting poor relief recipients, whether children or not, from any associated stigma or trauma was not a special concern.⁹⁵ Generally the laws did not seek to stigmatize affirmatively those individuals sanctioned as needing relief;⁹⁶ there was simply little effort to

91. TenBroek, *supra* note 71, at 258.

92. *Id.* See also Quigley, *supra* note 67, at 127-28 (explaining how the English Poor Laws represented the first attempt to remedy poverty through legislation).

93. An Act for the Relief of the Poor, 1601, 43 Eliz., ch. 2, § 1 (Eng.), *reprinted in* II The Statutes at Large 702 (Owen Ruffhead, ed., 1763). The statute also made financially able family members of “every poor, old, blind, lame and impotent person, or other poor person not able to work” financially responsible for each other, thus imposing a legal duty upon parents to support their children, a duty not found in the common law. *Id.* at § 7 (included were fathers, grandfathers, mothers, grandmothers and children), *reprinted in* II The Statutes at Large 703 (Owen Ruffhead, ed., 1763). The responsibility laws applied only to the poor, and “the common law did not seek to augment the poor law. . . . The courts continued to find that parents were under a natural duty and a moral responsibility [to support their children] but not a legal obligation.” TenBroek, *supra* note 71, at 290. “If the son is left to starve, the exclusive remedy of the law is to apply to the parish poor law authorities who will ‘compel the father, if of ability, to pay for his son’s support.’” *Id.* at 291 n.148 (quoting *Shelton v. Springett*, 138 Eng. Rep. 549, 550 (1851)). See also Quigley, *supra* note 67, at 127-28 (discussing how children of the poor could be taken from their families by operation of law).

94. TenBroek, *supra* note 71, at 286.

95. The concern was control and regulation by the state:

The Elizabethan poor law system proved . . . a fertile source of special legal provisions about the poor. These governed their subjection to public control, their condition of idleness or labor, their freedom of choice of living arrangements, their right to travel and settle where they pleased, their personal and civil rights, and their family relationships. Regulation of those family relationships included the denial or subordination of parental rights to custody, control, and determination of training or education The poor law was thus not only a law *about* the poor but a law *of* the poor. It dealt with a condition, and it governed a class

Id. (emphasis in original).

96. See generally Quigley, *supra* note 67, at 84, 87, 93, 102. By contrast, those designated as not legitimate recipients, those seen as able-bodied persons refusing to work, were singled out for punishment, and sometimes for the stigma of public punishment. The 1531 Act, for example, provided that an unauthorized beggar who was a repeat offender would have “the upper part of the gristle of his right ear cut off.” An Act Concerning Punishment of Beggars and Vagabonds, 1531, 22 Hen. 8, ch. 12 (Eng.), *reprinted in* V Historical Documents 1485-1558 at 1027 (C.H. Williams, ed., 1971).

Further, legitimate recipients were not always spared. The Poor Relief Act of 1662, An Act for the Better Relief of the Poor of this Kingdom (The Act of Settlement), 14 Car. 2, ch. 12 (Eng.), *reprinted in* III The Statutes at Large 243 (Owen Ruffhead, ed., 1763), for example, was enacted primarily to respond to a concern that the rural poor were moving to cities and placing an

eliminate social stigma associated with poor relief. Workhouses, for example, establishments designed to thus reducing the cost of poor relief,⁹⁷ were designed to “make the receipt of aid so psychologically devastating and so morally stigmatizing that only the truly needy would request it....”⁹⁸ While the implicit humiliation of the workhouse was theoretically reserved for the able-bodied,⁹⁹ their children were not exempt. A description of a 1795 workhouse: “The number of Paupers in the workhouse at present . . . is 136 Of these 38 are under 10 years of age; 26 between 10 and 20 Their employments are various . . . [and] children are generally sent to the different manufactories”¹⁰⁰

unfair burden on cities. *Id.* at § 1. *See also* Quigley, *supra* note 67, at 103-04 (describing how London was being overrun by migratory rural settlers). As later amended, the Act required that poor relief recipients, including children, wear a red or blue cloth “P” on their clothing:

And to the end that the money raised only for the relief of such as are well impotent as poor, may not be misapplied and consumed by the idle, sturdy and disorderly beggars; be it further enacted . . . that every such person . . . [who] receive[s] relief [from] any parish . . . and the wife and children of any such person cohabiting in the same house . . . shall upon the shoulder of the right sleeve of the upper-most garment of every such person, in an open and visible manner, wear such badge or mark as is herein after mentioned and expressed, that is to say, a large Roman P. together with the first letter of the name of the parish or place whereof such poor person is an inhabitant, cut either in red or blue cloth, as by the church wardens and overseers of the poor it shall be directed and appointed

An Act for Supplying Some Defects in the Laws for the Relief of the Poor of this Kingdom, 1697, 8 & 9 Will. 3, ch. 30 § 2 (Eng.), reprinted in III *The Statutes at Large* 681 (Owen Ruffhead, ed., 1763). *See* Quigley, *supra* note 67, at 106. The Act simply substituted stigma for judgment, and relied on public branding as the mechanism for sorting out the truly needy from the merely idle.

97. Quigley, *supra* note 67, at 109. Workhouses were the most significant feature of the modifications and reforms enacted in years after 1601 and were a primary component of the Poor Relief Act. *Id.* at 109-113.

98. *Id.* at 110 (citing Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract*, 24 J. LEGAL. STUD. 283, 310 (1995)).

99. Quigley, *supra* note 67, at 109.

100. *See id.* at 111 (quoting Rules of Kendal Workhouse, 1797, quoted in Sir Frederic Eden, *The State Of The Poor* (1797) at 754-57, reprinted in 11 *English Historical Documents* (1783-1832) at 446-48 (David C. Douglas, ed. 1959)). Workhouses went out of favor in the late 1700s, emerged again in 1834, and retreated yet again. Quigley, *supra* note 67, at 112-13, 117, 124-25. *See also* Peter M. Cicchino, *The Problem Child: An Empirical Survey and Rhetorical Analysis of Child Poverty in the United States*, 5 J.L. & POL’Y 5, 76-77 (1996); George Fisher, *The Birth of the Prison Retold*, 104 YALE L.J. 1235, 1295-96 (1995).

The workhouse reflected English society’s prevailing belief about the poor, and thus its lack of concern about stigmatizing the poor. Being poor was usually a personal failing, not a result of economic or societal factors. There was thus no need to protect those who deserved no protection. The consideration for the design of poor relief was cost efficiency. Quigley, *supra* note 67, at 126-27; TenBroek, *supra* note 71, at 286. Other motivations were sometimes present, however; for example, the laws seemed to recognize “ethical concepts about the need for the individual to work, and criminological concepts about the social results of idleness and vagrancy – but these forces were only contributory The seminal source of the law of the poor was the need to curtail public expenditures and to conserve public funds once the public undertook the burden [of support of the poor].” *Id.* at 286-87.

The pain or stigma that accompanied relief ensured that assistance to the poor would only be provided to those who had genuine need. Quigley lists as one of the “seven major principles one can glean from the poor laws over these 500 years” that “assistance to the nonworking poor must not

With the exception of providing poor relief to children in various ways, the histories of the Poor Laws and any attendant institutions or practices reflect little concern with protecting children. Relief was grudgingly given, many apprenticeships and indentures were harsh, and the stigma and trauma visited upon the recipients, including the children, were largely irrelevant to the public paying for the support of the poor. The Poor Laws may have established the legislative basis for modern dependency court, but they did not establish a practice or custom, a historical judgment, favoring confidentiality in dependency proceedings.

B. England's *Parens Patriae* in Chancery Court

While lacking support for confidentiality, the Poor Laws do provide a good basis for arguing that the intervention in the parent-child relationship in today's dependency court is a descendent of the English legislative branch.¹⁰¹ The rationale for the court's authority to intervene, *parens patriae* ("parent of the country"),¹⁰² however, was borrowed from judicial law developed in the English chancery courts.¹⁰³ It makes sense that the English chancery court felt obligated to justify its intervention. The Poor Laws dealt with only the children of the poor; the chancery courts, however, dealt primarily with the children of the rich.¹⁰⁴ The English chancery court appears to have been, like other English courts, an "open court." However, the operation of the chancery court, along with its jurisdiction over matters involving children, does provide some support for a historical judgment of confidential hearings for children.

The history of the Court of Chancery and *parens patriae* is difficult to review briefly. Ample literature is available for more detail, but the following summary will do for our purposes.¹⁰⁵ The chancery court's

be generously given nor made too easy to accept," thus helping to ensure that "only those worthy of help receive it." Quigley, *supra* note 67, at 126-27. Similarly, the removal of children from their families and homes was not to safeguard children from the hands of neglectful or abusive parents; it was to put the children to work, a "product of cost consciousness." Areen, *supra* note 79, at 896.

101. Rendleman, *supra* note 68, at 223.

102. DAVID MELLINKOFF, *MELINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE* (West. Pub. Co. 1992).

103. See generally Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of "Parens Patriae,"* 22 S.C. L. REV. 147 (1970); Rendleman, *supra* note 68, at 210; TenBroek, *supra* note 71, at 262.

104. Rendleman, *supra* note 68, at 210-11; Quigley, *supra* note 69, at 102-03.

105. For two excellent histories, see John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 OXFORD J. OF LEGAL STUD. 159 (1994) and Cogan, *supra* note 103. Cogan's self-appointed task was to show how the court's authority to take "special care" of infants had evolved from extending care to infants "who were properly before [the court]" to when "the court could properly bring infants before it to give them special care." *Id.* at 180. As Seymour warns, however, it is important to exercise caution when drawing any conclusions from these or other histories. "It is . . . impossible to be sure about the character of Chancery's jurisdiction at this time. . . . No inference can be drawn from the irregular proceedings of ancient times, when grievances of every kind were pressed upon the Chancellor's attention." Seymour, *supra*, at 166 (quoting MACPHERSON, A TREATISE ON THE LAW RELATING TO INFANTS 103 (1842)).

origin is traced to matters that originally were brought before the King's Council. These matters were often referred to the Chancellor, as a member of the Council and the King's "chief secretary" and advisor.¹⁰⁶ By the close of the fifteenth century, this custom had evolved into a chancery court.¹⁰⁷ The court's *parens patriae* authority seems to have developed from its jurisdiction in wardship and guardianship issues,¹⁰⁸ which originally concerned land and profits, and only incidentally, children. "Wardship . . . procedures . . . (and the role of the courts in administering these procedures) were directed towards the administration of the property of infant heirs. Wardship procedures were not designed with the purpose of facilitating judicial intervention in the lives of vulnerable infants."¹⁰⁹ By the seventeenth century, however, so long as the ward-child was properly before the court on an accounting or other similar matter,¹¹⁰ the reported cases show the chancery court beginning to reflect a broader concern for the child's care, for example, in matters related to custody.¹¹¹ By name, however, *parens patriae* seems to have first appeared (as "Pater patriae") in a chancery "infant case" in 1696.¹¹² *Falkland v. Bertie*¹¹³ was a testamentary trust case in which the court was asked to release an infant from a condition precedent to a legacy, the condition precedent being a mar-

106. SIR GEOFFREY CROSS & G.D.G. HALL, *THE ENGLISH LEGAL SYSTEM* 98-101, 114-15 (4th ed. 1964).

107. The Chancellor sat at the hearings and issued decrees in his name. *Id.* at 118.

108. Seymour, *supra* note 105, at 167.

109. *Id.* at 172. Wardships arose when a tenant of the land would die and leave an infant heir. In wardships arising from military tenures (knight service), the lord who held the wardship, including when the King was the direct holder, had the right to the profits of the lands until the child came of age, along with other significant feudal benefits, including custody of the child and the right to arrange the child's marriage. *Id.* at 162-163. See also Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L. J. 195, 196 n.12 (1978); Cogan, *supra* note 103, at 148-49. These wardships, and thus their benefits and profits, could be purchased and were a source of revenue for their holders, particularly the King who was "always lord and never tenant." Seymour, *supra* note 105, at 164. See also Cogan, *supra* note 103, at 148. By contrast, there were also wardships of land held in socage, not military tenure. In these cases, the wardship of the child went to "the nearest relation to whom the land could not descend" and the holder of the wardship was required to account to the child for any profits of the land. Seymour, *supra* note 105, at 163-665 nn.16 & 17. Because socage tenure required the holder to account to the ward-child for any profits of the land, socage wardships suggested the fiduciary aspect inherent in a modern guardianship of a child; it reflected an obligation of the guardian to the child. *Id.* at 162-65. Still, "[t]he orphaned infant was treated as an adjunct to his lands," *id.* at 165 (quoting THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 545 (5th ed., 1956)), and a guardianship at that time did not resemble a modern day fiduciary relationship. *Id.* at 163.

110. Cogan, *supra* note 103, at 154-55.

111. *E.g.*, *Corsellis v. Corsellis*, 23 Eng. Rep. 192, 194 (1678) (ordering that a guardian could not have custody of "the Infant, but that he shall remain at *Eaton* till this Court give farther [sic] Direction").

112. See Cogan, *supra* note 103, at 166. Cogan questions whether the phrase was in the case at the outset, however. *Id.* at 167-68.

113. 23 Eng. Rep. 814 (Ch. 1696).

riage.¹¹⁴ The court in *Falkland* recognized its *parens patriae* duty and authority to take care of infants:

And as to the plea of infancy, it is true infants are always favoured. In this court there were several things that belonged to the King as *Pater patriae*, and fell under the care and direction of this court, as charities, infants, ideots, lunatics, etc., afterwards such of them as were of profit and advantage to the King, were removed to the *Court of Wards* by the statute; but upon the dissolution of that court came back again to the Chancery, where the interests of infants are so far regarded and taken care of¹¹⁵

The phrase appeared in a handful of chancery infant cases after *Falkland*,¹¹⁶ but the 1827 *Wellesley v. The Duke of Beaufort*¹¹⁷ infant case is traditionally the case cited for the clear recognition that *parens patriae* gave the chancery court broad power to make orders that would protect the child, without first having the child before it on some property matter.¹¹⁸

The facts of *Wellesley* began when Mr. Wellesley had an extramarital affair; as a result, Mrs. Wellesley left with their children. Not long afterwards, Mrs. Wellesley died. The children remained in the physical custody of Mrs. Wellesley's sisters. Mr. Wellesley filed a habeas corpus action to retrieve his children, and the sisters petitioned the chancery court for relief.¹¹⁹ The chancery court's discussion of the basis for its jurisdiction in the case, a private custody case, included a discussion of *parens patriae*,¹²⁰ and the court concluded that it had jurisdiction to protect the child:

The important consideration is, – is it necessary that the Court should thus interpose? If this Court has not the power to interpose, what is the provision of law that is made for the children? Wherever the power of the law rests with respect to the protection of children, it is clear that it ought to exist somewhere: if it be not in this Court, where does it exist?¹²¹

114. *Falkland*, 23 Eng. Rep. at 814.

115. *Id.* at 818.

116. Two are traditionally discussed as bookends for the evolution of *parens patriae* in cases involving children: *Eyre v. The Countess of Shaftsbury*, 24 Eng. Rep. 659 (Ch. 1722) and *Wellesley v. Duke of Beaufort*, 38 Eng. Rep. 236 (Ch. 1827). Custer, *supra* note 109, at 204, 207. *Parens patriae*'s appearance in 1722 in *Shaftsbury*, 24 Eng. Rep. 659, was not by the court, but was in the reported argument of the Countess of Shaftsbury. See Sarah Abramowicz, *English Child Custody Law, 1660-1839: The Origins of Judicial Intervention in Paternal Custody*, 99 COLUM. L. REV. 1344, 1352 n.37 (1999).

117. 38 Eng. Rep. 236 (Ch. 1827).

118. See Cogan, *supra* note 103, at 180.

119. *Wellesley*, 38 Eng. Rep. at 236-38.

120. *Id.* at 243 (“[w]ith respect to the doctrine that this authority belongs to the King as *parens patriae*”).

121. *Id.* at 244.

Thus, by the time of *Wellesley*, the Poor Laws had established the legislative basis for separating children from their parents when necessary; *Wellesley* then provided the rationale for the judiciary to intervene in the parent-child relationship. This legislation and this judicial rationale would eventually combine to create America's juvenile court, where confidential dependency proceedings would reside. But while the groundwork for the proceedings existed, closed hearings for these types of proceedings were not yet factors, or at least not yet newsworthy factors. Until this point, discussions concerning confidentiality in any of these proceedings, especially as needed to serve the child's best interest, are lacking in the reported cases and histories.

However, while histories of the English Court of Chancery, from which *parens patriae* emerged, suggest that the court was, by all indications, open; *Wellesley* and a smattering of other authorities around the same time indicate that there were some exceptions, sometimes in cases involving children.¹²² In addition, even "open court," at least in chancery court, did not necessarily provide public access in the way that open court does today.

Wellesley is notable for its mention of a private hearing for "matters of [its] kind,"¹²³ and the case provides a brief discussion indicating some matters in chancery court, and perhaps some matters involving children, were heard in private. It also suggests some matters *should* be held in private. What is not clear is whether the court's concern for privacy in the immediate case was for the children, the adult parties, or the public:

I will give no opinion (because it does not become me to do so), as to whether it were a discretion properly or improperly exercised, that this matter was not heard in private. In most cases, certainly, it has

122. The absence of sources discussing private or confidential hearings indicates public access was the norm for chancery court. In his book, W. J. Jones frequently refers to the Chancellor holding hearings in "open" court. W. J. JONES, *THE ELIZABETHAN COURT OF CHANCERY* 54, 208, 253, 253 n.1, 295 (1967). Other descriptions, by omitting any reference to closed hearings, imply the hearings were open. *E.g.*, EDWARD JENKS, *A SHORT HISTORY OF ENGLISH LAW 165-169* (6th ed., Methuen & Co., Ltd, London 1949). Other sources affirmatively suggest the court was open. *E.g.*, Vernon Valentine Palmer, "*May God Protect Us from the Equity of Parlements*": *Comparative Reflections on English and French Equity Power*, 73 *TUL. L. REV.* 1287, 1296-97 (1999) (comparing the French and English Equity powers: "[T]he [French] parlements [judicial tribunals] operated in total secrecy. . . . In contrast, the English Chancellors operated an open court and pronounced reasons for their decrees."). In addition, the reproduction of the illustration "The Lord Chancellor's Court at Lincoln's Inn Hall," E.S. TURNER, *MAY IT PLEASE YOUR LORDSHIP* 193 (Michael Joseph Ltd. 1971), shows an open court with spectators, and one author describes the King's Bench and the chancery court "at the upper end of Westminster Hall" as "both remaining open to the hall, and a bar being erected to keep off the multitude from pressing on the judges." JOHN G. HENDERSON, *CHANCERY PRACTICE* 143 (T.H. Flood & Co. 1904).

123. *Wellesley*, 38 Eng. Rep. at 243.

been thought expedient that matters of this kind should be heard in private¹²⁴

Also notable is that in the same breath in which the court acknowledged the possibility of a private hearing, thereby contributing to a historical judgment favoring closed dependency hearings, it also contributed to a discussion about the functional value of public court proceedings for the important matter before it:

[B]ut if the parties choose to have matters of so much delicacy, but of such mighty importance, discussed and argued in public, I know that it is one of the best securities for the honest exercise of a judge's duty, that he is to discharge that duty in public. That duty I will discharge as well as I can – recollecting that what I am called upon to do is a strong measure; that the interposition of this Court stands upon principles, which it ought not to put into operation without keeping in view all the feelings of a parent's heart, and all the principles of the common law with respect to a parent's rights; and that, though the Court has interposed in many instances of this sort, the application is one of the most serious and important nature.¹²⁵

Wellesley is not the only evidence indicating that hearings involving children around this time could be closed in chancery court. One infant case decided six years prior to *Wellesley*, *Lyons v. Blenkin*,¹²⁶ also mentions a hearing held in chambers in another (unnamed) case. The court states in a note to the opinion, “In a case which was heard in private before the Lord Chancellor in August 1821, his Lordship observed, that where the infant was a ward of the Court there were many circumstances to which he could give attention”¹²⁷ *Lyons* appears to have been held in open court. Other infant cases, cited in the major articles discussing the evolution of *parens patriae* in chancery court, also appear to have been held in open court. However, none of the cases make any mention of private or in-chambers hearings.¹²⁸

In addition to cases sometimes mentioning private or closed hearings for children, a later report by John David Chambers, from 1842 (fifteen years after *Wellesley*), states that, by that time at least, some suits in chancery court involving infants were closed: “[P]etitions regarding infants were heard before ‘all proper parties,’ but if a bill leads to a suit ‘no person can so attend . . . without special leave.’”¹²⁹ Other commentators who have described the operations of Chancery court and infant *par-*

124. *Id.* at 242-43.

125. *Id.* at 243.

126. 37 Eng. Rep. 842 (Ch. 1821).

127. *Lyons*, 37 Eng. Rep. at 848 n.5.

128. See *e.g.*, the cases cited in Cogan, *supra* note 103, at 180 (supporting the position that none of these cases indicate they were heard in private).

129. See Sokol, *supra* note 28, at 909 n.209 (quoting JOHN DAVID CHAMBERS, A PRACTICAL TREATISE ON THE JURISDICTION OF THE HIGH COURT OF CHANCERY OVER THE PERSONS AND PROPERTY OF INFANTS 2 at 82 (London, Saunders & Benning 1842)).

ens patriae cases (mostly from earlier years), however, have not mentioned that infant cases were subject to any special rules concerning being held in private.¹³⁰

Another factor to consider, when reviewing the history of hearings involving children in chancery, is that chancery hearings were not conducted like modern day trials. As a result, there was at least a coincidental lack of openness. Generally, witness testimony was taken with written interrogatories administered by court-appointed examiners; these proofs, and others, were placed before the court, and the court, after hearing the arguments of the lawyers, would issue its decree.¹³¹ *Viva voce*, or oral examinations of witnesses in open court, appear to have been limited.¹³² In addition, because of the great number of cases, a matter set for hearing would frequently be referred to an administrative "Master,"¹³³ who would "draw up a report on which the Lord Chancellor would base his decision."¹³⁴ And, when detailed inquiries were needed before a court could

130. *Id.* at 909 n.210 (stating that S. ATKINSON, PRACTICE OF THE COURT OF CHANCERY 15-19 (London, S. Sweet et al. eds., 1842) and CHARLES BARTON, AN HISTORICAL TREATISE OF A SUIT IN EQUITY (Dublin, Byrne ed., 1796), never mentioned this). *See also* JONES, *supra* note 122; CROSS & HALL, *supra* note 106.

131. CROSS & HALL, *supra* note 106, at 148-49. A typical description of witness testimony is as follows:

[A] number of questions in writing were framed by the party calling the witnesses, and these questions . . . were put to the witness by an examiner appointed by the court. The answers, given on oath, were recorded and copies could be taken by the other side. . . . When the depositions . . . had all been taken the case was set down for hearing and eventually would come on in court. The allegations of each side would be explained to the Chancellor (who had copies of the affidavits before him) and counsel would address him on the points of law involved. It was then for the Chancellor to make up his mind on all the issues of law and fact involved in the case and to pronounce a decree . . .

Id. While the witness testimony was "published" (made available to the parties after the examiners deposed the witnesses), the parties had separate examinations and did not have access to copies of the other party's examinations until publication. This ensured that the "adversant party's 'cross-examination' could not be inspired by any knowledge of the witness's evidence in chief." JONES, *supra* note 122, at 238-39.

132. JONES, *supra* note 122, at 252-54.

133. CROSS & HALL, *supra* note 106, at 153.

134. JONES, *supra* note 122, at 253. A part of this process might include the advantage of some oral examination of witnesses; the disadvantage is that this was done not in open court, but in chambers: "In the privacy of his chambers, a Master . . . could get to grips with a witness, or for that matter with one of the parties, and fight it out with the aid of flexible cross-examination." *Id.* at 254. In addition, while "[t]he Lord Chancellor might order *viva voce* examination at a hearing . . . [t]his was a rare procedure in open court . . ." *Id.* at 253. One author also reports a method used for a time by which witnesses were examined *ad informandum conscientiam iudicis*, *id.* at 250, "intended for the sight of the judge alone." *Id.* at 499. Examinations *ad informandum conscientiam iudicis* were meant for circumstances when embarrassing information might be revealed by the interrogatories put to the witness. This evidence, "regarded as unfit for general publication, and thus reserved for the eye of the bench, was often concerned with the interests, activities, or investments of the Crown." *Id.* at 250-51. Such examinations were also frequently used even when there was not potential for embarrassment, but simply to obtain more information when the ordinary interrogatories failed to cover matters relevant and important to the suit. *Id.* at 252. Examinations *ad informandum conscientiam iudicis* were no longer used by the latter half of the seventeenth century, however. *Id.* at 252 n.3.

rule, such as when the question was whether a trustee had discharged the necessary duties,¹³⁵ “the Chancellor, who was far too busy a person for such details, would refer the matter to a Master for investigation in the presence of the parties and for a report on which the Chancellor could subsequently found his decree.”¹³⁶

It seems likely that, given the chancery court’s procedures and practices, some of its proceedings were not routinely subject to public access. With the court’s awakening concern for protecting children and its willingness to act as *parens patriae*, it is also likely that some of those proceedings involved children. Histories of the court, however, do not suggest any substantial portion of the court’s “courtroom proceedings” involving children were purposefully and routinely conducted in a courtroom closed to the public until Chambers’ report in 1842. Nor do the earlier histories suggest the public was frequently barred from hearings involving children in order to “protect” the children. Finally, even when some hearings were being closed, the court’s comment in *Wellesley* also indicates the chancery court was aware of the value of open court, including in cases involving the welfare of children.¹³⁷

C. America’s Poor Laws and *Parens Patriae*

The Poor Laws and *parens patriae* both found their way to America. Colonial America first relied on forced apprenticeships and institutional “houses” to deal with the children of the poor¹³⁸ and, when the original thirteen states enacted legislation, England’s Poor Laws were quite evident.¹³⁹ At least eleven of the thirteen states provided that poor or unruly

135. CROSS & HALL, *supra* note 106, at 122.

136. *Id.* at 123. In addition, many matters were not dealt with in hearings before the Chancellor, but referred to administrative personnel for action or resolution in chambers. W.J. Jones’ thorough description of the Elizabethan Court of Chancery (1558-1603) also shows that court personnel did much of the work of the Chancery court. JONES, *supra* note 122, at 6, 52, 208, 287. How “open” these investigations and other inquiries were is not clear. Descriptions or references to the Chancery court suggest much work was done in chambers, CROSS & HALL, *supra* note 106, at 271; JONES, *supra* note 122, at 6, 52, 208, 287, and also done with very little oversight by the court. “[T]he detailed, and often very important, administrative business which was transacted in chambers was left entirely to the Masters and clerks of the court.” CROSS & HALL, *supra* note 106, at 271.

From time to time a Chancellor would issue a set of “general orders” prescribing (among other matters) the method of procedure to be followed in the prosecution of accounts and enquiries [sic] before the Masters, but in the nature of the case he was not able to exercise much control in the matter, and the masters were in fact given practically a free hand
Id. at 155.

137. The *Wellesley* court did not take it upon itself to close the proceedings, apparently believing it could do so only upon request of one of the parties. *Wellesley v. The Duke of Beaufort*, 38 Eng. Rep. 236, 243 (Ch. 1827) (“but if the parties choose to have matters . . . discussed and argued in public”).

138. William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. REV. 35, 48 (1996).

139. See William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 115 (1997).

children could be "bound out" or apprenticed for work.¹⁴⁰ Children were institutionalized in almshouses and poorhouses, along with workhouses, houses of correction, and houses of employment.¹⁴¹ Thus, children of the poor continued to be separated from their parents and were subjected to forced labor under harsh conditions, just as they were under the English Poor Laws.¹⁴² While this separation was "independent ... of any Latin rubric,"¹⁴³ the Latin rubric would eventually join up with the Poor Laws, although not until 1839.¹⁴⁴ There are hints that in the interim, some concern existed for "protecting" children from stigma in related welfare areas.¹⁴⁵ An 1804 Washington, D.C., act making public schooling available to poor children, for example, provided that the names of the children who could not pay for their education should be withheld from public reports.¹⁴⁶ Similar statutes in Delaware¹⁴⁷ and Pennsylvania,¹⁴⁸ however, had no such provisions, and like in England, most legislation was focused on caring for the poor at the least cost to the public.¹⁴⁹

In 1839, the rationale for court intervention to protect children and the legislative provisions for separating children from their parents finally joined.¹⁵⁰ *Ex parte Crouse*,¹⁵¹ a Pennsylvania case, is credited with first using *parens patriae* to justify a state committing a child to an institution over the objection of the parent.¹⁵² The court committed the "incurable" girl, Mary Ann Crouse, to a house of refuge without a jury trial after her mother complained that the child was beyond her control.¹⁵³ Her father brought a habeas corpus action arguing that the authorizing legislation was unconstitutional.¹⁵⁴ The court upheld the statute and the commitment, reasoning:

The House of Refuge is not a prison, but a school. . . . The object of the charity is reformation, by training its inmates to industry; by imbuing their minds with principles of morality and religion; by furnishing them with means to earn a living; and, above all, by separating them from the corrupting influence of improper associates. To

140. *Id.* at 119-40, and 153.

141. *Id.* at 156.

142. *Id.*

143. Rendleman, *supra* note 68, at 212.

144. *Ex parte Crouse*, 4 Whart. 9 (Pa. 1839).

145. See generally CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, vol. I: 1600-1865 (Robert H. Bremner ed. 1970).

146. *Id.* at 252.

147. *Id.* at 253.

148. *Id.* at 251.

149. See Mason P. Thomas, Jr., *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 301 (1972).

150. *Ex Parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).

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

152. Rendleman, *supra* note 68, at 212.

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

154. *Id.*

this end may not the natural parents, when unequal to the task of education, or unworthy of it, be superseded by the *parens patriae*, or common guardian of the community? It is to be remembered that the public has a paramount interest in the virtue and knowledge of its members, and that of strict right, the business of education belongs to it. That parents are ordinarily intrusted with it is because it can seldom be put into better hands; but where they are incompetent or corrupt, what is there to prevent the public from withdrawing their faculties, held, as they obviously are, at its sufferance?¹⁵⁵

What indeed? Under a theory of child protection, *Ex parte Crouse* upheld a state's authority to separate a child from its parents, or in the words of one author, to "sever ... poor parents from their children."¹⁵⁶ Most courts followed suit, upholding the reach of the Poor Laws into the lives of poor families and, later, upholding the reach of the juvenile court.¹⁵⁷

D. America's Child Savers in the 1800s

At the beginning of the 1800s in America, just as in England, poor children and poor children neglected by their parents were taken from their parents and apprenticed or placed in almshouses or similar facilities, many of which also housed "adult outcasts – paupers and insane and mentally retarded persons."¹⁵⁸ Except for that intervention into the lives of the poor, however, public intervention into the family life to protect children was rare.¹⁵⁹ Parental child abuse was frequently overlooked because the right of parents to discipline their children usually legitimated all but the most egregious cases of abuse.¹⁶⁰ Children accused and convicted of crimes were not subjects of protection for the state; they were tried and punished much like adults were, often sharing space in the same correctional institutions.¹⁶¹ Reformers sought to change this, however, and their nineteenth century reform agenda pushed for a more protective attitude concerning the country's children and culminated into the country's first juvenile court. Not until the advent of the juvenile court, however, would closed hearings and confidential proceedings be a cognizant aspect of the protective agenda.

155. *Id.*

156. Rendleman, *supra* note 68, at 212.

157. *See, e.g.,* Marlow v. Commonwealth, 133 S.W. 1137 (Ky. 1911); Commonwealth v. Fisher, 62 A. 198 (Pa. 1905).

158. Thomas, *supra* note 149, at 301-03. *See also*, Rendleman, *supra* note 68, at 205-12 (reasoning that statutes designed to protect children makes the state the legitimate guardian of the child).

159. Thomas, *supra* note 149 at 301.

160. *Id.* at 300-06.

161. Paul R. Rudof, *Throwing out the Baby with the Bathwater: Utah's Serious Youth Offender Statute*, 1998 UTAH L. REV. 443, 444 (1998); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 106 (1909).

Although social reform efforts at the start of the century were broad-based, they particularly targeted children. "Child savers," as they came to be called, sought to address issues associated with poor children, including education, nutrition, and neglect and abuse.¹⁶² Also, they were concerned with child crime.¹⁶³ Central to the child-savers' philosophy was that children were products of their environments. Any criminal behavior by a child was, thus, "learned" behavior.¹⁶⁴ To reform a child who had committed a crime, and to prevent the predelinquent child from adopting a life of crime, it was necessary to address the child's environment.¹⁶⁵ This meant public intervention into the child's family life.¹⁶⁶

Because of the large number of immigrants entering the country and especially the cities in the 1800s, public intervention was a remedy that particularly invited abuse. The new city dwellers were poor and "different":

Immigrants from southern and eastern Europe and from rural America flooded into the burgeoning cities to take advantage of new economic opportunities and crowded into ethnic enclaves and urban ghettos. The "new" immigrants' sheer numbers and their cultural, religious, and linguistic differences hindered their assimilation and acculturation, and posed a significant nation-building challenge for the dominant Anglo-Protestant Western Europeans who had arrived a few generations earlier. . . . Progressives attempted to "Americanize" the immigrants and poor through a variety of agencies of assimilation and acculturation to become sober, virtuous, middle-class Americans like themselves.¹⁶⁷

Reformers targeted the children of these new urban dwellers not only to keep them from crime, but also because they were a threat to the social order middle-class child-savers were accustomed to and favored. Just as England enacted its Poor Laws to protect society from the "wan-

162. Rudof, *supra* note 161 at 444.

163. Barry C. Feld, *The Transformation Of The Juvenile Court--Part II: Race And The "Crack Down" On Youth Crime*, 84 MINN. L. REV. 327, 395 n.16 (1999); Rudof, *supra* note 161, at 444-45.

164. ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIENCE* 36 (Hill & Wang 1978).

165. *Id.*

166. Larry J. Siegel & Joseph J. Senna, *JUVENILE DELINQUENCY* 363 (West 1988).

167. Feld, *supra* note 163, at 332-34. While concern for the children was perhaps the primary motivation for efforts by the end of the century, xenophobia and fear of crime were still present. The creation of the juvenile court system and its antecedents was, according to M.A. Bortner, "a thinly disguised system of oppression, dedicated to controlling the indigent and powerless." M.A. BORTNER, *INSIDE A JUVENILE COURT: THE TARNISHED IDEAL OF INDIVIDUALIZED JUSTICE* 2 (New York University Press 1982) (citing ANTHONY PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (2d ed. 1977) and *THE CHILDREN ISHMAEL: CRITICAL PERSPECTIVES ON JUVENILE JUSTICE* (Barry Krisberg & James Austin eds., Mayfield 1978)); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV., 1187, 1187-95 (1970). These concerns still echo in the literature today. *E.g.*, Feld, *supra* note 163, at 330.

dering” poor “terroriz[ing] town and country,”¹⁶⁸ the child-savers sought to use similar legislative remedies to save not only children, but also America’s middle-class culture.¹⁶⁹

Consequently, the child-savers’ early legislative efforts, directed at preventing children from lives of crime, went beyond delinquent and predelinquent children and focused on a broad range of indicators reformers considered to be troubling.¹⁷⁰ This meant dependent and neglected children were included in the reformers’ child-protective efforts, but lines were blurred. Poor children became dependent or neglected children; dependent and neglected children became delinquent children. An 1875 Wisconsin statute defining children who could be committed to industrial schools, for example, included children who had been abandoned “in any way” by their parents; children “without means of subsistence or support”; children “begging or receiving alms”; children “being in any public street or place for the purpose of begging or receiving alms”; children “found wandering and not having any home or settled place of abode”; and children “found wandering in streets, alleys or public places, and belonging to that class of children called ‘ragpickers.’”¹⁷¹ Some states defined “wayward behavior” as criminal conduct; others “broaden[ed] the committal grounds for noncriminal conduct.”¹⁷² Children subject to institutional commitment during this period were “broadly worded under the aegis” of social reform,¹⁷³ and these broad definitions would be used in the twentieth century juvenile court legislation.

The salvation of these children and, thus, of society, required removing them from the corrupting influences of their home environments and acculturating them anew.¹⁷⁴ Many were sent to institutions, and especially to “Houses of Refuge.”¹⁷⁵ Beginning with New York in 1825 and, over the next twenty-five years, continuing in Philadelphia, Boston, New Orleans and other cities, “laws authorized the courts to commit neglected, destitute, abandoned, and vagrant children to the houses of ref-

168. See *supra* text accompanying notes 89-90.

169. Fox, *supra* note 167, at 1192.

170. Thomas, *supra* note 149, at 306, 323-25; Corinne Schiff, *Child Custody And The Ideal Of Motherhood In Late Nineteenth Century New York*, 4 GEO. J. ON FIGHTING POVERTY 403, 413 (1997).

171. Thomas, *supra* note 149, at 314 (quoting 1875 Wis. Laws 633, ch. 325, § 5).

172. Robert W. Sweet, Jr., *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389, 392 (1991).

173. Thomas, *supra* note 149, at 314.

174. Fox, *supra* note 167, at 1189. These actions were done with little regard for the rights of the parents or the children. “The child-savers expounded the Protestant work ethic, were primarily philanthropic, and supported the rehabilitation model. They had little real interest in the law or legal issues. Any overreach of the legal rights of the children was excused under the concept of *parens patriae*.” CLIFFORD E. SIMONSEN, *JUVENILE JUSTICE IN AMERICA* 18 (3d ed. 1991). See also Thomas, *supra* note 149, at 315 (also reporting that *parens patriae* served as the catch-all justification for removing children from their homes).

175. Thomas, *supra* note 149, at 306; RYERSON, *supra* note 164, at 18-19.

uge along with child offenders.”¹⁷⁶ Unfortunately, refuge houses and their successors were not always the protective facilities envisioned by their backers. The New York house, for example, “evolved into a prison-like structure without facilities for rehabilitation.”¹⁷⁷ Other institutional facilities that continued from earlier years, or developed after refuge houses, were subject to similar criticism.¹⁷⁸ The Reverend Charles Loring Brace’s “program of ‘moral disinfection,’” according to one cynic,¹⁷⁹ which took children from their homes and their urban environments to live in foster homes with Western farmers¹⁸⁰ or, in Brace’s words, “good families in the country,”¹⁸¹ was a noteworthy alternative placement.

Until the latter part of the 1800s then, dependent and neglected children were included within the child-savers’ efforts, but primarily under the rubric of delinquent or predelinquent children. In 1874, however, the New York Society for the Prevention of Cruelty to Children (NYSPCC) was established. The NYSPCC emphasized removing children from their homes and placing them in institutions.¹⁸² Their efforts, however, seemingly were directed more towards protecting children from abuse and neglect per se, than preventing delinquency.¹⁸³ The NYSPCC was not only instrumental in seeking out neglected and abused children, but also was dedicated to punishing adult offenders by encouraging criminal prosecution of abusive or otherwise harmful parents.¹⁸⁴ Their focus was, therefore, distinguishable from that of the English Poor Laws and the earlier child-saving efforts.

Similar anti-cruelty groups were established in other localities over the next twenty-five years. Massachusetts and Philadelphia, for example, moved further and adopted a less punitive and more remedial approach to the problem, aimed at helping families and keeping children in the

176. Thomas, *supra* note 149, at 306.

177. Carla J. Stovall, *Justice and Juveniles in Kansas: Where We Have Been and Where We Are Headed*, 47 U. KAN. L. REV. 1021, 1022 (1999).

178. Fox, *supra* note 167, at 1223; John N. Kane, Jr., *Dispositional Authority and Decision Making in New York’s Juvenile Justice System: Discretion at Risk*, 45 SYRACUSE L. REV. 925, 931 (1994); Brent Pattison, *Minority Youth in Juvenile Correctional Facilities: Cultural Differences and the Right to Treatment*, 16 LAW & INEQ. 573, 590 (1998); Mary E. Spring, *Extended Jurisdiction Juvenile Prosecution: A New Approach to the Problem of Juvenile Delinquency in Illinois*, 31 J. MARSHALL L. REV. 1351, 1356-57 (1998).

179. Thomas, *supra* note 149, at 307.

180. *Id.*

181. Charles L. Brace, *The Best Method of Disposing of Pauper and Vagrant Children* 12 (1859), as quoted in Lucy S. McGough and Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 90 n.67 (1999).

182. Thomas, *supra* note 149, at 310-12.

183. ELIZABETH HAFKIN PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 79-86 (1987).

184. Wright S. Walling & Gary A. 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, 794-96 (1994); Thomas, *supra* note 149, at 310-11.

home.¹⁸⁵ This social work approach found some favor in the early 1900s with professionals in the field who were supportive of family preservation, especially when poverty was the only issue.¹⁸⁶ While concern for children was perhaps a greater motivation for the anti-cruelty groups' efforts than others, however, "these reformers [also] were responding to the new urban poverty and immigration" and the resulting fear:

The "large influx of foreigners who are not familiar with our laws," explained Elbridge Gerry, the president of the NYSPCC, in 1895, "necessarily leads to the continual ill-treatment of children, under the pernicious idea that liberty means license and that children are born slaves of their parents." Without the work of the NYSPCC, Gerry maintained, nothing would be done to protect the children of the "poor and unfortunate," and most of these "little outcasts" would become "mature criminals."¹⁸⁷

In addition to implementing efforts to rescue children from lives of crime, reformers also had some success in changing the judicial procedures that removed children from their homes and committed them to institutions or foster homes. Some legislation specifically provided for children's hearings to be separate from adult court. An 1870 Massachusetts statute, for example, provided that children in Suffolk under the age of sixteen should have "complaints against them heard and determined, by themselves, separate from the general and ordinary criminal business of said courts."¹⁸⁸ New York provided, by 1892, that "[a]ll cases involving the commitment or trial of children for any violation of the Penal Code . . . may be heard and determined by such court, at suitable times to be designated therefore by it, separate and apart from the trial of other criminal cases . . ."¹⁸⁹ Rhode Island too provided for children's hearings to be separate from the rest of the court business.¹⁹⁰ Closed hearings were not statutorily mandated, but the separateness of the hearings presumably accommodated or encouraged private hearings. Further, juvenile commitment hearings also were likely to be informal, summary, and with little due process,¹⁹¹ making it probable that some were held away from public view. Closed and confidential hearings per se, however, seem not to have been a concern.

Thus, at the close of the nineteenth century, the institutions, legislation, and procedures designed to deal with abused and neglected children had their problems: the motivation for removing children from their homes was often suspect, the due process accorded the families was of-

185. Walling & Debele, *supra* note 184, at 794-96; Thomas, *supra* note 149, at 312.

186. Thomas, *supra* note 149, at 312; PLECK, *supra* note 183, at 129.

187. Schiff, *supra* note 170, at 413.

188. Bremner, *supra* note 145, at Vol. II, 494-95.

189. *Id.* at Vol. II, 495.

190. *Id.* at Vol. II, 495-96.

191. Fox, *supra* note 167, at 1212-15, 1229; *see also* Thomas, *supra* note 149, at 315. *But see* People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 285-87 (1870).

ten absent, a family's poverty was frequently the basis for a child's removal, and the institutions or homes to which some of the children were sent were far from nurturing and humane places. Indeed, these same problems were present during the enactment and implementation of the Poor Laws in England. As for confidential hearings, some delinquency or dependency-type proceedings may have been heard separately from the other court business. Also, there may have been, as there was in England's chancery court, specific cases heard in chambers, either upon request of the parties or perhaps even at the initiative of the judge. It does not appear, however, that these type hearings were traditionally closed to the public.¹⁹²

There was, however, at least in the rhetoric of the late nineteenth century, an intent by society to protect children – to reform, rehabilitate, and treat – instead of merely punishing them for their wrongful acts or removing them from their homes and forcing them to work. Eventually, the modern dependency proceeding emerged from this philosophy and justified the confidentiality provision of modern proceedings. In the juvenile court born in 1900, however, protecting dependent and abused children remained a handmaiden to protecting society from delinquent children.

E. America's Juvenile Court and its Confidentiality Provision

In 1899, Illinois passed legislation, which created the country's first juvenile court.¹⁹³ By 1904, other states embraced the concept and eleven states had juvenile court legislation; by 1912, twenty-two states; and by 1925, forty-six of the country's forty-eight states had juvenile court legislation.¹⁹⁴ When Illinois founded its court in 1900, however, the goal was to deal with children committing crimes and, in society's view, children destined to commit crimes. Earlier legislation grouped delinquent, neglected, abused, abandoned, and poor children together and Illinois continued that grouping.¹⁹⁵ Central to the treatment of these delinquent and

192. See Brelsford & Myers, *supra* note 3, at 17.

193. Act of April 21, 1899, 1899 Ill. Laws § 3, 130, 132.

[T]here has been some mild controversy about the exact place of origin of the first juvenile court. Various earlier pieces of special legislation bore resemblance to the latter-day juvenile court. It seems clear, however, that the first real juvenile court, as we understand the institution today [1958], was organized in the United States during 1899. Most authorities agree that Illinois deserves credit for fathering the juvenile court movement, though Colorado's ebullient Judge Lindsey claimed this honor on the basis of his use of the state's 'school law' for the handling of juvenile offenders some months before the Illinois law was enacted . . . [But] Colorado's legislature did not specifically organize the state's juvenile court until 1903.

Gilbert Geis, *Publicity and Juvenile Court Proceedings*, 30 ROCKY MTN. L. REV. 101, 103-04 (1958) (footnotes omitted) (citing 1903 Colo. Sess. Laws ch. 85).

194. Geis, *supra* note 193, at 105.

195. "Delinquent" children were defined as "any child under the age of 16 years who violates any law of this State or any city or village ordinance." 1899 Ill. Laws § 1. The statutory definition of

pre-delinquent children, however, was not punishment, but remedial acculturation.¹⁹⁶ The goal of the juvenile court was to identify and remedy factors in the child's life that had led, or might lead, the child astray.¹⁹⁷ While the protective aspects of a confidential modern dependency proceeding were not the focus of the court, the genesis of the proceeding was there; so was the genesis of legislated confidentiality.

The Illinois legislation did not mandate confidentiality.¹⁹⁸ The statute did require, however, "[a] special court room, to be designated as the juvenile court room"¹⁹⁹ Still, this provision has long been recognized as a "confidentiality" provision and it seems apparent that it soon was treated as such. In addition, it also seems likely that many juvenile court hearings initially were confidential by practice and, later, by legislative

the "dependent child and neglected child" mixed what would today be classified as status offenses, dependency, abuse and simple poverty:

[A]ny child [under age 16] who for any reason is destitute or homeless or abandoned; or dependent upon the public for support; or has not proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame or with any vicious or disreputable person; or whose home, by reason of neglect, cruelty or depravity on the part of its parents, guardian or other person in whose care it may be, is an unfit place for such a child; and any child under the age of 8 years who is found peddling or selling any article or singing or playing any musical instrument upon the streets or giving any public entertainment.

1899 Ill. Laws §1. The effect of the Illinois statute was no discernable category for children who needed to be protected from abuse or neglect, but instead a catch-all grouping of poor children, pre-delinquent children, and delinquent children, who were to be "treated in substantially the same manner." Charles E. Springer, Vice-Chief Justice, Supreme Court of Nevada, U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, *Justice for Juveniles* at 21 (1986). The definition of delinquent was expanded substantially in a 1905 amendment, Act of May 13, 1905, 1905 Ill. Laws § 1, and all sorts of acts or conditions qualified a child as "delinquent," including children who were "incorrigible," children who ran away from home, children visiting pool rooms, and children who "habitually used vile, obscene, vulgar, profane or indecent language." *Id.*

196. RYERSON, *supra* note 164, at 35-37.

197. *See id.*

198. *See* Samuel J. Barrows, *CHILDREN'S COURT IN THE UNITED STATES: THEIR ORIGIN, DEVELOPMENT, AND RESULTS*, H.R. DOC. NO.701 (58th Sess. 1904).

199. "A special court room, to be designated as the juvenile court room shall be provided for the hearing of [cases under this act], and the findings of the court shall be entered in a book or books to be kept for that purpose and known as the 'Juvenile Record'" 1899 Ill. Laws § 3.

provisions.²⁰⁰ Judge Thomas Murphey, a Police Justice in Buffalo, N.Y., described in 1904 how he ran his court:²⁰¹

At the first session over the court at which I presided I announced that thereafter children would be tried separately and apart from adults, . . . and I insisted that at the trial of the children the court room be cleared of all spectators. No one was allowed to be present at the trials but the defendants, the complainants, and the court officers and witnesses.²⁰²

A 1958 article discussing confidentiality of juvenile court proceedings also reports that the practice of excluding the public seems to have occurred early on. "By 1901, judges were reported to be employing their own authority to hold the hearings of juveniles in private,"²⁰³ relying on their contempt power to do so.²⁰⁴ And "a hit or miss survey" done in 1910 showed that "a few states" excluded the public from juvenile court trials.²⁰⁵ By 1939, a substantial number of states had some confidentiality provisions concerning their juvenile courts.²⁰⁶ "[T]he public was excluded from juvenile courts by law in seven jurisdictions, and could be excluded in twenty-four additional jurisdictions. Eight states specifically prohibited the publication of the names of juveniles without the court's consent."²⁰⁷

200. Determining precisely how and where the confidentiality aspect of juvenile court originated is difficult. From early on, affirmative mentions of confidentiality were not explicitly associated with the stigma, shame and embarrassment concerns for the juvenile delinquent. It may be that the need for closed hearings was so apparent, and so much a part of the prevailing philosophy, that there was no need to discuss it. "Removing these cases from the criminal courts" may have also meant keeping them from the public eye, without explicit mention of that need. The custom of the predecessor proceedings also probably played a part. These proceedings were sometimes confidential; it seems, not so much from an affirmative legislative decision, but from a practice of informal, "summary," and chambers-like proceedings that did little to suggest there should be a public involvement. Thus, it is likely that hearings concerning delinquent, abused or neglected children, were occasionally closed in the later 1800s, that closed hearings simply continued at the beginnings of juvenile court, and that they quickly became legislatively or rule mandated.

201. The applicable statute provided that the proceedings for commitment or trial of any children charged with violating the Penal Code "may be heard . . . separate and apart from the trial of any other criminal cases, of which session a separate docket shall be kept." See Barrows, *supra* note 198, at 10.

202. *See id.*

203. Geis, *supra* note 193, at 116.

204. *See id.*

205. *Id.* (citing Abbott, *A Topical Abstract of Juvenile Court Laws Governing the Trial and Disposition of Juvenile Offenders*, in *JUVENILE COURT LAWS OF THE UNITED STATES* 132 (Hart, ed. 1910)).

206. *See id.* at 116-17.

207. *Id.* at 117. Geis says there were only "insignificant roadblocks" as the juvenile court made its way through some constitutional challenges, and in "none of the early cases did the question of the publication of juveniles' names by newspapers, the coverage of juvenile court hearings by the press, or the privacy of the hearings come into controversy." *Id.* at 110, 110 n.37.

One of the factors that probably contributed to the quick evolution of confidential hearings was the informality thought critical to delinquency hearings. Richard S. Tuthill, Judge of the Circuit Court of Illinois, described the Illinois statute in a Congressional Report in 1904, writing that the “[t]he hearing of the case is in the open court,”²⁰⁸ but adding that it was done:

with little of the formality usually observed in court proceedings. I have always felt and endeavored to act in each case as I would were it my own son that was before me in my library at home charged with some misconduct. . . . I first speak to him in a kindly and considerate way, endeavoring to make him feel that there is no purpose on the part of anyone about him to punish, but rather to benefit and help . . .

²⁰⁹

The lack of formality was consistent with the reformers’ reform philosophy and set the tone for concern and help, as opposed to judgment and punishment.²¹⁰ Closed hearings were conducive to this desired informality.

Closed or confidential hearings also were consistent with another concern the reformers had – protecting the delinquent child from the stigma of being branded a criminal. Keeping delinquency proceedings confidential would bury the errors of the child’s youthful mistakes from others and further protect the child from the stigma and trauma of publicity generally.²¹¹ “[T]he duty of the state . . . [is] not to degrade but to uplift, not to crush but to develop, not to make [the child] a criminal but a worthy citizen.”²¹²

208. See Barrows, *supra* note 198, at 3.

209. See *id.* Judge Julian Mack, one of Chicago’s juvenile court’s first judges, described the scene juvenile court proponents envisioned:

The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career. . . . The child who must be brought into court . . . [must] be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge . . . will gain immensely in the effectiveness of his work.

Mack, *supra* note 161, at 119-20.

210. “The elimination of procedural formality in the courtroom presumably freed the judge to employ all available resources in gaining the child’s confidence . . . thereby beginning the resocialization process.” RYERSON, *supra* note 164, at 39. See also Mack, *supra* note 161, at 107, 120.

211. See Susan S. Greenebaum, *Conditional Access to Juvenile Court Proceedings: A Prior Restraint of a Viable Solution?*, 44 WASH. U. J. URB. & CONTEMP. L. 135, 142-43 (1993); Oddo, *supra* note 7, at 111; Zierdt, *supra* note 36, at 420.

212. Mack, *supra* note 161, at 107.

Although not a criminal conviction, a delinquency adjudication has the same stigmatizing effect in practice. The stigma can have serious, adverse consequences for a juvenile offender and his chances for rehabilitation. . . . Society perceives delinquency as deviant

Both of these concerns however – informal hearings and eliminating stigma – along with closed hearings, were associated with delinquency proceedings. Abuse and neglect matters remained secondary to delinquency concerns and the literature discussing juvenile court during the first half of the century reflected that. A 1909 *Harvard Law Review* article by Judge Julian Mack, for example, talked about “the juvenile court” in connection with “the delinquent child.”²¹³

A 1943 article in the Pennsylvania Bar Association Quarterly observed that “[i]t is the aim of our laws to protect society and its members. It is the aim of our juvenile laws to save an erring and oftentimes headstrong boy from continuing a life of crime.”²¹⁴ A children’s court judge in White Plains, New York wrote in 1949 that the purpose of the juvenile court,

in working with children is to endeavor to understand the problems which have caused them to become in need of the care and protection of the State, to alleviate adverse conditions as far as possible, and to bring understanding and guidance to the children who have become delinquent, as well as to those verging on delinquency because of neglect.²¹⁵

A 1957 article on confidentiality in juvenile court began by noting that “[j]uvenile court proceedings are often regarded as the most progressive and promising avenue for the handling of youthful offenders.”²¹⁶

Eventually, however, governmental involvement in children’s issues would elevate abuse and neglect concerns. In 1909 the White House held its first Conference on Children²¹⁷ and three years later, Congress created

behavior; therefore, society responds negatively to juveniles who have been labeled delinquent. Specifically, once aware of the juvenile’s label, as well as his deviant acts, society responds differently to the juvenile, attempting to ostracize him from the community. At this point, the juvenile becomes aware of his delinquency label and his self-image is adversely affected. The juvenile begins to believe that “he is no good or that he can’t make it on the outside.” Eventually, the juvenile “becomes committed to deviant activities and peers” and views himself as a deviant. Unable to escape society’s label, the juvenile engages in more delinquent behavior. Consequently, the label’s stigma creates a self-fulfilling prophecy that tends to incite and exacerbate the very behavior that was complained about in the first instance.

Kara E. Nelson, Comment, *The Release of Juvenile Records Under Wisconsin’s Juvenile Justice Code: A New System of False Promises*, 81 MARQ. L. REV. 1101, 1149-53 (1998) (author reporting, but not agreeing with, what proponents of confidentiality argue).

213. See Mack, *supra* note 161, at 104.

214. Paul N. Schaeffer, *Pennsylvania’s Juvenile Court Law*, 14 PA. B. ASS’N Q. 253, 260 (1943).

215. Judge George W. Smyth, *The Juvenile Court and Delinquent Parents*, 13 FED. PROBATION 12, 12 (1949).

216. Geis, *supra* note 193, at 101; see also Roger J. Waybright, *Florida’s New Juvenile Court Act*, 6 MIAMI L. Q. 1 (1951); Helen S. MacPherson, *The Juvenile Court in Connecticut*, 11 CONN. B. J. 231 (1937) (treating the dependency aspects of juvenile court more fully and independently, while still viewing the juvenile court as one created primarily for delinquency problems).

217. See Thomas, *supra* note 149, at 312.

the United States Children's Bureau.²¹⁸ In 1935, The Aid to Dependent Children program was established to provide states with federal funds (on a matching basis) to help support children in single parent homes.²¹⁹ The Act also encouraged states to develop protective programs for children who were dependent or neglected and, consistent with the philosophy of juvenile court, for children "in danger of becoming delinquent."²²⁰ In 1962 amendments to the Social Security Act required states to adopt plans extending child protective services to "every political subdivision."²²¹ By 1967 every state had passed some form of a child abuse reporting bill.²²² The 1974 Child Abuse Prevention and Treatment Act²²³ further encouraged states to enact mandatory reporting laws. In addition, the 1974 Act provided funding and model legislation.²²⁴ States responded by developing procedures for investigating child abuse and neglect and creating "the government entity known as child protective services."²²⁵ In the late 1970s Congress held hearings on the concern that children adjudged dependent because of neglect, abuse or abandonment were being left in foster care for years.²²⁶ The hearings resulted in the Adoption Assistance and Child Welfare Act of 1980 (AACWA),²²⁷ which emphasized family preservation and keeping children in their homes if possible. Then in 1997, Congress passed the Adoption and Safe Families Act of 1997 (ASFA),²²⁸ an act that emphasized finding adoptive homes for those children who would not successfully be returned to their parents.²²⁹ Today, dependency court proceedings are no longer mere adjuncts to delinquency prevention; they are a separate and significant part of juvenile court designed to protect children from neglect and abuse. They retain, however, one of the early and primary characteristics of juvenile delinquency hearings: they are presumptively closed to the public.

The history of dependency proceedings, extending from its Poor Law origins in England to today's modern child protective proceedings, does not reflect a "virtually immemorial custom"²³⁰ of either closed or

218. See LEROY ASHBY, *ENDANGERED CHILDREN, DEPENDENCY, NEGLECT AND ABUSE IN AMERICAN HISTORY* 189 (1997).

219. See Thomas, *supra* note 149, at 313; Walling & Debele, *supra* note 184, at 799.

220. Thomas, *supra* note 149, at 313 (quoting 42 U.S.C. §§ 601-626 (1970)).

221. Walling & Debele, *supra* note 184, at 799 n.132 (quoting 42 U.S.C. § 625 (1970)).

222. See PLECK, *supra* note 183, at 173; see also Walling & Debele, *supra* note 184, at 801.

223. 42 U.S.C. § 5102 (1974).

224. See *id.* § 5102.

225. Mary B. Lerner, Carol S. Stevenson & Richard E. Behrman, *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, in *THE FUTURE OF CHILDREN* 4, 8 (Richard E. Behrman, M.D. ed., 1998).

226. *Id.*

227. 42 U.S.C. § 620 et seq. (1980).

228. 42 U.S.C. § 678 (1997).

229. See Cristine H. Kim, Note, *Putting Reason Back Into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 309-310 (1999).

230. *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 593 (1980) (Brennan, J., concurring).

open proceedings, as does the history of open trials generally.²³¹ The Poor Laws seemed not concerned with confidentiality, stigma, or any matters relevant to protecting children, with the exception of providing poor relief. The English Court of Chancery also seemed not concerned with protecting children at the outset. When it began to show broader concern for the child's welfare, however, evidence suggests some hearings were probably held in private.

In this country, although the evidence is not absolute, it appears that, while dependency-type hearings sometimes may have been held away from full public access, closed courtrooms were not an articulated mandate for delinquency or dependency-type proceedings until at least the late 1800s and, more likely, until the juvenile court began to establish itself in the first part of the 1900s. Even then, the confidentiality practice was motivated by proceedings concerned with delinquency. The protective dependency hearing of today had not yet emerged as a focus of most juvenile courts.

The history of closure for dependency hearings then, is not only relatively recent, but, in America, is also largely rooted in its affiliation with juvenile delinquency proceedings. That the practice had some origins in England, that it began in America over one hundred years ago, and that it has continued in dependency court despite its American origins being primarily anchored in delinquency proceedings, certainly speaks to the historical judgment. But this history, contrasted with the "virtually immemorial" and "abiding adherence to the principle of open trials" considered in *Richmond* and its related cases, does not reflect any "profound judgment about the way in which" dependency hearings should be conducted.²³² Further, while historical judgment informs, it does not dictate. Looking at the functional role access might play today remains critical. As Justice Brennan stated in *Richmond*, "what is crucial . . . is whether access to a particular government process is important in terms of that very process."²³³

III. FUNCTION: IS PUBLIC ACCESS TO DEPENDENCY COURT IMPORTANT TODAY?

The composition of juvenile court varies from state to state, but usually includes delinquency cases, status offense cases and dependency cases.²³⁴ Delinquency cases, which tend to give juvenile court its identity, involve children who violate the law and who, but for their age, would be

231. *Richmond*, 448 U.S. at 593 (Brennan, J., concurring).

232. *Id.* (Brennan, J., concurring).

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

234. See Carol S. Stevenson, et. al., *The Juvenile Court: Analysis and Recommendations, in THE FUTURE OF CHILDREN: THE JUVENILE COURT* 4, 6 (Richard E. Behrman, M.D. ed., 1996).

charged with criminal offenses.²³⁵ Status offenses involve children who have committed acts that are not illegal for adults, but are made so for children, such as truancy, running away, and violating curfew.²³⁶ Delinquency and status offenses involve some act of wrongdoing on the part of the juvenile. Dependency cases, on the other hand, involve situations where children are believed to be victims of neglect or abuse and the state moves to protect those children by bringing an action in dependency court.²³⁷

A usual dependency case arises from a report of neglect or abuse. Neglect occurs when a child's parents or guardians fail to provide even minimal care for the child, including abandonment. Abuse can be physical or sexual. Once a report has been made, the state's child welfare or child protective agency determines if an investigation is warranted.²³⁸ If so, and if the case is substantiated, that is if there is "good reason" to suspect abuse and neglect, further action is taken.²³⁹ In most cases, the child agency deals informally with the family, without a court petition or

235. See *id.* at 6, 7; Howard N. Snyder, *The Juvenile Court and Delinquency Cases*, in *THE FUTURE OF CHILDREN: THE JUVENILE COURT* 53, 53-58 (Richard E. Behrman, M.D. ed., 1996). Instead of being charged criminally and tried for their crimes, juveniles are charged with committing a delinquent act and the court is asked to "adjudicate" them as delinquent. Whereas adults are sentenced and imprisoned, juveniles are committed and provided "treatment" so that they can be rehabilitated. *Id.* at 58; Siegel & Senna, *supra* note 166, at 8. The court's disposition can include residential placement (detention facilities), restitution, community service, fines or probation, or the court can "dismiss the case in consideration of actions already taken." *Id.* Residential placement can range from placement in a large custodial institution such as a state training school, to a group home to a wilderness program or boot camp. See Peter W. Greenwood, *Responding to Juvenile Crime: Lessons Learned*, in *THE FUTURE OF CHILDREN: THE JUVENILE COURT* 75, 79-81 (Richard E. Behrman, M.D. ed., 1996). Further, state laws vary, but courts generally lose jurisdiction for purposes of disposition when the juvenile reaches a certain age. It is usually 18 or 21, but in some states it can extend past age 30. See Snyder, *supra* at 58-59; Spring, *supra* note 178, at 1352 n.5. Whether a juvenile court has jurisdiction to begin with varies widely from state to state, but often involves a consideration of several factors, including age, type of crime committed, and whether it is a first offense or not. See Eric K. Klein, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 *AM. CRIM. L. REV.* 371, 390 (1998); Zierdt, *supra* note 36, at 416 n.109.

236. See Stevenson, *supra* note 234, at 13 (discussing that status offenses can also include underage drinking and children who are "ungovernable"). Delinquent behavior is often preceded by status offenses, and today we would think of status offenses as "pre-delinquent" behavior. See James W. Payne, *Our Children's Destiny*, 35 *TRIAL* 83, 85 n.4 (1999). Many of the status offense problems, "as many as 80% of all cases," are addressed primarily through diversion and dealt with through community service programs or the school system and are not formally a part of the court caseload. See Stevenson, *supra* note 234, at 13; David J. Steinhart, *Status Offenses*, in *THE FUTURE OF CHILDREN: THE JUVENILE COURT* 86, 88 (Richard E. Behrman, M.D. ed., 1996). Examples of dispositional alternatives for status offenders, in addition to commitment, include probation, community service, fines, and canceling the juvenile's driver's license. See Erin M. Smith, *In a Child's Best Interest: Juvenile Status Offenders Deserve Procedural Due Process*, 10 *LAW & INEQ.* 253, 784 n.75 (1992).

237. See Stevenson, *supra* note 234, at 15-16.

238. See *id.*

239. Richard P. Barth, *The Juvenile Court and Dependency Cases*, in *THE FUTURE OF CHILDREN: THE JUVENILE COURT* 100, 101 (Richard E. Behrman, M.D. ed., 1996).

court oversight.²⁴⁰ In essence, the agency “offers voluntary services,” and the family “agrees” to those services.²⁴¹ When this does not work, however, the agency files a petition, initiating the court’s jurisdiction.²⁴²

Dependency cases are usually heard in juvenile court, although more recently states with family courts have placed juvenile and, thus, dependency proceedings there.²⁴³ Once a petition is filed, the court is charged with several tasks, primary of which are making sure the child is protected and seeking a permanent home for the child, either with the child’s family or elsewhere.²⁴⁴

To evaluate the functional role public access might play in the “particular government process” we are concerned with (today’s dependency court), it is important first to look at the current state of the court. Commentators and scholars, almost en masse, characterize juvenile court, including dependency court, as overcrowded, under funded, and failing to protect adequately the children who are subject to its rule of closure. Further, understanding something of the legal, procedural and substantive requirements in neglect and abuse cases provides some appreciation for the scope of the dependency court’s responsibilities and, thus, the characterizations of failure. The issues the courts must deal with are many and are complicated, the hearings are frequent and the number of participants is considerable. Dependency courts devote much of their efforts to just getting through the docket. Time for thoughtful consideration of issues is rare. Finally, an understanding of the culture of dependency court is important. The cultural dynamics, largely defined by the emotional issues with which the courts deal, the imbalance of power between the parties, and the informal but ingrained customs of the regular participants, characterize the system. All of this gives form to the particular government process of dependency court.

A. *The Current State of Dependency Court*

Juvenile court, including its dependency proceedings, is, by most accounts, a dismal mess. First, the workload is simply too great and the resources too meager for court personnel to adequately protect the children. Second, too many juvenile court personnel are untrained for or

240. Stevenson, *supra* note 234, at 16-17.

241. Barth, *supra* note 239, at 101.

242. *See id.*

243. Stevenson, *supra* note 234, at 6; H. Ted Rubin, *The Nature of the Court Today*, in THE FUTURE OF CHILDREN: THE JUVENILE COURT 40 (Richard E. Behrman, M.D. ed., 1996); Hon. Leonard P. Edwards, *The Future of the Juvenile Court: Promising New Directions*, in THE FUTURE OF CHILDREN: THE JUVENILE COURT 131, 132-33 (Richard E. Behrman, M.D. ed., 1996); Justice Frank Sullivan, Jr., *Unified Family Court Structure Recommended*, 42 RES GESTAE 28, 28-29 (1998). Statutes usually create both juvenile courts and family courts. Rubin, *supra*, at 41. Most of the literature addresses abuse and neglect cases assuming they are heard in juvenile court. As discussed earlier, juvenile court was designed to include what has now become dependency court.

244. *See infra* Part III.B.

uninterested in their work. Finally, the court and its work are often held in low esteem, sometimes even by those who work there, and turnover of personnel is great.

The juvenile court must oversee too many cases with complex issues and must do so with far from adequate resources. One source reports that Chicago judges who hear dependency matters have up to 3000 cases at any given time.²⁴⁵ “[F]rustrations of being responsible for an unmanageable number of cases” can lead judges to “eventually stop seeing respondent parents as individuals.”²⁴⁶ As a result, judges can end up doing their jobs with resigned attitudes produced by the seeming impossibility of their task. “In this overburdened system, then, an effective lawyer . . . is essential to making [the] client’s circumstances fully known to and understood by the court.”²⁴⁷ Unfortunately, that part of the system also is overburdened: children’s lawyers in Chicago, for example, represent an average of 350 children each;²⁴⁸ “reporters have compared hearings in the overwhelmed juvenile courts to cattle calls.”²⁴⁹ Further, it is not just the judges and lawyers who are overloaded. The rest of the system looks the same. “Every facet of the child welfare system is now overburdened. Social workers and their supervisors regularly handle more cases than recommended by licensing organizations: in some jurisdictions, more than four times more.”²⁵⁰

245. Laura Duncan, *State’s Attorney’s Office Adds 20 Lawyers for Surging Abuse and Neglect Caseload*, CHI. DAILY L. BULL., Feb. 24, 1994, at 1.

246. Kathleen A. Bailie, Note, *The Other “Neglected” Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2313 (1998). See also Thomas F. Geraghty, *Justice for Children: How Do We Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 232 (1997) (In delinquency court, “[h]igh caseloads pressure children, prosecutors, defense lawyers and judges to gloss over relevant facts, to ignore possible defenses, and to avoid the kind of attention to detail that makes for accurate determinations of fact.”).

247. Bailie, *supra* note 246, at 2313.

248. Steve Johnson & Colin McMahon, *Year’s Toll: Our Loss, Our Failure 61 Young Victims Leave Behind a Trail of Anger, Abuse & Blame*, CHI. TRIB., Jan. 2, 1994 (available in 1994 WL 6536741).

249. Gordon, *supra* note 17, at 679.

250. *Id.* See also Geraghty, *supra* note 246, at 232 (Juvenile courts everywhere “struggle with [a] lack of resources and [an] inability to obtain meaningful services for children.”). Massachusetts, for example, passed a court reform act directed at improving “a fragmented [juvenile court system] nearly strangled by an ever increasing caseload of matters involving more complex and demanding issues of family dysfunction.” Five years later, the system “remain[ed] under funded: the lack of resources for adequate courthouse facilities and court personnel contributes to docket delays and severely limits the ability to address serious family needs.” Gavin, *supra* note 14, at 15-16. New York’s child protective system was described by Judge Elaine Slobod: not enough foster parents, not enough trained aides and caseworkers in child protective services, inadequate mental health services for children, only intermittent services for families to help them keep their children – in short, there is not the “necessary services and resources” needed. *In re S Children*, 532 N.Y.S.2d 192, 198-199 (N.Y. Fam. Ct. 1988). See also Marcia Sprague & Mark Hardin, *Coordination of Juvenile and Criminal Court Child Abuse and Neglect Proceedings*, 35 U. LOUISVILLE J. FAM. L. 239, 293 (1997) (arguing that coordination of juvenile and criminal proceedings resulting from a single incident can, in part, increase court efficiency).

Professor Weinstein described how this overload plays out within the juvenile court system for dependency cases:

[H]eavy calendars . . . require cases to be moved through quickly. There is no time for thorough and careful consideration of all the facts and concerns. Giving too much time to any one case disrupts the entire calendar. Neither the judges nor the attorneys can be completely familiar with these cases because of the number of cases which they handle. . . . The caseloads maintained by most professionals working in these systems is too high to expect quality performance. . . . It is not unusual to see judges reading through case files during the presentation of the case, nor to have critical reports distributed on the day of the hearing. In ordinary litigation, that would be sufficient reason for delay. In these cases, however, each cause for delay means that a child's life is put on hold.

The work of attorneys, too, is impacted by high caseloads. Attorneys may be unable to investigate their cases, consult with experts, or prepare for hearings. It is typical for cases to settle just before a scheduled hearing, not because the parties suddenly discovered a way to resolve their differences, but simply because this may be the first time all of the attorneys have had the opportunity to discuss the case with each other. . . .

High caseloads prevent social workers from designing case-specific services for families, as required by [federal law]; instead, families often receive "boilerplate" service plans which can add to, rather than alleviate the families' problems, waste valuable resources and time, and heighten levels of frustration for all participants. . . .

Support services for families are very limited. . . . In the child protection arena, services are mandated by . . . federal requirement[s] . . . but are underfunded and often inadequate or unavailable to families due to long waiting lists or inconvenient locations.²⁵¹

Kathi Grasso, testifying in Congressional Hearings in 1997 on behalf of the American Bar Association Center on Children and the Law, reported that "emergency removal hearings, foster care review hearings, and other pertinent court reviews [too often] last no longer than five or 10 minutes."²⁵² The Report of the ABA's Working Group on the Unmet Legal Needs of Children and Their Families states that "Chicago juvenile

251. Weinstein, *supra* note 29, at 118-121.

252. *Juvenile Court Improvement: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 25, 28 (1997) (statement of Kathi L. Grasso, American Bar Association Center on Children and the Law, on behalf of the American Bar Association).

court judges have about ten minutes to devote to each case.²⁵³ These are not descriptions that evoke confidence.

Given these working conditions, it is not surprising that the juvenile court sits at the bottom of most judicial hierarchies. Whether the court's lack of resources is responsible for the court's low status or vice versa, the result is the same.²⁵⁴ Many judges and other personnel are discouraged from coming to and staying in juvenile courts. There are good and dedicated judges, lawyers and other personnel in juvenile court – this author has seen them – but many are ready to leave it and its many problems. Turnover of juvenile court personnel is high and is one of the biggest obstacles to protecting children within the system.²⁵⁵

Second, although many have interest, not all personnel in juvenile court have adequate training and desire:

[M]ost jurisdictions choose attorneys for children in child protection proceedings merely because the attorneys have expressed an interest in representing children; many of these attorneys bring to this task no special training in child advocacy and consequently may, despite good efforts and intentions, provide less than optimal representation to children.²⁵⁶

Some lack even minimum qualifications: "In some jurisdictions, where juvenile courts are regarded as legally unsophisticated, judges are appointed to juvenile court who wouldn't be trusted to judge major civil or criminal cases."²⁵⁷ Others simply do not have the interest: "Attorneys often accept appointments to specialized juvenile courts hoping for later promotion to higher judicial positions."²⁵⁸ All of these scenarios result in

253. *America's Children at Risk: A National Agenda for Legal Action*, 3 KY. CHILDREN'S RTS. J. 18, 22 (1994).

254. See Joshua M. Dalton, *At the Crossroads of Richmond and Gault: Addressing Media Access to Juvenile Delinquency Proceedings Through A Functional Analysis*, 28 SETON HALL L. REV. 1155, 1181 n.172 (1998) ("The juvenile court generally ranks low in state judiciary hierarchy; this [too] keeps many qualified judges away.") "Many juvenile courts have meager staff support and other resources. This is probably due to their lack of visibility within the court system, a lack of understanding of their unique characteristics, their typically low position in the judicial hierarchy, and the low regard in which they are held by the judiciary as a whole." Mark Hardin, *Child Protection Cases in a Unified Family Court*, 32 FAM. L. Q. 147, 197 (1998).

255. See Katharine Cahn & Paul Johnson, *Reaching Timely Permanency Decisions: A Recapitulation*, in CHILDREN CAN'T WAIT: REDUCING DELAYS IN OUT-OF-HOME CARE 129, 135 (Katharine Cahn & Paul Johnson eds., 1993).

256. Annette R. Appell, *Responses to the Conference: Decontextualizing the Child Client: The Efficacy of the Attorney-Client Model for Very Young Children*, 64 FORDHAM L. REV. 1955, 1968 (1996). "[T]he poor quality of some legal representation of children has been linked to low compensation . . . , high caseloads, and judicial concerns about the impact of hourly payment of these attorneys on courts' coffers." *Id.* at 1967.

257. Hardin, *supra* note 254, at 197.

258. *Id.*

personnel who lack the necessary commitment and training to discharge their responsibilities to the children committed to dependency court.²⁵⁹

The low esteem in which juvenile court is held is reflected in other ways too. "Many juvenile courts . . . are old and dilapidated or located in the basement of the local courthouse. The physical appearance of the courts often reflects their [low] position within the court system."²⁶⁰ In addition, "[i]n many jurisdictions, specialized juvenile court judges or referees draw the lowest judicial salaries."²⁶¹

B. The Responsibilities of Dependency Court

Dependency courts are responsible for a much greater number of dependency proceedings today than they were twenty-five years ago.²⁶² In 1976, there were 10 reports of abuse or neglect per 10,000 children; in 1994, there were more than 40 reports per 10,000 children, numbers totaling four percent of America's children.²⁶³ The real impact on workload, however, has come from the increased scope of responsibilities in the typical abuse or neglect case, and most of that comes from the requirements of the Adoption Assistance and Child Welfare Act of 1980 (AACWA)²⁶⁴ and the Adoption and Safe Families Act of 1997 (ASFA).²⁶⁵ These federal acts, along with some additional state and constitutional requirements, have resulted in a greater complexity of issues and an increased number of hearings. Finally, an increased number of participants in dependency cases has also contributed to the system overload.²⁶⁶

As discussed earlier, the usual dependency case starts with a report of neglect or abuse.²⁶⁷ While sexual and severe physical abuse cases tend to be those cases the public hears about, the majority of cases are neglect

259.

Advocates for children, be they prosecutors or defense lawyers, repeatedly have their efforts undermined by inefficient, ill-informed, or downright hostile judges. Judges who want to make a difference find themselves hamstrung by lawyers and child welfare personnel who are not as knowledgeable or as committed as they should be.

Geraghty, *supra* note 246, at 234. *See also* Appell, *supra* note 256, at 1968 (commenting on the lack of training child advocates have).

260. Hardin, *supra* note 254, at 197.

261. *Id.*

262. *See* Stevenson, *supra* note 234, at 16; Barth, *supra* note 239, at 102.

263. Barth, *supra* note 239, at 102. All states require certain professionals who serve children to "report suspected child abuse" to the proper authorities. Stevenson, *supra* note 234, at 15-16. Of these 2.9 million children on whom reports are made, "[n]early one half" were reported as neglected; twenty-six percent as victims of physical abuse; and fourteen percent as victims of sexual abuse. *Id.* at 16. *See also* Barth, *supra*, at 239.

264. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of U.S.C., primarily in 42 U.S.C.).

265. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of U.S.C., primarily in 42 U.S.C.).

266. *See* Hardin, *supra* note 30, at 113-20.

267. *See* Stevenson, *supra* note 234, at 16.

situations.²⁶⁸ The state's child protective agency investigates the report and, assuming the report is substantiated, takes appropriate action, which may include filing a petition in state court.²⁶⁹ Prior to AACWA in 1980, a judge in a dependency proceeding was charged primarily with determining whether child abuse or neglect had occurred and deciding whether the child could stay in the home with agency supervision, or whether the child needed an out-of-home placement (foster care). Two hearings were involved in the usual case.²⁷⁰ Since 1980, however, the courts are responsible for much more. "The Child Welfare Act [AACWA] tripled the number of issues to which lawyers and judges must attend in juvenile court proceedings."²⁷¹

AACWA came about in part from the criticism that children were being placed in foster homes when, with state-provided support services, they might have been able to stay safely in their homes.²⁷² AACWA responded by shifting emphasis to "permanency planning" for children, so they would not languish in foster homes.²⁷³ The centerpiece of the Act's permanency planning mandate was the "reasonable efforts" requirement.²⁷⁴ States were now required to provide support services to make "reasonable efforts" to maintain or reunite the child's in home-placement by providing services to the family, thus maintaining the stability and permanency of that placement.²⁷⁵ Instead of emphasizing foster care placement as a means of protecting abused or neglected children, the Act shifted the focus to protecting the child while the child remained in his or her home; foster care was to be the "last resort," not the first.²⁷⁶

To carry out AACWA's reasonable efforts provision, states were required to develop a case plan for each child in foster care.²⁷⁷ Each child's plan was to detail what had been done to try to keep the child in his or her home: the foster care placement; the services to be provided to the child, the foster family and the child's family; and the plans for returning the child to his or her home or another permanent placement.²⁷⁸ "A typical case plan specifies case goals, such as family reunification, and areas of parental improvement; agency and parental tasks needed to

268. See English, *supra* note 33, at 43-46.

269. See Stevenson, *supra* note 234, at 16-17. See also Barth, *supra* note 239, at 101.

270. See Hardin, *supra* note 30, at 112-13.

271. Gordon, *supra* note 17, at 679.

272. See Kim, *supra* note 229, at 287-89. The emphasis was on protecting children by placing them in foster homes, as was the focus of federal funding. After congressional hearings on the foster care system in the late 1970s the AACWA legislation was passed.

273. See *id.* at 288-89. Permanency advocates emphasized stability and finding permanent homes for children. The widespread use of long-term "temporary" placement, foster homes, was the antithesis of permanency. See also Hardin, *supra* note 30, at 112.

274. See Kim, *supra* note 229, at 289-90.

275. See *id.*

276. *Id.* at 290 n.22 (quoting 126 CONG. REC. 6942 (1980)).

277. See *id.* at 290.

278. See *id.*

achieve the goals; and timetables for the achievement of the identified goals and tasks.”²⁷⁹

AACWA also increased the number of court hearings required for most dependency cases. States were required to judicially review the child agency’s actions to see if there were “reasonable efforts” to keep the child with the family²⁸⁰ and to conduct periodic administrative or judicial review hearings for children in foster placements “to determine, among other things, the appropriateness of the placement, the extent of case progress, and compliance with the [child’s] case plan.”²⁸¹ In addition, state courts were required to hold permanency planning hearings (so that a new permanent home could be “secured” for children for whom reunification with families was not a safe option) within eighteen months after foster care placement.²⁸²

Then in 1997, additional federal legislation was added. While AACWA was prompted in large part by children “languishing” in foster homes,²⁸³ the Act did not necessarily remedy the foster care problem.²⁸⁴ The states had interpreted the Act’s reasonable efforts provision as requiring them to work towards reuniting children with families, even when there was little or no prospect of that becoming a safe placement.²⁸⁵ As a result children were kept in foster homes while fruitless efforts were expended to make their former homes safe for them.²⁸⁶ When Congress passed ASFA in 1997, then, it attempted to clarify and limit the reasonable efforts requirement.²⁸⁷ It did so in various ways, primarily, however, by shifting greater emphasis to the child’s safety and to permanency, as opposed to family preservation and reunification.²⁸⁸ ASFA specifically emphasizes finding adoptive homes for those children who will not successfully be returned to their parents.²⁸⁹ Consistent with these goals, ASFA also requires a permanency hearing within twelve months after a

279. Hardin, *supra* note 30, at 114.

280. *See id.* at 112-13, 119.

281. *Id.* at 114, 120. *See also* Kim, *supra* note 229, at 291 (explaining periodic reviews).

282. Hardin, *supra* note 30, at 114, 120. *See* Kim, *supra* note 229, at 312 (explaining change to requirements for permanency hearings from eighteen months after placement in foster care under AACWA to twelve months under ASFA). As of 1996, however, at least 21 states had sued child welfare agencies on behalf of children who had not received the benefits of permanency planning envisioned by this law. *See also* Stevenson, *supra* note 234, at 17.

283. Jill Chaifetz, *Listening To Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 4-5 (1999).

284. *See* Kim, *supra* note 229, at 287.

285. *See id.* at 287-89, 309.

286. *See id.*

287. *See id.* at 287.

288. *See id.* at 309 (quoting 42 U.S.C. § 671 (a)(15)(A) (West Supp. 1998)).

289. *See id.* at 309-10. In addition, specific limitations on reasonable efforts to keep intact or reunite families were enacted. For example, states are no longer required to meet the reasonable efforts requirement for family reunification if there are “aggravated circumstances” (e.g., torture or sexual abuse), if a parent murders another child, or if a parent loses his or her parental rights to a sibling. 42 U.S.C. § 671(a)(15)(D) (Supp. IV 1998).

child enters foster care (as opposed to eighteen months under AACWA) and moves states more quickly towards initiating termination of parental rights hearings (to facilitate adoptions).²⁹⁰

The requirements of AACWA in 1980, combined with those of ASFA in 1997 have significantly expanded the courts' responsibilities in dependency actions in the last twenty to thirty years.²⁹¹ Today's dependency court, in addition to determining the validity of abuse or neglect allegations, may need to determine emergency placement issues,²⁹² assess reasonable efforts to keep the child in the home,²⁹³ assess reasonable efforts to get the child back in the home, review case plans, review implementation efforts of case plans, hold (more quickly) a hearing to terminate parental rights, and deal with adoption issues.²⁹⁴ "In 1976, the same case might have had two hearings and two issues for the court to deal with. Today the court might have to hold an emergency hearing, several review hearings, several permanency planning hearings, a parental rights termination hearing, and an adoption hearing."²⁹⁵

Adding further to the complexity of cases with which juvenile dependency court must deal is the increased number of persons, including lawyers, needed or required to participate in the hearings. Federal and state constitutional and statutory requirements regulate who is represented in child dependency proceedings and at what stage.²⁹⁶ First, the child's interests must be represented. The Child Abuse and Neglect Prevention and Treatment Act of 1974 (CAPTA) requires the appointment of a guardian ad litem (GAL) for each child who is the subject of a child protection proceeding.²⁹⁷ While the GAL does not have to be a lawyer, many states provide lawyers to children.²⁹⁸ The rest of the states use Court Appointed Special Advocates (CASAs) or other laypersons.²⁹⁹ Some children have both a lawyer and a GAL.³⁰⁰

290. See Kim, *supra* note 229, at 309-14. Even in 1996, prior to ASFA, Mark Hardin reported an increase in termination proceedings resulting from "[t]he emphasis on finding permanent families for foster children who cannot safely be returned home." Hardin, *supra* note 30, at 115.

291. See Hardin, *supra* note 30, at 114. See also Hardin, *supra* note 254, at 154-60.

292. Stevenson, *supra* note 234, at 17.

293. Hardin, *supra* note 30, at 113.

294. *Id.*

295. *Id.* at 116. See also Kim, *supra* note 229, at 302 (describing the shelter care hearing, adjudicatory hearing, dispositional hearing and review hearing typical of the juvenile court process).

296. See generally Hardin, *supra* note 30, at 118-19.

297. *Id.*; Daniella Levine, *To Assert Children's Legal Rights or Promote Children's Needs: How to Attain Both Goals*, 64 *FORDHAM L. REV.* 2023, 2025 (1996) (citing 42 U.S.C. §§ 5101-5107 (1998 & Supp. 1994)).

298. Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 *CORNELL L. REV.* 895, 900 n.12 (1999) (citing Donald N. Duquette & Sarah H. Ramsey, *Representation of Children in Child Abuse and Neglect Cases: An Empirical Look at What Constitutes Effective Representation*, 20 *U. MICH. J.L. REFORM* 341, 346-47 (1987)).

299. Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 *U. PA. J. CONST. L.* 95, 108 (1999) ("[I]n only half of the states . . . do children in dependency actions have attorneys. In the other half . . . children are represented either by [CASA or laypersons.]") (citing

Next, the interests of the parents must be represented. In each case that involves termination of parental rights the court must determine whether the parents have a constitutional right to legal representation.³⁰¹ However, most states give parents the right to request or the court the discretion to appoint counsel.³⁰² Fewer, but still most, states give parents the right to request or the court the discretion to appoint counsel at all stages in child dependency cases.³⁰³ In some cases separate counsel represents each parent.³⁰⁴

While in theory lawyers assist the court in substantive and procedural matters, this is not always the case. Inadequate training of juvenile court personnel, high employee turnover, inadequate pay, and status issues influence the outcome.³⁰⁵ CASA volunteers, either serving as GALs or as an additional voice for the child, enjoy a deserved reputation for their contributions to ensuring that the child's interests are represented. However, "they generally offer neither expertise (training is good, but does not turn volunteers into social workers or psychologists) nor a particularly intimate knowledge of the child."³⁰⁶ In addition, while lawyers and GALs theoretically ensure that the interests of the parties are represented, representation of varied interests can also make for a more adversarial hearing,³⁰⁷ and thus increase the court's workload.

Lawyers or representatives, along with other participants have changed the look of the dependency case. In 1976, a dependency pro-

Interview with Howard Davidson, Director of the American Bar Association Center on Children and the Law (Feb. 1999).

300. Hardin, *supra* note 30, at 118-19; Levine, *supra* note 297, at 2025.

301. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 32 (1981) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)).

302. Hardin, *supra* note 30, at 118 ("[I]n some states the right to counsel originates only with procedures to terminate parental rights"). See also *Indigents' Rights to State Funding in Civil Actions*, 95 HARV. L. REV. 132, 142 n.82 (1981) ("*Lassiter* may have little practical effect on the provision of counsel in termination proceedings. . . . Most states have statute[s] authorizing appointment of counsel."); Amy Sinden, 'Why Won't Mom Cooperate?': A Critique of Informality in *Child Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 348-49 (1999) (citing WASH. REV. CODE 13.34.090 (1998); PA. STAT. ANN. tit. 42, § 6337 (West 1992)).

303. William Wesly Patton, *It Matters Not What is but What Might Have Been: The Standard of Appellate Review for Denial of Counsel in Child Dependency and Parental Severance Trials*, 12 WHITTIER L. REV. 537, 539 (1990). See also Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 TOURO L. REV. 247, 262 (1997) (explaining that ten states currently "require the appointment of counsel for indigent parents" in termination cases "absent an intelligent waiver," while "[t]wenty-two . . . states and the District of Columbia require that counsel be appointed" if the "parent requests counsel and meets local standards for indigence").

304. See e.g., John Haney & Lisa Kay, *Making Reasonable Efforts in Iowa Foster Care Cases: An Empirical Analysis*, 81 IOWA L. REV. 1629, 1650 n.140 (1996) ("In some cases, the court will appoint separate attorneys for each parent when their interests conflict.").

305. Hardin, *supra* note 30, at 118-19.

306. Buss, *supra* note 298, at 954 n.191.

307. Bailie, *supra* note 246, at 2310 (citing Weinstein, *supra* note 29). See generally Hardin, *supra* note 30, at 118-19.

ceeding typically included only the caseworker and the custodial parents.³⁰⁸ Today, participants might include the caseworker, the custodial parents, the noncustodial parents, the parents' attorney or attorneys, the child's attorney, the child protective agency's attorney, a CASA volunteer (acting as a GAL) and even foster parents.³⁰⁹

Increased caseloads, increased complexity of cases, and inadequate resources, including personnel, and the resulting overload and ineffectiveness of dependency courts are all important to understanding the "particular government process" of dependency court. However, one must understand another aspect of the court in order to evaluate the relative costs of open versus closed proceedings; perhaps more than anything, the culture most characterizes the institution of dependency court.

C. *The Culture of Dependency Court*

The government wields enormous power in dependency court.³¹⁰ It takes children away from their parents, and often thrusts children "into strange surroundings with perhaps no understanding of why this traumatic event is happening or when it might end."³¹¹ At the same time, the government deprives the parents of the "liberty to direct and control [their] care and upbringing."³¹² Further, while the parents and children are usually strangers to the dependency court, the other participants are not. The judge, the lawyers, the social workers, the GALs, and the other court workers are usually daily participants in dependency court. The familiarity that these court workers have with the system and with each other can breed a "go along to get along" philosophy that pressures not only the regular participants, but also the parents and thus their children to conform and comply. The culture that results is one that does not always encourage thorough and accurate fact-finding or thoughtful decisions about the important matters before the court.

It is important to grasp the nature of a dependency action. "A dependency case . . . pits parent against state."³¹³ "[I]t is no secret that the people affected by the child welfare system are some of the least powerful members of our society: women, many of whom belong to racial minority groups and virtually all of whom are desperately poor,"³¹⁴ and children. Further, it is possible that neither mother nor child will have a lawyer. If they do have lawyers, it is likely the lawyers are not highly

308. Hardin, *supra* note 30, at 115.

309. *Id.*

310. *In re Welfare of R.L.K.*, 269 N.W.2d 367, 368 (Minn. 1978).

311. Sinden, *supra* note 302, at 363.

312. *Id.* at 362.

313. *Id.* at 346.

314. *Id.* at 364-65. See also Sokol, *supra* note 28, at 917 ("[T]he parents who end up in dependency court frequently are drawn from the most powerless segments of our society.") (citing *Santosky v. Kramer*, 455 U.S. 745, 763 (1982); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 30 (1981)).

trained or experienced. This is in spite of the fact that the government is there to take or interfere with the parent's right to direct the upbringing of her child. The Supreme Court's language in *Stanley v. Illinois*³¹⁵ concerning this right bears repeating:

The rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and '(r)ights far more precious . . . than property rights,' . . . 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment.³¹⁶

The government, through the dependency court judge, has the power to deny parents this precious right. The judge has the ultimate power to terminate the child's legal relationship with his or her parents.³¹⁷ The result is that the government presides over a critical court proceeding that is initiated by the government against a poor and vulnerable private party.

In addition, all the participants in this proceeding, except the parent and the child, are regular dependency court participants.³¹⁸ The repeat presence of these individuals fosters a "clubbiness" and contributes to the court's informality, both of which can influence the dynamics and the results of the hearings.³¹⁹ First, the regulars in dependency court know each other. They know each other's children, partners and lives. When people know each other well and see each other regularly, they develop "a set of unwritten rules and shared expectations that govern the expected and accepted behavior."³²⁰ Theoretically, this familiarity, "learning each other's styles, understanding expectations, and developing trust," could work to the advantage of the court system, "but only if each participant is vigilant in monitoring the professional behavior of

315. 405 U.S. 645 (1972).

316. *Stanley*, 405 U.S. at 651 (quoting *Meyer v. Neb.*, 262 U.S. 390, 399 (1923); *Skinner v. Okla.*, 316 U.S. 535, 541 (1942); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Prince v. Mass.*, 321 U.S. 158, 166 (1944); *Griswold v. Conn.*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)).

317. See Brelsford & Myers, *supra* note 3, at 16 (citing *In re Tarshaw J. and Carlos V.*, Nos. 71752, 69605, Reporter's Trans. at 9-11 (Cal. Super. Ct., Fresno Cty., June 25, 1991)).

318. Sinden, *supra* note 302, at 351-52.

319. *Id.* at 352-55. See Bremner, *supra* note 145, Vol. III at 1162-65, for an excellent discussion of this dynamic.

320. Sinden, *supra* note 302, at 352 ("[F]rom the lawyers and social workers to the judges, their courtroom deputies, stenographers and clerks - [all] have well-established relationships and a kind of collegiality that comes from daily contact."). See also Bremner, *supra* note 145, Vol. III at 1162-65.

others.³²¹ Instead of vigilance, however, this clubbiness too often encourages judges, lawyers, and others to place collegiality and relationships ahead of their responsibilities. They conform to the group's expectations and make implicit pacts of non-aggression.³²² This is especially true because of the tremendous caseloads in dependency court. "Giving too much time to any one case disrupts the entire calendar."³²³ Lawyers and other court workers understand this and understand that raising troublesome issues or arguments will consume time and resources that are simply not available.³²⁴ This may be particularly true of attorneys appointed by the court under a contract system.³²⁵ Again, because of the limited resources allocated to dependency court, the pay under these contracts is inadequate compensation given the services they require.³²⁶ Still, "the attorney must agree to these demands or risk receiving no future appointments. . . . The judge is clearly in a dominant position . . . because the judge has control over whether the attorney may appear in the courtroom in the first place."³²⁷

The familiarity with which these regular courtroom participants interact also contributes to what is already a purposeful atmosphere of informality in juvenile dependency proceedings.³²⁸ This informality creates yet another obstacle to the court fulfilling its responsibility. Formal, open court adversarial proceedings are associated with relevant and accurate fact-finding.³²⁹ While even formal court proceedings can include decisions based on prejudices and other factual inaccuracies, informal proceedings exacerbate these problems. Without formal constraints, decision-making is more "susceptible to being swayed by prejudices, stereotypes, and snap judgments based on innuendo and rumor."³³⁰ Similarly, part of the informality of dependency court is influenced by the "social work norms and discourse" that dominate.³³¹ Social work norms discourage conflict and emphasize cooperation and non-adversarial means of resolving issues. Amy Sinden, a lawyer who has represented parents in dependency court, argues persuasively that these values oper-

321. Shari F. Shink, *Hallmarks: New Directions in the Defense of Children*, 26 COLO. LAW. 39, 40 (1997).

322. Sinden, *supra* note 302, at 354-55.

323. Weinstein, *supra* note 29, at 118.

324. *Id.*

325. Shink, *supra* note 321, at 40.

326. *Id.*

327. *Id.* See also *Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, Report of The Working Group on the Judicial Role*, 64 FORDHAM L. REV. 1389, 1392 n.18 (1996) ("Many members of the Group, including the three members of the judiciary, believed that an appointment process that relieves judges of the responsibility for selecting and monitoring attorneys may be an appropriate step in assuring high quality representation for children.").

328. See *supra* text accompanying notes 208-210.

329. Sinden, *supra* note 302, at 379-80. See also *infra*, § III.D.1. (examining the importance of full and accurate information in dependency court).

330. Sinden, *supra* note 302, at 380.

331. *Id.* at 353.

ate especially to pressure parents to cooperate. A non-cooperating parent already accused of neglect or abuse, risks being accused of harming his or her child a second time.³³² Cooperation in these situations, says Sinden, is “frequently just a code word for the parent doing whatever the social worker tells” the parent to do, if that parent wants to be reunited with his or her child.³³³ This pressure to cooperate can also generate unreliable facts on which the court might base its decision.

It is the convergence in dependency court of all of these factors – the imbalance of power, the emotionally charged issues that are before the court, the conformity and cooperation required of all participants, and the informality of the proceedings – that defines the culture of dependency court. The stakes are high in dependency cases, and the issues – child rearing, child abuse, child neglect – are particularly susceptible to prejudices. When possible harm to a child is the issue, the temptation to “cut corners” in order to reach the outcome one wants to reach is great.³³⁴ As Sinden so succinctly points out, this combination of factors is designed to produce inaccurate information:

[S]ince *Miranda v. Arizona*, we have recognized that informality in the context of the power imbalance that exists when the state elicits information from an individual under a palpable threat of a substantial deprivation of liberty (there, physical restraint – here, removal of child) is a recipe for coercion and that such coercion can actually result in inaccurate information being elicited.³³⁵

Each act of conformity and cooperation in a child’s dependency proceedings – every agreement of non-aggression – runs the risk of hurting a child whose best interest needs someone at that particular moment not to conform, not to cooperate, not to operate on instinct or prejudice, but to find the facts and to “make waves.”³³⁶

Thus, the proceeding to keep in mind as we look at the function of open or closed dependency hearings is a proceeding about a child the government believes is abused or neglected; it can separate the child from his or her parents; it takes place in a grossly overburdened and under funded system that resides at the bottom of the judicial hierarchy; it is one of an overwhelming number of cases with complex issues; and it

332. *Id.* at 353-54.

333. *Id.* at 354. *See also* Sokol, *supra* note 28, at 914, n.233 (arguing that dependency cases often place parents in the awkward position of being required to admit wrongdoing in order to be “acquitted”).

334. Sinden, *supra* note 302, at 380.

335. *Id.* at 381 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

336. Shink, *supra* note 321, at 40. *See also Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, Report of The Working Group on the Judicial Role*, 64 *FORDHAM L. REV.* 1389, 1392 n.18 (1996) (discussing the Work Group’s process of selecting attorneys to represent children).

is resolved in an informal environment in which there is great pressure to “not make waves.” And, it takes place in a system that was charged with protecting Tavelle, Brianna, Kayla, Ashley, and Larry. The question is, what function would public access to *this* proceeding serve?

D. The Value of Access to Dependency Court

Even if history yielded a stronger judgment about the confidentiality of dependency proceedings, the functional role of access today must be closely scrutinized. Historical judgments yield the judgment of the past, not the present. The function of closed dependency proceedings is largely defended as being in the best interest of the children whom the court is to protect, and the historical origins link the practice to that purpose. The seemingly dismal state of the dependency court system today, however, raises the question of “how?” How exactly does presumptively closing dependency hearings serve the best interest of the children?

Dependency court is charged with the responsibility of protecting children from abuse and neglect; to that end, dependency court is accorded the power of disrupting and severing the parent-child relationship. Such responsibility should be carefully discharged and such power should be carefully exercised; the consequences of the courts’ actions will likely have significant and irrevocable consequences for the children and their parents.

The best interest of the children would first seem to demand that the court be designed to encourage the fullest and most accurate information about the important issues before it. Further, to operate in the best interest of the children, the court also needs the confidence and support of the public. Closed hearings discourage full and accurate information and closed hearings fail to provide to the public information needed for the public’s confidence and support. It is “the sure knowledge that anyone is free to attend [a trial that] gives assurance that established procedures are being followed and that deviations will become known.”³³⁷ A closed hearing can sometimes serve the best interest of a child, but presumptively closed hearings do not serve the best interest of children.³³⁸

1. Full and Accurate Information

Full and accurate information about the matters before dependency court ought to be a major factor in determining how dependency court will operate. “No decisions have a more profound impact on the daily lives, emotional well-being, and safety of litigants than those made every

337. *Press-Enterprise Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984).

338. Richard D. Hendrickson, *Media Access to Juvenile Courts: An Update*, 44 (No. 3) *JUV. & FAM. CT. J.* 27, 40 (1993).

day in family courts.”³³⁹ Dependency court factual questions are also “among the most difficult . . . and most sensitive [questions] litigated in American courtrooms.”³⁴⁰ An open courtroom has long been recognized as one of the most important means of enhancing the reliability of judicial evidence and should help to make more accountable those who testify or otherwise provide evidence in dependency proceedings. The public scrutiny of open proceedings can further encourage accurate and reliable evidence in dependency proceedings by countering the culture of informality and familiarity of current proceedings. Finally, public scrutiny should encourage dependency court decisions based on reliable evidence, and discourage decisions based on prejudice, bias and good intentions – all of which are more likely to prosper behind closed doors.

Dependency court proceedings are judicial proceedings. The court engages in fact-finding and makes decisions based on those findings. One premise of our judicial system is the belief that justice emerges from full and truthful testimony,³⁴¹ and it has long been recognized that open courtrooms help ensure the reliability of the testimony offered and thus the accuracy of the fact-finding.³⁴² A courtroom audience who knows the truth can discourage perjury and encourage full and complete testimony. The same audience might also realize they have additional information to share that might be helpful.³⁴³

While dependency proceedings may have more than the normal share of specific situations that require private testimony, such as when a child is testifying about sexual abuse, for example, dependency proceedings are still court proceedings. There is no general reason to except them from the rationale that applies to testimony in all other court proceedings. Children testifying about sensitive matters can be dealt with in the way other courts deal with it – using the court’s discretion on a case by case basis to determine if the testimony should be taken in private.³⁴⁴

Further, inaccurate and unreliable evidence that may also result from the culture of informality and familiarity in dependency court can

339. Catherine J. Ross, *Unified Family Courts: Good Sense, Good Justice*, 35 TRIAL 30, 30 (1999).

340. Sokol, *supra* note 28, at 913.

341. See *supra* text accompanying notes 57-59. See also Sokol, *supra* note 28, at 913 (examining dependency court fact finding).

342. Gofen, *supra* note 13, at 878 (citing *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 606 (1982)). “As noted in *Globe Newspaper*, public presence at trials aids accurate fact-finding.” See also Sokol, *supra* note 28, at 913 (examining dependency court fact finding).

343. Karla G. Sanchez, *Barring the Media From the Courtroom in Child Abuse Cases: Who Should Prevail?*, 46 BUFF. L. REV. 217, 224-25 (1998). See also Breilsford & Myers, *supra* note 3, at 15-16 (examining mandatory closure and conditional closure of juvenile proceedings); Gofen, *supra* note 13, at 864 (discussing the lower court recognition of the First Amendment right of access to dependency proceedings).

344. Sokol, *supra* note 28, at 914.

be countered somewhat with public access.³⁴⁵ While informality was central to the original vision of juvenile court, and while both familiarity and informality can and likely do contribute to some beneficial outcomes in dependency court, an open courtroom can provide a check to their possible negative effects. "Several courts acknowledge that juvenile cases exhibit far more procedural errors than do comparable adult cases and suggest that confidential proceedings and the absence of counsel may foster a judicial casualness toward the law that visibility and appellate accountability might constrain."³⁴⁶ This state of affairs seems particularly troubling when it concerns cases as critical as dependency proceedings. Amy Sinden emphasizes some of the benefits of both formality and formal rules in courtroom hearings:

The formal rules that govern trial procedure also help to assure accuracy. Witnesses testify under oath under threat of penalty for perjury. The judge excludes unreliable evidence, like hearsay, as well as evidence likely to cause prejudice. The requirement that judges state the basis for their decisions helps to ensure that decisions are based on a rational view of the evidence and not on prejudice or bias. Numerous rules governing judges' conduct in adversarial proceedings encourage impartiality and the appearance of impartiality. Thus, judges sit higher than and at some distance from the parties, and usually address only the lawyers. When they do address the parties directly they do so formally and on the record. And they do not communicate with one party out of the presence of the other party.³⁴⁷

Open hearings would not preclude informality in dependency proceedings, but the openness should operate to minimize procedural errors resulting from that informality. It should similarly help prevent actions and decisions based on bias or prejudices, and abuses,³⁴⁸ some of which are aided by the culture of dependency court.

As discussed earlier, the process and dynamics of dependency court create a significant imbalance of power between the family and the government. The informality and clubbiness, the fact that a child's health and safety are at issue, and the significant discretion accorded the court can skew the proceedings to result in the resolution that the government

345. See *supra*, text accompanying notes 57-59. See also Sokol, *supra* note 28, at 918 (arguing that public access would heighten procedural regularity in dependency cases).

346. Barry C. Feld, *The Right to Counsel in Juvenile Court: An Empirical Study of When Lawyers Appear and the Difference They Make*, 79 J. CRIM. L. & CRIMINOLOGY 1185, 1346 n.290 (1989) (citing *RLR v. State*, 487 P.2d 27, 38 (Alaska 1971); *In re Dino*, 359 So. 2d 586, 597 (La. 1978)).

347. Sinden, *supra* note 302, at 379-80.

348. 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, 379 (1995); Dienes, *supra* note 3, at 7; Erin M. Smith, *In a Child's Best Interest: Juvenile Status Offenders Deserve Procedural Due Process*, 10 LAW & INEQ. J. 253, 260 (1992); Gofen, *supra* note 13, at 877.

favours.³⁴⁹ Because dependency courts are charged with making major decisions about children's lives, the potential for misuse of power is great.

In addition, the subject matter in dependency court requires judges to exercise a great deal of discretion.³⁵⁰ Standards are vague³⁵¹ and judges must ultimately decide where and with whom a child will do best. Solutions must often be fashioned around: 1) parents who love a child, but do not know how to care for that child; 2) support services that are assumed to exist, but that do not – because the resources are not there; and 3) a foster system that is overloaded and inadequate. Because of the overload on the system, judges must often make their decisions with hurried hearings and incomplete information. Prejudices or biases are more likely to be called upon when reliable information is lacking and are especially called on in such an “emotionally-charged arena” like dependency court. The safety of a child is at stake and if cutting corners – procedural corners and evidentiary corners – will keep a child from what the judge suspects is a dangerous situation, cutting corners is likely to be done.³⁵²

Public access can check the shortcuts and abuses that stem from these probably good-intentioned impulses. Indeed, the inappropriateness of many of these actions may not be visible to the daily participants in dependency court. The implicit agreements fostered by the familiarity in juvenile dependency court, for example, those which discourage participants from “making waves,” and challenging the decisions or actions of colleagues, may be so much a part of the culture of the court that the regular participants simply fail to see them. It sometimes takes the outside view, someone to say “but why do you do that?” before insiders can see practices that need to be reformed. Thus, open hearings would work to create self-awareness in a system that may have become so closed that it has lost the ability to see some of its own faults. Open hearings would give insiders a fresh view, not only of the court, its personnel, and its practices, but of the employees of the social services agency, all of whom “wield vast ‘authority on the State’s behalf.’”³⁵³

349. Abuse can first result from governmental oppression. Formality not only aids in accurate fact finding, but it also helps to “prevent . . . governmental oppression.” See Smith, *supra* note 348, at 260.

350. Sokol, *supra* note 28, at 916.

351. *Id.* at 916.

352. *Id.* at 917. See generally Sinden, *supra* note 302, at 380-81 (arguing that the evidentiary constraints and protections against bias and prejudice provided by formality are important in the child welfare context).

353. Brelsford & Myers, *supra* note 3, at 17 (quoting Kahn v. Bower, 232 Cal. App. 3d 1599, 1613 (Cal. Ct. App. 1991)). See also Sokol, *supra* note 28, at 917-18 (arguing that public access would heighten procedural regularity in dependency cases).

Finally, without public scrutiny, court personnel can intentionally hide or explicitly agree to ignore shortcuts they might feel are needed for the system to produce what they perceive as the needed result.³⁵⁴ Almost all persons are a bit more conscientious about not rounding the edges of their performances if their actions are open to scrutiny by others.³⁵⁵ Critical decisions about a child's future must not be the result of bias, prejudice or "instinct." Open hearings provide an accountability that can help prevent this.³⁵⁶

2. Educate and Inform the Public

A court charged with serving the best interest of abused and neglected children also needs the confidence and support of the public. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."³⁵⁷ For the dependency system to have the support of the public, the public must either believe the system is functioning properly or understand what is necessary for reform. In either event, the public needs access to dependency proceedings. Further, the "public" includes those who appear before the court. Parents, children, foster parents and other affected individuals need to know about the court that decides matters so important and central to their lives.

Again, the dependency court system deals with important and critical issues. The system must have the support and confidence of the public. Further, not only is juvenile court a public institution, the public is also a party to dependency proceedings, alleging through its government that a child is in need of protection. Thus, the public has a need, but also a right to know what occurs in its own judicial proceedings. The opportunity for criticism of government institutions is also particularly valued in our society.³⁵⁸

The first reason to provide access to dependency court proceedings is to provide the knowledge necessary for intelligent public discussion and debate. Public access can let the public know if judges are making decisions based on what the evidence supports, or on individual biases or personal beliefs.³⁵⁹ Public access can let the public see the choices dependency court judges are too frequently faced with today. Often there is a choice between an inadequate parent and an inadequate foster care

354. Sokol, *supra* note 28, at 920-22.

355. See *supra* text accompanying note 57; Sokol, *supra* note 28, at 918.

356. See *supra* text accompanying note 57. While many states give the court the discretion to open the proceedings to the public or any interested person, this still requires the court to act affirmatively to bring accountability to the system. Few willingly hold themselves out to public scrutiny. See Sokol, *supra* note 28, at 920; Brelsford & Myers, *supra* note 3, at 14-15.

357. *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 567, 572 (1980).

358. Brelsford & Myers, *supra* note 3, at 14-15.

359. Gofen, *supra* note 13, at 876-77.

system.³⁶⁰ “If public court business is conducted in private, it becomes impossible to expose corruption, incompetence, inefficiency, prejudice, and favoritism.”³⁶¹

Public action can occur if the public can see for itself the inadequacies of the system, such as the need for better facilities; the need for more staff, better trained staff, better paid staff, and better qualified staff; the need for daycare subsidies, more healthcare support, more home support services, and better support for foster families; and the overall need for substantially more financial resources. The action may be as pointed and immediate as voting a judge out of office or applying public pressure to remove a lawyer from court appointments; it may be as broad as demanding more funding to attract better personnel, train better personnel, and retain better personnel. But knowledge is the prerequisite to action, and the public first needs access to the system.³⁶²

Further, if the public sees a court treating the issues fully and the parties fairly, and making the best choices under the circumstances, the public will be less likely to blame the court when tragic events occur.³⁶³ The outrage at a child’s death might offend less and motivate more if the public understood the limited resources with which the court must function.³⁶⁴

It is ongoing daily access and first hand information that is needed to motivate, and ultimately support a public call for action and reform. The current limited access to dependency court information lets the public hear of cases only when there has been a horrible result – when a child subject to the jurisdiction of dependency court is found terribly abused or dead. The community response is often a short-lived outrage over the “mistake” made in that particular case. Community members simply do not have enough information for a more constructive and long-term response. “A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.”³⁶⁵ If, however, the public could see the daily inadequacies of the system – the daily mistakes, and the daily tragic circumstances of smaller cases needing a day care voucher,

360. “Dependency court factual questions are among the most difficult, and most sensitive [questions] litigated in American courtrooms.” Sokol, *supra* note 28, at 913. See also *In re the Welfare of R.L.K.*, 269 N.W.2d 367, 368 (Minn. 1978) (“The public has a right to know how this Court conducts its business, especially in a Court having as much power as this one.”).

361. *Estate of Hearst v. Lubinski*, 67 Cal. App. 3d 777, 784 (Cal. Ct. App. 1977).

362. *RLR v. State*, 487 P.2d 27, 35-40 (Alaska 1971); *In re Dino*, 359 So. 2d 586, 597 (La. 1978) (*overruled on other grounds by State v. Fernandez*, 712 So.2d 485 (La. 1998)). See also Gofen, *supra* note 13, at 875-78; Trasen, *supra* note 348, at 381.

363. Sanchez, *supra* note 343, at 225-26, 226 n.49.

364. Sokol, *supra* note 28, at 926.

365. *Richmond Newspapers Inc. v. Va.*, 448 U.S. 555, 571 (1980).

public transportation vouchers to obtain medical care, weekly home nurse visits, or good and accessible counseling services – perhaps the public could respond in a more meaningful and lasting way.

A trial court judge in Oregon recognized the difference between the public knowing about one case with a horrific ending and the public understanding the repeated nature of the daily shortcomings of the system. The trial court ordered specific treatment for a troubled thirteen-year-old girl over the objection of the state, which argued that the Children's Services Division did not have the funds to pay for the court-ordered treatment. The trial court judge explained why he admitted the press (with some restrictions) to a trial involving an adolescent girl with a sensitive history of sexual abuse and other troubles:

[T]he Court knows from its own experience this [case] is not an isolated incident where this particular issue has been involved, and the Court feels that one of the reasons we have this problem is because the people of the State of Oregon and, specifically, members of the Legislature, are not really aware of the magnitude of the problem; and I believe it is the function of the press as well as the function of all of us to see that the people of this state, and, particularly, members of the Legislature, are confronted with the grave reality and stark reality of children in need in this state whose needs are not being met now; and I can't do that, and I think that the press can. Exercising my discretion under the statute, I have allowed the press to be present.³⁶⁶

Finally, public access can also facilitate research and scholarly input.³⁶⁷ The problems dependency court must deal with are difficult and challenging. The easier access to dependency court is, the easier it will be for others to amass the information and knowledge needed to offer informed views and proposed solutions.

If, with knowledge, the public judges dependency proceedings to be fair and effective, then the discussion and debate will end there and the public will support the institution. If the public judges dependency proceedings to be less than desired, however, and the resources too limited, perhaps instead of an outrage defined by anger at and blame on the court, the public outrage will instead be defined by public debate about how the system can better protect our children.

366. *State ex rel. Juv. Dept. of Multnomah Co. v. L.*, 546 P.2d 153, 155 n.1 (Or. 1976).

[The 13 year old girl] was removed from her parental home when she was 11 years old after a long and disturbing history of sexual abuse by her stepfather and the child's rejection by her mother. She was first sexually assaulted when she was five years old. Since [the Children's Services Division] took custody of the child, she has been placed in a number of institutional and foster homes and has spent a considerable amount of time in juvenile detention. During the year and a half preceding the hearing [she] ran away from these homes at least 15 times and was often picked up in various parts of the state in the company of older boys and young men.

Id. at 155. *See also* Hendrickson, *supra* note 338, at 41.

367. *See* Sokol, *supra* note 28, at 927.

[P]ublic disclosure might assist in drawing attention to the terrible plight of children in this country and to the ever shrinking resources allocated to both them and the system which is designed to protect them. . . . [T]he press can assist juvenile courts . . . by providing the public with greater knowledge of the child welfare system and the adequacy, or lack thereof, in (child protective) service delivery systems.³⁶⁸

With full information over a sustained period of time, the public³⁶⁹ may well make meaningful contributions to what seems now like a hopeless task.³⁷⁰

IV. FUNCTION: IS PUBLIC ACCESS IN THE BEST INTEREST OF THE CHILDREN IN DEPENDENCY COURT TODAY?

The ultimate function test for dependency court access is whether it is in the best interest of the children whose futures are decided daily by the dependency court system. Indeed, best interests of the children are at the heart of mandatory or presumptive closure of juvenile court, including dependency proceedings. Unfortunately, an analytical framework that pits public access to dependency court against the best interest of children assumes that, on balance, an open courtroom hurts the interest of children. This is a false premise. A particular child might benefit from his or her case being closed to the public, but a standard of closure does not benefit the system that decides that same child's future. If access is presumed, however, individual assessment of cases in which closure is requested can continue to respond to the particular privacy needs of any child. At the same time, the standard of presumed access will continue to benefit the judicial system, and thus benefit the children the system serves. In this way, the best interests of the children are served.

The fatal flaw behind mandatory or presumptive closure in dependency cases is the assumption that closure is generally in the best interest of all children.³⁷¹ Court decisions taking this position correctly review the history of access, emphasizing the juvenile court's practice of closure

368. Brelsford & Myers, *supra* note 3, at 14.

369. Gofen, *supra* note 13, at 878. Just as important as the public at large are the parents, children, foster parents and others who are subject to the juvenile court institution. If the public is barred from observing the proceedings, when members of that public are called before the court, they do not know what they are called before. They are less likely to know what the process is, what goes on, how it functions, and what is expected of the subject. The disadvantage is all the more apparent because everyone else – the judges, lawyers, social services, and other court personnel – do know what is going on. But the public, the parent and the child, whose lives will be greatly affected by decisions made, are barred from information about the system until they are subject to it. Further, publicity also gives notice – it lets parents, foster parents and others understand what their responsibility is to the children they care for.

370. See generally Brelsford & Myers, *supra* note 3, at 14-17; See also Dienes, *supra* note 3, at 1, 3-4; Gofen, *supra* note 13, at 875-76.

371. *E.g.*, Edward A. Sherman Pub. Co. v. Goldberg, 443 A.2d 1252, 1258 (R.I. 1982).

and therefore its historical judgment that closure is best, but the courts generally ignore the relatively brief history of juvenile court.³⁷² Courts also appropriately look at the purpose and function of closed juvenile proceedings, but their analysis too often sounds like a mantra, e.g., “[t]he interests of the juvenile . . . are most often best served by anonymity and confidentiality.”³⁷³ The result is that courts too often conclude the best interests of children require mandatory or presumptive closure in all proceedings without fully considering the cost such closure brings to the system of justice that must serve those same children. Thus in Florida, the supreme court upheld mandatory closure of termination of parental rights hearings,³⁷⁴ simply noting the historical “overriding interest in, among other things, protecting the child from stigma, publicity, and embarrassment and promoting rehabilitation.”³⁷⁵ In *Natural Parents of J.B.*, it was the dissenting opinion that provided a discussion of the “strong policy concerns” supporting open hearings, not the majority.³⁷⁶

Certainly there are situations where public access might interfere with a child’s best interest, and where testifying in open court might traumatize children, or where the fairness of the trial might otherwise be prejudiced.³⁷⁷ But these situations can be dealt with by closure in any given case; closure should not be deemed as being in the best interest of all children at all times. The Supreme Court recognized this in *Globe*, when holding a statute unconstitutional because it excluded the public from trials of specified sexual offenses involving a victim under the age of eighteen:

[S]afeguarding the physical and psychological well-being of a minor is a compelling one. But as compelling as that interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. . . . In short, [the statute] cannot be viewed as a narrowly tailored means of accommodating the State’s asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State’s legitimate concern for the well-being of the minor victim necessitates closure. Among the factors to be weighed are the minor victim’s age, psychological maturity and

372. *E.g.*, *San Bernardino County Dept. of Pub. Soc. Serv. v. Super. Ct.*, 283 Cal. Rptr. 332, 338-39 (Cal. Ct. App. 1991).

373. *Edward A. Sherman Pub. Co.*, 443 A.2d at 1258. *See also In the Matter of M.C.*, 527 N.W.2d 290, 293 (S.D. 1995) (quoting *Edward A. Sherman Pub. Co.*, 443 A.2d at 1258).

374. *Natural Parents of J.B. v. Fla. Dept. of Children & Soc. Servs.*, 780 So.2d 6, 9-11 (Fl. 2001).

375. *Natural Parents of J.B.* 780 So.2d at 6, 9.

376. *Id.* at 14-15 (Anstead, J., dissenting, with Pariente, J., concurring in the dissent).

377. In addition to keeping a child from suffering the additional stigma and embarrassment that can occur with open hearings, closed hearings can better accommodate the informality and social work approach proponents of juvenile court have traditionally favored, and perhaps the rehabilitation that must occur afterwards. While the informality and social work aspects of dependency court produce mixed results, *see supra* text accompanying notes 208-10, 327-33, there may be reasons besides stigma, embarrassment and trauma that justify partial or full closure of a hearing.

understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.³⁷⁸

Similarly, *Globe* also rejected the other rationale offered for excluding the press and public from sex-offense trials – “the encouragement of minor victims of sex crimes to come forward and provide accurate testimony.”³⁷⁹ That assertion, according to *Globe*, was “speculative in empirical terms” and “open to serious question as a matter of logic and common sense.”³⁸⁰

Consistent with the Court’s opinion in *Globe*, many courts have recognized the heavy burden closure bears when weighing these issues in the context of the First Amendment analysis. The U.S. Supreme Court has held that the presumption of open public proceedings (for proceedings pertaining to criminal trials) can only be overcome by an “overriding interest”³⁸¹ – a “compelling interest,”³⁸² “articulated in findings”³⁸³ “specific enough that a reviewing court can determine whether the closure order was properly entered.”³⁸⁴ The Court further held that the closure must be “narrowly tailored to serve that interest.”³⁸⁵ Federal circuit courts considering the issue in civil proceedings have held similarly,³⁸⁶ as has the California Supreme Court.³⁸⁷ The Ohio Supreme Court considered

378. *Globe Newspaper Co. v. Super. Ct. for County of Norfolk*, 457 U.S. 596, 607-09 (1982).

379. *Globe*, 457 U.S. at 609.

380. *Id.* at 609-10. Kathie Aschenbrenner Pate, *Restricting Electronic Media Coverage of Child-Witnesses: A Proposed Rule*, 1993 U. CHI. LEGAL FORUM 347 (1993) (discussing the trauma that can occur to child witnesses testifying in a public forum and stating that portions of a dependency proceeding can be closed if circumstances warrant). Further, there is a distinction between a child being a witness and a child being the subject of the proceeding. Pate, as do many authors, focuses on child witnesses. Either being a witness or being the subject of a legal proceeding can cause trauma – trauma that may be exacerbated if the proceeding is subject to public access – but neither warrant a standard of closure, either mandatory or presumed, of all child dependency proceedings.

381. *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 581 (1980).

382. *Globe*, 457 U.S. at 607.

383. *Richmond*, 448 U.S. at 581.

384. *Press-Enterprise Co. v. Super. Ct. of Cal., Riverside County*, 464 U.S. 501, 511 (1984).

385. *Globe*, 457 U.S. at 606-07.

386. *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1983) (“to limit the public’s access to civil trials there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest”); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (“closure is proper only if necessary to achieve a legitimate purpose”; “less intrusive alternatives must be considered”; and “if closure is warranted, the restriction on access must be narrowly drawn with only that part of the proceeding as is necessary closed”). See also *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1983); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-79 (6th Cir. 1983).

387. *NBC Subsidiary (KNBC-TV), Inc. v. Super. Ct.*, 980 P.2d 337 (Cal. 1999). The California Court held that the court ordering closure must find that there is an overriding interest supporting closure and that there is a substantial probability that absent closure, that interest will be prejudiced. The closure must be narrowly tailored to serve the interest and it must be the least restrictive means of achieving the overriding interest. *NBC Subsidiary*, 980 P.2d at 365. The court’s holding applied to

the issue specifically as it relates to dependency court and ruled that the person seeking closure of a dependency hearing bears the burden of establishing “(1) there exists a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the proceeding, and (2) the potential for harm outweighs the benefits of public access.”³⁸⁸

Mandatory or presumptive closure is still the norm in dependency proceedings,³⁸⁹ however, and “protection of the children” by closure usually trumps access in cases challenging the constitutionality of closed juvenile hearings,³⁹⁰ whether they are mandatory or presumptive closure provisions.

In California, the Court of Appeal was faced with deciding whether the public had a constitutional right of access to child dependency proceedings.³⁹¹ The court fully discussed the important policy concerns supporting open proceedings. The court found itself “at the crossroad,”³⁹² deciding that the function of access (e.g., encouraging accurate fact-finding, checking judicial abuse) favored opening the proceedings, but that the historical judgment of America’s juvenile court would not grant access to dependency proceedings.³⁹³ In the end, the court worried that finding a constitutional right of access would “mean that the proceeding constitutionally could not be closed unless the judicially created strict test for closure is met. . . . With the welfare of minors at stake, we are reluctant to impose the strict standard for closure required for a First Amendment right.”³⁹⁴

Similarly, the Georgia Supreme Court, even when holding invalid mandatory closure of juvenile hearings (on delinquency, deprivation and unruliness matters),³⁹⁵ ruled that it was permissible to legislate a presumption of closure.³⁹⁶ Thus, the public or press requesting access must show that the “state’s or juveniles’ interest in a closed hearing is overridden by the public’s interest in a public hearing.”³⁹⁷ Unfortunately with such a presumption, most courts will likely agree with the Supreme

“ordinary civil proceedings in general, and not any . . . particular proceedings governed by specific statutes.” *Id.* at 361 n.30. The court thus did not include dependency hearings within its holding. *Id.*

388. *In re T.R.*, 556 N.E.2d 439, 451 (Ohio 1990) (ruling, however, that dependency hearings had neither a presumption of closure nor access). *See also* *State ex rel. Plain Dealer Publ’g Co. v. Geauga Co. Ct.*, 734 N.E.2d 1214 (Ohio 2000); and *State ex rel. Dispatch Printing Co. v. Lias*, 628 N.E.2d 1368 (Ohio 1994) for helpful dicta interpreting *In re T.R.*

389. *See supra* note 5.

390. *See In re J.S.*, 438 A.2d 1125, 1127 (Vt. 1981); *San Bernardino County Dep’t of Pub. Soc. Servs. v. Super. Ct.*, 283 Cal. Rptr. 332, 343 (Cal. Ct. App. 1991).

391. *See San Bernardino*, 283 Cal. Rptr. at 343.

392. *Id.* at 342.

393. *See id.*

394. *Id.* at 343.

395. *See Fla. Publ’g Co. v. Morgan*, 322 S.E.2d 233, 238 (Ga. 1984).

396. *Fla. Publ’g Co.*, 322 S.E.2d at 238.

397. *Id.*

Court of New Jersey in *New Jersey Division of Youth and Family Services v. J.B.*,³⁹⁸ that “[t]he factual settings presented in the vast majority of [child protection] cases involve allegations that warrant closure.”³⁹⁹

One of the myths that access to dependency court would correct is the assumption that most dependency cases involve allegations of sexual and other severe physical abuse. Sexual and physical abuse cases, while numerically substantial, still constitute a minority of dependency cases.⁴⁰⁰ After looking at various surveys, studies and reports, Diana English concluded that neglect “apparently affects about twice as many children as do physical and sexual abuse.”⁴⁰¹ Most dependency cases are neglect cases, children who lack basic emotional and physical care,⁴⁰² and most neglect is rooted in poverty.⁴⁰³ While all such cases are tragic, they do not necessarily involve allegations that would cause sufficient trauma to a child such that closure would be appropriate.⁴⁰⁴ Even assuming most sexual and physical abuse cases should be closed to the public,⁴⁰⁵ along with some of the neglect cases, a substantial number of cases would still be heard in open court.

398. 576 A.2d 261 (N.J. 1990). The court said *J.B.* involved “the rare situation in which the public’s right to attend judicial proceedings is not outweighed by the state’s compelling interest in conducting a private hearing.” *N.J. Div. of Youth*, 576 A.2d at 270.

399. *Id.* at 269.

400. See English, *supra* note 33, at 43.

401. *Id.*

402. See *id.* at 41 Box 1.

403. See Robert F. Kelly, *Family Preservation and Reunification Programs in Child Protective Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L.Q. 359, 389 (2000).

404. Most of the cases in dependency court are indeed tragic. The tragedy of these cases, however, is the poverty and ignorance in which they are rooted. Most are not cases that suggest trauma or stigma as a result of public access. For example,

[i]n her recent book, Jane Waldfogel asserts that the current foster care population may be grouped into three categories. First, the most serious category, constituting about 10% of current caseloads, includes “serious and criminal cases.” The second group encompasses serious cases that do not require criminal justice intervention. The final group of cases are those in which a child is at a relatively lower risk of serious harm, and the parents may be willing to work with an agency to secure needed services. Together, the latter two groups comprise 90% of the caseload. Typically, these cases involve less serious physical abuse (for example, a single, minor injury such as a bruise or a scratch) or less severe neglect (such as parental drug or alcohol abuse with no other apparent protective issues, dirty clothes or a dirty home, lack of supervision of a school-age child, or missed school or medical appointments). Many of these lower-risk neglect cases are poverty-related, resulting from inadequate housing or inappropriate child-care arrangements while a parent works.

Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1724-25 (2000) (reviewing ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999) (quoting JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION 124 (Harvard University Press 1998))).

405. However, the Supreme Court’s caution in *Globe* applies here: “the measure of the State’s interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying in the presence of the press and the general public.” *Globe Newspaper Co. v. Sup. Ct.*, 457 U.S. 596, 609 n.19 (1982).

For this to happen, however, the standard of access must incorporate the value of the open courtroom. Only with a standard that recognizes this value, and thus assumes access, will dependency proceedings stand to benefit from that access and thus better serve the interests of the children and other litigants before the court.

Trauma, stigma, embarrassment, and similar concerns for children in dependency court can all be addressed on a case-by-case basis.⁴⁰⁶ However, concerns about obtaining reliable and accurate information, about court decisions being based on evidence, about lawyers and judges being held accountable for their performances, and about a judicial system earning the confidence of the public – these are concerns resulting from the “particular government process” of dependency court. These concerns cannot effectively be addressed in a closed courtroom; they must be addressed systemically by legislating public access back into the juvenile dependency system. If a party wishes to bar the public from a particular hearing, and there is a sufficient reason to do so, that party can request closure. Because the system and thus the children should benefit substantially from public access, however, the reason offered for closure must also be substantial. “Closed proceedings . . . must be rare and only for cause shown that outweighs the value of openness.”⁴⁰⁷

The type of harm that must be established and the probability of its occurrence with an open trial needs to be that which can overshadow the value open proceedings bring. It could be the Supreme Court’s standard in criminal proceedings: “an overriding interest based on findings that closure is essential to preserve higher values and . . . narrowly tailored to serve that interest.”⁴⁰⁸ It could be “reasonable likelihood of substantial prejudice;”⁴⁰⁹ “substantial probability ” of substantial prejudice;⁴¹⁰ or a “realistic likelihood of prejudice to a fair trial.”⁴¹¹ It could meet the Ohio Supreme Court’s “reasonable and substantial basis” that the child could be harmed or the fairness of the proceeding endangered.⁴¹² In any event, the harm and the probability of it occurring must outweigh the benefits of public access,⁴¹³ “one of the essential qualities of a court of justice.”⁴¹⁴

V. CONCLUSION

“[T]he paramount question,” said Judge Elaine Slobod in her Orange County, New York Family courtroom in 1988, “is whether the par-

406. See *Globe*, 457 U.S. at 607-09.

407. *Press-Enterprise Co. v. Sup. Ct.*, 464 U.S. 501, 509 (1984).

408. *Press-Enterprise Co.*, 464 U.S. at 510.

409. *Press-Enterprise Co. v. Super. Ct.*, 478 U.S. 1, 14 (1986).

410. *Press-Enterprise Co.*, 478 U.S. at 14.

411. *State v. Williams*, 459 A.2d 641, 654 (N.J. 1983).

412. See *In re T.R.*, 556 N.E.2d 439, 451 (Ohio 1990).

413. See *In re T.R.*, 556 N.E.2d at 451.

414. *Richmond Newspapers, Inc. v. Va.*, 448 U.S. 555, 567 (1980) (quoting *Daubney v. Cooper*, 109 Eng. Rep. 438, 440 (K.B. 1829)).

ties and children are better served by retaining the veil of confidentiality that covered the Family Court from its inception or by lifting that veil and laying bare the breadth of society's ills which lie beneath."⁴¹⁵ Access will lay bare the state of dependency court and access can bring reform to the court. Presumptive access can better serve the children and others in dependency court than can closure. It may be, as the New Jersey Supreme Court posited, that "[i]t will be the unusual case in which a factual context that poses no danger of trauma or embarrassment to the child coincides with the general public's interest in following the proceedings."⁴¹⁶ But I believe otherwise. With daily access presumed in dependency courts across the nation, I believe the public will follow the proceedings. I believe access will work as it was intended to work and as it has worked in courts for centuries. I believe it will – perhaps slowly – bring reform to dependency court.

For some time now, legislatures and courts have "retain[ed] the veil"⁴¹⁷ of closure. Their answer to the paramount question Judge Slobod presented has left us with a dependency system that is in crisis and failing many of our children.⁴¹⁸ My argument is that public access can help; only access and time will tell us if I am correct. But "[t]he only way one can fully comprehend the realities with which the Family Court deals is to be here to see what is presented on a daily basis."⁴¹⁹ I have sat in dependency court as an observer, and I have participated in dependency court as a CASA. I have seen judges and lawyers and others do exceptional jobs with the resources they had, but the resources were not sufficient. I have also seen judges and lawyers who needed to do more than they were doing, even with the inadequate resources they had. Access gives hope for reform, whereas now there is little. I believe the children who will be in dependency court tomorrow should have that hope.

415. *In re: S Children*, 532 N.Y.S.2d 192, 198 (N.Y. Fam. Ct. 1988).

416. *J. Div. of Youth & Fam. Servs. v. J.B.*, 576 A.2d 261, 269 (N.J. 1990).

417. *In re: S Children*, 532 N.Y.S.2d at 198.

418. *See supra* text accompanying footnotes 14-29.

419. *In re: S Children*, 532 N.Y.S.2d at 198.