

Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?

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INTRODUCTION

What role, if any, does the public have to play in the delinquency and dependency proceedings that compose the dockets of juvenile and family courts?¹ Since the establishment of the first juvenile court in Chicago in 1899, most jurisdictions have allowed only a small group of judges, lawyers, probation officers, and social workers access to court proceedings and records when children are either victims of abuse or accused of crimes.² Policies of non-disclosure for minors originated because the founders of the juvenile court at the turn of the century believed confidentiality was critical to rehabilitation and treatment. Only if children escaped the stigma of public knowledge, the juvenile court founders reasoned, could they leave behind their troubled pasts.³

Despite a wave of doubt in the 1920s and again in the 1950s and 1960s about whether the juvenile court could meet its rehabilitative goals, lawmakers and courts continued to assume the benefits of confidentiality in

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1. Jurisdiction over legal matters related to children varies widely. In some states, such as California, juvenile court is the forum for both child abuse and neglect and juvenile crime proceedings. See CAL. R. OF CT. 1423. In other states, like New York, family court judges hear both sets of proceedings. See, e.g., N.Y. CT. R. §§ 205.83, 205.20. See, e.g., Barbara A. Babb, *Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint To Construct a Unified Family Court*, 71 S. CAL. L. REV. 469, 483-84 (1998).

2. I discuss both dependency and delinquency cases because the continuum from crime to mistreatment makes it difficult to draw lines between perpetrators and innocents. Half of juvenile court cases today involve status offenses, neglect, and dependency. See Judge Lindsay G. Arthur, *Abolish the Juvenile Court?*, JUV. & FAM. CT. J., Winter 1998, at 51, 54. For example, parents can petition the juvenile or family court to help control their children under Persons or Children in Need of Supervision (PINS or CHINS) statutes. See Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 699 (1991). These “status offenders” may have broken curfews or skipped school, but they are not criminals, and yet they do not match the profile of an abuse or neglect victim.

3. See *In re Gault*, 387 U.S. 1, 24 (1967) (describing the desirability of wiping out juvenile criminal records); ELLEN RYERSON, *THE BEST LAID PLANS* 40 (1978); cf. *Kent v. United States*, 383 U.S. 541, 556 (1966) (explaining that being “shielded from publicity” is one of the special rights and immunities of juvenile court).

delinquency cases. The landmark 1960s cases, *Kent v. United States*⁴ and *In re Gault*,⁵ gave juveniles charged with crimes many of the same procedural rights as adults but did not grant them the right to a public trial or to a jury trial.⁶ Congress also emphasized confidentiality in passing the 1974 Child Abuse Prevention and Treatment Act (CAPTA).⁷ Following CAPTA's guidelines, states enacted statutes that strictly protected the confidentiality of child protective proceedings and child welfare agency records.

More recently, disclosure restrictions have faced attack on multiple fronts. Some critics argue against the separation of juvenile court from adult court⁸ or question the enterprise of rehabilitation.⁹ Trials of delinquents should be open, some urge, because minors accused of serious felonies have forfeited protection from public scrutiny.¹⁰ In response, legislators have passed laws mandating public trials for juveniles charged with serious crimes.¹¹ At the same time, news organizations have begun to alter long-standing policies against printing the names and photographs of juvenile offenders.¹² In this debate, confidentiality is still viewed as a protective measure—but increasingly one that juvenile delinquents do not deserve.

Meanwhile, from a different perspective, child advocates argue that

4. 383 U.S. 541 (1966).

5. 387 U.S. 1 (1967).

6. While closure has been the general rule, a few jurisdictions, like Philadelphia County, have long opened juvenile court to the public. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 555 & n.2 (1971) (opinion of Brennan, J.).

7. CAPTA made grants to the states for prevention and treatment programs contingent on passage of state laws that "provide[d] for methods to preserve the confidentiality of all records in order to protect the rights of the child, his parents or guardians." Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4, § 4(b)(2)(E) (1974) (codified at 5 U.S.C. § 8902(j) (1976)) (amended by 42 U.S.C. § 5106a (1996)).

8. See, e.g., Janet E. Ainsworth, *Re-Imaging Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1120-29 (1991) (arguing that juveniles would be better served by the procedural protections of adult criminal court in conjunction with a system of lesser sentences); Barry Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 903 (1988) (arguing that renewed emphasis on punishment calls into doubt the adequacy of juvenile court procedural protections); Feld, *supra* note 2, at 724. For an opposing view, see Arthur, *supra* note 2, at 51-54; Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 175 (1993).

9. See Adam D. Kamenstein, Note, *The Inner-Morality of Juvenile Justice: The Case for Consistency and Legality*, 18 CARDOZO L. REV. 2105, 2107 (1997) (arguing for abandonment of treatment and rehabilitation as the juvenile court's primary goals).

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

11. See, e.g., CAL. WELF. & INST. CODE § 676 (1998) (granting public access to juvenile court trials for crimes such as murder, arson, robbery, rape, kidnapping, and assault). Other states that hold public trials for serious juvenile offenders include Colorado, Idaho, Illinois, Kansas, Missouri, and New Jersey. See Blum, *supra* note 10, at 353.

12. See *infra* note 115 and accompanying text.

Public Access to Juvenile and Family Court

disclosure bans in dependency cases hamper efforts to improve child welfare programs. Following the 1992 death of five-year-old Adam Mann in New York, whose abuse history was known to child welfare officials, advocates complained to Congress that CAPTA-imposed state confidentiality laws prevented caseworkers from talking with a child's teacher or school counselor, a parent's drug treatment provider, or even the police or prosecutor about how best to handle a case.¹³ Yet support for access to involved professionals does not necessarily imply support for *public* access. Some advocates who think teachers, counselors, and police should know more about a child's abuse and neglect history oppose sharing the same information with the public because they believe doing so would not serve an individual child's best interests.¹⁴ They too view privacy as a tool for safeguarding abused children from further harm.

A third group of critics believe public attention benefits children in the child welfare system. They argue that strict disclosure rules shield judges, lawyers, and caseworkers from accountability and obscure the need for institutional reforms.¹⁵ This conception of access emphasizes the role of the press in exposing poor policy, and expects a properly informed general public to call for reform.¹⁶ There is a trade-off, however, for increased public awareness that could benefit dependent children as a group—potential risk to the individual child whose history is exposed.

In 1992, Congress responded to the various calls to relax disclosure restrictions. Federal law now allows states to grant police, doctors, and counselors access to child welfare agency files.¹⁷ In some cases, states are

13. See *Child Abuse Prevention, Adoption and Family Services Act: Hearings before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 102d Cong. 126 (1992) (statement of Mary Margaret Oliver, Ga. House of Rep.) [hereinafter *1992 House Comm. Hearings*]; TEMPORARY COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, SECRETS THAT CAN KILL: CHILD ABUSE INVESTIGATIONS IN NEW YORK STATE 29-30 (1996) [hereinafter SECRETS THAT CAN KILL]. Organizers of child abuse and fatality review panels also told Congress that efforts to trace systemic failure were at times frustrated because records are sealed or expunged. See *1992 House Comm. Hearings, supra*, at 249-50 (statement of Susan J. Wells, Director of Research for the American Bar Association Center on Children and the Law).

14. See ALICE BUSSIERE ET AL., ABA CENTER ON CHILDREN AND THE LAW, SHARING INFORMATION: A GUIDE TO FEDERAL LAWS ON CONFIDENTIALITY AND DISCLOSURE OF INFORMATION FOR CHILD WELFARE AGENCIES 10 (1997) ("In striking a balance between maintaining confidentiality and disclosing information, confidentiality should take precedence unless disclosure is necessary to further the goals of child protection."); Telephone interview with Gary Solomon, Director of Training for the New York Legal Aid Juvenile Rights Division (June 1, 1998).

15. See SECRETS THAT CAN KILL, *supra* note 13, at 131.

16. See Jan L. Trasen, Note, *Privacy v. Public Access to Juvenile Court Proceedings*, 15 B.C. THIRD WORLD L.J. 359, 382 (1995).

17. See *Juvenile Justice Delinquency and Prevention Amendments*, Pub. L. No. 102-586 § 9(a), 106 Stat. 5036 (codified at 42 U.S.C. § 5106a(4)(B) (1994)).

instructed to grant limited access to the public.¹⁸ Since the congressional revisions, states have widened the circle of access.¹⁹ But they have done so in sharply contrasting ways.

California court rules, for example, allow law enforcement agencies, the school district where a child is enrolled, and treatment providers to review a dependent or delinquent child's records without a court order.²⁰ But in California and most other states, members of the public and the press may not see dependency records or attend a hearing without the consent of the child and his or her parent or guardian.²¹ California allows public access to delinquency cases only in cases in which children commit serious crimes.²²

In contrast to California, New York in 1996 authorized child welfare agencies to disclose publicly names, findings, and other facts about some child abuse and neglect investigations.²³ In 1997, New York's family court, which hears delinquency and dependency cases, declared its proceedings presumptively open to the public.²⁴

With the increasing exception of minors who commit serious crimes,²⁵ California and New York share the goal of rehabilitation for delinquents. Abused and neglected children, for their part, retain an affirmative right to state protection and treatment. The states' differing approaches to

18. See 42 U.S.C.A. § 5106a(b)(2)(A)(v)-(vi) (West 1998).

19. Twenty-seven states and the District of Columbia have statutes that track the 1992 CAPTA amendments. See Susan S. Greenbaum, *Conditional Access to Juvenile Court Proceedings: A Prior Restraint or a Viable Solution?*, 44 WASH. U. J. URB. & CONTEMP. L. 135, 138 n.15 (1993) (citing state statutes in which courts may grant access to parties with a "direct" or "legitimate" interest in a case in Alabama, Arizona, California, Georgia, Hawaii, Idaho, Illinois, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, Nevada, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, Washington, D.C., West Virginia, Wisconsin, and Wyoming).

20. See CAL. WELF. & INST. CODE § 827 (1998).

21. See CAL. WELF. & INST. CODE § 346 (1998).

22. See CAL. WELF. & INST. CODE § 676 (1998). The public's right to access in such cases is not contingent on the consent of the juvenile and his or her parent or guardian.

23. The law authorizes a city or county social services commissioner to disclose investigatory information about the abuse of a child if the subject of an abuse report has been criminally charged; an investigation has already been disclosed by law enforcement agents or by the subject of the report; or a child has died. See N.Y. SOC. SERV. LAW § 422-a (Consol. 1997).

24. The new rules put into practice a long-standing presumption of open court that was rarely implemented. See Alan Finder, *Chief Judge in New York Tells Family Courts to Admit Public*, N.Y. TIMES, June 19, 1997, at A1.

25. New York Penal Law § 30.00 establishes criminal liability for juveniles ages 13 and over charged with murder, kidnapping, arson, manslaughter, assault, rape, robbery, and other crimes. Initial jurisdiction over minors charged with these crimes is in adult criminal court. Mitigating circumstances must be present for the case to be removed to family court. See N.Y. CRIM. PRO. LAW § 180.75(c)(4) (Consol. 1997). For a description of the New York Juvenile Justice Reform Act of 1976, which lowered the age of criminal liability, see PETER S. PRESCOTT, *THE CHILD SAVERS: JUVENILE JUSTICE OBSERVED* 29-30 (1981). For an account of the national trend of sending serious juvenile criminals to adult court, see Jonathan Simon, *Law and the Postmodern Mind: Power Without Parents*, 16 CARDOZO L. REV. 1363, 1402 (1995).

Public Access to Juvenile and Family Court

public access, then, must turn on how best to *achieve* rehabilitation and harm prevention.

This paper considers the merits of allowing the public and press access to dependency and delinquency cases, as in New York, and of barring the public and press, as in California. I chose these two states because they exemplify contrasting approaches. Part One examines three rulings by New York and California courts on petitions to open dependency and delinquency proceedings. The cases illustrate the range of variables—such as age, type of proceeding, and type of access—that courts confront. They also demonstrate the way in which statutory differences affect how judges balance the state's interest in protecting privacy against the public's interest in obtaining information.

Part II briefly presents historical arguments in favor of confidentiality. I look at why turn-of-the-century reformers closed the first juvenile courts and why federal and state law emphasized confidentiality. Part III considers arguments in favor of public access. I begin with Supreme Court rulings that the public has a constitutional right to attend adult criminal court proceedings,²⁶ in part because the right acts as one of the “checks-and-balances” on government. I then examine the idea that the public as audience can help to generate and express community norms.²⁷ I suggest how considering these rationales might help juvenile and family courts exercise more reasoned discretion. Finally, I look at one example of how New York's access laws may have generated public pressure for better cooperation between child welfare and school officials.

Part IV uses the Supreme Court rulings and the cases discussed in Part I to develop a set of factors that juvenile and family court judges could use to weigh the state's interest in protecting children's privacy. I return to the three cases explored in Part I to demonstrate how these factors on the one hand, and consideration of the value of developing community norms on the other, can ground judges in balancing privacy and access. Finally, I ask what statutory changes might be called for in light of how this decision-making method would fare under current California and New York law.

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

27. See, e.g., Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 416-21 (1987).

I. PETITIONS FOR OPEN JUVENILE COURT PROCEEDINGS

A. *Statutory Frameworks*

The 1997 New York Family Court rules state that Family Court is open to the public and the news media. New York courts have held that family court proceedings should be open absent a compelling reason for closure.²⁸ Judges can exclude the public or any person only “on a case-by-case basis based upon supporting evidence.”²⁹ In exercising discretion over whether to allow access, judges may consider whether closure or exclusion of an individual is necessary to prevent disruption, to protect the privacy interests of the parties, or to protect “the litigants, in particular, children, from harm.”³⁰ The judge also may consider whether a party’s objection to the observer’s presence is compelling and whether less restrictive means are available for resolving the objections. Before closing the court, judges must make findings about their reasons for doing so.³¹

The corresponding California statute governing access to dependency proceedings reverses this presumption. The law bars the public from attending these hearings unless the child’s parent or guardian consents. The statute also states that judges may “nevertheless” admit people deemed to have a “direct and legitimate interest in the particular case or the work of the court,” requiring the party seeking access to show good cause.³² But California courts have interpreted the parental or guardian consent clause to mean that the press and the public do not have a direct or legitimate interest.³³ The California Rules of Court reinforce this under-

28. See *In re Ruben R.*, 219 A.D.2d 117 (N.Y. App. Div. 1996) (public access to court proceedings is strongly favored both under federal and state law); *In re Katherine B.*, 189 A.D.2d 443 (N.Y. App. Div. 1993); *In re M.S.*, 662 N.Y.S.2d 207 (Fam. Ct. 1997) (recognizing presumption of openness of court proceedings that may be overcome only by a finding that closure is essential to preserve higher values and is narrowly tailored to serve that interest).

29. N.Y. CT. R. § 205.4 (b).

30. N.Y. CT. R. § 205.4 (b)(3).

31. See N.Y. CT. R. § 205.4 (b)(4).

32. CAL. WELF. & INST. CODE § 346 (1998). The statute governing access to delinquency proceedings is identical except that the public is permitted to attend proceedings involving minors accused of committing serious crimes. See *id.* § 676(a). Other states also distinguish between dependents and minor offenders and delinquents who have committed a serious crime. See, e.g., *Tennessee v. James*, 902, S.W.2d 911 (Tenn. 1995). Two federal appellate courts similarly have found that the federal Juvenile Delinquency Act allows for closure only on a case-by-case basis. See *United States v. Three Juveniles*, 61 F.3d 86 (1st Cir. 1995); *United States v. A.D.*, 28 F.3d 1353 (3d Cir. 1994).

33. See, e.g., *San Bernardino County Dep’t of Pub. Soc. Services v. Superior Court*, 283 Cal. Rptr. 332 (Cal. App. 4th Dist. 1991); *In re Keisha T.*, 38 Cal. App. 4th 220 (1995). Other state courts have reasoned similarly. See, e.g., *New Jersey Div. of Youth and Family Serv. v. J.B.*, 576 A.2d 261 (N.J. 1990) (holding that the case involved the rare situation in which the public’s right to attend proceedings was not outweighed by the State’s compelling interest in conducting a private hearing); *In re T.R.*, 556 N.E.2d 439 (Ohio 1990) (holding that there is no presumption of openness in juvenile court and that the press has no qualified right of access to these proceed-

Public Access to Juvenile and Family Court

standing by allowing judges to permit access to juvenile court records or proceedings “only insofar as is necessary, and only if there is a reasonable likelihood that the records in question will disclose information or evidence of substantial relevance to the pending litigation, investigation, or prosecution.”³⁴ Such grants of access may be accompanied by protective orders.³⁵

B. In re Katherine B., In re Keisha T., and In re M.S.

This Part looks at three petitions for access to dependency and delinquency proceedings. The first, *In re Katherine B.*,³⁶ concerns a petition by major media outlets to attend a child protective hearing in New York regarding a widely publicized case of child sexual abuse. In the second, *In re Keisha T.*,³⁷ a California newspaper sought access to the unnamed juvenile court files of ten dependency cases for a series of articles about the systemic failures of the regional child welfare agency. The third, *In re M.S.*,³⁸ involves a petition for access by New York print and television reporters to cover the delinquency trial of Malcolm Shabazz, charged with setting a house fire that led to his grandmother’s death.

Ten-year-old Katherine was kidnapped by an adult family friend and imprisoned for sixteen days in his basement. After a police rescue, New York began an abuse and neglect proceeding against her mother. Katherine went to live in a foster home. Her plight drew intense attention from the media. The Suffolk County Department of Social Services, with the support of Katherine’s lawyer and the district attorney, sought to close the abuse and neglect proceeding to the public. The department argued that continuing public attention would be contrary to Katherine’s best interests. In support of this claim, it presented an affidavit from an examining psychologist who said that opening the courtroom would “revictimize” Katherine, whose “feelings of embarrassment and shame . . . are intensified and exacerbated by her knowledge that these facts are not private.”³⁹ Katherine also submitted her own affidavit. She wrote:

I Don’t Want People To Know What HAPPEND To ME, Because It’s None of THERE BUSINESS. A MEAN Little Boy Was Saying Things About ME Last Week and It Made ME Sad. If Everyone Saw MY Life on T.V. iT WILL Upset ME AALLOOT. Please Don’t Put MY CASE On T.V. It’s

ings).

34. CAL. R. OF CT. 1423 (1998).

35. *See id.*

36. 189 A.D.2d 443 (N.Y. App. Div. 1993).

37. 38 Cal. App. 4th 220 (1995).

38. 662 N.Y.S.2d 207 (Fam. Ct. 1997).

39. *In re Katherine B.*, 189 A.D.2d at 448.

BBAADD Enough That It's In the Papers. Sincerely, Katherine.⁴⁰

Lawyers for NBC, CBS, ABC, the *New York Times*, and the *New York Daily News* argued that the presumption of openness of Family Court proceedings was a matter of constitutional law and state statute.⁴¹

The family court of Suffolk County ruled in favor of admitting the press to the hearing set to determine whether Katherine's mother had abused or neglected her. The family court judge noted that the press had already attended related proceedings without causing disruption; the issues to be discussed in court had already been aired publicly; and access might help to focus the media's attention on events in court rather than on Katherine's new foster home, neighborhood, and school.⁴² In addition, the judge argued that opening the courtroom furthered the goal of keeping the public informed of the court's work. The court noted the "important public and legislative educational component" of open court. "Enhancing public understanding of the works of its municipal offices is important if there is to be public confidence in court proceedings," the judge wrote.⁴³

On appeal, the Appellate Division of the New York Supreme Court reversed. The appeals court rejected the argument that the press had a constitutional right to attend family court proceedings. The court also cited an Ohio decision holding that the need for confidentiality is more compelling for dependent children than for delinquents.⁴⁴ The court further found that the public's interest in criminal matters is "not present" in child protective proceedings.⁴⁵

Finally, the court rejected the claim that New York's statute granted the press a right to attend Katherine's hearing. Instead, the appeals court interpreted the Family Court rules as balancing the right of public and press access against the state's interest in protecting a child from harm.⁴⁶ The court offered several factors for consideration in weighing these interests: the nature of the abuse allegations (with sexual abuse weighing heavily against closure), the child's age and maturity, peer pressure from

40. *Id.* at 447. The quote is reproduced with the grammatical and spelling errors that appear in the court reporter.

41. The press cited *Richmond Newspaper Inc. v. Virginia*, 448 U.S. 555 (1980), and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), as conferring a constitutional right of public access to adult criminal trials. See *infra* Section III.B for a discussion of these cases.

42. See *In re Katherine B.*, 189 A.D.2d at 446.

43. *Id.*

44. See *id.* at 449 ("The delinquent child is at least partially responsible for the case being in court: an abused, neglected or dependent child is wholly innocent of wrongdoing.") (citing *In re T.R.*, 556 N.E.2d 439, 449-50 (Ohio 1990)).

45. See *id.*

46. See *id.* at 450.

Public Access to Juvenile and Family Court

classmates in school, and the potential for embarrassment.⁴⁷

*In re Keisha T.*⁴⁸ concerned a *Sacramento Bee* reporter's request to see ten juvenile court files. Three children under Sacramento County's protection had recently died from abuse and neglect, and the reporter planned to use the files to investigate the systemic shortcomings of the county's child protective services.⁴⁹ As a condition of access, the reporter agreed to abide by a court order barring her from copying the files or from publishing the identity of the children, their families and caretakers, and those who had reported the abuse.⁵⁰ The juvenile court judge granted access to some information in the files on this basis.

The children's lawyers objected. They argued that California law did not permit public disclosure of juvenile court records, that disclosure would be against the children's best interests, and that the protective order did not sufficiently protect their clients from harm.⁵¹ The Sacramento County Department of Health and Human Services also opposed the juvenile court's order granting the *Bee* limited access.

The California Court of Appeals remanded the juvenile court's order to grant qualified access to ten dependency files. The appeals court found that the state legislature had intended to keep juvenile records confidential. The court noted that there could be a situation in which "competing interests" required some disclosure.⁵² But while police, school officials, and treatment providers might merit access on these grounds, the media did not.⁵³

Like the New York appeals court, the California court framed its decision about whether to grant access as a balancing test between the social value of informing the public and the best interests of the child. The appellate court then proposed several specific factors for the juvenile court to consider: the child's age, the nature of the allegations, the nature of the publicity, and the effect of disclosure on the child and on family reunification.⁵⁴ The court further ordered the juvenile court to determine whether opening the files was necessary to "permit public awareness and monitoring of the juvenile welfare system," or whether adequate information could be obtained elsewhere.⁵⁵ Finally, the party seeking disclo-

47. *See id.* at 451.

48. 38 Cal. App. 4th 220 (1995).

49. *See id.* at 226.

50. *See id.* at 226-27.

51. *See id.* at 227.

52. *Id.* at 231.

53. *See id.* at 234.

54. *See id.* at 239.

55. *Id.* at 240.

sure bore the burden of showing good cause.⁵⁶ With these guidelines, the case was remanded.

In re M.S. involves an application by the *New York Daily News* to cover the criminal trial of Malcolm Shabazz, the grandson of civil rights leaders Malcolm X and Betty Shabazz. Twelve-year-old Malcolm was charged with setting a house fire that led to Betty Shabazz's death. Four reporters and a sketch artist attended the first hearing on the ensuing delinquency charges. Malcolm's lawyer then objected to press access. After hearing medical testimony indicating that publicity might skew the results of Malcolm's psychiatric testing, the Family Court closed the proceedings. The press intervened, claiming a constitutional right of access that could be overcome only by a compelling state interest and a state statutory presumption favoring public access. Malcolm's lawyer and the prosecuting County Attorney countered that press access is not an absolute right and that, in this case, the family court's aim of rehabilitating Malcolm could be compromised by widespread publicity.⁵⁷

The New York family court reversed its earlier decision favoring closure, ruling only weeks after the state family court, as a whole, issued its 1997 rules calling for routine public access. Rather than rejecting the press's constitutional claim, the court found a principle favoring public access to be "firmly rooted" in the First Amendment and in federal and state case law.⁵⁸ The court said the new Family Court rules suggested a balancing test between the state's interest in protecting children and the public's interest in open hearings, but that "judicial discretion must be exercised against a strong presumption of openness."⁵⁹ Closure might be more appropriate for an "innocent victim of abuse and neglect," the court noted.⁶⁰ But when a child was accused of committing a serious crime, and extensive press coverage had already taken place, the court's responsibility to the child "must be considered in tandem with its responsibility to consider the need to protect the community."⁶¹ The court found that Malcolm's lawyers offered little evidence to support their contention that opening the proceedings would cause their client emotional harm. Finally, it cited the possibility that misinformed reporting could pose its own harm. Based on these factors, the court admitted two print reporters to be seated in the back of the courtroom, but barred TV and radio coverage.

56. *See id.*

57. *See In re M.S.*, 662 N.Y.S.2d at 208.

58. *Id.*

59. *Id.* at 209.

60. *Id.*

61. *Id.*

Public Access to Juvenile and Family Court

The family court's final words underscore the difference between New York and California's approaches. "Justice cannot prevail under a veil of secrecy or behind doors that do not open," the court intoned. "Darkness must give way to light."⁶² Such rhetoric aside, *In re Katherine B.*, *In re Keisha T.*, and *In re M.S.* demonstrate that the New York court rules and case law are more receptive in several ways to petitions for access than their California counterparts. First, the California statute differentiates between the direct and legitimate interest of service providers and law enforcement officials in dependency proceedings and the public's lack of such an interest. Second, the California court placed the burden of showing good cause on the party seeking access, whereas the New York courts placed the burden on the party seeking closure. Third, the California court weighed the decision about whether to grant access in terms of whether a more limited form of access could accomplish the same goal. Fourth, the New York court in *In re M.S.* interpreted U.S. Supreme Court rulings granting access to criminal proceedings as extending in principle to juvenile courts as well.⁶³

Yet the New York and California statutes and case law also share common ground. Courts in both states indicated that dependent children have a greater claim to confidentiality than delinquent ones. Both conceived of the decision about whether to grant access as a balancing test between the public's right to information and the best interests of the child. And by closing a dependency hearing in light of the sexual abuse Katherine B. suffered, her psychiatrist's recommendation, and her own expressed wishes, the New York appellate court in *In re Katherine B.* demonstrated that New York's presumption of openness does not dictate public access to all child abuse and neglect cases.⁶⁴

C. Factors in Decision-making

These three cases raise issues that courts could consider in deciding whether to allow public access to juvenile and family court proceedings. Each area of consideration prompts underlying questions.

62. *Id.* at 210.

63. See *infra* Section III.B. for a discussion of the Supreme Court rulings in *Richmond Newspaper Inc. v. Virginia*, 448 U.S. 555 (1980); see also *Globe Newspaper Co. v. Superior Court.*, 457 U.S. 586, 606 (1982).

64. See *In re Ruben R.*, 219 A.D.2d 117 (N.Y. App. Div. 1996) (holding that the right of the public and press to attend court proceedings may be overcome by an overriding interest, in this case evidence setting forth enormous potential harm to children). Although it is not certain that the appeals court would have closed Katherine's hearing after the promulgation of the 1997 Family Court Rules, it is possible—if not likely—that the court would have. The revised rules continue to allow judges to take into account an objection by the parties, the parties' privacy interests, and the potential for harm to the child. See N.Y. CT. R. § 205.4 (a)(2)(3).

To begin, the cases suggest that one factor is the child's age. At the time of their court proceedings, Katherine was ten, Malcolm was twelve, and the ages of Keisha and the other nine children in that case were not reported. How should the children's ages factor into a judge's decision about whether to grant public access? Do older children have a greater claim to privacy than younger children? Although states are generally responsible for dependent children until the age of eighteen, some have lowered the age at which juvenile offenders are treated like adults, particularly when they commit serious crimes.⁶⁵ Thus, in some jurisdictions, judges might find they have an interest in shielding a dependent child until age eighteen, but a delinquent child only until a younger age.

Courts could also consider a child's maturity level or state of mental health. In *In re Katherine B.*, the treating psychologist testified that public access would cause Katherine to be "revictimized." In *In re M.S.*, the court faulted Malcolm's lawyers for failing to submit medical evidence supporting their claim that publicity would augment his psychological problems. How should a court assess the impact of publicity on an emotionally vulnerable child? How much weight should the court give evidence, or the lack of evidence, of a child's ability to cope? This last factor allows judges to consider sexual abuse charges or a diagnosis of mental illness in terms of how they affect the child's capacity for resilience or grasp of his or her situation. Legislatures or courts could indicate whether evidence of suffering from such harms suggests a greater interest in privacy, as the Supreme Court indicated in *Globe*. They could also guide judges in the extent to which they should rely on testimony from psychiatric experts.

Another factor for consideration is the type of proceeding at issue. Katherine was a sexually abused child for whom the court must decide whether to continue foster care. *In re Keisha T.* also involved dependency matters. Malcolm Shabazz was an emotionally disturbed juvenile charged with the crime of arson. Should Katherine and Keisha T.'s cases remain closed because these children are in court due to their parents' failings, as the presiding judges argue? Should Malcolm's case be open because he is in court due to his own actions? In states like New York, in which serious juvenile offenders are transferred out of juvenile or family court, but in which low-level offenders receive rehabilitative services, courts could accord a lesser privacy interest to serious offenders and group other delinquents with dependents.

Another consideration is the type of access requested. Major news organizations had reported the particulars of Katherine and Malcolm's

65. See, e.g., N.Y. PENAL LAW § 30.00 (Gould 1998), described *supra* note 25.

Public Access to Juvenile and Family Court

cases and planned to continue reporting about them. Should this widespread interest have induced the courts to take steps to protect the children's privacy, or did it offer an opportunity to educate the public about the work of the court? Should the court have treated the press coverage as inevitable and opened the proceedings in the hopes of generating more accurate reporting?

The *In re Keisha T.* cases, by contrast, would not have become public without the juvenile court's grant of access. The *Sacramento Bee* wanted to use the confidential files to illustrate with specifics a more general story about child welfare agency problems. Should this distinction, which could be characterized as investigative rather than sensationalized journalism, matter to the court? Because the press often functions as a stand-in for the public, courts might consider the kind of media attention that public access is likely to generate. While sensationalized media coverage poses a danger,⁶⁶ access to the detail-rich proceedings and records of juvenile and family court may also deepen the press coverage that harrowing delinquency and dependency cases often generate, producing more varied, textured accounts.⁶⁷

Courts may also wish to take into account a child's wishes. In *In re Katherine B.*, the appeals court cites Katherine's statement in support of its decision to close the courtroom. The lawyers for the Keisha T. dependents and Malcolm Shabazz also objected to opening the court, though we do not learn whether the basis for their objections was their clients' wishes or their judgment about the children's best interests. Should courts ensure that they learn of a child's wishes, or is it sufficient or more appropriate to use the attorney's assessment of the child's best interests? Decisions about how much weight to accord children's wishes recur in many juvenile and family court contexts, with little consensus about the answer.⁶⁸

66. Media coverage can exacerbate the privacy risks inherent in access. Advocates note that reasons to protect the information disclosed in juvenile and family court include "avoiding embarrassment and humiliation, such as through disclosing details of sexual abuse [and] avoiding exposing inflammatory information, such as HIV status." See BUSSIERE ET AL., *supra* note 14, at 4.

67. See *infra* Section III.D for a discussion of press coverage of the death of Sabrina Green. See also Francine T. Sherman, *Thoughts on a Contextual View of Juvenile Justice Reform Drawn from Narratives of Youth*, 68 TEMP. L. REV. 1837, 1847 n.44 (1995) (quoting the author of a *New York Times Magazine* story on girl gang members about how difficult it is to publish stories that do not focus on a particular crime or more sensational aspect of delinquency).

68. Compare Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1507, 1509 (1996) ("Clients, not lawyers, set the objectives of their legal representations."), with JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 144 (1996 ed.) ("Counsel cannot turn directly to the children whom she represents for instructions; children are by definition persons in need of adult caregivers who determine what is best for them.").

The categories I have outlined also interact. Should the wishes of an older or more mature child be given greater weight than those of a younger or less mature child? If the difference between Katherine and Malcolm's ages and reasons for being in court are not dispositive on their own, should they be so when taken together? Does Malcolm's history of emotional problems further his claim to be seen as a victim rather than a perpetrator? The answers to these questions depend in part on one's normative approach to issues of privacy and access.

II. ARGUMENTS FOR CONFIDENTIALITY

A. *Juvenile Court Origins: 1900-1960*

The turn-of-the-century progressives who created the juvenile courts blamed urban conditions of poverty and the stresses of large-scale immigration and industrialization for juvenile crime.⁶⁹ The child-savers, as historians later nicknamed these progressives,⁷⁰ believed that sending troubled juveniles to prisons filled with adult offenders would lead them to commit more crimes.⁷¹ So they set out to provide a new, transformative setting: a separate court to handle juvenile cases and separate institutions in which to house offending minors. The idea was to dispense a kind of therapeutic justice⁷² to help the children become productive, crime-free adults. In keeping with this belief, the reformers also sought authority for pre-delinquency intervention. Juvenile court judges acquired jurisdiction over boys who were wandering the streets and over girls who were begging or uncared for.⁷³ The courts' broad powers superseded the parental interest to which courts have long accorded deference in other contexts.⁷⁴ As a result, the conceptual difference between dependency and delinquency had little meaning in the early juvenile courts.⁷⁵

69. See RYERSON, *supra* note 3, at 24.

70. See, e.g., ANTHONY PLATT, *THE CHILD-SAVERS* (1969).

71. See *id.* at 37.

72. See Simon, *supra* note 25, at 1364.

73. See PLATT, *supra* note 70, at 104 (citing an Illinois statute authorizing the juvenile court to hear cases of children suffering from "want of proper parental care, mendicancy, ignorance, idleness, or vice"). In 1873, the Illinois Supreme Court held, however, that such children could not be sent to the state's reform school. See *id.* at 105. New York did not make a similar distinction until 1930. See 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, 910 (1975).

74. See *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting) (noting that the parental interest "occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility").

75. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 250-52 (1990); see also PLATT, *supra* note 70, at 117 (discussing the child-savers' belief that no "distinction should be made between dependent and delinquent children if prevention of crime was to be realistically achieved").

Public Access to Juvenile and Family Court

By the 1920s, the progressives had succeeded in establishing special courts for juveniles in almost every state.⁷⁶ To justify their new role, the juvenile courts adopted the legal construct of *parens patriae*,⁷⁷ which justified heightened state authority over children and authorized the state to act *in loco parentis*.⁷⁸ With *parens patriae* as their guiding principle, the early juvenile courts rejected the adult criminal justice model of fact-finding jury verdicts of guilt. Instead they relied on juvenile court judges to serve more as counselors than as adjudicators.⁷⁹ To do this work well, a judge needed flexibility to gather a range of testimony about who a child was and how he⁸⁰ had become that way. Often judges made general findings of delinquency rather than handing down specific convictions.⁸¹

The emphasis on informality and flexibility supported closing the juvenile courts. Public access could get in the way of rehabilitation.⁸² If courts were closed to the public, a child could confess his troubles without fear of public stigma.⁸³ Closed records would prevent a record of juvenile offenses from being used against defendants in adult court.⁸⁴ Confidentiali-

76. See RYERSON, *supra* note 3, at 4. At about the same time, some states created family courts with jurisdiction over a range of legal matters related to children and families. The first family court in Cincinnati dates from 1914. See Babb, *supra* note 1, at 480.

77. The phrase, which means “parent of the country,” refers to the state’s role as sovereign and guardian of juveniles. See BLACK’S LAW DICTIONARY 1137 (7th ed. 1999). In the mid-17th-century, *parens patriae* placed the English king at the head of each family as ultimate guardian, creating an equitable remedy for orphans whose estates were in jeopardy. See Simon, *supra* note 25, at 1378. In its more punitive guise, *parens patriae* fed into an earlier practice of removing the children of the poor from their families. See RYERSON, *supra* note 3, at 42; Areen, *supra* note 73, at 895. Areen details how the practice of apprenticing out poor children or housing them in almshouses or orphanages, often under rough and unmonitored conditions, was exported to America and continued through the 19th century. See *id.* at 899-902.

78. “*In loco parentis*” means “in place of a parent.” See BLACK’S LAW DICTIONARY 791 (7th ed. 1999). As the Supreme Court noted, the “Latin phrase [*parens patriae*] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme.” *In re Gault*, 387 U.S. 1, 16 (1967).

79. See Martha Minow, *Whatever Happened to Children’s Rights?*, 80 MINN. L. REV. 267, 279 (1995).

80. While the majority of juvenile offenders were male, the majority of status offenders were female. Girls came to the attention of the juvenile court for engaging in “morally dubious behavior” or for “behavior considered to be promiscuous.” They often received indeterminate sentences and therefore could spend more time in detention than male juveniles convicted of felonies. See Laurie Schaffner, *Female Juvenile Delinquency: Sexual Solutions, Gender Bias, and Juvenile Justice*, 9 HASTINGS WOMEN’S L.J. 1, 8-9 (1998) (citing MARY E. ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES 1885-1920*, at 113-16 (1995)).

81. See RYERSON, *supra* note 3, at 40-43. According to a 1920s study, many juvenile courts handled more than half their cases without a formal inquiry to establish guilt, and some courts handled more than three-quarters of their cases that way. See *id.* at 93 & 169 n.26 (citing Katherine Lenroot, *The Evolution of the Juvenile Court*, ANNALS, CV 26 (Jan. 23, 1923)).

82. See Trasen, *supra* note 16, at 370; *supra* note 3 and accompanying text.

83. See Blum, *supra* note 10, at 361; Minow, *supra* note 79, at 279.

84. See RYERSON, *supra* note 3, at 39-40 (citing *The Reformation of Juvenile Delinquents Through Juvenile Court*, Procs. of NCCC, XXX 213 (1903) and OUR PENAL MACHINERY AND ITS VICTIMS 47 (1884)).

ality dovetailed with judicial discretion and lack of procedural constraint.⁸⁵ The public, like juries and lawyers, would hinder the sensitive task of helping children see the wrongfulness of their behavior or environment.⁸⁶

Some early observers expressed misgivings about the secretive nature of juvenile proceedings; in 1913 Roscoe Pound likened the juvenile court to a Star Chamber.⁸⁷ The next decades brought evidence to support these misgivings. The juvenile courts' shortcomings included little access to sustained therapy, unprepared rotating judges, and use of adult jails for detention of minors.⁸⁸ But the early wave of criticism led to few reforms. Again in the 1960s, studies showed that juvenile courts often lacked social work and psychiatric services.⁸⁹ They also lacked lawyers.⁹⁰

Such findings made the juvenile court's relaxation of procedural rules suspect.⁹¹ Closing the courts could lead the state to abuse its power.⁹² In addition, confidentiality did not fulfill its promise of preventing stigma because the Star Chamber was not completely sealed. Juvenile court secrecy "is more rhetoric than reality," the Supreme Court noted in the watershed case *In re Gault*,⁹³ because a judge had discretion to give records to the military, the FBI, and even to prospective employers.⁹⁴

B. Kent, *In re Gault*, and *McKeiver*: Confidentiality Preserved in Delinquency Proceedings

The Supreme Court began to address the juvenile court's procedural

85. For example, juvenile courts use a lower threshold for establishing guilt: preponderance of the evidence rather than reasonable doubt. See PRESCOTT, *supra* note 25, at 57.

86. By contrast, custody proceedings involving children were open in many states by the 1930s. See Mary Mcdevitt Gofen, Comment, *The Right of Access to Child Custody and Dependency Cases*, 62 U. CHI. L. REV. 857, 867 (1995).

87. See Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 322 (1913). The term comes from a 15th-century English court known for its secret and oppressive procedures. See THE NEW OXFORD ENGLISH DICTIONARY (1993 ed.).

88. See RYERSON, *supra* note 3, at 140-46.

89. See generally GORDON L. LIPPITT & SHIRLEY D. MCCUNE, GEORGE WASH. U. CTR. FOR THE BEHAVIORAL SCIENCES, JUDGES LOOK AT THEMSELVES: A NEW APPROACH TO JUDICIAL EDUCATION, THE FIRST YEAR'S EVALUATION STUDY OF THE NATIONAL COUNCIL OF JUVENILE COURT JUDGES TRAINING PROGRAM (1963).

90. A 1959-60 study found that 92% of juvenile offenders in New York had no lawyer to represent them. See PRESCOTT, *supra* note 25, at 58.

91. See *id.* at 77.

92. See DAVID J. ROTHMAN, *The Progressive Legacy: Development of American Attitudes Toward Juvenile Delinquency*, in JUVENILE JUSTICE: THE PROGRESSIVE LEGACY AND CURRENT REFORMS 34, 67 (1979) ("We no longer trust state or parents to act in a child's best interest."); see also Blum, *supra* note 10, at 371 (describing how proponents of the juvenile court began to lose faith in the state's ability to fulfill its role as *parens patriae*).

93. 387 U.S. 1 (1967).

94. See *id.* at 25.

Public Access to Juvenile and Family Court

failings in 1966. In *Kent v. United States*,⁹⁵ Chief Justice Warren wrote that the state's guardian role could not be "an invitation to procedural arbitrariness."⁹⁶ A year later, an Arizona juvenile court sentenced fifteen-year-old Gerald Gault to six years of reform school for making obscene telephone calls. The boy's parents had no notice of his arrest, he had no lawyer to represent him, and the state permitted him no appeal.⁹⁷ *In re Gault* led the Supreme Court to set a fundamental fairness standard for juvenile courts based on six due process protections.⁹⁸

Yet in introducing due process reform, the Court left the confidential nature of the courts untouched. This aspect of *In re Gault* is striking given that confidentiality rules were linked to two of the procedural abuses that caught the Court's attention. Police picked up Gerald Gault on a June morning in 1964. They did not relate the specific charges against him until his hearing two months later—ostensibly to protect his privacy.⁹⁹ When a juvenile court judge committed the un-represented Gault to a reform school until the age of twenty-one, there was no transcript of the hearing, again because of confidentiality.¹⁰⁰

Despite these facts, the *In re Gault* opinion does not discuss public oversight or participation as a potential check on the juvenile courts' power. Perhaps that is because the Court wanted procedural reform that would not hinder the courts' rehabilitative mission.¹⁰¹ Inadequate as the juvenile court system might be, it still seemed better than the alternative of treating children accused of crimes like adults.¹⁰² Today defenders of the juvenile court continue to argue that toughening procedural requirements inevitably will erode rehabilitation-based policies.¹⁰³

95. 383 U.S. 541 (1966).

96. *Id.* at 555.

97. 387 U.S. 1 (1967).

98. These protections were right to notice of the charges; right to counsel; right to confrontation and cross-examination; privilege against self-incrimination; right to a transcript of the proceedings; and right to appellate review. *See id.*, 387 U.S. at 10.

99. *See id.* at 25.

100. *See id.* at 58.

101. Justice Fortas wrote: "[T]he observance of due process standards, intelligently and not ruthlessly administered, will not compel the States to abandon or displace any of the substantive benefits of the juvenile process." *Id.* at 21.

102. *See id.* at 18 (citing REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 78 (1967) ("Although its shortcomings are many and its results too often disappointing, the juvenile justice system in many cities is operated by people who are better educated and more highly skilled, can call on more and better facilities and services, and has more ancillary agencies to which to refer its clientele than its adult counterpart.")).

103. *See* Rosenberg, *supra* note 8, at 175 (arguing that attempting to improve juvenile court procedure while preserving lighter sentencing may be unrealistic). *But see* Minow, *supra* note 79, at 290-91 (arguing that as crime control increasingly pushes the juvenile justice agenda, minor offenders receive neither adequate procedural protection nor treatment).

Four years later, the Court addressed the issue of public access in *McKeiver v. Pennsylvania*,¹⁰⁴ which turned on the question of whether juveniles charged with crimes had a Sixth Amendment right to a jury trial. Justice Blackmun's plurality opinion recognized the flawed reality of juvenile justice.¹⁰⁵ Nevertheless, the Court was still unwilling to give up on the juvenile court experiment. The plurality feared that the presence of juries would "put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding."¹⁰⁶

Justice Brennan, however, viewed public access in a wholly different light. Brennan cast a key vote against requiring juvenile court juries.¹⁰⁷ But in his concurrence, he stated that, to pass the fundamental fairness test, a state must open juvenile court to the public.¹⁰⁸ Justice Brennan described the value of the jury as allowing "an appeal to the community conscience." Public trials could serve a parallel function "by focusing public attention upon the facts of [the] trial, exposing improper judicial behavior to public view, and obtaining, if necessary, executive redress through the medium of public indignation."¹⁰⁹ Pennsylvania passed Brennan's fairness test because it had open juvenile court proceedings. North Carolina, the second defendant in the case, excluded the public and so did not.

Justice Brennan had few illusions about the way the juvenile court functioned. But he wrote that the court's "very existence as an ostensibly beneficent and noncriminal process for the care and guidance of young persons demonstrates the existence of the community's sympathy and concern for the young."¹¹⁰

It is doubtful that Justice Brennan could make the same assumptions

104. 403 U.S. 528 (1971).

105. *See id.* at 543-44 ("We must recognize, as this Court has recognized before that the fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized. The devastating commentary upon the system's failures as a whole . . . reveals the depth of disappointment in what has been accomplished.").

106. *Id.* at 545.

107. Four Justices (Chief Justice Burger, Justice Blackmun, Justice Stewart, and Justice White) joined the *McKeiver* majority opinion, which found that the fundamental fairness due process standard for juvenile court does not include the right to a jury trial. Justice Harlan concurred in the judgment on the ground that criminal jury trials are not constitutionally required of the states. Justice Brennan's concurrence in part, therefore, is the only still-valid basis for a majority holding.

108. Justice Brennan reached this conclusion by reasoning that a jury was not the only means to ensure a fundamentally fair trial. He wrote, "the States are not bound to provide jury trials on demand so long as some other aspect of the process adequately protects the interests that Sixth Amendment jury trials are intended to serve." 403 U.S. at 554 (Brennan, J., concurring in part and dissenting in part).

109. *Id.* at 555.

110. *Id.*

Public Access to Juvenile and Family Court

today about public sympathy for young felons.¹¹¹ Advocates for public access to juvenile criminal proceedings now argue that the courts' mission should be preserving public safety rather than rehabilitating its charges. They press for public trials so delinquents can bear the full brunt of public displeasure.¹¹² Some courts have found that the public has an interest in delinquency proceedings akin to its interest in adult trials, and have suggested that juvenile offenders do not have the same claim to privacy as abused and neglected children because they are "at least partially responsible for the case being in court."¹¹³ This rationale distinguishes between delinquents and dependents by assuming some guilt on the part of the accused minors, reserving victim status for sufferers of abuse and neglect.

In keeping with these sentiments, states like California now grant public access to trials in which teenagers commit crimes such as murder, rape, kidnapping, robbery, and assault.¹¹⁴ In addition, news organizations are altering long-standing policies about identification of juvenile felons. Traditionally, news outlets did not print or air the names of teenage criminals because of a widely shared ethic that children deserved to be shielded. Recently, that consensus has broken down. When thirteen-year-old Mitchell Johnson and eleven-year-old Andrew Golden opened fire on a school yard in Arkansas in March 1998, news organizations printed their names, photographs, and detailed stories about their childhoods.¹¹⁵

This shift in attitude dovetails with a growing concern about serious juvenile crime.¹¹⁶ Yet the call for trying serious juvenile offenders in public and publishing their names and pictures does not address the question of whether to maintain confidentiality for small-time delinquent offenders. It also tends to overlook the fact that teenagers accused of robbery, rape, and murder increasingly are tried in the adult criminal justice system, where the public has a constitutional right to access.¹¹⁷ The stance of

111. For a discussion on changing attitudes toward children, see generally Minow, *supra* note 79, and Sherman, *supra* note 67, at 1847.

112. See Blum, *supra* note 10, at 391-99.

113. San Bernardino County Dep't of Pub. Soc. Serv. v. Superior Court, 232 Cal. App. 3d 188, 200 n.7 (1991) (citing *In re T.R.*, 556 N.E.2d 439, 449 (Ohio 1990)).

114. See CAL. WELF. & INST. CODE § 676(a) (West 1998).

115. One journalism professor responded to the no-holds-barred coverage by saying: "I found that while I was startled to read their names, I was not offended." Mike Allen, *Shielding Young Suspects Is No Longer Automatic*, N.Y. TIMES, Mar. 27, 1998, at A14. When the boys were sentenced for the shootings, the judge did not follow the state's usual practice of closing the hearing to the public and allowed the press and family members and friends of the victims into the courtroom. See Rick Bragg, *Judge Punishes Arkansas Boys Who Killed 5*, N.Y. TIMES, Aug. 12, 1998, at A1.

116. Despite this concern, at least half of juvenile court cases are neglect, dependency, and status offence matters. See Arthur, *supra* note 2, at 54.

117. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspa-*

the juvenile court critics is consistent with the long-standing notion that disclosure is a vehicle for punishment.¹¹⁸

C. Confidentiality in Dependency Proceedings

Confidentiality requirements in dependency cases historically have been based on two arguments. First, court and child welfare agency records in which there has been a finding of abuse and neglect should be closed to protect the best interests of the child. Second, records of unfounded or unsubstantiated charges should be sealed or expunged so that government intervention does not infringe on the privacy rights of child abuse reporters and of the parents these reporters are accusing. The latter argument, based on civil libertarian principles, is thus distinct from anti-stigma and best-interests rationales in that it focuses not on shielding children, but on protecting the privacy of adults.

In 1974, Congress expressed support for both of these positions in passing the Child Abuse Prevention and Treatment Act (CAPTA).¹¹⁹ CAPTA mandated that states provide for "methods to preserve the confidentiality of all records in order to protect the rights of the child, his parent or guardians."¹²⁰

At the congressional subcommittee hearings that preceded CAPTA's passage, a spokesperson for the federal Department of Health, Education and Welfare cited "the serious problem of privacy" raised by child abuse prevention, adding that "protection of citizens who report suspected cases of child abuse is a difficult problem as well."¹²¹

Lawmakers' concerns about confidentiality thus stemmed from several sources. Congress sought to use disclosure bans to fulfill the government's responsibility to abused children, to parents wrongfully accused of abuse, to parents not yet found guilty of abuse, to the family unit, and to third parties who reported suspected abuse, both correctly and incor-

pers Inc. v. Virginia, 448 U.S. 555 (1980); *infra* Section III.B.

118. See Blum, *supra* note 10, at 353, 391-97.

119. Before passing CAPTA, the federal government primarily supported state efforts to protect children by awarding grants for child welfare services. See *Child Abuse Prevention and Treatment Act: Hearings on S. 1191 Before the Subcomm. on Children and Youth of the Sen. Comm. on Labor and Pub. Welfare*, 93d Cong. 91 (1973) (statement of Stanley B. Thomas) [hereinafter *1973 Sen. Comm. Hearings*]. In the early 1970s, as the problem of child abuse gained a higher profile, concern grew about stagnant funding and about the lack of uniformity and cooperation among the states. See *id.* at 142-43 (statement of William G. Lunsford). CAPTA required states to report child abuse cases to a national registry, to mandate child abuse reporting, and to grant immunity to reporters of abuse. See *Child Abuse Prevention and Treatment Act*, Pub. L. No. 93-247, 88 Stat. 4, § 4(b)(2)(B)(C) (1974) (codified at 5 U.S.C. § 8902(j)) (amended by 42 U.S.C. § 5106a (1994)).

120. *Child Abuse Prevention and Treatment Act*, Pub. L. No. 93-247, 88 Stat. 4, § 4(b)(2)(E) (1974) (codified at 5 U.S.C. § 8902(j)) (amended by 42 U.S.C. § 5106a (1994)).

121. *1973 Sen. Comm. Hearings*, *supra* note 119, at 88 (statement of Stanley B. Thomas).

Public Access to Juvenile and Family Court

rectly.

By the 1990s, the mandates of government responsibility toward children and accused parents were in conflict. A 1992 *Frontline* documentary about the death of five-year-old Adam Mann, whose abuse history was known to child welfare workers, partially blamed confidentiality laws for the lack of coordination between the child's caseworker, police, and other government agencies.¹²² In response, child advocates sought to step up the government's efforts to intervene in cases of suspected abuse and to widen the circle of access to current records by including more professionals.¹²³ At the same time, concerns about the damage that unfounded reports caused to parents' reputations fueled a drive to restrict access to records or ongoing investigations.¹²⁴

Congress sought to balance these competing concerns when it amended CAPTA's confidentiality provisions in 1992 and 1996. Lawmakers found that strict confidentiality laws placed "an undue burden" on abuse investigation. "[O]ften the purpose of confidentiality laws and regulations are defeated when they have the effect of protecting those responsible," they wrote.¹²⁵ The new law required states to ensure that child welfare agencies cooperated with police, courts, and human service providers working with abused and neglected children and their families.¹²⁶ At the same time, CAPTA continued to require that states preserve the confidentiality of records to protect children and their parents or guardians.¹²⁷ In 1996, Congress expanded information-sharing further¹²⁸ and allowed agencies to keep information on unsubstantiated reports "to assist in future risk and safety assessment."¹²⁹

For the first time, the 1996 CAPTA amendment also called for lim-

122. See *Frontline: Who Killed Adam Mann?* (PBS television broadcast, Dec. 3, 1991).

123. See 1992 *House Comm. Hearings*, *supra* note 13, at 249-50.

124. See *Child Abuse Prevention and Treatment Act: Hearings before the Subcommittee on Children and Family of the Committee of Labor and Human Resources*, 104th Cong. 13 (1995) (statement of Richard Wexler: "America's children are victimized by false allegations of child abuse more than 2 million times a year").

125. Congressional Findings, Pub. Law. No. 102-586 § 9(a), 106 Stat. 5036 (codified at 42 U.S.C. § 5106a(4)(B) (1994)).

126. See *Juvenile Justice Delinquency and Prevention Amendments*, Pub. Law. No. 102-586 § 9(a), 106 Stat. 5036 (codified at 42 U.S.C. § 5106a(4)(B) (1999)). Department of Health and Human Services regulations authorized the disclosure of information about abuse and neglect cases only to specific law enforcement and social service agencies. See 45 C.F.R. § 1340.14(i) (1994). These regulations have been superseded by the 1996 amendments to 42 U.S.C. § 5106a (Supp. II 1996). Proposed regulations recommended that states extend disclosure provisions to prosecuting attorneys, doctors, mental health providers, parents' substance abuse counselors, foster families, and school officials. See 59 Fed. Reg. 26,046 (1994) (proposed revision to 45 C.F.R. § 1340.14(i) (1994)). The regulations have not yet been approved.

127. See 42 U.S.C. § 5106a(4)(A) (1994).

128. See *supra* text accompanying note 18.

129. 42 U.S.C. § 5106a(b)(2)(A)(viii) (Supp. II 1996).

ited outsider scrutiny at the federal level. The new law asked states to disclose information about abuse and neglect cases to child abuse and fatality citizen review panels,¹³⁰ and to publicly disclose investigatory findings when a child dies or nearly dies from abuse.¹³¹

The 1992 and 1996 CAPTA amendments can be said to have two goals in allowing for limited disclosure. The first goal is to aid prevention and treatment by encouraging child welfare caseworkers to work with police, prosecutors, schools, and treatment providers. The second goal is to create a "watchdog" to scrutinize the work of the child welfare agencies and juvenile and family courts that handle abuse and neglect cases. But in recognizing the need for oversight, Congress primarily turned not to the public, but to child fatality review panels.¹³²

CAPTA thus draws a line between limited disclosure to a contained group of outsiders and broad disclosure to the public. Federal regulations continue to require states to criminalize unauthorized disclosure of information concerning abuse and neglect cases.¹³³ They also restrict the kind of information that can be released to researchers or to the press, even when a child dies.¹³⁴ Many states have followed the CAPTA amendments by allowing judges to grant parties with a "direct" or "legitimate" interest to attend juvenile or family court proceedings.¹³⁵ But few have followed New York in routinely opening the courts.¹³⁶

The distinction reflects the different risk to privacy posed by access for professionals, citizen review panels, and the public. To be sure, widening the circle of professional access has implications for family privacy.

130. Citizen panels established to review child abuse and fatality cases were started in Los Angeles, New York City, and Texas in the early 1980s to address undercounting of abuse cases and inadequate investigatory procedures. *See 1992 House Comm. Hearings, supra* note 13, at 246 (statement of Susan J. Wells). Members are usually lawyers, doctors, counselors, and other citizens with an interest in children's issues. Some panels focus on identifying systemic failures in child welfare agencies and making legislative recommendations. *See id.* at 247. Others track individual child abuse deaths. *See Telephone Interview with Paul Hoffman, Child Protective Support Team Director for the Administration of Children's Services (April 29, 1998).*

131. *See Child Abuse Prevention and Treatment and Adoption Reform Act of 1994, Pub. Law. No. 105-153 (codified at 42 U.S.C. § 5106a (Supp. II 1996)).*

132. *See infra* note 130.

133. *See 45 C.F.R. § 1340.14(i) (1994).*

134. While proposed CAPTA regulations would allow child welfare officials to acknowledge the existence of an ongoing investigation, they would not be able to answer underlying questions about a family's history or a caseworker or judge's decisions. They also would allow states to grant access to records to a person or organization engaged in "bona fide" research, but only without names or other identifying information, unless the researcher obtains the permission of a state official and the child involved, through his or her representative. *See 59 Fed. Reg. 26,046 (1994) (proposed revision to 45 C.F.R. § 1340.14(i) (1994)).*

135. *See infra* note 19 and accompanying text.

136. Five states (Alaska, Colorado, Indiana, Iowa, and New Jersey) have laws that require a judicial finding that a closed hearing is in the best interest of the child or the community. *See Greenbaum, supra* note 19, at n.16.

Public Access to Juvenile and Family Court

Police, treatment providers, and school officials may intrude on parents' rights to make decisions for their children. Still, juvenile court judges and child welfare workers have long intruded in this way into the lives of families. Increasing access for professionals thus can be seen as an extension of the goal of promoting the best interests of the child.

A somewhat different rationale based on oversight and accountability justifies extending access to citizen review panels. Giving panels detailed information allows outsiders with no direct role to learn of families' traumas and failures. But the small size of the panels means that families will not confront the effects of scrutiny directly, as they might if their neighbors were to read about them in the newspaper or see them on television. By barring their members from becoming a source of disclosure, the panels seek to bring themselves inside the circle of limited access.¹³⁷ In a sense, then, state laws that create exceptions to disclosure bans for involved professionals and citizen panels, but do not provide for public access, descend from the early juvenile court rules. The argument for widening access often turns out not to be an argument for allowing the public into the courtroom, but rather for sharing information only with those who have scripted roles as professionals or advocates.

III. ARGUMENTS FOR PUBLIC ACCESS

A. *Access as Beneficial*

If the rationale for expanding access to involved professionals and citizen review panels does not justify public access, what does? In their classic work on the best interests of the child, Joseph Goldstein, Albert Solnit, Sonya Goldstein, and Anna Freud noted a "covert quality" in juvenile and family court work that is rarely dispelled unless a child dies.¹³⁸ Other observers argue that low visibility gives the courts an incentive to speed through huge caseloads without giving adequate attention to individual children.¹³⁹ Advocates of opening the courts believe the threat of publicity will make judges, caseworkers, and lawyers exercise greater care and professionalism in juvenile and family court.¹⁴⁰

137. American Bar Association guidelines for the review panels stress that individual members cannot give out information, and suggest that panels report to the public only statistical data that pose no risk of individual identification. *See 1992 House Comm. Hearings, supra* note 13, at 249.

138. *See* GOLDSTEIN ET AL., *supra* note 68, at 174. The authors do not argue in favor of open family court proceedings. Rather they urge social workers and judges to make their assumptions visible so that the bases for their decisions and actions will be clear. *See id.* at 174, 195.

139. *See* Ainsworth, *supra* note 8, at 1128.

140. *See* Trasen, *supra* note 16, at 379-80.

These advocates look to several sources for support. For example, they cite the theory that disseminating information about how courts and government work is essential to democracy. Constitutional protection for the press's role in promoting an "unfettered interchange of ideas for the bringing about of political and social changes" underpins Supreme Court jurisprudence in First Amendment arenas such as libel law.¹⁴¹ In the context of adult criminal proceedings, the Justices have held that states must presume that adult criminal trials should be open to the public and the media.¹⁴² While the Court has not applied this holding to juvenile and family court, its argument that opening the courts serves a "checks-and-balances" function in educating the public about how its laws and judicial system work has relevance outside the adult criminal setting. Other commentators argue that opening courtrooms may not necessarily lead the public to impose higher standards, but does allow for the development and expression of community norms in some form.¹⁴³ Also, limited empirical evidence from New York following the 1997 Family Court Rules that presume in favor of open court shows that public access can generate reform efforts. What is not clear is whether such efforts can sustain momentum.

B. *Richmond and Globe*

In the 1980 case *Richmond Newspaper Inc. v. Virginia*,¹⁴⁴ the Supreme Court recognized a constitutional right of public access to criminal trials. The Justices offered several First Amendment rationales for invalidating a Virginia judge's order to close the trial of a murder defendant. They cited the historic openness of criminal proceedings and observed that open trials helped ensure fairness by discouraging court misconduct¹⁴⁵ and had "therapeutic value" because they provided an outlet for community reaction.¹⁴⁶ They also approved the "educative effect of public attendance" and backed the newspaper's claim that it was acting as a "surrogate" for the public.¹⁴⁷ In concurrence, Justice Brennan called the

141. *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)). Professor Alexander Meiklejohn identified the connection between the free press and democracy. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government.").

142. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982); *Richmond Newspaper Inc. v. Virginia*, 448 U.S. 555 (1980).

143. See Resnik, *supra* note 27, at 420.

144. 448 U.S. 555 (1980).

145. See *id.* at 569.

146. *Id.* at 570.

147. *Id.* at 572-73.

Public Access to Juvenile and Family Court

open trial one of the essential “checks and balances” of government.¹⁴⁸ Open trials protect the defendant by helping to ensure accuracy,¹⁴⁹ and they build public confidence by “demonstrat[ing] the fairness of the law to our citizens,” the Justice wrote.¹⁵⁰

Two years later, when the Court struck down a Massachusetts law that closed the courtroom for testimony of child victims of sexual abuse, Brennan wrote for the majority. In response to the *Boston Globe’s* attempt to gain access to a rape trial involving seventeen and sixteen-year-old victims, six justices found the state’s mandatory closure statute invalid.¹⁵¹ Brennan again stressed the importance of an informed citizenry. The public’s ability to “participate in and serve as a check upon the judicial process” is “an essential component in our structure of self-government,” he wrote.¹⁵² To bar observers from a court, *Globe* held, a trial judge must find that closure serves a compelling interest and is narrowly tailored to serve its purpose.¹⁵³

The *Globe* Court emphasized the limited nature of this holding—it did not prohibit the trial court from closing the courtroom for the teenagers’ testimony in the case at issue. Instead it had struck down a *mandatory* closure statute. But the Court found no difference in kind between minor and adult victims of sexual abuse and did not propose special rules of closure for minors.

C. *Beyond Richmond and Globe*

Richmond and *Globe* stand for the principle that the idea of a trial entails an audience. Their holdings became the basis for subsequent Supreme Court and circuit court decisions granting access to a range of court proceedings.¹⁵⁴ But some commentators have not found wholly persuasive the holdings’ historical, community-catharsis, educative, and checks-and-balances rationales. Judith Resnik questions the Court’s claims that open trials provide an outlet for community catharsis,¹⁵⁵ that

148. *Id.* at 592 (Brennan, J., concurring).

149. *See id.* at 596.

150. *Id.* at 594.

151. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Justices Marshall, White, Blackmun, and Powell joined the majority opinion. Justice O’Connor concurred in the judgment.

152. *Id.* at 606.

153. *See id.* at 607.

154. *See Press Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (Press Enterprise II); *Press Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (Press Enterprise I); *Rushford v. New Yorker Magazine*, 846 F.2d 249 (4th Cir. 1988); *Publicker Indus. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984).

155. *See Resnik, supra* note 27, at 413 (noting that trials take place months after a crime is committed, and that there is “no assurance that the community will either attend or learn of the proceedings”).

educating the public through access will foster confidence in the judicial system,¹⁵⁶ and that public scrutiny will be wholly beneficial.

Resnik offers a different set of rationales for opening courtrooms. Judicial proceedings, she writes, offer an important opportunity for storytelling. If the public hears them, the stories “may become the shared tales of a variety of citizens—across social and ethnic boundaries.”¹⁵⁷ Because adjudication is an element of political life, access to court proceedings allows the public to know its government better and to affect the way it works—both to generate norms and to express them.¹⁵⁸

Resnik does not imagine the public as a “single, homogenous community,”¹⁵⁹ but recognizes that its multiplicity makes disseminating information across communities important, either for hammering out shared standards about how disputes should be handled, or for revealing the areas in which consensus cannot be reached. Informed discussion by the public about dispute resolution is both a goal unto itself and the possible means to establishing baseline standards for the day-to-day workings of the justice system. Norm-generating, then, suggests a broader way to think about the educative aspect of public access. Rather than assuming, as *Globe* does, that an informed public will gain faith in the judicial system, the collective storytelling model highlights the connection between access and norms without assuming that the public will reach a particular conclusion based on the information it receives.

The concept of norms expression is similarly useful in thinking about how public scrutiny serves a checks-and-balances function. The correlation between public knowledge and the behavior of judges and lawyers need not be positive nor direct to merit consideration. Rather, a public presence helps ensure that courts will follow established norms. Norm-generation and expression does not idealize the public’s function, but instead recognizes that the public may act as a watchdog, or express indifference or a taste for sensationalism. It treats Justice Brennan’s faith in the public as a possibility instead of a certainty, offering a more open-ended way of understanding the public as audience.

D. Community Norms and Juvenile and Family Court

How might the rationale of norm-generation and expression help judges make decisions about access in the juvenile and family court set-

156. See *id.* at 414 (noting that “the uses to which the information [from open trials] will be put are far from certain”).

157. *Id.* at 413-14.

158. See *id.* at 419-20.

159. *Id.* at 417.

Public Access to Juvenile and Family Court

ting? Since their formation, juvenile and family courts have been significant sites for the creation of narrative.¹⁶⁰ Francine Sherman has pointed out that because children can rarely tell their own stories and do not make their own laws, it is important to inject their voices into the public arena.¹⁶¹ Access to juvenile and family court proceedings, it can be argued, helps achieve this goal because the proceedings expose the circumstances of certain children's lives. In court, involved professionals and family members sort out what wrongs have been done either to children or by them. Information flows about the child's past and present. The child may even voice his or her own perspective. The search for root causes and solutions can provide a thumbnail sketch or detailed picture of the child's experience.

Advocates for opening these courts argue that children in juvenile and family court feel the absence of community norm-generation.¹⁶² The courts are woefully crowded, chaotic, and overwhelmed. Judges routinely spend only minutes deciding to sentence children to a lock-down facility or to place them with a relative, foster parent, or group home. Heavy caseloads and low pay provide an incentive for harried lawyers and social workers to speed through cases, providing little opportunity for any but the most obvious solutions to problems.¹⁶³ If the court's rehabilitation and treatment missions still have meaning, then there is a gap between internal systemic norms and the public's conception of how the system should function.

Since the late nineteenth century, the American public has in fact reacted to well-known cases of abuse by demanding greater protection for child victims.¹⁶⁴ What is less clear is whether public and media attention can be more than episodic.¹⁶⁵ Press and public attention often follows a cycle: outrage at a gruesome child abuse death, pressure on politicians to enact reforms, some move to "clean house" in the juvenile court or child

160. See *infra* note 164 and accompanying text.

161. See Sherman, *supra* note 67, at 1845-46.

162. See Trasen, *supra* note 16, at 382 ("If the public was informed about how the juvenile system functions—and more importantly, does *not* function—this might prompt an 'understandable community reaction of outrage and public protest.'").

163. See Ainsworth, *supra* note 8, at 1128.

164. In 1874, the first Society for the Prevention of Cruelty to Children was established after the story of eight-year-old Mary Ellen Wilson, an abused foster child, led to public outcry. See Areen, *supra* note 73, at 903. "I saw a child brought in, carried in a horse, blanket, at the sight of which men wept aloud," reporter Jacob Riis wrote of Wilson's entrance in court. Newspapers printed the child's photograph and accounts of her experiences and condition, and the New York court removed her from her foster home. See Tracy Thompson and Jane O. Hansen, ATLANTA CONST., Sept. 24, 1991, in 1992 *House Comm. Hearings*, *supra* note 13, at 185. The link between widespread media attention to an individual abuse victim, public outcry, and promises of reform continues. For an example of this pattern playing out in Georgia, see *id.* at 134-35.

165. See PRESCOTT, *supra* note 25, at 244 ("The problem is not to attract people's attention but to maintain public interest in maintaining the basic fairness of our society.").

welfare agency, and then a lull until the next calamity.¹⁶⁶

How does New York's decision to open Family Court and certain child welfare agency records to the public measure in terms of generating community norms that lead to sustained reform efforts? An empirical study of this question is beyond the scope of this paper. However, this Part presents some mixed evidence about the effect of the new law and rules. Although the changes have not necessarily led to increased interest in routine dependency and delinquency matters, they have eased the flow of information to the press and public in some child death cases that become the focus of intense community scrutiny. Such cases can serve as a catalyst for re-examination of system-wide policies.

Despite the new family court rules, New York reporters have said that the frequent continuances, brief hearings, and chaotic nature of the court make it hard to cover abuse and neglect cases that do not involve serious crimes or celebrities.¹⁶⁷ News accounts of judicial reaction to the new rules have documented few problems but also little additional attention to routine cases.¹⁶⁸ Child advocates who believe that publicity is not usually in the best interests of their individual clients have been relieved that most abuse and neglect cases still go unreported in the press.¹⁶⁹ Instead, the law has led reporters to gather facts more successfully and quickly for the kinds of high-voltage stories they usually write.¹⁷⁰

Press coverage of the deaths of Elisa Izquierdo and Sabrina Green offers one window into how New York laws have begun to function. In November 1995, New York City police arrested Elisa Izquierdo's mother after finding the six-year-old's battered and sexually abused body. Elisa was under the protection of the child welfare system when she died. Her extended family's account of her life exposed serious errors in how caseworkers and the juvenile court handled her case. Her death became a symbol of the failings of the New York City child welfare agency.¹⁷¹ Yet information about Elisa's death trickled rather than flowed onto newspa-

166. See *id.* at 8-9 (arguing that the press gives disproportionate attention to harrowing tales of violent juvenile criminals, and often fails to tell the stories of the vast majority of mundane cases of petty crime and abuse and neglect).

167. See Telephone Interview with David Lewis, reporter, *Newsday* (May 1, 1998). Lewis said access remains cumbersome because news organizations must litigate to receive access to the records of proceedings they have not attended. Lewis also said Elisa's Law has changed the response of child welfare officials to requests for information when a child dies.

168. See Don Lehman, *Open Family Courts Pose Few Problems in First Year*, THE GLEN FALLS POST-STAR, Sept. 2, 1998, at B3.

169. See Interview with Solomon, *supra* note 14.

170. Lewis said the rule change has been significant. "Before, we weren't allowed into the Family Court building or into the courtrooms," he said. "It's been a real eye-opener to see what goes on inside." Interview with Lewis, *supra* note 167.

171. For example, Elisa's death was featured on the cover of *Time Magazine* on Dec. 11, 1995. See TIME, Dec. 11, 1995.

Public Access to Juvenile and Family Court

per and magazine pages and television screens. Elisa's caseworker and an agency supervisor, later fired for their errors, refused to discuss the case.¹⁷² And when Kathryn Croft, then head of the Child Welfare Administration, was questioned by the New York City Council, she responded so indirectly to questions that Council members were forced to repeat themselves several times.¹⁷³ Reporters pieced together Elisa's story from members of her extended family and from leaked internal memos.¹⁷⁴ A month elapsed between Elisa's death and a comprehensive newspaper account of what had happened to her.¹⁷⁵

Elisa's case became synonymous with the drawbacks of the New York Child Welfare Agency's strict confidentiality policy.¹⁷⁶ To some commentators, the privacy interests of a dead child seemed a poor justification for secrecy.¹⁷⁷ The case led the New York State Legislature to loosen confidentiality rules. Lawmakers found "unacceptable":

[Laws that] frustrate the ability of the legislature to set informed policy and act in an appropriate oversight capacity; impair the ability of independent government agencies to determine the effectiveness of services, staff and funding; corrode public trust; and undermine the right of the public to determine whether abused children are being adequately protected.¹⁷⁸

"Elisa's Law" was enacted in February 1996. In June 1997, the New York family court issued its revised rules creating a presumption of openness.

The following November, a nine-year-old girl died under circumstances similar to Elisa's death.¹⁷⁹ Sabrina Green's body was found with a fractured skull and a gangrenous severed thumb. Prosecutors charged her thirty-one-year-old sister and legal guardian, and the sister's boyfriend,

172. See Joe Sexton, *Children's Agency Details Errors and Sets Sanctions*, N.Y. TIMES, Feb. 15, 1997, at A25.

173. See Frank Bruni, *Child Welfare Chief Is Forced To Testify*, N.Y. TIMES, Dec. 28, 1995, at B3. Child Welfare Agency head Kathryn Croft was replaced by Nicholas Scopetta following Elisa Izquierdo's death. The Child Welfare Agency was renamed the Administration for Children's Services.

174. One worker was suspended for talking to the press. This disciplinary action led a federal judge to strike down a gag rule restricting the speech of city employees. See Lynda Richardson, *U.S. Judge Strikes Down a Ban on Talking to the Press*, N.Y. TIMES, Nov. 27, 1996, at B3.

175. See Nina Bernstein & Frank Bruni, *Seven Warnings: A Special Report. She Suffered in Plain Sight but Alarms Were Ignored*, N.Y. TIMES, Dec. 24, 1995, at A1.

176. See Ian Fisher, *Disclosure Laws at Issue After Girl's Death*, N.Y. TIMES, Nov. 29, 1995, at B8.

177. See, e.g., Editorial Desk, *Child Abuse: Theory vs. Reality*, N.Y. TIMES, Dec. 2, 1995, at A20 (labeling state confidentiality a "handy cover" for bureaucratic bungling).

178. N.Y. SOC. SERV. LAW § 422-a, Legislative Intent of L.1996, c. 12 § 1 (Gould 1997).

179. According to a study by the New York City Public Advocate, 71 children died from abuse and neglect in 1996 and 78 in 1995. The Public Advocate determined that 15 of the 1996 deaths occurred in cases in which the Administration of Children's Services "failed to monitor abuse adequately or provide needed services." Vivian S. Toy, *Public Advocate Faults Child Welfare Agency in the Deaths of 15*, N.Y. TIMES, Nov. 20, 1997, at B3.

with manslaughter. Sabrina had by all accounts been well cared for before going to live with her sister. Her family, like Elisa's, was being monitored by the city's Administration for Children's Services when she died.

With the benefit of Elisa's Law and the revised family court rules, the press used government and court sources to tell quickly the story of Sabrina's death. Within a week, the *New York Times* had obtained and quoted in full the transcript of the minutes-long guardianship proceeding that led a family court judge to place Sabrina in the home of an older sister who had a history of investigation for neglect and whom he had not interviewed. The newspaper also recounted the public school system's failure to make a required home visit when Sabrina did not appear for the first weeks of the fall term.¹⁸⁰

In response, politicians and advocates called for specific institutional reforms. The *New York Times* noted that the school district's multi-tiered attendance-tracking system invited malfunction.¹⁸¹ New York City Schools Chancellor Rudy Crew and Administration for Children's Services head Nicholas Scoppetta admitted their agencies' failures and pledged to create a system for information-sharing.¹⁸² The judge who placed Sabrina with her sister explained how an overburdened family court system could lead to hasty decisions.¹⁸³

The calls for reform can be seen as an example of community norms developed through access to substantive information about one horrific child death. In this sense, the response to Elisa Izquierdo's death demonstrates the dovetailing of Justice Brennan's argument for the benefits of public access and Judith Resnik's more skeptical rationale of enabling the public to hammer out standards for how courts and government should work. The norm-generating rationale, however, does not ask about the burden access places on individuals. Child abuse deaths are rare, and even when they occur, the privacy interests of siblings and other children may still be at stake.¹⁸⁴ The problem of individual privacy is the flip side

180. See Joe Sexton & Rachel L. Swarns, *Pictures of Sabrina: A Special Report*, N.Y. TIMES, Nov. 15, 1997, at A1.

181. See Elizabeth Kolbert, *Metro Matters: Fine on Paper, Truancy Policy Fails a Child*, N.Y. TIMES, Nov. 17, 1997, at B1; Editorial Desk, *Another Preventable Death*, N.Y. TIMES, Nov. 12, 1997, at A30.

182. Schools Chancellor Crew also sanctioned the principal of the school that had failed to visit Sabrina's home. See Jacques Steinberg, *Crew Seeks To Suspend or Fine Principal for Abuse Case Delay*, N.Y. TIMES, Nov. 12, 1997, at B5.

183. Sexton & Swarns, *supra* note 180, at A1 (quoting Judge Terrence J. McElrath as saying: "I didn't have a lot of information. Given the realities, the bottom line is that you don't always have all the time or all the information that you would like").

184. See *In re Ruben R. v. Daily News*, 219 A.D.2d 117 (N.Y. App. Div. 1996) (holding that the right of the public and press to attend court proceedings may be overcome by an overriding interest, in this case evidence setting forth enormous potential harm to the siblings of Elisa Izquierdo).

Public Access to Juvenile and Family Court

of the Supreme Court's holding in *Globe*. Had the Court been asked to grant access to the proceeding in question—the testimony of seventeen and sixteen-year-old girls about being raped—the Justices might not have chosen to open the courtroom.¹⁸⁵ The next Part seeks to develop a set of factors that judges can use to assess the state's interest in protecting a child's right to privacy.

IV. *KATHERINE B.*, *KEISHA T.*, AND *M.S.* REVISITED

A. *Interest-balancing: Protecting Children's Privacy*

The courts in *In re Katherine B.*, *In re Keisha T.*, and *In re M.S.* framed the decision about whether to grant public access as a “balancing test” between the state's interest in protecting a child's privacy and the public's interest in obtaining information about the court's work. In *Globe*, the Supreme Court proposed a set of factors for judges to consider in balancing these interests: “the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives.”¹⁸⁶ Such a set of factors could help juvenile and family court judges exercise more reasoned discretion over access decisions. Without them, petitions for access may succeed or fail simply as a result of a statutory presumption or a judge's predilections. The courts in *In re Katherine B.*, *In re Keisha T.*, and *In re M.S.*, for example, considered some factors like those in *Globe*, but did not systematically analyze how these factors influenced their decision.¹⁸⁷

With additional guidance from legislatures or court rule-making bodies about what factors to consider, judicial discretion might be exercised along more uniform lines to produce a more consistent body of case law.

185. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982). While the Court struck down Massachusetts's mandatory closure law, it did not require the trial court to open the rape testimony at issue in the case. Justice Brennan wrote: “if the trial court had been permitted to exercise its discretion, closure might well have been deemed necessary.” *Id.* at 609. Through their lawyer, the girls told the judge that they did not object to opening the courtroom as long as the press would agree not to interview them or to publish their names and photographs. See *id.* at 599 n.5.

186. *Id.* at 608 (footnotes omitted). The first three factors inject content and specificity into the “best interests of the child” standard that courts use to adjudicate dependency and some delinquency cases. See GOLDSTEIN ET AL., *supra* note 68, at 50 (defining best interests as making paramount the needs of the child to be placed); Peters, *supra* note 68, at 1514-16 (discussing best interests as the looming legal standard).

187. For example, the appeals court in *In re Katherine B.* approvingly quoted dicta from another jurisdiction claiming a greater right to privacy by abused rather than delinquent children, but did not explain why this should apply under New York law. See *In re Katherine B.*, 189 A.D.2d at 449. The court in *In re M.S.* cited the New York Family Court Rules, which concern the operation of the court, the parties' objections, and the need to protect the child from harm. But it did not consider them in terms of Malcolm's psychological problems. See *In re M.S.*, 662 N.Y.S.2d 207, 210 (Fam. Ct. 1997).

In re Katherine B. and *In re Keisha T.* indicate that some judges fill the gap left by current laws by developing their own set of factors. *In re M.S.* suggests that they do not always do so. To gain a better understanding of how this idea can be put into practice, this Part reconsiders *In re Katherine B.*, *In re Keisha T.*, and *In re M.S.* in light of the factors outlined in *Globe* and Part I.¹⁸⁸ I will also explore the interaction between the factors and the potential for norm-generation and expression that public access to information brings. The New York Family Court rules governing access would allow—though not require—judges to open or close their courtrooms based on an analysis of the *Globe* factors. Under California law, however, a meaningful analysis of the same factors would be precluded by the strong presumption of closure. I argue that this variation measures how receptive each state is to the value of generating and expressing community norms, the public's role as audience, and Justice Brennan's checks-and-balances rationale.

B. Interest-Balancing: A Trial Run

In *In re Katherine B.*, the Suffolk Family Court could have begun by considering Katherine's relatively young age, medical evidence of her vulnerability to "revictimization," and her desire for a closed hearing. The court could then have weighed the type of proceeding at issue: a hearing about whether Katherine should remain in foster care or return to her mother following the kidnapping and sexual abuse. Next, the court could have discussed the type of access: coverage by three major television networks and several newspapers.

On the other hand, in weighing the public's right to obtain information, the court could have viewed the case in light of norm-generation. The court could have explored the case's potential to inform the public about child sexual abuse, foster care for dependent teenagers, and parental responsibility for crimes committed by other adults. The court also could have considered whether allowing for press and public access would help the public determine the adequacy and appropriateness of family court procedures for adjudicating cases like Katherine's.

Under New York's law, the presumption in favor of access would have led the court to give weight to this second set of considerations. But the Family Court rules do not demand that every dependency proceeding be opened. The 1997 rule revisions would still allow the appeals court to find for closure based on Katherine's objection and the need to protect her from harm. Yet New York's rules do not *require* judges to consider

188. Although the set of factors I develop comes from *In re Katherine B.* and *In re Keisha T.* as well as *Globe*, I will refer to them as the *Globe* factors.

Public Access to Juvenile and Family Court

these factors. As a result, they allow for decisions like that of the Family Court in *In re Katherine B.*, which opened the court despite substantial reasons—intense media attention, sensitive sexual abuse charges, and Katherine’s affidavit—for finding that the balancing test between privacy and access weighed on the side of closure. In addition, the absence of formal factors in the rules led the appeals court to base its decision in part on the assertion that dependent children have a greater right to privacy than delinquent children. This assertion does not reflect New York law, which seeks to rehabilitate non-serious juvenile offenders and adjudicates their cases in Family Court with dependency cases. The New York Family Court rules must set forth clear factors, like those in *Globe*, to ensure that judicial reasoning follows a consistent step-by-step analysis, matches New York’s rehabilitative focus for non-serious offenders, and adequately protects the child’s interest in privacy.

The California statute governing access presents a more basic problem. In California, a court’s approach to the access petition in *In re Katherine B.* could not turn on an analysis of a set of factors like those in *Globe*. Instead, a California court necessarily would have found for closure because the state’s statute does not allow for the possibility that the public may have a direct and legitimate interest in a dependency proceeding. While in Katherine’s case a closed hearing is the preferred outcome, the statute is flawed because it precludes California courts from considering any access petition in terms of the value of disseminating information to the public for the purpose of norm-generation and expression.

In summary, both New York and California courts deciding *In re Katherine B.* might have issued the same ruling in favor of closure. But New York court rules do not require judges to consider the *Globe* factors that would help them think through the state’s interest in protecting a child’s privacy. The California statute, on the other hand, does not allow courts meaningfully to take into account the public’s right to obtain information.

In re Keisha T. provides an example of a case in which the public’s right to information might outweigh the factors in favor of privacy. The juvenile court judge deciding *In re Keisha T.* could have begun by considering the ages and maturity levels of the ten children whose files the *Bee* reporter asked to review. The appeals court opinion does not provide any information about the children, but notes that the children’s lawyers objected to the *Bee*’s petition with the support of the county Department of Health and Human Services. These objections and the court’s knowledge of the children’s circumstances could have been considered in light of another *Globe* factor: the type of access being requested. In contrast to the

intense media scrutiny at stake in *In re Katherine B.*, the files were to be used for a series of articles on the failures of the county child welfare system by the *Sacramento Bee*, a single regional newspaper. The paper agreed not to disclose the names of the children, who had not been the subject of other publicity.¹⁸⁹

Next the court could have considered *In re Keisha T.*'s potential to allow the public to generate and express norms. Reading the children's files might have allowed the *Bee* to assess better systemic problems in the county child welfare system. That understanding might lead to an article that pushed beyond case-by-case accounts of the three deaths that precipitated the initial inquiry. Such an article in turn might have helped the public to evaluate how the child welfare system was working. In this case, therefore, consideration of the *Globe* factors weighs in favor of granting access.

It is at least possible that a *Bee* series based on access to the *In re Keisha T.* files also would have aided the public in expressing norms. There is some evidence that news organizations with access to facts like those in the *In re Keisha T.* files can produce deeper coverage, and that this coverage can lead to more useful public involvement.¹⁹⁰ Perhaps readers of a *Bee* series using the *In re Keisha T.* files would be better equipped to express their view of how abuse and neglect cases should be handled, and whether existing agency practices followed this norm.

Under California law, however, the juvenile court in *In re Keisha T.* could not have pursued this line of inquiry into norm-generation and expression and allowed the *Bee* access to the files. The appeals court ruling stated that accommodation of press requests for information should take into account "whether adequate information can be obtained from other sources."¹⁹¹ The California statute further bars access without consent from a child and parent or guardian. I did not find a California case in which a court allowed press access to a dependency proceeding.¹⁹² Because even the anonymous and limited access envisioned by the *In re Keisha T.* lower court falls outside the lines drawn by the California statutes, this case exemplifies the shortcomings of California's approach.¹⁹³ Had

189. *In re Keisha T.*, 38 Cal. App. 4th 220, 226 (1995).

190. See *supra* Section III.D.

191. *In re Keisha T.*, 38 Cal. App. 4th at 240.

192. See, e.g., *San Bernardino County Dep't of Social Services v. Superior Court*, 232 Cal. App. 3d 188 (1991) (holding that there is no constitutional right of public access to juvenile court proceedings, and finding the *Richmond-Globe* test of access too constraining for adequate consideration of a child's interests in closure); *In re Jesse McM.*, 105 Cal. App. 3d 187 (1980) (holding that a minor does not have an absolute constitutional right to a public trial in juvenile court).

193. See CAL. WELF. & INST. CODE § 827. (West 1998).

Public Access to Juvenile and Family Court

the case been decided in New York, however, a family court judge could have given weight to the public awareness benefits argued for by the *Bee*. The judge could also have considered the objections of *In re Keisha T.*'s lawyers and the child welfare agency. But again, New York's revised court rules can produce cursory or misdirected analysis because they do not require such a consideration.

In summary, a New York court deciding *In re Keisha T.* might have opened the files while a California court would have been likely to close them. Under New York's rules, the court's analysis might or might not have taken into account the children's wishes, as expressed through their lawyers. California's statute strictly limits how courts can take into account the values of norms expression and generation.

An analysis of *In re M.S.* demonstrates how the *Globe* test could work in a case of a petition for access to a juvenile delinquency proceeding. The Family Court judge deciding whether to grant the *New York Daily News* petition for access to Malcolm Shabazz's arson hearing could have begun by considering Malcolm's age of twelve and his level of maturity and understanding. Attention to age and understanding would allow the judge to consider how media access might affect Malcolm as an emotionally disturbed teenager. If the court did not feel equipped to answer this question on its own, it could have solicited psychiatric testimony from the doctors treating Malcolm. Next, the court could have considered the type of access being requested: coverage by several television and radio networks and large newspapers. Finally, the court could have weighed whether Malcolm's status as a delinquent accused of a serious crime lessened the state's interest in protecting his privacy.

In considering *In re M.S.* in terms of its potential to aid in generating and expressing community norms, the court could have noted the substantial public response to the death of Malcolm's grandmother. Did the public's response seem confined to the family tragedy, or could it lead to broader inquiry into, for example, treatment efforts on behalf of emotionally disturbed children like Malcolm? The court also could have considered the public's interest in understanding how the juvenile court handles such cases. Granting access might allow the public to examine its norms about rehabilitation for juvenile offenders with psychological problems and about protecting the community from such offenders.

New York court rules and law provide for some but not all of this analysis. The judge considered Malcolm's objections to access. But the New York rules do not require judges to assess for themselves a child's level of maturity or understanding and thus weigh the effects of publicity on a child with emotional problems. As a result the Family Court judge faulted Malcolm's lawyers for failing to submit evidence supporting their

opposition to publicity, but made no independent inquiry into the merits of Malcolm's objection to press access on the basis of its effect on his emotional well-being.

New York law permits the judge's distinction between some delinquents as less deserving of privacy protection and dependents, since it treats some serious juvenile offenders differently from lesser offenders.¹⁹⁴ However, Malcolm did not come under the serious-offender category because his case had been transferred from adult court to Family Court.¹⁹⁵ As a result, there is no basis under New York law for according the state a lesser interest in protecting Malcolm's privacy interest than in protecting the interests of dependents and minor delinquents. Yet neither the court rules nor state statute explicitly address this question, leaving judges deciding access petitions free to draw lines between different kinds of delinquents as they see fit. The rules also do not address the type of access factor, beyond suggesting that judges consider the "orderly and sound administration of justice" in making their determinations. While New York's presumption of openness requires consideration of the case's potential to build public awareness, the state's approach does not sufficiently protect the lesser delinquent's interest in privacy. The decision about whether to grant press access in *In re M.S.* is a closer question than the New York rules require courts to recognize. The judge making this decision should have asked Malcolm's psychiatrist to testify and considered the sensationalized nature of much of the coverage of Malcolm's crime before deciding to allow reporters into the courtroom.

Had *In re M.S.* been heard in California, by contrast, consideration of the *Globe* factors would have been irrelevant to the court's ruling. California law requires public trials for juveniles accused of arson. The law thus dictates that for juvenile offenders like Malcolm, the values of norm-generation and expression must outweigh the state's interest in protecting a child's privacy. The law does not mention exceptions for children with emotional problems or other vulnerabilities.

In summary, a New York court and a California court might have both ruled in favor of openness in *In re M.S.* But in New York the judge might or might not have taken into account a child's objection and the need to protect the child from harm. In California, the law does not allow for such nuances.

CONCLUSION

Judges deciding whether to open proceedings in dependency and de-

194. See *supra* note 25 and accompanying text.

195. See N.Y. CODE CRIM. PROC. § 180.75.

Public Access to Juvenile and Family Court

linquency cases face competing claims. On the one hand, each case may give the public insight into how the child welfare and court systems work. On the other hand, each case involves personal facts about which one can easily understand the need or desire for privacy. The courts in *In re Katherine B.*, *In re Keisha T.*, and *In re M.S.* framed this choice as a balancing test between the public's interest in obtaining information and the state's interest in protecting the privacy of a dependent or delinquent child. This Note has explored the history and arguments behind the balancing test by asking two questions: How successfully has the state rehabilitated and protected delinquent and dependent children under a closed court system? How successfully have the press and public been involved in the handling of juvenile and family court cases? The answers on both fronts are mixed and ambiguous.

The juvenile court founders believed confidentiality would help shield children from stigma. They designed an informal courtroom so that judges could exercise discretion for the good of the children who came before them. But the juvenile justice and child welfare systems in many ways did not live up to their founders' aspirations. Their well-documented shortcomings provide ample support for the argument that confidentiality rules help prop up a malfunctioning bureaucracy by shielding courts and agencies from accountability.

Still, most attempts to reform the juvenile court have stopped short of opening it to the public. The Supreme Court in *Gault* and *McKeiver* did not give juveniles the right to a public trial because it did not want to abandon the court's rehabilitative mission. Out of concern for the privacy interests of the victims of child abuse and neglect and their parents, Congress also emphasized confidentiality in passing the 1974 Child Abuse and Prevention Act. Disclosure bans, however, have proven to be a mixed blessing. Some child advocates found that CAPTA-imposed state restrictions prevented collaboration among the lawyers, police, teachers, and social service workers involved in a child's case. Their frustration led Congress to loosen CAPTA's disclosure ban in 1992 and 1996. At the same time, Congress opened child welfare agency records to citizen review panels and instructed states to provide limited information to the public in cases in which children die or nearly die.

New York has taken the next step by making dependency and delinquency proceedings presumptively open. Open courtrooms disturb some child advocates who worry that laws like New York's place children's privacy at risk. Even the most sensitive press accounts probe and expose. They seek not to heal, but to account for what has happened and why. The public is not a contained group participating in the system, and it may react to an abused child's story with a mix of horror, concern, mis-

understanding, indifference, or scorn.

Exposure in individual cases may seem gratuitous given that the press and the public have not focused in a sustained way on the vast majority of dependency and delinquency cases. Yet proponents of open courts can point to moments when the public has snapped to attention, often when it learns that a child presumed to be under the care of the child welfare system has died. In the case of Sabrina Green, public attention translated into some "watchdog" oversight of the child welfare and school systems. Continuing calls for better system-wide monitoring and ongoing accountability support the claim that open courts can help lead to reform, at least in some cases.¹⁹⁶

The link between support for open delinquency proceedings and harsher punishment for juvenile criminals further complicates the question of support for public access. As news outlets begin to publish the names and photographs of children accused of serious crimes, the faith placed by Justice Brennan (in *McKeiver*) in the public to respond to the plight of juvenile miscreants has come to seem misplaced. California's statute underscores this point by carving out an open-court exception only for serious juvenile offenders. The state takes the position that closure will facilitate rehabilitation, and openness will punish. For the same reason, California continues to draw a bright line in dependency cases between increased professional access and public access.

New York, by contrast, presumes that the public has a significant interest in Family Court matters. The revised New York Family Court rules treat juvenile and family court as a site of public narrative. The rules also recognize that children and their families have an interest in privacy and authorize judges and child welfare officials to protect that privacy when necessary. But under New York's approach, the child's privacy interest does not always (or even often) outweigh the public's interest in being informed. New York courts thus frame their decisions to open the courtroom in terms of the *Richmond* and *Globe* principle that the public has a right to know about what happens in court. At the same time, treatment and rehabilitation remain the state's goals for dependent and lesser delinquent children. By allowing public access to coexist with these goals, New York takes the position that public access is in some circumstances compatible with a child's best interests.

Opening the courts entails a normative shift away from an informal juvenile court with unbounded judicial intervention and toward fixed

196. See Rachel L. Swarns, *Finding Common Ground on Child Welfare*, N.Y. TIMES, Dec. 6, 1998, at A49 (describing the creation of an expert panel to monitor child welfare agency reform in New York City that resolved years-long litigation brought in the wake of Elisa Izquierdo's death).

Public Access to Juvenile and Family Court

standards and public oversight. As they increasingly lose faith that the state will do what is best, access advocates have turned to the public as another line of defense for children's interests. This view of the juvenile and family courts gives the public a monitoring role to play. By barring public access to all delinquency and dependency proceedings, legislatures and courts inhibit the public's ability to serve as watchdog. This viewpoint accords with the checks-and-balances rationale of *Richmond* and *Globe*. Another more skeptical view is that public access to the courtroom will enable the larger community to generate and express norms about what takes place in courts, even if these norms do not necessarily impose higher standards on the juvenile justice and child welfare systems.

Under a law that allows for some disclosure, the question facing courts and policy makers becomes *how* decisions about closure should be made. In New York, the legislature asks judges to exercise their discretion with a presumption toward granting access. In California, lawmakers cut off judicial analysis by virtually mandating closure for dependents and some delinquents and mandating access for serious juvenile offenders. For different reasons, then, the California and New York statutes share a weakness: they do not ensure rigorous, case-by-case analysis of underlying issues. Setting forth a set of factors like those in *Globe*—child's age, maturity, type of proceeding, type of access, and child's wishes—would ensure that judges exercise their discretion within a structured, thought-out framework. New York could make this improvement by incorporating a set of standards into its existing court rules. California would have to reconsider its strong presumptions in favor of closure for dependents and access for serious delinquents to make room for meaningful judicial analysis of a set of standards like those in *Globe*.

To elicit better reasoned and more nuanced rulings about openness and closure, New York legislators and rule-makers should require judges to consider a set of factors like those in *Globe*. The New York Family Court rules could be expanded to encourage more thorough analysis, and judges could be instructed, rather than permitted, to consider them. Such a requirement would be consistent with New York's presumption in favor of open courtrooms, while at the same time help judges develop common precedent and focus on the individual child before them. It would discourage outcomes like the lower court decision granting access in *In re Katherine B.* despite troubling facts about sexual abuse and a child's heart-wrenching plea for closure. And it would also discourage decisions like *In re M.S.*, in which access is granted without sufficient consideration of the factors weighing toward closure. These examples of routine decisions granting access suggest that New York judges often do not consider systematically their reasons for opening or closing a particular case. In-

corporating the *Globe* factors into the family court rules would address this weakness.

Lawmakers who choose to emphasize privacy over public access, as in California, must moderate their approach if they are to allow the public to generate and express community norms. Pro-closure statutes can require judges to think through the competing privacy and access issues at stake in a particular case only if they create some window for recognizing the public and press as legitimate observers. The appellate court's reluctance to allow for the limited, anonymous access requested in *In re Keisha T.* demonstrates the lack of such a window in the current California statute. States that presume in favor of closure should rethink their approach to embrace, at least under some circumstances, the values of public norm-expression and generation. By shifting in this direction, they can then set forth standards to guide judicial reasoning, and thus provide juvenile and family courts with a more effective mechanism for resolving the complicated and case-specific issues that inevitably surround petitions for access.
