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TO: State of Connecticut Select Committee on Children

FROM: WILLIAM WESELY PATTON, PROFESSOR AND J. ALLAN COOK  
AND MARY SCHALLING COOK CHILDREN'S LAW SCHOLAR

RE: ***Raised Bill No. 6419, An Act Concerning Transparency and  
Accountability of the Department of Children and Families, in  
opposition to Section 1a(1)(F)***

DATE: FEBRUARY 3, 2009

I am an expert on the legal and pediatric psychiatric effects of opening child dependency proceedings to the press and public. I have testified in several different state legislatures, testified in court as an expert witness, debated this issue at dozens of different conferences with jurists, legislators, reporters, and other researchers [including at the University of Connecticut School of Law], and have published more on this topic than any other American legal scholar. I also teach a course, *Forensic Child and Adolescent Psychiatry*, at the UCLA David Geffen School of Medicine, Department of Psychiatry. I am deeply concerned with the safety of Connecticut's abused and neglected children under the open court pilot project described in *Raised Bill No. 6419*. I am supplying your committee with copies of some of my articles on the effects of open court hearings, and I am available to assist you as this bill evolves.

I am aware of many of the problems currently inherent in Connecticut's dependency court system.<sup>1</sup> My and other experts' research have demonstrated that

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<sup>1</sup> Open court jurisdictions have as many systemic accountability and quality control problems as closed court jurisdictions. For instance, in Florida, an open court jurisdiction, the Department of Child and Family Services lost the location of hundreds of foster children, and Florida decided to place foster children at risk

presumptively opening the courts not only fails to solve these problems, but it also creates great risk to abused children from being further emotionally traumatized by the system and by the public disclosure of abused children's most intimate facts.

*Raised Bill No. 6419* as currently written provides none of the protections necessary in a pilot project to protect abused and neglected children from the consequences of open dependency proceedings. The bill does not discuss or allocate the millions of dollars necessary to assure that Connecticut's open dependency proceedings protect children's rights to privacy and guard against violations of Federal confidentiality requirements that are tied to the receipt of federal child abuse funds [see, *infra.*, section II. C.]. In addition, since psychiatric literature demonstrates that abused children will have increased psychiatric problems caused either by testifying in court before strangers and/or from public disclosure of embarrassing private facts, the bill should allocate substantial new funding for psychological services to assist these children with attempting to achieve emotional equipoise [see, *infra.*, section II.A]. Further, although the bill calls for a report on the results of the open court pilot project, it does not require any level of quality in those reports. Since abused children who testify or merely appear in court often do not physically manifest psychological symptoms for months after the court appearance, the bill should require a longitudinal study of parents and children who participate in the open pilot project, including any children whose cases are tried in public but who do not appear.<sup>2</sup> In addition, since attorneys, social workers, and judges lack the psychological training to intelligently assess the psychological impact of open proceedings, the bill should provide sufficient funding for child and adolescent psychiatrists to, at least in part, observe the proceedings and prepare the open court analysis and report.

I am providing the following short analysis of the status of open court proceedings in the United States as an overview and introduction of my articles that I am providing your committee:

## I. A Short History of Closed Dependency Hearings in the United States.

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by cutting \$1.6 million in funds for attorneys to represent foster children. In addition, in another open court jurisdiction, Michigan, the federal government threatened a \$2.5 million fine because of the deplorably poor funding by the state legislature for the state foster care system. (Megan O'Matz (2003 WL 55284579); Jack Kresnak, *Workers Charged in Foster Child's Beating Death*, Detroit Free Press, May 13, 2003).

<sup>2</sup> Abused children's trauma from public disclosure of or from testifying about their abuse may not fully manifest as post traumatic stress disorder for more than 18 months. This is called the "sleeper effect." See, Robert M. Reece, TREATMENT OF CHILD ABUSE: COMMON GROUND FOR MENTAL HEALTH, MEDICAL, AND LEGAL PRACTITIONERS 25 (John Hopkins Univ. Press 2000); Susan V. McLeer, et. al., *Psychiatric Disorders in Sexually Abused Children*, 33 J. Am. Acad. Child & Adolescent Psych. 313, 313-314 (1994); David Pelcovitz, et. al., *Posttraumatic Stress Disorder in Physically Abused Adolescents*, 33 J. Am. Acad. Child & Adolescent Psych. 305, 306 (1994); Dean G. Kilpatrick, et. al., U. S. Dept. of Justice, YOUTH VICTIMIZATION: PREVALENCE AND IMPLICATIONS 7 (2003); John N. Briere and Diana M. Elliot, *Immediate and Long-Term Impacts of Child Sexual Abuse*, 4 Sexual Abuse of Children 54, 63 (1994).

The modern trend in child dependency law is to keep child abuse dependency proceedings presumptively closed to the press and public in order to both protect abused children from being retraumatized by the system and to permit courts to maintain their ability to control and/or to hold in contempt of court those individuals or media sources that publish confidential identifying information regarding abused children.

A super-majority of states, approximately two-thirds, have presumptively closed dependency proceedings. Of those states with presumptively open systems, most were opened between 1875 and 1990 before pediatric psychiatric literature demonstrated the jurogenic effects of opening the proceedings on the psychopathology of abused children. Some of those open court states, such as Oregon, never even engaged in an analysis of the consequences of opening their dependency courts because their state constitutions required that all court proceedings be open to the press and public. In fact, the modern trend has been to either maintain closed courtrooms or to provide trial courts on a case-by-case basis discretion to open the proceedings if it will not harm the abused child's best interest. Based upon pediatric psychiatric evidence of serious potential harm to children, four states, California, Connecticut, Illinois and Kentucky have within the past few years rejected presumptively open dependency court proceedings.<sup>3</sup>

## II. **The Reasons That States Have Rejected Presumptively Open Dependency Courts.**

States have relied on **four reasons** for rejecting open dependency courts: (1) Child and Adolescent research clearly demonstrates that open proceedings exacerbate abused children's psychopathology; (2) presumptively open courts strip judges' power to control spectators from publishing embarrassing identifying information regarding the abused child and/or her family; (3) opening the courts is expensive because it substantially increases the case processing time and substantially increases the costs and time of support personnel to redact documents and testimony that violates federal and/or state confidentiality laws; and, (4) Empirical studies demonstrate that open proceedings do not increase system accountability and do not improve the quality of social worker, attorney, and/or judicial services.

### A. **The Psychopathological and Neurobiological Effects of Increasing Abused Children's Trauma in Open Hearings.**

Child and adolescent psychiatric evidence is undisputed that emotionally fragile abused children may be substantially retraumatized by having their private affairs aired in public. A recent poll of pediatric psychiatrists indicated that 97% believe that dependency proceedings should not be presumptively open to the press and public. The

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<sup>3</sup> Two separate open court bills were defeated in California, SB 1391 (1990) and AB 2627 (2004). Two previous open dependency court bills were defeated in Connecticut. For a history of Connecticut HR 555 (2004), see, William Wesley Patton, *The Connecticut Open-Court Movement: Reflection and Remonstrance*, Connecticut Public Interest Law Journal (2004), at 8-24. In 2008, the Kentucky legislature rejected a presumptively open dependency court bill, RS BR 1234, which would have created a new statute, KRS § 610 (2008).

general expert opinion of mental health experts is clearly summarized by one psychiatrist's testimony in the California legislature:

***The notion that publicizing this process [child dependency] will somehow benefit the child is hard to fathom. Publicity in the area of child maltreatment makes the child vulnerable to wide ranging humiliation, it leads to repetition of original trauma allowing the legal process to redress grievance, to become part of an extended pattern of psychological abuse.***<sup>4</sup>

Children are affected in two ways by open proceedings. **First**, children who testify in court in front of strangers suffer increased levels of stress both pre-trial [the anticipation of having to testify before strangers] and post-trial [the shame and embarrassment of having exposed themselves before strangers].<sup>5</sup> “[D]isclosing the abuse publicly in court could increase a child’s feelings of stigmatization....”<sup>6</sup> “Clinicians have long reported that victims of abuse or trauma are often haunted by feelings of shame”, and studies have found that such shame can predict in children risky behavior, drug use, and unsafe sexual practices.<sup>7</sup> Psychotherapists have determined that abused children who feel shame and guilt must develop trust with another adult and must have a sense of control<sup>8</sup> over their lives before they can successfully begin to examine their abuse. “There is a general acknowledgement in the literature that...a premature focus on exposure to the trauma may result in a worsening of symptoms” and that psychological treatment, to be successful, must be “a stage-based approach to

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<sup>4</sup> This pediatric Psychiatrist’s testimony appears at, *Dependency Proceedings: Open Court and Public Access: Hearing on A.B. 2627 Before the Senate Judiciary Committee, 2003-2004 Leg., Reg. Sess. 7 (Ca 2004)*.

<sup>5</sup> “Not surprisingly, the prospect of testifying in open court rather than via CCTV was associated with children experiencing greater pretrial anxiety.” Goodman, Tobey, Batterman-Faunce, et. al., *Face to Face Confrontation: Effects of Closed-Circuit Technology on Children’s Eyewitness Testimony and Jurors’ Decisions*, 22 *Law and Human Behavior* 165, 197-198 (1998). See, also, K. J. Saywitz & R. Nathanson, *Children’s Testimony And Their Perceptions of Stress In and Out of the Courtroom*, 17 *Child Abuse and Neglect* 613 (1993).

<sup>6</sup> Jessica Liebergott Hamblen and Murray Levine, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses*, 21 *Law & Psychology Rev.* 139 (1997).

<sup>7</sup> June Price Tangney, Jeff Stuewig, and Debra J. Mashek, *Moral Emotions and Moral Behavior*, 58 *Annual Review of Psychology* 345, 354, 357 (2007); George A. Bonano, et. al., *Context Matters: The Benefits and Costs of Expressing Positive Emotion Among Survivors of Childhood Sexual Abuse*, 7 *Emotion* 824, 826 (2007).

<sup>8</sup> Abused children experience a lack of control of their lives, and testifying before strangers in court increases their lack of control. “[E]xperiences of lack of control in the early environment lead to the perception of subsequent events as similarly uncontrollable, resulting in the development of anxiety problems.” Julie B. Kaplow and Cathy Spatz Widom, *Age Onset of Child Maltreatment Predicts Long-Term Mental Health Outcomes*, 116 *Journal of Abnormal Psychology* 176, 183-184 (2007).

treatment.”<sup>9</sup> Thus, forcing abused children to testify before strangers can increase those children’s mental health problems and make therapy more difficult and prolonged. **Second**, even if children do not actually testify or appear in court, the knowledge that their most intimate secrets will be disclosed to the general public and/or press, creates significant psychological stress upon the child. Even adults fear public exposure of abuse. In a poll by the National Women’s Study, 69% of adult rape victims feared public exposure and public reaction.<sup>10</sup> The manner in which the abuse is disclosed and the abused child’s perceptions of the reactions of family, peers and the community to the disclosure critically affect the child’s mental health. “[D]isclosure-related events may be even more strongly related to the long-term consequences of childhood sexual abuse than are the characteristics of the abuse itself.”<sup>11</sup>

Scientists are just beginning to understand how the stress of child abuse affects the neurobiological development of children and how the circumstances surrounding the treatment of abused children after that abuse have a lasting impact upon the physical health and mental and emotional capacity and competence of these children. “[E]arly maltreatment may have neurobiological consequences that last into adulthood and that increase the risk of psychopathology.”<sup>12</sup> Of particular importance to the public disclosure of the embarrassing facts of child abuse is the significant impact of such disclosure on children’s level of stress. The general public’s and their peer’s attitudes toward the abused child have a significant effect upon the child’s stress level and upon the child’s self-image: “[c]hildren’s stress responses are also sensitive to social experiences beyond the context of the family. Negotiating peer interactions in school settings is a potent challenge to the stress system, particularly at the stage in development when social skills are just emerging.”<sup>13</sup> In addition, the most important factor is the child’s perception of social responses to the abuse, not the reality of the response: “[s]ubjective perceptions to stigmatization may be as important as objective exposure to discrimination in predicting adverse health-relevant outcomes among the stigmatized.”<sup>14</sup> The “social environment” substantially affects abused children’s “stress hormones”, such as cortisol levels, which alter “typical pathways and organization of the young brain.”<sup>15</sup> Cortisol is a hormone secreted to increase a human’s survival skills; however, high cortisol levels can delay

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<sup>9</sup> Jacqueline N. Cohen, *Using Feminist, Emotion-Focused, And Developmental Approaches To Enhance Cognitive-Behavioral Therapies For Posttraumatic Stress Disorder Related To Childhood Sexual Abuse*, 45 *Psychotherapy Theory, Research, Practice, and Training* 227, 237 (2008).

<sup>10</sup> Deborah W. Denno, *Perspectives on Disclosing Rape Victim’s Names*, 61 *Fordham L. Rev.* 1113, 1125 (1993).

<sup>11</sup> Lynn Sorsoli and Maryam Kia-Keating, “*I Keep That Hush-Hush*”: *male Survivors of Sexual Abuse and the Challenges of Disclosure*, 55 *Journal of Counseling Psychology* 333, 334 (2008). “It is through the experience of being accepted even after sharing their most secret and shameful feelings and thoughts that these children come to accept themselves.” David A. Crenshaw and Kenneth V. Hardy, *The Crucial Role of Empathy in Breaking the Silence of Traumatized Children in Play Therapy*, 16 *International Journal of Play Therapy* 160, 164 (2007).

<sup>12</sup> Megan Gunnar and Karina Quevedo, *The Neurobiology of Stress and Development*, 58 *Annual Review of Psychology* 145, 159 (2007).

<sup>13</sup> *Id.*, at 163.

<sup>14</sup> Brenda Major and Laurie T. O’Brien, *The Social Psychology of Stigma*, 56 *Annual Review of Psychology* 393, 410 (2005).

<sup>15</sup> *Id.*, at 164.

and/or alter brain development and can increase physical disease.<sup>16</sup> Since abused children fear that disclosure of their abuse may result in peer rejection, even if that rejection does not transpire, they are subject to increased cortisol levels; “higher levels of cortisol levels in children for whom sociometric measures indicated peer rejection.”<sup>17</sup> Child abuse victims suffering from post traumatic stress disorder (PTSD) exhibit “elevated cortisol levels...”<sup>18</sup> The problem is that abused children suffer from the “cumulative effects” of the original stress caused by the abuse and any additional exposure to stress. Thus, abused children who know that they must testify in court before strangers and/or know that their abuse will be published to the general public will suffer stress in addition to that already caused by the initial abuse. That cumulative stress will cause neurobiological results that will affect their physical, emotional, and mental growth, competence, and capacity.

The only two empirical studies that supported a conclusion that open dependency proceedings do not harm abused children, the **NATIONAL CENTER FOR STATE COURTS MINNESOTA STUDY**<sup>19</sup> and the **ARIZONA OPEN COURT STUDY**<sup>20</sup> have proven to be so methodologically flawed that the National Council of Juvenile and Family Court Judges, the premier juvenile judges organization, has cautioned against reliance on the empirical data and warned that those results cannot be generalized to different state dependency statutory schemes.<sup>21</sup> In addition, in a California trial, after the authors of both the Minnesota and Arizona studies were examined, the court found that both empirical studies were seriously methodologically flawed, and the court refused to order the proceedings open to the press and public.<sup>22</sup> I am attaching as **ATTACHMENT #1** a portion of my recent article analyzing the San Mateo trial and the unreliability and methodological flaws of the Minnesota and Arizona studies. That article has been accepted for publication at 33 University of Alabama Law and Psychology Review (2009).

### **B. Presumptively Open Court Proceedings Abrogate Courts’ Ability to Protect the Child’s Confidentiality.**

A **second reason** that states have refused to promulgate presumptively open juvenile dependency bills is because they, in effect, abrogate the courts’ ability to control the dissemination of confidential and/or identifying information regarding the abused

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<sup>16</sup> Kipling D. Williams, *Ostracism*, 58 Annual Review of Psychology 425, 433 (2007).

<sup>17</sup> *Id.*, at 434.

<sup>18</sup> Megan Gunner, *supra.*, note 10, at 161.

<sup>19</sup> Fred L. Chessman, NATIONAL CENTER FOR STATE COURTS, KEY FINDINGS FROM THE EVALUATION OF OPEN HEARINGS AND COURT RECORDS IN JUVENILE PROTECTION MATTERS (Aug. 2001).

<sup>20</sup> Gregory B. Broberg, ARIZONA OPEN DEPENDENCY HEARING PILO STUDY: FINAL REPORT (March 5, 2006).

<sup>21</sup> Dionne Maxwell, Kim Taitano, and Julie A. Wise, *To Open Or Not Open: The Issue Of Public Access In Child Protection Hearings*, National Council of Juvenile and Family Court Judges, Permanency Planning For Children Department 13, June 2004.

<sup>22</sup> *In re San Mateo County Human Services Agency v. Private Defender Program, San Mateo County Bar Association*, San Mateo Superior Court, Dept. 5, March 3, 2005, Judge Marta S. Diaz (Reporter’s Transcripts reported by Janice Scott, CSR 10561).

child. The United States Supreme Court has held that the press and public lack a constitutional right to attend juvenile court proceedings.<sup>23</sup> Courts, thus, have the ability not only to prohibit the attendance by press and public, but courts can also issue contempt citations for those who illegally obtain confidential dependency court data. However, once a state makes its dependency court proceedings presumptively open and provides that right to the press and public, it can no longer punish or hold in contempt those who publish any data disclosed in that open dependency court proceedings.<sup>24</sup> Therefore, many states, like California, have promulgated bills that provide the court with discretion on a case by case basis to open the proceedings upon a finding that it will not harm the best interest of the abused child.<sup>25</sup> States, like California, have statutes that permit family members and/or foster parents to attend dependency hearings and strike a **cost/benefit balance** between protection of children’s privacy and mental health and access for those with specific interests implicated in the hearing.<sup>26</sup> Since a person or media does not have a constitutional right to enter the dependency proceeding, the court can have those individuals sign non-disclosure agreements, and if a person or the media publishes data in the hearing, the court then has actual cause not to permit that person or media source into future dependency court proceedings. In presumptively open dependency court systems the court loses much of its power to protect abused children from the publication of embarrassing data that will exacerbate the child’s already fragile psychopathology. I am attaching **ATTACHMENT # 2**, my article, *Revictimizing Child Abuse Victims: An Empirical Rebuttal To The Open Juvenile Dependency Court Reform Movement*, 38 Suffolk University Law Review 303-350 (2005) that has a substantial analysis of how open courts abrogate courts’ control over the confidential information adduced in dependency hearings.

### C. Opening Dependency Proceedings Is Very Expensive.

A **third reason** why jurisdictions do not presumptively open their proceedings is because it is **expensive**. For example, when New York opened its hearings, the Governor estimated that in 1996/1997 alone that it would cost \$5.6 million dollars to retrain employees and make necessary changes to the child protection and court systems. However, those 1997 budget costs did not include unexpected increased costs to court staff. For instance, the National Center for State Courts study of the Minnesota open court pilot project (Aug. 2001), found that: “[T]here has been a significant impact on the workload of administrative staff...” (NCFSC, at iii); “[t]here have been cases when a considerable amount of time has been used to ‘protect children’ from having sensitive information disclosed in a public forum.” (NCFSC, at 9). If courts are serious about protecting abused children from being retraumatized by the hearings, then a substantial

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<sup>23</sup> *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501, 510 (1984); *Globe Newspaper Co. V. Super. Ct.*, 457 U.S. 596, 607-09 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U. S. 555, 580-81 (1980).

<sup>24</sup> *Bartnicki v. Vopper*, 532 U.S. 514 (2001) [holding that the court cannot punish an individual or company that publishes information that it legally obtains].

<sup>25</sup> See, *California Welfare & Institutions Code* § 346.

<sup>26</sup> See, e.g., *California Welfare & Institutions Code*, §§ 291, 346. *California Rules of Court, Rule 5.530* permits attendance by “a parent, de facto parent, guardian, or **relative** of the child....” For De Facto parents’ rights to attend hearings, see (*In re Kieshia E.*, 23 Cal. Rptr. 2d 775 (1993); *In re Matthew P.*, 84 Cal. Rptr. 2d 269 (1999).

amount of time/expense is necessary to assure that the abused children are not needlessly harmed by the proceedings. Often, the press and public will have to be removed during the discussion of confidential information or testimony. In addition, since social workers' information and records that will be admitted in the proceedings will contain confidential data not to be released to the public, that agency and its lawyers will have to spend a considerable amount of extra time preparing for hearings. Further, those attorneys who represent parents and children will, as they have in other open court jurisdictions like Minnesota, file many motions to have the hearings closed based upon the best interest of the child. These hearings will increase the courts' calendars and often will require expert testimony by pediatric psychiatrists in order to determine the likely emotional impact on the abused child of having a public hearing. And finally, since it is certain that a percentage of these abused children will suffer more emotional trauma from having their lives publicly exposed, the system must allocate substantial additional money to help treat these abused children whose psychological conditions will be exacerbated by the process. Not to provide such funding would be in callous disregard for the state sanctioned re-abuse of these children. Therefore, the Connecticut Legislature should be prepared to add millions of dollars to the budget to cover added administrative staff costs, the costs of hundreds of hearings by parents' and children's counsel to close hearings to protect abused children, and the cost of providing substantial additional pediatric psychiatric services to abused children further traumatized by the publicity of the intimate details of their abuse.

**D. Open Proceedings Do Not Result In Better Systemic Accountability, And Do Not Improve the Quality of Social Worker, Attorney, or Judicial Services.**

A **fourth reason** for rejecting presumptively open proceedings is based upon empirical evidence that opening dependency proceedings has no effect on accountability, on improving the quality of social workers, attorneys, or judges, on the public's understanding of the system, or on the public's willingness to increase tax dollars to support a more efficient and effective child dependency system. For instance, the National Center on State Courts study of the Minnesota open court pilot project found that:

1. "[T]he evidence suggests that open hearings...have had virtually no effect on general public awareness of child protection issues", at 29;
2. "Most respondents [to the study] noted no change in the quality of child protection hearings since the implementation of open hearings...." at 96;
3. "[M]ost professionals did not feel that the professional accountability of judges, county attorneys, court administrators, public defenders, GAL's, or social workers had changed as a result of open hearings...." at 24.

One member of the Minnesota open court commission, Esther Wattenberg, expressed her frustration that not only did opening the courts not "bring a wave of child protection reform", but that "[t]here is not a shred of evidence to support" the assumption that

opening hearings leads to greater accountability or an increase in system quality.”<sup>27</sup> In my article in **Appendix II**, there is an extensive discussion demonstrating that the Minnesota and Arizona open court studies demonstrate that more accountability was not achieved in those systems.

Therefore, one must ask, if presumptively open courts do not better protect abused children, but rather place them at risk of exacerbating already existing psychopathology, if open proceedings cost a great deal of money in administrative and court time and in additionally needed pediatric psychiatric services, and if open courts do not increase system accountability and quality, why should one support presumptively open dependency court proceedings? The cost/benefit analysis clearly points to rejecting presumptively open hearings. However, that does not mean that there is not a legitimate reason for supporting a system that provides judges with discretion on a case by case basis to open those proceedings if it will not harm the best interest of the abused child. In addition, there are other alternatives, such as creating a joint media/public-member board that has access to the dependency system for observation and that has an obligation to publish white papers on suggested systemic improvements.<sup>28</sup>

I appreciate your consideration of my research, and I am here to assist your Legislature in any way that I can during its consideration of *Raised Bill No.6419*.



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<sup>27</sup> Esther Wattenberg, *Open Hearings Don’t Make Children Safer*, Star-Tribune (Minneapolis-St. Paul), Feb. 15, 1997, at 23A).

<sup>28</sup> See, e.g., William Wesley Patton, *Pandora’s Box: Opening Child Protection Cases To The Press and Public*, 27 Western State L. Rev. 181, 199-209 (1999-2000).