

# ***A T T A C H M E N T # 1***

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## ***D R A F T***

### *WHEN THE EMPIRICAL BASE CRUMBLES: THE MYTH THAT OPEN DEPENDENCY PROCEEDINGS DO NOT PSYCHOLOGICALLY DAMAGE ABUSED CHILDREN*

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James R. P. Ogloff, past president of the American Psychology-Law Society, has noted the unexpectedly minor impact that the law and psychology movement has had on the development of law.<sup>1</sup> One of the movement's great weaknesses has been its failure to "challenge false assumptions about law [which] inhibits efforts to bring about transformative change and makes the continued acceptance of injustice more likely."<sup>2</sup> Critics have noted that perhaps the greatest challenge for psychology and psychiatry in the quest to influence the law is to create a path of accessibility to "relevant knowledge and skills."<sup>3</sup> Ogloff argues that psychologists "must ensure that the psychological findings relevant to the law find their way into the hands of lawyers, and that the findings we produce are valid and of high quality."<sup>4</sup>

This paper considers two related issues. What happens when lawyers, legislators, and judges obtain psychological data but do not fully understand it and either misapply that psychological information or use that data in a manner that is not scientifically justified? Second, what should be the legislative or judicial response when the medical or psychiatric evidence relied upon is later proven to be so empirically flawed that it is unreliable?

In two previous articles I chronicled the vast pediatric psychiatric empirical evidence regarding the fragile psychological state of abused and/or neglected children and the evidence

that forcing abused children to testify before the press and strangers in open dependency court proceedings exacerbates their psychopathology and makes therapeutic assistance more difficult and time consuming.<sup>5</sup> Those articles also provided dozens of examples from several states of media stories regarding abused children that included identifying data, such as the child's name, address, relatives' names, and children's schools.<sup>6</sup> Pediatric psychiatric literature clearly states that such public exposure of child abuse victims could cause them incalculable additional emotional trauma.<sup>7</sup>

This article will, instead, analyze the psychological data relied upon by those in the open dependency court movement to justify opening those proceedings to the press and public and to support their finding that abused children will not be unreasonably harmed by the jurogenic effects nor by the resultant publicity inherent in public proceedings. Part one of this article analyzes the National Center for State Courts empirical study of the effects of the Minnesota open dependency courts upon abused children<sup>8</sup>, and it also discusses the latest open court empirical study, the Arizona State University study of the Arizona open court pilot program<sup>9</sup>. Although these open court empirical studies have provided the psychological and policy bases for legislators and judges to open child dependency proceedings to the press and public, the reliability of those findings have recently been severely impeached in *In re San Mateo County Human Services Agency v. Private Defender Program, San Mateo County Bar Association*.<sup>10</sup> Part two discusses a number of psychological myths about the effects on abused children of opening child abuse proceedings to the press and public.

## I.

### *New Evidence Regarding the Validity of the **Minnesota** and **Arizona** Studies of Open Dependency Court Pilot Projects*

The National Center for State Courts study of the Minnesota open court pilot project is the "Holy Grail" of empirical support for proponents on the efficacy and safety of open court proceedings.<sup>11</sup> It is difficult to read a contemporary article or speech on open court proposals that don't refer to that study.<sup>12</sup> However, starting in 2004, serious questions regarding that studies' methodology and results began to appear. For instance, the National Council of Juvenile and Family Court Judges issued a report that concluded that:

The NCSC report and its findings are now widely referenced by proponents for open hearings as supporting the view that open hearings do not produce the negative effects that have been argued for by opponents of the practice. However, as indicated by the concluding thoughts of the report itself, the recommendations made by the NCSC evaluators were much more cautious and neutral than later references to the report would suggest. In addition, a number of methodological and other design flaws have been identified in the study by other researchers in this area that may further limit the scope and applicability of these findings to other jurisdictions."<sup>13</sup>

In a previous article, I articulated many of the methodological flaws of the NCSC study that include: (1) a search for only "extraordinary" psychological harm caused by open court proceedings and publicity, instead of analyzing all psychological harm; (2) an inadequate study of media publicity regarding abused children; (3) no survey of those most aware of any effects of the open court system on abused children's psychopathology, including children, parents, and treating psychologists; (4) a failure to investigate post-adjudication trauma; and, (5) neither

pediatric psychiatrists nor pediatric psychiatric literature were consulted regarding the study's conclusions.<sup>14</sup>

In addition, substantial new evidence regarding the methodological weaknesses of the NCSC study and the Arizona State study<sup>15</sup> of open court dependency systems was recently developed in a hearing in the California Superior Court, San Mateo County, that seriously calls into question the credibility of those studies regarding the safety of open court proceedings and publicity on abused children.<sup>16</sup>

A. *Methodological Flaws in the Minnesota Study.*

Dr. Fred Chessman was called as one of San Mateo County Counsel's star witnesses in its motion to presumptively open dependency court proceedings to the press and public.<sup>17</sup> Dr. Chessman is a senior court researcher for the National Center for State Courts who designed and administered the Minnesota Open Court study.<sup>18</sup> He testified that the Minnesota research advisory committee forbade the researchers from interviewing the abused children and their parents who appeared in dependency court because such interviews might harm the children.<sup>19</sup>

Dr. Chessman explained:

The other thing to sort of keep in mind about this methodology is that we had an advisory committee in Minnesota, and they were very concerned with protecting children. And as a result, even though as a professional, I would have – it would have been interesting to have been able to figure out a way to talk to children and families, the advisory committee was really adamant that they really didn't even want to entertain the possibility of harming kids. So we didn't have the chance to talk to kids and

families.<sup>20</sup>

Dr. Chessman's testimony is remarkable. First, he indicates that interviewing abused children and their parents is methodologically important in determining whether children were psychologically harmed by the open proceedings or from the publicity generated by those hearings. Second, he indicated that the study's design was substantially altered by the advisory committee in a manner inconsistent with Dr. Chessman's expert opinion and intended model. He answered "Right" to the follow-up question: "So you indicated that you couldn't speak to the children because Minnesota basically asked you not to."<sup>21</sup> More to the point, the Minnesota Supreme Court's advisory committee concluded that expert researchers could not talk to the abused children in a private controlled environment because it might cause them psychological harm, but it was not too risky to permit children to appear in court before strangers and the press and testify regarding intimate details of their child abuse.<sup>22</sup>

Dr. Chessman further admitted that no psychologists or psychiatrists were consulted or questioned regarding whether the open court proceedings had harmed children.<sup>23</sup> In fact, he testified that rather than selecting the professionals to interview, the researchers relied upon the governmental agencies and court to determine who should be surveyed.<sup>24</sup> Dr. Chessman answered "[t]hat's fair to say, yeah" to the question, "[s]o the government people selected the list of people for you to survey with regard to this question of harm [to children]; is that correct?"<sup>25</sup> The research sample was thus biased since those with the most interest in seeing that the court proceedings would remain open were the ones who selected the sample from whom evidence of harm to children would be derived. Dr. Chessman further testified that the study did not analyze whether any of the children suffered posttraumatic stress disorder from the open hearings even

though he indicated that "[i]t's an interesting theory, that post traumatic stress syndrome might be related to open hearings. I think that's an interesting theory."<sup>26</sup>

Another problem with the Minnesota study is that Dr. Chessman indicated that the researchers only investigated "extraordinary harm", not normal or milder forms of psychological harm.<sup>27</sup> However, he admitted that nowhere in the study was the term "extraordinary harm" defined.<sup>28</sup> But equally troubling was that Dr. Chessman was unable to define the term "extraordinary harm" or to propound on why that level of harm was chosen for the study. The cross examination included the following colloquy:

Q: And why did you choose extraordinary harm instead of some harm, slight harm, moderate harm to children – or ordinary harm?

A: That is an interesting question, why that word was chosen. It was probably some serious amount of harm. So I think that's why I chose the word. And it was my choice to use that word, extraordinary. I think that's why I chose the word.

Q: What did you consider to be harm, or what does your study consider to be harm?

A: I guess a case where you're able to demonstrate embarrassment or psychological trauma.<sup>29</sup>

Since Dr. Chessman had great difficulty even defining the term "extraordinary harm" and since that term was not defined anywhere in the report, one cannot have any confidence in the answers of those who were interviewed concerning harm to children in the open court study. Each person questioned might have had a very different speculation regarding what constitutes "extraordinary harm". For instance, anyone with an assumption that abused children might be psychologically

traumatized by testifying in public might conclude that "extraordinary harm" is a term defining only the most drastic cases rather than all cases involving child trauma. Thus, the ambiguity of the term "extraordinary harm" may have led to severe underreporting of children's psychological trauma.

Dr. Chessman also testified regarding two independent forms of bias that may have affected the conclusion in the Minnesota report that open hearings did not harm abused children. First, he indicated that some judges who were surveyed did not want to close hearings by finding that children would be harmed because closing the hearings might affect the study: "I do know that I think that there was some reluctance on the part of judges to close the hearings because they didn't want to interfere with the experiment. We heard that in the interviews."<sup>30</sup> He further testified that judges were afraid of the ramifications if they closed hearings: "So judges decided, 'Well, I can't close a hearing because the Supreme Court or higher-ups will want me to keep it open?'"<sup>31</sup>

Another bias in the report's conclusion that children were not harmed was a devaluation of public defenders' comments. Even though several public defenders expressed concern about harm to abused children in the open court proceedings, the report stated:

The expression of such sentiments by the public defender is consistent with a client-oriented perspective. Because public defenders tend to assume this orientation, it is not surprising that they would express concern about the privacy of the individual, children, and families regardless of what benefits might accrue from the openness of the hearings.<sup>32</sup>

Dr. Chessman further agreed with the question: "So I believe you're saying because the public defenders are client oriented and they're only looking out for the best interests of their clients, they're not paying attention to the overall good that's being achieved from this new policy; is that correct?"<sup>33</sup> Dr. Chessman's bias against public defenders, one set of professionals in the best position to determine whether children exhibit symptoms of trauma, raises serious questions regarding the Minnesota report's conclusion that children suffered no harm in the open court project.

Finally, Dr. Chessman indicated that he, too, was not totally confident in the study. He testified that "I'm not claiming that this is the most full-proof study."<sup>34</sup> And he admitted that the study's methodology was flawed in determining the effects of the open court system on abused children because "there was no way, with our methodology, which we really could have taken into account some of these extraneous factors, like maturation. We just couldn't given the budget that we had to work with."<sup>35</sup>

It is no wonder that the National Council of Juvenile and Family Court Judges has cautioned against too much reliance on the Minnesota report because of its design flaws.<sup>36</sup> As was demonstrated, supra., the methodology was biased since it was, in part, designed by an advisory committee that would not permit the researchers to interview children and parents who would best know whether or not the children suffered trauma, was an incomplete study because no treating mental health professionals were interviewed, used a very vague and ill-defined standard for determining the level of harm to children, was subject to the bias and fear of judges in upsetting the experiment if they protected traumatized children by closing the hearings to the press and public, devalued the evidence presented by public defenders, and lacked the financial resources to sufficiently investigate whether trauma to children occurred, and if it did, the

attribution of that trauma. Therefore, legislators, judges, and researchers should rely on the Minnesota study with great caution.

*B. Methodological Flaws in the Arizona Report.*

I have previously commented upon the Arizona Open Court Pilot Project and discussed many of the weaknesses in that statutory scheme.<sup>37</sup> However, this additional analysis involves the subsequently published report on the Arizona experiment written by Greg Broberg, a graduate student at Arizona State University.<sup>38</sup> Broberg was called by the San Mateo County Counsel in the San Mateo hearing as a witness on the methodology and results of the Arizona Open Court Pilot Project Report.<sup>39</sup> Broberg attended all meetings regarding the Arizona study, formulated the methodology, implemented the research, and wrote the report.<sup>40</sup> The methodology for the Arizona report was based upon the Minnesota study discussed, *supra*.<sup>41</sup> The Arizona report, therefore, suffers most of the methodological flaws shared by the Minnesota report. For instance, no parents, children or mental health experts were consulted regarding any psychological trauma caused to abused children.<sup>42</sup> Instead, the researchers relied "upon the department's caseworker in order to do that [determine detriment to children]"<sup>43</sup> even though Broberg testified that the report did not take into consideration any potential caseworker bias.<sup>44</sup> He was asked whether that methodology gives him "pause for concern as to the reliability" of the findings that children were not harmed by open hearings, and he answered: "Many of these things can be pause for concern with regards to this project."<sup>45</sup> He explained that the Arizona study could not analyze the effects of the open dependency court system on abused children because "[w]e had no money for this, so this is what the department did in order to respond to it. It's the best that they could do."<sup>46</sup> The San Mateo County Superior Court judge asked Broberg

whether they studied the impact of the open hearings on the child and he again responded that "[w]ithin the time and the scope of this project – again, I'm sorry to use the unfunded mandate again, but the department did not have the resources to do that type of thing."<sup>47</sup>

Thus, reliance upon the Arizona study for any empirical evidence that children were not traumatized by testifying or from publicity about their child abuse is not warranted. That study not only suffered from the same methodological flaws as the Minnesota study, but since the Arizona Legislature provided an "unfunded mandate" for the report, the researchers lacked sufficient resources to reliably report on the open court system's impact on abused children.<sup>48</sup>

## II.

### *Debunking Open Dependency Court Myths*

Although a substantial body of pediatric psychiatric evidence supports the conclusion that abused children are at further psychological risk in open dependency court proceedings, evidence supporting a contrary conclusion is extremely sparse. Therefore, open court advocates have been forced to rely on analogies to other types of legal proceedings such as mental health, juvenile delinquency, status offenses, and adult proceedings to support their "no child harmed" position. However, most of those analogies are the equivalent of apples and oranges arguments in which the number of variables between court systems belies any methodological or analytical generalizations, applications, or reliability. The following discussion deconstructs some of these myths by tracing the genesis of the myths back to their primary sources and shows the evolution of the precepts from valid observations in one legal context to speculative and/or false applications in discussions of open dependency court proceedings.

A. *Myth Number One: “Open Dependency Proceedings Help Abused Children Psychologically Recover.”*

One of the nation’s staunchest open court proponents<sup>49</sup>, stated that “[o]pen **child protection proceedings may also assist the psychological recovery of the abused child.**” This statement, if true, provides some support for opening child dependency proceedings since children will be benefited by accelerating therapy and expediting emotional equipoise. However, deconstructing this claim from its primary sources demonstrates the precursor psychological studies provide no empirical basis for the conclusion that testifying in open court is therapeutically beneficial for most abused children.

1. *Source Number One: Sokol, 1998.*

The claim that testifying is beneficial for abused children is directly based upon a statement made by another open court proponent, Samuel Broderick Sokol, who stated that “[f]or some children, particularly older children, a formal public hearing might even aid **their psychological recovery.**”<sup>50</sup> However, as will be demonstrated, Sokol’s assertion is both speculative and conditional, and it is based upon a strained extrapolation from an earlier statement by Janet R. Fink.

2. *Source Number Two: 1987: Sokol on Fink.*

Samuel Broderick Sokol generalizes from the following statement by Janet R. Fink that: **[w]hile the adversary system’s purported psychological harms to children noted by the Supreme Court in *Parham v. J. R.* [442 U. S. 584, 611 (1979)] have yet to be demonstrated, its benefits are obvious, particularly for older children. Research has established that the more adversary the structure, the more the affected parties**

**have positive perceptions of the control they have exercised and the fairness of the result by virtue of their input into the decision made.”<sup>51</sup>**

It is obvious that there are several problems with the leap from Fink’s to Sokol’s conclusion regarding the psychological benefits to children testifying in open dependency court hearings. First, Fink’s statements do not even refer to abused children or to dependency court proceedings, but rather concern mental health commitment procedures. Second, Fink’s statement refers to studies of adults in adversary systems and she merely speculates that one would find the same results in the population of minors who are involved in mental health commitments. Sokol jumps from empirical evidence that adults find comfort in adversary proceedings, to Fink’s application to children in mental health commitments, and finally to abused children in dependency court. Thus, when deconstructed, there is simply no empirical link between the adult hearings and children testifying in dependency courts. But Sokol’s reliance on Fink is even weaker because Fink was discussing the lack of empirical evidence to support the Supreme Court’s statement in *Parham* that an adversary mental health hearing would cause a psychological rift between parents and children, not that adversary proceedings do not cause children trauma. Thus, reliance upon *Parham* to prove the safety of child abuse victims testifying in open court is misplaced.

3. *Source Number 3: 1983: Fink on Melton.*

But the genesis of the claim that testifying before strangers is therapeutic for abused children has a much longer lineage. Fink relied on the work of Gary B. Melton and his colleagues that mentioned that “[s]ome research has been done on people’s reactions to **having their interests decided through adversary versus nonadversary procedures.**”<sup>52</sup> But Fink’s reliance on Melton, et. al., is not only misplaced because those studies involve adults, not

abused children, but because Melton substantially qualifies the statement that the adversary system is sometimes more satisfying than alternative dispute resolution. He indicates that such studies have “many limitations and that research also demonstrates “the unsuitability of formal adjudication for resolving certain kinds of disputes....”<sup>53</sup> Melton neither discusses the different effects of adversarial litigation versus alternative dispute resolution regarding dependency proceedings nor the different psychological effects of public testimony on children rather than upon adults.

4. *Source Number 4: 1975: Melton on Thibaut and Walker.*

Melton relied on a general study by Thibaut and Walker on the attitudes of adults regarding their satisfaction with different resolution systems.<sup>54</sup> They found that adults were more satisfied with formal adversarial processes if they had interests at stake.<sup>55</sup> However, Melton indicates that one must not generalize too easily since, “[d]ifferent procedures have differential power to protect or undermine interests, produce more or less balanced fact distribution, and generate more or less subjective stress or well-being.”<sup>56</sup>

Melton also recognizes several methodological and empirical problems with generalizing Thibaut’s and Walker’s studies regarding adults to children involved in adversarial proceedings. First, their studies did not involve cases with “emotion-laden contexts.”<sup>57</sup> In other words, although adults might find more satisfaction than psychological trauma in litigating a commercial dispute, one cannot assume that the same reaction would occur, even for adults, in family court disputes. Second, Melton indicates that there is some evidence that children, unlike adults, may not find litigation more fulfilling than alternative dispute resolution and calls for more research on the Thibaut and Walker theory as applied to children.<sup>58</sup> Melton further acknowledges that because of “the massive status difference between a child and his or her

advocate”, the child, unlike an adult, might not perceive that the child has more power to direct the litigation than the power to direct alternative dispute resolution.<sup>59</sup> And when Melton speculates that children “might benefit from *more* adversary proceedings”, he is not talking about psychological benefit, nor is he discussing the potential psychological harm that children might suffer.<sup>60</sup> The “benefit” Melton describes concerns the more desirable outcome for the child in an adversary system that brings forth “complete information concerning the child’s best interests being available to the decision maker” versus an informal system in which much relevant data might not be disclosed to the fact finder.<sup>61</sup> Most importantly, Melton notes that this increased supply of information might come at the expense of the child’s emotional health.<sup>62</sup> Finally, none of the research cited in Thibaut and Walker or in Melton discusses the effects of a public adversarial process on abused children. Thus, neither Thibaut’s and Walker’s research, nor Melton’s ruminations on that research, support statements that adversary proceedings, much less public hearings, are psychologically beneficial to children.

##### 5. *Conclusion.*

By deconstructing the etiology of the assertion that open child dependency proceedings are therapeutic for abused children, one discovers that the claim has absolutely no empirical support. The evolution of the statement started in 1975 with Thiabaut’s and Walker’s general study on adults’ satisfaction with different modes of resolving disputes, to Melton’s 1983 discussion of informed consent, to Fink’s 1987 analysis of mental health commitment hearings, to Sokol’s 1998 discussion of open dependency proceedings, and finally to the 2000 conclusion that open proceedings are psychologically beneficial to children. None of those precursors studied abused children or child dependency proceedings. This faulty analytical thread is not based upon any empirical support that stripping the cloak of confidentiality from abused children

and forcing them to testify in public and/or being the subject of media reports is therapeutically beneficial. To the contrary, empirical data states that:

"[D]isclosing the abuse publically in court could increase a child's feelings of stigmatization by generating adverse opinions by friends, relatives, and possibly the media. In addition, the child's self-blame and guilt may increase as a result of any cross-examination...."<sup>63</sup>

Therefore, the statement that open dependency hearings are therapeutic for most abused children is merely a myth.

B. *Myth Number Two: Children Are Not Traumatized By Testifying Before Strangers.*

Another open court advocate, Sara Van Meter, asserts that “[t]here is, to date, **no empirical support for contentions that children are traumatized by the presence of an audience during their testimony.**”<sup>64</sup> If this statement is true, then one of the strongest arguments against opening dependency proceedings has no merit since the presence of the press and strangers will not deleteriously affect abused children. However, again, a study of the etiology of that statement demonstrates that it is nothing more than pure speculation, and that it is not based upon any current expert evidence.

The quotation, supra., cited by Van Meter’s for the proposition that testifying before strangers does not harm abused children is from a 22-year-old study by Debra Whitcomb.<sup>65</sup> However, Van Meter’s reliance on Whitcomb is even more troubling since she does not indicate that Whitcomb, herself, also states that “**some children will indeed be humiliated by public**

**exposure of their victimization..”<sup>66</sup>** Whitcomb thus admits that testifying before strangers in court may cause harm to some abused children and that protective measures, such as removing strangers, may be necessary to protect child witnesses.<sup>67</sup> In addition, Whitcomb notes that when children testify in confidential hearings where strangers are not admitted, children are less stressed by the experience: “[j]uvenile court proceedings also may be less traumatic to the child...[in part because of][c]losing of the courtroom....”<sup>68</sup> Whitcomb further states that some studies have found that an audience intimidates child victims.<sup>69</sup> Whitcomb, thus, provides Van Meter with little support for her proposition that testifying in court in front of strangers does not cause child victims additional psychological harm.

Whitcomb may well have been correct that in 1985, 19 years before Van Meter’s article, that no empirical studies proved that testifying before strangers traumatizes children. However, Van Meter did not discuss any of the more contemporary psychological research regarding trauma to child abuse victims. As early as 1988<sup>70</sup>, just three years after Whitcomb’s study, the United States Supreme Court in *Coy v. Iowa*<sup>71</sup> recognized that trauma to child victims testifying in open court before the child abuser might require prophylactic protections for the child even though the result might be to diminish the defendant’s right to confrontation. And the Court, again, just two years later in *Maryland v. Craig*<sup>72</sup> approved using one-way closed circuit television during the examination of child abuse victims as long as it was demonstrated that that particular child would suffer serious psychological damage from being examined in court in front of the alleged abuser.<sup>73</sup> It is further significant that in *Maryland v. Craig* the American Psychological Association filed an *amicus curiae* brief in support of providing abused children protection during their in-court testimony and supported that conclusion with several psychological studies.<sup>74</sup> But in addition to United States Supreme Court cases and the articles

cited in the APA *amicus curiae* brief, there is further evidence that abused children can suffer further trauma when testifying before strangers. In 1993 Saywitz and Nathanson conducted a study to determine whether children questioned in court before strangers would feel more or less stress than those children questioned outside of court.<sup>75</sup> Their research discovered that “[a]nswering questions in front of a lot of strange adults in court...” was much more stressful for the children than answering the same questions in a familiar environment without the presence of strangers.<sup>76</sup> Their study indicated that the source of children’s fear of testifying in court before strangers was a fear of “public scrutiny, embarrassment, personal inadequacies, and fear of an inability to cope with over-whelming emotions.”<sup>77</sup> These findings are critically important because the cause of the children’s fear of testifying in court, humiliation and shame, are two of the strongest determinates of the severity and duration of abused children’s posttraumatic stress disorder.<sup>78</sup> Although *Coy v. Iowa* and *Maryland v. Craig* were adult criminal cases, their logic and holdings have been applied by many states to provide similar protection for abused children testifying in child dependency proceedings.<sup>79</sup> It is quite clear, therefore, that Whitcomb’s 1985 statement regarding the paucity of empirical evidence that children are traumatized while testifying in court before strangers is no longer true. Van Meter's assertions, when read in the context of Whitcomb's full research and in light of subsequent psychological findings, provides no support for the myth that abused children do not suffer emotional stress while testifying before strangers.

C. *Myth # 3: The Press Will Protect Abused Children By Not Publishing Identifying or Embarrassing Information About Them.*

One open court advocate states that “publication of names is the single largest impediment to public hearings in abuse and neglect cases.”<sup>80</sup> But other prominent open court proponents have argued that the fear of publication is unwarranted because the “media protects the victims” and does not publish child abuse victims’ names or photographs.<sup>81</sup> The problem is that empirical evidence clearly demonstrates that the media do identify child abuse victims and that opening the courts will lead to more, rather than less, publicity of abused children. Media reports sometimes list abused children’s names, specific details regarding their abuse, their medical and psychological information, quotations from the abused child’s siblings, addresses, schools, teachers’ names, and photographs of the abused children.<sup>82</sup>

The media’s publication of identifying information regarding abused children is nothing new. During the media’s first foray into the juvenile dependency and delinquency courts in the nineteenth and early twentieth centuries, they “published stories about children, including their names, addresses, and in delinquency cases, their alleged offenses.”<sup>83</sup> This policy of publishing abused children’s identifying information continues in many contemporary media sources.<sup>84</sup> “There’s no universal media policy against identifying children as there is for victims of sexual assault. Some papers name them, some don’t. Some are inconsistent, naming sometimes, but not others.”<sup>85</sup> And the decision to publish identifying data is not dependent on the size or prominence of the media source: “Newspapers big and small, from Albuquerque to New York City, routinely publish children’s names and photographs.”<sup>86</sup> Some newspapers have promulgated policies favoring the publication of abused children’s identifying information for three different reasons. First, it is argued that omitting abused children’s names dehumanizes them.<sup>87</sup> Second, some consider stories without specific identifying information regarding the individuals involved to be less credible than articles that identify the victims.<sup>88</sup> And finally,

some argue that by protecting the identities of victims, media perpetuate the stigma of being a victim; publication will bring the victims' abuse into the open and the shame involved in being violated will be reduced.<sup>89</sup>

A number of problems are inherent in the three grounds justifying publication of abused children's identities. First, proponents of the dehumanization theory proffer no empirical evidence that shielding abused children from publicity harms them. In fact, the empirical evidence supports protecting child victims from media and public scrutiny. Mental health professionals have found that "child abuse victim[s] should be shielded from publicity...."<sup>90</sup>, that "fear of public scrutiny" is one of child abuse victims' greatest fears<sup>91</sup>, and "intense publicity surrounding the events which have brought a child into the juvenile court may psychologically harm the child, making it more difficult, if not impossible, for the child to recover from those events."<sup>92</sup> Second, although proponents provide no empirical support for their proposition that stories that list victims' names are more credible, such argument is only half of the equation. Since the press does not have a constitutional right to attend dependency court proceedings, the question is whether the increased credibility for the news report outweighs the public policy of shielding abused children from the psychological harm caused by publicity. Because proponents of the "credibility theory" have not produced any empirical data to support their proposition, it is unlikely that any court would open its doors and permit the publication of abused children's identities at this time. Third, the theory that abused children's identities should be published in order to strip the guilt of being a victim of sexual abuse is a harsh curative since it places the burden of reforming public attitude upon one of our most vulnerable populations, abused young children. "[W]hy must the victim, who has already suffered from the ordeal of rape, be forced to bear the responsibility of educating society and changing its prejudicial view toward rape and

its victims?’’<sup>93</sup> Public attitudes do not currently support publishing rape victims’ names. In fact, seventy-six percent of American women support legislation making it illegal to publish rape victims’ identities<sup>94</sup>. The reality is that publishing abused children's identities will not only psychologically harm the abused children, but it will also “seriously strain the [child’s] family” and reduce the chances of rehabilitation and reunification.<sup>95</sup>

Therefore, the belief that the media protects child abuse victims from publicity and the publication of identifying information is not only a myth, it is contrary to historical press coverage and is inconsistent with the express policies of several contemporary media sources. One commentator has even stated that a media source’s general decision not to publish children’s names<sup>96</sup>

may be swept aside by legally important or sufficiently sensational case[s]. Professional self-restraint, therefore, does not always succeed in protecting the child-witness – nor should the media be forced to carry the entire burden of protecting such witnesses, particularly when declining to broadcast runs counter to its pecuniary interests.

Thus, children’s privacy and psychological health cannot be left to the discretion of media editors, but rather must be protected by legislators and courts in limiting access to the press and public who might psychologically harm and humiliate these fragile children.

#### 4. *Myth # 4: Older Abused Children Are Not At Risk From Publicity.*

Most cases, statutes, and law review articles have focused on how to protect young children from the jurogenic effects of the legal system. In addition, most literature has focused on child sexual abuse victims rather than on those otherwise physically and/or emotionally abused, or those children who suffer several different forms of abuse.<sup>97</sup> This bias

toward young children has led to policy and legislative decisions that under-protect older abused children from the harsh effects of the adversary system and its attendant publicity.

An example of a "young child" bias is contained proposed *California Welfare & Institutions Code Section 346.1*.<sup>98</sup> That bill would provide that in child dependency proceedings that:

If a child under the age of 14 will be testifying at the hearing, the juvenile court shall exclude members of the public from that portion of the hearing unless a member of the public requests the right to be present and the court deems that member of the public to have a direct and legitimate interest in the particular case or the work of the court.<sup>99</sup>

No empirical evidence was supplied by the proponents of proposed §346.1 supporting the presumption that children under 14 years old should be treated differently than those child abuse victims older than 13.

The problem with the presumption that younger children are at greater risk of trauma from testifying is that the empirical evidence demonstrates that older children are equally or sometimes more at risk of psychological damage. For instance, one study found that older children experienced more stress than younger children while testifying in open court and also determined that stress of children twelve to sixteen years of age was more than four times greater than stress experienced by six and seven-year-old children.<sup>100</sup> In addition, another study that determined the psychopathology of abused children before testifying and any changes three months later found that the trauma suffered by young children who testified declined much more

significantly than the stress suffered by older children who testified (those between 12 and 16-years-old).<sup>101</sup> And among the total population of out-of-home placed children, "older youths in the foster care system have a disproportionately high rate of psychiatric disorders...."<sup>102</sup>

Therefore, legislators and judges should not rely upon the myth that only younger children may be psychologically harmed by being forced to testify before the press and public. We owe an equal duty to our older abused children to reduce their trauma when they are captured in the child abuse legal maelstrom. As Justice Blatz has so eloquently argued, "while we [judges] are not responsible for the harm that forces these children and their families into our courtrooms, we do have a responsibility to ensure that the system doesn't contribute to or exacerbate the problems."<sup>103</sup> That duty extends to older, as well as younger children.

5. *Myth # 5: Observing Child Abuse Victims' Open Court Testimony Can Determine The Frequency, Seriousness, and Duration of the Psychological Effects Of Testifying In Open Court And The Effects Of Any Publicity.*

Many of the studies and proponents of open court hearings conclude that abused children forced to testify in open court or whose stories are reported in the media suffered no psychological damage because the children did not manifest symptoms while testifying. For example, the National Center for State Courts study of the Minnesota open court pilot project determined that child abuse victims suffered no psychological harm based in large part on interviewees' anecdotes about dependency court hearings and reviews of case files.<sup>104</sup> The researchers in that study did not interview children, parents, or psychological service providers about post-hearing trauma suffered by those abused children.<sup>105</sup>

For several reasons, in order to determine whether open court proceedings harm abused children, risk assessment instruments must study much more than the abused child while she testifies. First, much of the psychological damage is long-term and none of the courtroom participants have an opportunity to observe the child's psychological path.<sup>106</sup> Since a high percentage of child abuse victims suffer posttraumatic stress disorder which often does not manifest for months or years after the traumatic event, longitudinal studies of children who testify are critically important to determine how testifying before strangers and/or the resultant publicity have increased their existing psychopathology or created new and different psychological problems.<sup>107</sup> Second, children often do not manifest psychological symptoms of stress for months, or even a year, after the traumatic event.<sup>108</sup> The result of one longitudinal study of abused children found that "children who were initially asymptomatic had more problems at an 18-month follow-up than did children who were initially highly symptomatic."<sup>109</sup> This delay in the physical manifestation of trauma symptoms of "children who appeared to have the fewest symptoms when initially evaluated" is termed the "sleeper effect".<sup>110</sup> Thus, studies that merely analyze children's behavior in court proceedings while they testify provide significantly insufficient evidence regarding the effects on the children's psychopathology. That is why it is critical for research on the effects of open court proceedings to examine longitudinal evidence of children's trauma by investigating in a confidential and protective manner the child's, parents', and treating mental health professionals' observations.

## CONCLUSION

I am not an apologist for the current quality of care, professional competence, accountability, or inadequate resources in most states' child dependency systems.<sup>111</sup> I, as much

as the next person, would like to find the magic potion to transform child abuse courts into dynamic, caring, creative, and competent mechanisms for determining abused children's best interests, for helping families deprived of the most basic resources find a way to safely stay together or to place children in loving, stable new family relationships if reunification is not possible. However, I am unwilling to experiment with our children's mental health by opening these proceedings to the press and public and by forcing abused children to suffer the humiliation and embarrassment of having their intimate secrets revealed without the empirical evidence to support the wisdom of that systemic sunshine.

As some child abuse experts have noted, "we are now in danger of uncritically embracing whatever is offered as a remedy, even though it is not at all clear that we should be comforted by the 'something' that is being done about this tragic phenomenon [child abuse]."<sup>112</sup> As Richard Gelles has argued, "we must provide services based on scientific information rather than conventional wisdoms and persuasive myths."<sup>113</sup> Merely reacting out of desperation by "simply doing something about child...abuse may have taken precedence over drawing on available knowledge to do something that ensures children's best interests are served by our actions."<sup>114</sup>

This article has attempted to illuminate several of the pervasive myths surrounding the safety and wisdom of opening our child dependency court to the press and public. I have demonstrated that there is no empirical support for the following myths that: (1) open hearings help abused children psychologically recover; (2) children are not traumatized by testifying about intimate details of their abuse in front of strangers; (3) the press protects abused children by not publishing identifying data; (4) older abused children are not at risk from publicity; and (5) merely observing children testify in court is a reliable and sufficient methodology for determining whether open proceedings traumatize them. In addition, this article demonstrated

the inherent biases, methodological flaws, and incomplete and misleading research and conclusions of the Minnesota and Arizona studies of open dependency court systems.

Hopefully, policy makers, judges, and legislators will now demand empirical evidence that abused and/or neglected children will not be psychologically harmed by open dependency proceedings and the publicity generated from those hearings before admitting the press and public into child dependency proceedings. As I have detailed in this and earlier articles, there is significant pediatric psychiatric evidence that open dependency proceedings are not benign, but rather that they retraumatize abused children, make therapeutic recovery more difficult and more time consuming, and exacerbate psychological problems that will last these unfortunate children a lifetime.

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#### ENDNOTES

\* Professor, J. Allan Cook and Mary Schalling Cook Children's Law Scholar, and Associate Dean for Clinical Programs, Whittier Law School.

<sup>1</sup> James R. P. Ogloff, *Two Steps Forward and One Step Back: The Law and Psychology Movement(s) in the 20<sup>th</sup> Century*, 24 *Law and Human Behavior* 457, 464 (2000).

<sup>2</sup> *Id.*, at 464-465 (quoting D. R. Fox, *Psycholegal scholarship's Contribution to False Consciousness About Justice*, 23 *Law and Human Behavior* 9, 11-12 (1999)).

<sup>3</sup> S. Shah, *Dangerousness: A Paradigm for Exploring Some Issues in Law and Psychology*, 33 *American Psychologist* 224, 236 (1978).

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<sup>4</sup> Ogloff, Id., note 1, at 478.

<sup>5</sup> William Wesley Patton, *Revictimizing Child Abuse Victims: An Empirical Rebuttal To The Open Juvenile Dependency Court Reform Movement*, 38 Suffolk Univ. L. Rev.303, 310-320 (2005); *The Connecticut Open-Court Movement: Reflection and Remonstrations*, Conn. Pub. Int. L. J. 8, 18-19 (Fall 2004; online journal).

<sup>6</sup> *Revictimizing, supra., note 1*, at 320-329; *Connecticut, supra., note 1*, at 19-22. I reported on one of the most heinous media exploitations of a child abuse victim in American history in one of the country's most zealous open court advocate's own newspaper in which during a 28 day period 23 articles written by more than 12 different reporters identified the child abuse victim by name and/or photograph. In addition, the newspaper published a photograph of the alleged sex abuser in front of his wall of sado-masochistic sex tools in what the reporter described as the "slave master['s]" "dungeon". *Connecticut, supra., note 1*, at 21-22.

<sup>7</sup> *Revictimizing, supra., note 1*, at 313-319; *Connecticut, supra., note 1*, at 19. Child abuse victims have "rates of PTSD [post traumatic stress disorder] of greater than 30%" and "children in foster care are some 16 time more likely to have psychiatric diagnosis, eight times more likely to be taking psychotropic medications and utilize psychiatric services at a rate of eight times greater compared with children from similar socio-economic backgrounds and living with their parents." Robert Racusin, Arthur C. Maerlander, Jr., et al., *Psychological Treatment of Children In Foster Care: A Review*, 41 Community Mental Health J. 199, 202-203 (2005).

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<sup>8</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>9</sup> Gregory B. Broberg, ARIZONA OPEN DEPENDENCY HEARING PILOT STUDY: FINAL REPORT (March 5, 2006).

<sup>10</sup> San Mateo Superior Court, Dept. 5, March 3, 2005, Judge Marta S. Diaz.

<sup>11</sup> NCSC, *supra.*, note 5.

<sup>12</sup> See, Barbara White Stack, *The Dangers of Identifying Children*, 90 *The Quill*, Issue 7, Sept. 1, 2002 (2002 WL 1705034; no page references available); Barbara White Stack, *Edited Transcript of Comments*, Univ. of Conn. Pub. Int. L. J. 24, 25 (Fall 2004) (online journal); Blatz, *Transcript of Remarks*, *supra.*, note 39, at 29; Van Meter, *supra.*, note 22, at 879; Christina D. Ghio, Staff Attorney, Child Abuse Project, Center for Children's Advocacy, Univ. of Connecticut School of Law, *Testimony Of The Center For Children's Advocacy In Support Of Raised Bill No. 555: An Act Concerning Juvenile Courts*, March 5, 2004, at 3 (copy at Whittier Law School law library); 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>13</sup> Maxwell, et. al., *supra.*, note 70, at 13.

<sup>14</sup> Patton, *Revictimizing...*, *supra.*, note 1, at 309-313.

<sup>15</sup> *Supra.*, notes 5 and 6.

<sup>16</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. I filed an *amicus curiae* brief and testified as an expert witness in that hearing. See

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Reporter's Transcript [hereinafter, RT], transcribed by court reporter Janice Scott, CSR 10561, v. 2, March 4, 2005, at 233-310.

<sup>17</sup> RT, supra., note 73, at 11.

<sup>18</sup> Id., at 11-13.

<sup>19</sup> Id., at 16.

<sup>20</sup> Id., at 16.

<sup>21</sup> Id., at 17.

<sup>22</sup> Dr. Chessman further testified that "[b]ut I think the overall concern was on the part of the advisory committee that we do nothing that would cause harm or embarrassment to the parents or the children." Id., at 48.

<sup>23</sup> Id., at 32. Dr. Chessman testified no therapists were questioned. Id., at 44.

<sup>24</sup> Id., at 44.

<sup>25</sup> Id., at 44.

<sup>26</sup> Id., at 34.

<sup>27</sup> Id., at 45.

<sup>28</sup> Id., at 45.

<sup>29</sup> Id., at 46-47.

<sup>30</sup> Id., at 54.

<sup>31</sup> Id. County Counsel's motion to strike this statement was granted. However, even though the statement was not admitted at the hearing, it still describes Dr. Chessman's assessment of the empirical evidence used to reach the conclusion that children were not harmed.

<sup>32</sup> Id., at 74.

<sup>33</sup> Id.

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<sup>34</sup> Id., at 92.

<sup>35</sup> Id. at 95.

<sup>36</sup> Supra., note 70.

<sup>37</sup> *Revictimizing*, supra., note 1, at 340-347.

<sup>38</sup> Supra., note 6.

<sup>39</sup> RT, supra., note 73, at 145.

<sup>40</sup> Id., at 146-149.

<sup>41</sup> Id., at 151.

<sup>42</sup> Id., at 158, 170.

<sup>43</sup> Id. at 170.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id., at 171.

<sup>47</sup> Id., at 178-179. Broberg further answered the court, "So your question [whether we studied adverse effects on children] is very valid. It should be studied. they don't have the resources to study it. Nor do we." Id., at 180.

<sup>48</sup> Id., 103-104.

<sup>49</sup> Heidi S. Schellhas is a judge in Minnesota. Heidi S. Schellhas, *Open Child Protection Proceedings In Minnesota*, 26 Wm Mitchell L. Rev. 631, 631, fn. 1 (2000).

<sup>50</sup> Judge Schellhas refers to the Samuel Broderick Sokol quotation in *Open...*, supra., note 7, at 666-667. See, Samuel Broderick Sokol, *Trying Dependency Cases In Public: A First Amendment Inquiry*, 45 UCLA L. Rev. 881, 924 (1998).

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<sup>51</sup> See Sokol, *supra.*, note 8, at 924, fn. 281 wherein he relies on Janet R. Fink, *Determining the Future Child: Actors on the Juvenile Court Stage* 270, at 275, in 2 *From Children to Citizens* (Francis X. Hartmann, ed. 1987).

<sup>52</sup> Fink, *supra.*, note 9, at 301, note 28; Gary B. Melton, Gerald P. Koocher, and Michael J. Saks, *CHILDREN'S COMPETENCE TO CONSENT* 48 (Plenum Press 1983).

<sup>53</sup> Melton, et. al, *supra.*, note 10, at 48.

<sup>54</sup> Melton, *supra.*, note 10, at 48, 53, citing to J. Thibaut and L. Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, N.J.: Erlbaum, 1975).

<sup>55</sup> Melton, *supra.*, note 10, at 48.

<sup>56</sup> *Id.*

<sup>57</sup> *LEGAL REFORMS AFFECTING CHILD & YOUTH SERVICES* 68-69, Gary B. Melton, ed., 5 *Child & Youth Services*, Nos. 1 & 2 (Haworth Press, 1982)

<sup>58</sup> *Id.*, at 70-71.

<sup>59</sup> *Id.*, at 70.

<sup>60</sup> *Id.*, at 75.

<sup>61</sup> *Id.*, at 75.

<sup>62</sup> “On the other hand, the stress of making what may seem to be an impossible decision may increase as children become more cognizant of the gravity of the proceeding and of being the object of a battle in which there is necessarily a winner and a loser.”

<sup>63</sup> Jessica Liebergott Hamblen and Murray Levine, *The Legal Implications and Emotional Consequences of Sexually Abused Children Testifying as Victim-Witnesses*, 21 *Law & Psych. Rev.* 139, 158 (1997). Another major problem is that there are insufficient pediatric psychiatric state services to help abused children whose psychopathology is worsened by the trauma and

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publicity of testifying in open dependency proceedings. Bonnie T. Zima, et.al., *Quality of Public-Funded Outpatient Specialty Mixed Health Care for Common Childhood Psychiatric Disorders In California*, 44 J. Am. Aca. Child Adolesc. Psychiatry 130, 131 (2005). Further, abused children's defense mechanisms are weakened and they are at a greater risk of being re-abused by external factors. Peter M. Thomas, *Dissociating and Internal Models of Protection: Psychotherapy With Child Abuse Survivors*, 42 Psychotherapy: Theory, Research, Practice & Training 20, 201-22 (2005).

<sup>64</sup> Susan Van Meter, *Public Access To Juvenile Dependency Proceedings In Washington State: An Important Piece Of The Permanency Puzzle*, 27 Seattle U. L. Rev. 859, 888-889 (2004).

<sup>65</sup> Debra Whitcomb, et. al, *When the Victim Is a Child: Issues for Judges and Prosecutors* 46 (U. S. Dept. of Justice 1985).

<sup>66</sup> Whitcomb, supra., note 16, at 46.

<sup>67</sup> "Mental health professionals have found that legal proceedings can have a profoundly disturbing effect on the mental and emotional health of the child victim. Stigma, embarrassment and trauma to the child, sometimes with lifelong ramifications, are increased by involvement in the current judicial system." Mary Avery, *The Child Abuse Witness: Potential For Secondary Victimization*, 7 Crim. Just. J. 1, 3 (1983).

<sup>68</sup> Id., at 17.

<sup>69</sup> Id., at 18. It is not surprising that strangers in the courtroom will cause abused children additional trauma since research has demonstrated that the second most significant determinant of psychopathology among abused children is the abused child's sense of a loss of control of their lives and a sense of powerlessness. Victoria L. Banyard and Linda M. Williams,

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*Characteristics of Child Sexual Abuse as Correlates of Women's Adjustment: A Prospective Study*, 58 J. of Marriage and Family 853, 862 (November 1996).

<sup>70</sup> Even earlier, in “1977, the federal government formally recognized the special concerns of the child witness by funding two programs devoted specifically to children as victim/witnesses: The Sexual Assault Center at Harborview Medical Center in Seattle, Washington, and the Children’s National Hospital and Medical Center in Washington, D.C. The goal of the programs at these institutions was to develop social, medical, and legal responses to child victims which recognized and accommodated the children’s special needs and encouraged their successful participation in the criminal justice process.” Lucy Berliner, *The Child Witness: The Progress And Emerging Limitations*, 40 U. Miami L. Rev. 167 168-169 (1985).

<sup>71</sup> *Coy v. Iowa*, 487 U.S. 1012, 1015-1016 (1988).

<sup>72</sup> *Maryland v. Craig*, 497 U. S. 836 (1990).

<sup>73</sup> *Id.*, at 855-857.

<sup>74</sup> Amicus Curiae brief of the American Psychological Association in *Maryland v. Craig*, 1990 WL 10013093 [no internal pagination] at 11.

<sup>75</sup> Karen J. Saywitz and Rebecca Nathanson, *Children’s Testimony And Their Perceptions Of Stress In and Out Of the Courtroom*, 17 Child Abuse & Neglect 613 (1993).

<sup>76</sup> *Id.*, at 617. Another study conducted in South Africa also found that testifying in a courtroom caused children to feel “nervous, embarrassed, or scared” and “[m]any instances were observed in the courtroom where the children showed signs of nervousness, for instance, twisting hair, trying to leave the witness stand or courtroom before they were finished, shaking, and in once [sic] instance, the child even started crying.” Karen Muller, *An Inquisitorial Approach to the Evidence of Children*, 4 Crime Research in South Africa 1, at 1 (October 2001).

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<sup>77</sup> Id., at 620.

<sup>78</sup> See, Malgorzata Ligenzinska, et. al, *Children's Emotional and Behavioral Reactions Following the Disclosure of Extrafamilial Sexual Abuse: Initial Effects*, 20 *Child Abuse & Neglect* 111, 121 (1996); Finkelhor & A. Browne, *The Traumatic Impact of Child Sexual Abuse, a Conceptualization*, 55 *Am J. Orthopsychiatry* 530, 532-33 (1985); McLeer, et. al., *Psychiatric Disorders in Sexually Abused Children*, 33 *J. Am. Acad. Child & Adolescent Psychiatry* 313, 313-314 (1994); Clarice J. Kestenbaum, *Childhood Trauma Revisited: Interruption of Development*, 20 *Adolescent Psychiatry* 125, 135 (1995); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 *Psychol. Pub. Pol. & L.* 645, 665 (1997) Even adults fear public disclosure. In a poll by the National Women's Study, 69% of adult rape victims feared the public's reaction to the disclosure of their abuse. Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 *Fordham L. Rev.* 1113, 1125 (1993).

<sup>79</sup> See, *In re Adoption of Don*, 755 N. E. 2d 721, 723 (Mass. 2001); *In the Matter of Katherine S.*, 705 N.Y.S. 2d 670 (2000). *California Welfare & Institutions Code §350 (b)* provides: "The testimony of a minor may be taken in chambers and outside the presence of the minor's parent or parents...[if] and of the following circumstances exist: (1) The court determines that testimony in chambers is necessary to ensure truthful testimony. (2) The minor is likely to be intimidated by a formal courtroom setting. (3) The minor is afraid to testify in front of his or her parent or parents."

<sup>80</sup> Barbara White Stack, *The Dangers of Identifying Children*, 90 *The Quill*, Issue 7 (September 1, 2002), 2002 WLNR 9121497, at 4 [2002 WL 17050384].

<sup>81</sup> Honorable Kathleen Blatz, *Transcript of Remarks*, November 17, 2004, University of Connecticut Symposium, *Public Access to Juvenile Court Proceedings*, *Conn. Pub. Int. L. J.* 25,

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32-34 (Fall 2004). See also, Judge Gerald W. Hardcastle, *The Case for Open Hearings*, Exhibit D, Legislative Committee on Children, Youth & Families, June 28, 2002, at 5-7, regarding the Nevada open court bill, AB 132; *Proposal Would Open Child Abuse Hearings in Nevada*, Associated Press, March 3, 2003 ([www.rgj.com/news/stories/html/2003/03/35838.php?sp1=rgj&sp2=News&sp3](http://www.rgj.com/news/stories/html/2003/03/35838.php?sp1=rgj&sp2=News&sp3)).

<sup>82</sup> For detailed examples of media reports on abused children, see, William Wesley Patton, *Revictimizing...*, *supra.*, note 1, at 323-329. The minority report to the National Center for State Courts study of the Minnesota open court pilot project found that “a review of several of these [Michigan] news articles revealed that in some cases children’s real names were used, as well as their photographs, when describing cases of foster care abuse, termination of parental rights and child protection matters.” Mary Jo Brooks Hunter, *Minnesota Supreme Court Foster care and Adoption Task Force*, 19 Hamline J. Pub. L. & Pol’y 166, 230 (1997). For more recent examples of the identification of child abuse victims, see, e.g., Joyesha Chesnick, *Shift in Policy Aims at Keeping Children Out of Foster Homes*, Arizona Daily Star, July 25, 2005 [lists child’s name, his medical condition, and fact that police took him and his sibling into custody]; Rhonda Bodfield Bloom, *Moms Behind Bars, Their Children Focus Efforts to Nurture Health Ties*, Arizona Daily Star, October 22, 2005 [child’s name, and description of the child crying when taken from mother and placed in foster care]; Emily Tsao and Sarah Hunsberger, *Failings Found In Foster Child’s Case*, The Oregonian, Feb. 19, 2005 (2005 WL 58224163) [child’s name and medical condition].

<sup>83</sup> David S. Tanenhaus, *Before the Doors Closed: A Historical Perspective on Public Access*, Conn. Pub. Int. L. J. 1, 4 (Fall 2004); David S. Tanenhaus, *JUVENILE JUSTICE IN THE MAKING* 49-53 (Oxford Univ. Press 2004).

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<sup>84</sup> In one case the *Post Gazette* newspaper won a hearing to open an otherwise confidential custody hearing and then published the name of the fourteen-year-old child involved in that hearing. William Shane Stein, *Open Minds – and Courts; Out West, Officials rethink Closed Custody Hearings*, Pittsburgh Post-Gazette, July 31, 2002, at A10. And in a New York case the court permitted a reporter to attend a hearing, but ordered the reporter not to publish the story for at least twenty-two hours after the hearing. The reporter, however, violated the court order and published the report the next morning. See, *In re “S” Children*, 532 N.Y.S. 2d 192, 193-196 (N.Y. Fam. Ct. 1988).

<sup>85</sup> *The Dangers of Identifying*, supra., note 38, at \* 3.

<sup>86</sup> Id. By 1999 many media changed their policies regarding identifying children involved in juvenile court. “News organizations have begun to alter long-standing policies against printing the names and photographs of juvenile offenders” “because of a widely shared ethic that children deserved to be shielded. Recently, that consensus has broken down.” Emily Bazelon, *Public Access To Juvenile and Family Court: Should The Courtroom Doors Be Open Or Closed?*, 18 Yale L. & Pol’y Rev. 155, 156, 173 (1999).

<sup>87</sup> *The Dangers of Identifying...*, supra., note 38, at \* 1-3.

<sup>88</sup> “[I]n Albuquerque, N. M., Tribune reporter Susie Gran said her editors insist on true identities. They believe a papers [sic] credibility is threatened by deliberately withholding such information and enhance when it uses real names, ages and hometowns.” Id., at note 38, at 5.

<sup>89</sup> Deborah W. Denno, *Perspectives On Disclosing Rape Victims’ Names*, 61 Fordham L. Rev. 1113, 1114, fn. 5, 1124-1125 (1993).

<sup>90</sup> *The Child Abuse Witness*, supra., note 25, at 2-3.

<sup>91</sup> *Children’s Testimony*, supra., note 33, at 620.

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<sup>92</sup> *In re T.R.*, 556 N. E. 2d 439, 451 (Ohio 1990).

<sup>93</sup> *Perspectives On Disclosing...*, *supra.*, note 47 , at 1124-1125.

<sup>94</sup> *Id.*, at 1130.

<sup>95</sup> Kara E. Nelson, *The Release Of Juvenile Records Under Wisconsin's Juvenile Justice Code: A New System of False Promises*, 81 Marq. L. Rev. 1101, 1152-53 (1998).

<sup>96</sup> Kate Aschenbrenner Pate, *Restricting Electronic Media Coverage of Child-Witnesses: A Proposed Rule*, 1993 U. Chi. Leg. F. 347, 357-358 (1993).

<sup>97</sup> In reality, children who suffer any type of child abuse have an increased chance of "feelings of distrust of others, disconnection, and isolation in adulthood." Marlene Cloitre, K. Chase Stovall-McClough, and Regina Miranda, *Therapeutic Alliance, Negative Mood Regulation, and Treatment Outcome in Child Abuse-Related Posttraumatic Stress Disorder*, 72 J. of Consulting and Clinical Psychology 411, 411 (2004); Robert Racusin, Arthur C. Maerlender, Jr., Anjana Sengupta, Peter K. Isquith, and Martha B. Straus, *Psychosocial Treatment of Children in Foster Care: A Review*, 41 Community Mental Health J. 199, 202, 204 (2005). In addition, "[s]tudies using clinical samples suggest that there may be a high rate of co-occurrence among sexual abuse, physical abuse, witnessing of violence, and other trauma...children who have been both physically and sexually abused appear to be at additionally increased risk for subsequent victimization than children who have experienced sexual abuse but not further physical abuse." Mark Chaffin and Rochelle F. Hanson, *Treatment of Multiply Traumatized Abused Children*, 271-288, at 272-273 in David Findelhor, *SEXUALLY VICTIMIZED CHILDREN* (The Free Press 1979). For differences in psychopathology between physically and emotionally abused children, see, Seth D. Pollak, Dante Cicchetti, Katherine Hornung, and Alex Reed, *Recognizing Emotion in Faces: Developmental Effects of Child Abuse and Neglect*, 36 Developmental

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Psychology 679, 684-685 (2000). "[T]he most consistent and robust predictor of past year psychiatric disorder was the number of types of maltreatment reported, suggesting that the effects of maltreatment on disorder may be additive." J. Curtis McMillen, *Prevalence of Psychiatric Disorders Among Older Youths in the Foster Care System*, 44 *Journal of the American Academy of Child and Adolescent Psychiatry* 88, 93 (2005).

<sup>98</sup> Proposed *Welfare & Institutions Code § 346.1* was a substantially amended version of a previous California open dependency court bill that was not passed, *AB 2627*. Legislative Counsel of California, *Official California Legislative Information*, at [http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_2601-2650/ab\\_2627\\_bill\\_20040220](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2601-2650/ab_2627_bill_20040220) .

Proposed *Welfare & Institutions Code § 346.1* was drafted by the San Mateo County, California County Counsel's office; however, it was never voted upon by the California Legislature. Letter from Michael P. Murphy, Chief Deputy, San Mateo County Counsel to Gerry Hillier, San Mateo Private Defender Program, April 6, 2005. A copy of proposed *§ 346.1* is on file in the Whittier Law School Library.

<sup>99</sup> Proposed *§ 346.1 (a)(2)*, *supra.*, note 56.

<sup>100</sup> Debra Whitcomb, et. al., *THE CHILD VICTIM AS WITNESS RESEARCH REPORT* 124 (Office of Juvenile Justice, 1994). The psychological fragility of abused children does not magically disappear within a few years after the abuse or even when they age out of the juvenile dependency system. See, e.g., Mary Avery, *The Child Abuse Witness: Potential For Secondary Victimization*, 7 *Crim. Just. J.* 1, 3 (1983); John N. Briere and Diana M. Elliot, *Immediate and Long-Term Impacts of Child Sexual Abuse*, 4 *Sexual Abuse of Children* 54, 63 (1994); Pamela C. Alexander, *The Differential Effects of Abuse Characteristics and Attachment in the Prediction of Long-Term Effects of Sexual Abuse*, 8 *J. Interpersonal Violence* 346, 359 (1993); Steven J.

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Collings, *The Long-Term Effects of Context and Noncontact Forms of Child Sexual Abuse in a Sample of University Men*, 19 *Child Abuse & Neglect* 1, 5 (1995).

<sup>101</sup> Gail S. Goodman, et. al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 *MONOGRAPHS OF THE SOC'Y FOR RESEARCH IN CHILD DEV.* 13-15, 44-47 (1992).

<sup>102</sup> J. Curtis McMillen, et. al., *Prevalence of Psychiatric Disorders Among Older Youths in the Foster Care System*, *J. of the Am. Acad. of Child and Adolescent Psych.* 88, 92 (2005).

<sup>103</sup> *Transcript of Remarks, supra.*, note 39, at 30.

<sup>104</sup> NCSC, *supra.*, note 5, at 2. The NCSC study was based upon site visits, interviews, focus groups, surveys, information logs, court records, and newspaper articles. *Id.* But the purpose of these various reviews did **not** include the purpose of analyzing stress on the child abuse victims. For instance, the "face-to-face interviews" sought to "solicit information about the relationship of open hearings to specific start-up processes, implementation strategies, local court operations and policies, case management, file management, docketing, and calendaring." *Id.*, at 3. The purpose of the "focus groups" was to "produce information regarding operational shifts, if any, on collateral agencies and solicit stakeholder perceptions on the frequency of closed hearings and records and on the open hearings process generally." *Id.*, at 4. The observations of dependency court hearings was to "generate experiential information regarding court hearings such as how cases are called for hearing, judicial style and notice of open hearings to participants, docket postings, participants in process, court spectators, courtroom and waiting area layout, and availability of private conference rooms." *Id.*, at 4. The purpose of case file review was to "test the feasibility of the proposed court file data collection instrument and to interact and assess the particulars of file management and file setup." *Id.* It is amazing that nowhere in the description

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of the NSCS study methodology does it indicate that one purpose was to specifically test how open court proceedings affected abused children. Instead, the study merely provided interviewees an opportunity to volunteer any information that they found to be a positive or negative result of open hearings. *Id.*, at 5. None of the data relied upon by the NCSC study to conclude that abused children were not harmed by open hearings studied the children's psychopathology **after** the hearings.

<sup>105</sup> None of the questions in the two-volume NCSC study even specifically asked judges, court personnel, attorneys or GAL's whether they had witnessed trauma to children during their testimony.

<sup>106</sup> See, Susan V. McLeer, et. al., *Psychiatric Disorders in Sexually Abused Children*, 33 *J. Am. Acad. Child & Adolescent Psych.* 313, 313-314 (1994).

<sup>107</sup> 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. Dep't of Justice, *YOUTH VICTIMIZATION: PREVALENCE AND IMPLICATIONS* 7 (2003).

<sup>108</sup> McLeer, *supra.*, note 64, at 314.

<sup>109</sup> John N. Briere and Diana M. Elliot, *Immediate and Long-Term Impacts of Child Sexual Abuse*, 4 *Sexual Abuse of Children* 54, 63 (1994).

<sup>110</sup> Robert M. Reece, *TREATMENT OF CHILD ABUSE: COMMON GROUND FOR MENTAL HEALTH, MEDICAL, AND LEGAL PRACTITIONERS* 25 (Johns Hopkins Univ. Press 2000).

<sup>111</sup> I have frequently written about the inadequacies of counsel, judges, social workers, experts, and legal precedent and theory in the child dependency system. See, e.g., *LEGAL ETHICS IN CHILD CUSTODY AND DEPENDENCY CASES: A GUIDE FOR JUDGES AND*

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LAWYERS (Cambridge University Press 2006); *JUVENILE LAW AND ITS PROCESSES: CASES AND MATERIALS*, 3<sup>RD</sup> Ed. (Lexis 2003) with Francis Barry McCarthy and Judge James G. Caar; *Rethinking The Privilege Against Self-Incrimination In Child Abuse Dependency Proceedings: Might Parents Be Their Own Worst Witnesses?* 11 U. C. Davis J. of Juv. L. & Policy 101 (2007); *The Whittier Law School Legal Policy Clinic's Amicus Curiae Advocacy On Behalf Of Siblings*, 5 Journal of Child and Family Advocacy 449 (2006); *The Connecticut Open-Court Movement: Reflection And Remonstrations*, Connecticut Public Interest L. J., Fall 2005; *The Reality of Concurrent Planning: Juggling Multiple Family Plans Expeditiously Without Sufficient Resources*, [with Amy Pellman] 9 Univ. of Cal., Davis, J. of Juv. L. & Policy 171 (2005); *An Empirical Rebuttal To The Open Juvenile Dependency Court Reform Movement*, 38 Suffolk Univ. L. Rev. 303 (2005); *The Interrelationship Between Sibling Custody and Visitation and Conflicts Of Interest in the Representation Of Multiple Siblings in Dependency Proceedings*, 23 Children's Legal Rights Journal 18 (2003); *CHAPTERS: MacMILLAN ENCYCLOPEDIA OF EDUCATION*, 2<sup>ND</sup> Ed. (2002): (1) *The History of Child Protective Services*; (2) *Contemporary Child Protective Services*; (3) *The History of the Juvenile Justice System*; (4) *The Contemporary Juvenile Justice System; Juveniles in the Criminal Justice System: A Prescription for the Defense*, 1 Criminal Defense Weekly Issue 20 (2002); *The Status of Siblings' Rights: A View Into The New Millennium*, 51 De Paul L. Rev. 201 (2001); *Pandora's Box: Opening Child Protection Cases To The Press and Public*, 27 W.S.L. Rev. 181 (2000); *Mommy's Gone, Daddy's In Prison, Now What About Me? Family Reunification For Children Of Single Custodial Fathers In Prison - Will The Sins Of Incarcerated Fathers Be Inherited By Their Children?*, 75 North Dakota L. Rev. 179 (1999); *The California Child Abuse Hearsay Exception: Is Truth Competency Still Required?*, 3 U.C. Davis J. of Juv. L. & Policy 68 (1999); *Searching for the Proper Role of*

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*Children's Counsel in California Dependency Cases: The Answer of the Dependency Sphinx*, 1 J. Of The Center For Children, Families And The Courts 21 (1999); *In re Car* [a child protection case], published in NEGOTIATION SIMULATION EXERCISES, 1999 (Willamette University College of Law Center For Dispute Resolution, 1999); *Legislative Regulation of Dependency Court Attorneys: Public Relations and Separation of Powers*, 24 Notre Dame J. of Legislation 1 (1998); *Who Speaks For The Child in Abuse Cases: Autonomy or Best Interests?*, 40 Orange County Lawyer 40 (1998); *S.B. 1516, California's New Hybrid: Children's Counsel As Advocates And Guardians Ad Litem*, 2 U.C. Davis J. of Juv. L. and Policy 16 (1997); *Children Are Invisible, Children Are Real: An Introduction To The Child Law Symposium*, 18 Whittier L. Rev. 759 (1997); *Standards Of Appellate Review For Denial Of Counsel And Ineffective Assistance Of Counsel In Child Dependency And Parental Severance Cases*, 27 Loyola Univ. Chicago L. J. 195 (1996); *An Opening Gambit In Teaching Juvenile Law: Creating Icons of Normative Family Structures*, 20 Univ. of Alabama Law & Psychology Review 1 (1996); *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 Univ. Miami L. Rev. 745 (1994); *Law Schools' Duty to Train Children's Advocates: Blueprint for an Inexpensive Experientially Based Juvenile Justice Course*, 45 Juv.& Family Ct. J. 3 (1994); *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 Univ. of Louisville J. of Family Law 37(1992-1993); *Evolution In Child Abuse Litigation: The Theoretical Void Where Evidentiary And Procedural Worlds Collide*, 25 Loyola of Los Angeles L. Rev. 1009 (1992); *It Matters Not What Is But What Might Have Been: The Standard of Appellate Review For Denial Of Counsel In Child Dependency And Parental Severance Trials*, 12 Whittier L. Rev. 537 (1991); *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination In Concurrent Civil and Criminal Child Abuse*

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*Proceedings*, 24 Georgia L. Rev. 473 (1990); *Forever Torn Asunder: Charting Evidentiary Parameters, The Right To Competent Counsel And The Privilege Against Self-Incrimination In California Child Dependency And Parental Severance Cases*, 27 Santa Clara L. Rev. 299 (1987).

<sup>112</sup> Frank D. Fincham, Steven R. H. Beach, Thom Moore, and Carol Diener, *The Professional Response to Child Abuse: Whose Interests Are Served?*, 43 Family Relations 244, 244 (1994).

<sup>113</sup> Richard J. Gelles, *Demythologizing Child Abuse*, 25 The Family Coordinator 135, 141 (1976).

<sup>114</sup> Fincham, et. al., *supra.*, note 108, at 246.