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AN UPDATE TO STRIKING A BALANCE: FREEDOM OF THE PRESS VERSUS CHILDREN'S PRIVACY INTERESTS IN JUVENILE DEPENDENCY PROCEEDINGS

WILLIAM WESLEY PATTON* AND KELLY CRECCO**

In *Striking a Balance: Freedom of the Press Versus Children's Privacy Interests in Juvenile Dependency Proceedings*,¹ Kelly Crecco favorably described a Los Angeles County, California, experiment initiated by Judge Michael Nash which presumptively opened the child abuse dependency courts to the media. A series of events subsequent to her law review article have convinced us that the initial positive assessment of Judge Nash's court order was incorrect for several reasons.

I. THE DANGERS OF JUDGES' JUDICIAL ADMINISTRATIVE ORDERS THAT ARE INCONSISTENT WITH STATE LEGISLATORS' REJECTION OF IDENTICAL STATE POLICIES

Crecco originally lauded Los Angeles Superior Supervising Court Judge Michael Nash for his "[m]omentous change for Los Angeles County" regarding his court order that "[m]embers of the press shall be allowed access to juvenile dependency court hearings unless there is a reasonable likelihood that such access will be harmful to the child's or children's best interests."² The media, direct beneficiaries of the open

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1. Kelly Crecco, *Striking A Balance: Freedom of the Press Versus Children's Privacy Interests in Juvenile Dependency Hearings*, 11 FIRST AMEND. L. REV. 490, 540 ("Each state should adopt an approach that allows for juvenile dependency courtrooms to be presumptively open to the press and public.").

2. *Id.* at 517-18.

court order, repeatedly praised Judge Nash for doing what the California Legislature refused to do—presumptively open the courts to the press.³

A. Judge Nash's Involvement in the Failed Legislative Efforts to Mandate Presumptively Open Dependency Courts in California

Although Crecco discussed two failed California bills that attempted to create presumptively open dependency courts, the history of a third failed open court bill sheds light on Judge Nash's involvement in these legislative debates and raises serious questions regarding his judgment to presumptively open the Los Angeles dependency courts.⁴

In 2011, proposed California Assembly Bill 73 would have created a “4-year pilot project in 3 counties to create a presumption that juvenile court hearings in juvenile dependency cases be open to the public”⁵ Most importantly, the legislature built into that bill several protections for abused children and their families from unwarranted invasions of their privacy and from the dissemination of confidential information disclosed in those open child dependency proceedings. For instance, the bill would have required that the child's attorney inform the abused or neglected child of her “right to request that the hearing be closed.”⁶ In addition, it would have required courts to “take appropriate

3. See Editorial, *Thanks and No Thanks*, L.A. TIMES, Nov. 24, 2011, at A26; Editorial, *A Dependency Court Cure*, L.A. TIMES (Feb. 12, 2011), <http://articles.latimes.com/2011/feb/12/opinion/la-ed-dependency-20110212>; Jim Newton, Op-Ed., *The Cost of Delay*, L.A. TIMES, June 4, 2012, at A13; Editorial, *An Open-And-Shut Case*, L.A. TIMES (Dec. 19, 2010), <http://articles.latimes.com/2010/dec/19/opinion/la-ed-dcfs-20101219>; Jim Newton, Op-Ed., *Secrecy That Hurts Kids*, L.A. TIMES, Mar. 8, 2011, at A11; Editorial, *Let Sun Shine on Dependency Court*, L.A. TIMES (Apr. 26, 2011), <http://articles.latimes.com/2011/apr/26/opinion/la-ed-court-20110426>; Garrett Therolf, *Presiding Judge Prepares to Open L.A. County Dependency Courts*, L.A. TIMES (Nov. 8, 2011, 1:20 PM), <http://latimesblogs.latimes.com/lanow/2011/11/presiding-judge-prepares-to-open-dependency-courts-.html>; Garrett Therolf & John Hoeffel, *Media Gain Access to L. A. County Children's Courts*, L.A. TIMES (Feb. 7, 2012), <http://articles.latimes.com/2012/feb/07/local/la-me-open-child-court-20120207>.

4. Crecco, *supra* note 1, at 514–17.

5. See A.B. 73, 2011 Sess. (Cal. 2011) (amended in the Assembly on Apr. 14, 2011), available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0051-0100/ab_73_bill_20110414_amended_asm_v97.pdf.

6. A.B. 73 § 2(c).

action to keep personally identifiable information about the child or about the child's sibling or parent confidential and . . . prevent release of that information in any court hearing open to the public”⁷ Finally, the bill would have required an independent evaluation of the pilot project, including measuring “the effects of opening the proceedings on children.”⁸

AB 73 failed for many reasons, including opposition by some children's rights groups, mental health professionals, and the largest organization of abused children in the country, the California Youth Connection,⁹ even though one of the most powerful and influential supporters of AB 73 was the Judicial Council of California.¹⁰ This council had also strongly supported the two previous attempts to presumptively open the courts, Senate Bill 1391 (2000) and Assembly Bill 2627 (2004).¹¹

Judge Nash, who issued the Blanket Order, was not only a member of the Judicial Council from 2003–2006, he also co-chaired its

7. A.B. 73 § 2(e)(1).

8. A.B. 73 § 2(j).

9. The following organizations were some of those who opposed AB 73: California Association of Marriage and Family Therapists; California Public Defenders Association; Children's Law Center of Los Angeles; and the California Youth Connection. *Bill Analysis*, Assembly Committee on Human Services, Apr. 26, 2011, at 25–26, available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0051-0100/ab_73_cfa_20110425_093017_asm_comm.html [hereinafter *Bill Analysis of AB 73*].

10. California Constitution Article VI, Section 6(d) provides for the creation of a Judicial Council in order “[t]o improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.” CAL. CONST. art. VI, § 6(d).

11. *Bill Analysis of AB 73*, *supra* note 9, at 25. For a list of those supporting SB 1391 (2000), including the Judicial Council of California, see *Bill Analysis*, Assembly Committee on Judiciary, June 20, 2000, at 10, available at http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1351-1400/sb_1391_cfa_20000619_115719_asm_comm.html. For a list of those supporting Assembly Bill 2627, including the Judicial Council, see *Bill Analysis*, Senate Judiciary Committee, June 22, 2004, at 16, available at http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2601-2650/ab_2627_cfa_20040623_122457_sen_comm.html.

Family and Juvenile Law Advisory Committee from 1999–2003 and served as a member of that committee from 2006–2012.¹² During that time frame, his committee advised the Judicial Council to support legislation to presumptively open the courts, and he testified in the California Legislature in favor of AB 73.¹³ One must wonder, therefore, why Judge Nash disregarded the child protection measures included in AB 73 that the Judicial Council supported when he promulgated his Blanket Order presumptively opening the dependency courts. The Blanket Order does not provide any of the following protections guaranteed under AB 73: (1) requiring that abused children be informed of their right to seek a closed hearing; (2) prohibiting publication of identifying and/or confidential information; and (3) studying and reporting on the effects on abused/neglected children of presumptively opening the hearings to the media and public.¹⁴ Although his Blanket Order includes a detailed three and one-half page justification for opening the courts, Judge Nash did not address why he rejected the suggestions in AB 73 of including protections for abused children as part

12. The Judicial Council of California, Mission, at 13, *available at* http://www.courts.ca.gov/documents/wall_of_fame_0209.pdf; Family & Juvenile Law Advisory Committee Membership List, 1999-2013 (obtained via Judicial Administrative Records Request) (on file with author William Wesley Patton).

13. “The Judicial Council of California’s Family and Juvenile Law Advisory Committee makes recommendations to the council for improving the administration of justice in all cases involving marriage, family, or children.” *Fact Sheet*, Administrative Office of the Courts, Jan. 2014, *available at* <http://www.courts.ca.gov/documents/fjla.pdf>. From 1999 to 2003, Judge Nash co-chaired the Family and Juvenile Law Advisory Committee. *Family & Juvenile Law Advisory Committee* (provided to Professor William Wesley Patton on November 13, 2013, by the California Judicial Council Administrative Office of the Courts in response to Judicial Administrative Records Request #001088) (on file with author William Wesley Patton). *Judge Michael Nash Elected to Board of National Juvenile, Family Court Judges Group*, METROPOLITAN NEWS-ENTERPRISE, Aug. 6, 2003, at 3, *available at* <http://www.metnews.com/articles/nash080603.htm>. “Among the most fervent advocates for transparency is Michael Nash, the presiding judge of Los Angeles County Juvenile Court. He backed the efforts of Schiff [SB 1391] and Steinberg [AB 2627] and has urged the Legislature to finally adopt legislation [AB 73] to open dependency proceedings.” Editorial, *An Open-And-Shut Case*, *supra* note 3. “Judge Michael Nash, the presiding judge of the juvenile courts for Los Angeles County, was among the last to testify at Feurer’s hearing [on AB 73].” Newton, *supra* note 3, at A11.

14. A.B. 73, 2011-12 Reg. Sess. (Cal. 2011).

of the balancing of interests between children's privacy and safety and the concerns for openness and system accountability.¹⁵

Equally important, Judge Nash was on the Judicial Council Family and Juvenile Law Advisory Committee for most of the years in which the legislative debate over presumptively open courts raged. As such, he should have been aware that one of the reasons that the three open court bills did not pass was the fear that opening the courts could cost California more than \$1 billion in federal child abuse funding due to potential violations of federal confidentiality requirements. For instance, in 2000, Judge Nash was co-chair of the Judicial Council committee that recommended passage of SB 1391, even though the California Legislative Analysis of that bill stated that passage could cause:

Potential major loss of federal funds, up to \$1.49 billion, from Titles IV-B and IV-E of the Social Security Act, and the Child Abuse Prevention and Treatment Act (CAPTA), to the extent the state is out of compliance with federal confidentiality requirements. In FY 2000-01, California will receive federal funds totaling \$1.49 billion from these programs (\$1.4 billion, Title IV-E; \$84 million, Title IV-B; and \$7 million, CAPTA).¹⁶

And in 2004, the Legislative Analysis of AB 2627 proclaimed that:

This bill contains a provision identical to a provision in SB 1391 of 2000. It provides that the bill would be inoperative on the date the Department of Social Services director makes a finding that the state is out of compliance with federal confidentiality requirements governing the

15. Blanket Order Re: WIC 346 and Public and Media Attendance at Dependency Court Hearing, Super. Ct. of Cal. Cnty. of L.A. (Jan. 31, 2012), available at <http://www.nccpr.org/reports/nashdraftorder.pdf>.

16. *Bill Analysis*, Assembly Committee on Appropriations, June 9, 2000, at 2, available at http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_1351-1400/sb_1391_cfa_20000808_112718_asm_comm.html.

administration of the federal programs conducted pursuant to the Social Security Act that will result in the loss of federal funds.¹⁷

And finally, in 2011, when Judge Nash was again a member of the Judicial Council Committee recommending passage of AB 73, the Legislative Analysis noted:

Federal law later clarified pursuant to the Child Abuse Prevention and Treatment Act (CAPTA) reauthorization of 2003 that confidentiality requirements tied to state funding do not prohibit states from granting public access to court proceedings, *provided the public access does not jeopardize the safety and well-being of the child, parents, and families.*¹⁸

In considering the three presumptively open child dependency court bills, the California Legislature was clearly very concerned that breaches of federally protected confidential information could result in a serious loss of federal child abuse prevention revenue if the statute did not sufficiently protect abused children and their families. However, Judge Nash in his Blanket Order apparently ignored this financial risk since he provided inadequate protections for children and virtually no protection for other family members as required by federal regulations. He thus placed California at risk of losing more than \$1 billion in child abuse prevention funding.

In order to ameliorate the possibility of losing that funding, on July 17, 2012, Professor Patton wrote a letter to George H. Sheldon, Acting Assistant Secretary for the Administration of Children and Families under the U.S. Department of Health and Human Services, asking for an investigation of Judge Nash's Blanket Order as a possible violation of the confidentiality requirements of the Child Abuse

17. *Bill Analysis*, Senate Judiciary Committee, June 22, 2004, at 16, available at http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2601-2650/ab_2627_cfa_20040623_122457_sen_comm.html.

18. *Bill Analysis of AB 73*, *supra* note 9, at 16 (emphasis added).

Prevention and Treatment Act (CAPTA)¹⁹ and the Social Security Act.²⁰ After reviewing the evidence regarding the Blanket Order's possible federal confidentiality violations, on August 13, 2012, Acting Secretary Sheldon referred the case to the "Administration for Children and Families Regional Office (RO) staff in San Francisco to contact the California Department of Social Services" to determine whether California is in compliance with CAPTA.²¹ On October 31, 2012, Douglas Southard, Regional Program Manager, Region IX, Children's Bureau Administration of Children and Families, stated that his office had "made contact with the California Department of Social Services (CDSS). At our request, they are in the process of fact finding."²²

On December 15, 2012, Professor Patton filed a Freedom of Information Act Request for correspondence between the Children's Bureau and the California Department of Social Services,²³ and was provided a document dated January 31, 2013, from the State of California Health and Human Services Agency's Department of Social

19. 42 U.S.C.A. § 671(c) provides a very limited exception to the confidentiality requirements in CAPTA "relating to public access to court proceedings . . . [if such policies] at a minimum, ensure the safety and well-being of the child, parents and family." 42 U.S.C.A. § 671(c) (West 2010).

20. 42 U.S.C.A. § 5106(a)(G) of the Social Security Act contains similar language to that in CAPTA. 42 U.S.C.A. § 5106(a)(G) (West 2010). Letter from William Wesley Patton, Professor and J. Alan Cook and Mary Schalling Cook Children's Law Scholar, Whittier Law School, to George H. Sheldon, Acting Assistant Secretary for the Administration of Children and Families, U.S. Department of Health & Human Services (July 17, 2012) (on file with author William Wesley Patton).

21. Letter from George H. Sheldon, Acting Assistant Secretary for the Administration of Children and Families, U.S. Department of Health & Human Services, to William Wesley Patton, Professor and J. Alan Cook and Mary Schalling Cook Children's Law Scholar, Whittier Law School (Aug. 13, 2012) (on file with author William Wesley Patton).

22. Letter from Douglas Southard, Regional Program Manager, Region IX, Children's Bureau Administration of Children and Families, to William Wesley Patton, Professor and J. Alan Cook and Mary Schalling Cook Children's Law Scholar, Whittier Law School (Oct. 31, 2012) (on file with author William Wesley Patton).

23. On January 2, 2013, Professor Patton received an email confirmation from the Department of Children and Family Services acknowledging his FOIA request and issuing a Request Number of 13-0056 (on file with author William Wesley Patton).

Services to Douglas Southard.²⁴ In that letter, the California Department of Social Services reported that it had:

engaged this issue [of federal confidentiality] with Presiding Judge of the Los Angeles Dependency Courts, and has discussed possible revisions of the Blanket Order to ensure conformity with the Child Abuse Prevention and Treatment Act (CAPTA), and Title IV-E. As a result of that dialogue, the Presiding Judge is in the process of revising the Blanket Order to address federal conformity concerns.²⁵

The revised Blanket Order still did not include any of the child safety protections recommended in AB 73, but it appended the statutory language from CAPTA and the Social Security Act regarding the necessity of ensuring “the safety and well-being of the child, parents, and families.” The federal investigation of the Blanket Order is still pending, but Professor Patton’s response filed with the Regional Office of the Administration of Children and Families Children’s Bureau argues that the revised Blanket Order still violates CAPTA and the Social Security Act because it: (1) does not provide the abused child with an opportunity to inform the court why press attendance will be harmful without the presence of the media; (2) fails to provide parents and other family members with rights to privacy protection that are not interdependent on children’s safety; (3) does not require the juvenile court judge to make an independent decision regarding the best interests of the child unless a party objects to press and/or public attendance; and (4) violates CAPTA because the State of California has not promulgated a presumptively open child dependency system and has not secured the required permission of the Secretary for the Administration for Children and Families for a limited waiver of federally guaranteed confidentiality

24. Letter from the State of California Health and Human Services Agency, Department of Social Services, to Douglas Southard, Regional Program Manager, Region IX, Children's Bureau Administration of Children and Families (Jan. 31, 2012) (on file with author William Wesley Patton).

25. *Id.* at 1.

protections.²⁶ We will have to await the further federal investigation to determine the legal status of the revised Blanket Order.

B. The Review of Judge Nash's Blanket Order in the California Court of Appeal

Crecco states that the "California Court of Appeal denied the Children's Law Center's petition to overturn Judge Nash's order."²⁷ Her description, however, might mistakenly lead the reader to conclude that the Court of Appeal actually considered the substantive arguments in the writ. The basis for the Court of Appeal's denial of the writ was not available to Crecco since the court files are confidential. In fact, the Court of Appeal merely denied the writ because it concluded procedurally that the Children's Law Center lacked standing to litigate the legality of the Blanket Order.²⁸ The substance of the opposition to the Blanket Order was never considered by the Court of Appeal.

However, a Court of Appeal case decided recently, after the publication of Crecco's article, determined that Judge Nash's Blanket Order is illegal under California law. In *Los Angeles County Department of Children and Family Services v. A.L.*,²⁹ an abused child appealed a juvenile court judge's determination based upon the Blanket Order that the *Los Angeles Times* could attend her full dependency court hearing.³⁰

26. Letter from William Wesley Patton, Professor and J. Alan Cook and Mary Schalling Cook Children's Law Scholar, Whittier Law School, to Douglas Southard, Regional Program Manager, Region IX, Children's Bureau Administration of Children and Families (Feb. 8, 2013) (on file with author William Wesley Patton).

27. Crecco, *supra* note 1, at 518.

28. On February 15, 2012, the California Court of Appeal, Second Appellate District, Division Two, Case Number B238899, denied the writ by the Children's Law Center of California for a petition for writ of mandate "for lack of standing." (on file with author William Wesley Patton). The court of appeal also summarily denied the Los Angeles Dependency Lawyers' writ regarding Judge Nash's Blanket Order based upon a lack of standing. *See* Court of Appeal of the State Of California, Second Appellate District, Division Two, Case Number B238903, petition for writ of mandate "denied for lack of standing." (on file with author William Wesley Patton). The court of appeal in Case Number B238899 also refused to file an *amicus curiae* brief supporting a writ against Judge Nash regarding the Blanket Order filed by Whittier Law School. (on file with author William Wesley Patton).

29. *In re A.L.*, 168 Cal. Rptr. 3d 589 (Cal Ct. App. 2014).

30. *Id.* at 361.

Prior to this decision, the child had objected to the presence of the *Times* and other media outlets at her hearings and had asked the juvenile court for an opportunity to explain to the court why the press should be excluded from her hearings.³¹ The juvenile court judge ruled against the child and granted the press access to her hearings, including a preliminary hearing on her motion to exclude the press.³²

The appellate court ruled that the Blanket Order created “a paradigm shift from the plain meaning of Section 346,”³³ the statute that controls access to dependency court hearings. The court found that the Blanket Order did not require the juvenile court judge in each dependency case to balance the interests of the press with those of the child’s best interest; illegally shifted the burden of proving potential harm from the press coverage from the media to the abused child who is also required to object to the media’s presence; and transmogrified the Legislature’s determination that hearings are presumptively closed to a rule of presumptively open proceedings.³⁴ Because Judge Nash’s Blanket Order conflicts with the California statute, the appellate court found that it exceeded his “inherent rulemaking” authority and was thus illegal.³⁵

C. Trial Court Judges’ Administrative Orders and Separation of Powers Concerns

“Judicial Activism” is one of the most trite, yet politically charged terms.³⁶ The term may serve expedient political purposes, yet at

31. *Id.* at 359–60.

32. *Id.* at 360–61.

33. *Id.* at 364.

34. *Id.*, at 364–66.

35. *Id.* at 363–64.

36.

During the 1990s, the terms “judicial activism” and “judicial activist” appeared in an astounding 3,815 journal and law review articles. In the first four years of the twenty-first century, these terms have surfaced in another 1,817 articles—an average of more than 450 per year. Judges today are far more likely to accuse their colleagues of judicial activism than they were in prior decades. And the term has assumed a prominent role in public debates,

its structural heart rests a legitimate concern regarding separation of powers.³⁷ The Blanket Order illustrates the most inimical aspects of the cusp between legitimate exercise of judicial administrative discretion and the usurpation of the people's right to a legislative determination regarding questions of public policy that do not involve absolute constitutional rights.³⁸ During the legislative debates of the three California presumptively open dependency court bills, hundreds of different legislators heard evidence from dozens of organizations in numerous hearings. These hearings addressed the balancing of interests between the public's and media's need for access to the court hearings and the correlative need to protect child abuse victims and their families from unwarranted invasions of their privacy with the state and federal statutory guarantees of confidentiality.³⁹ As was demonstrated,⁴⁰ the

appearing regularly in editorial pages, Web "blogs," political discussion, and confirmation battles.

Keenan D. Kimiec, *The Origin and Current Meanings of "Judicial Activism,"* 92 CAL. L. REV. 1441, 1442–43 (2004); *see generally*, Thomas L. Murphy, *The Dangers of Overreacting to Judicial Activism*, 19 UTAH BAR J. 38 (Feb. 2006) (arguing that it is difficult to define judicial activism and that doing so has inherent dangers).

37. As stated in *Elkins v. Super. Ct. of Contra Costa Cnty.*, "[a] trial court is without authority to adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council, or that are inconsistent with the Constitution or case law." 163 P.3d 160, 166 (Cal. 2007). *See also* *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203, 1213–14 (Cal. 1997); *Hall v. Super. Ct. of Los Angeles Cnty.*, 35 Cal. Rptr. 3d, 211–13 (Cal. Ct. App. 2005). As provided in Government Code section 68070, subdivision (a): "Every court may make rules for its own government and the government of its officers *not inconsistent with law or with the rules adopted and prescribed by the Judicial Council.*" CAL. GOV'T CODE § 68070(a) (West 2013) (emphasis added); Courts, § 203, *in 2* Witkin, *Cal. Procedure* (5th ed. 2008) 285–86; Courts, § 204, *in 2* Witkin, *Cal. Procedure* (2006 supp.) 87–88.

38. Neither the United States Supreme Court nor the California courts have determined that the press and public have a constitutional right of access to child dependency court proceedings. *See San Bernardino Cnty. Dep't of Pub. Social Servs. v. Super. Ct.*, 283 Cal. Rptr. 3d 332 (Cal. Ct. App. 1991). This discussion does not, therefore, address the legality of courts' legitimate authority to hold statutes unconstitutional under separation of powers.

39. For instance, SB 1391 had six senate hearings and was amended five times before its eventual defeat. *See* Documents Associated with SB 1391 in the Session (2000), http://www.legislature.ca.gov/cgi-bin/port-postquery?bill_number=sb_1391

three California open court bills involved political compromises among those supporting openness and those supporting child and family protection with an eventual outcome of bills proposing more openness, but only if sufficient protections were guaranteed.

However, even though Judge Nash considered opposing views regarding the promulgation of his Blanket Order, his decision was not tempered by the same deliberative group decision-making necessary for forging effective consensus through legislative debate. Therefore, his Blanket Order, unlike the three legislative bills, focused on providing the press access to the courts, but failed to sufficiently balance that public policy with the necessity of protecting abused children and their families. Equally problematic is that he, as a single judicial officer in a single county in California, risked the loss of more than \$1 billion in federal funding for child abuse prevention and treatment, a risk rejected by the legislature three times. He issued an order he considered important for Los Angeles County, but created a risk to taxpayers throughout the state of California. Judge Nash's failure to include the specific child and family protections recommended in AB 73 and his disregard for the possibility of losing a significant amount of federal child abuse funding present serious concerns.

II. THE CONNECTICUT LEGISLATURE'S RESPONSE TO ITS FAILED PRESUMPTIVELY OPEN PILOT PROJECT WAS TO REJECT A PRESUMPTIVE RIGHT OF MEDIA ATTENDANCE IN CHILD ABUSE HEARINGS

In her earlier article, Crecco correctly noted that in Connecticut some cases involving juveniles are open to the press and public.⁴¹ Section 46b-122(b) of the Connecticut General Statutes, which controls *non-dependency* hearings, states that “[e]xcept as provided in subsection

&sess=9900&house=B&author=schiff. AB 2627 had five legislative hearings and was amended three times. *See* Documents Associated with AB 2627 in the Session (2004), <http://www.legislature.ca.gov/cgi-bin/port-postquery>. And AB 73 had two legislative hearings and was amended twice. *See* Documents Associated with AB 73 in the 2011-2012 Session (2011), http://www.legislature.ca.gov/cgi-bin/port-postquery?bill_number=ab_73&sess=PREV&house=B&author=feuer.

40. *See supra* Part I.A.

41. Crecco, *supra* note 1, at 511.

(c)” a juvenile court judge cannot exclude any person without a hearing and a finding of “good cause shown.”⁴²

However, after Connecticut’s failed presumptively open court pilot project, the legislature specifically changed child dependency proceedings to presumptively closed, but provided discretion to juvenile court judges on a case-by-case basis to admit the public and/or press. Section 46b-122(c), which only applies in child dependency proceedings, provides that a juvenile court judge in:

[A] juvenile matter, in which a child is alleged to be uncared for, neglected, abused or dependent or in which a child is the subject of a petition for termination of parental rights, *may permit* any person *whom the court finds has a legitimate interest* in the hearing or the work of the court to attend such hearing.⁴³

The difference between presumptively open and discretionarily open juvenile dependency courts is not merely a matter of semantics. The public policy battle over which of those two models should be adopted has been fought for more than fifteen years in several states.⁴⁴ For instance, in Connecticut, proposed legislation introduced by presumptively open court advocates was defeated in 2004⁴⁵ and in 2005.⁴⁶ And in 2009, a third bill to presumptively open the Connecticut

42. CONN. GEN. STAT. § 46b-122(b) (2012).

43. *Id.* at § 46b-122(c) (2012) (emphasis added).

44. For a discussion of many of those legislative debates, see William Wesley Patton, *Revictimizing Child Abuse Victims: An Empirical Rebuttal To The Open Juvenile Dependency Court Reform Movement*, 38 SUFFOLK UNIV. L. REV. 303 (2005); William Wesley Patton, *When The Empirical Base Crumbles: The Myth That Open Dependency Proceedings Do Not Psychologically Damage Abused Children*, 33 LAW & PSYCH. REV. 29 (2009); William Wesley Patton, *Pandora’s Box: Opening Child Protection Cases to the Press and Public*, 27 W. ST. U. L. REV. 181 (2000).

45. For a discussion of the defeat of Connecticut Raised Bill 5555, see William Wesley Patton, *The Connecticut Open-Court Movement: Reflection and Remonstrations*, 4 CONN. PUB. INT. L. J. 8 (2004–2005).

46. For a discussion of failed House Bill 6812 in 2005, see William Wesley Patton, *Connecticut’s Failed Open Juvenile Dependency Court Pilot Project*:

courts was amended to provide for a limited pilot project to test the effectiveness and safety of presumptively open courts.⁴⁷ Crecco correctly notes that Connecticut ended its pilot program after the Advisory Board rejected the presumptively open dependency court model.⁴⁸ After finding little benefit and potential danger to abused children, the Advisory Panel recommended a discretionarily open system requiring juvenile court judges on a case-by-case basis to determine whether to admit persons into proceedings and whom specifically to admit into those proceedings.⁴⁹

In 2011, the Connecticut Legislature accepted the Advisory Board's recommendation by promulgating §46b-122(c), which modified the presumptively open language of the pilot study with language

Presumptively Open Juvenile Court Doors Closed Again to Protect Abused Children, 11 WHITTIER J. OF CHILD & FAM. ADVOC. 85 (2011).

47. For a discussion of Connecticut House Bill 6419 [Public Act No. 09-194], see *id.* at 87–88. HB 6419, section 5(b) stated that:

The Judicial Council shall establish, in a superior court for juvenile matters location designated by the Chief Court Administrator, a pilot program to increase public access to proceedings in which a child is alleged to be uncared for, neglected, abused or dependent or is the subject of a petition for termination of parental rights. In any proceeding under this subsection, the judge may order on a case-by-case basis that such proceedings be kept separate and apart and heard in accordance with subsection (a) of this section, upon motion of any party for good cause shown

Substitute H.B. No. 6419, Pub. Act No. 09-194 §§ 5(b) (2009), available at <http://www.cga.ct.gov/2009/act/Pa/pdf/2009PA-00194-R00HB-06419-PA.PDF>. And in HB 6419, section 6, the court established policies for the new presumptively open dependency court proceedings, including the creation of a “Juvenile Access Pilot Program Advisory Board” to review the pilot project. *Id.* at § 6.

48. Crecco, *supra* note 1, at 510–11.

49. Juvenile Access Pilot Program Advisory Board, Report to the Connecticut General Assembly 15, 30 (2010), available at http://jud.ct.gov/Committees/juv_access/Final_report_123010.pdf [hereinafter *Connecticut Report*]. The Report indicated “significant concerns . . . that opening child protection proceedings could potentially harm children.” *Id.* at 15.

creating a discretionarily open dependency court system rather than a presumptively open court system.⁵⁰

Children are at much more risk of juragenic psychological harm in a presumptively open dependency court system than in a discretionarily open court system for a number of reasons. Abused children suffer short-term and long-term psychological risk by having their cases open to the media and public. First, child abuse victims suffer trauma from testifying before strangers. “In the last decade, developmental victimology studies have determined that abused children develop a sense of powerlessness, suffer social stigmatization, internalize self-blame, and have a deep sense of betrayal.”⁵¹ Even if no confidential information concerning the detailed facts of the child victim’s abuse is ever published, child victims still fear the possibility of such publication.⁵² In addition, an especially vulnerable group of children, LGBTQ child abuse victims, face disclosure of the most intimate facts regarding their gender identity in proceedings in which the court must find the most appropriate and safe out-of-home placements should these children not be returned home.⁵³

50. The Connecticut Legislature in P.A. 11-51 “deleted former Subsec. (b) re pilot program, added new Subsec. (c) re attendance of persons court finds has a legitimate interest and prohibitions on further disclosure of information” See legislative history section of Section 46b-122. CONN. GEN. STAT. § 46b-122 (2012), available at <http://law.justia.com/codes/connecticut/2012/title-46b/chapter-815t/section-46b-122/>.

51. William Wesley Patton, *Viewing Child Witnesses Through a Child and Adolescent Psychiatric Lens: How Attorneys’ Ethical Duties Exacerbate Children’s Psychopathology*, 16 WIDENER L. REV. 369, 372–74 (2010).

52. Child victims have a legitimate fear that facts disclosed in court will be published by some media source. For a study of journalistic ethics and a survey of child victim information actually published in the media, see William Wesley Patton, *The Psychiatric Implications of Media Ethics Code Policies Regarding the Publication of Child Abuse Victim Data: A Universal Deontological Model Code*, 16 U.C. DAVIS J. JUV. L. & POL’Y 427 (2012).

53. “A recent review of the research identified 19 studies linking suicidal behavior in lesbian, gay, and bisexual (LGB) adolescents to bullying at school” *Suicide and Bullying: Issue Brief*, SUICIDE PREVENTION RESOURCE CENTER 1, 3 (Mar. 2011), available at http://www.suicidepreventionlifeline.org/App_Files/Media/PDF/sprc.pdf. Although most literature focuses on the severe verbal and/or physical attacks on LGBT children, in reality they suffer a constant bombardment of lesser insults or attacks termed “microassaults and microinsults, suggesting that that LGB persons may . . . experience overt discrimination on a more

Second, if the media has a statutory presumptive right to be present, the burden of proving that they should be removed is often shifted to the child and decreases the likelihood that confidentiality will protect the child victim.⁵⁴ Finally, if the media has a presumptive statutory right to be in the courtroom, any attempts by the court to limit the media's publication of information gleaned during the hearing are substantially curtailed as a prior restraint violation of the First Amendment. In contrast, in a discretionarily open system, since the media does not have an absolute statutory or constitutional right to enter, juvenile court judges can condition their entry upon an agreement that

regular basis." Kevin L. Nadal et al., *Sexual Orientation Microaggressions: "Death by a Thousand Cuts" for Lesbian, Gay, and Bisexual Youth*, 8 J. LGBT YOUTH 234, 252 (2011). "[B]etween 25 and 35 percent of sexual minority adolescents report at least one suicide attempt . . ." N. Eugene Walls, Pam Hancock & Hope Wisneski, *Differentiating the Social Service Needs of Homeless Sexual Minority Youths from Those of Non-homeless Sexual Minority Youths*, 13 J. CHILDREN & POVERTY 177, 182 (2007). New York City has a policy in providing the homeless with shelter consistent with their gender identity. In 2006, the NYC policy provided that "staff will address individuals with names, titles and other terms appropriate to their gender identity . . . [and] staff at Intake/Shelter assignments will receive training on diversity, transgender and intersex issues." Dianna Scholl, *For Transgender Homeless, Choice of Shelter Can Prevent Violence*, CITY LIMITS (Dec. 6, 2010), <http://www.citylimits.org/news/articles/4235/for-transgender-homeless#.UrO5kPaSL0Q>. For an excellent discussion of the risk factors for LGBTQ youth, see Susan M. Swearer Napolitano, Risk Factors for and Outcomes of Bullying and Victimization (Educational Psychology Papers and Publications, Paper No. 132, 2011), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1131&context=edpsychpapers>. "Unless disclosure is legally required, no one should disclose information about sexual orientation or gender identity unless that person can identify a direct benefit to the youth." Shannan Wilber, Carolyn Reyes & Jody Marsamer, *The Model Standards Project: Creating Inclusive Systems for LGBT Youth in Out-of-Home Care*, LXXXV CHILD WELFARE 133, 140–41 (2006).

54. For instance, see Los Angeles Superior Court Blanket Order which provides: "1. Members of the press are deemed to have a legitimate interest in the work of the court. 2. Members of the press shall be allowed access to Juvenile Dependency Court hearings unless there is a reasonable likelihood that such access will be harmful to the child's or children's best interests." Blanket Order Re: WIC 346 and Public and Media Attendance at Dependency Court Hearing, Super. Ct. of Cal. Cnty. of L.A. 4–5 (Jan. 31, 2012), available at <http://www.nccpr.org/reports/nashdraftorder.pdf>. Furthermore, "the party objecting must demonstrate that harm or detriment to the minor child is reasonably likely to occur in the case as a result of permitting the public or press access to the proceeding." *Id.*

identifying information shall not be published regarding the parties. In fact, Connecticut General Statute § 46b-122(c) perfectly illustrates this point since it permits the juvenile court judge:

for the child's safety and protection and for good cause shown, [to] prohibit any person or representative of any agency . . . including a representative of the news media . . . from further disclosing any information that would identify the child, the custodian or caretaker of the child or the members of the child's family involved in the hearing.⁵⁵

III. THE MINNESOTA OPEN COURT STUDY CRECCO RELIES UPON TO DEMONSTRATE SAFETY TO ABUSED CHILDREN IN PRESUMPTIVELY OPEN HEARINGS HAS BEEN IMPEACHED BY ITS AUTHOR IN TESTIMONY IN COURT UNDER OATH

Crecco relied upon a 2001 study by the National Center for State Courts (NCSC) of the Minnesota open dependency court pilot project that concluded that no harm to abused children was found in the presumptively open court system.⁵⁶ However, the author and methodological designer of the NCSC study testified under oath that the study was seriously methodologically flawed. For instance, he testified affirmatively to the following question: "So you indicated that you couldn't speak to children because Minnesota basically asked you not to [?]"⁵⁷ Ironically, Minnesota prohibited its own researchers from talking to the abused children in a controlled, non-threatening environment, but permitted the press and public access to watch these same abused

55. CONN. GEN. STAT. § 46b-122(c) (2012).

56. Crecco, *supra* note 1, at 509.

57. See Patton, *When the Empirical Base Crumbles*, *supra* note 44, at 32 (quoting the sworn testimony from Transcript of Proceedings, *In re San Mateo County Human Services Agency* (Super. Ct. San Mateo Cnty., Dept. 5, Mar. 3, 2005) (on file with author William Wesley Patton) [hereinafter Trial Transcript]).

children testify in court.⁵⁸ The NCSC author further testified that his research team did not discuss possible psychological harm to abused children in the system with any mental health providers in that system, and that the Minnesota governmental officials, not his research team, selected the professionals that he was permitted to interview regarding harm to children.⁵⁹ Further, the study's author during his testimony was unable to define the term "extraordinary harm" that was supposed to be the type of harm that his research team was investigating, and finally he admitted that the NCSC study was not methodologically sound: "I'm not claiming that this is the most full-proof study," in part because he simply did not have a budget sufficient to investigate relevant data regarding possible harm to the abused children.⁶⁰ Therefore, the Minnesota study does not provide sufficient reliable evidence of safety to children in presumptively open dependency proceedings.⁶¹

IV. CONCLUSION

This article demonstrates the serious social, psychological, and economic problems created when superior court judges promulgate administrative, system-wide changes in policies rejected by the state legislature. Complex social issues such as the balance between children's and families' privacy and the need for public and press access to judicial proceedings to perfect effective accountability are issues that are not well suited for judicial administrative decisions which are system-wide rather than determinations on a case-by-case basis. Rather, these important political issues are best left to the legislative process.

58. Although he testified that it would have been more methodologically sound to ask the abused children about their experiences, he could not do so because Minnesota officials would not permit it. *Id.* at 32 (citing Trial Transcript, at 16–17).

59. *Id.* at 32.

60. *Id.* at 33–34 (citing Trial Transcript, at 45–46, 74, 92, 95).

61. Crecco also provides a discussion of an Arizona Pilot Program study of presumptively open courts. Crecco, *supra* note 1, at 509–11. However, the Arizona Pilot Project study was based upon the methodologically unsound NCSC study and suffered from the same problems of a lack of funding and an inability to interview the people in the system who would have the best knowledge about whether abused children were harmed by the process. See Patton, *When The Empirical Base Crumbles*, *supra* note 44, at 35–36.