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## Before the Doors Closed: A Historical Perspective on Public Access

DAVID S. TANENHAUS<sup>†</sup>

Although there is a nationwide trend toward opening child dependency hearings, this article argues that the state of Connecticut should think historically before opening the doors of its child dependency hearings to the public.<sup>1</sup> It should do so for two reasons. First, this issue is not new. The drafters of the nation's first juvenile court legislation in 1899 debated this same question.<sup>2</sup> Although the early history of American juvenile justice does not provide a definitive answer to the question that Connecticut now faces, it does provide a comparative perspective on the policy choices involved in balancing the interests of children, their families, and the larger public.<sup>3</sup> Second, studying history reminds us that legislative actions often have unintended consequences. Opening up child dependency hearings may fit this pattern. If Connecticut opts to open its child dependency hearings to the public, the state may also have to reconsider its rationale for keeping the children in

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<sup>†</sup> David S. Tenenhaus is the James E. Rogers Professor of History and Law, William S. Boyd School of Law at the University of Nevada, Las Vegas. He would like to thank his colleagues Annette Appell, Kate Kruse, Rebecca Nathanson, and David Thronson for their insights on child protection. In addition, he is grateful that the Connecticut Public Interest Law Journal and Center for Children's Advocacy invited him to participate in this important Symposium, and would especially like to thank Associate Dean Paul Chill and Lee Munger for including a historian in the mix.

<sup>1</sup> There is a growing literature on the trend toward opening the doors of juvenile courts. For a good overview of the issues at stake, see Emily Bazelon, Note, *Public Access to Juvenile and Family Courts: Should the Courtroom Doors Be Open or Closed*, 18 YALE L. & POL'Y REV. 155 (1999). For arguments in favor of opening dependency hearings, see Jan L. Trasen, Note, *Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?*, 15 B.C. THIRD WORLD L.J. 359 (1995). See also Sara VanMeter, Comment, *Public Access to Juvenile Dependency Proceedings in Washington State: An Important Piece of the Permanency Puzzle*, 27 SEATTLE U. L. REV. 859 (2004). For a defense of closed hearings, see William Wesley Patton, *Pandora's Box: Opening Child Protection Cases to the Press and Public*, 27 W. ST. U. L. REV. 181 (1999-2000).

<sup>2</sup> DAVID S. TANENHAUS, JUVENILE JUSTICE IN THE MAKING 18-22 (2004).

<sup>3</sup> For good introductions to the difficulties of devising rational policy for children, see ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY (2d ed. 1996). See also Elizabeth S. Scott, *The Legal Construction of Childhood*, in A CENTURY OF JUVENILE JUSTICE 113, 113-141 (Margaret K. Rosenheim et al. eds., 2000).

these cases out of the courtroom. Open hearings might, for instance, make it more difficult for the state to ban a child who is “entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake.”<sup>4</sup> Moreover, the public nature of an open dependency hearing could potentially harm children.<sup>5</sup> Thus, a benevolent effort to secure more child protection may backfire.

This article draws on the findings reported in my recent book *Juvenile Justice in the Making* in order to help frame this important debate over the question of whether Connecticut should open the doors of its juvenile courts to the public, while highlighting the real possibility that Connecticut’s decision may have unintended consequences for the welfare of its children.

The most fervent supporters of the juvenile court believed that its doors should be shut. The second provision of the proposed Juvenile Court Act of 1899 reflected this vision: “When a case is being heard, all persons not officers of the court or witnesses, and those having a direct interest in the case being heard, shall be excluded from the court room.”<sup>6</sup> This provision proved controversial and was ultimately removed from the legislation. The doors to the nation’s first juvenile court, which was located in Cook County, Illinois, were opened for the court’s first session on July 3, 1899, and remained so for more than a decade.<sup>7</sup>

The sponsors of the 1899 Illinois legislation, which included representatives from the city’s social settlements, women’s clubs, charity organizations, school and bar associations, were initially disappointed by this legislative defeat. They had contended that juvenile court hearings should be closed to the general public to protect the privacy of children and their families.<sup>8</sup> These child savers argued that closed hearings would shield children, both dependent and delinquent, from stigmatizing publicity that could undercut the court’s rehabilitative mission. I should add that they did not draw a sharp distinction between the cases of abused, neglected, and delinquent children, and the same judge heard all

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<sup>4</sup> *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005) (citing *Goss v. Lopez*, 419 U.S. 565 (1975); *In re Gault*, 387 U.S. 1 (1967)).

<sup>5</sup> See, e.g., Rebecca Nathanson & Karen J. Saywitz, *The Effects of the Courtroom Context on Children’s Memory and Anxiety*, 31 J. PSYCHIATRY & L. 67, 67-98 (2003).

<sup>6</sup> The bill is reprinted in TIMOTHY D. HURLEY, *ORIGIN OF THE ILLINOIS JUVENILE COURT LAW: JUVENILE COURTS AND WHAT THEY HAVE ACCOMPLISHED* 28 (3d ed., AMS Press 1977) (1907).

<sup>7</sup> TANENHAUS, *supra* note 3, at 18.

<sup>8</sup> The text of the initial bill is reprinted in HURLEY, *supra* note 7, at 26-40.

of these cases. Accordingly, in this article, I will follow their lead and not draw a distinction between dependency and delinquency cases.<sup>9</sup>

Critics of the city's private charity organizations vehemently objected to the idea of "secret" hearings. *The Daily Inter-Ocean* ran a sensational front-page story with the lead *Child Slaves*, which explained these concerns about secrecy.<sup>10</sup> The article quoted anonymous sources who declared that closed hearings in the juvenile court would contribute to the enslaving of poor children by allowing charity organizations to remove them from their families and sell them as cheap laborers. The proposed juvenile court would allow charity associations to bring these poor children before the court, have them declared "dependent" by the court, and then sell the child to a downstate, out-of-state or worst of all, Canadian farmer.<sup>11</sup>

As these critics cautioned, closed hearings would prevent the press from covering these cases and would shield "the anguish of a mother whose child was being taken from her by the 'association'" from public scrutiny. Moreover, as one anonymous source warned,

[s]hould this bill become law no child in the poorer sections of Chicago would be safe from the 'associations' interested in securing children. . . . The mother who permitted her little one to appear on the street not washed, curled, and combed to suit the critical inspection of an "association" practicing philanthropy at \$50 a head would be in danger of losing her child.<sup>12</sup>

The argument that private charity organizations stole poor children tapped into a reservoir of mistrust about private charity

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<sup>9</sup> In light of the varied jurisdictions of the nation's juvenile courts, Emily Bazelon argues that it still makes sense to combine dependency and delinquency cases for the purpose of discussing public access. See Bazelon, *supra* note 2.

<sup>10</sup> *Child Slaves*, DAILY INTER-OCEAN, Feb. 28, 1899, at 1.

<sup>11</sup> On the concern about child-slavery or "the traffic in children," including the selling of children to out-of-state farmers, see David Spinoza Tanenhaus, *Policing the Child: Juvenile Justice in Chicago, 1870-1925* 2:219-230 (1997) (unpublished Ph.D. dissertation, University of Chicago). See also David S. Tanenhaus, "Rotten to the Core": *The Juvenile Court and the Problem of Legitimacy in the Progressive Era*, in *A NOBLE SOCIAL EXPERIMENT? THE FIRST 100 YEARS OF THE COOK COUNTY JUVENILE COURT, 1899-1999*, 24-28 (Gwen Hoerr McNamee ed., 1999).

<sup>12</sup> *Child Slaves*, *supra* note 11, at 2.

organizations dating to the mid-nineteenth century.<sup>13</sup> The successful campaign against closed-hearings led to the removal of the controversial provision and the local newspapers did report on the new court's early cases and published stories about the children, including their names, addresses and, in delinquency cases, their alleged offenses.<sup>14</sup>

Progressive supporters of the court, including the presiding judges, did adapt to the public nature of juvenile justice. They used the free publicity to explain the rehabilitative mission of the court and helped to make the case for its benefits to the public.<sup>15</sup> These efforts to educate the public about the court were critical to establishing the legitimacy of the new institution, which did not even have funding for a probation staff or a detention home in its first years. To help secure and sustain the legitimacy of the juvenile court, the early judges and staff delivered many public lectures, participated in child welfare exhibitions and, in the process, helped to spread the word about the benefits of the new court.<sup>16</sup>

Publicizing the juvenile court, however, revealed an important tension in progressive thought: How can the state shield the child in court from publicity, but also publicize the plight of "the children of juvenile court" in order to raise public consciousness and further the crusade for social justice? Much like Jacob Riis's famous photographs in *How the Other Half Lives* had awakened the public consciousness about tenement conditions, progressive child savers wanted to continue the education of the middle class about the everyday conditions that working class children faced in America's congested cities.<sup>17</sup> Case histories, which included a great deal of information about a child but not his or her actual name, served as one way of meeting the twin goals of protecting individual children while educating the public about the troubling conditions of childhood. These accounts of specific children who remained nameless helped the public to learn about children in

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<sup>13</sup> On the mistrust of charity organizations, see KAREN SAWISLAK, *SMOLDERING CITY: CHICAGOANS AND THE GREAT FIRE, 1871-1874* ch. 5 (1995).

<sup>14</sup> See, e.g., *Case in Juvenile Court—Judge Tuthill Listens to the First Compliant Filed Under the New Enactment*, CHI. DAILY NEWS, July 3, 1899, at 2.

<sup>15</sup> See, e.g., *The Juvenile Law Is Good*, CHI. TRIB., July 16, 1899, at 15.

<sup>16</sup> TANENHAUS, *supra* note 3, at 82-110.

<sup>17</sup> See, e.g., MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870 TO 1920* 99-100 (2003).

general. Case histories, in fact, became a standard feature of the studies of juvenile delinquency compiled in the early twentieth century.<sup>18</sup>

In her introduction to Sophonisba Breckinridge and Edith Abbott's *The Delinquent Child the Home*,<sup>19</sup> the first detailed study of the Cook County Juvenile Court, which contained numerous case histories, Julia Lathrop championed this faith in the education of the public. She declared that "the great primary service of the court is that it lifts up the truth and compels us to see that wastage of human life whose sign is the child in court."<sup>20</sup> That sad sight, which she significantly called "the truth made public," she fervently believed would energize the public to ensure that the conditions facing children would be improved.<sup>21</sup>

The progressive faith that educating the public would rid society of corruption has often been described as naïve, but I would argue that Lathrop's desire to see the juvenile court remain in the public eye was an important insight.<sup>22</sup> When the public has forgotten the juvenile court, as later studies of the court revealed, children have often ended up being treated more harshly by the law than by adults.<sup>23</sup>

Yet, even the classic progressive article that made the case for private hearings carefully weighed their costs and benefits. Judge Harvey Humphrey Baker, the presiding judge of the Boston Juvenile Court, used a series of analogies, comparing the role of the juvenile court judge to that of a parent, teacher, and physician, to support his argument in favor of private hearings, whose main feature, he defined, as "the reduction of the number of persons present to minimum."<sup>24</sup> Ideally, the

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<sup>18</sup> For a classic example, see SOPHONISBA P. BRECKINRIDGE & EDITH ABBOTT, *THE DELINQUENT CHILD AND THE HOME: A STUDY OF THE DELINQUENT WARDS OF THE JUVENILE COURT OF CHICAGO* (1912).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.* Bazelon provides an overview of similar arguments made by legal scholars in the late twentieth century about how public exposure to juvenile justice could improve public policy. See Bazelon, *supra* note 2, at 180-86. It is worth noting that today's proponents of open hearings focus their attention on systematic problems in governance, while the progressives offer a broader critique of industrial capitalism.

<sup>22</sup> On the characterization of the progressives' faith in publicity as naïve, see OTIS L. GRAHAM, JR., *AN ENCORE FOR REFORM: THE OLD PROGRESSIVES AND THE NEW DEAL* (1967).

<sup>23</sup> The Supreme Court's finding in *In re Gault*, 387 U.S. 1 (1967), demonstrated what could happen to forgotten juvenile courts.

<sup>24</sup> Harvey H. Baker, "Private Hearings: Their Advantages and Disadvantages," *The Annals of the American Academy of Political and Social Science* (July 1910): 80-84. In order to describe the theory and practice of the early juvenile court, legal scholars too

judge, he declared, should talk with the child alone, unless she was a girl, who “of course, should never be talked with wholly alone.” The major advantage of the private hearing was that it allowed the “judge the closest approach to the conditions under which the physician works.”<sup>25</sup> The danger of this analogy, Baker pointed out, was that a judge, unlike a doctor, had the power to deprive children of their liberty and parents of their natural authority, and a private hearing represented a “radical departure from the hard-won and long-established principle of full publicity in court proceedings.”<sup>26</sup> Potentially, Baker acknowledged, a system of private hearings could shield not only the privacy of children and their families, but also to shelter the “carelessness, eccentricities or prejudices of an unfit judge.”<sup>27</sup>

Judge Baker concluded on a cautionary note. He recommended that

until the private hearing has been fully tested by experience, communities where the citizens are doubtful can proceed with caution, taking preliminary steps by suppressing newspaper reports of the name of the children and excluding all minors from the hearing except the offender and juvenile witnesses one at a time.<sup>28</sup>

Ten years after the establishment of the nation’s first juvenile court, a leading proponent of private hearings did not think that they had been in existence long enough to be considered “fully tested by experience.”

Judge Baker’s article is still valuable reading. Both his concerns about secrecy and his warning about proceeding too quickly to close hearings are still relevant. In light of the subsequent history of the juvenile court, I believe that there has to be some form of public

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often rely on a single source, Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909-1910).

<sup>25</sup> The other advantages were: “A bold child cannot pose as a hero in a small room with only half a dozen people and no other children present. Children are easily precluded from hearing, or even seeing, their parents admonished. It is frequently necessary to admonish them in the presence of their child, even if the child is so far away that he cannot hear, tends to further impair their already too weak authority. Children do not hear each other’s cases. Children are not pilloried before the public. Curiosity seekers are barred.” Baker, *supra* note 23, at 82.

<sup>26</sup> *Id.* at 83.

<sup>27</sup> *Id.* at 84.

<sup>28</sup> *Id.*

oversight of child protection hearings, perhaps a combination of review panels, limited media access, and maintenance of accurate records. Yet, fully opening up hearings to the public may cause problems, especially if Connecticut desires to keep dependent children from attending their own hearings. If children in Connecticut eventually become part of the court proceedings, the state will have to find ways to minimize the traumas of the courtroom experience for children, and to do so will probably involve keeping the number of people present to a minimum.<sup>29</sup> Thus, if Connecticut decides to open the doors of the juvenile court, it should exercise as much caution as Judge Baker did when he called for their closing almost a century ago.

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<sup>29</sup> Nathanson & Saywitz, *supra* note 6, at 67-98.