



1996

## Freedom of Speech and Press

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### Recommended Citation

(1996) "Freedom of Speech and Press," *Touro Law Review*. Vol. 12 : No. 3 , Article 32.  
Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol12/iss3/32>

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## SUPREME COURT

## NEW YORK COUNTY

Brentrup v. Culkin<sup>339</sup>  
 (decided November 30, 1995)

Petitioner, the children's guardian ad litem, brought a motion seeking closure of the courtroom during a custodial proceeding.<sup>340</sup> Petitioner argued that the interest and attention of both the public and the media would be harmful and humiliating to the children and an intrusion into the family's private life.<sup>341</sup> However, the supreme court rejected petitioner's argument, finding that the "[c]omplete closure of the courtroom in this matter would be neither narrowly tailored nor the least intrusive manner in which to address the possibility of real harm to the children."<sup>342</sup> In reaching its determination, the court recognized that the right of the public and the press to attend court proceedings is constitutionally protected under both the First Amendment of the United States Constitution<sup>343</sup> and article 1, section 8 of the New York Constitution,<sup>344</sup> and, therefore, such a right will only be impinged where "there are compelling reasons for closure."<sup>345</sup>

The courtroom proceeding at issue in this case involved the custody of the children of the Culkin family, several of whom are

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339. 635 N.Y.S.2d 1016 (Sup. Ct. New York County 1995).

340. *Id.* at 1018.

341. *Id.* at 1019.

342. *Id.*

343. U.S. CONST. amend. I. The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

344. N.Y. CONST. art I, § 8. This section provides in pertinent part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

345. *Brentrup*, 635 N.Y.S.2d at 1017 (citing *Merrick v. Merrick*, 154 Misc. 2d 559, 562, 585 N.Y.S.2d 989, 991 (Sup. Ct. New York County 1992), *aff'd*, 190 A.D.2d 516, 593 N.Y.S.2d 192 (1st Dep't 1993)).

well-known child actors.<sup>346</sup> Specifically, the dispute central to the custody proceeding involved a determination of “which parent is better able to care for the children, including managing and directing the careers of these child actors.”<sup>347</sup> It is significant and worth noting that the family is one of professional actors, which made “the family . . . by definition in the limelight.”<sup>348</sup>

In support of the petition, the children’s guardian ad litem proffered certain affidavits intending to detail particularly harmful and humiliating circumstances to be brought out at trial; however, the only real concern which came to light from the affidavit was the intrusion by the press on the privacy of the family.<sup>349</sup> In denying petitioner’s motion, the court recognized that “[t]he right of the public and press to attend court proceedings is generally a constitutional entitlement.”<sup>350</sup> The

346. *Id.* at 1018. The court recognized that, as child actors, these children were not “ordinary” in the sense that they were no strangers to the media and its effects upon them. *Id.*

347. *Id.* at 1019.

348. *Id.* at 1018. The court noted that “the most famous of [the children] is known internationally and has been called the best-known child actor since Shirley Temple.” *Id.*

349. *Id.* at 1019. The court conceded that the public and press were interested in this case due to the notoriety of the family which made this case different from other custody cases where “most of the time the press is not clamoring to attend such trials.” *Id.* However, even if the public wanted “to watch or report on a trial [this] cannot in itself serve as the basis to close a custody trial.” *Id.* As the supreme court logically asked, “[a]re we to close courtrooms for custody trials only when the press and public want to attend?” *Id.*

350. *Id.* at 1017. *See supra* notes 114-231. *See also* *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (applying this constitutional entitlement to criminal trials and finding that “the historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England have long been presumptively open”); *Associated Press v. Bell*, 70 N.Y.2d 32, 38, 510 N.E.2d 313, 316, 517 N.Y.S.2d 444, 447 (1987) (holding that a suppression hearing, involving the high profile murder case of accused murderer Robert Chambers, could not be closed because “a hypothetical risk of prejudice or taint cannot justify categorical denial of public access to suppression hearings” since the public and the press have a First Amendment right to attend such hearings).

court examined this right of access under an analysis of both federal<sup>351</sup> and state<sup>352</sup> caselaw, as well as statutory<sup>353</sup> imperatives.<sup>354</sup> However, the Supreme Court recognized that this right of access to court proceedings is not an absolute right.<sup>355</sup> There are certain “potentially delicate types of proceedings” where the court may “in its discretion, exclude therefrom all persons who are not directly interested therein . . . .”<sup>356</sup>

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351. *Press-Enterprise Co. v. Superior Court* [hereinafter *Press-Enterprise III*], 478 U.S. 1 (1986); *Press-Enterprise Co. v. Superior Court* [hereinafter *Press-Enterprise I*], 464 U.S. 501 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

352. *Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 564 N.E.2d 1046, 563 N.Y.S.2d 380 (1990); *In re Associated Press*, 70 N.Y.2d 32, 510 N.E.2d 313, 517 N.Y.S.2d 444 (1987); *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 399 N.E.2d 518, 423 N.Y.S.2d 630 (1979); *In re Katherine B.*, 189 A.D.2d 443, 596 N.Y.S.2d 847 (2d Dep’t 1993); *In re Douglas*, N.Y. L.J., Mar. 31, 1995, at 37 (Surr. Ct. Westchester County).

353. See N.Y. JUD. LAW § 4 (McKinney 1983). This section provides in relevant part:

The sittings of every court within this state shall be public, and every citizen may freely attend same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, and assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.

*Id.* Furthermore, section 235(2) of the New York Domestic Relations Law provides in relevant part:

If the evidence on the trial of such an action or proceeding be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel, and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action or proceeding or someone interested, on order of the court.

N.Y. DOM. REL. LAW § 235(2) (McKinney 1986).

354. *Brentrup*, 635 N.Y.S.2d at 1018.

355. *Id.* at 1017. See also *Westchester Rockland Newspapers*, 48 N.Y.2d at 438, 399 N.E.2d at 522, 423 N.Y.S.2d at 635.

356. *Brentrup*, 635 N.Y.S.2d at 1018. See also N.Y. JUD. LAW § 4 (McKinney 1983). See *supra* note 353.

The *Brentrup* court, utilizing the two part test enunciated in *Press-Enterprise Company v. Superior Court*<sup>357</sup> and later followed in the New York case of *In re Johnson Newspaper Corp. v. Melino*,<sup>358</sup> which determined whether the public and press should be allowed to invoke this constitutional right to gain access to certain court proceedings. First, “the forum or type of proceeding [must be one] which has been historically open to the public.”<sup>359</sup> Second, it must be determined whether public access plays a “significant positive role” in the functioning of the process in question.<sup>360</sup> Furthermore, once it is determined that the public or press has a right of access to a court proceeding, a further inquiry must be undertaken to determine whether there is a “compelling reason[] for closure” of the courtroom.<sup>361</sup> A

357. 478 U.S. 1 (1985).

358. 77 N.Y.2d 1, 564 N.E.2d 1046, 563 N.Y.S.2d 380 (1990).

359. *Brentrup*, 635 N.Y.S.2d at 1018. See *Press-Enterprise I*, 464 U.S. at 505 (determining that a review of the “historical evidence” dating back to when “our organic laws were adopted,” reveals that “since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause”). See also *Press-Enterprise II*, 478 U.S. at 10 (holding that there has been a “tradition of public accessibility to preliminary hearings conducted in California”); *Richmond Newspapers*, 448 U.S. at 577 (finding “[t]he right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press”); *In re Johnson*, 77 N.Y.2d at 7, 564 N.E.2d at 1049, 563 N.Y.S.2d at 383 (recognizing that “there is no suggestion that professional disciplinary hearings have any tradition of being open to the public”); *Westchester Rockland Newspapers*, 48 N.Y.2d at 441-43, 399 N.E.2d at 524-25, 423 N.Y.S.2d at 637-38 (finding that in a criminal case, the public has a right to have access to preliminary proceedings including the suppression hearing and pretrial competency hearing).

360. *Brentrup*, 635 N.Y.S.2d at 1018. See *Press-Enterprise I*, 464 U.S. at 508 (determining that the “open trial . . . plays a[n] important . . . role in the administration of justice . . . [because it] enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system”).

361. *Brentrup*, 635 N.Y.S.2d at 1018. See *In re Associated Press*, 70 N.Y.2d at 39, 510 N.E.2d at 317, 517 N.Y.S.2d at 448 (finding a compelling reason to warrant closure of a suppression hearing to be “specific findings . . . demonstrating that first, there is a substantial probability that the

“viable showing of actual and substantial harm” may constitute such a compelling reason to warrant closure.<sup>362</sup> However, even where such a harm may be shown, the “nature and extent of the asserted harm must be balanced against the competing interest of keeping the courtroom open.”<sup>363</sup> Moreover, the party moving for closure has the burden of demonstrating that the “proposed limitations on the public’s right of access are (1) essential to preserve a higher value; (2) narrowly tailored to serve that interest; and (3) effective at preventing the identified harm.”<sup>364</sup> In addition, “it has also been suggested that [the] court has the authority to consider reasonable alternatives less invasive of the public’s right to access to judicial proceedings than closure of the courtroom during the entire trial.”<sup>365</sup>

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defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights”).

362. *Brentrup*, 635 N.Y.S.2d at 1018. See *In re Katherine B.*, 189 A.D.2d 443, 445, 596 N.Y.S.2d 847, 849 (2d Dep’t 1993) (finding a viable showing of actual and substantial harm in allowing “continued public and media exposure” of a child protective proceeding commenced under Family Court Act article 10 because due to the particularly sensitive nature of the proceeding it would not be in the best interest of the alleged neglected and abused child). But see *Sprecher v. Sprecher*, N.Y. L.J., June 21, 1988, at 21 (Sup. Ct. New York County), *modified sub nom.* *Anonymous v. Anonymous*, 158 A.D.2d 296, 297, 550 N.Y.S.2d 704, 705 (1st Dep’t 1990) (finding that the plaintiff mother in the custody proceeding did “not establish sufficient grounds to warrant closing the court . . . [since] the unsupported speculation by her counsel as to the deleterious effect that media coverage might have on the child [was] simply inadequate to overcome the strong presumption that court proceedings be open to the public”).

363. *Brentrup*, 635 N.Y.S.2d at 1018. See *Sprecher*, N.Y. L.J., June 21, 1988, at 21 (applying this balancing test to a custody proceeding and holding that “[t]he court must balance the best interest of the child with the public’s right of information,” since a “closed courtroom would inhibit the public’s legitimate right to be educated about the child rearing practices of [the mother’s] group within its own community”).

364. See *Press-Enterprise I*, 464 U.S. at 509-510; *Press-Enterprise II*, 478 U.S. at 14; *In re Associated Press*, 70 N.Y.2d at 39, 510 N.E.2d at 317, 517 N.Y.S.2d at 448; see also *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 399 N.E.2d 518, 423 N.Y.S.2d 630 (1979).

365. *Brentrup*, 635 N.Y.S.2d at 1018. See *In re Associated Press*, 70 N.Y.2d at 39, 510 N.E.2d at 317, 517 N.Y.S.2d at 448. See *supra* note 363.

Although, this two-tiered test has traditionally been applied in the criminal setting in order to establish the constitutionality of access to criminal court proceedings by the public and media, it has lately been extended to civil judicial proceedings.<sup>366</sup> In fact, the court in *Brentrup* found that there should be no distinction between civil and criminal matters since “public scrutiny of a custody trial indeed can ‘promote fairness and due process and tends to prevent perjury, misconduct and biased results.’”<sup>367</sup> Thus, public access has a similar effect in the civil as well as criminal realm.

In the case at bar, the court applied this two-tiered test and determined that the public and media had a right of access to the proceeding since both tiers had been satisfied.<sup>368</sup> First, custody proceedings and trials held in the New York State Supreme Court have “historically been open to the public.”<sup>369</sup> Second, “public access has always played a significant and positive role in the Supreme Court.”<sup>370</sup> Specifically, “the public has a legitimate interest in knowing the substance of court proceedings, and the integrity of the judiciary is protected by keeping those proceedings open.”<sup>371</sup> Having determined that there is a presumption that judicial proceedings are open to the press and public, the court in *Brentrup* progressed to the next inquiry of determining whether there was a compelling reason to warrant closure of the courtroom in the present custody proceeding.<sup>372</sup>

In a custody proceeding, “[t]he public interest must be acknowledged to include the protection of children generally from injury . . . . However, we cannot assume that harm will

366. *Richmond Newspapers*, 448 U.S. at 580 n.17 (stating that “historically both civil and criminal trials have been presumptively open”). See also *Merrick*, 154 Misc. 2d 559, 585 N.Y.S.2d 989; *Sprecher*, N.Y. L.J., June 21, 1988, at 21.

367. *Brentrup*, 635 N.Y.S.2d at 1017-18 (citing *In re Douglas*, N.Y. L.J., Mar. 31, 1995, at 37 (Surr. Ct. Westchester County)).

368. *Id.* at 1017.

369. *Id.*

370. *Id.*

371. *Id.* (citing *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 399 N.E.2d 518, 423 N.Y.S.2d 630 (1979)).

372. *Id.* at 1017 (citations omitted).

result merely by virtue of public access to a custody trial, . . . [o]therwise all custody trials would be required to be closed to the public.”<sup>373</sup> The court recognized that in most instances courtroom closure is not sought because access by the media and public is rarely sought.<sup>374</sup> However, due to the nature and circumstances surrounding the present action, and in particular, the notoriety of the family in question, the press and public have sought access.<sup>375</sup> The court noted that this fact alone cannot change the standard for determining the present issue, thus, “a viable showing must be made that actual, substantial harm, emotional or physical, will result to the children from such public access to the proceedings, which can be avoided by sealing the courtroom . . . . And even then, the asserted harm must be balanced against the competing interest of keeping the courtroom open.”<sup>376</sup>

The court determined that there was no showing of a substantial harm which would be substantially compelling to warrant the closure of the courtroom during the pendency of the custody proceeding.<sup>377</sup> The mere fact that there could be negative elements surrounding the family was insufficient to constitute a compelling reason for closure of the courtroom to the public and media.<sup>378</sup> Furthermore, the dispute involved in this custody

373. *Id.* at 1018.

374. *Id.*

375. *Id.* See *supra* notes 346-349 and accompanying text.

376. *Brentrup*, 635 N.Y.S.2d at 1018. See also *Sprecher*, N.Y. L.J., June 21, 1988, at 21.

377. *Brentrup*, 635 N.Y.S.2d at 1019. The court noted that there had been “no allegations involving areas likely to cause such personal embarrassment, such as physical or sexual abuse.” *Id.*

378. *Id.* at 1018. In fact, the court noted the implications of the family’s notoriety and its effects on the outcome of this issue:

This family is by definition in the limelight, and all are the equivalent of public figures. Coverage in the media is a fundamental part of their lives, and must necessarily include negative as well as positive, press-release style information. While it is unpleasant to read, or have others read, about negative elements of one’s family relationships, that unpleasantness alone does not demonstrate harm.

*Id.* Moreover, sealing the courtroom will not have the “desired effect of causing the press to lose interest in either the trial or family.” *Id.* at 1019.

proceeding centered more on the parents rather than the children.<sup>379</sup> The court recognized that:

The trial w[ould] largely concern the parties' interpersonal skills and business acumen, and testimony w[ould] in all likelihood focus primarily not on the conduct or personalities of the children, but on those of the parents. Such evidence does not rise to the level of private matters whose exposure would be injurious to the children.<sup>380</sup>

Moreover, the court found that the petitioner did not meet her burden of demonstrating that closure of the courtroom would be either narrowly tailored or "the least intrusive manner in which to address the possibility of real harm to the children."<sup>381</sup> Although the court recognized the potential for certain testimony to be humiliating to the children, it determined that, if such circumstances did arise, closing of the courtroom for those limited portions of the trial upon an *in camera* review of the testimony would be the least intrusive manner to address this possibility of harm to the children.<sup>382</sup>

Therefore, the court, under both the Federal and State Constitutions, denied petitioner's motion for closure of the courtroom in this custody proceeding absent a demonstrative showing of substantial harm to the children. The court stated the requested closure was neither narrowly tailored nor the least intrusive means to prevent the substantial harm.<sup>383</sup> Thus, there

379. *Id.*

380. *Id.*

381. *Id.*

382. *Id.* The court in its decision noted:

However, it may well be that testimony will be taken, which might be personally humiliating to some of the children: for instance, if the testimony of the forensic psychiatrist will include psychological diagnoses, evaluations of maladjustment or other assertions likely to humiliate a child. If that is the case, I will entertain *in camera* offers of proof and upon an appropriate showing, will close the courtroom for that portion of the trial. With the assistance of counsel in monitoring the expected testimony, the court should be able to avoid the publicizing of any humiliating information regarding the children.

*Id.*

383. *Id.* at 1018-19.

are no real distinctions to be drawn, under either federal or state constitutional analysis, when dealing with the right to freedom of the press, particularly public and media access to courtroom proceedings.

City of New York v. Dana<sup>384</sup>  
(decided April 16, 1995)

The defendants, Raymond Dana and 236 W. 54th St. Corp., owners and operators of an adult movie theater known as "The New David Cinema," opposed a proceeding that would grant the City of New York a preliminary injunction to close the cinema. Defendant's argued that the injunction would violate the New York State Constitution's guarantee of freedom of expression.<sup>385</sup> Defendants urged that article I, section 8, of the New York State Constitution as construed by the New York Court of Appeals in *Arcara v. Cloud Books*,<sup>386</sup> precluded granting the preliminary

384. 165 Misc. 2d 409, 627 N.Y.S.2d 273 (Sup. Ct. New York County 1995).

385. *Id.* at 414, 627 N.Y.S.2d at 276. N.Y. CONST. art. I, § 8. This section states in relevant part: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.* The defendants did not invoke their right to free speech under the United States Constitution. *See* U.S. CONST. amend. I. The First Amendment states that: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." *Id.*

386. 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986). In *Arcara*, the New York Court of Appeals held that "when government regulation designed to carry out a legitimate and important State objective would incidentally burden free expression, the government's action cannot be sustained unless the State can prove that it is no broader than needed to achieve its purpose." *Id.* at 558, 503 N.E.2d at 495, 510 N.Y.S.2d at 847. The *Arcara* court stated that "[if] other sanctions, such as arresting the offenders, or injunctive relief prove unavailing," then the state's burden under the standard would be met. *Id.* at 559, 503 N.E.2d at 495, 510 N.Y.S.2d at 847. The important state interest in *Arcara* was the abatement of public nuisances (the premises were used to engage in prostitution). *Id.* at 556, 503 N.E.2d at 494, 510 N.Y.S.2d at 846.