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Juvenile Criminal Record Confidentiality

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> "While opening access to the juvenile record is a policy based on legitimate public safety concerns, it threatens to reverse nearly 100 years of juvenile justice policy that stresses rehabilitation, treatment and individual privacy. How to balance the use of juvenile justice records in today's climate presents unique challenges to juvenile justice administrators, public policy makers, and others in the criminal justice arena involved in aspects of collecting, maintaining, using or disseminating juvenile justice record information."
>
> Jan Chaiken, Director
>
> U.S. Bureau of Justice Statistics (1997)

Professor Franklin Zimring (2002) has pointed out that the founders of the juvenile court had two main goals: 1) to avoid burdening and harming youth with a criminal stigma, and 2) to rehabilitate wayward youth. To achieve the first goal, they proposed that juvenile court proceedings and records be kept confidential (Belair 1982).Anticipating what sociologists would later call "labeling theory" (Lemert 1951; Becker 1963), they believed that to label a child "criminal" is itself "criminogenic," i.e. that when prosecutors, judges, corrections personnel and peers treat a child as a criminal,

the child begins to form attachments with others similarly situated, become estranged from pro-social peers, self-define as and act like a criminal. They insisted that stigmatizing a child with a "criminal" label was not in the best interest of the individual child or society (Platt 1969; Tanenhaus 2004).

The juvenile court movement began at the turn of the twentieth century. One of its founders**,** Judge Julian Mack (1909), urged "[getting] away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma —this is the work which is now being accomplished [by the juvenile court]." The first challenge in keeping confidential the juvenile's contacts with the police and the court was to cabin all information about the youth's criminal activity in the hands of a small group of juvenile court insiders. This would be accomplished by closing the courtroom to all but court insiders, i.e. the public would not be admitted to juvenile court proceedings. There would be no jurors who might later talk about what they had seen and heard.

The juvenile court sought to avoid creating records that would impose a stigma that a youth would necessarily carry forward into adulthood. It attempted to accomplish this by defining its procedures as civil rather than criminal, and by decriminalizing the language used by the court. The child would be called "respondent," not defendant. The respondent would be held in "pretrial detention," not jail. The proceeding would be referred to as an "adjudication," not a trial. The respondent would not be convicted, but "adjudicated as delinquent." The respondent would receive a "disposition," not a sentence. If the disposition included confinement, the delinquent would be sent to

"training school," not prison. No transcript of the proceeding would be prepared. In the event that an appeal or post conviction petition reached an appellate court, the appellate court's published opinion would anonymize the juvenile respondent's name (i.e. "In re J.B.").

Although the founders of the juvenile court wanted to protect children from the negative consequences of labels and records, they also urged the juvenile court judge to obtain as much information as possible about the respondents over whom it exercised authority. This meant creating a copious file on each respondent. Court personnel prepared a "social file" that included information about the respondent's contacts with social service agencies, behavior at school, parents' description of the respondent's behavior at home, use of alcohol and drugs, sexual activity and the probation officer's perception of the respondent's remorse. (Judges sometimes ordered a psychological report.) These reports typically included much rumor and hearsay. The more information that flowed to and through the court, the more serious the consequences (embarrassment and stigma) to the respondent if the information was inadvertently or purposefully disclosed to unauthorized parties.

Juvenile court historian David S. Tanenhaus (2004) points out that in the first three decades of the twentieth century, efforts to keep juvenile court proceedings and records confidential met significant resistance in some jurisdictions. In Illinois, for example, opponents declared that "secret courts might operate to enslave poor children." However, by the late 1920s, proponents of confidentiality had achieved substantial success. The majority of states passed laws limiting disclosure of information about adjudications and arrests, albeit permitting disclosure to law enforcement agencies, adult

courts and other government agencies. Some states required that the case file automatically be sealed when the respondent turned 21 years old so that the delinquent youth could embark upon adulthood without a criminal stigma. For example, Massachusetts's law provided that:

> Criminal offender record information shall be limited to information concerning persons who have attained the age of 17 and shall not include any information concerning criminal offenses or acts of delinquency committed by any person before he attained the age of 17; provided, however, that if a person under the age of 17 is adjudicated as an adult, information relating to such criminal offense shall be criminal offender record information. (Mass. Gen. Laws Ann. Ch. 6).

Some state statutes provided that an individual with a sealed or purged juvenile adjudication could, when asked, deny ever having been found guilty of a crime or adjudicated delinquent. (This could be very confusing when, for example, law schools or bar committees ask applicants if they have ever been arrested or adjudicated, even as a juvenile and even if purged). In 1950, Congress passed the Federal Youth Corrections Act in order to spare "rehabilitated youth offenders the common and pervasive social stigma and loss of economic opportunity that in this society accompany the 'ex-con' label." The Act made federal offenders between 18-26 year-old eligible to have their convictions "set aside" if the court released them early from probation.

Despite the philosophical and statutory commitment to confidentiality, it is unclear how effectively juvenile courts maintained the confidentiality of respondents' identities . It should not be assumed that the identities of and charges against juvenile arrestees and respondents remained secret. No doubt there was considerable variation

from court to court. In small towns, it was nearly impossible to keep a young person's contact with the juvenile court completely confidential, because the community usually knew when a youngster had gotten into trouble. Because sealing statutes always gave judges discretion to unseal a case file upon a showing of good cause, judges in all jurisdictions could disclose information those deemed to have a legitimate need to know. This might include military recruiters, social service casewrkers, school authorities and some private employers. It is unlikely that much attention was given to information security, and in any case, one of the court insiders might be willing to oblige a nosy acquaintance, curious friend or potential employer.

In its watershed 1967 decision in *in re Gault*, the U.S. Supreme Court cast doubt on the extent to which Arizona's and other states' juvenile courts kept information confidential:

> "It is frequently said that [the juvenile court protects] juveniles from disclosure of their deviational behavior. As the Supreme Court of Arizona phrased it, in the present case, the summary procedures of the juvenile courts are sometimes defended by a statement that it is the law's policy to 'hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.' This claim of secrecy is, however, more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to employers."

The *Gault* Court held that the constitution guarantees to juvenile court respondents most of the criminal procedure rights enjoyed by adult criminal defendants: the constitutional right to counsel; the opportunity to confront witnesses; the right against self-incrimination; the right to a transcript of the hearing and the right to appeal the court's decision. (Tanenhaus 2004). However, the Supreme Court did not require the juvenile court to open its proceedings or records to the public, and emphasized the importance of protecting youth from being labeled criminal.

Some juvenile court critics charged that secrecy invited abuse and arbitrariness; inaccessible records invited suspicion of abuse of authority and discrimination. For example, Massachusetts Justice Gordon A. Martin Jr., wrote: "Elimination of juvenile delinquency's historic cloak of confidentiality is essential to rebuilding trust and dissipating the fear that the closed juvenile system fosters." (Martin, Jr. 1995). In the years that followed, several states responded to these criticisms by opening up juvenile court proceedings to the public (Bazelon 1999; Martin 2002-2003).

Further Erosion of Confidentiality

In the 1970s, the Supreme Court heard three cases that challenged the confidentiality of delinquency records, and the proponents of confidentiality lost all three. In *Davis v. Alaska (1974),* the Supreme Court considered whether a criminal defendant has a constitutional (confrontation clause) right to cross-examine a prosecution witness about that witness's juvenile criminal record. Alaska, like many states, did not allow lawyers to impeach a witness by exposing prior delinquency adjudications. The state claimed to have a compelling interest in protecting a person from having his juvenile criminality disclosed. In *Davis*, the Court held that a criminal court defendant's Sixth

Amendment right to impeach a juvenile prosecution witness outweighed the state's interest in protecting that witness from having his juvenile criminality disclosed. Chief Justice Burger's majority opinion said that: "Whatever temporary embarrassment might result to Green [the prosecution's witness] or his family by disclosure of his juvenile record - if the prosecution insisted on using him to make its case - is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." It concluded "that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself." (In accord with the *Davis* decision, Rule 609 of the Federal Rules of Evidence, like state evidentiary rules, now provides that a juvenile adjudication is admissible to impeach a witness *other than the defendant* if an adult's conviction for that offense would be admissible to attack the adult's credibility, and admitting the evidence is necessary to fairly determining guilt or innocence.)

Oklahoma Publishing v. District Court (1977) and *Smith v. Daily Mail Publishing* (1979) dealt with whether, in order to preserve confidentiality of juvenile offenders, states can prohibit media from naming juvenile arrestees and respondents. The Supreme Court ruled that a state cannot, either by court order (*Oklahoma Publishing*) or statute (*Smith*), prevent the media from revealing a juvenile arrestee's identity as long as the information was legally acquired. In *Smith,* Justice Rehnquist concurred in striking down West Virginia's law because it prohibited newspapers, but not electronic media, from disclosing the name of an accused juvenile offender. "It is difficult to take very seriously West Virginia's asserted need to preserve the anonymity of its youthful offenders when it

permits other, equally, if not more, effective means of mass communication to distribute this information without fear of punishment." However, in a passage that now reads like a swan song for the ideal of confidential juvenile court records, Rehnquist observed:

> "The prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State. . . . Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public. . . . Such publicity also renders nugatory States' expungement laws, for a potential employer or any other person can retrieve the information the States seek to "bury" simply by visiting the morgue of the local newspaper. The resultant widespread dissemination of a juvenile offender's name, therefore, may defeat the beneficent and rehabilitative purposes of a State's juvenile court system."

In the 1980s, there was bipartisan support for greater transparency in juvenile justice proceedings. conservatives and many liberals had soured on rehabilitation and now embraced retributive (just deserts) and incapacitative rationales for criminal sentencing. Liberalscharged that juveniles were being accorded second-class justice and urged that juvenile charged with crime be accorded the same process as adult criminal defendants (Feld 1998). They tended to secret proceedings and recommended open up the juvenile court to public scrutiny. (Some advocates of abused and neglected children, also

handled by the juvenile or family court, sought to open up proceedings and records in order to expose and remedy abuses.)

Law-and-order conservatives argued that prosecutors and judges in adult court should have access to a defendant's delinquency adjudications in order to make sensible charging, plea bargaining and sentencing decisions. They insisted that because adult offenders whose "criminal careers" started when they were juveniles had a higher risk of future offending than adult offenders without delinquency adjudications, it was foolish and dangerous to treat an adult with previous delinquency adjudications as a first time offender.

Public support for confidentiality protections significantly eroded during the 1980s and 1990s, in response to a sharp spike in both the prevalence and violence of juvenile crime. As society began to demand more punitive measures, state legislatures enacted laws emphasizing "accountability" over juvenile confidentiality. In 1984, Congress repealed the Youth Corrections Act. Every state made it easier to prosecute in adult court juveniles who were charged with serious crimes.

Many states passed laws requiring juvenile records to remain open well into adulthood. Florida, for example, required records about juveniles considered habitual offenders to be preserved until the offender reaches age 26. Other states repealed laws protecting juvenile offenders' confidentiality, especially in cases involving violent or serious offenses. By 1997, half the states had enacted laws cutting back on sealing and/or expunging juvenile records. (Butts 2009).

At a 1997 conference on juvenile records, Robert R. Belair, a leading privacy law expert, reported that the confidentiality of both police and court records pertaining to

juvenile offenders had significantly diminished. The juvenile court's original commitment to rehabilitation and protection of minors had been eclipsed by commitment to community protection and the "public's right to know." Support for forgiving and forgetting juvenile misconduct had significantly diminished, while support for governmental and judicial transparency had significantly increased.

Currently, at least 21 states require or permit the court to open juvenile proceedings if the respondent is charged with a serious offense or is a repeat offender. In California, the public can be admitted to hearings when a juvenile is alleged to have committed "felony criminal street gang activity," such as carjacking or drive-by shooting. In Illinois, the public has the right to find the name and address of a juvenile who is at least 13 years old and has been criminally convicted of a serious crime or been connected to criminal street gang activity. A Pennsylvania law provides for public access to juvenile court proceedings when the respondent in felony cases when the respondent is over 14 and charged with conduct that would be a felony if s/he was in adult court; in cases involving the most serious felonies, the public has a right of access when the respondent is older than 12. In 1997, New York State created a presumption that family court proceedings would be open to the public. Wisconsin opened up juvenile court proceedings to the media on condition that those attending do not disclose the respondent's name (Reporters Committee For Freedom of the Press 1999). Of course, when a juvenile is tried in adult court, the proceedings are fully open to the public as they are when the defendant is an adult.

Collateral Consequences

The disclosure of delinquency adjudications is important because significant consequences flow from disclosure. Increasingly, delinquency adjudications are being taken into account by criminal justice system and other decision makers. For example, the Federal Sentencing Guidelines (1987) instruct federal judges to assign the same weight to a delinquency adjudication (for conduct that would be criminal if committed by an adult) as to an adult conviction. Every state provides that adult criminal court judges have access to at least some delinquency adjudications for purposes of pretrial release, detention and sentencing. Some states, including 14 with sentencing guidelines, *require* that criminal courts consider juvenile adjudications (Redding 2002).

Delinquency adjudications increasingly trigger collateral consequences outside of the criminal justice context (*see*, Shepherd, 2000; Pinard 2007; Love et al 2013). For example, the 1993 (Brady) Handgun Violence Control Act imposes a lifetime disqualification from firearms ownership on individuals who had been adjudicated delinquent for conduct that would have been a felony if committed by an adult. A delinquency adjudication has serious and wide-ranging immigration consequences, e.g. barring adjustment of legal status and requiring or permitting secure detention pending deportation. It also can disqualify a juvenile from living in public housing (Livingston 2004).

In many states, a juvenile sex offense adjudication bars the record-subject from working with children and other vulnerable populations. Every state has a "Meagan's Law" that requires convicted sex offenders to register. (*see*, Garcia 2010) While details differ, all Meagan's laws require convicted sex offenders, *including juvenile sex offenders,* to register with a designated state agency (Zimring 2004). Individuals who

have committed more serious sex crimes must regularly provide the database custodian with information on residence, place of employment, school, automobile license plates, etc., and this information, plus photo, is posted to a publicly-accessible website. The federal Adam Walsh Child Protection and Safety Act requires that state sex offender registries include juveniles convicted in adult court of sex offenses. The "Amie Zyla bill," currently pending before Congress, would amend the federal Sex Offender Notification and Registration Act (SORNA) to require that juvenile sex offenders be included in state sex offender registries (Wisconsin already has such a law).

The "collateral consequences" discussed in the previous paragraph are policies imposed by law or regulation. In addition to those disabilities, an individual with a recorded delinquency adjudication may be discriminated against by colleges and universities, private employers, landlords, volunteer organizations and other entities and individuals. For example, the common entrance application used by 500 colleges and universities asks applicants if they have ever been adjudicated delinquent and, if so, to explain the circumstances. Many employers ask job applicants to disclose delinquency adjudications and, in any event, become aware of them via reports from commercial background checking companies.

Police Records

The history of juvenile justice has always been court-centric, paying much less attention to police and corrections. This is especially shortsighted when it comes to juvenile records policy because police juvenile record policies and practices significantly affect the viability of judicial policies. If the police freely disclose information about

juveniles' criminal history, the court's confidentiality policy is substantially undermined, even rendered irrelevant.

Historian David Wolcott points out that "one of the [juvenile court's] reformers' basic goals has been to remove children from the punitive control of the police." (106). The founders were not oblivious to the fact that police officers created and disseminated information about juvenile delinquents (Flexner and Baldwin 1914). They and their intellectual and ideological descendants sought, with some degree of success, to prevent juvenile criminality from being recorded on permanent rap sheets. They supported laws restricting police photographing and fingerprinting of juveniles. Practically every state limits fingerprinting of juveniles, although there is an exceptions for juveniles accused of serious crimes. Even today, some states require a court order to fingerprint a juvenile; others authorized fingerprinting only for serious offenses. If the juvenile is not fingerprinted, no "rap sheet" (record of arrest and conviction) is created. In the event that the juvenile is fingerprinted, some states have laws requiring police authorities to keep juvenile fingerprints separate from adult fingerprints and to keep juvenile and adult rap sheets in different data bases. Other states maintain a single rap sheet system for all arrests.

While criminal record confidentiality was fundamental to the juvenile court, it was not central to police departments' mission or ideology. Other than in very large cities with specialized units (e.g. "youth bureaus"), police departments did not have officers assigned to policing juveniles. Of course, specialized juvenile policing units did not have a monopoly on police contacts with juvenile offenders. Moreover, the members of the

specialized units were not necessarily committed to keeping juvenile offender information confidential.

The police could (and can) also be a source of much *informal information disclosure*. It is much easier to maintain control of juvenile court information than to control the dissemination of police information. Even a fairly large jurisdiction might have only one or two juvenile court judges and a handful of juvenile court officers, as compared to hundreds or thousands of police officers who come into contact with juveniles. Furthermore, juvenile court judges are often volunteers with a professed commitment to the ideals of the juvenile court, including its goal of keeping information confidential. This is not true of police who come into contact with juvenile offenders.

Police who monitor and arrest juveniles are not selected on the basis of their commitment to preventing juveniles from being labeled as criminals. Patrol officers might arrest a juvenile in response to a reported crime-in-progress or a call complaining about an unruly and noisy clique that disturbs and frightens some neighborhood adults. Unlike a juvenile court judge who may define her mission as "child saving," a police officer's primary goals are maintaining public order, preventing crime and apprehending criminal perpetrators (Wolcott 2005). Unlike the judge, who sees a nervous and contrite child, the police officer confronts surly teenagers on the street or at a crime scene. Police officers regularly interact with members of the community who feel threatened by and complain about "delinquents" and "gang members." They meet the victims (sometimes juveniles themselves) of juvenile crime perpetrators. Many police officers are cynical about juvenile offenders' contrition and rehabilitative prospects.

In the *in re Gault* case, the state (Arizona) argued that opening up juvenile courts' practices to outside eyes would stigmatize and thereby harm juvenile respondents. The Supreme Court rejected this argument, in part because the police routinely disseminated information about the juvenile offender's contacts with the criminal justice system to the armed forces and various federal, state and local government agencies and even to private businesses.

Police officers create "quasi-criminal" files and databases on juveniles who are suspected of past or future crimes. They routinely compile "intelligence" about young people (perhaps gang members) who might have committed unsolved crimes or who might commit future crimes. Some police departments, at some points in time, have required their officers to keep records on all juvenile contacts (Spalty 1972). For example, in the 1970s, the New York City Police Department's (NYPD's) Youth Division (Y.D.) created "contact cards" on youths whom they suspected of delinquency (New York State Division of Criminal Justice Services 1990; Coffee 1972). These reports, routinely shared with the juvenile court, probation services, schools and social welfare agencies, frequently had negative repercussions for the contact-card subject; at a minimum the police would monitor the juvenile more closely. In addition, they might leak their suspicions to government and private agencies and employers. Consequently, a class action challenged the constitutionality of these records, arguing that creating, maintaining and disseminating intelligence information about suspicious juveniles violated their rights to procedural due process and privacy (*Cuevas v. Leary* 1970). In effect, according to the plaintiffs, the contact cards labeled them as delinquents or quasi-delinquents without providing any opportunity to challenge the label. Ultimately, the

parties settled the case. The NYPD agreed to inform juveniles and their parents when a Y.D. Report was created, provide them an opportunity to challenge the Report and to destroy the Report when the report-subject turns seventeen years-old.

In most States the police keep a complete file of juvenile "police contacts" and have complete discretion to disclose this information. Police departments often comply with requests for information about juveniles from the FBI and other law enforcement agencies, the Armed Forces, and social service agencies. Some departments and/or individual officers comply with private employers' requests for juvenile record information.

The same 1980s political pressures that eroded confidentiality of juvenile court records also eroded restrictions on police information gathering, record keeping and dissemination (Office of Juvenile Justice and Delinquency Prevention 1997). In 1992, the FBI changed its long-standing policy against accepting juvenile arrest information from state and local police. Henceforth, it would accept fingerprints and arrest information for "serious and significant juvenile offences" (Bishop 1997). Federal law requires that when a juvenile is found guilty of an act that would be a violent felony if committed by an adult, the juvenile must be photographed and fingerprinted. Moreover, a federal court must transmit to the FBI the court record and fingerprints of a juvenile who has twice been adjudicated for an offense that would be a felony if committed by an adult and those of a juvenile over the age of 13 who committed a felony with a firearm.

Practically every state passed laws allowing more juvenile arrestees to be fingerprinted and making juvenile records more accessible to police, prosecutors and courts. A 1995 Institute for Law & Justice (ILJ) survey found that 40 states explicitly

authorized, while only two states prohibited, fingerprinting arrested juveniles, almost a complete reversal from 20 years before. In 1995, Pennsylvania broadened its existing fingerprinting law to allow the fingerprinting of youth arrested for committing misdemeanors. Connecticut authorizes law enforcement agencies to photograph and fingerprint of a child charged with a felony. Idaho requires fingerprinting and photographing juvenile offenders who are placed in pre-adjudication detention. Missouri requires law enforcement officials to fingerprint juveniles arrested for felonies. North Dakota expanded the criteria for fingerprinting and photographing juvenile arrestees (Bureau of Justice Statistics 1997). At the end of the twentieth century, twenty-seven states maintained juvenile records in a centralized state-level database; only five prohibited juvenile record centralization (Miller 1997). Many states included juvenile arrests and adjudications on adult rap sheets ("one record one system").

The clear trend is passage of state laws authorizing or requiring police and juvenile court personnel to share criminal record information with schools and other agencies and organizations that provide services to children. The goal is to protect students from criminally inclined classmates by informing school authorities when students have been adjudicated delinquent or are even suspected of criminal activity. Even without a law, some police departments may voluntarily notify the school when they have arrested one of its students (Henning 2004).

Some states have laws requiring that schools bring certain disciplinary problems to the attention of the police (Henning 2004). Even when such notification is not required, more contact between police and schools inevitably leads to greater information sharing. Many localities have established interagency partnerships ("collaboratives")

among police, parole, probation, school and prosecutor's offices. Police resource officers, stationed in many schools, facilitate information sharing between schools and police.

In at least 30 states the names and photos of violent and repeat juvenile offenders can be released to the public (Snyder and Sickmund 2006). Maine, for example, for a $31 fee allows anyone to obtain any person's delinquency adjudications. (Maine State Police, Maine Criminal History Record & Juvenile Crime Information Request 2013). The Florida Department of Law Enforcement sells juvenile arrest records along with all other rap sheet information. Several states (e.g. Utah; Maryland) have opened juvenile court proceedings to the public and the media. Strangely, some of those states still seal juvenile court records, a policy significantly undermined when information about the adjudicated juvenile has already been widely disseminated by court observers, media or commercial information vendors (Markman 2007).

While clear, the trend toward wider access to and dissemination of juvenile records should not be exaggerated. There are still many old laws and regulations, and even some new ones, that treat juvenile criminal records as confidential. For example, on March 6, 2013, the House of Representatives in Washington State unanimously passed a bill that to seal juvenile records from public view. It would reverse a four-decade old policy of open juvenile records. Moreover, a majority of states have procedures that allow a person who has been adjudicated delinquent to request that his juvenile record be sealed.

New Types of Juvenile Records and Databases

The information technology revolution makes possible the collection, classification and retrieval of vastly more information than the juvenile court founders

could have imagined. Local, state and federal "gang databases" are a good example (Jacobs 2009). Their purpose is to aid law enforcement and other government agencies identify and monitor suspected gang members whom, it is assumed, pose a high risk of current and future criminality. The police populate these databases with suspected gang members' names, gang affiliation, residence, school and other identifying information. Michelle Alexander points out that:

> In Los Angeles, mass stops of young African-American men and boys resulted in the creation of a database containing the names, addresses and other biographical information of the overwhelming majority of young black men in the entire city… In Denver, displaying any two of a list of attributes—including slang, "clothing of a particular color," pagers, hairstyles or jewelry—earns a youth a spot on the Denver Police gang database. (36).

The police use gang databases to obtain leads on unsolved crimes and to prevent future crimes by taking preemptive action against gang members. When there is a crime with an unknown perpetrator, "known gang members" will be among the first to be questioned and investigated. If a known gang member is arrested, police and prosecutors will press the case harder than they otherwise would. Prosecutors are more like to charge gang members in criminal court rather than juvenile court. If adjudicated in juvenile court or convicted in adult court, the gang member will be sentenced more severely. Gang databases are not public, but police, probation and parole officers, as well as school and social services personnel, have direct or indirect access to them. A database which is accessible to hundreds or even thousands of police officers certainly cannot be called confidential. Undoubtedly, on occasion information from the gang database is

purposefully or inadvertently leaked to employers and others who have a strong interest in (and may be willing to pay for) such information.

Conclusions

For sixty years there was a consensus that American juvenile court records and, to a lesser extent, police contacts should be treated as confidential or at least quasi-confidential. Indeed, the U.S. juvenile court experience had enormous influence on international standards and national laws all around the world. For example, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice state:

> Rule 8.1: The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labeling.
>
> Rule 8.2: In principle, no information that may lead to the identification of a juvenile offender shall be published.

The International Covenant on Civil and Political Rights (ICCPR), to which the United States became a party in 1992, specifically emphasizes special treatment and rehabilitation of children in the criminal justice system. While most of the world embraces the principle that rehabilitation requires confidential treatment of information about juvenile delinquents, the U.S., which invented a juvenile court based upon a commitment to record confidentiality, now is exceptional for disclosing juvenile offender information.

Our examination of juvenile criminal records policy needs to distinguish between the confidentiality afforded juvenile criminal record information while the record-subject is still a juvenile and the confidentiality afforded that information after the record-subject

crosses the threshold of legal adulthood. Before adulthood, juvenile criminal record information is important to the police (e.g. gang intelligence databases), juvenile court, schools and social service and immigration agencies.

However, juvenile criminal record information is increasingly thought to be relevant to assessing the character and predicting the conduct of adults. When an adult, especially a young adult, is arrested, the police, prosecutors and adult court judges want access to his or her juvenile offending history in order to inform their decision-making. Confidentiality was meant to protect the youth (first for the remainder of adolescence and then as an adult) from the indiscretions and poor decisions of his adolescence so that he could embark upon adult life with a clean record. Once he got into trouble as an adult, the rationale for concealing his youthful delinquencies no longer applies. Indeed, his juvenile record now seems to confirm that his experience in the juvenile justice system has not led to reform. Because, for adult defendants, a juvenile record is a significant predictor of later criminality (Miller and McEwen 1996), that record will be important for the prosecutor's charging and plea-bargaining decisions and the criminal court's bail and sentencing decisions. Delinquency information becomes relevant for employers, landlords, and volunteer organizations when those entities have to make decisions about employing or renting to young adults.

The majority of individuals with delinquency adjudication are not later charged with adult crimes. For them, sealing/expunging juvenile adjudications will have facilitated their successful transition to adulthood. Adolescent "trouble making" is a phase for many youth, especially males, but "only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of

problem behavior that persist into adulthood." (Scott and Steinberg 2003). Judgment and self-discipline are far from fully developed at age 13, 14 or 15. The Supreme Court's recent decisions in *Roper v. Simmons (2005), Graham v. Florida (2010)* and *Miller v. Alabama* (2012) emphasized precisely this point. In holding that the death penalty cannot be imposed on juvenile offenders, the *Roper* majority highlighted three important characteristics of juvenile offenders that distinguish them from adults: (i) their recklessness and impulsiveness; (ii) their increased vulnerability and susceptibility to outside influences and peer pressure; and (iii) their still-forming (and thus, more redeemable) moral character. Five years later, in *Graham,* the Court reiterated these points in rejecting the imposition of life sentences without parole on offenders who, as juveniles, had not committed homicide. The majority observed that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," particularly those parts of the brain involved in behavior control. In *Miller,* Justice Kagan wrote for the Supreme Court's 5-4 majority that a mandatory life without parole sentence for an offender who committed murder when younger than 18 constitutes cruel and unusual punishment because "it precludes consideration of his chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences," and that life without parole "prevents taking into account the family and home environment that surrounds him — and from which he cannot usually extricate himself — no matter how brutal or dysfunctional."

For the reasons articulated by the Supreme Court, adolescent criminal conduct should not be treated as an indelible mark of bad character or as a strong predictor of future offending. "Character" evolves throughout adolescence and early adulthood.

Because there is a strong societal interest in encouraging and facilitating juvenile offenders' rehabilitation makes, it highly desirable that delinquency adjudication not become a "scarlet letter." Unless and until the adjudicated delinquent is later charged as an adult, it is desirable to keep his or her juvenile record as non-public as possible. That means that juvenile court files and dockets should not be available for inspection by journalists, commercial information vendors and for use by employers and curious members of the public.

Unfortunately, maintaining juvenile records as confidential will be increasingly difficult given the strong societal commitment to publicly accessible adult criminal records. Criminal background checking has become the norm in employment and other sectors. (One government report is aptly titled "The Criminal Backgrounding of America" (2005)). The military, diverse government agencies and volunteer organizations want as much information as they can get about applicants, including their juvenile records. Private sector employers, landlords and others (including some colleges and universities) want to know whether a young adult job seeker has ever been convicted or perhaps even arrested, at least for conduct that would be criminal if committed by an adult. The American Bar Association has recommended that states adopt standards that would bar employers and educational institutions from asking about or considering juvenile arrests or sealed or expunged juvenile adjudications. That would be an important step in the right direction, but the First Amendment and ever-stronger societal commitment to transparency makes its adoption unlikely (Nelson 1998).

If juvenile offenders' criminal become as publicly accessible as adult criminal records, the first *raison d'etre* of the juvenile court, preventing the juvenile from being

publicly marked as a criminal, will have been negated. Unable to assure respondents a confidential process, the juvenile court would survive be as a kind of problem-solving court, like the drug court and mental health court. Such a court might still have value on account of its expertise in deploying juvenile-specific rehabilitative services, but a great deal of its potential will have been lost.

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