S. HRG. 9

CONFIDENTIALITY OF JUVENILE COURT RECORDS

HEARING

BEFORE THE

SUBCOMMITTEE ON JUVENILE JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

POLICIES REGARDING CONFIDENTIALITY OF JUVENILE RECORDS

JULY 19, 1983

Serial No. J-98-55

nted for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1984

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TUESDAY, JULY 19, 1983

U.S. SENATE,
SUBCOMMITTEE ON JUVENILE JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Arlan Specter (chairman of the subcommittee) presiding.

Present: Senator Metzenbaum.

Staff Present: Mary Louise Westmoreland, chief counsel.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA, CHAIRMAN, SUBCOMMITTEE ON JUVENILE JUSTICE

Senator SPECTER. We shall proceed with this hearing of the Juvenile Justice Subcommittee of the Judiciary Committee. Today, the committee will consider policies regarding confidentiality of juvenile records.

Traditionally, information concerning juvenile offenders, unlike information relating to adult offenders, has been held on a confidential basis by law enforcement authority. This confidentiality is founded on two principles of juvenile law—first, juveniles are generally considered not to be criminally responsible for their acts, and second, an inference which follows from the first is that children who have committed acts, which would be criminal were they adults, should receive treatment and rehabilitation. In fact, the adjudication is customarily one of delinquency as opposed to a judgment of guilt for a specific crime.

As a result, juvenile records are closely guarded to avoid branding a child as a criminal because such branding may interfere with the child's rehabilitation and reassimilation into the mainstream of society.

In most jurisdictions, these considerations have resulted in laws prohibiting public and media access to juvenile records. In this regard, the relationship of the policy of confidentiality to the rehabilitation process is apparent. However, this principle of confidentiality has also led to provisions which prohibit even the criminal court system access to juvenile records. As a result, in many jurisdictions, judges and prosecuting attorneys are forced to make charging, bail, and sentencing decisions without any information on the defendant's prior criminal history.

A number of research efforts aimed at identifying chronic or repeat offenders point out the practical implications for the criminal justice system of such limitations. In 1980, a study by Prof. Marvin Wolfgang disclosed that the most reliable predictor of adult career criminals was juvenile criminality. Similarly, a 1982 study performed by the Rand Corp. under a grant by the National Institute of Justice, found that the group profiled as "violent predators" usually began committing crimes before age 16 and was more likely to have spent a longer time in juvenile facilities.

Even in those jurisdictions where law enforcement access to juvenile records is not barred, information sharing between juvenile and adult records is inadequate. For example, the 1980 Rand study found that very few jurisdictions had uniform information-sharing policies between juvenile and adult departments of the criminal justice system. Almost one-half of the prosecutors who responded to the survey reported that they received little or no information on young adult felony defendants within their jurisdiction.

Current Federal law does not allow the court to release juvenile record information in response to inquiries from law enforcement agencies or courts. Because most juveniles fall initially within the jurisdiction of the State courts, the confidentiality of juvenile records is a matter primarily for State action. At the Federal level, however, we cannot ignore the increasing volume of research which indicates the important connection between juvenile and adult offenses.

In our efforts to try to deal with the growing crime problem and with the attention focused on the career criminal, it has been noted by many that the career criminal tendencies begin with the juvenile offenders at a very early age. As we pursue this subject, it becomes more and more important to take a close look at what the juvenile offenders are doing as a relevant determination for treating some as adults. In some jurisdictions, juveniles are treated as adults at the age of 16 or 17, and certainly, in these areas, prior records are necessary. Similarly, when a juvenile turns 18 and is charged in an adult court, there is good reason to conclude that the sentencing judge ought to have ready access to the juvenile record in order to determine the appropriate sentence.

Beyond these considerations, there are also critical factors in availability of juvenile records to the media as a means of evaluating how well the juvenile justice system is working. These are only a few of the complex questions posed in this area, and all of it has to be balanced against the traditional view that the juveniles are not a part of the criminal justice system and are traditionally entitled to unique safeguards, including the confidentiality of their records for these kinds of purposes, collateral or important, as they may be.

Today, we have three very distinguished witnesses to shed some light on this subject, and we are pleased to welcome first the Honorable Alfred S. Regnery, Administrator of the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice.

We welcome you, Mr. Regnery, to what is, I believe, your first appearance before this subcommittee since your confirmation.

STATEMENT OF HON. ALFRED S. REGNERY, ADMINISTRATOR, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE

Mr. REGNERY. That is right. Thank you very much, Senator.

I do have a prepared statement, which I would ask be included in the record, and I am prepared to summarize that today.

Senator SPECTER. Mr. Regnery, your full statement will be included in the record, and we appreciate your proceeding to summarize it.

Mr. REGNERY. Let me point out, just for those who are here and who have it, that there are two minor mistakes in the testimony. At the bottom of page 4, there appears a paragraph which should be a quote, from Judge Delaney, who is mentioned in the paragraph above; and the second paragraph on page 5 is a quote from the *Gault* decision. I have given your staff an amended copy, Senator, that includes those quotes.

Senator SPECTER. Thank you.

Mr. REGNERY. Let me also ask at the outset, Senator, that a copy of a Bureau of Justice Statistics book, "Privacy in Juvenile Justice Records," which was prepared in 1982 by the Search Group, be included in the record. It gives, really, a very clear and concise view of the law as it now stands, both federally and in the States, and I think a very cogent discussion of the issue, and I think if included in the record, it would add a great deal to your hearings.

I have a copy of it here, and I will give it to your staff.

Senator SPECTER. We shall include it in the record, Mr. Regnery, and we appreciate your making it available to us.

Mr. REGNERY. The issue of juvenile records as used both in the juvenile courts and in the adult courts appears to be one of the more important issues that exists in the juvenile justice debate. It is one that has changed considerably over the past years, as various States have amended their statutes to allow juvenile records to be used, either in the juvenile courts, in the adult courts, and as the courts themselves have rendered decisions which have allowed access to those records by the media and the public, in some cases.

I think that the public has become aware of the issue primarily because of the increase over the last 15 or 20 years of serious crime among juveniles. Just briefly, let me recite some of those figures.

About 40 percent of all serious crime is committed by those under 18, and approximately 20 percent of the violent crime is committed by those under 28. Furthermore, and I think——

Senator SPECTER. Mr. Regnery, when you say 40 percent of serious crime and 20 percent of violent crime, what is the balance of the serious crime which is not in the category of violent crime?

Mr. REGNERY. Basically, felonies against property.

Senator SPECTER. Thank you.

Mr. REGNERY. I think really an even more important statistic than those are the numbers that have been determined by Marvin Wolfgang, by the Rand Corp., Sarnoff Mednick, and others who have done research to determine the fact that a rather small percentage of juveniles does commit a large percentage of the crime, and I know, Senator, that you are familiar with those studies, but just briefly, again, they have found that generally, somewhere less

than 10 percent of all juveniles—and Wolfgang has narrowed that down to about 7 percent of all juveniles—commit some 50 percent of all serious juvenile crime.

He has also found that those 7 or 8 percent of the juveniles who are committing that crime have a very high recidivism rate, that they are committing, in some cases, hundreds of serious offenses before they are 18, and that to a great extent, those are the same people, as you mentioned in your introduction, who go on to become the career criminals when they are adults. It is a pattern which unfortunately starts when they are 12 or 13 years old and continues into their midthirties or so.

Because of the cutoff at 15, 16, 17, or wherever it is, in various States, of juvenile jurisdiction, obviously, the fact that those records sometimes do not follow those children into adult courts has rather substantial impact on the success of the career criminal programs that exist in so many prosecutors' offices across the country.

It is my understanding that the records are generally accessible to courts in the sentencing phase, but they are not accessible to courts before somebody is determined to be guilty. As a result, in the charging phase of the process, those records often in adult court are not available, and the result is that a multiple juvenile offender who has turned 17 or 18 or whatever the cutoff point in his State is, enters the adult court as a first offender.

Let me just read a quick quote from a piece that Marvin Wolfgang did in "The California Lawyer" in November of 1982. Talking about his studies, he says:

> These studies show that the many career criminal programs around the country that define a career criminal only in terms of serious, repeated crime committed after age 18, are functioning at the tail-end of a much larger animal. A justice system that closes juvenile records to the criminal court, permitting serious recidivists to be reborn with virginal records at the age of 18, is failing to protect society from persons who have already established a criminal career by that age.

Similarly, let me quote very briefly from the BJS study which I just referred to, which says the following:

> The real problem for the adult courts caused by the confidentiality strictures is at the arraignment or charging phase in criminal proceedings. In recent years, State legislatures have established selective charging and sentencing regimens for certain types of first offenders, as well as certain types of multiple offenders. In some States, it is not always clear whether a prior juvenile adjudication affects entitlement for such programs. In any event, if a prior juvenile record is unavailable to prosecutors—and in some States, this is more likely than others—it makes it extremely difficult to effectively implement first offender and multiple offender programs. Criminologists note that as a practical matter, far too many chronic and serious juvenile offenders enter the adult criminal justice system masquerading as first offenders.

The Rand study that was completed in 1981 found that only 3 percent of the prosecutors questioned had full access to juvenile records in the adult court system. Furthermore, half the prosecutors said they never had any information whatsoever. Again, this is often not so much because of the law. The law in most States does allow that to happen. But it is rather because of the fact that the records are kept in two separate systems, they are often kept differently; they are kept by different sets of people, and as a result, because of the administrative problems that exist, it is simply difficult for the prosecutors, or impossible for them, to actually get the records.

Let me recount one incident that came to my attention. I was in New York City not too long ago, talking to the chief juvenile prosecutor, who prosecutes both in adult and juvenile court, who told me that in New York City, although there is one system for keeping adult records, there are basically five systems for juvenile records, one in each borough, and that when she had the necessity to get juvenile records from the juvenile court system, basically, the only way she could do that was if she knew somebody in the repository, and if she had time during her lunch hour or something to go to the repository, which was several blocks away, to physically get the records herself. Otherwise, she said, in New York, those records were basically inaccessible to her. And she was prosecuting murders, rapes, arsons, and other serious crimes among 15- and 16-year-olds.

Senator SPECTER. Well, were those records legitimately available to her, or——

Mr. REGNERY. Legally, they were, yes, but just from an administrative standpoint and a logistical standpoint, they were not.

The State law of all States requires that juvenile and adult court records be kept separately. All States have some confidentiality provisions. About half of those are called comprehensive. That is discussed more fully in the BJS booklet, but basically what that means is that there are very strict restrictions on who can get them, when, why, and so on and so forth.

Most records are available to the juvenile justice system, that is, legally, and of course, since the juvenile justice system keeps its own records, they are physically available, as well. The problem, though, exists with the adult court system getting juvenile records which—again at some stages, and of course, there are 50 different statutes, providing for availability in many stages, but particularly early in the proceedings—are not often available, and of course, also, they are not often timely available.

Another problem exists with the criminal justice records repositories which exist in every State, and of course, the FBI's, also. Most State statutes require that juvenile court records not be included in those repositories. That creates a serious problem for the law enforcement community inasmuch as police often—usually, these days—solve crimes by use of records, by use of other material and if they do not have those records of 40 percent of all the serious crimes that have been committed available to them, obviously, their entire system of solving those crimes is seriously hindered.

It has been my experience in reviewing the literature and talking to those who have reviewed this question that most criminal justice experts, criminologists, prosecutors, and others no longer advocate the complete confidentiality of juvenile records for serious offenders. I think most people now recognize that the policy is one which has been tried, and it has not succeeded, particularly with serious and chronic juvenile offenders, and I do not know of any serious criminologist, in fact, who continues to advocate that those records be kept confidential for such offenders, particularly after the age of 14 or 15.

The juvenile statutes have been amended in many cases over the past years to allow for the increased waiver of juveniles into the adult court or the direct transfer of juveniles into adult court for prosecution of serious offenses.

One of the reasons for that, I believe, is that although the evidence still is not in as to whether or not children who are tried in adult courts actually receive longer sentences or more certain sentences, or whether they are even prosecuted more successfully, many prosecutors believe that by waiving them into adult court, the confidentiality provisions of their records are once and for all terminated, and if you have somebody who has been in adult court several times, even if you are not going to successfully prosecute him in adult court, by waiving him in, you get his records into the adult court system, which for the next time may have some impact.

I think one thing that is important to distinguish is that there are basically three different types of records which exist in the juvenile justice system. There are the police records, which the police keep on their own, which are records of arrests, and which often do not include any kind of a dispositional indication with them. Second, there are the official court records, which are basically the pleadings in the juvenile court. Third, there are the court's social records, which include family history, school history, medical history, and so on and so forth, of the offender. There are rather distinguished differences between the three types of records and whether or not they are available. The social records are the most closely-guarded, of course, as they should be. The court records are generally available, of course, to the juvenile court and often, again, to the adult court. But the interesting thing, I think, is with the police records. There are, in many States, no restrictions whatsoever on police records as to whether or not they can be used by prosecutors. And I think that there is one interesting irony that arises, and that is that because the police records are available to prosecutors, but because they are really unofficial records, because they do not include any kind of a disposition oftentimes, or perhaps just an unofficial disposition, they may be inaccurate. And the result is that prosecutors oftentimes use the police records which they get from the police force, often inaccurate, because there is nothing else available to them. The result is that the juvenile offender may often be done a disservice by those inaccurate records, but because they are the only records available, in fact, they are the only thing the prosecutor has available to him. Obviously, if, the confidentiality restrictions were eased, or if the administrative problems were eased so that those records could become available, the official records, that irony, when it exists, would no longer exist.

Another interesting irony is the fact that different States have different cutoff ages at which juvenile jurisdiction ends, and that varies from 16 to 18, I guess. In addition, the waiver provisions in some States have no minimum age whatsoever, and in Maine, I think it is, people as young as 10 years old have been waived into adult court. In other States, even where there is a waiver provision, a juvenile may be tried in adult court and then put in the juvenile justice system until he is 21. The result of all of that is that sometimes you may have somebody as young as 10 or 11, more

realistically, 12 or 13, who is treated as an adult, and his records are available to anybody; in other cases, you may have somebody 19 or 20 who is still treated as a juvenile, and his records are sealed.

Obviously, as you look at that problem across the country, it does not make any sense anymore.

Senator SPECTER. Mr. Regnery, you say it does not make any sense. Do you think that it would be appropriate for the Federal Government to step in to establish some standards or take some action? We have a problem, as your testimony outlines, and of which we are aware, because often the juvenile offender is a very serious participant in crimes as a juvenile, and often becomes an adult career criminal. And what we are trying to do in the criminal justice system, at the risk of oversimplification, is to take the offenders and try to segregate them, to rehabilitate those we can, and take them out of the system. For those the protections are present—parens patriae, rehabilitation, confidentiality of records. Then, at a point, they become, really, part of the chronic or career criminals. They may be the group that Professor Wolfgang characterizes, as your testimony outlines, as the 7 percent committing 50 percent of the crimes or, as your written statement says, 10 percent who commit 50 percent of the offenses.

Now, where these juveniles act in interstate commerce and use handguns, there is a substantial nexus to the traditional Federal jurisdictional points; is there some point where the Federal Government through the legislative process should say to the States that total confidentiality does not make sense? I interrupted you at the point where you said it does not make sense.

Mr. REGNERY. Well, I guess there are a series of problems that you have. First of all, as I pointed out, it is not so much the laws; it is simply the administrative problems of having two separate sets of records and exchanging them.

On the other hand, there are a couple of things I think the Federal Government might want to think about doing. First of all, legislatively, the Federal Youth Corrections Act, which outlines what Federal procedures are used in juvenile proceedings in Federel court——

Senator SPECTER. Well, I see in your statement at page 8, "The committee may wish to reexamine the confidentiality provisions of the Federal Youth Corrections Act."

Mr. Regnery, what alternatives would you suggest we consider—not necessarily your recommendations, but the alternatives that you see as to reexamination of the confidentiality provisions of the Federal Youth Corrections Act?

Mr. REGNERY. Well, I think, looking at the Federal Youth Corrections Act, you will find that it has a rather strict confidentiality provision. Now, in fact, there are very few juveniles who are prosecuted under the Federal Youth Corrections Act, so from the standpoint of actually having some impact on crime, no matter what you do, it is going to be very negligible. On the other hand——

Senator SPECTER. Would you say that if a juvenile has committed three offenses which would be felonies if he were an adult that the records should no longer be confidential?

Mr. REGNERY. Well, that would certainly be one way to approach it, if you wanted to have some kind of an arbitrary cutoff like that. I guess you do have to have some kind of an arbitrary cutoff, in fact——

Senator SPECTER. I would not say it is arbitrary. I would say it is a standard. It is just a matter of word choice, but that would be one approach.

Mr. REGNERY. Right. That would certainly be one way to do it. But of course, that is not going to dictate to the States—and in fact, I guess the Federal Government cannot dictate to the States how their statutes are going to change.

Senator SPECTER. Well, could we? It certainly would be a significant departure from the norm. But if we have a problem which is Federal in nature, could the system get bad enough so that the Federal Government could step in? For example, if you have a 17-year-old who is traveling in the District of Columbia from North Carolina, which I understand has very restrictive laws, can North Carolina shield those records? Is the chief of police in the District of Columbia entitled to know the record of this juvenile criminal?

Mr. REGNERY. Sure, you could do that. That would get at part of the problem. But again, so much of the problem is not legislative on a State level; it is administrative, and it is the fact that these two separate systems exist. And it is just a matter of the logistics of getting the records exchanged.

Of course, the other problem is the repository problem. If you have got an individual case, your North Carolina to D.C. case, that is one thing. But if you can then take those records and put them in the FBI's repository or the statewide repository, it gives the police the ability to be able to compare patterns of crimes, and so on, and oftentimes, solve crimes that way.

Senator SPECTER. Well, we have added to the FBI repository a number of times. Last year, for example, we had the Missing Children Act passed, which requires that the FBI computer now contain the names of missing children. We felt that if the FBI had missing cars, it ought to have missing children in the records. Last week, we had hearings on the subject of the FBI establishing a more comprehensive system for serial murders, since serial murders usually have a pattern to them. Why not say that if a juvenile offender commits three felonies—say, three armed robberies, for example, to make a clear-cut case of serious, violent crime—that a State has an obligation to report that information to the FBI. Then those records will be maintained in the FBI computer. And when the North Carolina juvenile is picked up in the District of Columbia or in Kansas City, his record is available. What would you think of that kind of a requirement?

Mr. REGNERY. Well, I think you may have some problems with State law. It is my recollection that the Federal Youth Corrections Act as it now stands allows a State statute which prohibits the exchange of such records to take precedence over the Federal statute, so you would need to override—and of course, you could do that by Federal law—all of the State statutes which provide for confidentiality. I do not want to go into the Federalist questions or anything else that exists, but obviously, there are going to be some

people who will come up here and raise quite a ruckus about that, I suppose, on the State level.

Senator SPECTER. Well, I think there would be the very basic question about Federal intrusion in State practice. What is your judgment, if you care to give one? Is the problem sufficiently serious with multiple offenders?

Mr. REGNERY. Yes, I think it certainly is. I mean, that is what the figures show, and where you have a very substantial amount of serious crime being committed by people whose records are shielded, and where those people go on to be the adults who commit, as I said before, sometimes literally hundreds of felonies, I think that we are giving them more of a break than they deserve by shielding their records. So certainly, it is a significant problem which society faces, which I suspect would be a strong enough problem to overcome that kind of a Federalist objection.

Senator SPECTER. That is my instinct on the problems generally, that if there had been an opportunity for States to act where there is a Federal, national problem—juveniles moving in interstate commerce, crossing interstate lines, as they do—the Federal laws have moved very far into the State practice, for example on the gun laws, on RICO, on a variety of mail frauds. Certainly, you cannot have a more far-reaching Federal incursion for criminal prosecution purposes than the mail fraud statutes, and violent juvenile crime is certainly a lot more detrimental to society in most aspects than is mail fraud—I do not want to deprecate mail fraud.

Mr. REGNERY. I think another thing that is important to point out in the whole question of the Wolfgang-related studies is the fact that a relatively small number of juveniles committing these serious crimes does a major disservice to the rest of youth, and people generally have the impression, I think, that most violent crime, at least in large cities, is committed by young people, when in fact, it is not. And it seems to me that if, once and for all, we can ever get a handle on the question of the serious juvenile crime that is committed by this small percentage, it will, in the eyes of the public anyway, put the rest of youth who are not criminals by any means in a much better perspective. A recent study that was done at Harvard University, for example, found that in Portland, Oreg., 75 percent of all people questioned, if they saw a group of kids coming along the street the other way, would turn around or go to the other side of the street so they did not have to pass them, simply because they thought those kids were dangerous. Well, in fact, you have 20 percent of all violent crime committed by youth, but by the same token, if you go to the streets of New York or Philadelphia or someplace and ask people what percentage of violent crime is committed by youth, they will probably tell you 80 or 90 percent.

So I think that again, not only for the rest of us in society, but for the rest of youth, too, it is important to try to get a handle on the issue. I think that can be done by facilitating one way or another the juvenile records confidentiality question.

Our office is, incidentally, working on this area in a nonlegislative way. We are looking at both research we can conduct that will shed some light on the issue, pilot projects, and other things where we can go into States and help them, perhaps, facilitate the use of

their records in the adult court system, and so on. And I hope that we will be able to find some things that we can do that will be successful outside of the legislative arena.

Senator SPECTER. I am glad to hear you are working on that, because it certainly is a serious problem. When you talk about an 18-year-old entering the system as a first offender, after he has a long string of armed robberies—and you and I have seen many cases like that—it is just appalling to think that he comes in to an adult court at the age of 18 and his criminal record is not available for the judge to use as a guide in sentencing.

Mr. REGNERY. In fact, another interesting statistic, Senator, is that the career criminal programs which exist across the country apparently, on the average, are able to convict somebody as a career criminal only when he is first in his mid- to late-twenties, which is the time, of course, when his criminal activity, statistically, is beginning to recede. That is often because he comes into the adult system as a first offender at 18, when in fact, he has got a string of offenses on his record, which is not available. And I think with the freeing up of those records, again, at the early stage of the prosecution, you could bring that age down to a level where you would be incapacitating him at a point in his life when he is committing the most number of offenses in the shortest period of time.

Senator SPECTER. Well, given that the records do not catch up with someone until his mid-twenties, you are really offering a very strong reason for changing confidentiality, if we are to deal effectively with career criminals. Because the problem is Federal in nature, it is hardly one that we can expect the 50 States to solve.

Mr. REGNERY. That is right.

Senator SPECTER. Even if the States do act to solve the problem, and even if North Carolina does change its laws, or any other State, those records are still not available to the other 49 States simply by virtue of having them cataloged in some central repository, unless we give that responsibility to the FBI.

Mr. REGNERY. That is right.

Senator SPECTER. Well, it is something certainly worth pursuing.

Mr. Regnery, let me take up another subject with you which is related only generally, and that is the question of incarceration of juveniles, the so-called status delinquents, and the mixing of juveniles and adult offenders. It is a subject on which this subcommittee has continued to have more hearings, and we would like to explore that question with you.

The recent statistics compiled in a 1982 study from the University of Illinois, dealt with some 479,000 juvenile offenders, and it concluded—and these are rough statistics—that of that group, there were about 100,000 who were in custody in adult institutions who had never committed any offense at all; they were runaways or had been neglected. About 325,000 were charged with minor offenses, and they were mixed with adult offenders. Only about 10 percent, or, say, 50,000, had been charged with serious crimes as juveniles.

Now, it would be difficult to make a determination as to what was the major cause of a juvenile becoming an adult career criminal. I have a sense that it may well be confinement with adult offenders. It is hard to say that society has the resources to stop juveniles from becoming career criminals, but I think that society does have an obligation not to cause juveniles to become career criminals by putting them into confinement with adults. We are proceeding to work on this question in the subcommittee, and this work also involves the very difficult question of whether it is appropriate for Congress to pass legislation which would order a State: "You cannot after this date take a status offender—so-called—somebody who has been picked up for being neglected or a runway, and put them in a prison."

I would like your observation on what we ought to do about that issue.

Mr. REGNERY. OK. First of all, on the numbers, the University of Illinois study, I believe, is of all of the juveniles who passed through institutions during the course of a year, and they may have only been there, I believe, a matter of hours. The Bureau of Justice Statistics did a study where they did a one-time review of all the juveniles who were in those institutions at a given time, and I think there were about 1,000—that is, juveniles in adult institutions at one given day in the course of the year—and I believe they did it at several different times during the course of the year and came up with an average of 1,100. So those figures, I think, have to be balanced against each other to show what the problem actually is.

Now, as far as the bigger question of what happens to those children who are placed in adult institutions, I have asked my staff to try and prepare an analysis of that issue from the standpoint of a criminal issue as opposed to a social issue. The preliminary results of that study indicate that there is no empirical evidence whatsoever that shows that in fact, mixing children and adults in those cases where it still is done in this country has an impact on the crime rate. How, just what that means, I do not know. My sense is, though, that it is more of a social problem than it is a criminal problem.

Senator SPECTER. Well, is there any empirical evidence to show that it does not have an impact on the crime rate?

Mr. REGNERY. I do not think you could show that.

Senator SPECTER. I understand what you are saying, and I turn it around for the purpose of illustration: you cannot prove that it does cause crime, and you cannot prove that it does not cause crime. We may well come back to our own judgments about it.

My own sense is that if a juvenile is mixed with an adult offender for a few hours, there can be a tremendous amount of damage done; a tremendous amount of education can be passed on from an adult criminal to a juvenile, in a very brief period of time.

Mr. REGNERY. Well, I am sure there can, but I think that it is important to look at it statistically, and I think you will find when you do that in fact, at least in this day and age, the innocent first offender very rarely does get mixed with a hardened adult offender. It may happen from time to time. I am sure you could find where it has happened. But it is really the most unusual exception, simply because in most States now, kids are not incarcerated—they do not even get to that point in the system—unless they have committed a lot of offenses. That is just the way the system works.

There are enough breaks in the system as they go through that divert them.

Senator SPECTER. Mr. Regnery, I would ask you to take a specific look at that study, because that is not my understanding of the conclusions. My understanding of the conclusions is that among the five States which have not subscribed to the Juvenile Justice and Delinquency Prevention Act of 1974——

Mr. REGNERY. Four States now, I believe. Oklahoma is in now.

Senator SPECTER. Wonderful. I am glad to hear that. We had quite extensive hearings on the Oklahoma juvenile justice system. I had not heard that Oklahoma had joined.

Mr. REGNERY. That came in several weeks ago.

Senator SPECTER. Well, that is fine. But certainly, we know—from very detailed hearings which we had in this subcommittee last year—that Oklahoma did house first offenders with adult criminals, and the information provided to me is that the other four States did also. The GAO study picks out States which you would not expect to have this kind of a problem, and those States are rampant with the mixing of status children and adult offenders, and juvenile offenders with adult offenders.

So I would be very interested to have you pursue this subject and provide the specifics to the subcommittee.

Mr. REGNERY. Well, we are pursuing it, as I say, and I hope, if any conclusions can be drawn, to have those completed before too long, because it is certainly an issue that needs to be looked at, and I think it is one where the empirical data, where it exists, has to be examined very carefully, because it is the sort of thing that is easy to theorize about, but I think we need to know precisely what the facts and figures are, before we——

Senator SPECTER. Well, do the statistics show specific cases of juveniles who have been mixed with adult offenders and what happens to them? Do they get involved in criminal activity?

Mr. REGNERY. What I have so far does not, no. And I guess there are studies that show specificity on an individual basis, and just how those will mix into the entire effort, I do not know.

Senator SPECTER. Well, I interrupted you, I think, not in midstream—you were fairly far along in your testimony—but please, continue.

Mr. REGNERY. Actually, I am just about done, as a matter of fact. I guess in conclusion, all I want to say is I think that we all agree that no matter where we come from ideologically, that our goal is to reduce juvenile crime and to reduce recidivism among juveniles where we can, in order to put them back and make them productive members of society. I think we need to look at the policies carefully to find out how we can best do that, and whether or not the availability of records, particularly, will have impact on future conduct, whether it will act as a deterrent, whether it will, in fact, damage efforts at rehabilitation. I think we need to look at it from the standpoint of protecting society where, again, the small minority of youth who are committing many, many offenses during the course of their careers in some cases simply do have to be incarcerated, it is the only thing to do with them, and whether or not that is facilitated by making their records available to the court systems. And then I think, most specifically, we need to keep a close eye on the empirical data to see what that shows.

We are trying to answer those questions as best as we can at OJJDP. We have a rather concerted effort on the question of confidentiality of records. I have assigned one person to the issue full time, who has been working on it, really, since I got there, who is tryinq to determine precisely what needs to be done, who is making an analysis of all the State laws to determine where we are, and also, the administrative problems in the States, to determine what needs to be done, and then we will, I hope be funding some programs that will, at least on a demonstration basis, try to indicate what might be done.

Senator SPECTER. One final question, Mr. Regnery, on the issue of news media access to juvenile proceedings. Has your office any plans to study that issue? Have studies been conducted which shed substantial light on the issue, and what is your view, to give you three questions in one.

Mr. REGNERY. We are not doing anything, I do not believe, on that issue. It is included in this BJS booklet. There is a rather good discussion of that. Some states have, in fact, opened that question up to the extent that should juveniles be prosecuted for what would be felonies if they were adults, their names and records are available to the media. And the Supreme Court has held that if the media legally gets the names and records of juveniles, they may print them, and it would be a violation of the first amendment to keep them from doing so. The state of that law is much different than it was 20 years ago.

Senator SPECTER. How about the basic issue of the desirability of giving the news media access to records in order to evaluate how well the juvenile justice system is working?

Mr. REGNERY. Well, from the standpoint of the records in the aggregate, not only the news media, but the research community, I think, does need to have access to those records, but that does not mean that they need to have access to an individual's records. I think those are two different things.

Of course, the debate about whether or not the publication of records and names in the media has any impact on deterrence or on rehabilitation or other things is a debate which I guess is still open. I am not sure that anybody has been able to conclude what it is, and there are certainly very strong opinions both ways.

Senator SPECTER. Well, researchers would not have any more access to juvenile records than anybody else.

Mr. REGNERY. Well, sometimes, they do, in fact. Some States allow researchers, particularly where——

Senator SPECTER. By specific statutory provision?

Mr. REGNERY. Right. And generally, I think that researchers do have sufficient access to juvenile records—and again, those are records in the aggregate, rather than a specific individual's record which will be published.

Senator SPECTER. Access in the aggregate does not really conclude the issue, however, because specific cases are perhaps the best illustration of how well the system is working. The celebrated cases often attract the attention of the media and the public, and they illustrate the problems. It is very hard to communicate a mass

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of statistics to the public. But if you have specific cases, a number of them, and they demonstrate the poor operation of the juvenile system, then you can get sufficient public concern to help improve the system.

Mr. REGNERY. Well, it is my belief that the research community does have such access. I think in virtually all States, the courts can make exceptions to the confidentiality rules for good cause, and in many cases, research is considered a good cause, I guess, because, I have not heard complaints from researchers that they do not have access.

Senator SPECTER. What do you think about access by the news media?

Mr. REGNERY. As to what it should be?

Senator SPECTER. Yes.

Mr. REGNERY. I really have not drawn any conclusion. I think that again, you need to distinguish between serious offenses and nonserious offenses.

Senator SPECTER. Well, how about news media access on serious offenses?

Mr. REGNERY. Well, I guess the issues go both ways. On the one hand, people argue that certain juveniles feel a sense of pride by seeing their picture in the paper, and it is a matter with their gang or their group or whatever, that that publicity is something to be sought. In other cases, it is argued that it is a deterrent. I really do not know what the answer is one way or the other.

Senator SPECTER. Mr. Regnery, thank you very much. It was very nice having you here. I appreciate the time and attention you gave to the issue and to your statement. We look forward to following up on the specifics with you.

Mr. Regnery, before you depart, Senator Mathias would like to submit some written questions to you which will be propounded. If you would be kind enough to respond to them, we would appreciate it.

Mr. REGNERY. Do you know when he will get them to me?

Senator SPECTER. Reasonably promptly. I do not know when.

Mr. REGNERY. I will be out-of-town all of next week, but if you could see that he gets them to me this week, I would be happy to answer them.

Senator SPECTER. We will convey that information to him.

Thank you.

[The prepared statement of Mr. Regnery, the Bureau of Justice Statistice book, and written questions submitted by Senator Mathias follow:]

PREPARED STATEMENT OF ALFRED S. REGNERY

First, I would like to commend the Subcommittee for holding this hearing. The subject of the confidentiality of records is one of the most critical issues facing the juvenile justice system. I would also like to thank Senator Specter for giving me the opportunity to testify.

Police, prosecutors, judges and others in the criminal justice system and the juvenile justice system are increasingly concerned about the lack of easy and timely access to juvenile records of serious, habitual young offenders appearing in adult courts for the first time. In addition, there is considerable concern that when records are available they are often of poor quality.

As it becomes increasingly clear that a majority of juvenile crime is committed by a small minority of youth, who often go on to continue their criminal careers as adults, the necessity of access to their juvenile records becomes increasingly critical. Studies conducted by Marvin Wolfgang at the University of Pennsylvania, and substantiated by the Rand Corporation, Professor Sarnoff Mednick of the University of Southern California, and others, all point to the fact that at least 50% of all juvenile crime, and perhaps even more, is committed by less than 10% of all young people. These studies indicate that members of this small majority commit crime after crime as juveniles; as they are unfortunately often not affected by rehabilitative efforts, they continue their criminal activity into their adult years. It has then become obvious to the law enforcement community that

for the criminal justice system to attempt to control their behavior in order to protect society, it is crucial that there be unimpeded and timely access to their juvenile records by law enforcement officials.

The extent and nature of the records problem was studied by the Rand Corporation (Greenwood, Petersilia, Zimring), in 1980. Rand found that only some 3% of prosecutors had access to complete juvenile records.

In addition, 75% of the prosecutors Rand surveyed said that "serious administrative problems and resource constraints limited their ability to search for juvenile records except in unusual circumstances." Overall, half of the prosecutors in the national survey reported that they would normally receive "little or no juvenile record information." This was true for even the most serious young adult offenders. When records were obtained, they were often incomplete and arrived too late to assist in the charging decision.

There are important uses for prior offense records, at most of the key decision points in the juvenile and criminal process, including arrest, bail determination, charging, plea negotiation, and sentencing. To the extent records are not available when and where needed, the entire justice system is compromised as a viable crime control mechanism. This diminishes the public's trust in the system and reduces any fear or respect for the system by the criminal, and thereby diminishes the deterrence value of the entire justice system.

Most importantly, habitual or serious offender programs are completely dependent on record information for identification of such offenders early in the juvenile or criminal justice process. Particularly at the charging stage, when juvenile records are usually not available, career criminal programs are often not able to identify habitual offenders until

their criminal careers have left a long string of victims.

A number of investigators have dealt with the reasons and remedies for the shortcomings in the records area, as well as with their consequences. Most agree that the culprit in this breakdown in the juvenile/criminal justice machinery is the two-track records system we have built and maintained. This two-track or dual system exists as a result of state juvenile codes and administrative provisions which require separate storage of juvenile and adult court records.

Because of this separate storage requirement, other code provisions on confidentiality, and a virtual morass of administrative policies and procedures governing access, records of serious juvenile repeat offenders are often not available at crucial stages of criminal court processing. Too often, the result is that an adult offender with a lengthy and serious juvenile record frequently starts with a clean slate in criminal court, delaying for 7 to 10 years his identification as an habitual offender.

The two-track system has come under serious question over the last two decades, and a number of states have changed their statutes to facilitate access to juvenile records. Nevertheless, because the systems <u>are</u> kept separately and often in different forms, records are often accessible in theory but not in practice. Although records are probably sufficiently available for purposes of sentencing, they may not be available at earlier stages of the criminal justice process, and may not be included in statewide and federal criminal record system. Similarly, fingerprints and photographs of juvenile offenders are rarely available.

The Attorney General's Task Force on Violent Crime, appointed in 1981, recommended that at the very least, fingerprints and photographs of violent juvenile offenders be placed in the F.B.I. Information Bank so they

can be retrieved by prosecutors.

Recent reports and articles appearing in criminal justice literature indicate that there is growing interest in a review of existing provisions governing juvenile record confidentiality and utilization. Most scholars agree; few, if any serious ones advocate the continued restrictions of their use, in the case of serious habitual offenders.

Marvin Wolfgang, for one, believes that the records of violent juveniles, particularly recidivists, must be readily available to the adult criminal justice system in order to identify career criminals as they enter their adult lives.

In 1982, Martin Guggenheim, a professor of family and juvenile law at New York University Law School, said in an interview that a relaxation of confidentiality provisions is long overdue. He said we should eliminate confidentiality and believes it has been a protection for terrible abuses. According to critics like Professor Guggenheim, the theory of confidentiality does not apply to the tougher juvenile criminals of today.

Even juvenile court judges have begun to call for a reform and balancing of confidentiality laws in the face of the supposed rising tide of juvenile crime. At a recent symposium, James J. Delaney, a juvenile and family court judge from Brighton, Colorado, expressed the view that a juvenile who commits a crime forfeits his rights of privacy--in just the same way that adult offenders forfeit their right of privacy:

> "When a juvenile steals an automobile and wrecks it, does he still have the same right to privacy as another who does not commit an offense? We must address the issue of juvenile records and confidentiality with reason. There must be a balancing of rights and obligations, on the part of both juveniles and society."

The Courts have also questioned the theory of juvenile records confidentiality. In the 1967 landmark decision, In re Gault, for example, the Supreme Court expressed considerable cynicism about the reality, if not the wisdom, of confidentiality.

The Court said, "As the Supreme Court of Arizona phrased it in the present case, the summary procedures of 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, however, is more rhetoric than reality." 387 U.S. 1, 1980.

At least one state, Maryland, has a working group of its own, striving to examine their situation with regard to juvenile records access in connection with a repeat offender program they have established in several jurisdictions. Additionally, the California legislature, which is reexamining its entire juvenile justice system has included restrictions on the use of juvenile records as one of its primary subjects.

The several efforts summarized above, including the Attorney General's Task Force recommendations, may be leading us closer to developing a national consensus on juvenile records use. I expect that the hearing before this committee today will add measurably to the achievement of that goal. At the same time, it should be stressed that the many issues surrounding this topic are by no means resolved.

There are differences among state codes governing records use, often reflecting real differences in the policies and philosophy. In addition, because the actual availability of records for various purposes does not always correspond with what the juvenile codes allow, and because variations exist among jurisdictions in record quality, their management

and retrieval systems, there exists an inconsistent and often illogical system across the country.

There are differences involving fingerprinting and photographing of juveniles, sealing or expunging of records, and the handling of different types of records -- law enforcement data, official court files, and social histories.

This is but a brief sketch of the legal, procedural, and technical issues to be reviewed and resolved to reach consensus on the appropriate use of juvenile records. It is intended to convey the complexity of the subject matter.

We would be remiss, I believe, if we failed to recognize another dimension of the topic. This has to do more specifically with the human element, the people who make or interpret the laws and policies on records use.

Much controversy surrounds this topic because of the divergent philosophies and values held by officials of the juvenile and criminal justice systems. I expect that in any randomly selected group of such officials there would be, on the one side, those who stress rehabilitation and protection of the child, and on the other, those who stress protection for society. While these two points of view are often antithetical, there is some fear that reassessing the confidentiality of records may lead to the demise of the juvenile court. In fact, neglecting to review the use of juvenile records would be the greater threat. The recent popularity of waiver provisions is a prime example of community and judicial frustration with the juvenile system, and is directly related to the records issue.

Although there is disagreement over the effectiveness of the increased use of waiver or transfer of juveniles to adult courts, prosecutors

do agree that it does genereally accomplish one thing: the placement of the waived offender's record in the criminal justice system. Prosecutors and judges will often admit, in fact, that they will waive a juvenile to adult court for the sole purpose of getting his records into the system. If this is in fact true, should not advocates of the preservation of the juvenile justice system favor a more liberal policy of records access of serious offenders in order to strengthen the juvenile system for the non-serious offenders?

Legislatively established original jurisdiction of juvenile courts covers children between 16 and 19 years of age. In addition, a number of states do not specify a lower age limit when a child can be waived to criminal court -- I believe South Dakota allows the waiver at age 10. At the same time, there are provisions for retention of juvenile jurisdiction (once under correctional restraint) through age of majority or longer.

Thus, it appears that who is a juvenile and who is an adult for juvenile and criminal court purposes varies over a range of 10 years or more. Thus, there is an irony with regard to record confidentiality. The juvenile and criminal systems cannot always be viewed as substantially discrete or separate, nor are their clients identifiable as composing discrete categories. In one state, a person 9 or 10 years old can be an adult criminal, without records confidentiality, while in another, he is treated as a juvenile delinquent until 19 or 20 with corresponding confidentiality of records.

The time has come to establish some equivalance between juvenile and adult records access and use for serious offenders. There are several areas that must be addressed in order to make headway in this area.

First of all, I believe that some model criteria for optimum level juvenile record utilization must be established. Although the federal

government should not dictate what each state does in this area, a national model might be helpful to all states. Additionally, this Committee may wish to reexamine the confidentiality provisions of the Federal Youth Corrections Act (18 U.S.C. 5038), which protects records of juveniles prosecuted in the Federal District Courts.

The availability of juvenile records would enhance the credibility of both the juvenile and the adult justice systems. Proper utilization of records would increase the certainty and integrity of intervention with serious, habitual offenders, by increasing the accountability of such offenders to the justice system and to the public. Contrary to the argument that nothing seems to work against crime, there is considerable empirical evidence from research and program evaluations that the proper mix of secure custody, for those who need it, and of punishment, discipline, rehabilitation and reintegration back into the community make a difference.

In addition, record management, including creation, storage, retrieval and control, must be improved. This would assure better quality of records and access to them, and would also guard against record proliferation and abuse. Under properly maintained systems, the records of serious habitual juvenile offenders should be as accessible for justice system purposes as adult criminal records. Ironically, the lack of the availability of juvenile records sometimes does a disservice to juvenile offenders. State statutes rarely restrict the use of police records and files kept on juvenile offenders. But, because such files are not official ones, without the inclusion of official court dispositions, they are often inaccurate. Because they are often the only records available, however, police and prosecutors often exchange them privately for their own use.

Thus, a juvenile offender may be more severely punished for his offense because those in the system have, as the only records available to them, inaccurate and unofficial records. Opening the present system would certainly correct that problem.

To assist in the resolution of the record confidentiality and utilization issues, OJJDP has undertaken several projects. We are now reviewing all state juvenile code provisions pertaining to record confidentiality and utilization. In the course of this review, we will communicate with justice system practitioners to determine what they consider the most important needs and procedures to be in this area. From this, we plan to develop draft model code provisions together with policies and procedures for their implementation. To the extent uncertainty exists regarding the proper approaches, we will support research to find the answers.

We expect to develop information on where and how juvenile records ought to be used, what the best record management systems are, what code and procedural improvements are required to facilitate record availability and use, and what benefits accrue to the justice systems and the public from improvements in these areas. Further, we expect to provide the information obtained to the practitioner field through publications, conferences, and training programs.

I would recommend to the Subcommittee review of a recent booklet published by the Bureau of Justice Statistics called Privacy and Juvenile Justice Records (1982), which presents a thorough and well-documented examination of the subject. I would request that the booklet, in its entirety, be placed in the hearing record.

During the course of our reexamination of the confidentiality question, we will seek and appreciate continuing guidance and support from this Committee, from our own National Advisory Committee, and from practitioners in the field.

U.S. Department of Justice
Bureau of Justice Statistics

Criminal Justice Information Policy

PRIVACY AND JUVENILE JUSTICE RECORDS

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EXECUTIVE SUMMARY

This is a report about the confidentiality of "arrest" and "conviction" information (juvenile justice record information) relating to youths who are 18 years of age or younger.[1] It comes at a critical time when criminal justice officials, political figures, scholars and members of the public are calling for a fundamental re-examination of our nation's commitment to the confidential treatment of juvenile record information.[2]

Confidentiality and Principles of Juvenile Justice Philosophy

During most of this Century it has been a matter of policy that juvenile justice information be kept strictly confidential and used, with narrow exceptions, only within the juvenile and criminal justice systems. Throughout this period the belief in confidentiality has rested upon two basic principles of juvenile justice. The first principle holds that juveniles are not to be considered criminally responsible for their crimes. According to this theory, children have neither the understanding nor the criminal motive of adults. Thus, they cannot form the criminal intent that is necessary for criminal culpability. Of course, children may actually commit criminal acts, but--much like the insane--children should not be considered guilty of crimes.

The second principle followed naturally from the first. If a child who commits a crime is not culpable and is not to be punished, then how should society react to this event? With treatment. Children who have committed anti-social or criminal acts must receive treatment and rehabilitation. Since children are impressionable, malleable and not yet hardened to the criminal life, they were thought to be perfect candidates for such treatment.

These two basic principles of the juvenile justice

system--non-culpability and rehabilitation--produced pressures for confidentiality: non-culpability because it is unfair and inappropriate to brand a child as a criminal; and rehabilitation because such branding interferes with a child's rehabilitation and reassimilation into the mainstream of society.

Unfortunately, faith in the principles of non-culpability and rehabilitation upon which it rests, has eroded. Three developments seem to be responsible. First, a perceived epidemic of juvenile crime has provoked cries for tougher measures against juveniles. Second, both statistics and anecdotal experience suggest that rehabilitation is not working. Juvenile recidivism rates are high and seemingly going higher. Third, during the 1960's and 1970's, the Supreme Court reformed the juvenile court process to make it both more formal and more fair. However, in the process, the Court also made it possible for the first time to consider a juvenile adjudication of delinquency as equivalent to an adult determination of criminal guilt.

Part One of the report indicates that confidentiality in our society is seldom justifiable as an end in itself; therefore, proponents of juvenile justice confidentiality must be able to demonstrate that the degree of confidentiality now enjoyed by juvenile offenders is warranted; presumably because confidentiality fosters rehabilitation and because efforts at rehabilitation are desirable and realistic. In the absence of such a demonstration, it is likely that juvenile justice records, or at least those that pertain to "older" juveniles, will eventually be subject to the same confidentiality standards which apply to adult criminal record information. In any event, over the course of the next decade, policymakers are likely to take a careful and skeptical look at the purpose, practicability and effect of confidentiality in juvenile justice proceedings.

Summary of Current Standards and Practice

With this as its premise, the report in five parts addresses both law and practice relating to the creation,

maintenance, use and disclosure of juvenile record information.[3] Part One describes the history and philosophy of the juvenile justice system, with particular attention to juvenile record confidentiality. Part Two discusses agency practice and legal standards affecting the creation and content of juvenile records. Part Three covers disclosure and confidentiality of juvenile record data. Part Four addresses two controversial media issues which are a part of the confidentiality debate: the media's right to attend juvenile court proceedings, and the media's right to publish the names of juveniles who are arrested or convicted. Lastly, Part Five identifies and analyzes the policy arguments for and against the confidential handling of juvenile record information.

Creation of Juvenile Justice Records

The creation of juvenile records by the police remains an informal art in which police agencies retain substantial discretion. The creation of juvenile records by the juvenile courts is, by contrast, a far more formal and directed process. Part Two indicates that existing policies which restrict the fingerprinting of juveniles and require the segregation of juvenile and adult records restrict adult courts and law enforcement agencies from obtaining juvenile data. There are two ironies to this result. First, both adult courts and law enforcement agencies are entitled, as a matter of law, to obtain such data. Second, at the time that these restrictive policies were adopted they had little practical effect because the technology was not generally available to combine or link adult and juvenile records. Today, such technology is readily available, but fingerprinting and segregation policies--not confidentiality policies--restrict such linkages and contribute to the existence of a "two-track" system of justice.

Disclosure of Juvenile Justice Records

Part Three discusses the affect that confidentiality

policies have upon the ability of different types of recipients to obtain juvenile justice data. It concludes that juvenile record information is widely available within the juvenile justice system; that in theory, it is almost as available within the adult criminal justice system, but, in practice, is often unavailable; that juvenile record information surprisingly is not available to record subjects in many jurisdictions; that juvenile records are available, with restrictions, to researchers; and that the basic rule continues to be--with exceptions--that juvenile data is unavailable to governmental, non-criminal justice agencies, private employers, the media and other members of the public. However, confidentiality strictures that previously applied to non-juvenile and non-criminal justice agencies are being modified and relaxed, at least as to juvenile conviction data.

Part Four discusses the fact that the media does not have a constitutional right to attend juvenile court proceedings; however, some states and courts now permit the media to attend, particularly when juveniles are tried for serious offenses. In some cases the media may be restricted from disclosing juvenile identities obtained from attending the court proceeding.

Further, in some states the media is authorized to publish a juvenile's name if the juvenile is accused or convicted of a serious offense. Moreover, a recent Supreme Court decision holds that if the media obtains a juvenile's name from any public or lawful source, a state cannot prohibit the media from publishing that name. To do so would abridge the media's First Amendment rights.

Key Elements of the Debate Over Confidentiality

Part Five identifies six arguments which are most often raised in the debate over the confidentiality of juvenile record data: (1) publicity "rewards" criminal conduct; (2) publicity traumatizes erring juveniles; (3) publicity deprives juveniles of opportunities for employment and other benefits; (4) publicity is inherently unfair; (5) publicity promotes public safety; and (6) publicity

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promotes oversight and supervision of the juvenile justice system.

Without trying to provide definitive solutions for these arguments, the discussion suggests that the outcome turns on three basic questions.

1. What kind of confidentiality and disclosure policy is most likely to have a positive effect on the juvenile offenders' future conduct, and does the effect depend upon the age of the juvenile or the extent and nature of his juvenile record? Assuming that the goal is to reduce juvenile recidivism and increase the chances that juvenile offenders will become constructive members of society, the key question is whether confidentiality or disclosure promotes this goal.

Since it appears that disclosure policies may have little measurable impact upon rehabilitation, it is appropriate to look to other factors in setting disclosure policy.

2. A second issue--quite apart from the future conduct of juvenile offenders--is how much does the public (or segments of the public, such as criminal justice agencies, licensing boards or employers) need to know about specific juvenile offenders in order to assure the public's physical safety and confidence; and how much needs to be known to assure society's efficient economic operation; or the effective administration of juvenile and criminal justice; or to assure productive statistical and longitudinal research?

Here too, there are no dispositive answers. Certainly there needs to be (and are) different disclosure policies for different segments of the public, depending upon the criticality and nature of each group's needs for juvenile record data and their accountability and reliability in handling this data.

3. The third issue on which the juvenile confidentiality debate turns is essentially a moral issue. Regardless of the practical effects of confidentiality or disclosure on juveniles or on society, is it fair and proper for society to publicly brand a young person on the basis of his misdeeds? While any opinion is subjective and controversial, it appears that many observers still hold to

the view that it is both unfair and improper to publicly stigmatize children for their misdeeds--at least so long as the juvenile is "younger" rather than "older," and so long as his misdeeds are not continually repeated or are not of a violent or heinous nature.

Juvenile Justice Confidentiality Issues Needing Attention in the 1980's

Perhaps this report's primary conclusion is that extensive and difficult work lies ahead in framing a new juvenile justice information policy for the nation. The discussion and analysis in this report suggest that the following issues need attention.

1. Identifying the interests served by juvenile justice confidentiality. Specifically, policymakers need to examine whether the principles of juvenile non-culpability and rehabilitation have vitality and, if so, whether confidentiality promotes these principles.

2. Defining the age of a juvenile. It may be that the traditional principles of juvenile justice--non-culpability and rehabilitation--make sense when applied to 12-year-olds but make less sense when applied to 17-year-olds.

3. Developing policies for the creation, maintenance and disclosure of juvenile justice record information by law enforcement agencies. Existing policies are more likely to cover juvenile court records than juvenile police records and, within the category of juvenile police records, far more likely to cover fingerprint records than narrative records.

4. Developing policies for access to and for challenge and correction of juvenile justice records by juveniles and their attorneys and parents and guardians.

5. Establishing interfaces and connections between juvenile and adult record systems. Existing statutory policies mandating the strict segregation of juvenile and adult records should be examined. The interface of juvenile and adult systems may promote statistical and longitudinal research, may improve oversight and manage-

ment of juvenile and criminal justice institutions, and may promote the effective implementation of first offender, career offender and other innovative prosecutorial and sentencing programs. The existing two-track system has been sharply criticized because it increases the possibility that chronic and serious juvenile offenders will reach the adult system with a clean slate.

6. Developing policies for the disclosure of juvenile justice data outside of the juvenile and criminal justice systems based upon the nature of the juvenile's alleged conduct; its frequency; its contemporaneousness; the nature of the disposition; and the identity and purpose of the potential recipient.

7. Sealing and purging policies for juvenile records. An examination of the merits of existing policies which customarily require the juvenile to obtain a court order issued pursuant to the judge's discretion, versus more automatic and less discretionary sealing and purging based upon the juvenile's establishment of a clean record period.

PART ONE

THE PHILOSOPHY OF THE JUVENILE JUSTICE SYSTEM

Part One of this report provides background for the report's discussion of the handling of juvenile justice information and describes the history and philosophy of the juvenile justice system, identifying current forces that are working to redefine that philosophy. Part One discusses these developments in terms of their effect upon the handling of juvenile justice records.

There are two chapters in this part. The first chapter recounts the history of the juvenile court system, and describes the development of the twin principles upon which the system has rested: (1) the non-criminal responsibility of juvenile offenders; and (2) the desirability and practicability of rehabilitation for juvenile offenders. The chapter concludes that both of these principles mandate confidentiality in juvenile justice records.

Chapter Two identifies and analyzes the current forces that are causing a re-examination of the dual principles of non-culpability and rehabilitation and thereby creating demands for a relaxation of confidentiality standards. The chapter discusses the amount and nature of juvenile crime and identifies recent changes in the juvenile justice system that have been wrought by Supreme Court decisions and by state legislation. The conclusion is that the basis for juvenile justice confidentiality has changed and that the level of confidentiality in the juvenile justice system, at least for "older" juveniles, will soon be no greater than the level of confidentiality in the adult criminal justice system unless proponents of juvenile justice confidentiality are successful in identifying compelling and distinct societal interests served by juvenile justice confidentiality.

Chapter One

THE HISTORY AND PHILOSOPHY OF THE JUVENILE JUSTICE SYSTEM

The following briefly recounts the history and philosophy of the juvenile justice system in America. It describes the successful efforts by reformers at the turn of this Century to create a separate system of justice for juveniles based on the complementary principles that juveniles are not criminally responsible for their wrongdoing and that such juveniles can and should be rehabilitated. These principles of non-culpability and rehabilitation created a compelling demand that juvenile justice records be kept confidential.

History of the Juvenile Court

When the English system of courts was transplanted to this country, it included the chancery court; and chancery courts, as courts of equity, were charged, among other things, with the protection of wayward or delinquent children.[4] However, chancery courts did not have jurisdiction over children who were accused of committing serious criminal acts. Throughout the 19th Century, children who committed serious criminal acts and who had reached the age of criminal responsibility (seven at common law and ten in some states) were tried as adults.[5] As population and urbanization increased so too did juvenile crime, and with it the frequency and severity of juvenile punishment.

By the end of the 19th Century reformers were calling for a separate system of juvenile courts to deal in a more humane, less criminal and presumably more effective manner with this growing problem. The kind of incident which incited reformers' wrath is chronicled in a New Jersey court opinion captioned State v. Guild,

published in 1828.[6] A 12-year-old boy named James Guild was tried for killing a woman named Catherine Beakes. A jury found him guilty of murder and he was sentenced to death. The boy was subsequently hanged.

As early as 1869, Massachusetts adopted a statute which required that an officer of the State Board of Charity be present at all criminal proceedings involving juveniles, "to protect the juvenile's interest." In 1877 another Massachusetts statute established special sessions of the criminal courts for juveniles with separate dockets and records.[7]

In 1899 the Illinois Legislature established the first entirely separate and independent juvenile court system.[8] The statute provided that all juveniles, whether accused of conduct which would not be criminal for an adult such as truancy, or conduct which would be criminal if done by an adult, were to be handled by the same court. Its "hearings were to be informal and non-public records confidential, children detained apart from adults, a probation staff appointed. In short, children were not to be treated as criminals nor dealt with by the process used for criminals."[9]

Purposes of Juvenile Court Reforms

Two purposes were to be served by these reforms. First, the juvenile courts would not stigmatize children as criminals or punish them for criminal conduct. According to this theory of non-culpability, children have neither the understanding nor the criminal motive of adults. Thus, they cannot form the criminal intent, what the courts call the mens rea, that is necessary for criminal culpability. Of course, children may actually commit criminal acts, but--much like the insane-- children should not be considered guilty of crimes. What follows from this analysis is that children--again like the insane--should not be punished for acts that they neither understand nor intend.

The second purpose of the reforms follows naturally from the first. If a child who commits a crime is not culpable and is not to be punished then how should society

react to this event? The answer is treatment. Children who have committed anti-social or criminal acts are thought to need treatment and rehabilitation. Since children are impressionable, malleable and not yet hardened to the criminal life, they are considered perfect candidates to respond to such treatment.

The Supreme Court has described the early conception of the juvenile court as a paternal, noncriminal process. "The early conception of the Juvenile Court proceeding was one in which a fatherly judge touches the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition and in which in extreme situations, benevolent and wise institutions of the state provided guidance and help, to save him from a downward career."[10]

The fervor with which many courts, even well into the middle of this century, proclaimed that juvenile court proceedings were noncriminal and aimed at treatment and rehabilitation of the erring youth is illustrated in these remarks by a Pennsylvania court.

> "The proceedings [in juvenile court] are not in the nature of a criminal trial but constitute merely a civil inquiry or action looking to the treatment, reformation and rehabilitation of the minor child. Their purpose is not penal but protective--aimed to check juvenile delinquency and to throw around a child, just starting, perhaps, on an evil course and deprived of proper parental care, the strong arm of the State acting as parens patriae. The State is not seeking to punish an offender but to salvage a boy who may be in danger of becoming one, and to safeguard his adolescent life."[11]

Many of the original juvenile court acts at their inception did not provide for the confidentiality of juvenile court proceedings or records.[12] A comprehensive survey in 1920, for example, found only seven states

which banned the publication of information about juvenile court proceedings.[13] However, juvenile court proponents soon came to appreciate that confidentiality was essential. The two basic principles of the juvenile justice system--non-culpability and rehabilitation--generated strong pressures for confidentiality: non-culpability because it is unfair and inappropriate to brand a child as a criminal; and rehabilitation because such branding interferes with a child's rehabilitation and reassimilation into society.

A law review commentary published in 1909, at the peak of the juvenile justice reform movement, explained the importance that confidentiality plays in the implementation of the theories of non-culpability and rehabilitation.

> "To get 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 courts]".[14]

Chapter Two

RECENT DEVELOPMENTS AFFECTING JUVENILE JUSTICE PHILOSOPHY

This chapter provides a statistical profile of the current frequency and nature of juvenile crime and points out that the public believes that a juvenile crime wave is underway. This perception has led to appeals for an end to special provisions for juvenile confidentiality.

At the same time, and perhaps for the same reason, the courts and the legislatures have cast critical eyes on the philosophical underpinnings of the juvenile justice system. The concepts of juvenile non-culpability and rehabilitation are being challenged by those who believe that juvenile offenders should be made criminally responsible for their wrongdoing. This rethinking of the philosophy and goals of the juvenile justice system inevitably undermines support for juvenile justice confidentiality.

If juvenile records are to continue to be subject to stricter confidentiality standards than adult criminal history records, proponents of juvenile justice confidentiality will have to identify and justify the societal interests served by such confidentiality.

The Frequency and Character of Juvenile Crime

The incidence and nature of juvenile crime is a complex subject that resists quick judgments or sensational conclusions. Numbers and percentages alone do not tell the whole story. Still, by any standard, the numbers and percentages are startling.

In 1979, juveniles up to 18 years of age accounted for about 20 percent of all violent crime arrests, 44 percent of all serious property crime arrests and 39 percent of all overall serious crime arrests (up from about

20 percent in 1965).[15] Juveniles aged 10 to 17 constitute 13.6 percent of the total population. When the statistics for youthful offenders (ages 18-20) are added in, the percentages are even more sobering. In 1979 children and youth ages 12 to 20 accounted for 38 percent of all violent crime arrests, 62 percent of all serious property crime arrests and 57 percent of all overall serious crime arrests.[16]

When actual numbers are substituted for percentages the statistics become still more dramatic. In 1980 the FBI reported approximately 9.7 million total arrests, of which approximately 2.1 million were juveniles aged 10 to 17. According to self-reporting surveys, each year males age 12 to 18 commit 3.3 million aggravated assaults, 2.5 million grand thefts and 6.1 million breakings and enterings.[17] The numbers for crime in the schools are also staggering. An estimated 282,000 students are attacked at school in a typical one-month period, and an estimated 5,200 teachers are physically attacked at school each month.[18]

Disagreement exists as to whether juvenile crime is presently on the increase or in decline. However, the best judgment of experts is that juvenile crime increased significantly from 1960 through 1975 and, at least as to violent crime, has perhaps decreased modestly since that date.[19] What is known with more certainty is that, despite fluctuations in the juvenile crime rate, a substantial percentage of violent, random street crime--the crime which so terrorizes and marks our society--and an even higher percentage of crimes against personal property, are committed by the young. As one commentator has said, "[C]rime in the United States is primarily the province of the young."[20] And, as regards crime by the young, it is primarily the province of males rather than females; disproportionately minority youth rather than white youth (especially as to violent crime); and youths from poor backgrounds, rather than from middle class backgrounds.[21]

Public Perceptions, and Demands for Relaxation of Juvenile Confidentiality

Perhaps the real conclusion that should emerge from any discussion of juvenile crime statistics is not so much a statement about the incidence or nature of juvenile crime, as it is about the public's perception of the incidence and nature of juvenile crime. Most experts agree that the media and the public perceive that a juvenile "crime wave" is underway, and in some areas a virtual "reign of terror" by armed and dangerous juveniles and youth gangs.[22]

Given this perceived epidemic of juvenile crime, it is no surprise that criminal justice officials, political figures and the public are calling for tougher measures against juveniles, including a relaxation of secrecy standards. Indeed, as long ago as 1957, J. Edgar Hoover issued a rousing call for a relaxation of juvenile confidentiality strictures.

> "Gang-style ferocity--once the evil domain of hardened adult criminals--now enters chiefly in cliques of teenage brigands. Their individual and gang exploits rival the savagery of the veteran desperadoes of bygone days."
>
> * * *
>
> "Publicizing the names as well as crimes for public scrutiny releases of past records to appropriate law enforcement officials, and fingerprinting for future identification are all necessary procedures in the war on flagrant violators regardless of age. Local police and citizens have a right to know the identities of the potential threats to public order within their communities."[23]

In 1982, Martin Guggenheim, a professor of family and juvenile law at New York University Law School, said

in an interview that a relaxation of confidentiality provisions is "long overdue." "We should eliminate confidentiality" he said. "It has been a protection for terrible abuses."[24] According to critics like Professor Guggenheim, the theory of confidentiality does not apply to the tougher juvenile criminals of today.

Even juvenile court judges have begun to call for a reform and balancing of confidentiality laws in the face of the supposed rising tide of juvenile crime. At a recent symposium James J. Delaney, a juvenile and family court judge from Brighton, Colorado, expressed the view that a juvenile who commits a crime forfeits his rights of privacy--in just the same way that adult offenders forfeit their right of privacy.

> "When a juvenile steals an automobile and wrecks it, does he still have the same right to privacy as another who does not offend?"
>
> * * *
>
> "[W]e must address the issue of juvenile records and confidentiality with reason. There must be a balancing of rights and obligations, on the part of both the juvenile and society."[25]

Judicial Challenge to the Juvenile Justice Philosophy

The increase in the amount and severity of juvenile crime has also led scholars, and eventually the courts and legislatures, to take a skeptical look at the basic principles of the juvenile justice system--non-culpability and rehabilitation. As long ago as the mid-1950's some commentators were beginning to ask tough questions about the wisdom and efficacy of the juvenile justice philosophy. The Annual Survey of American Law for 1954 cited the increasing crime rate among juveniles and noted that this had "given impetus to those who would call for a solution in terms of strict retribution and deterrent

penalties." It predicted that "[A] sharp clash of divergent penal philosophies may well be in the offing."[26]

By the mid-1960's the Supreme Court had begun to react to the percussion of the public policy debate. The Court worried that the juvenile court process offered juveniles the worst of both worlds. Juveniles were deprived of the constitutional protections provided to defendants in criminal proceedings and yet they seemed to receive little of the rehabilitative treatment supposedly provided by juvenile courts.[27]

In 1966, in a case called Kent v. United States, the Court issued the first of a series of landmark decisions that, when completed, would reform the juvenile justice process so that it more closely resembled the criminal justice process. In Kent, the Supreme Court considered whether certain procedural safeguards should be met before a juvenile court could transfer a 16-year-old accused of forcible entry, robbery and rape to an adult court.

The Court decided that, "[W]hile there can be no doubt of the original laudable purpose of the juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical performance to make tolerable the immunity of the process from the reach of the consitutional guarantees applicable to adults."[28] Kent, affirmed that juveniles have a right to counsel in juvenile proceedings; provided for a right to a hearing before a juvenile court waives jurisdiction; and provided for a right of access by the juvenile's attorney to records relied on by the court.

In Kent, and the decisions which followed during the period 1966 to 1975, the Supreme Court required juvenile courts to provide juveniles with most of the basic constitutional rights and protections which applied in adult criminal prosecutions.[29] In re Gault, (1967) reaffirmed a juvenile's right to counsel; provided a right to notice of charges; and a right to confront and cross-examine witnesses.[30] In re Winship, (1970) held that juvenile courts must use the "beyond a reasonable doubt" standard applic-

able to adult criminal proceedings to make a determination of a juvenile's "guilt."[31] Breed v. Jones, (1975) held that juvenile courts must adhere to the double jeopardy protections offered by the Fifth Amendment.[32] Indeed, by the time that the Supreme Court was done, juveniles enjoyed every federal constitutional protection afforded adult criminal defendants, except the unqualified right to a jury trial.[33]

The Supreme Court's message in these cases was quite simple. The Court was saying that if, as a practical matter even if not in theory, juveniles were being punished by juvenile court dispositions, then juveniles should enjoy the same constitutional, procedural protections enjoyed by adults.

Judicial Challenges to Juvenile Justice Confidentiality

As the conception of the juvenile court as a non-criminal, rehabilitative process faded, it was to be expected that the concept that juvenile records must be kept confidential in order to foster these concepts would also fade. Not surprisingly, the Supreme Court's challenge to paternalism in the juvenile courts included a skeptical review of juvenile justice confidentiality. In 1967 in In re Gault, the Supreme Court expressed considerable cynicism about the reality, if not the wisdom, of confidentiality.

> "As the Supreme Court of Arizona phrased it in the present case, the summary procedures of 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, however, is more rhetoric than reality."[34]

In every instance over the last 20 years in which juvenile record confidentiality has conflicted with another constitutional right, the Supreme Court has said that

confidentiality must recede. In Davis v. Alaska, for example, the Supreme Court held that an adult defendant, who had been prosecuted for grand larceny and burglary, had been denied his constitutional right of confrontation by a lower court's protective order which prevented him from cross-examining a prosecution witness who happened to be a juvenile. The lower court issued the order because the defendant's cross-examination would have revealed that the witness was on probation from a juvenile adjudication of delinquency. The Court rejected the State's argument that the secrecy of these juvenile records must be preserved in order to further the "rehabilitative goals of the juvenile correctional procedures."[35] The Supreme Court concluded that "the State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding so vital a constitutional right as the effective cross-examination for bias of an adverse witness."[36]

In Oklahoma Publishing v. District Court,[37] and Smith v. Daily Mail Publishing Co.,[38] the Supreme Court held that a court order and a statute, respectively, prohibiting the publication of a juvenile defendant's name and photograph or name only, was an impermissible violation of the First Amendment. In both cases the media had lawfully obtained the name and photograph of the juvenile, and thus in both cases this information was already in the public domain. Although neither decision holds that the media has a right of access to juvenile court proceedings or records, both do hold that once information is lawfully obtained by the media, the First Amendment interest in a free press must prevail over the interest in preserving the anonymity of juvenile defendants.

> "The sole interest advanced by the State to justify its criminal statute is to protect the anonymity of the juvenile offender. It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future

> employment or suffer other consequences for this single offense. The important rights created by the First Amendment must be considered [and] must prevail over the state's interest in protecting juveniles..."[39]

These decisions do not mean that the Supreme Court has abandoned an interest in upholding the confidentiality of juvenile proceedings or records. And indeed, in virtually all of its juvenile justice decisions the Court has acknowledged the importance of confidentiality, even while holding that confidentiality does not prevail over other constitutional interests.[40] However, what these decisions do demonstrate is that the concept of confidentiality, like the concepts of non-culpability and rehabilitation from which it partly springs, is no longer sacrosanct.

Empirical and Legislative Challenges to Juvenile Justice Philosophy

Of course, the judiciary is not alone in challenging the principles of the juvenile justice system. Empirical studies seem to bear out that rehabilitative efforts aimed at juvenile offenders have not worked very well. Studies of juvenile recidivism are admittedly inconclusive, and they are hampered by the fact that confidentiality policies impede the combining of juvenile justice and adult criminal history records.[41] However, even some conservative estimates indicate that about 35 percent of the juveniles found to be delinquent are subsequently found delinquent for another offense.[42] Other juvenile recidivism studies show much higher rates, sometimes exceeding 60 percent.[43]

In any event, there are two points on which nearly everyone agrees: (1) present juvenile recidivism rates are alarmingly high; and (2) juvenile offenders seem to have higher recidivism rates than do adults.[44] Certainly many, and probably most juveniles who have experienced the "benefit" of juvenile courts and corrections treatment are not thereby rehabilitated and many commit subsequent crimes.

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Recent Legislation Authorizes Punishment of Juvenile Offenders

Increasing numbers of experts are also questioning whether rehabilitation even ought to be the system's goal. It has been argued that juvenile offenders should be considered criminally responsible; that they have a "right" to punishment and to be spared the inappropriate intervention, manipulation and exercise of discretion and dominion that comes with attempts to treat and rehabilitate juveniles.[45]

Juvenile justice legislation adopted in Washington state in 1977 calls for "punishment commensurate with the age, crime and criminal history of the juvenile offender." Commentators at a national symposium on juvenile justice in 1977 noted the sharp contrast between the "punishment" language in this statute and the "rehabilitative" language in traditional juvenile justice statutes.

> "This statute stands in contrast to the more common and traditional juvenile justice statutes which stress treatment and rehabilitation."[46]

They conclude that the Washington statute indicates that "a great change appears to have occurred."[47]

The growing popularity of the notion that juveniles should be punished for their crimes is also reflected in recent legislation which permits juveniles to be tried as adults at an increasingly young age. In the same year that Washington state amended its legislation, New York's legislature responded to urgent calls from police and the public for help in combatting teenage crime. The New York legislature amended its juvenile code to permit children 15 or over to be tried for homicides as adults.[48] More recently, in July, 1982, New Jersey amended its already strict juvenile justice code to permit juveniles 14 years old and older to be tried as adults in cases such as murder, kidnapping or sexual assault.[49]

Of course, not everyone is happy with this approach. The National Council on Crime and Delinquency sharply criticized the New Jersey law. They condemned the adult trial provisions stating that they were adopted,

> "...in spite of the fact that there is no evidence that the adult correctional system works either to deter crime or rehabilitate offenders. In its present overcrowded and crisis-ridden condition, it is doubtful that the adult system can offer the juvenile offender much more than confinement at best and homosexual rape and other brutality at worst."[50]

Supreme Court Reforms and Legislation Change the Perception of a Juvenile "Conviction"

Ironically, the notion that juveniles should have criminal responsibility for their wrongdoing has received a boost from the Supreme Court's juvenile justice reforms. By extending many of the adult criminal due process protections to juvenile trials, the Court has imbued the juvenile trial with the elements of fairness, impartiality and dispositiveness customarily associated with adult trials. Thus, when a juvenile is found delinquent today there is reason for confidence in the fairness and accuracy of that judgment.

If juveniles are tried by standards that were previously only used when making determinations of criminal responsibility, and if the juvenile is found "guilty" according to such standards, then it is easier to argue that the consequences of a juvenile's conviction--including the recordkeeping consequences-- should be the same as the consequences of an adult conviction. In the adult system, conviction record information is largely available to the public on the theory that conviction records, unlike arrest records, are a reliable indicator of wrongdoing; that the criminal has "waived" his right to privacy in that data; and that, in any event, the public interest in those who violate society's laws outweighs the offender's privacy interest.

Increased confidence in the reliability of juvenile delinquency adjudications makes it more attractive to argue that the waiver and public interest considerations which apply to conviction records should apply, as well, to juvenile delinquency records. Not surprisingly, this change in the perception of the meaning of a juvenile delinquency adjudication has led to recent changes in state juvenile justice record statutes. Prior to 1975, juvenile justice statutes seldom distinguished between juvenile "arrest" and delinquency records. Both enjoyed a similar, high degree of confidentiality. However, over the last ten years, seven states--Alaska, Delaware, Georgia, Mississippi, Nevada, New Jersey and Pennsylvania--have modified their juvenile codes to authorize the public release of the names and delinquency record dates of juveniles adjudicated delinquent who either have a prior record or who have committed a serious offense.[51]

Basis for Confidentiality May be Re-examined

In summing up the findings of the 1977 national symposium, the commentators concluded that the symposium indicates that the traditional principles of non-culpability and rehabilitation are losing currency. Specifically, they identified, among other things, the following developments:

1. The doctrines of non-culpability and rehabilitation are under serious attack, both from the courts and from state legislatures.

2. The idea of "punishing" juveniles is being seriously reconsidered.

3. As America's population ages, and as elderly citizens are victimized or fear being victimized by juvenile crime, the incarceration of juvenile offenders is likely to become increasingly popular.[52]

Because confidentiality in our society is seldom justifiable as an end in itself, proponents of juvenile justice confidentiality will be called upon to demonstrate that the degree of confidentiality now enjoyed by juvenile offenders is warranted; presumably because confidentiality fosters rehabilitation and because efforts at rehabilitation are desirable and realistic. In the absence of such a demonstration, it is likely that juvenile justice records, or at least those that pertain to "older" juveniles, will eventually be subject to the same confidentiality standards that apply to adult criminal record information. In any event, proponents of juvenile justice confidentiality should expect that over the course of the next decade, policymakers will take a careful and skeptical look at the purpose, practicability and effect of confidentiality in juvenile justice proceedings and records.

PART TWO

THE CREATION AND MAINTENANCE OF JUVENILE JUSTICE RECORDS

This part of the report deals with both law and practice as they affect the creation and maintenance of juvenile justice records.

Chapter One describes the way in which *police departments* create and maintain records about their contacts with juvenile suspects and offenders. The chapter concludes that the creation and maintenance of juvenile records by the police remains an informal act in which police agencies have significant discretion. To date, state legislatures have not dictated the circumstances under which police agencies can create a juvenile record, nor have they set standards for the content of those records or the amount of time or circumstances under which they must be maintained.

However, most legislatures have set standards for the fingerprinting of juveniles. In so doing, legislatures greatly influence the use and sharing of juvenile data because in most adult criminal history systems fingerprints are required to obtain or, at least, to verify juvenile history data.

Chapter Two describes the way in which *juvenile courts* create and maintain records about their contacts with juvenile offenders. The chapter includes a brief description of how the juvenile courts operate, and describes the types of records customarily created by juvenile courts and the role of state law in setting standards for such recordkeeping. Lastly, the affect of state statutes which forbid the co-mingling of juvenile and adult records are discussed.

Chapter One

LAW ENFORCEMENT AGENCY RECORDS

This chapter describes the way in which police departments customarily create and maintain records about their contacts with juvenile suspects and offenders. Historically, the courts and legislatures have given the police almost unfettered discretion to create and maintain any type of information about juvenile suspects or alleged offenders. The result has been a very informal system producing records which are an amalgam of adult investigative and arrest records. The courts and legislatures have placed restraints on these records only at the dissemination stage.

The legislatures' only significant intervention to date has been to regulate the creation and sharing of juvenile fingerprint records. However, regulation of the creation and use of fingerprint records is critical. In modern, adult justice information systems fingerprint records are essential for the location and verification of record entries.

Discretion to Create Records

Historically, law enforcement agencies have had wide discretion to create and maintain records of their contact with juveniles. Police discretion to create juvenile justice records is merely an extension of their discretion to apprehend and refer to juvenile court juveniles who are engaged in criminal or anti-social acts. While juvenile codes in many states instruct police agencies that they can only "take into custody" juveniles, not "arrest" them, and can only "refer" juveniles to juvenile courts, not arraign or book them, this is merely a change in vocabulary.[53]

Juvenile codes in most states do not disturb traditional police discretion to determine whether a juvenile

should be taken into custody and, once in custody, whether he should be released or formally referred to juvenile court.[54] Furthermore, juvenile codes in the vast majority of states do not restrict police discretion as to whether to create a record of their contacts with juveniles, nor do juvenile codes tell police what to put in those records.

According to commentators, five variables usually affect whether a police department establishes a record about a particular juvenile contact: (1) the severity of the act; (2) community attitudes; (3) the juvenile's past conduct; (4) the police officer's background and tolerance; and (5) the juvenile's demeanor after being arrested.[55] A survey done in 1970 of the New York City Police Department's dealings with juveniles found that the "interplay between the juveniles' attitude and the police officers' background and tolerance" is the principal factor in determining whether the officer makes a permanent record of his contact with a particular juvenile.[56] If a police agency decides to make a record of the "arrest," "detention," or other contact, the agency typically completes a card containing spaces for various items of personal identification; a description of the incident; the date of the occurrence; and any subsequent disposition.[57]

Customarily, the space for disposition information is never completed. According to estimates, between fifty and eighty percent of all juveniles taken into custody are immediately released or otherwise handled within the arresting agency.[58] Even when a juvenile is subsequently processed by a juvenile court, the police department is not likely to receive or record the disposition. At present, not one state juvenile code requires law enforcement agencies to include dispositions on juvenile justice arrest or detention records.

In the absence of statutory restrictions, the courts have affirmed that the police have broad discretion to create and maintain juvenile records. In Monroe v. Tielsch, the Washington State Supreme Court refused to order a police department to purge juvenile arrest records, citing the department's legitimate interest in those records.

> "Thus in dealing with juveniles who are frequently as mobile as any other part of our society, law enforcement officials should have the assistance of the past involvement of the juvenile with offenses as reflected by arrests."[59]

Other courts have reached the same conclusion.

> "But in the absence of statute, discretion in the matter belongs to the police. Since they are responsible for our safety, it is for them to decide whose identification papers will be apt to assist them in the performance of their duty."[60]

In Dugan v. Police Department, City of Camden, a New Jersey Superior Court upheld the right of a police department to maintain records of juvenile arrests which included the particular charge on which the juvenile was arrested. The Court found that statutory and constitutional challenges to this authority were without merit.[61] In Cuevas v. Leary,[62] decided by a federal District Court in 1970, a determined challenge by New York legal aide attorneys led to restrictions on the New York Police Department's use of juvenile detention records (called Y.D.-1 cards). The legal aide attorneys charged that many police officers cited youngsters on a Y.D.-1 card for any type of investigative or intelligence contact, with little verification that the particular youngster had done anything wrong. The informality of the system allegedly led to inconsistencies, inaccuracies, and ultimately, unfairness.[63]

The District Court declined to restrict police discretion to create Y.D.-1 cards. However, the Court decided that these cards were analogous to adult investigative records and not so analogous to adult arrest records and, accordingly, the Court approved a settlement whereby the police were restricted from sharing the Y.D.-1 cards outside of the Department.

Fingerprints and Photographs

The only aspect of the creation and maintenance of juvenile justice records by law enforcement agencies which is customarily subject to statutory regulation is the fingerprinting and photographing of juveniles. Of course, whether or not a juvenile can be fingerprinted, and the prints retained in police files, has a very significant impact on the availability and accessibility of juvenile records. Fingerprints are essential for searching record systems, for matching records to record subjects and for use in investigations.

The Federal Youth Corrections Act states that unless a juvenile is prosecuted as an adult, the law enforcement agency which takes the youth into custody--typically the United States Marshal's Office or the FBI--cannot take the youth's fingerprints or photograph unless the agency first obtains the written consent of the judge.[54]

Many state juvenile codes also prohibit or restrict the fingerprinting of juveniles and impose restrictions on the use and disposition of these prints. Provisions of this kind are included in the laws of Alabama, the District of Columbia, Georgia, Illinois, Indiana, Iowa, Kansas, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Oregon, South Carolina, Texas, Vermont, Virginia and Wyoming.

Most of the statutes are similar. They prohibit agencies from taking a juvenile's prints unless he is at least an adolescent and he has committed a serious offense. In addition, many of the statutes prohibit agencies from mixing juvenile and adult prints and require the agency to destroy the prints once the juvenile reaches adulthood, at least, if the juvenile has established a "clean record" period beforehand.

Iowa's statutory fingerprint provision is fairly typical. It provides that a juvenile taken into custody by a criminal justice agency may not be fingerprinted unless: (1) the juvenile court waives jurisdiction so that the juvenile can be prosecuted as an adult; or (2) the juvenile

is 14 years of age or older and charged with an offense that would be a felony if committed by an adult. Fingerprints of juveniles are required to be kept separate from those of adults and may not be placed in the state central repository which contains adult criminal records nor sent to any federal fingerprint repository.

Under Iowa law access to fingerprints of juveniles is limited to peace officers when necessary for the discharge of their official duties or when ordered by the juvenile court in individual cases when inspection is "necessary in the public interest." If no petition alleging delinquency is filed or if the outcome of the juvenile court proceedings is favorable to the juvenile, the fingerprints must be removed from the file and destroyed. Even if the juvenile is adjudicated delinquent, Iowa requires that the prints must be destroyed when he or she reaches 21 years of age, provided that the juvenile has not been the subject of a delinquency adjudication or conviction of a felony or aggravated misdemeanor since the juvenile attained 16 years of age.

The only flexibility in Iowa's statutory scheme, and the scheme in many other states, involves latent prints which are found in an investigation. If latent fingerprints are found during the investigation of a crime and a peace officer has reasonable grounds to believe the prints are those of a particular juvenile, the juvenile may be fingerprinted without regard to age or the nature of the offense "for immediate comparison" with the latent prints. If the comparison is negative or the juvenile is not referred to the court, the fingerprints must be destroyed immediately. If the comparison is positive and the child is referred to the court, all copies of the fingerprints must be delivered to the court for disposition.

Nevada's statute is very similar, except that juveniles under the age of 14, charged with offenses that would be felonies if committed by adults, may be fingerprinted with court approval. Nevada also permits fingerprints of juveniles to be sent to the state criminal record repository and to the FBI if the juvenile is found to have committed an offense that would be a felony if commit-

ted by an adult. Such fingerprints are to be maintained in files separate from Nevada's adult files, subject to special security precautions, and are to be available only for comparison purposes in the investigation of crime. The Nevada law also authorizes the taking of prints for comparison with latent prints.[65]

New York's family court statute includes detailed provisions for juvenile fingerprint records. A juvenile may be fingerprinted by a police agency if he is at least 13 years old and is charged with an offense that if committed by an adult would be a class A, B or C felony, or is at least 11 years old and is charged with an offense that would be a class A or B felony. All copies of such fingerprints must be forwarded to the state central record repository and no copies may be retained locally.

If the juvenile court adjudication is favorable to the juvenile, the family court must order the repository to destroy the fingerprints. If, on the other hand, the juvenile is adjudicated delinquent for an offense that would be a felony if committed by an adult, the prints may be maintained by the repository in a special juvenile file. If the juvenile reaches age 21, or 3 years after the adjudication, the fingerprints must be destroyed, if there has been no intervening conviction of a criminal offense. Importantly, if the subject is convicted of a criminal offense before the prints are destroyed, the juvenile file is transferred to the repository's adult criminal file and becomes available as part of that file.

Because so many states prohibit local police agencies from sending juvenile fingerprints to the FBI, the Attorney General's Task Force Report on Violent Crime calls upon the Attorney General to encourage states to take appropriate steps to make juvenile fingerprints available to the FBI.[66] New Jersey has recently done just that. Its new juvenile offender law adopted on July 23, 1982, permits the fingerprinting and photographing of most juvenile offenders and establishes a central registry of juvenile offenders for the exchange of prints and information among law enforcement agencies, including the FBI.[67]

Chapter Two

JUVENILE COURT RECORDS

This chapter describes the manner in which juvenile courts customarily create and maintain records about their contacts with juvenile offenders. The chapter begins with a brief description of the size and manner of operation of the juvenile court system.

Juvenile court records, unlike juvenile police records, are closely regulated by legislation and court rule. In most states there are two types of juvenile court records: legal records, which formally describe the juvenile's experience in the court; and social records, which contain information about the juvenile's background and subjective, evaluative information.

In most states, statute law requires that an individual's juvenile record information and his adult criminal history record information not be combined. This prohibition hinders the development of statistical data, creates problems for the effective implementation of first offender and other innovative sentencing programs, and, depending upon one's point of view, either provides individuals with a needed second chance or an inappropriate opportunity for a second criminal career.

The Juvenile Court System

There are approximately 2,800 juvenile courts in the United States.[68] Most of these courts are created and authorized by state statute, although they are usually municipal or county based. In most states juvenile courts have a complex tangle of relationships with state and local agencies. The juvenile courts' ability to function is usually dependent on fiscal and administrative resources provided by both state and local welfare and criminal justice agencies.[69] Customarily, juvenile courts' decisions are reviewable by the state's appellate courts.

Over the years the juvenile courts and their judges have been the subject of harsh criticism. Juvenile court judges are sometimes elected; sometimes serve in the position on a part-time basis; may not be lawyers; and may not, in rare cases, even have the benefit of a college education.[70] These factors, coupled with chronically and critically low funding, provoke charges of poor performance. One law review commentator observed that while "good will, compassion and similar virtues. . . are admirably present throughout the system. . . expertise, the keystone of the whole venture, is lacking."[71]

Prodded by these criticisms and the Supreme Court's extension of substantial due process rights to juvenile defendants, juvenile courts in recent years have become more formal and arguably more professional. Today, most juvenile courts are courts in every sense of the word, replete with full-time lawyers, jurists, public prosecutors, public defenders or legal aide attorneys, and private counsel.[72]

Although juvenile courts vary to some extent from state to state in philosophy, function and procedure, virtually every juvenile court divides its proceedings into three stages. First, the court holds a detention hearing to determine if the youth will be detailed in a juvenile institution pending the "trial." Second, the court holds the trial (sometimes called a jurisdictional hearing) in which the youth's conduct is established.[73] Third, juvenile courts hold dispositional or sentencing proceedings in which the youth may be ordered to return to his family, referred to a youth welfare or services agency, or, in rare cases, sent to a juvenile correctional institute.[74]

Legal and Social Records

Unlike law enforcement juvenile records, the records maintained by juvenile courts are, to some extent at least, regulated by state legislation. Virtually every state mandates that its juvenile courts create and maintain records about the children it processes, and most of those statutes describe the records in some detail.

Furthermore, most of these statutes distinguish between two types of juvenile court records; legal records and social records. Legal records usually consist of the following documents: the petition (which by law in many states must include the juvenile's name and age, the identity of the juvenile's parents, their address, and must describe the nature of the offense); a summons; a notice; any motions; the court's findings; any court orders; and the judgment.[75]

Legal records are created more or less automatically and the type of information which these records contain and their maintenance is usually not a matter of discretion for the juvenile court judge. One juvenile court judge described the process that impels the creation of legal records as follows:

> "The juvenile court, therefore, receives a great quantity of detail, the receipt of which it does not control.
>
> The public prosecutor files petitions in delinquency. These must allege the juvenile's name and age, identify parents and their address and state the precise nature of the offense. This becomes and remains a permanent court record unless and until sealed or expunged. A preliminary hearing will reveal further detail about the alleged offender and offense, preserved in a stenographic record. Motions to suppress evidence or for greater particularity further increase the record. An admission to the petition will develop yet more recorded detail about the child and the offense. A contested hearing whether to court or jury, will add to the record."[76]

Social records usually include information about the juvenile's family background; records of medical or mental health examinations; treatment information; and other types of personal information compiled by probation,

treatment and rehabilitative personnel. The creation and maintenance of social record information is considered more controversial than the creation and maintenance of legal record information. Social record data is regarded as more sensitive and less germaine to the juvenile justice process than legal record information. Probably for these reasons, juvenile justice statutes generally accord social records the highest degree of confidentiality, frequently requiring court approval for access by anyone other than the juvenile or his representatives and court and rehabilitative personnel.

Customarily, juvenile court statutes do not define or in any way restrict the type or amount of personal information that can be collected or placed in social records. In consequence, critics have charged juvenile judges and rehabilitative agencies with an unthinking, unselective and ultimately counterproductive "lust" for the acquisition of extremely personal data about juveniles and their families.

> "...[T]here are no laws establishing any quality controls with regard to practices of collecting and using information. Thus, juvenile courts are not compelled to be introspective about their information-gathering practices. In other words, juvenile courts are never required to ask themselves (never mind prove) why, in a robbery case, for example, there is or is not a justification for expending resources to collect information regarding the child's performance in school or the degree to which his family is functional or dysfunctional. * * * The policy question on the level of information systems is to what extent should the juvenile courts be allowed to collect and store information, particularly information of a private nature, which has a relatively low predictive power. * * * There are no laws which presently recognize that a juvenile court's thirst for information should be

> weighed against a juvenile's right and need for privacy."[77]

The courts have not taken nearly so negative a view as the commentators have of juvenile courts' appetite for information. In T.N.G. v. Superior Court of City and County of San Francisco, the Supreme Court of California--traditionally one of the nation's courts that is most sensitive to privacy concerns--rejected a request to purge juvenile records, and quoted with approval the trial court's rationale that, "these records should be made available to the probation officers and knowledgeable to the Court, so that if they came back that all of these matters can be considered in determining what is in the best interests of the minors."[78]

A few years later the Washington Supreme Court reached exactly the same conclusion for the same reasons.

> "Complete expunction of petitioners' arrest records, juvenile court files and what they have categorized as social and legal files, however, would be contrary to the underlying philosophy of our juvenile law.
>
> * * *
>
> In short, the judge facing one of the most difficult tasks in the judicial system needs all the help and information possible to reach a decision as to how to best correct and aid the juvenile before him."[79]

One of the few complaints made by a court about the juvenile court's collection of information was implied by the Supreme Court in In re Gault. There the Supreme Court noted that under the guise of paternalism and informality juvenile courts may extract information from juveniles which the juvenile would not offer in a more adversarial setting.[80] The Court implied, and others have

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said expressly, that if the juvenile courts collect sensitive data in this manner they have an obligation to insure its confidentiality. Otherwise, the juvenile court deceives its youthful wards into making disclosures which later come back to haunt them.

As one juvenile court judge put it:

> "...the juvenile court entraps the juvenile into a disclosure under the guise of non-criminality and confidentiality. If such is the case, then a fraud is thereby perpetrated on the juvenile who trusts the integrity of the Court."[81]

Segregation of Juvenile and Adult Records

Regardless of the content or character of juvenile court record information, virtually every state juvenile code today requires that such records be maintained separately from adult criminal record information. Provisions for separate maintenance of juvenile records are found in the juvenile codes of Illinois, Kansas, Maryland, Minnesota, Missouri, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, Virginia and several other states.

In addition, many state adult criminal justice record laws provide expressly that juvenile records may not be included in adult systems. For example, Louisiana's law expressly states that, "nothing contained herein shall require or permit the collection and storage of individually identifiable criminal history or delinquency records of juveniles by the bureau unless a juvenile is tried and convicted as an adult..."[82] Provisions expressly excluding juvenile records from inclusion are found in the adult criminal history statutes of Kansas (K.S.A. §38-808(2)), Maryland (§27-743(3)(2)), Massachusetts (M.G.L.A. § 6-167), Nevada (Nev. Rev. Stat. §179A.070.2), Pennsylvania (Pa. Stat. Ann. §18-9105), Virginia (Va. Code Ann. §9-108.0.C) and Washington (Rev. Code Wash. §10.97.030(1)).

In many other states, the adult criminal justice record legislation clearly implies that juvenile records may not be included in adult criminal justice files. Most of these state laws authorize the collection and maintenance of records of "criminal offenses," "penal offenses," "crimes," or "criminals." Since most state juvenile codes provide that detention of a juvenile is not an arrest and that adjudication as a juvenile delinquent is not a criminal conviction, juvenile records are presumptively excluded from inclusion in systems which the state describes as adult criminal record systems.

Segregation requirements have a critical impact on the availability of juvenile record information. Today, law enforcement agencies and the courts rely upon automated criminal history record systems to obtain information about offenders for purposes of identification, investigation, charging and sentencing. If juvenile record information cannot be combined with adult data or maintained in the same system it may, as a practical matter, be unavailable to police and the courts--even if theoretically they are entitled to the data.

Depending upon one's point of view, these segregation requirements are either positive, because they give individuals a clean slate for a new start in life, or negative, because they give individuals a clean slate for a second criminal career. Regardless of one's point of view, restraints on the integration of an individual's juvenile and adult information frustrates first offender, career offender and other innovative sentencing programs and plays havoc with statistical and other research efforts.

To date, the juvenile justice system has lagged behind the adult system in developing their own automated record and index systems. Although there are many likely reasons for this phenomenon, probably the principal reason is the comparative absence of a priority for quick retrieval and exchange of juvenile justice history information.[83] However, as a result of continued improvements in the capabilities of information technology and its growing affordability, automated juvenile court and law enforcement systems are becoming increas-

ingly common.[84] Recently, New Jersey adopted legislation which authorizes the creation of a registry of juvenile offenders for exchange of information among law enforcement agencies.

PART THREE

THE DISCLOSURE OF JUVENILE JUSTICE RECORDS

There are six chapters in this part of the report. All deal with the topic that is central to the report--the confidentiality of juvenile justice records. Each concerns the circumstances under which juvenile record data is available.

Chapter One deals with sealing and purging. If a juvenile record is purged it is destroyed and therefore unavailable to everyone. If a juvenile record is sealed then, at least in most jurisdictions, it is only available by court order, and then only if certain strict conditions are met.

Chapter Two covers disclosures to juvenile justice courts and agencies. Chapter Three covers disclosures to adult courts and to criminal justice agencies. Chapter Four covers disclosures to the juvenile justice subject. Chapter Five covers disclosures to researchers. Chapter Six deals with the most controversial issue, disclosures to governmental, non-criminal justice agencies, private employers, the media and other members of the public.

These chapters are organized according to the identity of the proposed recipient of the data, because the availability of juvenile justice data is influenced by this factor. In this regard the juvenile system differs substantially from the adult system. The disclosure of adult criminal history records to noncriminal justice agencies turns in most jurisdictions on whether there has been a disposition and the character of that disposition. Stated simply, adult conviction records are much more likely to be disseminated than adult arrest records. No doubt because juvenile dispositions are not supposed to indicate or connote criminal conduct, juvenile records, until recently at least, have been equally available, or more accurately unavailable, regardless of whether the juvenile arrest has resulted in a determination of delinquency.[85]

At the federal level the Youth Corrections Act compels Federal District Courts handling juvenile matters to safeguard their juvenile records from disclosure, except in six circumstances.[86] At the state level, the disclosure of juvenile records is affected by the Criminal Justice Information Systems Regulations, originally published in 1976 by the Law Enforcement Assistance Administration (LEAA), and referred to throughout this report as the "Department of Justice Regulations". These Regulations apply to all state and local agencies which have in the past received funds from LEAA for collecting, storing or disseminating criminal history information. The Regulations prohibit dissemination of juvenile records to non-criminal justice agencies unless a federal or state statute, court order, rule or court decision specifically authorizes their dissemination.[87]

In addition, every state has adopted statutory provisions which deal with the disclosure and confidentiality of juvenile records. These provisions usually are included in separate juvenile or family court codes or titles, but a few juvenile record provisions are found in statutes governing adult criminal records or in statutes dealing with particular types of offenses, such as drug offenses.

Most state juvenile justice codes devote considerable detail to the confidentiality of juvenile records, and about half of the states have adopted confidentiality provisions that can be classified as comprehensive. The comprehensive statutes, naturally, cover a broad range of confidentiality issues, including the fingerprinting of juveniles; the availability and disposition of fingerprint files; public attendance at juvenile court proceedings; publication of information relating to juvenile proceedings; dissemination of juvenile court records (both legal records and social records); dissemination of police records relating to juveniles; and the sealing and purging of juvenile records. States and jurisdictions with statutes that may be classified as comprehensive include Alabama, California, the District of Columbia, Georgia, Indiana, Iowa, Kansas, Maryland, Mississippi, Montana, Nevada, New Jersey, North Dakota, Oregon, South Dakota,

Tennessee, Texas, Utah, Vermont, Virginia and Washington.

Juvenile record information is widely available within the juvenile justice system. In theory, it is almost as available within the adult criminal justice system, but in practice, this is often not the case. Juvenile record information is surprisingly unavailable to record subjects in many jurisdictions; juvenile records are available with significant restrictions to researchers; and the basic rule continues to be--with exceptions--that juvenile data is unavailable to governmental, non-criminal justice agencies, private employers, the media and other members of the public unless specifically authorized by federal or state law.

Chapter One

SEALING AND PURGING OF JUVENILE JUSTICE RECORDS

All of the chapters in this part of the report deal with the disclosure and confidentiality of juvenile justice record information; however, probably the most dispositive factor affecting such confidentiality is whether the juvenile data has been sealed or purged. A seal or purge order, with rare exception, will prohibit disclosure regardless of the identity or purpose of the proposed recipient. If the data has been purged it is destroyed and thus unavailable, regardless of the identity or purpose of the proposed recipient. If the data has been sealed it will continue to exist, but customarily cannot be disclosed outside of the agency holding the data, except pursuant to a court order.[88]

Under federal law a youth's juvenile delinquency record is automatically sealed if his conviction is "set aside." Under most state statutes a juvenile must petition a court for an order sealing or purging his record. Customarily, juveniles are eligible to petition for such an order after the elapse of a few years from the date of the delinquency adjudication, provided that a subsequent adjudication has not occurred. In most states a seal or purge order can cover both court and police records.

Besides discussing how sealing and purging limits disclosure, this chapter also describes the availability of a seal or purge order based on constitutional considerations or based upon the judiciary's inherent authority to redress governmental misconduct. Some courts have held that a seal or purge order will be granted, independent of statutory authority, whenever the juvenile detention, arrest or adjudication is unconstitutional, or whenever it is based on improper governmental conduct.

Federal Law

The Federal Youth Corrections Act has something of a hybrid sealing formulation in that it provides that all court records of a juvenile proceeding are automatically sealed "[Upon] the completion of any juvenile delinquency proceeding whether or not there is an adjudication."[89] However, unlike a "true" sealing statute, the Youth Corrections Act expressly authorizes disclosure of the "sealed" juvenile record in a variety of circumstances.

The courts have narrowed this formulation by holding that under the Youth Corrections Act a juvenile offender whose conviction is set aside is entitled to have his conviction record "completely" sealed. The Youth Corrections Act provides that a youthful offender who is discharged from confinement or probation prior to the maximum term of such confinement or probation is automatically entitled to a set aside of his conviction.[90] As interpreted by most courts this setting aside of the conviction requires a "true" sealing of the juvenile conviction record.

In Doe v. Webster, for example, the District of Columbia Circuit held that the set aside provisions implicitly authorize the sealing of the record of the set aside conviction. The Court said that once the set aside order is communicated to the FBI, then the FBI must:

> "physically remove [the record] from the central criminal files and place [A] in a separate storage facility not to be opened other than in the course of a bona fide criminal investigation by law enforcement authorities and where necessary for such investigation. These records may not be used by [the FBI] for any other purpose, nor may they be disseminated to anyone public or private, for any other purpose."[91]

Oddly, the District of Columbia Circuit in Doe v. Webster refused to order the sealing of the record of the arrest which led to the conviction. The Court said that the Youth Corrections Act does not provide implicit

authorization for this step. Furthermore, the Court said that police agencies needed the arrest record for future investigations; and that arrest information is less likely to be disseminated and, if disseminated, is less stigmatizing.

In reality the arrest record, standing alone, may be more damaging to the juvenile than the arrest record accompanied by the ameliorating and explanatory record of the set aside conviction. With this point in mind, at least two courts have rejected the District of Columbia Circuit's approach and have held that a set aside conviction under the Youth Corrections Act implicitly authorizes the sealing of both the arrest and the conviction record.[92]

State Law

With a very few exceptions, all of the states have now added provisions to their juvenile codes for juvenile justice record sealing or purging, or both.[93] These statutes are surprisingly uniform in their approach. Most of the statutes contain standards for: (1) the time at which the records may be sealed or purged; (2) the conditions that must be met; (3) the records affected; (4) the effects of the seal or purge; and (5) the circumstances under which access to sealed records is permitted.

When Records May be Sealed or Purged

The approach of a majority of the states is to make the juvenile eligible to petition a juvenile court for an order to seal his record at a specified time and for an order to purge his record at a specified later time. Alabama's approach is typical. The Alabama juvenile code provides for sealing of juvenile records, upon petition by the subject or on the court's own motion, two years after discharge from custody or termination of court jurisdiction; and for purging five years after the subject reaches the age of majority. This approach is relatively common, and is followed by Colorado, the District of Columbia, Georgia, Idaho, New Jersey, North Dakota and numerous other states.

Arizona's statute provides for sealing at 18 (the age of majority) and purging 5 years later. Maryland's statute states that the juvenile court may order records sealed at any time and shall order them sealed upon the subject's petition, after reaching the age of majority. Texas' code provides that the court may seal any time, shall seal two years after jurisdiction ends (if stated conditions are met) and shall purge the records 7 years after the subject's 16th birthday (if stated conditions are met).

Arkansas' and Indiana's statutes simply say that the court may order records purged at any time on its own motion or the juvenile's petition.

California's statute authorizes sealing, upon petition, after the juvenile's 18th birthday or 5 years after court jurisdiction ends; and provides for purging 5 years after sealing, or automatically at age 38 unless the court orders otherwise for good cause shown. Louisiana's statute permits courts to purge juvenile records that have been inactive for 10 years. However, Louisiana excepts certain serious felony-type offenses from its purging provision. Montana provides for sealing at age 18 or termination of jurisdiction and purging 10 years later if the county attorney agrees.

A large number of states, including Connecticut, Michigan, Mississippi and North Dakota, have adopted statutes which authorize sealing or purging if the juvenile is adjudicated not delinquent or the petition is dismissed.

Delaware's and New Jersey's statutes authorize purging to occur earlier than the normal time if the juvenile intends to enlist in the military.

Importantly, most of the state statutory sealing and purging provisions require the juvenile to petition the court in order to obtain the seal or purge order. Requiring juvenile offenders to return to court to obtain a seal and purge order poses a substantial burden for most juvenile offenders. Undoubtedly, many juvenile offenders will not have the understanding, initiative or resources to surmount such a hurdle. Alaska's statute is an exception in that it requires "automatic" purging. In Alaska a court must order the purge of a juvenile record within 30 days

of the juvenile's 18th birthday or 30 days from the date that the court relinquishes jurisdiction, whichever occurs last.

The President's Commission on Law Enforcement and the Administration of Justice's Task Force Report on Juvenile Justice described the difficulty which juvenile offenders have in seeking a court seal or purge order.

> "Expunging records is not the simple operation it may seem. In California it requires initiative from the party concerned and usually the assistance of an attorney; the procedure necessitates a hearing, and it may be complicated or im-possible if a person has been a juvenile ward in more than one county.[94]

Conditions for Court Action

Again, the approach taken in Alabama's statute is typical: in order for records to be sealed or purged, the court must establish at a hearing that the record subject has not been subsequently adjudicated delinquent or convicted of a felony or a misdemeanor involving moral turpitude and no juvenile or criminal proceedings may be pending. These standards are found in juvenile sealing and purging provisions throughout the country. In addition, many jurisdictions (including Colorado, the District of Columbia, Georgia, Idaho, Texas and Vermont) also require that the court find that the juvenile has been "rehabilitated."

However, some states (including Arkansas, Indiana and Maryland) take the opposite tack in that they do not set out standards, but instead leave the matter to the discretion of the juvenile court. Ohio, as noted in a previous section, conditions purging upon the subject's waiver in writing of his right to bring a civil action against the authorities for his arrest.

Finally, several state statutes (including those in Alabama, the District of Columbia, New Jersey, New Mexico and Washington) provide that the juvenile record

can be "unsealed" if the subject is subsequently adjudicated delinquent or convicted of a crime. This unsealing permits the court to take the sealed record information into account in setting the sentence.

Records Affected

Many of the statutes which provide for sealing or purging of juvenile court records also cover law enforcement agency records. Specific reference to sealing or purging of law enforcement records is found in the juvenile codes in Alabama, Alaska, Arizona, California, the District of Columbia, Indiana, Iowa, Idaho, Montana, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, South Dakota, Texas, Utah and Virginia. These statutes usually provide either that law enforcement records are automatically included in sealing or purging orders or may be included if the petition so requests and/or the court so orders. Usually the court is required to give notice to appropriate law enforcement agencies and order them to seal or purge their records about the juvenile. In a few states, including Indiana, Iowa and Oklahoma, the juvenile code explicitly states that juvenile courts can order law enforcement agencies to send the juvenile records to the court to be destroyed or returned to the subject.

Missouri's statute provides that all juvenile court records shall be purged except the "official court file" (legal records) and that the court may seal the official court file and all police records if deemed in the best interest of the juvenile. Idaho's statute states that when records are purged a special index shall be kept, available only by court order.

Effect of Seal and Purge Orders

Most of the juvenile codes contain a provision very similar to that set out in the Alabama statute:

> "Upon the entry of the order, the proceedings in the case shall be treated as if they never occurred and all index references shall be deleted and the court and law enforcement officers and departments shall reply and the person may reply to any inquiry that no record exists with respect to such person."

In addition, Massachusetts' statute provides expressly that sealed records may not disqualify the juvenile from future public employment or service and that the juvenile shall answer "no record" to public inquiries and answer "sealed delinquency record over 3 years old" to police inquiries. Texas' statute expressly states that nothing concerning sealed juvenile proceedings may ever be used against the juvenile in a civil or criminal case.

Access to Sealed Records

All of the juvenile statutes severely limit access to sealed records. A number of jurisdictions (including Alabama, California, the District of Columbia, Kansas, Kentucky, Utah, Vermont and Washington) provide that access may be permitted only by court order upon petition of the juvenile and only to persons named in the petition. Maryland and West Virginia provide for access only by court order upon "good cause shown." However, a sizeable number of state statutes (including those in Alaska, Massachusetts, Nevada, South Dakota and Utah) expressly provide that sealed records may be used for sentencing purposes if the record subject subsequently is convicted of a crime.

A number of state statutes also expressly permit other miscellaneous uses of sealed juvenile justice records. Washington's statute, for example, states that sealed records may be made available to the victim of the juvenile offense. Iowa provides that sealed records can be available by court order for research purposes. Montana law provides that sealed records can be made available by court order to certain law enforcement officials and to

persons with a legitimate interest in the case or in the work of the court. New Jersey permits sealed records to be accessed, pursuant to court order, for use in determining prior offender status.

Constitutional and Inherent Authority for Sealing and Purging

Only a relative handful of reported decisions deal with the issue of sealing or purging of juvenile records in the absence of statutory authority. This comparative lack of case law probably reflects the availability and adequacy of statutory sealing and purging remedies for juvenile offenders.

However, where juvenile offenders have sought to obtain a court order to seal or purge their juvenile justice record without the benefit of statutory authorization, some courts have provided a remedy. In these instances, the court's decisions to seal or, more often, purge the juvenile justice record rest on one of two grounds.

Some courts have said that where the juvenile arrest or detention was unconstitutional or some other improper government action led to the creation of the juvenile record, the court will exercise its inherent authority to right governmental wrongs and will order the sealing or purging of the record. For example, a New York Family Court ordered the purging of both court and police agency records of a juvenile detention after the juvenile delinquency petition had been withdrawn for lack of evidence.[95] The Court based the purge order on its inherent power over its own records and its ancillary power to reach juvenile records held by police agencies.[96]

> "And relief in the instant case is dictated by the principle that a court must exercise its power over its records when necessary to prevent injustice and unwarranted injury--that a court will not allow itself to be made the instrument of a wrong."[97]

In Doe v. Webster, the District of Columbia Circuit refused to exercise its inherent authority to purge a juvenile's arrest record because the juvenile failed to demonstrate that the record described an arrest that was illegal or improper. However, the court acknowledged that in the right case courts have inherent authority to provide such relief.

> "[A]lthough there are indeed many instances in which courts have ordered expungement of arrest records in the exercise of their inherent equitable powers, all of these cases involved either a lack of probable cause coupled with special circumstances, flagrant violations of the Constitution, or other unusual and extraordinary circumstances.[98]

The other basis on which courts rest sealing or purging orders in the absence of statutory authorization is to find that the continued maintenance of the record, in and of itself, represents a violation of the subject's constitutional right of privacy or another of his constitutional rights. Up until 1976, many courts ordered the purging of adult criminal history records (almost always arrest records without a disposition) on precisely this theory.[99] However, the Supreme Court's 1976 decision in Paul v. Davis,[100] holding that police disclosure of adult arrest records does not violate any constitutional privacy right, casts doubt on whether a seal or purge order can be based on the notion that the continued existence or, at least, the continued use of a juvenile record violates the juvenile's constitutional right of privacy. Lower court decisions since Paul v. Davis, confirm that this theory is highly suspect.[101]

Although few decisions regarding the constitutional basis for purging juvenile records have been published since Paul v. Davis, juvenile justice records are generally considered to be far more sensitive and confidential than adult criminal history records. Therefore, the constitutional basis for sealing or purging juvenile records may

continue to have vitality, despite the Supreme Court's decision in Paul v. Davis.

Finally, a few courts have denied requests for a seal or purge order where no statutory right of sealing or purging was involved, not because they questioned the authority of courts to provide such relief, but rather because the courts concluded that the juvenile justice system's interest in the continued availability of the records outweighed the juvenile's interest in their destruction.[102] These courts said that this conclusion was especially justifiable in view of the juvenile courts' need for data in order to "treat" the juvenile and the fact that confidentiality safeguards already offer juveniles adequate protection.

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Chapter Two

SHARING OF JUVENILE JUSTICE RECORDS WITHIN THE JUVENILE JUSTICE SYSTEM

This chapter describes the availability of juvenile justice records within the juvenile justice system and concludes that, as a rule, juvenile courts are entitled to obtain any unsealed juvenile records for any purpose. In some states juvenile courts are also entitled to obtain sealed juvenile records for sentencing purposes. The primary limitation upon a juvenile court's handling of juvenile records, apart from sealing and purging, involves the use of a prior record in the adjudicative stage. A court which reviews the juvenile's prior record at this stage may be accused of prejudgment.

The availability of juvenile justice records to rehabilitative and other child welfare agencies is also described. Such agencies have broad access to juvenile record data, although their access is not as broad as the juvenile court's. Depending upon the state, the rehabilitative agency may not be able to obtain all of the legal records or may not be able to obtain law enforcement records about the juvenile. Since social record data is thought to bear directly on the child's rehabilitation, and in fact, is usually compiled by a child welfare agency, it is broadly available to such agencies.

Juvenile Courts

The Federal Youth Corrections Act authorizes courts handling juvenile records to release these records upon receiving inquiries from any other court of law, including, presumably, juvenile courts.[109] However, somewhat surprisingly, most state statutes do not expressly authorize the use of juvenile court records in subsequent juvenile court proceedings. Express authority

is found in only a few state statutes, including those in Hawaii, Iowa, Massachusetts, Mississippi, Oregon, Tennessee and West Virginia. Similarly, most state juvenile codes do not expressly authorize juvenile courts to obtain or use juvenile records held by police agencies. Only a few states statutes, including those in Alabama and Hawaii, expressly provide for juvenile court access to juvenile law enforcement records. While few juvenile codes expressly authorize juvenile courts to obtain juvenile justice records, at the same time no state statutes prohibit such access or prohibit agencies handling juvenile records from sharing such records with juvenile courts.

The absence of express authority probably reflects a view that such authority is implicit in the juvenile court's charter. Access to juvenile justice records can also be presumed from the juvenile court's mission. If a juvenile court is to prescribe effective treatment and rehabilitation for a juvenile, it must have before it as much relevant information as possible, including a record of the juvenile's prior offenses.

Where necessary, juvenile courts can obtain a juvenile's prior court or law enforcement record by issuing an order for its release. Juvenile codes in almost every state give juvenile courts authority to order disclosure of juvenile records to parties with a "legitimate interest" in the record. Juvenile courts should be considered to have a legitimate interest in the record. Furthermore, there is no credible countervailing policy argument against juvenile court access because, as noted, such access serves the basic purposes of the juvenile justice system and conversely, does not undermine any of its goals or philosophies.

Thus, even in the absence of express authority, it seems a near certainty that both juvenile court and law enforcement records, provided that they have not been sealed or purged, are legally available to juvenile courts for use in subsequent proceedings involving the juvenile. This conclusion is further borne out by the fact that, in almost every state, juvenile rehabilitative agencies are expressly authorized by statute to obtain juvenile court

and law enforcement records. It would be anomalous if rehabilitative agencies to which the juvenile court assigns the juvenile (sometimes including private organizations under contract with juvenile justice agencies) could obtain records about the juvenile that are unavailable to the juvenile court.

The better question is whether there are any restrictions upon a juvenile court's use of juvenile justice record information. Court opinions indicate that juvenile courts can, and should, use juvenile justice records to aid in the disposition or sentencing of the juvenile.[104] Since juvenile courts try to achieve individualized sentencing it makes great sense for the court to know as much as possible about the juvenile. Indeed, as noted in the prior chapter, many state codes make even sealed juvenile records available to both juvenile and adult courts for use in the sentencing phase of their proceeding.[105]

But what of the use of juvenile records in the adjudicative phase? The Supreme Court has said that juvenile adjudications must be conducted according to the rules of basic fairness. Is it fair for a juvenile court judge to have a record of a juvenile's past offenses before him when he tries to decide whether the juvenile committed the specific act of which he is accused? At least a couple of courts have answered this question in the negative, holding that a juvenile court's review of a juvenile's prior record during the adjudicative phase is reversible error.[106]

In McKeiver v. Pennsylvania, the Supreme Court took note of this issue. The Court held that a jury trial is not constitutionally mandated in a juvenile trial. However, Justice Blackman, writing for the majority, worried that without a jury trial the chance for prejudgment is increased because juvenile court judges may be aware of the juvenile's prior record.[107] Moreover, Justice Douglas' dissent, with which Justices Black and Marshall concurred, complained of the danger of prejudgment in juvenile cases because the judge may review the juvenile's prior social and legal records.[108] Although the extent to which juvenile judges review a juvenile's prior record

before deciding a juvenile's guilt varies, no doubt, depending upon the state and the court, there are reports that in some jurisdictions this is a relatively common practice.[109]

The prudent view is that juvenile courts should not look at prior records before the sentencing phase; however, as a practical matter, juvenile court judges in most jurisdictions are free to consult a juvenile's prior record at any stage in the proceeding, with the caveat that if the juvenile can show that the court's use of his juvenile record resulted in bias or unfairness, or that the juvenile court failed to establish his guilt beyond a reasonable doubt, the juvenile will be able to overturn the adjudication of delinquency.

Juvenile Rehabilitative and Welfare Agencies

Although almost every state gives juvenile correctional agencies, probation agencies and other rehabilitative agencies access to juvenile justice records, some states require that the agency first obtain an order from the juvenile court authorizing their access. State codes may distinguish between social records and legal records in regard to access by rehabilitative agencies. State codes may also distinguish between juvenile court records and police juvenile records. Rehabilitative agencies are usually assured of access to juvenile court records as a matter of right, whereas their access to police records is a matter of court or police discretion.

Virginia's statute is typical. It provides that social records about juveniles committed to the state Board of Corrections may be made available to "any public agency, child welfare agency, private organization, facility or person who is treating the child pursuant to a contract with the Department." Such records also may be made available by court order to "any other agency, person or institution having a legitimate interest in the case or in the work of the court." Law enforcement records about juveniles may be made available to "public and non-governmental institutions or agencies to which the child is

currently committed" as well as to persons with a legitimate interest in the case or in law enforcement work.

The District of Columbia's statute makes juvenile court records (legal and social records) available to "public or private agencies or institutions providing supervision or treatment or having custody of the child." Law enforcement records may be made available to "the officers of public and private institutions or agencies to which the child is currently committed and those professional persons or agencies responsible for his supervision after release."

New York's statute provides that, "any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record to be had and may in the discretion of the court obtain a copy."

Idaho's statute states that juvenile court records may be open to inspection to, "any institution or agency to which custody of a child has been transferred" or by "persons, institutions or agencies having a legitimate interest in the protection, welfare or treatment of the child."

Alabama's juvenile code states that social and legal records of the juvenile court shall be open to "representatives of a public or private agency or department providing supervision or having legal custody of the child." Law enforcement records may be made available to "public and non-governmental institutions or agencies to which the child is committed."

Chapter Three

SHARING OF JUVENILE JUSTICE RECORDS WITHIN THE ADULT JUSTICE SYSTEM

The availability of juvenile data within the adult justice system is discussed in this chapter. By law, juvenile justice data is almost as available within the adult justice system as it is within the juvenile justice system. Thus, it is ironic that, in practice, adult justice agencies do have less access to juvenile data than do juvenile agencies. This occurs, not because laws or policies mandate confidentiality, but because the legal and administrative rules that govern the organization of recordkeeping systems--such as rules for segregation of adult and juvenile records, or rules restricting the creation or use of juvenile fingerprints--make it difficult, as a practical matter, for adult agencies to obtain juvenile data.

The first section of this chapter discusses access to juvenile data by adult courts for criminal prosecutions. Adult courts are precluded (with exceptions) from using juvenile data in the adjudicative phase, but this data is theoretically available in the sentencing phase. In this respect adult court access is very similar to juvenile court access.

The second section of this chapter discusses the availability of juvenile data in civil suits. Juvenile data is seldom available in civil suits, with the exception of instances in which the juvenile offender or his victim bring a suit involving the very event which gave rise to the juvenile record.

The third section deals with disclosure of juvenile records to law enforcement agencies. Juvenile law enforcement records are available to law enforcement agencies and, to a lesser extent, so too are juvenile court records. The primary obstacle to law enforcement agency access is not statutory confidentiality policies but statu-

tory and other policies that govern the organization of adult and juvenile record systems. Thus law enforcement agencies often do not obtain juvenile justice records, even though they are legally authorized to obtain this data.

Disclosure in Criminal Prosecutions

In theory, juvenile data ought to be less available in adult criminal proceedings than it is in juvenile proceedings. After all, when juvenile data is available in juvenile proceedings no threat is posed to the concept of confidentiality because juvenile courts and welfare agencies will presumably use this data to assist in the juvenile's rehabilitation--and a primary purpose of confidentiality is to assist in rehabilitation. However, disclosure of juvenile record information in adult criminal prosecutions presents a different issue. Such disclosure raises a possibility of juvenile record information being used to punish, not rehabilitate.

However, the issue is seldom analyzed in this way. As a theoretical matter juvenile data is as available to adult courts as it is to juvenile courts. Access to such data is restricted at the adjudicative phase (with exceptions) and is available at the sentencing phase. However, as a practical matter juvenile data is probably much more likely to be made available to juvenile courts than to adult courts, due to administrative factors such as the segregation of adult and juvenile data, the absence of juvenile fingerprints and the separation of the juvenile and adult court processes.

A 1981 survey of access by prosecutors to juvenile data for use in adult criminal prosecutions reached exactly this point.

> "Although most states have laws that permit the sharing of information in particular instances, the practicality of the matter appears to be the critical issue. Since the juvenile and adult court systems are totally separate institutions-- with separate personnel, policies and

> recordkeeping systems--information sharing is not a routine matter."[110]

Federal Law

The Federal Youth Corrections Act, as noted earlier, permits disclosure of juvenile records in response to inquiries from "another court."[111] However, in the only court opinion published to date interpreting this provision, United States v. Chacon, the Ninth Circuit Court of Appeals narrowly interpreted this broad language. It said that before admitting a juvenile record, a court should weigh the need for the juvenile record against the Youth Corrections Act's goal of preventing undue public disclosure of a juvenile offender's identity.

In Chacon, an adult defendant tried to introduce the juvenile record of the individual with whom the defendant was arrested. The Court held that the trial judge should review the accomplice's juvenile record in camera and make any relevant material available to the defendant. The Court suggested that a juvenile record should not be admissible in an adult proceeding unless the defendant's constitutional rights are at stake or the defendant is attempting to introduce his own juvenile record.

> "To permit release of juvenile records to any court for any purpose would substantially weaken the protection intended by Congress in enacting §5038."[112]

State Law

State law, although perhaps a little more restrictive, is generally similar to federal law. Customarily, state juvenile codes prohibit the use of a juvenile court record in the adjudicative stage of an adult criminal prosecution but not in the sentencing stage.[113]

The Sentencing Phase

Most state codes either expressly provide, or have been interpreted by the courts to provide, that a juvenile justice record can be used for sentencing or related decisions, such as bail. The majority of the state codes expressly permit the use of both legal and social juvenile court records for criminal sentencing purposes after conviction.[114] A smaller number of state codes also expressly authorize criminal courts to use police records concerning juveniles for sentencing purposes.[115]

Even in states where no such express statutory authority exists, court decisions consistently have held that juvenile court and police records may be used for adult sentencing purposes.[116] Traditionally, adult courts have enjoyed broad discretion to take into account a variety of information about the offender at the sentencing phase.[117] The courts have ruled in favor of the use of juvenile records in adult sentencing proceedings even when the state's juvenile confidentiality statute expressly prohibits the use of juvenile court records as evidence for any purpose in subsequent proceedings in other courts. The courts have reasoned that use of records for sentencing after conviction does not constitute use as evidence or as part of the formal court proceeding.

In Commonwealth v. Myers,[118] for example, the Supreme Court of Pennsylvania ruled on whether the following provision in the Pennsylvania Juvenile Code barred the use of a juvenile record in an adult sentencing proceeding: "The disposition of a child or any evidence given in a juvenile court shall not be admissible as evidence against the child in any other court."[119] The Court held that it did not, on the grounds that a judge imposing sentence must have the most complete data possible about the defendant in order to make a just and fair decision.

> "A judge whose duty it is to determine the proper sentence imposed on those convicted of crime cannot be expected to limit himself to

> only that which appears in the record of the trial of the prisoner.[120]
>
> * * *
>
> "A sentencing judge and others dealing with the sentence, cannot with justice to the boy or the public ignore completely the boy's conduct during the time he was within the age of juvenile court law."[121]

At least one court has also held that it makes no difference whether the juvenile justice record is a juvenile court disposition or merely a police detention and referral. Any relevant information can be used at sentencing that bears on the defendant's behavior or character.[122]

The only exception to the rule that a juvenile record can be used in an adult sentencing proceeding involves the use of a juvenile record generated in a case in which the juvenile did not have the benefit of counsel or some other constitutional right mandated by Gault and its progeny. In these instances the courts have almost always held that the juvenile record cannot be used in the adult sentencing process.[123]

Many of the state codes which authorize the use of juvenile records for sentencing purposes also expressly authorize the use of these records for parole, probation, correctional and similar dispositional purposes associated with the criminal conviction. Provisions of this kind are included in the statutes in Alabama, Georgia, Illinois, Indiana, Kansas, Pennsylvania, Tennessee and Vermont. Here too, even where no express authority of this kind is given, courts have interpreted the juvenile codes to permit such uses.[124]

Perhaps the most common type of "dispositional" use for which juvenile records are available is bail decisions. The District of Columbia's Juvenile Code, for example, expressly authorizes the use of juvenile court records for bail determinations. But even in states where

the juvenile code is silent about bail determinations, some courts permit the use of juvenile records for bail purposes. In Brunetti v. Scotti, for example, a New York state court said that a bail determination, like a sentencing determination, requires the court to "take into account" the defendant's "character, reputation, habits and mental condition."[125] This kind of decision requires the court to make its determination on the basis of all available information, including juvenile records.

The Adjudicative Phase

In general, a defendant's juvenile record cannot be introduced in court or disclosed to the judge or jury prior to their determination of his guilt. However, the courts have said that juvenile records of witnesses and others can be used in criminal adjudications if the information is necessary in order to safeguard the defendant's right to due process and a fair trial under the Fifth and Sixth Amendments.[126] As noted earlier, the Supreme Court reached exactly that decision in Davis v. Alaska, holding that the defendant had a right to cross-examine a key prosecution witness about the witness' adjudication of juvenile delinquency.[127]

Apart from cases where a prosecution witness is involved, courts are much more reluctant to permit the introduction of a witness' juvenile record for impeachment purposes. In fact, the general rule continues to be that a defense witness' juvenile record cannot be introduced to impeach him--although some courts have disagreed.[128] Where the defendant himself is the witness, the courts generally hold that the defendant's prior juvenile record cannot be introduced to impeach him.[129] To hold otherwise, of course, would make a nullity of state stautes which expressly forbid the use of juvenile records against juveniles in subsequent adult proceedings. However, there is respectable case law authority for the proposition that the juvenile record of a criminal defendant is admissible to impeach the defendant where he has testified as to his good character and past conduct.[130]

In summary, it appears that adult courts, at least in theory, have adequate access to juvenile justice records for criminal sentencing and dispositional purposes. The unavailability of the juvenile record at the adjudicative stage in an adult proceeding has caused little complaint since the court and the jury are seldom aware of a defendant's prior adult criminal record at this point.

However, the real problem for the adult courts caused by confidentiality strictures is at the arraignment or charging phase in criminal proceedings. In recent years state legislatures have established selective charging and sentencing regimens for certain types of first offenders, as well as certain types of multiple offenders. In some states it is not always clear whether a prior juvenile adjudication affects entitlement for such programs. In any event, if a prior juvenile record is unavailable to prosecutors (and in some states this is more likely than others) it makes it extremely difficult to effectively implement first offender and multiple offender programs. Criminologists note that as a practical matter, far too many chronic and serious juvenile offenders enter the adult criminal justice system masquerading as first offenders.[131]

Disclosure in Civil Suits

In general, juvenile records are much less apt to be available for use in civil suits than in criminal actions. For one thing civil actions do not involve a sentencing phase where, by tradition and logic, the use of juvenile record information is thought to be proper. Furthermore, civil actions are less likely to raise ticklish constitutional questions about the necessity for the use of a juvenile record to assure a fair trial. Accordingly, with only minor exceptions, the courts have held that a juvenile record is not admissible in a civil proceeding to impeach a witness' testimony.[132]

The Federal Youth Corrections Act and juvenile codes in a few states do contain language which suggests that a juvenile record may be used in a civil proceeding if

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the court determines that there is a legitimate interest in such use and this interest outweighs the juvenile's and the state's confidentiality interest. The juvenile codes in Delaware and Wyoming, for example, authorize the use of juvenile records by "other courts," which presumably can include civil courts. However, as previously discussed, the courts are likely to interpret this language quite narrowly.[133]

Perhaps the only civil situation in which a juvenile record is likely to be admissible occurs when the action involves the very incident which gave rise to the juvenile record. For instance, where the juvenile sues based on the event which led to the creation of the juvenile record in the first place, the defendant may be able to introduce the juvenile record.[134] Similarly, where the victim of the incident which led to the creation of the juvenile record brings an action against the juvenile offender, a few courts and the juvenile codes in a few states authorize the victim to obtain and use the juvenile record.[135]

Ohio has adopted a somewhat unusual provision concerning juvenile records and civil actions. If a juvenile is adjudicated not delinquent, or if charges against him are dismissed, he may apply for expungement of all records. However, he must first waive his right to bring a civil action based on the juvenile arrest. If he does not submit a written waiver, the juvenile court must seal the records until the statute of limitations on the civil action expires, or until the civil action is terminated. Then the records may be ordered expunged.

Disclosure to Law Enforcement Agencies

In general, law enforcement agencies, primarily police agencies, have broad and largely unrestricted access to juvenile justice record information. At the federal level the Youth Corrections Act expressly provides that juvenile court records may be obtained by "law enforcement agencies where the request for information is related to the investigation of a crime or a position within the agency."[136]

State Statutory Provisions

Only about a dozen of the states have adopted statutory provisions expressly authorizing access by law enforcement officials to juvenile court records.[137] However, some of these states place certain limits on police access or use. About the same number of states, but not the same states in every case, have adopted statutory provisions which authorize the sharing of law enforcement agency records about juveniles with other law enforcement agencies.[138] Some of these statutes limit the particular uses to which the records may be put. Absent such a limit, it appears that the records can be used for all purposes related to law enforcement, including police investigations and charging and prosecution decisions.

As an example, the District of Columbia's statute places strict rules on the circumstances under which court records are available, but has no restrictions on the availability to criminal justice agencies of law enforcement juvenile records. The statute provides that legal records of the juvenile court may be made available to law enforcement officials of the District of Columbia only to investigate a criminal case growing out of the same transaction or occurrence that gave rise to the juvenile proceeding. Social records are available only by court order. However, law enforcement agency records about juveniles may be made available to law enforcement officials of the District of Columbia, the United States or other jurisdictions, "when necessary for the discharge of their official duties."

California's statute provides that any unsealed information gathered by a law enforcement agency relating to a juvenile may be disclosed to another law enforcement agency which has a "legitimate need for the information for purposes of official disposition of a case." When the disposition of the juvenile court proceeding is available, it must be included with any information released.

Louisiana's statute states that juvenile court records may be released to a peace officer, probation officer or district attorney "in connection with the performance of

his duties." The statute also provides that for good cause the court may order disclosure of juvenile court records and law enforcement agency records relating to juveniles "to any person, agency, institution or other court upon a particular showing that the information is relevant to a specific investigation or proceeding."

Maryland's statute provides that police records about juveniles may be made available for "confidential use" in the "investigation and prosecution of the child by any law enforcement agency." Juvenile court records, however, may not be released for law enforcement purposes without a court order, "upon good cause shown."

Mississippi law enforcement agency records about juveniles may be released to any public law enforcement agency, but the agency releasing the record must report the release and location of the records to the juvenile court. Law enforcement agencies receiving the records may use them only for "criminal law enforcement and juvenile law enforcement."

New Jersey law permits records of juveniles, including social, legal and law enforcement records, to be made available to prosecutors and law enforcement agencies if necessary "for the investigation of particular acts of delinquency or crime" or if necessary to locate, apprehend or protect the juvenile.

Pennsylvania permits law enforcement records about juveniles to be made available to "law enforcement officers of other jurisdictions when necessary for the discharge of their official duties." The Tennessee statute has an identical provision, and similar provisions are found in other state codes. Presumably, disclosure to Pennsylvania and Tennessee law enforcement officers is also permitted, although the statutes do not say so expressly.

Vermont's statute provides that law enforcement records about juveniles may be made available to prosecutors and other law enforcement officials "in connection with record checks and other legal purposes."

Virginia's statute is quite detailed on the subject of the use of juvenile law enforcement agency records for law enforcement purposes. Such records are required to

be kept separate from adult files, and law enforcement agencies are required to take special precautions to protect such records from unauthorized disclosure. Disclosure is permitted by court order to law enforcement officers of other jurisdictions for the discharge of their "current official duties." In addition, without court order, law enforcement officials may exchange "current information on juvenile arrests" with other Virginia law enforcement officials as well as those of other states and the federal government. This information must be limited to name, address, physical description, date of arrest and charge. Furthermore, the data may be used only for current investigations and may not be used to create new files or records by the recipient agencies.

Wisconsin's statute permits the "confidential exchange" of police records about juveniles with other law enforcement agencies.

Miscellaneous Factors Which Foster Law Enforcement Access

Even in states which have not adopted statutes which expressly authorize the disclosure of juvenile court or law enforcement records to police agencies, there is good reason to believe that these records are usually available to the police.

First, the law in many states, and at the federal level, is silent about the disclosure of law enforcement juvenile justice records to law enforcement agencies. Furthermore, the Justice Department's Regulations, which set standards for the handling of criminal history record data by state and local criminal justice agencies, place restrictions on the disclosure of juvenile records to non-criminal justice agencies. However, these Regulations place no restrictions on disclosures to criminal justice agencies.[139]

Second, the case law indicates that the courts are sympathetic to the sharing of juvenile record information among law enforcement agencies. In Brunetti v. Scotti, for example, a New York State Supreme Court panel

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noted that New York's juvenile code prevents public access to juvenile records held by police agencies, but the Court concluded, "nothing in that section prohibits the use of such records within the criminal justice system."[140]

Third, juvenile codes in virtually every state permit juvenile court records to be made available by court order to persons with a "legitimate interest" in them. Law enforcement users should qualify under this standard.

Fourth, as examined in detail in a subsequent chapter, many state codes provide that certain types of juvenile court records, or juvenile records relating to particular offenses, are public records. These records, of course, would be available for unrestricted law enforcement use.

In summary, despite the fact that statutes in only about a dozen states expressly state that law enforcement agencies are authorized access to juvenile records, the likelihood is that the information is often available, until sealed, for use by the police agencies, prosecutors and others in the criminal justice system for specific investigative and prosecutorial purposes. This is especially true of the arrest records that police agencies maintain about juveniles, and these are the records that are most often sought by law enforcement agencies. Social records created by juvenile courts and rehabilitative agencies, and to a lesser extent legal records, are less likely to be available, but are probably not as necessary for most law enforcement purposes.

Access to Juvenile Data by Criminal Record Repositories

This is not to say though that law enforcement agencies are as able to obtain juvenile data as they would like. Perhaps the most significant problem is posed by statutes which prohibit state criminal justice record repositories from obtaining juvenile histories or at least prohibit them from combining the juvenile and adult data. Today, criminal justice agencies, usually the state department of justice or state department of public safety, have the responsibility to compile, maintain and disseminate,

as appropriate, complete histories of every individual's in-state criminal activities.

However, even though law enforcement agencies may be able to get juvenile justice data in connection with a specific investigation, repositories in most states are not able to obtain juvenile justice data in order to compile a complete history of an individual's delinquent and criminal behavior. Many codes are not worded broadly enough to authorize courts or law enforcement agencies to share juvenile justice data with the state repository. Indeed in some states, such as Virginia, the juvenile code expressly prohibits the recipient agency from using the juvenile data to create a new record. And in a great many states, juvenile statutes explicitly prohibit the co-mingling of adult and juvenile records.[141]

Meanwhile, the number of law enforcement agencies and courts which are abandoning or curtailing their own record systems in favor of reliance upon central state repositories is growing. Even agencies with their own record systems are increasingly apt to rely primarily upon the repositories because, thanks to automation, its response is likely to be quick, inexpensive and relatively complete. The result of all this is predictable but extremely important. If the state repository does not have the juvenile data, then investigators, prosecutors and adult courts will not often obtain this data.

Thus, the primary effect of existing restrictions upon a repository's handling of juvenile data may be to foster the continued existence of two parallel but largely distinct record systems--one for juvenile offenses and one for adult offenses. The result of this two-track system, as discussed earlier, may be to handicap the apprehension and prosecution of juvenile offenders. The result may also be to handicap policymakers who are deprived of fully accurate or complete statistical information about juvenile crime and recidivism and about the performance of juvenile and criminal justice agencies.

A New York Times analysis of juvenile justice secrecy concluded that the, "veil of secrecy means that policymakers--in the Legislature, in City Hall, in the

school, in the prosecutors' offices, in the Police Department, in the courts and institutions for juveniles--usually find themselves without the information needed to shape policy on juvenile crime."[142]

Chapter Four

SUBJECT ACCESS TO JUVENILE JUSTICE RECORDS

In this chapter, a juvenile's right to obtain records maintained about him by the police and the courts is discussed. Statutes in a few states give juveniles a right of access to their police records, and statutes in several states give juveniles a right of access to their court records. This differs considerably from the state of the law concerning subject access to adult criminal history records. The Department of Justice Regulations and state statutes give adults a right to see their criminal history records in virtually every jurisdiction.

In those states that do not provide for a statutory right of access, courts are inclined to order access only when the juvenile can show that the information in question was used to make a decision about the juvenile. For this reason, juvenile justice data which is relevant to a juvenile's defense is usually made available to the juvenile and his attorney, either by statute or court order.

The question of access by a juvenile or his attorneys, parents or guardians to his juvenile justice records comes up in three contexts: (1) access to records held by police agencies; (2) access to historical juvenile court records; and (3) access to contemporaneous juvenile court records in order to assist the juvenile in his defense.

Juvenile Records Held by Police Agencies

Just as there is comparatively little law governing the handling of juvenile records by police, there is similarly little law governing access by the juvenile subject to such records. A few state statutes expressly give juveniles a right of access to their police records. But more often juveniles do not enjoy a statutory right of access to their police records. Although there is no case law

directly on point, it is likely that if the juvenile could show that this information was used as a basis for significant adverse decision about him, the courts would find that he has a right of access to the data on due process grounds.[143]

Juvenile Court Records

Many state juvenile codes do authorize access by the juvenile subject to his juvenile court records, including social records. In most cases, such access is granted to the subject and, while he is a juvenile or under custody, to his parents, guardian and attorney.[144] Most state laws also permit the subject to have access to his sealed records, and many permit the subject to petition the court to send his records to other persons or agencies.

Surprisingly, only two states, Indiana and Washington, have adopted statutory provisions which expressly permit access to juvenile court records for the purpose of challenge and correction of juvenile justice records. By contrast, challenge and correction rights are routinely available to adults in respect to their criminal history records.

The Indiana statute provides that "a person on whom records are maintained may request the court to modify any information that he believes is incorrect or misleading." The Washington state statute states that juvenile justice agencies have a duty to maintain accurate records; shall not knowingly record inaccurate information; shall make reasonable efforts to insure the completeness of their records; and shall implement procedures to facilitate inquiries concerning such records. The law further provides:

> "A juvenile, or his or her parents, or any person who has reasonable cause to believe information concerning that person is included in the records of a juvenile justice or care agency may make a motion to the court challenging the accuracy of any information

> concerning the moving party in the record or challenging the continued possession of the record by the agency. If the court grants the motion, it shall order the record or information to be corrected or destroyed."

In states which do not provide by statute for juveniles to inspect their court or police agency records, the juvenile may have trouble convincing a court that he has a constitutional or common law right of access to this information, particularly the social record information, unless, of course, he can show that this data was used to make an adverse decision about him.

In Turner v. Reed, an Oregon state court upheld the denial of a former prisoner's request for access to psychiatric and psychological evaluations on the ground that this type of subjective, evaluative material was exempt under the state's open records law.[145] The Court was impressed by the argument that the subject had little interest in or potential benefit from access to this type of non-factual, subjective and evaluative material. This type of reasoning, if applied in a juvenile case, would make it difficult for a juvenile or his designee to obtain access to his social records.

Juvenile Records for Defense in Juvenile Adjudications

In cases where the juvenile and his attorney require access to his juvenile record in order to effectively "defend" the juvenile, there is little doubt that such access is required. The Federal Youth Corrections Act implicitly authorizes such access in stating that during the course of a juvenile proceeding in federal court all records relating to the proceeding must not be disclosed, except to the "judge, counsel for the juvenile and the government, or others entitled under this section to have sealed records."[146]

Many state juvenile codes expressly give juveniles and their attorneys a right to inspect any reports or other information relied upon by the juvenile court.[147] Further-

more, surveys indicate that almost all juvenile courts have adopted formal or, at least, informal rules which give juvenile attorneys access to all juvenile records relied upon by the court.[148]

In Kent v. United States the Supreme Court said that access to relevant juvenile court records by the juvenile's attorney is guaranteed by the Constitution. Kent held that before a juvenile court could make a significant decision affecting a juvenile (in that case a decision to waive the juvenile court's jurisdiction) the juvenile's attorney must have access to all information on which the court would rely, including any social record information.[149] The Court cited the District of Columbia Federal Court of Appeal's opinion in Watkins v. United States, wherein it held:

> "All of the social records concerning the child are usually relevant to waiver since the Juvenile Court must be deemed to consider the entire history of the child in determining waiver.
>
> * * *
>
> The child's attorney must be advised of the information upon which the Juvenile Court relied . . . .".[150]

Chapter Five

DISCLOSURE OF JUVENILE RECORDS TO RESEARCHERS

This chapter covers the circumstances under which researchers may obtain access to juvenile justice records. Under federal law researcher access is prohibited. However, under the law in many states researchers are expressly permitted to obtain juvenile court records. Juvenile records maintained by law enforcement agencies are less apt to be covered by state statutes. In addition, many of the state statutory access provisions place sharp restrictions upon researcher use and disclosure of juvenile data.

In states which do not include researcher access provisions in their juvenile code, researchers may be able to obtain access by convincing a court that they have a "legitimate interest" in the records. The chapter notes that researchers have charged that various restrictions on researcher access to and use of juvenile data make it difficult to conduct longitudinal research about juvenile recidivism and about career crime patterns.

Federal Law

Under federal law, research groups cannot obtain access to legal or social juvenile court records for research purposes. The Federal Youth Corrections Act prohibits the disclosure of juvenile court records except in six specified circumstances, none of which cover researchers.[151]

State Law

However, under state law the result is often different. The Department of Justice Regulations permit states and local criminal justice agencies to disseminate juvenile records to individuals and agencies for the ex-

press purpose of research, or evaluative or statistical activities, pursuant to an agreement with a criminal justice agency.[152]

Furthermore, 17 states now make express provision in their juvenile codes for access to juvenile records for research or statistical purposes.[153] However, most of those statutory provisions cover only juvenile court records, not police records. Moreover, many of these statutes require researchers to get a court order, and they place restrictions on the researchers' use of the data in order to protect the anonymity of the juveniles. Colorado's statute, for example, permits records of court proceedings to be inspected, with the consent of the court, by persons conducting "pertinent research studies." Essentially identical provisions appear in the Hawaii, Idaho, Maine, South Dakota and Utah juvenile codes.

The Georgia statute provides that the court may permit researchers to inspect juvenile court records under whatever use and disclosure restrictions the court deems proper.

Indiana has adopted a detailed provision for researcher access which requires the court to find that the researcher's proposed safeguards are adequate to protect the identity of each juvenile whose records the researcher plans to review.

Some of the juvenile codes prohibit researchers' access to data which personally identifies juvenile offenders. Iowa's juvenile code, for instance, states that access to juvenile court records may be permitted by court order to a researcher provided that "no personal identifying data shall be disclosed to such a person."

Mississippi's Youth Court Act has an identical provision, except that the court can release identifying data if it is convinced that this is "absolutely essential" to the research purpose.

West Virginia's statute permits the release of juvenile court records, and law enforcement records, pursuant to court order to a person doing research, on the condition that information which would identify any juvenile may not be disclosed.

Other states permit researchers to have access only if they are conducting research at the request of a state agency. The Virginia statute, for instance, falls into this category.

Also, as already noted, practically every state statute permits juvenile courts to issue orders making juvenile records available to persons with a legitimate interest in the juvenile or in the work of the court or the juvenile system. Although no court opinions were found in which researchers sought access under this type of provision, a proper research project may well qualify under this standard.

In summary, juvenile records, and particularly juvenile court records, are expressly made available to researchers in many states, subject to court order and various restrictions to protect the confidentiality of the records and, in some cases, the anonymity of the juvenile.

Although researchers enjoy relatively broad access to juvenile data, confidentiality restrictions, while important to protect juvenile rights, may have a negative impact upon researchers' ability to do longitudinal research about topics such as juvenile recidivism and career crime. Researchers wishing to do this kind of work must strike a deal with several juvenile and adult agencies and must get their approval to link juvenile and adult records. The researcher must then be able to actually link an individual's juvenile and adult records--no easy task in states that make juvenile data available to researchers only without personal identifiers. Not surprisingly, researchers complain that juvenile justice confidentiality and privacy standards, together with the legal, administrative and physical separation of juvenile and adult record systems, makes longitudinal juvenile research expensive and difficult, if not impossible.[154]

Chapter Six

DISCLOSURE OF JUVENILE RECORDS TO NONCRIMINAL JUSTICE ORGANIZATIONS, THE MEDIA AND THE PUBLIC

This chapter deals with disclosure of juvenile justice data outside of the juvenile and criminal justice systems. Sharing juvenile data within the juvenile or, to a lesser extent, the criminal justice systems is not thought to label and stigmatize juvenile offenders. However, disclosures outside of these systems, according to many observers, stigmatizes the juvenile and imperils his chances for rehabilitation and reassimilation.

Despite pressures to relax juvenile confidentiality, the basic rule continues to be that juvenile record information cannot be disclosed outside of the juvenile and criminal justice systems--except to record subjects and to researchers. Federal courts are flatly prohibited from making such disclosures. Furthermore, the Department of Justice Regulations prohibit many state and local agencies from disclosing juvenile data outside of the systems, unless expressly authorized to do so by federal or state law. And the law in most states not only fails to authorize such disclosures, it often expressly prohibits them.

The second section of this chapter identifies those factors which, notwithstanding the basic rule of confidentiality described above, foster the disclosure of juvenile data to non-juvenile or criminal justice agencies. The section identifies four potential sources for such disclosures: (1) police agencies which are not covered by the Department of Justice Regulations or by state confidentiality provisions or which are not in full compliance with these authorities; (2) the courts, pursuant to their power to release data, upon petition, to parties with a "legitimate interest" in the data; (3) the juvenile himself; and (4) most importantly, new provisions in state statutes which make juvenile adjudication or charging information concerning serious offenses available to the public.

The availability of juvenile data over the last ten years has been subject to two diverging trends: a decrease in permissible, selective disclosures based upon police agency discretion; and an increase in across-the-board public disclosures based upon statutory public record provisions.

Factors that Make Juvenile Data Confidential

In general, juvenile record information, both law enforcement and particularly court records, is not available to governmental non-criminal justice agencies, private organizations, the media or the public. Federal law flatly prohibits the disclosure of juvenile court records held by federal courts to non-criminal and non-juvenile justice agencies, private employers, the press or the public. In fact, the Federal Youth Corrections Act instructs federal courts that if the inquiry is "related to an application for employment, license, bonding, or any civil right or privilege," the court's response "shall not be different from responses made about persons who have never been involved in a delinquency proceeding."[155]

The Department of Justice Regulations prohibit those state and local criminal justice agencies which are covered by the Regulations from disclosing juvenile record information to any non-criminal justice agency "unless a statute, court order, rule or court decision specifically authorizes dissemination of juvenile records." (emphasis added)[156]

Statutes in several states make juvenile delinquency adjudication information available to the public; however, apart from these public record provisions, few if any states or localities have adopted statutory schemes which specifically authorize the disclosure of juvenile records to non-criminal justice agencies. None of the state juvenile codes expressly authorize dissemination of juvenile record information to governmental non-criminal justice agencies.[157] At most, it can be argued that the juvenile statutes in a few states contain broad language which arguably covers governmental, non-criminal justice agen-

cies. Delaware's statute, for example, authorizes dissemination to "other courts and public agencies," and North Carolina's code permits the "necessary sharing of information among authorized agencies." Furthermore, not one juvenile code authorizes the dissemination of juvenile record information to private employers, the media or any other private group.

Court decisions or orders authorizing or compelling disclosure of juvenile record information to non-criminal justice agencies, private organizations, the media or the public are rare. In fact, most courts that have dealt with the juvenile record disclosure issue have emphasized that if the juvenile justice system's purpose is to rehabilitate, then juveniles must be spared the stigma that comes from disclosure of a juvenile record and the attendant exclusion of juvenile offenders from educational and employment opportunities.[158]

In Monroe v. Tielsch, for example, the Washington Supreme Court, while refusing to expunge juvenile records, declared that these records must be kept confidential from employers and society.

> "This salutary goal [rehabilitation] cannot be accomplished if the arrest mechanism seriously impedes the occupational or educational opportunities of the youth that are to be served by the juvenile justice system."[159]

The Court in Tielsch cited a "poignant example" of the mischief that may be caused by the misuse of juvenile arrest records. According to the Court, a Washington state community had recently fired its Chief of Police on the basis of their discovery of the Police Chief's "relatively ancient" juvenile arrest record.

The Court held that:

> "In accordance with the principles of fundamental fairness implicit in our institutions of juvenile justice, it is my best judgment that information relating to arrests not leading to

> conviction of a juvenile may not be released under any circumstances to prospective employers or non-rehabilitative educational institutions."[160]

In many states the juvenile code not only makes the juvenile record non-public, but in addition, in an effort to further assure confidentiality, it authorizes individuals with juvenile offenses to deny that they have ever been arrested or detained or otherwise had contact with the juvenile justice system.[161]

Factors that Encourage the Disclosure of Juvenile Data

Despite these statutory and court imposed confidentiality safeguards, many observers still express the view that juvenile record information is relatively widely available to private employers, the press and the public. The President's Commission on Law Enforcement and the Administration of Justice, for example, worried that although juvenile justice records are supposed to be confidential by law, "in practice the confidentiality of these records is often violated."[162] The Supreme Court, as noted earlier, has cynically observed that the claim of juvenile justice secrecy" is more rhetoric than reality."[163]

However, much of the concern about the availability of juvenile justice data stemmed from the fact that in the late 1960's and early 1970's police departments in many states enjoyed more or less complete discretion to disseminate juvenile justice data. At that time the juvenile codes in many states restricted the dissemination of juvenile court records, but not the dissemination of juvenile records held by law enforcement agencies. Thus, in 1967 the Supreme Court could claim that police agencies had complete discretion to release their juvenile data and routinely exercised their discretion for the benefit of employers and other private decisionmakers.

"Of more importance are police records. In most states the police keep a complete file of juvenile 'police contacts' and have complete discretion as to disclosure of juvenile records.

* * *

...in some jurisdictions information concerning juvenile police contacts is furnished private employers as well as government agencies."[164]

In 1970 a New York family court even stipulated to the fact that private investigators in New York could readily obtain police juvenile arrest and detention data.[165] During the same period concerned commentators decried the easy availability of police juvenile records.[166]

However, the extent of this discretion has been curtailed in recent years both by the enactment of state statutory standards covering police records and the publication in 1976 of the Department of Justice Regulations prohibiting police agencies which have received LEAA monies in support of their information systems from disclosing juvenile record data to non-criminal justice agencies. Today, roughly one-half of the police agencies, including virtually all large agencies, are bound by the Department of Justice's regulatory prohibition against public disclosure of juvenile record data. Furthermore, a significant but unknown portion of the remaining police agencies are prohibited from disclosing juvenile data to the public by state and local statutes, ordinances and regulations.

Nevertheless, it is probably still true that police records about juveniles are more apt to be available than court records. This availability is based on the fact that police agencies in some jurisdictions still enjoy discretion to release juvenile data and on the unquestioned failure of some agencies to be in full compliance with the Department of Justice Regulations or applicable state law.

Certainly, a number of studies and commentators have pointed the finger at police agencies as the culprit for the disclosure and "leakage" of juvenile justice data.[167] To the extent that police juvenile records are, in fact, more readily available than court juvenile records, a particular irony results because police juvenile records often do not contain a disposition and are otherwise less likely to be complete, accurate or up to date.[168]

In addition to police discretion, three other factors may contribute to the public availability of juvenile justice data. First, most statutes give juvenile courts discretion to release information to any party with a "legitimate interest." A survey done in the mid-1960's reported that juvenile courts were barraged with requests for records from employers, the military and others. Some of these courts reportedly routinely granted such requests.

"Every court investigated reported a steady influx of records requests. A few judges have employed their discretionary power to establish a flat rule of refusing to release record information to anyone, but in most areas it is routinely released to the military and sometimes to private employers as well."[169]

However, this claim is now almost twenty years old and does not appear to represent current practice. No evidence was found that the military or private employers or any other segment of the public routinely seek or obtain court orders for access to juvenile data under the "legitimate interest" clause found in most state juvenile codes.

A second factor often cited as instrumental in permitting the release of juvenile record information to non-criminal justice agencies is the alleged practice of employers, the military, licensing boards and certain other private sector decisionmakers of seeking such data from the juvenile himself. One court described the phenomenon as follows:

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> "At present this legislative policy of confidentiality suffers erosion, in practical terms, by the omnipresent inquiry 'Have you ever been arrested?' This question appears on practically every application for employment, college admission, business license or other undertaking open to young persons. Indeed some employers often require a prospective employee to permit actual inspection of his juvenile court files so that the employer may make his own check of the juvenile's history. More often, however, employers and others will simply reject an application from anyone who admits to the fact that he has been the subject of juvenile court proceedings.[170]

Of course, as noted earlier, many state codes permit a juvenile to respond to such questions by denying the existence of his record, particularly if the record has been sealed. Furthermore, the growing sensitivity and sophistication of employers may have led to a decrease in at least overt efforts by employers to determine if applicants have juvenile justice records.

The third factor is clearly the most important and seems to be increasing in importance. A number of state juvenile codes expressly provide that certain juvenile justice data is public. As noted earlier, over the last ten years seven states, Alaska, Delaware, Georgia, Mississippi, Nevada, New Jersey and Pennsylvania, have modified their juvenile codes to authorize the public release of the names and delinquency record information of juveniles adjudicated delinquent. In all of these states the juvenile must either have a prior record or be found to have committed a serious offense before the public disclosure is triggered.

In addition, a number of states make juvenile arrest or charging data public. Here too, the public disclosure provision is triggered only by arrests for serious offenses. Maine's statute, for example, admits the general public to juvenile proceedings involving homicide or certain serious

offenses, and also provides that all records of these proceedings are public. Indiana's juvenile code states that records of proceedings involving offenses that would be adult crimes are open to the public.

Iowa's code states that records of juvenile proceedings involving charges of delinquency are public records unless the public was excluded from the proceedings by court order. Missouri makes juvenile records public if the offense charged is equivalent to murder or to a class A felony; Montana if the offense would be a felony; and New Mexico if the juvenile has previously been adjudicated delinquent.

Statutes in Nebraska and Washington go even further. Regardless of the seriousness of the charge or the adjudication, Nebraska makes all legal court records public. Only social records remain confidential. Similarly, Washington's statute states that legal records of juvenile courts shall be open to public inspection until sealed.

In summary, juvenile record information, while not readily available outside the criminal and juvenile justice systems, is also not entirely secret. Juvenile justice statutes customarily prohibit the public disclosure of juvenile court record information except for several states which make records of arrests for serious offenses or records of adjudications for serious offenses public. In addition, in some jurisdictions, police juvenile records may be more available than court records.

The availability of juvenile record data over the last ten years has been subject to two divergent trends. On the one hand, police discretion to disclose juvenile data has been restricted. On the other hand, statutory provisions have been adopted in many states which make adjudication data and/or arrest data about serious offenses public. The ultimate effect may not change the actual amount of juvenile data which is disclosed. However, the system has become more formal and selective; and discriminatory disclosures which tend to occur when police discretion is involved have been replaced by more uniform disclosures of qualified data to all members of the public.

PART FOUR

JUVENILE RECORD CONFIDENTIALITY AND THE MEDIA'S COURTROOM ACCESS AND PUBLICATION RIGHTS

This part of the report deals with two media issues which sharply affect juvenile justice record confidentiality: the media's access to juvenile court proceedings; and the media's right to publish the names of juveniles who are arrested or convicted.

There are two chapters in this part. Chapter One discusses the media's right and opportunity to attend juvenile court proceedings. The chapter covers both statutory and constitutional standards, and finds that the media does not have a constitutional right to attend juvenile court proceedings. However, some states and courts now permit the media to attend, particularly when juveniles are tried for serious offenses.

Chapter Two discusses the statutory and constitutional standards which apply to the media's publication of the names and photographs of juvenile arrestees and offenders. In some states, the media is authorized to publish such information if the juvenile is accused or convicted of a serious offense. Moreover, a recent Supreme Court decision holds that if the media obtains a juvenile's name from a public or lawful source, a state cannot prohibit the media from publishing that name without running afoul of the media's First Amendment rights.

Chapter One

MEDIA ACCESS TO JUVENILE COURT PROCEEDINGS

Increasingly, state statutes or juvenile courts are permitting media representatives to attend juvenile court proceedings, with the admonition that they not publish the juvenile's name. However, in cases where juveniles are charged with serious offenses the media may be admitted without publication restrictions.

In the absence of a statutory or administrative authorization to attend a proceeding, the media cannot argue that it has a right of access based upon the Constitution. However, juvenile defendants may have a constitutional right to insist upon an open proceeding. Juvenile defendants probably do not have a constitutional right to insist upon a closed proceeding.

Statutory Standards

Traditionally, the public and the media have been excluded from attending juvenile court proceedings. In many states this exclusion has been based upon express language in the juvenile code. New Hampshire's statute, for example, expressly permits only the parties, witnesses, counsel, the county attorney, the attorney general and persons with official duties to attend juvenile proceedings.

However, recently more juvenile courts have been willing to admit the public and the media. Thirteen state statutes now expressly authorize the media to attend juvenile proceedings, with the caveat that the media is not permitted to reveal the identity of the accused juvenile.[171]

In a few states the juvenile code permits the public, including the media, to attend juvenile proceedings without restrictions on subsequent dissemination or publication. Customarily, these provisions only apply if the

youth is charged with particularly serious conduct which would be a felony if done by an adult. For example, Maine's statute excludes the public from juvenile proceedings as a general rule, but not if the juvenile is charged with an offense that, if committed by an adult, would be classified as a serious homicide. Delaware's statute also opens juvenile proceedings to the public if the offense charged would be a felony if committed by an adult.

In most other states the opening or closing of the proceeding is left entirely to the judge's discretion. In a few of these states the juvenile code sets standards to guide the judge's determination. In Iowa, for instance, the statute allows the juvenile court on its own motion, or on the motion of any party before the court, to exclude the public from the hearing if the court determines that the possibility of harm to the juvenile outweighs the public's interest in having an open hearing. Even if the hearing is ordered closed the court may, "admit these persons who have a direct interest in the case or in the work of this court."[172] Surprisingly, courts which have interpreted similar language in the juvenile codes in Minnesota and California have held that the news media has a "direct interest" in the proceeding.[173] In a similar and equally odd vein, one state, Illinois, excludes the general public from juvenile proceedings, but permits the media to attend.[174]

Constitutional Standards

The extent to which constitutional standards may compel a closed or open juvenile hearing is still in some doubt, at least as regards the juvenile's right to insist upon an open or closed hearing. However, there is little doubt as to the absence of constitutional rights for the public and press. The Supreme Court's decision in Gannett v. DePasquale makes clear that the public and the press do not have a constitutional right to insist upon an open adult criminal proceeding.[175] Presumably, the public's and the media's constitutional arguments for opening a juvenile hearing would be even less persuasive.

By implication the Supreme Court has indicated that it would have no difficulty in upholding a juvenile court decision to close its proceedings. In Oklahoma Publishing Company v. District Court in and for Oklahoma County, the Court upheld the constitutional right of the media to publish the name of a juvenile which the media obtained by attending an open hearing.[176] However, the Supreme Court implied that the juvenile court could have readily and legally closed such a hearing, thereby preventing the media from obtaining the juvenile's name.

The juvenile's constitutional right to open or close a hearing presents a more difficult question. In criminal trials the courts have held that a defendant has a near absolute right to insist upon a public trial, and a qualified right to insist upon the closing of the proceeding if closing the proceeding will help to assure a fair trial.[177] However, the courts are split as to whether a juvenile defendant can insist upon opening a juvenile proceeding.[178] At least one court has reasoned that a juvenile's demand for an open proceeding is merely a misguided attempt to attract attention.[179]

To date, the courts have not issued an opinion on constitutional grounds concerning a juvenile's right to close a proceeding to the public. In all likelihood this would be considered a matter for state discretion. In Gault, the Supreme Court indicated that the states have wide discretion to establish disclosure policies regarding juvenile records and proceedings.[180]

Chapter Two

MEDIA PUBLICATION OF INFORMATION ABOUT JUVENILES

This chapter discusses the statutory and constitutional standards which apply to the media's publication of the names and photographs of juvenile arrestees and offenders. In many states the media is statutorily prohibited from publishing such information. In a few states the juvenile code makes the name of the juvenile public if he has been convicted of a serious offense or, more rarely, if he has been charged with a serious offense.

A 1979 Supreme Court decision imperils many of the state non-publication statutes because it holds that the media has a First Amendment right to publish the name of any juvenile if it has lawfully obtained that data.

Statutory Standards

The Federal Youth Corrections Act and a number of state statutes expressly prohibit the media's publication of information concerning juvenile offenders. The federal law states:

> "[N]either the name nor the picture of any juvenile shall be made public by any medium of public information in connection with a juvenile delinquency proceeding."[181]

New Hampshire's statute contains a strict publication prohibition which includes a criminal penalty:

> "It shall be unlawful for any newspaper to publish, or any radio or television station to broadcast or make public the name or address or any other particular information serving to identify any juvenile arrested, without the

> express permission of the court; and it shall be unlawful for any newspaper to publish, or any radio or television station to make public, any of the proceedings of any juvenile court."

South Carolina's statute provides that the name or picture of any juvenile shall not be made public by any newspaper or radio or television station without court approval. Wyoming's statute similarly states that law enforcement records concerning juveniles may not be disclosed for newspaper publication without the written consent of the court. And South Dakota's law provides that there shall be no publication, broadcast (or other publicity) of the name, picture, residence, or identity of any juvenile, parent, guardian or witness unless specifically permitted by court order.

In a number of states the juvenile code permits the media to publish the name of the juvenile offender, in the event of serious or repeat offenses. Indeed, as noted earlier, statutes in seven states now make the name and juvenile history data of serious juvenile offenders public information. Alaska's statute, for example, states that the name and picture of a juvenile may be published if he is adjudicated for a second time for an offense that would be a felony if committed by an adult. Virginia's law provides that, if the public interest requires, the court may release the name and address of a juvenile adjudicated for an offense that would be a serious felony if committed by an adult. Delaware's statute covers arrests rather than adjudications and provides that if a juvenile is arrested for an offense classified as a felony the clerk "shall release the name of the child and the names of his parents upon request by a responsible representative of public information media."

Constitutional Standards

A 1979 Supreme Court decision indicates that state and federal statutes which prohibit the media from publishing the names of juvenile offenders in all circum-

stances may be unconstitutional. In Smith v. Daily Mail Publishing Com pany, the Supreme Court ruled unconstitutional a West Virginia statute which made it a crime for a newspaper to publish, without written approval of a juvenile court, the name of any youth charged as a juvenile offender.[182] The Court said that where the media had lawfully obtained the alleged juvenile offender's name, it was a violation of the First Amendment's right of a free press to prohibit the publication of the juvenile's name.

Smith involved a 14-year-old boy who fatally shot a classmate in the junior high scool of a small West Virginia community. The juvenile assailant fled from school and after a 3-hour search was returned to school handcuffed. The press learned the name of the assailant from eyewitnesses. A local newspaper subsequently published the boy's name and his picture on the front page. Grand jury indictments were returned for violation of West Virginia's juvenile anti-publication statute and the newspaper defended, citing its First Amendment rights.

The Supreme Court recognized the state's interest in preserving the anonymity of juvenile identities but said that this interest is outweighed by the First Amendment's interest in assuring the right to publish truthful information. The Court emphasized that "state action to punish publication of the truthful information can seldom satisfy constitutional standards."[183]

It is important to emphasize that Smith is a publication case, not an access case. In other words, nothing in Smith or any other Supreme Court decision gives the press or the public a constitutional right of access to court proceedings or records.[184] Therefore, the state is free to close its juvenile proceedings and to make confidential juvenile records or other information emanating from juvenile proceedings. All that Smith holds is that if the juvenile information gets into the public domain or is otherwise lawfully obtained by the press, the states cannot constitutionally prohibit the press' subsequent publication of this data.[185]

In summary, if a state wishes to preserve juvenile offender anonymity and confidentiality, Smith makes it imperative that the juvenile court and the police take steps to insure that juvenile information is not inadvertently made available to the press or the public; and imperative that the juvenile court, upon taking jurisdiction, issue orders prohibiting the public's access to and use of any identifying information about the juvenile which is generated by the court proceedings.

PART FIVE

THE DEBATE OVER THE CONFIDENTIALITY OF JUVENILE JUSTICE RECORD INFORMATION

There are almost as many views about juvenile justice secrecy and confidentiality as there are participants in this debate. And, as a practical matter, most participants--from juvenile social workers at one pole to newspaper reporters at the other--advocate a moderate approach which balances confidentiality and publicity interests. However, for the sake of contrast, we discuss the competing positions from the perspective of the opposite sides of the spectrum.

Certainly it is true that opponents of strict or absolute confidentiality for juvenile justice records have become increasingly vocal about the need to relax existing confidentiality statutes.[186] Predictably, proponents of strict confidentiality argue with equal vigor that confidentiality is essential for both the juvenile and society.[187] This part of the report identifies both the "pro" and "con" arguments regarding juvenile justice confidentiality. There are three chapters to this part. The first chapter identifies four arguments supporting confidentiality: (1) publicity only "rewards" criminal conduct; (2) publicity traumatizes erring juveniles; (3) publicity deprives juveniles of opportunities for employment and other benefits; and (4) publicity is inherently unfair.

The second chapter identifies two arguments which support the relaxation of confidentiality: (1) publicity promotes public safety; and (2) publicity promotes oversight and supervision of the juvenile justice system.

The third chapter identifies the basic questions raised by the juvenile confidentiality debate. Without trying to provide answers to those questions, the discussion suggests the direction in which the policymaking process may be moving.

Chapter One

ARGUMENTS IN SUPPORT OF CONFIDENTIALITY

Proponents of confidentiality identify a number of interests served by confidentiality--and most of these interests, in turn, serve the traditional goal of the juvenile justice system. One interest arguably served by closing juvenile justice proceedings and safeguarding the confidentiality of juvenile justice records is to prevent the "rewarding" and reinforcing of juvenile misconduct which arguably occurs when juvenile offenders receive official publicity and acknowledgement.

Publicity Rewards and Reinforces Criminal Conduct

Many social workers and juvenile court workers, for example, oppose open juvenile proceedings out of fear that this gives the juvenile an audience before which to "show off."[188] Some researchers have also argued that publicity reinforces a juvenile offender's "tough guy" image; provides needed recognition; and actually increases the juvenile's status among his peers. Thus, it is argued that publicity encourages the juvenile to commit further acts of delinquency.[189]

The difficulty with this theory is that it is just that--a theory. There is no empirical support for this theory and indeed, it is the sort of theory that may not be susceptible to empirical validation. One commentator summed up empirical attempts to validate this hypothesis by concluding, "Empirical research attempts to support the labeling hypothesis have been inconclusive."[190]

Publicity Stigmatizes and Labels Juvenile Offenders

Many proponents of juvenile confidentiality also argue, somewhat inconsistently, that publicity, rather

than rewarding juveniles, may actually traumatize and scar them so that emotionally they are less susceptible to efforts at rehabilitation and assimilation into the mainstream of society.[191] These proponents claim that publicity dramatically affects a juvenile's self concept and that a juvenile's self concept determines whether or not he will become delinquent.[192] This theory also lacks empirical validation.

The closest thing to an empirical validation of the trauma theory is found in the work of two psychologists who investigated the effects of publicity on an 11-year-old juvenile offender.[193] The psychologists worked in cooperation with the juvenile's father, his attorney and the juvenile court judge over an eight-month period in 1976. During that time more than 40 separate newspaper articles appeared about the boy. The boy's name was published in a number of the articles and one article contained his photograph. Several of the articles referred to the case as that of the "11-year-old boy" or the "black boy who shot a railroad switchman." One article was headlined "Young Slayer Found Delinquent."

The psychologists concluded that frequent publicity made the boy fearful and confused about his peer's reactions, and distrustful of his father. The psychologists did not find that the boy's self perception changed as a result of his public labeling as a "slayer" and "criminal." However, they did find that his feelings of dependency and vulnerability increased.[194]

Some critics of confidentiality respond that if publicity in fact harms juvenile offenders, there is a salutary effect to this because it acts as a deterrent against juvenile crime. Juveniles are served notice that their crimes will result in unwanted publicity.[195] The New Jersey Supreme Court recently endorsed the view that publicity for juvenile offenders may be desirable because of its deterrent effect. In State of New Jersey in the Interest of B.C.L.,[196] the Court was called upon to apply New Jersey's new juvenile justice code. It provides, among other things, that juvenile adjudication data about serious offenses is public information unless the juvenile

court decides to withhold the data for "good cause." In this case the Court refused to order the withholding of information about a 16-year-old's conviction for arson and extortion because the Court found that the publicity's alleged harmful effect on the juvenile's rehabilitation was outweighed by the public's interest in disclosure. The Court concluded that this public interest "embraces... 'the possible salutory effect of publicity on deterrence of the affected juvenile and others'."[197]

Other critics argue that publicity has no positive or negative effect on the juvenile crime rate. They point out that prejudice, poverty, alienation, abuse and neglect create the type of environment in which juvenile crime is likely, and indeed inevitable. Since juveniles who become involved with the juvenile justice system either return to the environment that breeds this crime or go to a correctional institution with juveniles from similar environments, publicity is irrelevant.[198]

Publicity Makes it Difficult for Juvenile Offenders to Obtain Employment and Other Valued Statuses

Although proponents of confidentiality may sometimes concede that reasonable men can disagree about the effect of publicity on a juvenile's self concept and behavior, they steadfastly maintain that there can be no argument about the effect of publicity on the behavior of employers, creditors, licensing agencies and other decisionmakers. Both common sense and a relatively large body of empirical data insist that publicity and the availability of juvenile justice record information stigmatizes the juvenile and makes it much harder for him to obtain a job, join the military, get credit, obtain licenses, or otherwise participate constructively in society.[199]

Justice Rhenquist's concurring opinion in Smith v. Daily Mail Publishing Co., emphasizes the longstanding and accepted view that secrecy and confidentiality in the juvenile justice system is beneficial, indeed necessary, because, among other things, "exposure may cause the juvenile to lose employment opportunities." Justice

Rhenquist argues that secrecy 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."[200]

In this regard, record dissemination policies are thought to be far more important than policies regarding publication of contemporaneous juvenile offender information. One commentator expressed this view as follows: "Those interested in the background of the juvenile--employers, licensing agencies, the armed forces and educational institutions--seek out cumulative records of the individual's past conduct, rather than specific, isolated news reports."[201]

Critics of juvenile justice confidentiality contend that even if juvenile offenders are stigmatized and thereby find it more difficult to obtain jobs and other valued resources or statuses, this turns out to be irrelevant because juvenile offenders are so unlikely, regardless of confidentiality or publicity, to be rehabilitated.[202] They argue that after all these years of insisting upon secrecy and confidentiality in order to help rehabilitate juvenile offenders, one thing is crystal clear--juvenile offenders are seldom rehabilitated.

Indeed, the juvenile recidivism rate--however it is measured and whatever its exact amount--significantly exceeds the adult recidivism rate.[203] Thus, critics contend that if confidentiality is necessary and proper only, or at least primarily, because it promotes rehabilitation and if rehabilitation turns out to be illusion, then there is little reason to worry about maintaining confidentiality. One commentator has expressed this argument as follows:

> "Traditionally the closure of juvenile court hearings is premised solely upon the contribution of anonymity toward the ultimate rehabilitation of juvenile offenders. Absent the underlying justification of rehabilitation, there is no interest in closed juvenile court hearings."[204]

Publicity is Unfair to Juveniles

Advocates of juvenile justice confidentiality also argue that confidentiality for juvenile records and proceedings--even if not warranted based on the principle of rehabilitation--is warranted based on the principle that juveniles are not criminally responsible for their actions. They point out that juvenile offenders are immature and are not considered capable of exercising adult judgment. Juveniles are not considered competent to enter into binding contracts; nor are they thought capable of exercising the judgment to vote. Thus, it is both illogical and unfair to expose a juvenile's misconduct to the full gaze of society or to hold juveniles publicly accountable for their failure to exercise mature and proper judgment.[205]

Proponents of confidentiality also emphasize that the dissemination of information about a juvenile offender not only harms and stigmatizes the juvenile--it also harms and stigmatizes his family.[206] Obviously, it is harsh and unfair to publicly embarrass the innocent parents and siblings of a juvenile offender.

To these arguments critics of confidentiality respond that as the juvenile justice system moves closer to a criminal model and away from a non-culpability model, juvenile offenders will come to understand that they are criminally responsible for their misconduct and that they thereby waive their right to anonymity and privacy.[207] They will also come to understand that the adverse effects of publicity and dissemination of their record are part of the punishment. Critics maintain that claims for confidentiality and "fairness" made by juvenile offenders and their families are simply outweighed by the societal interests served by permitting expanded publicity and dissemination of juvenile offender information.

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Chapter Two

ARGUMENTS IN SUPPORT OF PUBLICITY

Critics of confidentiality not only claim that arguments which support confidentiality are unpersuasive, they cite a couple of positive, societal interests served by the public availability of information about juvenile arrestees and offenders.

Publicity Promotes Public Safety

Proponents of publicity argue that publication of information about juvenile offenders is important because it serves society's valid need for identification of dangerous offenders. They urge that in an era when criminal acts, including serious criminal acts, are frequently committed by juveniles, it is critical that the public is assured that those offenders, whatever their age, are identified and punished.

As long ago as the mid-1950's, newspaper editorials campaigned for public identification and punishment of juvenile offenders.

> "...the kid who prowls the city with a loaded gun doesn't even deserve a first break. At 14, he can kill you just as though he were 40. We think [the juvenile court judge] serves no useful purpose by trying to keep Tulsans from learning the names of those youngsters who have gone forth to rape or who are equipped to kill."[208]

Critics of existing confidentiality strictures contend that a relaxation of secrecy is necessary in order to warn employers, educators and others who may entrust responsiblities to or deal with juveniles that a particular juvenile

may be unsuitable for certain duties, or may be violent and dangerous.[209] According to this view, juvenile justice authorities are too often concerned with the welfare of the juvenile at the expense of societal safety. As one juvenile court judge has observed, "The juvenile justice system's first responsibility is to society, to promote voluntary compliance with society's rules, to safeguard the public.[210]

The New Jersey Supreme Court's 1980 opinion in the case captioned In the Interest of B.C.L., made exactly this point. "The gravity of the offense can also be a sufficient warrant for disclosure... Implicit in the public's recognized right to be informed is its ability to have the information necessary for its security."[211]

The late J. Edgar Hoover put it more bluntly:

> "Are we to stand idly by while fierce young hoodlums--too often and too long harbored under the glossy misnomer of juvenile delinquents--roam our streets and desecrate our communities?"
>
> * * *
>
> Recent happenings in juvenile crime shatter the illusion that soft-hearted molly coddling is the answer to this problem."[212]

Proponents of confidentiality argue that there is no empirical evidence to suggest that the availability of criminal history data to employers, educators or others promotes public safety. Indeed, the only empirical data about the effect of such availability indicates that it results in the closing of employment, educational or other opportunities to offenders. When these doors are closed, offenders are more likely, not less likely, to return to criminal and anti-social conduct, thereby increasing, not decreasing, the danger to society.

Publicity Promotes Public Oversight of System

A number of observers of the juvenile justice process, including jurists, also worry about the effect of juvenile justice secrecy on the public's right to evaluate the juvenile system's performance and their faith in this performance. A New York State appellate court, for instance, admonished juvenile courts against closing their proceedings on the grounds that the community's need to scrutinize juvenile justice activities outweighs considerations about the effect of publicity on a juvenile.

> "Whether public exposure deters or rewards the young offender has been debated. In either case, those considerations should be subordinated to the community's need to observe the workings of its justice system with regard to accusations of major proportions."[213]

The critics also argue that unless the press can use a juvenile's name in a story the press will have comparatively little interest in covering juvenile justice matters. And if the juvenile justice system is sheltered from press coverage, its performance and accountability may suffer. An Alaska Supreme Court was very blunt about the enervating effect of secrecy on juvenile court performance.

> "We cannot help but notice that the children's cases appealed to this court have often shown much more extensive and fundamental error than is generally found in adult criminal cases and wonder whether secrecy is not fostering an attitude of casualness toward the law in children's proceedings."[214]

Critics of secrecy in juvenile proceedings and confidentiality in juvenile records also argue that a climate of secrecy handicaps juvenile justice and juvenile welfare agencies in coordinating their activities--notwithstanding that these agencies are the customary champions of confidentiality and are customarily exempt from its strictures.

> "From the schoolroom to the police precinct, from the courtroom to the juvenile jail, secrecy so pervades the system that even officials who ought to be informed about a child's criminal conduct are kept in the dark."[215]

To these arguments proponents of confidentiality respond that oversight of the juvenile justice system is not dependent upon the disclosure of personally identifiable information. Provided that the public and its elected representatives are sufficiently interested in the juvenile justice system, there are ample opportunities for review and oversight.

Chapter Three

ESSENTIAL ELEMENTS OF THE POLICY DEBATE

The foregoing discussion demonstrates the complexities in the debate over juvenile justice confidentiality. Although there is a danger in over simplification, this debate seems to turn on three basic and extremely difficult issues.

1. What kind of confidentiality and disclosure policy is most likely to have a positive effect on juvenile offenders' future conduct, and does the effect depend upon the age of the juvenile or the extent and nature of his juvenile record? Assuming that everyone's goal is to reduce juvenile recidivism and increase the chances that juvenile offenders will become constructive members of society (i.e., will be rehabilitated), the key question is whether confidentiality or disclosure promotes this goal.

   Probably disclosure policies have little measurable impact upon rehabilitation and thus we should look to other factors in setting disclosure policy.

2. How much does the public (or segments of the public, such as criminal justice agencies, licensing boards or employers) need to know about specific juvenile offenders in order to assure the public's physical safety or confidence; and how much needs to be known to assure society's efficient economic operation; or the effective administration of juvenile and criminal justice, or productive statistical and longitudinal research.

   Here too there are no dispositive answers. Certainly part of the answer is that there needs to be different disclosure policies for different segments of the public, depending upon the criticality and nature of each group's need for juvenile record data and their accountability and reliability in handling this data.

3. Regardless of the practical effects of confidentiality or disclosure on juveniles or on society, is it fair and proper for society to publicly brand a young person on the basis of his misdeeds? Many observers still hold the view that it is both unfair and improper to publicly stigmatize children for their misdeeds--so long as the juvenile is younger rather than "older" and so long as his misdeeds are not continually repeated or are not of a violent or heinous nature.

While the debate over these three issues is sure to rage for many years ahead, the shape of emerging policy may already be visible. Extreme positions are being avoided in favor of a more balanced approach which encourages the selective disclosure of juvenile justice data in certain defined circumstances.

CONCLUSION

Elected officials, justice professionals, courts and other institutions of our society are contributing to a re-evaluation of juvenile justice information policy. The tenet that juveniles who commit crimes are not culpable is being challenged as the public's safety and economic well being is increasingly threatened by children engaged in criminal behavior. The result is likely to be a more formal process of juvenile justice and a shift in attitudes about the confidentiality of records from these proceedings.

As prosecutors and judges come to treat juveniles, particularly older ones, more and more like adults who commit similar crimes, the differences in policies which distinguish the treatment of these groups will blur. Policies governing information about the handling of juveniles by law enforcement, judicial and corrections agencies will begin to resemble comparable policies in the adult process. The challenge to policymakers in the years ahead, then, will be to identify and preserve those qualities of information policy which protect juveniles in a way that reflects the principles and character of the society.

Strategies to prosecute violent offenders, identify career criminals and punish habitual offenders require information to succeed; information which does not necessarily differentiate behavior when an adult from behavior when a juvenile. These initiatives are combining with the other forces we have explored to frame a new juvenile justice information policy for the nation.

FOOTNOTES

[1] We use the terms "juvenile justice record information", "juvenile justice information," "juvenile information," "juvenile justice data," and "juvenile data" to mean information about a particular juvenile maintained by law enforcement agencies, courts or other governmental agencies concerning the apprehension, prosecution or adjudication of that individual in connection with a juvenile delinquency proceeding or the equivalent.

Except where the context indicates otherwise, this Report uses the term juvenile to refer to an individual 18 years of age or younger.

The Federal Youth Corrections Act defines a "juvenile" as a person who has not attained his 18th birthday, 18 U.S.C. §5031. The juvenile codes in 39 of the states set 18 as the maximum age for juvenile court jurisdiction. The remaining states set the maximum at 17 or 16. See, Reports of the National Juvenile Justice Assessment Centers, Vol. III., p. 125, Office of Juvenile Justice and Delinquency Protection (1979).

[2] See the discussion in this Report beginning on page 17 and concluding on page 26.

[3] This report, although comprehensive, is by no means exhaustive. Research for the report centered on three sources: (1) secondary materials, primarily legal but including some non-legal; (2) statutes; and (3) case law. The report's observations about agency practice must be qualified in that no empirical research was done for this report and the literature review was heavily biased in favor of legal materials.

[4] Eldefonzo, Law Enforcement and the Youthful Offender, John Wiley & Sons, 3rd Ed. (1978) at p. 147.

[5] Id. and, see, Mack, "The Juvenile Court," Harv. L. Rev., 23; 104, 106 (1909).

[6] State v. Guild, 5 Halst. 163, 10 N.J.L.R. 163 (1828). See, In re Gault, 387 U.S. 1, 80, Harlan J. concurring.

[7] Eldefonzo, supra, note 4 at p. 147.

[8] "The Juvenile Court," supra, note 5 at p. 107.

[9] Eldefonzo, supra, note 4 at p. 49.

[10] In re Gault, supra, note 6 at pp. 25-26 (1967); and see, "Rights and Rehabilitation in the Juvenile Courts," Colum. L.Rev. 67: 281, 282 (1967).

[11] In re Holmes Appeal, 109 A.2d 523, 525 (Penn. 1954).

[12] See, e.g. 1899 Ill. Stat. §131; 1903 Calif. Stat. Ch. 43, §44.

[13] Geis, "Publicity and Juvenile Court Proceedings," Rocky Mountain L. Rev., 30:101, 116 (1958).

[14] "The Juvenile Court," supra, note 5 at p. 109.

[15] U.S. Department of Justice, Federal Bureau of Investigation, Crime in the United States (1979).

[16] Id.

[17] Id.

[18] National Institute of Education, Violent Schools - Safe Schools: The Safe School Study Report to the Congress, Vol. 1, pp. 2-3, U.S. Dept. of Education (1978) as reported in the Attorney General's Task Force on Violent Crime, Final Report, August 17, 1981, p. 82.

[19] "Serious Juvenile Crime: National Patterns," Reports of the National Juvenile Justice Assessment Centers, OJJDP (1979), Vol. II at p. 59.

[20] Zimming, "The Serious Juvenile Offender: Notes on an Unknown Quantity," The Serious Juvenile Offender, Proceedings of a National Symposium, Office of Juvenile Justice and Delinquency Prevention (1977) at p. 15.

[21] "The Characteristics of Juveniles Arrested and Adjudicated for Serious Offenses: Patterns and Trends." Report of the National Juvenile Justice Assessment Centers, OJJDP (1979) at p. 143.

[22] U.S. Senate, Committee on the Judiciary, Serious Youth Crime: Hearings before the Subcommittee to Investigate Juvenile Delinquency, 95th Cong., 2nd Sess. (1978).

[23] Geis, supra, note 13 at p. 120.

[24] "End of Secrecy" supra, note 2.

[25] Delaney, Juvenile Records and Confidentiality, unpublished monograph, p. 5 (1977).

[26] Geis, supra, note 13 at p. 115.

[27] In Kent v. United States, the Court said "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." 383 U.S. 541, 556 (1966).

[28] Id. at pp. 555, 561-562 (1966).

[29] The Court was assisted in the reform of the juvenile justice system by the development of model juvenile justice standards published by several groups, including the Institute of Judicial Administration/ABA Juvenile Justice Standards Project; The National Task Force to

Develop Standards and Goals for Juvenile Justice and Delinquency Prevention; and the National Advisory Committee for Juvenile Justice and Delinquency Prevention.

These model standards and the teaching of the Supreme Court have been reflected in revised and updated juvenile codes in most states.

[30] Supra, note 6 at pp. 33, 41, 57 (1967).

[31] 397 U.S. 358, 361 (1970).

[32] 421 U.S. 519, 541 (1975).

[33] In McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971), the Court rejected the unqualified right of a juvenile to a jury trial, in part on the notion that jury proceedings might inject unwanted publicity.

[34] In re Gault, supra, note 6 at p. 24 (1967).

[35] 415 U.S. 308, 319 (1974).

[36] Id. at p. 320.

[37] 430 U.S. 308, 311 (1977).

[38] 443 U.S. 97, 104 (1979).

[39] Id. at p. 104.

[40] See, for example, In re Gault, supra, note 6 at p. 25; and In re Winship, supra, note 31 at p. 366.

[41] Reports of the National Juvenile Justice Assessment Centers, supra, note 19 at p. 212.

[42] Ariessohn, "Recidivism Revisited," Juvenile and Family Court Journal, Nov. 1981 at p. 63.

[43] Note, "Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of 'Conditional Access'," U. of Calif. at Davis L. Rev. 13: 123, 153-154, n. 115 (1979).

[44] Ariessohn, supra, note 42 at p. 61.

[45] Fox, "The Reform of Juvenile Justice: The Child's Right to Punishment," Juv. Just., Aug. 1974, pp. 2-9; and see discussion in The Serious Juvenile Offender, supra, note 20 at pp. 178-179.

[46] Hudson and Mark, "Summary and Conclusions," The Serious Juvenile Offender, supra, note 20 at p. 179.

[47] Id. at pp. 180-181.

[48] "Strict New Rules on Juvenile Crime Adopted in Jersey," New York Times, July 24, 1982, p. 1.

[49] Id. However, references to the New Jersey statute in this report, unless otherwise indicated, are to the pre-July, 1982 statute.

[50] "Strict New Rules," supra, note 48.

[51] Appendix A contains an alphabetical listing of the statutory citations to every state juvenile justice code. Unless otherwise indicated, all references to state juvenile codes are to the statutes listed in that Appendix.

[52] Hudson and Mark "Summary and Conclusions," supra, note 20 at pp. 180-181.

[53] In T.N.G. v. Superior Court of the City and County of San Francisco, 484 P.2d 981, 985, 986 (Sup. Ct. Calif. 1971) the Court said that,

> "In order to protect the juvenile from the stigma of criminality often attached to adult penal proceedings,

the Legislature has carefully avoided the use of the term "arrest" for the type of detention to which the petitioners were subjected in the present case. Welfare and Institutions Code Section 625 provides that juveniles are not subject to 'arrest' but may only be taken into 'temporary custody'."

[54] "Juvenile Delinquents: The Police, State Courts, and Individualized Justice," Harv. L. Rev. 79: 775, 776-777 (Feb. 1966); and see "Juvenile Police Recordkeeping," Colum. Human Rights L. Rev. 4: 461 (1972).

[55] "Juvenile Delinquents," supra, note 54 at pp. 778-779.

[56] Coffee, "Privacy vs. Parens Patria: The Role of Police Records in the Sentencing and Surveillance of Juveniles," 57 Cornell L. Rev. 571, 581 (Ap. 1972).

[57] "Juvenile Delinquents," supra note 54 at pp. 778-779.

[58] Coffee, supra note 56 at p. 590; and Handler and Rosenheim "Privacy in Welfare: Public Assistance and Juvenile Justice." Law and Contemporary Problems, 31: 377, 395 (1966); and see, Monroe v. Tielsch, 525 P.2d 250, 251 (Wash. 1974).

[59] 525 P.2d 250, 251 (Wash. 1974).

[60] Fernicola v. Keenan, 39 A.2d 851, 852 (Ct. of Chancery, N.J. 1944) involving the creation of a fingerprint and photographic record of an adult.

[61] 271 A.2d 727, 728 (Supr. Ct. N.J. 1970). The courts reach a different conclusion, however, when the organization creating the "juvenile record" is a governmental agency other than a law enforcement agency or a court. In Merriken v. Cressman, 364 F. Supp. 913, 922 (E.D. Pa. 1973), a federal district court held that a school system could not collect and maintain personal information regarding 8th graders which supposedly identified potential

drug abusers. The Court said that this violated the children's constitutional right of privacy and the school could not show a reasonable connection between the information being gathered and drug abuse prevention.

[62] No. 70-2017 (S.D. N.Y. 1970).

[63] Coffee, supra, note 56 at pp. 571-574.

[64] 18 U.S.C. §5038 (d).

[65] Georgia permits the fingerprinting of juveniles only in connection with the investigation of enumerated serious crimes. Such fingerprints are available only to law enforcement officials, or upon court order, if the public interest requires, and are not permitted to be sent to a state or federal repository unless needed for national security purposes.

The Virginia statute permits the fingerprinting of juveniles who are at least 13 years old and are charged with offenses that would be felonies if committed by adults. If no petition is filed or if the juvenile court adjudication is favorable, the prints must be destroyed. If the juvenile is adjudicated delinquent and is under 13 years of age, the prints are destroyed. If a delinquent juvenile is at least 13 years old, his fingerprints may be maintained locally by the law enforcement agency that took them, and if he is at least 15 years old and is adjudicated for an enumerated serious offense, the fingerprints may be forwarded to the state Central Criminal Record Exchange.

[66] Attorney General's Task Force on Violent Crime, Final Report, August 17, 1982, Recommendation No. 58 at p. 82.

[67] "Strict New Rules" supra, note 48 at p. 1.

[68] National Court Statistics Project, National Center for State Courts, State Court Organization, 1980. Bureau of Justice Statistics, May 1982, Table #16, p. 54.

[69] Vinter, "The Juvenile Court as an Institution," President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967) at pp. 884-886.

[70] Id., and see In re Gault, supra, note 6 at p. 14, n. 14 (1967).

[71] "Juvenile Delinquents," supra, note 54 at p. 809.

[72] Delaney, supra, note 25 at p. 9.

[73] Virtually every state permits a juvenile court to waive its jurisdiction so that the juvenile can be prosecuted as an adult. Customarily, before the juvenile court can waive its jurisdiction, it must be established that: (1) the child is at least 14; (2) there is probable cause to believe that the child has committed a criminal offense; (3) there are no reasonable prospects for rehabilitating the child; and (4) waiving jurisdiction is in the best interests of the child and the community. Once in an adult court the juvenile and his records are treated just as an adult and his records would be treated.

[74] Only a tiny fraction, well under 5 percent, of juveniles who are arrested are sent to a juvenile correctional institution. Since so few juvenile offenders ever receive the benefits of treatment in a juvenile institution, some observers think that it is little wonder that juvenile offenders are seldom rehabilitated.

[75] The following provision from Minnesota's Juvenile Code is typical of the juvenile court record creation and maintenance language found in many juvenile justice statutes. "The juvenile court judge shall keep such minutes and in such manner as he deems necessary and proper. The court shall also keep an index in which files pertaining to juvenile matters shall be indexed under the name of the juvenile. After the name of each file shall be shown the file number and, if ordered by the court, the book and

page of the register in which the documents pertaining to such file are listed. The court shall also keep a register properly indexed in which shall be listed under the name of the juvenile all documents filed pertaining thereto and in the order filed. Such list shall show the name of the document and the date of filing thereof. The juvenile court legal records shall be deposited in files and shall include the petition, summons, notice, findings, orders, decrees, judgments, and motions and such other matters as the court deems necessary and proper."

[76] Delaney, supra, note 25 at p. 9.

[77] Altman, "Juvenile Information Systems: A Comparative Analysis," Juvenile Justice, Feb. 1974 at p. 5; see also, Czajkoski, "Computer Backfire on the Ethical Mission of Juvenile Justice," Juvenile Justice, Feb. 1974 at p. 24.

[78] Supra, note 53 at p. 984.

[79] Monroe v. Tielsch, supra, note 59 at p. 251.

[80] Supra, note 6 at p. 11, n. 7.

[81] Cashman, "Confidentiality of Juvenile Court Proceedings: A Review," Juv. Just., Aug. 1973 at p. 34.

[82] La. Rev. Stat. §15-578.A(6).

[83] See, Altman, supra, note 77 at p. 2.

[84] See, Symposium, Juvenile Justice, Feb. 24, 1974 issue and specifically Phillips "Experience Acquired from the Design and Implementation of PROFILE: Utah's Juvenile Information System" at p. 12; Horvath, "A Non-technical Description of the Michigan Youth Services Information System" at p. 19; Griffeth, "Orange County Sheriff's Department Computerized Central Juvenile Index" at p. 30; and Corneilson, "Juris: A Juvenile Court Information System" at p. 35.

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[85]Just as most jurisdictions label a juvenile arrest as a "detention," most jurisdictions label a juvenile conviction as a "determination of delinquency." In an effort to avoid the stigma that even the term "delinquency" carries, some states, such as New York, have dropped the term in favor of phrases such as "Persons in Need of Supervision" (PINS).

[86]18 U.S.C. §5038 "(a) Throughout the juvenile delinquency proceeding the court shall safeguard the records from disclosure. Upon the completion of any juvenile delinquency proceeding, whether or not there is an adjudication, the district court shall order the entire file and record of such proceeding sealed. After such sealing, the court shall not release these records except to the extent necessary to meet the following circumstances:

(1) inquiries received from another court of law;

(2) inquiries from an agency preparing a presentence report for another court;

(3) inquiries from law enforcement agencies where the request for information is related to the investigation of a crime or a position within that agency;

(4) inquiries, in writing, from the director of a treatment agency or the director of a facility to which the juvenile has been committed by the court;

(5) inquiries from an agency considering the person for a position immediately and directly affecting the national security; and

(6) inquiries from any victim of such juvenile delinquency, or if the victim is deceased from the immediate family of such victim, related to the final disposition of such juvenile by the court in accordance with section 5037."

[87]28 C.F.R. § 20.21(d).

[88]Traditionally, the drafters of state codes and judges define and use the terms "seal" and "purge" in many varied and inconsistent ways. In this report we define and use the terms "seal" and "purge" as follows. Except where the context indicates otherwise, the term "seal" means to prohibit access to juvenile history record information except to a party authorized access to the record by a court order. We use the term "purge" to mean to destroy, blot out, strike out, or efface so that no trace remains. Expunge is a synonym. Destruction of personal identifiers so that the record or entry cannot be associated with an individual is also a form of purging. These definitions are based on SEARCH Technical Report No. 27, Sealing and Purging of Criminal History Record Information (April 1981).

[89]18 U.S.C. 5038(a).

[90]18 U.S.C. §5021(a)(b).

[91]606 F.2d 1226, 1244 (D.C. Cir. 1979).

[92]United States v. Doe, 496 F.Supp. 650, 653 (D.R.I. 1980); United States v. Henderson, 482 F. Supp. 234, 242 (D.N.J. 1979)

> "We have noted repeatedly that the Act was intended to eliminate the social and economic disabilities which accompany a criminal record. These same disabilities exist when an individual has only an arrest blotting his or her record."

[93]Sealing and purging provisions are a relatively new phenomenon. According to one source, as late as 1974 only about half of the states had adopted sealing or purging provisions. Altman, supra, note 77 at p. 6.

[94] Pres. Comm. on Law Enforcement and Admin. of Justice Task Force Report: Juvenile Delinquency and Youth Crime, at pp. 92-93 as quoted in Cashman, supra, note 81 at p. 34.

[95] In the Matter of Smith, 310 N.Y.S.2d 617, 623 (N.Y. Fam. Ct. 1970).

[96] However, there is a disagreement among courts as to whether a family court, exercising its inherent authority to purge its own records, also has inherent authority to reach police records. See, for example, Statman v. Kelly, 264 N.Y.S.2d 1008 (N.Y. Fam. Ct. 1970), which held that a Family Court could not order police agencies to purge juvenile records on the basis of the Family Court's inherent authority.

[97] Id. at p. 1014.

[98] Supra, note 91 at p. 1230. And see, United States v. Heller, 435 F.Supp. 955, 956 (N.D. Ohio 1976) stating that, "Absent specific statutory language the general power of the courts to expunge is limited and will only be exercised in extreme cases, e.g., where an arrest is unlawful; where the arrest represented harassing action by the police or where an arrest was prosecuted pursuant to an unconstitutional statute."

[99] Henry v. Loony, 317 N.Y.S.2d 848, 851-852 (Sup. Ct. N.Y. 1971); S. v. City of New York, 347 N.Y.S.2d 54, 56 (Sup. Ct. N.Y. 1973); and see cases discussed in SEARCH Technical Report No. 27, supra, note 88 at p. 7; and see, Volenick "Juvenile Court and Arrest Records," Clearinghouse Review 9: 169 (July, 1975).

[100] 424 U.S. 693 (1976).

[101] See cases discussed in SEARCH Technical Report No. 27, supra, note 88 at pp. 10-11.

[102] Monroe v. Teilsch, supra, note 59 at p. 251 (Wash. 1974); and T.N.G. v. Superior Court of the City and County of San Francisco, supra, note 53.

[103] 18 U.S.C. §5038(a)(1).

[104] Monroe v. Tielsch, supra, note 59 at p. 251.

[105] See, Coffee, supra, note 56 at p. 595.

[106] See, In re Corey, 72 Cal. Rptr. 115, 118 (1st Dist. 1968).

[107] Supra, note 33 at p. 550.

[108] Id. at pp. 563-564.

[109] Coffee, supra, note 56 at p. 575.

[110] Petersila, "Juvenile Record Use in Adult Court Proceedings: A Survey of Prosecutors," J. of Crim. L. and Criminology, 72: 1746, 1750 (1981).

[111] 18 U.S.C. §5038(a)(1).

[112] 564 F.2d 1373, 1375-1376 (9th Cir. 1977). The Court pointed out that there is no legislative history to provide guidance in interpreting the bare statement in the Act authorizing disclosure in response to "inquiries received from another court of law." Id. at 1375. The Federal Youth Corrections Act also authorizes the release of juvenile records to "any agency preparing a presentence report for another court."

[113] A somewhat typical state statutory provision (except for the reference to access by the juvenile court) reads as follows:

> "no adjudication, disposition, or evidence from a juvenile proceeding is admissible against a child in any criminal or other action, except in subsequent juvenile

proceedings involving the same child or as an aid to sentencing in a later criminal proceeding against the same person."

[114]Alabama, Alaska, Connecticut, Delaware, District of Columbia, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Mississippi, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, Tennessee, Vermont, Virginia, Washington, West Virginia and Wyoming.

[115]Alabama, District of Columbia, Illinois, Indiana, Iowa, Maryland, Montana, New York, North Dakota, South Dakota, Vermont, Virginia, Washington, West Virginia and Wisconsin.

[116]See, for example, Massey v. State, 256 A.2d 270, 272 (Del. 1969); Neely v. Quatsoe, 317 F.Supp. 40, 42 (E.D. Wis. 1970); and see several hundred cases reaching this same conclusion cited at 64 ALR 3d 1291. The only decisions which reach a different result appear to be a handful of Illinois state court decisions also cited at 64 ALR 3d 1291.

[117]Williams v. New York, 337 U.S. 241, 243 (1949).

[118]144 A.2d 367, 369 (Pa. 1958).

[119]This provision has since been amended to expressly permit juvenile records to be used in adult sentencing.

[120]Supra, note 118 at p. 371 quoting Commonwealth v. Johnson, 35 A.2d 312, 314 (Pa. 1944).

[121]Id. at 371, quoting Commonwelth ex rel. Czarnecki v. Stitzel, 115 A.2d 805, 806 (Pa. 1955).

[122]Lange v. State, 196 N.W.2d 680, 685 (Wis. 1972).

[123]See, State v. Flores, 511 P.2d 414, 416 (Or. 1973); Stockwell v. State, 207 N.W.2d 883, 889 (Wis. 1973) and the

cases cited at 64 ALR 3d 1291, §5; C. F. State v. Corral, 521 P2d 151, 153 (Ariz. 1974), holding that any lack of rights enjoyed by juvenile offenders is constitutionally irrelevant to the use of the juvenile record in an adult sentencing proceeding.

In many respects the holding in this case makes more sense than the rule that "tainted" convictions cannot be used, if in fact courts are going to accept, as the court in Lange v. State did, mere detention records, without a disposition.

[124]64 ALR 3d 1291, supra, note 116.

[125]353 N.Y.S.2d 630, 632 (Sup. Ct. N.Y. 1974).

[126]However, a few state codes have adopted broad language which potentially could be interpreted to permit various other uses of juvenile records in criminal courts. Delaware permits the use of juvenile records by "other courts and public agencies." New Jersey authorizes use by "any court," and Wyoming authorizes disclosure to "another court of law." Nebraska provides that juvenile court records may be made available to "criminal courts for confidential use in matters pending before the court." North Carolina law provides that the juvenile record confidentiality provisions shall not preclude the "necessary storing of information among authorized agencies."

[127]Davis v. Alaska, supra, note 35 at p. 319; and see annotations at 63 ALR3d 1112 §4. Prior to Davis, the general rule was that a juvenile record could not be introduced to cross-examine or impeach a prosecution witness. While there is some authority for the proposition that the rule survives even after Davis (by distinguishing Davis in that the witness in Davis was on probation), the better view today seems to be that a juvenile record can be introduced to impeach a prosecution witness. In other situations where the defendant has shown that fundamental fairness demands the introduction of juvenile record

evidence, the courts have also acquiesced. For example, State v. Brown, 334 A.2d 392, 394 (N.J. 1975) held that a defendant could introduce a victim's prior juvenile record of assault in an assault prosecution, at least when the victim had a juvenile petition pending or was on probation.

[128] See, cases annotated at 63 ALR3d 1112 §6; and see, State v. Allen, 361 A.2d 5, 11 (N.J. 1976) which held that a prosecutor could get access to a defense witness' social records in order to determine whether to obtain a psychiatric examination of the witness.

[129] 63 ALR 3d 1112, §5; and see, People v. Rhem, 271 N.Y.S. 2d 751, 757 (N.Y. Sup. Ct. 1966).

[130] 63 ALR 3d 1112, §4(b); and see, State v. Cox, 327 N.E.2d 639, 642 (Ohio 1975).

[131] Petersila, supra, note 110 at p. 1748.

[132] 63 ALR3d 1112 §8.

[133] See, for example, United States v. Chacon, supra, note 112 at pp. 1375-76.

[134] South Carolina's juvenile code, for example, authorizes a defendant in a civil proceeding to obtain and use the plaintiff's juvenile record if relevant; and see, State in the Interest of A.S. a Juvenile, 327 A.2d 260, 261 (N.J. 1974), which held that a court could inspect the transcript of a juvenile defendant's allegedly inconsistent prior testimony in a juvenile adjudication.

[135] Indiana and New Jersey, for example, authorize the victim of a juvenile offense to use the juvenile records in a civil action against the offender; and in Aetna Casualty and Surety Company v. Barnard, 227 N.W.2d 551, 553 (Mich. 1975) the Court held that insurers, as subrogee of victims, could obtain police records of the juvenile of-

fenders because the statutes limiting access to juvenile court records did not apply to police records; but see, State of New Jersey in the Interest of S.F., a Juvenile, 353 A.2d 573, 575 (N.J. 1976), which held that a juvenile adjudication transcript could not be introduced in a wrongful death action arising out of the same event, where the juvenile offender was available to testify.

[136] 18 U.S.C. §5038(a)(3).

[137] California, Delaware, District of Columbia, Florida, Indiana, Iowa, Louisiana, Montana, New Jersey, New Mexico, New York, North Carolina, Virginia and Washington.

[138] Alabama, District of Columbia, Indiana, Iowa, Kansas, Maryland, Montana, New Jersey, North Carolina, North Dakota, Pennsylvania, Tennessee, Texas, Vermont, Virginia, Washington and Wisconsin.

[139] 28 C.F.R. Part 20.

[140] Supra, note 125 at p. 632 (Sup. Ct. N.Y. 1974). See also, Dugan v. Police Department, City of Camden, supra, note 61 at p. 728; and Monroe v. Tielsch, supra, note 59 at pp. 251-252.

[141] See, text at notes 82-84, supra.

[142] "End of Secrecy," supra, note 2.

[143] See, Gardner v. Florida, 430 U.S. 349, 361 (1977).

[144] But see, State of New Jersey in the Interest of D.G., a Juvenile, 416 A.2d 77, 81 (N.J. 1980), which denied a father's request for access to all records concerning his 15-year-old daughter. The daughter had been promised that her social records would be kept confidential, and material in those records indicated hostility between the father and daughter.

[145]538 P.2d 373, 381 (Ct. App. Or. 1975).

[146]18 U.S.C. §5038(c).

[147]Altman, supra, note 77 at p. 7.

[148]Skoler and Tenney, "Attorney Representation in Juvenile Court," Journal of Family Law 4: 77, 86-87 (1964).

[149]Supra, note 27 at p. 561 (1966).

[150]343 F.2d 278, 282 (D.C. Cir. 1964); and see, Joe Z. v. Superior Court of Los Angeles County, 478 P.2d 26, 31 (Sup. Ct. Calif. 1970), holding that the juvenile court exceeded its discretion in denying discovery to a juvenile arrested for murder and assault. The juvenile sought access to all his statements, admissions and conversations with police which he alleged were necessary for preparation of his defense; but see, In re W.R.M., 534 S.W.2d 178, 180 (Tex. 1976), holding that a juvenile defendant's attorney does not have an absolute right to inspect the prosecution's report on the juvenile which included psychiatric data.

[151]18 U.S.C. §5038(a)(1-6).

[152]28 C.F.R. §20.21(d) and 20.21(b)(4). It is not clear whether this provision applies to courts, since the Regulations exempt "court records of public judicial proceedings" (§20.20(b)(4)), but otherwise apply to all state or local agencies handling "criminal history record information" funded in whole or in part with LEAA monies. Since juvenile court records are ordinarily not considered to be court records of "public judicial proceedings," it may be that the Regulations do apply. The Regulations also require that researchers insure that the data they obtain will be handled pursuant to the detailed and comprehensive confidentiality and security standards mandated for researchers in 28 C.F.R. §524(a).

[153]Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Louisiana, Maine, Mississippi, Missouri, New Mexico, South Dakota, Utah, Virginia, Washington and West Virginia.

[154]Petersilia, supra, note 110 at pp. 1747, 1748; and Aciessohn, supra, note 42 at pp. 61, 62.

[155]18 U.S.C. §5038(a). The only exception made by the federal law is to permit disclosures of disposition information to the victim. §5038(a)(6).

[156]28 C.F.R. §20.21(d).

[157]In John Doe v. County of Westchester, 358 N.Y.S.2d 471, 477 (App. Div. 1974), a New York State court held that under New York law a juvenile adjudication is confidential and may not be made available to any person. Thus, a county sheriff could not disclose to a United States Army representative information regarding an enlistee's prior juvenile arrest and adjudication.

[158]See, People v. Y.O. 2404, 291 N.Y.S.2d 510, 513 (Sup. Ct. 1968), holding that juvenile records are never available to a member of the public unless he has a court order; and Application of Lascaris, 319 N.Y.S. 2d 60, 62 (Sup. Ct. 1971), holding that the Commissioner of Social Services for a county could not release juvenile data to the news media unless the media had first obtained a court order.

[159]Supra, note 59 at p. 255.

[160]Id.

[161]See, for example, T.N.G. v. Superior Court of City and County of San Francisco, supra, note 53 at pp. 988-989 (Calif. 1971).

[162]President's Comm. on Law Enforcement and the Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (1967) at p. 54.

[163]In re Gault, supra note 6 at p. 24 (1967).

[164]In re Gault, supra, note 6 at pp. 24-25.

[165]In re Smith, 63 Misc.2d 198, 200, n. 2 (N.Y. Fam. Ct. 1970).

[166]Coffee, supra note 56 at p. 590.

[167]Report of the Governor's Special Study Commission on Juvenile Justice, Part I - Recommendations for Charges in California's Juvenile Court Law (1960) p. 47; Cashman supra, note 81 at p. 34; and see "Juvenile Delinquents," supra, note 59 at p. 784.

> "Employers denied information from juvenile courts often get the desired facts from police."

[168]"Juvenile Delinquents," supra, note 54 at pp. 784-785.

[169]"Juvenile Delinquents," supra, note 54 at p. 800.

[170]T.N.G. v. Superior Court, supra, note 53 at p. 988 (Calif. 1971); and see, Baum, "Wiping Out a Criminal or Juvenile Record," State Bar J. 40; 816, 826 (1965).

[171]"Delinquency Hearings," supra, note 43 at p. 124 n. 5.

[172]Iowa Code §232.39 (1979).

[173]In re R.L.K., 269 N.W.2d 267, 269 (Minn. 1978); Brian v. Superior Court, 20 Cal. 3d 618, 623-26 (1978).

[174]The courts have held consistently that from a constitutional standpoint there is no distinction between the public and the media. See, SEARCH Privacy and Security of Criminal History Information: Privacy and the Media, U.S. Department of Justice, Bureau of Justice Statistics (1979) at pp. 4-5.

[175]Supra, note 38 at p. 104.

[176]Supra, note 37 at p. 310.

[177]SEARCH, supra, note 174 at pp. 47-49; and see, Gannett v. DePasquale, supra, note 175 at p. 383.

[178]R.L.R. v. State, 487 P.2d 27, 39 (Sup. Ct. Alaska 1971), holding that a child may open an adjudicative or dispositive hearing; and In re Burrus, 169 S.E.2d 879, 887 (Sup. Ct. of N. Car. 1969), holding that a child's request to open a juvenile proceeding need not, indeed in most cases, should not be honored.

[179]In re Burrus, supra, note 178 at p. 887.

[180]Supra, note 6 at p. 25; and see, In re Jones, 263 NE2d 863, 864, 865 (Ill. 1970), a juvenile moved for exclusion from the court of all witnesses, the public and the media. The Illinois Supreme Court, interpreting the Illinois juvenile act, refused to find fault with the juvenile court's ruling that the press could stay in the courtroom.

[181]18 U.S.C. §5038(d)(2).

[182]Supra, note 38 at pp. 104-105 (1979). Smith overturns an earlier federal court decision in Government of Virgin Islands v. Brodhurst, 285 F. Supp. 831, 836, 837 (D. Vir. Islands 1968); and see, Ithica Journal News, Inc. v. City Court, 294 N.Y.S.2d 558, 564 (Sup. Ct. N.Y. 1968). However, the decision in Smith was anticipated by the New Mexico Court of Appeals in Poteet v. Roswell Daily Record, Inc., 584 P.2d 1310, 1313 (N.M. 1978); and see, "Poteet v. Roswell Daily Record, Inc.: Balancing First Amendment Free Press Rights Against a Juvenile Victim's Right to Privacy," N. Mex. L. Rev., 10: 185 (Winter, 1979-1980); and "Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation," Iowa L. Rev. 65: 1471 (1980).

[183] Supra, note 38 at p. 102, citing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, at pp. 491-492 (1975) wherein the Court struck down a Georgia statute which prohibited the publication of a rape victim's name, on the grounds that the media must be permitted to publish such information once it is in the "public domain."

[184] See, Branzburg v. Hayes, 408 U.S. 665, 684 (1972).

[185] Smith is consistent with the Court's earlier decision in Oklahoma Publishing Co. v. District Court in and for Oklahoma County, supra, note 37 at p. 310 upholding the press' right to publish the name and picture of a juvenile defendant after that data was already in the "public domain."

[186] "End of Secrecy," supra, note 2.

[187] Howard, Grisso and Neems, "Publicity and Juvenile Court Proceedings," Clearinghouse Rev. 11:203 (1977).

[188] "Juvenile Delinquents," supra, note 54 at 794.

[189] Gardner, "Publicity and Juvenile Delinquency," Juv. Ct. Judges J. 15:29 (1964). And see, Supreme Court Justice Rehnquist's concurring opinion in Smith v. Daily Mail, wherein he notes, "[T]his exposure ...provide[s] the hardcore delinquent the kind of attention he seeks, thereby encouraging him to commit further anti-social acts," supra, note 37 at p. 108. See also, Davis v. Alaska, supra, note 35 at p. 319.

[190] Orlando and Black, "Classification in Juvenile Court: The Delinquent Child and the Child in Need of Supervision." Juv. Just. 25: 13, 22, 23 (1974). And see, "Delinquency Hearings," supra, note 43 at pp. 153-154.

[191] Howard, Grisso and Neems, supra, note 187 at pp. 209-210.

[192] See, Coffee, supra, note 56 at p. 593; and see "Negative Labels: Passageways and Prisons," Crime and Delinq., 19: 33, 35 (1973); Faust "Delinquency Labeling: Its Consequences and Implications," Crime and Delinq., 19: 41 (1973).

[193] This is the same juvenile and the same event which was the subject of the secrecy battle in Oklahoma Publishing Co. v. District Court in and for Oklahoma County, supra, note 37.

[194] Howard, Grisso and Neems, supra, note 187 at pp. 208-211.

[195] Geis, supra, note 13 at 121-123.

[196] 413 A.2d 335, 342 (N.J. 1980).

[197] Id. at p. 342.

[198] "Delinquency Hearings," supra, note 156 at p. 155.

[199] See, Gough, "The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status," Wash. U.L.Q. 1966:147, 168-74; and see also, supra, note 162 at pp. 92-93.

[200] Supra, note 38 at pp. 107-108.

[201] "Delinquency Hearings," supra, note 43 at p. 157.

[202] See, The Serious Juvenile Offender: Proceedings of a National Symposium, supra, note 20 at pp. 175-181; and see, Fox, "The Reforms of Juvenile Justice: The Child's Right to Punishment," Juv. Just., Aug. 1974, pp. 2-9; and Wilson, "Crime and Criminologists," Commentary, July 1974, pp. 47-48.

[203] "Delinquency Hearings," supra, note 43 at p. 153-154, n. 115, and Ariessohn, supra, note 42 at p. 61.

[204] "Delinquency Hearings," supra, note 43 at p. 151.

[205] See, McCarthy, "Role of the Concept of Responsibility in Juvenile Delinquency Proceedings," U. Mich. J.L. Rel. 10: 181, 215-216 (1977).

[206] "Freedom of the Press vs. Juvenile Anonymity," supra, note 182 at p. 1485.

[207] Delaney, supra, note 25 at p. 5.

[208] Tulsa Tribune, Feb. 13, 1957, as quoted in Geis, supra, note 13 at p. 120.

[209] Id.

[210] Delaney, supra, note 25 at p. 5.

[211] In the Interest of B.C.L., supra, note 196 at p. 343.

[212] Hoover, 26 FBI Law Enforcement Bulletin, as quoted in Geis, supra, note 13 at p. 120.

[213] People v. Williams, 410 N.Y.S.2d 978, 985-986 (Dutchess County, 1978).

[214] R.L.R. v. State, supra, note 178 at p. 28 (Alaska 1971).

[215] "End of Secrecy," supra, note 2.

RESPONSES BY MR. REGNERY TO WRITTEN QUESTIONS SUBMITTED BY SENATOR MATHIAS

1. Question:

As you point out, many experts advocate taking another look at the concept of juvenile records confidentiality.

Do you have any views to share with the Subcommittee on the proper scope of such confidentiality? For example, you have testified that "the records of serious habitual juvenile offenders should be accessible for justice system purposes as adult criminal records." What about the records of other juvenile offenders? Should they remain confidential? What about the use of juvenile records for other than "justice system purposes" (e.g., for employment or licensure decisions)?

With respect to the last area of non-justice system access, what Federal agency ought to take the lead in developing policy about juvenile record confidentiality?

Answer:

The first priority is to facilitate timely access to good quality records of violent or serious juvenile offenders upon appearance in criminal court as young adults. This is to improve prosecutorial and sentencing decisions, help curtail further crime, and enhance the credibility and the deterrence capability of the juvenile and criminal justice system.

One or two time non-serious juvenile offenders tend to pose considerably less threat of continuing criminality, and their records could be withheld from further use for any purpose by properly conceived sealing provisions and procedures.

With regard to record use outside the justice system, some juvenile codes provide access to those with "a legitimate interest," and several states have made official court reco (except social/medical or otherwise sealed records) public. The definition of "legitimate" varies from state to state. Whatever the rules of access, records frequently are poor quality,

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hard to get, and incomplete. Thus, the final order of business should be to shore up record quality both in terms of accuracy and completeness.

OJJDP is presently canvassing the appropriate organizations to ascertain what their members think should be done to improve the quality of juvenile record management and utilization.

2. Question:

Recently, the Subcommittee on Patents, Copyrights and Trademarks held hearings on the system for interstate exchange of criminal records. We received some disturbing testimony on the poor quality of the records which move in this system. An unacceptably high percentage of criminal records are incomplete, inaccurate, or outdated.

Are you aware of any empirical evidence about the quality of juvenile records held by the States? Has the Office of Juvenile Justice and Delinquency Prevention ordered any studies on this topic? Are you aware of any other studies?

Is there any reason to believe that the records of the state juvenile justice systems are of any better quality than records of state criminal justice systems?

In your view, how can the Federal government best encourage and assist the states to improve the quality of their juvenile records?

Answer:

There is no reason to believe that state and local juvenile records are of better quality than adult records. A 1980 Statutes Analysis on the creation, dissemination, and disposition of juvenile and family court records by the National Center for Juvenile Justice showed that most state codes were silent on the quality of records. That is, they appeared to have no specific provisions on such elements of quality as requirements that juvenile court information be accurate, complete, objective, necessary, specific, translatable, and verifiable.

Another 1980 study by the Rand Corporation (Greenwood, Petersilia, Zimring) found that according to the majority of prosecutors, the adult record systems are better than juvenile record systems with respect to ease of access, timeliness, completeness, and clarity. The Rand study notes that 50-75% of prosecutors rated their juvenile records as fair to poor in most respects. However, there were variations among jurisdictions. Six jurisdictions said their juvenile records were excellent according to all measures and another twelve said they were good or excellent.

Both the Rand study and a 1982 Search Group, Inc., report prepared for BJS by Robert R. Blair, verified that among the reasons for the poor quality of juvenile records is the requirement in most juvenile (and some adult) codes that juvenile records must be stored separately from adult records.

OJJDP is currently assessing the need and potential scope of additional research in this area. The office might initiate other action to help improve the quality and appropriate utilization of juvenile records.

This office currently is considering a survey of existing juvenile record systems and a description of an exemplary system, or development of a model system.

3. Question:

Within the Department of Justice, the Bureau of Justice Statistics has the responsibility for ensuring compliance with record privacy and security regulations applicable to state criminal records. BJS is one of the few Federal agencies with a specific mission in the field of record privacy and security.

Has OJJDP consulted with BJS with respect to the work which your agency has already undertaken in the field of juvenile records access?

What role do you think BJS ought to play in the development of standards or criteria for the use of juvenile records?

Answer:

OJJDP has both consulted with BJS and utilized materials produced by BJS relating to records, notably the recent Search Group, Inc., review of juvenile record confidentiality.

Consistent with BJS mandates and plans, we are prepared to pursue a cooperative effort to help resolve the record quality, utilization, storage, and related issues particularly where adult and juvenile justice systems are both involved. In order to help develop a general consensus about these matters, OJJDP will seek the guidance of the Federal Coordinating Council, the OJJDP National Advisory Committee, and from state and local justice system practitioners.

4. Question:

You recommend that "model criteria for optimum level juvenile record utilization . . . be established." What agency is best equipped to do this? Is this a task which OJJDP should undertake?

Should these "model criteria" also address record quality questions? For example, should they suggest mechanisms for making sure that all records of arrests of juveniles are accompanied by records of dispositions within a limited time?

Answer:

As stated above, the office is considering the development and dissemination of model code provisions for the management and use of juvenile court records.

A decision will be made shortly about the program to be pursued.

Senator SPECTER. I would next like to call the Honorable Peter S. Gilchrist III, district attorney, Charlotte, N.C.

Mr. Gilchrist, we appreciate your coming today. Before you start, would you give us a biography of yourself, where you went to school; how long you have been the district attorney?

STATEMENT OF PETER S. GILCHRIST III, DISTRICT ATTORNEY, 26th JUDICIAL DISTRICT, NORTH CAROLINA

Mr. GILCHRIST. Certainly. I am in my third elected term as the district attorney in Charlotte, N.C., 4-year terms. I am a graduate of Duke University School of Law, the University of North Carolina at Chapel Hill undergraduate school.

Senator SPECTER. What is your year of graduation from law school?

Mr. GILCHRIST. 1965.

Senator SPECTER. So, you have been district attorney for 9, 10 years?

Mr. GILCHRIST. I am in my 9th year, yes, sir.

Senator SPECTER. Well, you have been district attorney long enough to know better, Mr. Gilchrist.

Mr. GILCHRIST. Yes, sir. It is an avocation, I suspect, as well as a profession.

Senator SPECTER. Yes, sir. We look forward to your testimony.

Mr. GILCHRIST. With your consent, I would prefer to deviate from the written remarks that I have prepared and I think have been submitted to you——

Senator SPECTER. That will be fine, Mr. Gilchrist. We will make your remarks a part of the permanent record, and we look forward to your summarizing them or proceeding on the highlights, as you see fit.

Mr. GILCHRIST. Thank you. As you are well aware, the criminal justice system is certainly swamped with more cases and people than we can address, and our commonsense and experience has indicated that there certainly are a small number of individuals who are responsible for an inordinate amount of crime. Our career criminal programs have addressed this.

The difficulty has been that traditionally, the criteria that we have used for our career criminal units have not been sensitive enough to predict with the degree of accuracy that we would hope for future recidivism. Some recent work has been done by Inslaw and the Rand Corp. which I think substantiate our commonsense, and that is that there are some more sophisticated or there are some inquiries which can be made which help us identify those which we expect to see again. We traditionally, I suspect, relied upon what I would call our gut reaction or gut feeling, and this has not been proven to be as reliable as some statistical information.

In addition to that, perhaps the greatest predictor is youthful crime. The youngster who has had a long history of criminal activity can be anticipated to move on and do this as an adult, and what we have done is we have shielded from law enforcement prosecutors and judges juvenile histories. I like to say we have intentionally stuck our finger in their eye. And the result has been that many young people stand before judges as youthful offenders to be sen-

tenced, and stand up with a record that reflects no priors; a judge imposes a sentence which is inappropriate, based on prior conduct, prior history, and as a result of that, we see the young adult offender released too soon, or perhaps given treatment that is inappropriate under the circumstances.

North Carolina being a State which provides for confidentiality of juvenile records, I think has suffered inordinately as a result of this.

Senator SPECTER. What access, if any, is there to juvenile records in North Carolina?

Mr. GILCHRIST. The only access that North Carolina permits is that which is obtained with the consent of the juvenile court judge. Some have been quite liberal, others have been extremely restrictive.

Senator SPECTER. Under what circumstances would you as the prosecution get access? For example, if you have an 18-year-old come up, you do a regular records check, and you do not find anything unless you have personal knowledge or some special clue. Would you even know that the juvenile had been involved in the juvenile process?

Mr. GILCHRIST. We would not, and I think that is the tragedy of the process that we are using now, to, in effect shield the prosecutor who is trying to make decisions as to investment of prosecutorial resources as to which of the many defendants arrayed before him he is going to elect to——

Senator SPECTER. And how about researchers or news media—do they have access to the juvenile records?

Mr. GILCHRIST. Researchers may have access to the juvenile records.

Senator SPECTER. With a court order.

Mr. GILCHRIST. With a court order.

Senator SPECTER. And how about the media?

Mr. GILCHRIST. No, they do not.

Senator SPECTER. Do you know of any case where the media has sought leave of the court to examine a juvenile record in North Carolina?

Mr. GILCHRIST. I think there have been many situations where they would like to know the juvenile record, but traditionally and historically, it has been denied them.

Senator SPECTER. But do you know of any case where there has been an application?

Mr. GILCHRIST. No, I am not aware of any.

Senator SPECTER. Before asking the question about a Federal law, what would you think, Mr. Gilchrist, about a law in North Carolina which would say that where a youthful offender has three adjudications for armed robbery or some equivalent crime his record is no longer subject to the confidentiality standards of the juvenile law of North Carolina?

Mr. GILCHRIST. Are you referring to availability to people with what I would call a need to know, such as law enforcement?

Senator SPECTER. Yes, I would say that would be the basis.

Mr. GILCHRIST. Definitely, I think that should be the proviso.

Senator SPECTER. What would you make the standard? Would you make it less stringent than three armed robberies?

Mr. GILCHRIST. I think any time you have a young offender charged with a felony crime, that you ought to be able to make a determination as to whether or not he has a prior juvenile adjudication for a felony offense of any kind.

Senator SPECTER. So, you feel that you should be able to check the juvenile record of anybody who is charged with a felony.

Mr. GILCHRIST. Certainly. If we make the assumption——

Senator SPECTER. Well, then, you would have no confidentiality at all for juvenile records.

Mr. GILCHRIST. Certainly.

Senator SPECTER. What would you think about a Federal law which would, say, require North Carolina to report any youthful offender who had been convicted of three or more armed robberies to the FBI National Records Center.

Mr. GILCHRIST. I think the standards are too high. Three armed robbery convictions, obviously, makes a very strong case, but I think we can see individuals who perhaps have been charged with significant felonies, allowed to plead guilty to misdemeanors, or perhaps adjudicated for lesser offenses, where the youngster is still extremely dangerous, even without a conviction.

Senator SPECTER. Well, I pick a strong case, because I am postulating a Federal mandate to State law. But you would think that in cases where there have been serious violations by youthful offenders, it would be appropriate for the Federal Government to pass a law requiring the States to report these cases to the FBI?

Mr. GILCHRIST. Certainly. It would seem that perhaps another approach might be that if an individual had charged a young offender in one jurisdiction, that he would be allowed the opportunity to make inquiry of other jurisdictions as to whether or not that juvenile had, in fact, been adjudicated delinquent for a criminal offense.

Senator SPECTER. And then the other jurisdictions, you think, should have an obligation to respond to the law enforcement official, or to the court, on the sentencing issue.

Mr. GILCHRIST. Yes, sir.

Senator SPECTER. Then, you do not think there ought to be any confidentiality of juvenile records as far as inquiries made by a prosecutor for charging or a court for sentencing?

Mr. GILCHRIST. Or even a law enforcement officer for investigation and definitely for a judge for sentencing.

Senator SPECTER. And you think it would be appropriate for the Federal Government to require States to open up their records for these purposes.

Mr. GILCHRIST. To respond to a legitimate inquiry, yes, sir.

Senator SPECTER. Do you think that if the Federal Government entered this area, it would cause any States' rights issues of a compelling nature?

Mr. GILCHRIST. Yes, sir, but not that I think could not be overcome.

Senator SPECTER. Let me ask you a question that I went over with Mr. Regnery, and that is the issue of commingling. I believe North Carolina is one of the States—and I am getting a "Yes" from Mary Louise Westmoreland, whose recollection is better than

mine—which was criticized by the recent GAO report, on this issue of commingling juveniles with adult offenders.

What is your law, Mr. Gilchrist, in North Carolina, on the confinement of status children?

Mr. GILCHRIST. Status offenders in North Carolina are not incarcerated. If a juvenile is adjudicated a delinquent for a criminal offense, normally, he or she is placed in a juvenile facility. There are circumstances where an individual who is over the age of 14, who commits an offense that would be punishable as a felony by an adult may, by determination of the juvenile court, be treated as an adult for serious offense, perhaps a homicide or an armed robbery. Normally, this only happens in circumstances where the juvenile has previously been in a juvenile treatment facility, and the conduct is such that he cannot be controlled in a juvenile facility. There are——

Senator SPECTER. But status offenders may not be put in jail at all.

Mr. GILCHRIST. No, sir.

Senator SPECTER. Do you know of any deviation from that requirement in North Carolina?

Mr. GILCHRIST. We are very careful about the treatment of status offenders.

Senator SPECTER. And juveniles charged with a crime may not be commingled with adults charged with criminal offenses.

Mr. GILCHRIST. Charged with a crime. We have a requirement for separate facilities pretrial.

Senator SPECTER. Yes.

Mr. GILCHRIST. There are circumstances under which a juvenile who has been convicted of a felony crime may be sentenced to an adult facility.

Senator SPECTER. All right, but let's pick up the issue of juveniles charged with a crime. Is there a mandatory segregation from adults for these juveniles?

Mr. GILCHRIST. Yes, sir.

Senator SPECTER. All right. And is this segregation observed in all cases, to your knowledge?

Mr. GILCHRIST. Yes, unless it is under circumstances where there may be some temporary period where a juvenile who is arrested has not been identified as a juvenile—obviously, that could happen under any set of circumstances.

Senator SPECTER. And then, after an adjudication of delinquency, is a juvenile still segregated from convicted adults unless he has been convicted of an adult offense.

Mr. GILCHRIST. Yes, and there have been specific findings of fact that he should be treated as an adult as opposed to a juvenile. That is a relatively rare occurrence, but it obviously does happen on occasion.

Senator SPECTER. In your professional judgement, Mr. Gilchrist, what are the affects of commingling juveniles with adult criminals?

Mr. GILCHRIST. I think the emphasis traditionally—at least, in North Carolina, and I assume in other places, is to provide every available facility for the juvenile, attempts being made to segregate them. And I think there certainly is much to be said for not incarcerating a younger person with a hardened and sophisticated criminal. It is just, so they say, giving him a college education in crime.

Senator SPECTER. Do you think it is true that you give the juvenile a college education in crime by commingling him with adults?

Mr. GILCHRIST. Sure. I think you have a young person with a receptive mind, and they are fascinated with learning from a more sophisticated individual additional techniques or approaches.

Senator SPECTER. Have you seen specific cases in your experience as a prosecuting attorney?

Mr. GILCHRIST. Not so much as a result of incarceration, but as a result of association.

Senator SPECTER. So, the association can occur anyplace.

Mr. GILCHRIST. Certainly.

Senator SPECTER. But if it is in a jail, it is a closer association.

Mr. GILCHRIST. Yes, sir.

Senator SPECTER. One final question, Mr. Gilchrist. Do you think it would be appropriate for the Federal Government to tell the States that they can not put status offenders in jail?

I am looking now to the States' rights issue.

Mr. GILCHRIST. Without giving you an answer that is longer than you want to hear, I am somewhat wary of people who denominate that all of the juveniles are in custody for status offenses. It seems to me what happens is you have a youngster who comes before the court for a delinquency charge, housebreaking or whatever, is placed on probation, and then perhaps the probation is revoked because he fails to attend school or is otherwise out of the control of the juvenile authorities. I think the statistics, in my experience, are soft. What makes it appear that an individual is in for a status offense is really a probation violation, indicating that the individual is totally beyond the control of the juvenile authorities, and more significant sanctions had to be imposed to bring him under control.

Senator SPECTER. Well, the case you cite is a common situation where children are out of control. I think that it would be an exception. There are many cases however, where you have people classified as status offenders. We had a case of a teenage girl who ran away from home, was found by the police and was ordered to jail by the judge. She was raped by the custodian and the male prisoners. Another case occurred when parents found their child smoking—not marihuana, just cigarettes—and they turned him over to the police to teach him a lesson. The police put him in a jail with other juvenile offenders, who brutally beat him. Another youth was later beaten to death by these same juveniles.

There are genuine cases where these juveniles have done absolutely nothing, and they come into the hands of law enforcement officials for a variety of reasons. We call them status offenders. They are not offenders. They may be runaways; they may be neglected children. And the system has not devised facilities for housing them. When you have a problem, you call the police department, and the police department has a vacant cell. The question really is whether the Federal Government is going to get involved in this problem and tell the States, "You simply cannot house status offenders in jails."

We had some interesting testimony from a juvenile court judge, the chairman of the legislative committee of the National Council of Juvenile and Family Court Judges, about the one category which he felt was an exception, which you have also identified: When a juvenile is simply out of control. When he has not committed a crime, but he has not responded to the supervision in school or in his home or in the juvenile court, then he is confined.

But aside from that exception, it is a tough question with which we are trying to deal.

Mr. GILCHRIST. What do you do with a youngster who is out of control of all authority, whether he or she has committed a crime or not? The court does not have the power to enforce its judgment, as for contempt in the case of an adult; the court is powerless.

Senator SPECTER. Well, I think in that situation, you must have confinement, but I think it has to be very carefully regulated, and the juvenile has to be segregated from adult prisoners. But my sense is that there ought to be a Federal law which says the State may not put a status offender into confinement except for the situation the juvenile court judge and you described.

Mr. GILCHRIST. Well, what you end up doing is having to have duplicate facilities; one facility where you can incarcerate for a criminal offense and another facility where you can incarcerate for a totally wayward child. Obviously, we would all like to think that love and affection and care can rectify the situation, but I am sure that anyone who has dealt with a juvenile court very long finds that there are situations where the child has got to be in custody.

Senator SPECTER. Well, you would not necessarily need a totally different facility. It could be in a juvenile institution, but there would have to be segregation of the wayward child from the juvenile-adjudicated delinquent.

Mr. GILCHRIST. We are just at the point, it seems to me, where we are beginning to break the juvenile facilities out from the adult jails, to further subdivide that and require that the juvenile facility be segregated into the criminal and the noncriminal function. There is no question that it is desirable, but it may not be financially feasible.

Senator SPECTER. The other aspect is a Federal law to compel States not to mix adjudicated juvenile delinquents with those who are convicted of adult criminal offenses.

What is your view on that?

Mr. GILCHRIST. If I understood your—let me ask you to go over that question again. I am not sure of the question.

Senator SPECTER. Yes. The question is should the Federal Government require that States not mix adult criminals with juveniles who have been adjudicated delinquent or convicted of an offense as a juvenile which would, if the juvenile was an adult, be a crime.

Mr. GILIHRIST. We have that situation in North Carolina. There are occasions where juveniles who have committed a crime are incarcerated with adults.

Senator SPECTER. Aside from the classic cases where it is really an adult crime.

Mr. GILCHRIST. We do not have any crimes that are crimes only because they are committed by a young person other than obviously the status offenses. I am not sure I am completely clear on your question.

Senator SPECTER. Do you have laws in North Carolina which require separation of adult offenders from juvenile offenders?

Mr. GILCHRIST. Yes, sir.

Senator SPECTER. If some States do not separate adult offenders from juvenile offenders, would you think it appropriate for the Federal Government to say the States must separate juvenile offenders from adult offenders?

Mr. GILCHRIST. In the ordinary course, yes. However, you are going to find on occasion, I think, some juveniles who have committed the same crimes as adults, and they are so bad or so dangerous that you cannot retain them in a juvenile facility, and you have got to ship them over to an adult facility.

Senator SPECTER. Well, that would arise in a case where a juvenile might be certified to be tried as an adult, for example, a 17-year-old.

Mr. GILCHRIST. Certainly.

Senator SPECTER. Mr. Gilchrist, your testimony has been very helpful. Thank you very much. We appreciate your taking the time to be with us.

Mr. GILCHRIST. Thank you.

[The prepared statement of Mr. Gilchrist follows:]

PREPARED STATEMENT OF PETER S. GILCHRIST, III

North Carolina provides for the confidentiality of juvenile records and related social reports. These records are maintained by the Clerk of Superior Court and may only be examined by order of the judge. In addition to the confidentiality a person who has attained the age of 16 may file a petition to have his juvenile record expugned if he has not subsequently been convicted as an adult of a felony or misdemeanor.

In spite of these provisions the Court may order a Presentence Investigation of an adult offender but the present North Carolina law is silent as to whether the juvenile records may be made available for sentencing adults, and many juvenile judges refuse to allow access to the records. In certain areas of the State juvenile judges, upon motion, may allow probation officers to obtain access to a juveile record but the process is cumbersome and thus infrequently utlized because it is so time consuming. Efforts were made this year to specifically provide for inclusion of the juvenile records in presentence reports but legislation failed because various juvenile advocates felt that all juvenile records should remain exclusively for use by the juvenile court with no access by other courts.

My personal experience has been that an extremely active juvenile offender frequently continues to commit criminal acts upon becoming an adult. (One becomes an adult under North Carolina law upon reaching his 16th birthday) My perception shared by many other active prosecutors about previous criminal conduct of young adult offenders has been born out by empirical validation done by INSLAW, Inc. and the RAND Corporation.

As a local prosecutor who implemented a Career Criminal program in 1977 which relied only upon adult conviction and arrests information, it soon became apparent that there was an undue focus of the program on older defendants. As our experience began to accumulate, it became more and more apparent that

utlizing only adult records caused us to have an inordinate number of individuals identified as career criminals whose criminal activities were actually on the decline because of their ages. It also became just as apparent that the young adult offenders were the most active and dangerous. The problem was that by not utilizing juvenile records, we were not able to identify until too late who the active criminals were. Identification of criminally active individuals requires a systematic review of all defendants, not just those that intuition or chance information highlight.

It is apparent that police officers bend over backwards to avoid arresting juveniles, juvenile authorities try to divert juvenile offenders from court appearances, prosecutors reduce felonies to misdemeanors for juveniles, and judges give light sentences to juveniles and training schools release young defendants at the earliest possible time. The natural inclination of law enforcement, prosecutors and judges is to deal leniently with youthful adult defendants. When the juvenile record is unavailable for decision making serious young criminals are often repeatedly given treatment not justified by crimes committed or past history. This inappropriate treatment can be directly traced to the fact that no one has an accurate criminal history of the young offender that includes both his juvenile and adult records. There are numerous cases where an individual with a very active juvenile record is thought to have "no prior record" as a young adult defendant. Thus young offenders with terrible juvenile records are being sentenced as if they had never committed crimes when they come before adult courts.

Perhaps the most atrocious example we have had of failure to deal with a dangerous offender involved a 16-year old who with a co-defendant of 17 on October 31, 1981, burglarized the home of a 71-year old woman. The woman was beaten, raped, robbed and utlimately strangled to death. During the course of the pretrial investigation, I interviewed two other women who had been raped by the defendant for which he was never charged or convicted. During

the course of the trial another elderly woman was interviewed who lived in the neighborhood and had been hit in the head by a hammer in the course of a first degree burglary that the defendant had committed in 1980 and plead guilty to nine days prior to the commission of the murder. Also encountered was a 74-year old woman who the defendant had robbed, assaulted and broken her arm the day the body in the murder case was found. Throughout the investigation numerous people described assaults and cuttings going back several years involving the defendant that had been committed while he was a juvenile.

Frequently we find other cases where two young adults are charged with the same crime and to late we learn that one of the defendants has a significant juvenile record and thus should have been treated differently than his less culpable co-defendant.

Equally unfortunate situations arise where two co-defendants receive desparate sentences and the one who receives the lighter sentence actually had a far more significant juvenile history, but it was never brought to the attention of the sentencing judge and the less serious defendant receives a heavier sentence.

As prosecutorial resources become further strained it is most important that juvenile records of previously adjudicated criminal conduct be made available to the prosecutor so that better choices may be made in allocation of prosecutorial resources. Further it is even more important for sentencing judges, to have access to previous juvenile records such that appropriate sentences may be imposed.

In conclusion there is a natural and understandable tendency for all concerned to give consideration to youth, but this consideration must be tempered when we have demonstrable conduct indicating that young individuals have been involved in serious criminal activities for long periods of time so that prosecutors will be able to identify cases for intensive prosecutorial efforts and so that judges are able to impose appropriate sentences based on all the facts.

Senator SPECTER. I would like now to call Ms. Catherine Conly, chief of research and statistics, Maryland Criminal Justice Coordinating Council.

Ms. Conly, we thank you very much for submitting your testimony to us, and it will be made a part of the record in full.

STATEMENT OF CATHERINE H. CONLY, CHIEF OF RESEARCH AND STATISTICS, MARYLAND CRIMINAL JUSTICE COORDINATING COUNCIL, TOWSON, MD.

Ms. CONLY. I apologize that the written testimony was late. I had thought it would get here in time for you to have reviewed it.

Senator SPECTER. Almost everything is late, Ms. Conly.

Ms. CONLY. As you indicated, I am Catherine Conly. Would you like me to tell you some of my credentials?

Senator SPECTER. I would appreciate that, and then summarize, if you would, hitting the highlights.

Ms. CONLY. I am chief of research and statistics at the Maryland Criminal Justice Coordinating Council. I also serve on the executive board of the Criminal Justice Statistics Association. Prior to joining the coordinating council, I worked at Inslaw for 4 years, where I did research in the Federal criminal justice area.

I am pleased to be here today so that I may share with you some information about Maryland's repeat offender experiences and describe our efforts to make juvenile delinquency records available for the processing of juvenile and young adult offenders.

As I note in my written testimony, since 1981, the coordinating council has been very interested in developing the optimal way for processing repeat offenders. We feel we have come up with a good plan that involves the entire criminal and juvenile justice systems, and State and local governments, in processing adult and juvenile repeat offenders.

We have implemented what we call repeat offender program experiments in five of the main subdivisions in the State, and we term those programs ROPE's for short. Those ROPE's specify as one of their basic tenets that juvenile record information be available for the early identification of juvenile and adult repeat offenders. Consequently, the council has formed an ad hoc committee to study the issue of juvenile records. I chair that committee, which is why I was selected to speak with you today.

The issue of the need for access to juvenile records has been very clearly stated by Mr. Regnery, by researchers, both nationally and in the State of Maryland, and by the previous speaker from North Carolina: There is a small group of individuals who are committing a large amount of crime and there is concern that juvenile records be available for the processing of young adult offenders. This concern rests on the fact that those individuals should not be treated as first offenders when they enter the criminal system, which frequently occurs in lieu of information about serious and chronic juvenile delinquency. Furthermore, those individuals tend to be very active offenders when they enter the criminal system: 18-, 19-, 20-year-olds may be active criminal offenders, especially if they started committing offenses at an early age, such as 12, and were chronic juvenile delinquents.

The law in Maryland is very clear about the admissibility of juvenile records in criminal proceedings. The information may not be introduced until after conviction of an individual. Consequently, it may be used by the sentencing judge——

Senator SPECTER. Well, you cannot introduce evidence of prior crime against anyone, can you—I should not ask you that since you are not an attorney. I do not think you can introduce evidence of a crime against anybody.

Ms. CONLY. You are right; you cannot.

Senator SPECTER. OK.

Ms. CONLY. But what concerns prosecutors, in particular, in Maryland is that it would be helpful to introduce information about a person's juvenile record at bail hearings, for instance, and that cannot be done.

Senator SPECTER. You cannot do that.

Ms. CONLY. In addition, a bill to allow juvenile records to be admitted as evidence at bail hearings was introduced in the Maryland General Assembly this last year, and that bill failed.

Senator SPECTER. What is the juvenile age in Maryland—18?

Ms. CONLY. Eighteen.

Senator SPECTER. So if you have an 18 year-old charged with a crime, and that person is convicted, you can then introduce the record of juvenile offenses at 17 and 16?

Ms. CONLY. For purposes of sentencing. That information may also be used by parole officials.

Senator SPECTER. May the prosecuting attorney get that information for purposes of filing a charge?

Ms. CONLY. Well, the law is fairly clear about what the prosecuting attorney may obtain. There are a number of restrictions on the accessibility of police records and particularly on the availability of court records, which may be revealed if there is a court order that accompanies a request. but if the State's attorneys in Maryland happen to have maintained good records themselves, then they are able to use their own information in making their decisions whether the charge——

Senator SPECTER. Suppose a State's attorney has an incident involving an 18 year-old, and he wants to figure out whether or not to charge him. He would base that decision on whether it is a repeat or first offense. Can that State's attorney get access to the 18-year-old's juvenile record for purposes of charging?

Ms. CONLY. Theoretically, yes. Unfortunately, there are a number of problems that we have identified, both as part of the ROPE efforts and as part of the committee's work, that indicate that it is probably very difficult for criminal prosecutors to obtain juvenile record information.

Senator SPECTER. Why?

Ms. CONLY. One of the best examples of the difficulty is in Baltimore City's States attorneys office where they have a juvenile habitual offender unit. The unit maintains very good juvenile records, however, attorneys in the unit have no formal procedures for sharing that information with the criminal prosecutors in the office. If the criminal prosecutor happens to come downstairs and say, "Hey, do you have this fellow on your file?" then the information is shared.

Senator SPECTER. What is your opinion about the desirability of having such records in the FBI computer?

Ms. CONLY. I have some problems with that. But you are asking my personal opinion now——

Senator SPECTER. What other kind of an opinion can I ask for—your professional opinion, your official opinion?

Ms. CONLY. That is also my professional opinion, but perhaps not the opinion of the coordinating council or the task force, which I also represent.

Senator SPECTER. Well, you are not authorized to speak for them on all subjects. They have not anticipated all the questions.

Ms. CONLY. I have some problems with having records maintained by the FBI, because I think it is a bit premature to have a repository at the Federal level. I think we have a number of problems with the data that we are maintaining in the States. Juvenile record information is often missing disposition information; it is often incomplete with respect to information about the offenses and number of charges for which a juvenile was arrested, adjudicated, disposed. We also have a number of problems with sharing information, across subdivisions.

Senator SPECTER. Well, might it not facilitate it if the records were in the FBI. Then, when the prosecuting attorney makes the records checks on John Doe, age 19, he picks up the information.

Ms. CONLY. Yes, I think in the long run, that might be a wise thing to consider. I think in the short run, we have a lot of intrastate kinds of concerns that have to be addressed first. Largely, I think these concerns are administrative. At this point I do not think the law is amenable to change.

Senator SPECTER. Well, why should the Federal Government wait for Maryland to organize its internal records——

Ms. CONLY. Well, certainly, you could request that juvenile records be included in FBI records. I am just concerned about the quality of the information that you would receive before we clean up our own shops.

Senator SPECTER. You do not have a concern about intrusion into States' rights?

Ms. CONLY. I do not; but I think there would be those who would, particularly those who consider protecting the child to be the main function of the juvenile justice system, and there are a number of those individuals.

Senator SPECTER. In your opinion, is there any point where the juvenile's interests are no longer appropriate to be protected, balancing them against society's interests? Three armed robberies, for example, clearly the kind of case that I have postulated.

Ms. CONLY. I would say that certainly, we recognize, and research has indicated that there are serious offenders who are chronic juvenile delinquents, and they continue to be serious career offenders as adults. For those individuals, yes, I would advocate that we have good information and that we have it available to us to make decisions about those individuals so they do not "slip through the cracks.

Senator SPECTER. What is your opinion on access by the news media?

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Ms. CONLY. Well, I think my priority would be for people within the criminal justice system to have that information.

Senator SPECTER. After that priority, how about the news media?

Ms. CONLY. I do not have any particular problem with that with regard to individuals who have committed serious felonies as adults. I think there are any number of juveniles, and the majority of juveniles, whose records should remain protected——.

Senator SPECTER. You would make access to the news media the same as access to the prosecutors?

Ms. CONLY. Yes—well, prosecutors, at this point, have access, theoretically, to all information about all juveniles, and I do not think that complete access for all sources is what we are talking about when we are talking about repeat offender processing. We are talking about limited access.

I might add that we have discussed in our committee—and there are several attorneys on that committee who have contributed to the discussion—the possibility of having limited access to juvenile records for the processing of serious adult offenders. There is a great deal of concern about having limited access. The attorneys do not feel that it is constitutionally justified.

Senator SPECTER. What kind of limited access are you referring to now?

Ms. CONLY. Well, in the sense that we would define "access" in terms of the types of offenses or numbers of offenses for which a young adult would have been arrested. That is, if an individual who committed a robbery at age 18, the nature of the offense would trigger the availability of juvenile record information. The concern is that access may not be limited by circumstances. Of course, if access cannot be limited many would prefer to see that there be no access at all.

Senator SPECTER. So they are saying that unless you make everything available, you cannot make anything available; since it would be inappropriate to make minor matters available, do not make any of it available.

Ms. CONLY. That, of course, contradicts a lot of what we know from national research: Theoretically it is possible and could be very beneficial, to make information available in certain instances.

Senator SPECTER. Well, that is an argument which some may not think is very valid.

What else would you like to bring to our attention?

Ms. CONLY. Well, I think that the issue of making juvenile records accessible is not simply a legal one. There are constraints that the law places on accessing juvenile records, but there are also a number of problems that we have identified with respect to the quality of juvenile records and the sharing of those records, both with the criminal system and between subdivisions in the State, much less between States. I think these administrative issues have to be addressed; and for that to occur, the States continue to need support, both from the Federal Government and the State governments, to conduct research and develop information systems to aid in the sharing of information.

Senator SPECTER. Ms. Conly, thank you very much. We appreciate your testimony and your being with us.

Ms. CONLY. Thank you.

Senator SPECTER. The hearing is concluded.

[Whereupon, at 10:53 a.m., the subcommittee was adjourned.]

[The prepared statement of Ms. Conly follows:]

Prepared Statement of Catherine H. Conly

My name is Catherine Conly, and I am Chief of Research and Statistics for the Maryland Criminal Justice Coordinating Council. I am also on the Executive Board of the Criminal Justice Statistics Association, the national organization of state Statistical Analysis Centers.

I am pleased to be invited to testify before the Senate Judiciary Subcommittee on Juvenile Justice. I believe that Maryland's recent experiences with repeat offenders and juvenile delinquency records may be of interest to the Subcommittee.

Since 1981, the Maryland Criminal Justice Coordinating Council and its Repeat Offender Task Force has been involved in designing a systemwide strategy for the identification, arrest, prosecution, conviction, sentencing, and treatment of career juvenile and adult offenders. The Task Force reviewed national and state information about repeat offenders and decided that a well planned and coordinated strategy must be developed to improve the effectiveness of repeat offender processing by all components of Maryland's criminal and juvenile justice systems. As a result, the Council initiated Repeat Offender Program Experiments (ROPE) in five of the largest subdivisions in Maryland. After a careful planning process involving numerous state and local justice agencies, these subdivisions developed Repeat Offender Steering Councils to actively coordinate all law enforcement, probation, court, prosecution, juvenile justice, and corrections functions in order to improve the handling of these defendants.

Since these ROPE programs require that juvenile records be available for the early identification of juvenile and adult repeat offenders and because numerous national research studies have emphasized the importance of juvenile history information to the effective processing of young adult career criminals, an ad hoc committee of the Maryland Criminal Justice Coordinating Council began meeting in December 1982 to study the quality, completeness, and accessibility of juvenile records in Maryland.

The committee has concentrated on the issue of using juvenile records in the processing of young adult offenders. The primary concern is that criminal justice officials be aware of the prior juvenile record of a young adult who is arrested for a serious felony, particularly if the young adult has a history of serious and chronic juvenile delinquency. Numerous research studies, including several in Maryland, suggest that without juvenile record information, the criminal justice system automatically treats young adult offenders as first offenders. Effectively,

the system gives chronic offenders a "second chance" when they become 18 (or younger in some states) which is a time when they are very criminally active.

In Maryland, sharing juvenile information with the adult system is limited by the law. Like other states, we are well aware of the need for security and privacy of juvenile delinquency records in the vast majority of cases. Nevertheless, we are also concerned about repeat offenders. Sections 3-824 of the Juvenile Causes Subtitle of the Maryland Code states the following:

> (a)(1) An adjudication of a child pursuant to this subtitle is not a criminal conviction for any purpose and does not impose any of the civil disabilities ordinarily imposed by a criminal conviction.
> (2) An adjudication and disposition of a child in which the child's driving privileges have been suspended may not affect the child's driving record or result in a point assessment. The State Motor Vehicle Administration may not disclose information concerning or relating to a suspension under this subtitle to any insurance company or person other than the child, the child's parent or guardian, the court, the child's attorney, a State's attorney, or law enforcement agency.
> (3) However, an adjudication of a child as delinquent by reason of his violation of the State vehicle laws shall be reported by the clerk of the court to the Motor Vehicle Administration, which shall assess points against the child under Title 16, Subtitle 4 of the Transportation Article, in the same manner and the same effect as if the child had been convicted of the offense.
> (b) An adjudication and disposition of a child pursuant to this subtitle are not admissible as evidence against the child:
> (1) In any criminal proceeding prior to conviction; or
> (2) In any adjudicatory hearing on a petition alleging delinquency; or
> (3) In any civil proceeding not conducted under this subtitle.
> (c) Evidence given in a proceeding under this subtitle is not admissible against the child in any other proceeding in another court, except in a criminal proceeding where the child is charged with perjury and the evidence is relevant to that charge and is otherwise admissible.
> (d) An adjudication or disposition of a child under this subtitle shall not disqualify the child with respect to employment in the civil service of the State or any subdivision of the State.

Hence, in Maryland, an adjudication of delinquency is not admissable as evidence against the child in any criminal proceeding prior to conviction (Section-824 (b)(1)). What this means for the processing of young adult offenders is that juvenile adjudication and disposition information may only be formally introduced at sentencing. Consequently, using information about juvenile adjudications and

dispositions in criminal proceedings that precede conviction, such as bail hearings, is not possible. In fact, a bill that would have allowed juvenile records to be used as evidence at bail hearings failed during the 1983 Session of Maryland's General Assembly.

Indeed, there are a number of decisions that precede conviction that require accurate and timely information. Key among these are prosecutors' decisions to prosecute, to determine charges, and to negotiate pleas. Section 3-828 of the Juvenile Causes Subtitle in Maryland does not mention, and therefore, does not restrict, the use of records created and maintained by Maryland's State's Attorneys. Hence, any barriers that prevent State's Attorneys from knowing whether a young adult had a significant history of delinquencies as a juvenile are administrative and not legal: if state's attorneys records are accurate and complete, there should be no problem in using that information to make prosecution decisions. However, Sections 3-828 (a) and (b) do limit the availability of police and court records:

> (a) A police record concerning a child is confidential and shall be maintained separate from those of adults. Its contents may not be divulged, by subpoena or otherwise, except by order of the court upon good cause shown. This subsection does not prohibit access to and confidential use of the record by the Juvenile Services Administsration or in the investigation and prosecution of the child by any law enforcement agency.
> (b) A juvenile court record pertaining to a child is confidential and its contents may not be divulged, by subpoena or otherwise, except by order of the court upon good cause shown. This subsection does not prohibit access to and the use of the court record in a proceeding in the court involving the child, by personnel of the court, the State's attorney, counsel for the child, or authorized personnel of the Juvenile Services Administration.

Because of the mix of terminology in Section 3-828 (a) (i.e., mixing "adult" terms like investigation and prosecution with language about children), it is probable that police records are also available for informal decisionmaking. But in Section 3-828 (b), Maryland law is very clear about the contents of juvenile court records: except in connection with a juvenile court proceeding, they may not be divulged without an order by the juvenile court.

The conclusion that can be drawn from this review of Section 3-828 is that the quality of "informal" decisions that are made by prosecutors is contingent on the quality of juvenile records generally, the completeness of prosecutors' records of

an individual's juvenile delinquency history, and the mechanisms by which information is shared. Maryland's ROPE efforts and the results of the juvenile records committee's own survey of criminal and juvenile justice officials indicates that there are a number of problems with juvenile data quality and procedures for sharing those data.

First, several of the ROPE planning efforts revealed that juvenile records omit some disposition and key social history information and that juvenile records are not always clear about the number and types of juvenile charges for which a person is arrested, adjudicated, or disposed.

Second, State's Attorney's records are only complete if making them so is a priority in the office. Even then, delinquency records only include information about arrests and adjudications within a particular subdivision. For example, in Baltimore City, the State's Attorney's Office has a juvenile habitual offender unit supported by the Coordinating Council with funds from the Office of Juvenile Justice and Delinquency Prevention. This office has maintained delinquency records for approximately 1,100 habitual juvenile offenders who have been identified in the City since 1980. The State's Attorney's Office in Baltimore City has the most complete juvenile records of any prosecutor's office in the State. Unfortunately, the records are exclusive to delinquent acts committed within the City limits. The office has no formal method of obtaining or sharing delinquency information with other subdivisions. This is a problem when dealing with individuals who are highly mobile and commit delinquent acts in more than one subdivision.

Third, even in Baltimore City, criminal prosecutors are not automatically notified of a young adult offender's history of delinquency. There, criminal prosecutors will generally request manual files from the juvenile habitual offenders' unit; there is no automated system, however, to alert the criminal prosecutor that he/she is dealing with a young adult who was an habitual juvenile delinquent. In State's Attorney's offices in Maryland subdivisions where there are no habitual juvenile offender units (and most do not have such units), there is even less chance (1) that records will be complete, and (2) that juvenile information will be shared with criminal prosecutors within the subdivision.

Finally, results of a survey of the State's Attorneys, public defenders, police, parole and probation officials, and Juvenile Court Administrators in six Maryland subdivisions conducted by the Council's Ad Hoc Committee on the Use and Access of Juvenile Records, suggest a number of discouraging things about the sharing of juvenile data generally. First, there is considerable variation across criminal justice agencies and between subdivisions in the methods for obtaining juvenile record

information and in the preferred sources of these data. Second, the reported procedures for sharing information within subdivisions indicate that there is sometimes confusion about the law. For example, one respondent stated that juvenile court records are not available for processing young adult offenders because records are sealed when a juvenile becomes 18. In fact, juvenile records in Maryland may only be sealed when a juvenile has reached age 21; and records are rarely sealed. Third, as noted earlier, juvenile court information does not include the level of detail about charges that is essential for repeat offender processing. Fourth, court procedures for releasing information (including who may receive information) vary considerably across subdivisions. Finally, requests for juvenile court information by anyone involved in criminal or juvenile justice processing are made infrequently in most subdivisions.

In conclusion, we have recognized the need to have access to juvenile records for processing Maryland's juvenile and young adult offenders. But making those records accessible is complicated and involves consideration of legal, philosophical, and administrative issues.

The Maryland law attempts to balance two competing priorities: protection of the child and protection of the public. In protecting the child, the law restricts the availability of juvenile delinquency records to use in criminal proceedings only after conviction. For some, this restriction seems to undermine the priority of public safety: young adults with histories of chronic delinquency are treated more leniently than they deserve to be.

The issue of the accessibility of juvenile records does not stop with the law, however. We have discovered in Maryland that juvenile data are often incomplete, particularly with respect to disposition information, that juvenile and adult terminology is different (i.e., adjudication vs. conviction), that procedures for allowing access to juvenile information are variable, and that there are no formal, and certainly no automated, ways to share juvenile information across the State's subdivisions or with the criminal justice system.

In the near future, rectifying these administrative problems is probably more feasible and more appropriate than changing Maryland's law. Maryland's juvenile data committee intends to design standards for the improvement of juvenile record information and develop data sharing procedures to assure that all records are of good quality and that law enforcement officials, prosecutors in the juvenile and criminal justice system, and the courts will be able to share accurate information within and between subdivisions of the State.

Many of the issues that I have discussed here have highlighted the continuing need by state and local governments to have good criminal and juvenile justice information systems and to have policy decisions supported by research information. On behalf of the Maryland Criminal Justice Coordinating Council, I would like to thank Senator Specter and this committee for your leadership in sponsoring S.53, the Justice Assistance Act of 1983. I urge you to continue your work in the 98th Congress to assure financial assistance to state and local criminal and juvenile justice agencies. Maryland needs federal funds to assist our efforts to prevent, treat, and control juvenile delinquency and crime. Information systems and research supported by Congress should continue to improve our understanding of the criminal and juvenile justice systems, and our ability to protect the public and respond to the Constitutional rights of defendants.

If those of us in Maryland can be of assistance to this Subcommittee during your deliberations, please feel free to contact us.

Thank you.

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