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ARTICLES

ERODING CONFIDENTIALITY IN DELINQUENCY PROCEEDINGS: SHOULD SCHOOLS AND PUBLIC HOUSING AUTHORITIES BE NOTIFIED?

KRISTIN HENNING*

While scholars have engaged in considerable debate about the continued viability of confidentiality in delinquency proceedings, much of that debate has focused on the media's First Amendment right to access those proceedings. Now, with crime prevention at the forefront of many political agendas, policymakers are reframing the confidentiality debate as a question of public safety and accountability, and juvenile records are being disseminated, both lawfully and unlawfully, to agencies and institutions responsible for the protection, supervision, and care of children. Most state legislatures have rewritten confidentiality statutes to grant multiple exceptions to general rules protecting confidentiality; some states even require law enforcement officials to notify schools when students have been arrested.

In this Article, Professor Henning examines how schools and public housing authorities obtain juvenile records and explains how these institutions may use the records to exclude children and their families from the basic benefits of education and housing. Drawing on recent research in the field of developmental psychology, Professor Henning reevaluates early assumptions about adolescents' amenability to treatment and the impact of stigma on children and explores the practical implications of sharing records with schools and public housing authorities, questioning whether new confidentiality exceptions actually will yield the expected benefits of improved public safety. She concludes that legislators should deny public housing authorities access to juvenile records but allow schools limited access to records through a series of school liaisons. These liaisons should attempt to accommodate, on a case-by-case basis, the often competing values of preserving safety in schools while enabling the rehabilitation of children in the juvenile justice system.

INTRODUCTION

During the summer of 2000, I began preparing for a juvenile disposition to follow my client's plea to one count of third-degree sexual assault. As part of the disposition plan, analogous to a criminal sentencing, the court was concerned with my client's school placement, and I fully expected, based on previous conversation with my client's

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parents and a review of his school records, that my client would return to his neighborhood high school where he was to begin the tenth grade. When I arrived at court, my client's father informed me that the principal had refused to allow his son to return to school because of the sexual assault. I was stunned by the school's knowledge of my client's court involvement. Although the incident had appeared in the newspapers and on the local news, no names had been reported, the incident did not occur on school grounds or during the school year, and the victim did not attend the same school as my client. The principal told my client's father that he had learned of the assault from local police. Despite the apparent violations of local confidentiality statutes[1] and school due process standards,[2] my client's father decided not to fight the school and voluntarily transferred his son to an area charter school. My client and his family feared that he would be mistreated by teachers, fellow students, and their parents if he remained at his local high school.

One morning in October of the following year, I arrived at court to represent another client in what I thought would be a routine juvenile probation review. As I entered the courthouse, I was approached by my client's mother, who advised me that she had just received a notice to vacate her public housing apartment. Somehow, the District of Columbia Housing Authority (DCHA) had learned about my client's juvenile drug conviction. With my client's home in jeopardy, the review quickly developed into a discussion about possible revocation of probation or at least temporary placement in a group home. Because my client had been doing fairly well on probation, the judge decided not to revoke at that time but instructed my client to maintain close contact with his probation officer. Shortly thereafter, my client and his mother were in fact evicted and began moving about among various friends and family. With no stable address and no consistent phone number, my client soon lost contact with his probation officer. In February of 2003, the judge finally revoked my client's probation, and he spent thirty days in secure detention. It is unclear how the local housing authority obtained information about my client's juvenile charge, especially given local confidentiality laws and DCHA's

[1] D.C. CODE ANN. §§ 16-2331 to -2335 (Supp. 2003); D.C. CODE ANN. § 16-2336 (2001).

[2] D.C. MUN. REGS. tit. v, §§ 2505–2506 (2001) (setting forth due process requirements—such as right to written notice, conference with school officials, and hearing upon request—for expulsion, transfer, or disciplinary actions in D.C. public schools).

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public statement that it does not routinely obtain juvenile court records or use juvenile arrests to evict tenants.[3]

Before I confronted these two situations, I naively believed that confidentiality was standard and accepted practice, not only in my local community but also nationally, as envisioned by the founders of juvenile court.[4] When I began to research this issue on behalf of my clients, I was surprised to discover fairly pervasive political pressure to erode juvenile confidentiality across the country. Not only did I find evidence of the informal and illegal dissemination of juvenile records, but I also discovered that, in the early 1990s, many state legislatures formally modified or altogether abandoned juvenile confidentiality statutes.

Although there long has been debate in legal scholarship about the media's right to attend juvenile proceedings under the First Amendment,[5] the new confidentiality debate seems to have emerged out of the push for public safety and accountability. Now, while the media is often uninterested in the day-to-day minutiae of juvenile court, confidentiality more routinely is breached through the formal and informal dissemination of juvenile records to agencies and institutions responsible for the care, supervision, or housing of children. In

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[3] Letter from Patricia Gracyalny, Associate General Counsel, District of Columbia Housing Authority (DCHA), to Giovanna Shay, Staff Attorney, Public Defender Service for the District of Columbia (Sept. 24, 2002) (on file with *New York University Law Review*); *see also* Memorandum of Understanding Between DCHA Police Department and the Metropolitan Police Department, § 7.3 (Sept. 15, 1997) (setting forth DCHA Police Department access to Washington Area Law Enforcement System, which excludes juvenile records). My client's eviction purportedly was based on drug activity in the apartment; the investigation began almost immediately after his adjudication in juvenile court. The family did not challenge the eviction.

[4] *See* discussion *infra* notes 16–18 and accompanying text.

[5] *See generally* Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*, 18 YALE L. & POL'Y REV. 155 (1999) (noting competing interests that lead to different policy decisions on openness of juvenile proceedings to public and press); Joshua M. Dalton, *At the Crossroads of* Richmond *and* Gault*: Addressing Media Access to Juvenile Delinquency Proceedings Through a Functional Analysis*, 28 SETON HALL L. REV. 1155 (1998) (arguing that juvenile proceedings should be presumptively open to media and public in order to facilitate systemic reform); Kathleen M. Laubenstein, Note, *Media Access to Juvenile Justice: Should Freedom of the Press Be Limited to Promote Rehabilitation of Youthful Offenders?*, 68 TEMP. L. REV. 1897 (1995) (arguing that media should have access to juvenile proceedings only upon court's determination that public exposure will not adversely affect juvenile's chances for rehabilitation); *see also In re* J.D.C., 594 A.2d 70 (D.C. 1991) (holding confidentiality statute indicates that privacy interests of juveniles are weightier than media's interest in attending proceedings); *In re* A Minor, 563 N.E.2d 1069 (Ill. App. Ct. 1990) (holding that juvenile hearings are presumptively closed and that court has discretion to decide when media may be excluded); *In re* M.C., 527 N.W.2d 290 (S.D. 1995) (affirming lower court's decision to close hearing, noting that confidentiality promotes juvenile rehabilitation).

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this Article, I look closely at national trends and attempt to identify and evaluate this new movement to erode confidentiality.

The Article begins in Part I with an historical overview of the evolution of confidentiality in juvenile court, paying particular attention to early assumptions about the potential for rehabilitating delinquent children and the need to shield juveniles from the stigma that otherwise would interfere with their prospects for a successful future. Part I then looks at two significant waves of attack on juvenile confidentiality. The first wave consists of the due process challenges brought in the 1960s and 1970s. The second consists of the more recent challenges that began in the late 1980s and arose out of claims about the failure of the original goal of rehabilitation. The Article then joins the debate on confidentiality by drawing from recent research in the field of developmental psychology in an effort to reinvigorate early assumptions about amenability to treatment and the impact of stigma. Despite popular perception to the contrary, research over the last three to five years has shown that children and adolescents do in fact remain amenable to treatment and may benefit from juvenile court intervention.

In Part II I examine the practical implications of eroding confidentiality and question whether new confidentiality exceptions actually will yield the expected short- and long-term benefits of improved public safety. I look specifically at how schools and public housing authorities obtain juvenile records, both lawfully and unlawfully, and examine how they use these records to exclude children and their families from the basic benefits of education and housing. The school setting provides a particularly useful framework in which to evaluate confidentiality, because while the disclosure of records to schools may indeed satisfy some important short-term safety and even long-term rehabilitative goals, these benefits may come at great costs to the excluded student and ultimately to society at large. There already has been considerable public debate in many states about the dissemination of records to schools, and a number of states have resolved the issue, at least temporarily, by adopting broad confidentiality exceptions that explicitly allow or require law enforcement officials to disclose juvenile records to schools. Debate around the disclosure of juvenile records to public housing authorities has gained momentum only in the last few years. Housing authorities are now asking judges and policymakers to revisit confidentiality statutes and decide whether to grant or deny them access to facilitate aggressive eviction policies.

In an effort to help legislators respond to housing authority demands and to encourage policymakers to revisit confidentiality exceptions for schools, this Article calls for a more advanced, interdis-

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ciplinary discourse on confidentiality that incorporates lessons learned both from practical experience and from the research of developmental psychologists. Current arguments for and against confidentiality appear too simplistic. Part III of the Article attempts to identify and weigh the many competing interests in the debate. In the school context, arguments in favor of eroding confidentiality and exchanging information fail to recognize how school notification statutes and school expulsion policies work together to inhibit rehabilitation and actually increase crime over time. Arguments against eroding confidentiality, on the other hand, often focus too narrowly on the need to rehabilitate the offending child and have been perceived by some as outdated, naive, and unresponsive to public safety concerns. In the housing context, arguments for and against eroding confidentiality have emphasized the moral and retributive parameters of the debate without adequately contemplating the likely long-term practical implications of record sharing.

The Article concludes in Part III.C that policymakers should deny public housing authorities access to juvenile records under all circumstances, but should create a system whereby schools are granted limited access to those records. While sharing records with schools may be necessary to encourage and facilitate schools' collaboration in the rehabilitation of delinquent children and to address any real and immediate threat to students in the contained school environment, public housing authorities rarely have collaborated in rehabilitation and may be in a better position than schools to assume the risk of crime from unreformed juvenile offenders. Public housing authorities instead should rely on the juvenile and criminal justice systems to detain or incarcerate the most dangerous offenders and should look for other public safety measures to address crime in public housing communities.

As a suggestion for implementing the limited dissemination of records to schools, Part IV of this Article proposes that each jurisdiction appoint a series of "school liaisons" who will coordinate rehabilitative services in the schools and make case-by-case assessments of the need to disseminate court records to school officials to ensure the safety of students and staff. The Article hopes that relying on liaisons will better accommodate the competing but always coexisting values of preserving safety in the schools and rehabilitating children in the juvenile justice system. It recognizes, however, that the school liaison will not be effective unless policymakers repeal or amend overbroad school expulsion statutes and sincerely commit time and money to juvenile rehabilitation. Part IV discusses how a school liaison might be established and begins to identify the factors a liaison

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might consider in deciding whether a child poses an immediate threat to school safety.

I
EVOLUTION OF POLICY REGARDING JUVENILE CONFIDENTIALITY

In order to discuss current issues surrounding the confidentiality of juvenile records in a meaningful way, some knowledge of the juvenile justice system in its historical context is necessary. One cannot evaluate the effects of contemporary legislation and policies that impact court-involved youth without first understanding what the juvenile court was meant to do and without realistically assessing the court's limitations. This Part looks at evolving ideas about confidentiality in the juvenile justice system, particularly with respect to the prospect for rehabilitating delinquent children. Part I.A describes the early juvenile court and its founders' views about children's and adolescents' behavior, including the importance of shielding children from the stigma that accompanies a delinquent label. The Article continues by examining two legal challenges to juvenile confidentiality: the due process cases discussed in Part I.B and the statutory modifications discussed in Part I.C. Despite the skepticism underlying recent attacks on confidentiality, Part I.D shows how recent studies in developmental psychology actually confirm early ideas about children's amenability to treatment and potential for rehabilitation.

A. Establishment and Early Years of Confidentiality: Initial Assumptions About Amenability to Treatment

The first juvenile court was started in 1899, and other courts spread rapidly throughout the country.[6] The decision to create separate and closed juvenile courts arose out of several underlying assumptions or intuitions about children. Early reformers, relying on the new psychology of the day, believed that children were less culpable for their conduct and more amenable to rehabilitation than adults.[7] Reformers believed that children acted in part because of factors beyond their control, such as home and family environment,

[6] Jeffrey A. Butts & Daniel P. Mears, *Reviving Juvenile Justice in a Get-Tough Era*, 33 YOUTH & SOC'Y 169, 171 (2001); Arthur R. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 370 (1996).

[7] Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141–44 (1997).

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poverty, and poor physical or psychological makeup.[8] Children also were viewed as impulsive, immature, and incapable of understanding and controlling their conduct.[9] Even where children could distinguish cognitively between right and wrong, reformers believed that children often were unable to avoid misconduct because of the emotional pressure of peer influence.[10] Children seeking peer approval would be willing to take greater risks than adults and would be unable to anticipate the long-term consequences of their behavior.[11] Later reformers also assumed that children made bad choices because they lacked experience and judgment and had not yet learned lessons in accountability.[12] Given these characteristics, children could not form the requisite criminal intent and thus should not be subject to the policies of punishment, retribution, or deterrence, the usual responses to adult crime.[13]

Because early reformers believed that delinquent children could be treated as if they had a curable disease, rehabilitation became the hallmark of juvenile court.[14] Reformers viewed children as particularly suited for rehabilitation because they were impressionable, malleable, and would respond well to treatment.[15] Juvenile courts were created with the hope that young offenders could be transformed into law-abiding citizens if given the proper interventions.

Shortly after the establishment of separate juvenile courts, confidentiality was identified as an important component of rehabilitation.[16] Reformers hoped that confidential proceedings would protect

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[8] Blum, *supra* note 6, at 359–61 ("Determinism allowed the early reformers to absolve juveniles from moral culpability."). Positivists believed that delinquency is a result of determinants such as environment, psychological condition, and physical makeup. Because a juvenile is not responsible for his delinquency, positivists theorized that the delinquent should not be punished; instead, the causes of the delinquency should be "diagnose[d] and treat[ed] the way doctors diagnose and treat diseases." *Id.*; *see also* Scott & Grisso, *supra* note 7, at 138 ("[T]he job of the court was not to punish, but to rehabilitate and protect its charges.").

[9] Scott & Grisso, *supra* note 7, at 143–44; Blum, *supra* note 6, at 359.

[10] *See* Scott & Grisso, *supra* note 7, at 144.

[11] *Id.* at 147.

[12] *Id.* at 138.

[13] *Id.* at 143–44.

[14] *Id.* at 141–42; *see also* Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 299 (1999) (stating that objective of juvenile court was "to focus on the rehabilitative potential of children"); Blum, *supra* note 6, at 360–61 (noting reformers' belief that advances in sociology, psychology, and physiology that identified causes of juvenile crime also could remedy them).

[15] Scott & Grisso, *supra* note 7, at 142.

[16] *See* Kara E. Nelson, *The Release of Juvenile Records Under Wisconsin's Juvenile Justice Code: A New System of False Promises*, 81 MARQ. L. REV. 1101, 1101–02 (1998) (identifying confidentiality as one of central goals of traditional juvenile justice systems);

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children from the stigma that generally accompanies the publicity of criminal proceedings and would maximize their prospects for rehabilitation.[17] Early architects of juvenile court feared that without confidentiality, the public would brand a child as a criminal and reject him for his behavior, making a healthy readjustment to society difficult.[18]

Fears about the harmful impact of stigma on children have persisted well after the inception of juvenile courts. Confidentiality advocates continue to fear that authority figures and even peers who learn about a child's delinquent conduct forever will view the child as deviant and consciously or subconsciously treat the child differently, expecting the worst.[19] Children who experience the shame and humiliation of labeling, advocates of confidentiality argue, also may develop a poor self-image[20] and/or be socialized into a life of delinquency by responding and acting according to external perceptions and expectations.[21] Rejection by adults also may breed resentment and cause the child to develop negative attitudes toward authority figures. In the long run, stigma may damage the child's positive relationships with classmates, teachers, and other school personnel[22] and prevent him from adequately reassimilating into society, encouraging further delinquent behavior.[23]

Stephan E. Oestreicher, Jr., *Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings*, 54 VAND. L. REV. 1751, 1776 (2001) (noting tradition of closed juvenile proceedings); Blum, *supra* note 6, at 368 (reporting that, by 1920, seven states prohibited disclosure of juvenile records). Now almost every state has some statutory provision for the confidentiality of juvenile hearings and records. *See infra* notes 87–91 and accompanying text.

17 Blum, *supra* note 6, at 368–69.

18 *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 107–08 (1979) (Rehnquist, J., concurring).

19 *See* Delos H. Kelly, *Labeling and the Consequences of Wearing a Delinquent Label in a School Setting*, 97 EDUC. 371, 372–73 (1977) (noting that publicly labeling student as delinquent invites discriminatory treatment by teachers and classmates); Laubenstein, *supra* note 5, at 1905 (explaining how being labeled "delinquent" adversely affects child's employment prospects, likelihood of rehabilitation, and relationships with family, teachers, and peers).

20 Paul R. Kfoury, *Confidentiality and the Juvenile Offender*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 55, 56 (1991).

21 Edith Zober, *The Socialization of Adolescents into Juvenile Delinquency*, 16 ADOLESCENCE 321, 328 (1981).

22 Kelly, *supra* note 19, at 372–73.

23 *See In re* J.S., 438 A.2d 1125, 1129 (Vt. 1981) (stating that confidential proceedings protect juveniles from self-perpetuating stigma that makes "change and growth impossible"); Nelson, *supra* note 16, at 1150 (describing how community rejection leads to worsening self-image, increasing child's commitment "to deviant activities and peers" (citation and quotation omitted)).

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The child also may face "public ridicule" and lose "standing and reputation in the community."[24] Recent news reports, lawsuits, and anecdotal information from across the country provide evidence of children who feel perpetually stigmatized by their juvenile record. In one Connecticut case, the police notified a school, as required by state law, that one of its students had been arrested for possession of marijuana, resulting in the student's expulsion.[25] The state supreme court subsequently ruled that the expulsion was improper, as possession of marijuana off campus did not "markedly interrupt[] or severely impede[] the day-to-day operation of a school."[26] A year after the court's decision, the child's family reported to the media that they still felt "branded" and were making plans to move from the town where they had lived for nearly thirty years.[27] Students stigmatized in this way are likely to experience long-term emotional and social consequences.[28]

Public records also may impede a child's prospects for future employment.[29] When choosing among applicants, employers are less likely to select those with a criminal or juvenile record. Even employers who do not automatically exclude applicants with a record are unlikely to place ex-offenders in positions of power, trust, and authority, thereby limiting the delinquent child's prospects for career advancement and economic stability.[30] Without confidentiality pro-

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[24] *See, e.g.*, Thompson v. Barnes, 200 N.W.2d 921, 926 (Minn. 1972) (discussing claims of suspended high school student).

[25] Packer v. Bd. of Educ. of Thomaston, 717 A.2d 117, 121–22 (Conn. 1998).

[26] *Id.* at 133–34.

[27] Liz Seymour, *Schools Targeting Off-Campus Crimes*, L.A. TIMES, Feb. 15, 1999, Metro Desk at 1.

[28] *See* Whitney Joiner, *One Strike and You're Out of School* (Feb. 2, 2004), *at* http://www.salon.com/mwt/feature/2004/02/02/zero_tolerance/index.html (describing long-term financial consequences, social isolation, anxiety, and depression common among suspended and expelled children and their families, including one young man's eventual suicide); *see also* Nelson, *supra* note 16, at 1149–51 (describing adverse effects of stigma on juvenile offenders' long-term rehabilitation and reassimilation into society); Scott & Grisso, *supra* note 7, at 187 (recommending anonymity for juvenile offenders to limit long-term effects of stigma on youth's future employment and educational prospects).

[29] T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 926–27 (1996); Blum, *supra* note 6, at 394; Laubenstein, *supra* note 5, at 1905; *see also* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 108 (1979) (Rehnquist, J., concurring) (predicting loss of future employment opportunities for delinquent children); *In re* J.D.C., 594 A.2d 70, 76 (D.C. 1991) (quoting *Smith*, 443 U.S. at 107–08 (Rehnquist, J., concurring)); *In re* N.H.B., 769 P.2d 844, 847, 851 (Utah Ct. App. 1989) (noting that publicity can have deleterious effect on juvenile offenders' employment opportunities); *In re* J.S., 438 A.2d 1125, 1129 (Vt. 1981) (predicting that publication of juvenile's name may result in loss of employment opportunities).

[30] Nelson, *supra* note 16, at 1152.

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tections, ex-offenders carry the deviant label through each phase of their lives, lack meaningful opportunities for rehabilitation, and never earn full reentry and status in the community.[31] Where crimes are especially serious and public outrage is particularly great, the risk of long-enduring stigma may be even greater.[32] Advocates who worry about the impact of stigma thus argue that juvenile records should remain confidential so that children will have a second chance at job opportunities and community standing.[33]

Advocates of confidentiality also worry that publicity will embarrass family members and cause or exacerbate tension and resentment within the family.[34] The stigma of a child's conduct marks the parent and other significant caretakers as well as the child. Some family members may be embarrassed simply by the child's involvement in the system; others may have their own privacy interests at stake. Because a child's family is so integrally involved in the rehabilitation of delinquent juveniles, many juvenile court records include confidential psychiatric and psychological information about the child's parents or siblings.[35] Thus some family members will have an independent interest in maintaining the confidentiality of juvenile records. When records are public and parents are embarrassed, tensions in the home may emerge, breaking down support systems necessary for effective rehabilitation or depriving the child of adequate support and supervision.[36] Family disputes even may cause parents to

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[31] *See* Doe v. Webster, 606 F.2d 1226, 1234–36 (D.C. Cir. 1979) (stating that drafters of federal Youth Corrections Act, 18 U.S.C. §§ 5005–5024 (1976) (repealed 1984), were concerned with sparing youth offenders from stigma and loss of economic opportunity that accompany "ex con" label).

[32] *See* United States v. Three Juveniles, 61 F.3d 86, 93 n.7 (1st Cir. 1995) ("It is precisely *because* the alleged crimes have provoked so much public outrage and antipathy that closure becomes more appropriate . . . ."); *see also* Westcott v. Yuba County, 163 Cal. Rptr. 385, 389 (Cal. Ct. App. 1980) (finding that minors involved in shooting incident risked greater stigma and ridicule from publicity than those involved in less serious offense).

[33] *Webster*, 606 F.2d at 1234–35.

[34] *Smith*, 443 U.S. at 108 (Rehnquist, J., concurring); Kfoury, *supra* note 20, at 56; Laubenstein, *supra* note 5, at 1901.

[35] *See, e.g.*, *In re* Sheldon G., 583 A.2d 112, 121–22 (Conn. 1990) (noting that prior to disposition of any delinquency case, court must order investigation of delinquent child's home and "habits and character of his parents or guardians").

[36] *See, e.g.*, *In re* B.J.W., 595 A.2d 1132, 1134 (N.J. 1991) (closing trial of teenage girl to public based on psychologist's report that publicity would interfere with "family bonding" necessary for rehabilitation); *see also In re* J.S., 438 A.2d 1125, 1129 (Vt. 1981) (noting likelihood that "[p]ublic proceedings could so embarrass the youth's family members that they withhold their support in rehabilitative efforts"); Janet Gilbert et al., *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1155 (2001) (explaining importance of family in achieving juvenile justice system's rehabilitative goals); Laubenstein, *supra* note 5, at 1904 (noting that strong family relationship is essential to rehabilitation).

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force a child out of the home. Children without a stable home structure or strong family ties have limited prospects for rehabilitation and are likely to reoffend.[37]

Record sharing not only carries practical implications for children and families, but is also contrary to the traditional philosophy of juvenile court. Publicity is viewed as punitive when it brings "shame and humiliation upon the juvenile and her family."[38] While such publicity may be an accepted punishment for adults who engage in criminal conduct, it does not comport with the rehabilitative model of juvenile court.

B. The First Attack on Confidentiality: Due Process and First Amendment Challenges

Despite continued support among many child advocates, the presumption of confidentiality has undergone at least two significant waves of attack since its inception. The first came in conjunction with what some have called the due process movement in juvenile court.[39] In the 1960s, a new set of reformers began to challenge the absence of due process in juvenile proceedings.[40] They argued that public access to the courtroom and public scrutiny of the juvenile process may improve the integrity of the courts by providing a check on corrupt practices such as racism or ineffective assistance of counsel.[41] At least one proponent of public access has argued that publicity may discourage perjury by witnesses in juvenile cases and ensure a higher level of skill at the proceedings.[42]

The Supreme Court began responding to these complaints in *In re Gault*,[43] the first in a series of cases that conferred specific due process rights on children in juvenile proceedings.[44] In *Gault*, the Court

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[37] Nelson, *supra* note 16, at 1153–54.

[38] Allyson Dunn, Note, *Juvenile Court Records: Confidentiality v. The Public's Right to Know*, 23 AM. CRIM. L. REV. 379, 381 (1986).

[39] *See* Scott & Grisso, *supra* note 7, at 137 & n.3 (describing how, beginning in late 1960s, courts and legislatures "began to slowly chip away at the foundations of the juvenile justice system" as they introduced procedural regularity measures); Blum, *supra* note 6, at 372–73.

[40] *See* Butts & Mears, *supra* note 6, at 174; Oestreicher, *supra* note 16, at 1764–66; Blum, *supra* note 6, at 372–73.

[41] *See, e.g.*, Gordon A. Martin, Jr., *Open the Doors: A Judicial Call to End Confidentiality in Delinquency Proceedings*, 21 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 393, 400–01 (1995).

[42] *Id.* at 401 (citation omitted).

[43] 387 U.S. 1, 31–57 (1967) (holding that juveniles have right to receive adequate and timely notice of charges, to consult with lawyer, to confront and cross-examine witnesses, and to not incriminate themselves).

[44] Later cases in the series included *Breed v. Jones*, 421 U.S. 519, 540–41 (1975) (applying Fifth Amendment guarantee against double jeopardy in juvenile cases), and *In re*

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decided that, although the guarantees of due process assured juveniles the right to counsel,[45] the right to timely notice of charges,[46] the opportunity to confront witnesses,[47] and the right against self-incrimination,[48] due process did not prohibit states from conducting confidential juvenile proceedings.[49] While expressing great concern about the failure of juvenile courts to observe fundamental requirements of due process, the Court explicitly noted that many aspects of the juvenile court process still were valued and should remain unencumbered by constitutional restraints.[50] Among those valued aspects were efforts to save juveniles from the stigma associated with the "criminal" label, decisions not to disqualify juvenile offenders from civil service, and policies that "hide" or protect juvenile records from the public eye.[51] In addition, although there was early evidence of evolving skepticism about the viability of rehabilitation and increasing support for juvenile accountability,[52] the belief in rehabilitation was not rejected in the due process era, and youth still were viewed as less mature and less deserving of punishment than adults.[53] Even when the Court expressed fear that children were getting "the worst of both worlds" because they received neither the promised rehabilitation from juvenile court nor the procedural rights of adult defendants,[54] the Court ultimately concluded that principles of due process do not prevent states from providing and improving upon provisions for the confidentiality of court and law enforcement records that relate to juveniles.[55]

In 1971 the Court again commented briefly on the issue of juvenile confidentiality in *McKeiver v. Pennsylvania*, when it decided whether due process guarantees juveniles a right to trial by jury.[56] In

Winship, 397 U.S. 358, 368 (1970) (ruling that due process requires that juveniles be found guilty by proof beyond reasonable doubt). *See also* Oestreicher, *supra* note 16, at 1765 (stating *Gault*'s holding). *But see* McKeiver v. Pennsylvania, 403 U.S. 528, 545–51 (1971) (finding trial by jury in state juvenile delinquency proceedings not constitutionally required).

45 *Gault*, 387 U.S. at 41.

46 *Id.* at 33.

47 *Id.* at 57.

48 *Id.* at 55.

49 *Id.* at 25.

50 *Id.* at 22.

51 *Id.* at 23–24.

52 Blum, *supra* note 6, at 371–72.

53 Scott & Grisso, *supra* note 7, at 145–46; *see* Slobogin, *supra* note 14, at 299–300 (suggesting that amenability to treatment, which may never have been juvenile court's primary focus, has been relegated to secondary importance today).

54 *Gault*, 387 U.S. at 18 n.23 (citing Kent v. United States, 383 U.S. 541, 556 (1966)).

55 *Id.* at 25.

56 403 U.S. 528 (1971).

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concluding that a jury trial is not constitutionally required for juveniles, the Court expressed concerns that jury trials might adversely affect the juvenile justice system with publicity, unnecessary delay, formality, and adversarial proceedings.[57] Thus, in both *Gault* and *McKeiver*, the Court recognized the value of confidentiality to juvenile court and initially left the states to decide whether and to what extent confidentiality would be preserved.

The Court, however, was forced to revisit the issue in a second series of cases involving asserted limitations on state efforts to preserve confidentiality. This time, the Court determined that, although states have a legitimate interest in preserving a juvenile offender's anonymity, this interest in confidentiality will be outweighed when it interferes with another's fundamental rights, such as a criminal defendant's Sixth Amendment right to confront witnesses at trial or the media's right to access or publish lawfully obtained information. First, in *Davis v. Alaska*, the Court reversed a trial court's order precluding a criminal defendant from cross-examining the key government witness, a juvenile offender.[58] The defendant had intended to show bias arising from the witness's probationary status after a juvenile adjudication.[59] The Court found that the defendant's rights outweighed the state's interest in preserving the offender's anonymity.[60] A series of three First Amendment cases decided between 1977 and 1982 placed more significant restrictions on the states' interest in maintaining juvenile confidentiality. In those cases the Court made clear that the media cannot be prohibited from publishing information, even about sensitive juvenile matters, when media representatives obtained that information while lawfully present at a juvenile proceeding.[61] However, because the Court did not rule on the constitutional validity of any state statute that denied the media access to juvenile court proceedings or records in the first place, none of these cases undercut the fundamental baseline of confidentiality for juvenile offenders that existed in most of the states.

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[57] *Id.* at 550.

[58] 415 U.S. 308 (1974).

[59] *Id.*

[60] *Id.* at 319.

[61] Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (forbidding state from excluding press and public from criminal trial involving testimony of juvenile sex-crime victim without showing that closure is necessary to serve compelling state interest); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979) (holding that statute prohibiting truthful publication of juvenile's name violated First and Fourteenth Amendments); Oklahoma Publ'g Co. v. Dist. Court, 430 U.S. 308 (1977) (prohibiting trial court from ordering newspaper to refrain from publishing juvenile's name when members of press were present at hearing and no objections were made to their presence).

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C. *The Second Attack on Confidentiality: The Public Safety Challenge and the Perceived Failure of Juvenile Rehabilitation*

The second major attack on the presumption of confidentiality in juvenile court began in the late 1980s and early 1990s, when concerns about deteriorating public safety and the need for accountability became rampant.[62] Preserving confidentiality has become less popular, as it appears to frustrate society's increasing desire to hold delinquents accountable for their actions.[63] As long as the public perceives that crime is increasing,[64] citizens will demand greater accountability and responsibility from offenders. Public access to the justice system may satisfy "prophylactic" needs of the public, especially in serious cases, by tempering community outrage and providing "an outlet for community concern, hostility, and emotion."[65] By granting public access, government leaders can respond to public fear by showing how, in their assessment, the system effectively responds to juvenile crime.[66]

The rise of the victims' rights movement also has had an effect on the public's tolerance of and response to juvenile crime. In an effort to secure victims greater access to and influence in the criminal and juvenile justice systems, victims' rights advocates have fought for the right to attend and participate in delinquency proceedings.[67] A

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[62] *See* Marygold S. Melli, *Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 390 (1996) (describing how, since late 1980s, juvenile court reform has imported criminal justice objectives, including accountability and retribution); Scott & Grisso, *supra* note 7, at 137 (identifying three waves of attack on confidentiality and describing most recent one, beginning in late 1980s, as response to "public fear and anger" at youth violence).

[63] Blum, *supra* note 6, at 353 (1996); *see also* Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System,"* 22 PEPP. L. REV. 907, 918–20, 925–26 (1995) (arguing for "justice model" in juvenile court that relies on determinate dispositions and rejects confidentiality in effort to increase offender accountability); Danielle R. Oddo, Note, *Removing Confidentiality Protections and the "Get Tough" Rhetoric: What Has Gone Wrong with the Juvenile Justice System?*, 18 B.C. THIRD WORLD L.J. 105, 119–20 (1998) (discussing view that accountability rather than expungement will deter juvenile offenders from committing crimes as adults).

[64] See *infra* Part III.A for a full discussion of the public's perception versus the reality of juvenile crime rates.

[65] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980); *see also* REPORTERS COMM. FOR FREEDOM OF THE PRESS, ACCESS TO JUVENILE COURTS (1999), http://www.rcfp.org/juvcts/index.html (observing that media coverage of high profile crimes involving minors can change public attitudes about juvenile justice); Kfoury, *supra* note 20, at 57 (arguing that access to juvenile proceedings reassures communities that system is working to protect them, deters delinquency, ensures greater fairness in proceedings, and encourages juvenile courts and agencies to be more effective).

[66] Martin, *supra* note 41, at 394–95; Oddo, *supra* note 63, at 121.

[67] *See* Laurie Mason, *A Law for Victims of Juvenile Crime: Bill Would Ensure Statewide Enforcement of Rights*, LEGAL INTELLIGENCER, Oct. 4, 2000, at S1, WL 10/4/2000

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number of states have amended state constitutions to recognize the rights of victims of adult and juvenile crime.[68] Other states have adopted statutory amendments that explicitly grant victims the right to attend and participate in various stages of juvenile delinquency proceedings.[69] Victims' rights advocates hope that granting victims greater access to and participation in the proceedings will help the system better accommodate the needs and concerns of those harmed by crime.[70]

Proponents of eroding confidentiality also argue that juvenile records should be available to law enforcement officials who can anticipate crime and protect the community from those most likely to commit crimes in the future.[71] Some advocates go further and argue that citizens, neighbors, and teachers have a *right* to "fair warning" about children or adolescents who pose a danger to others.[72] Similarly, some argue that employers are entitled to information contained in juvenile records when selecting employees, as they seek to avoid personal loss from theft or violence and escape liability that might arise under an employer's common law duty to provide a safe work environment.[73] Employers can try to avoid these losses by declining applicants with juvenile and criminal records.

In response to concerns about the impact of stigma, advocates of public records argue that any stigma associated with disclosing juvenile records is beneficial because it serves as an additional deterrent to the undesirable delinquent conduct.[74] Under this theory, a child will abstain from criminal conduct in order to avoid embarrassment to

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Legal Intelligencer S1; Kellie A. Wagner, *Testing the Reach of Victims' Rights: Court Will Decide Whether Amendment Applies to Juvenile Proceedings*, CONN. L. TRIB., Mar. 26, 2001, at 1, WL 3/26/2001 Conn. L. Trib. 1.

[68] ALASKA CONST. art. 1, § 24; MO. CONST. art. 1, § 32; OKLA. CONST. art. 2, § 34; OR. CONST. art. 1, § 42; S.C. CONST. art. 1, § 24; UTAH CONST. art. 1, § 28.

[69] ARIZ. REV. STAT. ANN. § 8-381 to -419 (West 1999); CAL. WELF. & INST. CODE § 676.5 (West Supp. 2004); FLA. STAT. ch. 960.001 (Supp. 1994); IOWA CODE ANN. § 915.24–.29 (West 2003); MASS. GEN. LAWS ch. 258B, §§ 1, 3 (Supp. 2003); MO. REV. STAT. § 595.209 (2000 & Supp. 2003); N.J. STAT. ANN. § 2A:4A-60(c)(1), -60(i) (West Supp. 2003); UTAH CODE ANN. § 77-38-4(1) (2003).

[70] For a history of the victims' rights movement, see Elizabeth Beck et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 387–90 (2003); Lynne Henderson, *Co-Opting Compassion: The Federal Victim's Rights Amendment*, 10 ST. THOMAS L. REV. 579, 581–83 (1998).

[71] Funk, *supra* note 29, at 924–25.

[72] *See* Blum, *supra* note 6, at 388 (arguing that protecting confidentiality of most serious juvenile offenders does little for juveniles while concealing threats to public safety from rest of society); Oddo, *supra* note 63, at 121 (quoting former New Hampshire Governor that "citizens have a right to know who is committing what crimes and where").

[73] Funk, *supra* note 29, at 926–30.

[74] Blum, *supra* note 6, at 391–92.

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himself and his family and to keep from jeopardizing future opportunities.[75] Furthermore, where publicity has not been an effective deterrent and juveniles subsequently reoffend as adults, advocates maintain that judges in criminal court need delinquency records so that sentencing adequately will respond to the danger a defendant poses to safety in the community. This argument also reflects the retributive theory that an adult with a juvenile record deserves more punishment than an adult with no juvenile record.[76]

National perceptions of high and rising crime have generated a great deal of public pressure for state legislatures to get tough on juvenile crime.[77] Responding to this perceived increase in serious crime by children, policymakers have begun to question early assumptions about the differences between children and adults.[78] Many have rejected the notion that children are less culpable and less blameworthy than adults and have argued instead that young offenders of today are actually quite savvy and sophisticated.[79] A much less idealized view of adolescence now accompanies increasing skepticism about the likelihood of rehabilitation.[80] Given current views that children are indistinguishable from adult criminals,[81] policymakers now often argue that children who engage in adult-like criminal behavior should be punished like adults. Some constituents are ready to abandon the rehabilitative philosophy altogether and have called upon policymakers either to do away with juvenile court in its entirety or to strip the court of its rehabilitative features, such as individualized "sentencing" and confidentiality.[82] These proponents argue that juveniles are not and cannot be rehabilitated, either because previous attempts have failed or because some juveniles are fundamentally hard-wired for criminal conduct.[83]

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[75] *Id.* at 392.

[76] Funk, *supra* note 29, at 914–23.

[77] Scott & Grisso, *supra* note 7, at 137–38.

[78] *Id.* at 137, 148–49; *see* Butts & Mears, *supra* note 6, at 170 (noting recent trend to increase consequences of juvenile lawbreaking and to shift focus to incarceration).

[79] Scott & Grisso, *supra* note 7, at 138, 148–49.

[80] *Id.* at 138.

[81] *Id.*

[82] *Id.* at 138, 150. *See generally* Funk, *supra* note 29 (arguing against expungement of juvenile records); Rossum, *supra* note 63 (advocating replacement of "treatment model" in juvenile court with "justice model" and its determinate sanctions); *see also* Blum, *supra* note 6, at 353, 397–400 (proposing that confidentiality be abandoned for juveniles who commit acts that would constitute felonies if committed by adults). See *infra* notes 82–94 and accompanying text for further discussion of legislative responses to public safety concerns.

[83] Funk, *supra* note 29, at 905–11. Funk writes that, although a small subset of juveniles can be rehabilitated, most attempts at rehabilitation fail. *Id.* at 908–09. "Juvenile delinquents learn to think like criminals in early childhood, and . . . patterns of chronic

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Legislatures have responded to these public demands by introducing accountability and punishment into juvenile court and have begun to treat rehabilitation as a secondary objective.[84] Some states even revised juvenile court purpose clauses in the 1980s to reflect a shift away from rehabilitation and toward public safety, punishment, and individual accountability.[85] States now may be willing to provide therapeutic and rehabilitative services to children only to the extent that such services appear compatible with the safety of the community. Other manifestations of the public safety attack are the use of mandatory minimum sentences in juvenile court, the imposition of penalties that mirror those used in adult court, and the increased transfer of juveniles to adult criminal court.[86]

Confidentiality has been especially hard hit by the public safety and accountability movement. As the rehabilitative philosophy of juvenile court falls away, confidentiality loses its place. While almost every state still has some statutory provision for the confidentiality of juvenile hearings and records, the majority of states now grant multiple exceptions to the general rule. In many states, these exceptions eviscerate the rule. Beginning in the 1990s, a number of states abandoned presumptive closure statutes entirely and opened juvenile proceedings to the public.[87] Now only four states have absolute mandatory closure statutes.[88] Fourteen states have statutes that pre-

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criminality remain stable throughout the late teens and into adulthood." *Id.* at 910. He relies on a public safety rationale for the erosion of confidentiality, *id.* at 914–21, but also mentions the retributive idea that juvenile records should not be expunged because an adult with a juvenile record deserves more punishment than an adult with no juvenile record, *id.* at 921–23. *See also* Mark W. Lipsey, *Can Rehabilitative Programs Reduce the Recidivism of Juvenile Offenders? An Inquiry into the Effectiveness of Practical Programs*, 6 VA. J. SOC. POL'Y & L. 611, 611 (1999) (noting argument that rehabilitative programs do not reduce recidivism); Rossum, *supra* note 63, at 907–09 (arguing that serious juvenile crime is soaring while public's confidence in juvenile justice system's effectiveness is plummeting); Blum, *supra* note 6, at 363–72 (describing erosion of faith in ability of juvenile justice system to rehabilitate juvenile criminals successfully).

84 Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 843–45 (1988); Rossum, *supra* note 63, at 918–22; Slobogin, *supra* note 14, at 299–300; Blum, *supra* note 6, at 353; Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 485–86 (1995) (arguing that state legislatures have "rejected the exclusively rehabilitative model" in favor of more punitive approach).

85 Feld, *supra* note 84, at 842–45.

86 Butts & Mears, *supra* note 6, at 175–76; Lipsey, *supra* note 83, at 611; Scott & Grisso, *supra* note 7, at 149–50.

87 Oestreicher, *supra* note 16, at 1753–54.

88 States mandating closed proceedings are Connecticut, Nebraska, New Hampshire, and Oregon. CONN. GEN. STAT. ANN. § 46b-122 (West 1995); NEB. REV. STAT. § 43-277.01 (1998); N.H. REV. STAT. ANN. § 169-B:34(I)(a) (Supp. 2003); OR. UNIF. TRIAL CT. R.

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sumptively open juvenile proceedings but allow the judge discretion to close them upon petition by the child or guardian;[89] sixteen states close proceedings when the child is young or charged with a minor offense, but automatically open them if the child is over a specific age and/or is charged with a serious, enumerated offense;[90] and seventeen states presumptively close juvenile proceedings but allow judges to open proceedings upon petition by an interested party.[91]

Confidentiality also has been eroded in more indirect ways. In a number of states, sex offender registration laws now include juveniles on state registries;[92] law enforcement databases include DNA profiles

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3.180(2)(c) (2003), *available at* http://www.ojd.state.or.us/programs/utcr/documents/2003UTCR.pdf.

[89] States with presumptively open proceedings are Arizona, Arkansas, Colorado, Florida, Iowa, Kansas, Maryland, Michigan, Montana, Nevada, New Mexico, North Carolina, Ohio, and Washington. ARIZ. JUV. CT. R. 19(B); ARK. CODE ANN. § 9-27-325(i)(2) (Michie Supp. 2003); COLO. REV. STAT. § 19-1-106(2) (2003); FLA. STAT. ANN. § 985.205(1) (West 2001); IOWA CODE ANN. § 232.39 (West 2000); KAN. STAT. ANN. § 38-1652(a) (2000) (limiting court's discretion to close proceedings to those juveniles under sixteen years of age); MD. R. JUV. CAUSES § 11-110 (2002); MICH. COMP. LAWS ANN. § 712A.17(7) (West 2002); MONT. CODE ANN. § 41-5-1502(7) (2003); NEV. REV. STAT. 62.193(1) (2001); N.M. STAT. ANN. § 32A-2-16(B) (Michie Supp. 1999); N.C. GEN. STAT. § 7B-2402 (2000); OHIO REV. CODE ANN. § 2151.35(A)(1) (West Supp. 2003); WASH. REV. CODE ANN. § 13.40.140(6) (West 1993).

[90] States with open proceedings for children over a certain age or charged with specifically enumerated offenses are California, Delaware, Georgia, Hawaii, Idaho, Indiana, Louisiana, Maine, Minnesota, Missouri, North Dakota, Pennsylvania, South Dakota, Texas, Utah, and Virginia. CAL. WELF. & INST. CODE § 676(a) (West Supp. 2004); DEL. CODE ANN. tit. 10, § 1063(a) (1999); GA. CODE ANN. § 15-11-78 (2001); HAW. REV. STAT. §§ 571-41(b), -84.6 (Supp. 2001); IDAHO CODE § 20-525(1) (Michie 1997); IND. CODE ANN. §§ 31-32-6-2, -32-6-3 (West 1999); LA. CHILD. CODE ANN. art. 879 (West Supp. 2004); ME. REV. STAT. ANN. tit. 15, § 3307(2) (West 2003); MINN. STAT. ANN. § 260B.163(c) (West 2003); MO. ANN. STAT. § 211.171(6) (West Supp. 2004); N.D. CENT. CODE § 27-20-24(5) (Supp. 2003); 42 PA. CONS. STAT. § 6336(e) (2002); S.D. CODIFIED LAWS § 26-7A-36 (Michie 1999); TEX. FAM. CODE ANN. § 54.08 (Vernon 2002); UTAH CODE ANN. § 78-3a-115 (2002); VA. CODE ANN. § 16.1-302(C) (Michie 2003).

[91] States with presumptively closed proceedings are Alabama, Alaska, the District of Columbia, Illinois, Kentucky, Massachusetts, Mississippi, New Jersey, New York, Oklahoma, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, Wisconsin, and Wyoming. ALA. CODE § 12-15-65(a) (Supp. 2002); ALASKA STAT. § 47.10.070(a) (Michie 2002); D.C. CODE ANN. § 16-2316(e) (2001); 705 ILL. COMP. STAT. ANN. 405/1-5(6) (West Supp. 2003); KY. REV. STAT. ANN. § 610.070(3) (Michie 1999); MASS. GEN. LAWS ANN. ch. 119, § 65 (West 2003); MISS. CODE ANN. § 43-21-203(6) (1999); N.J. CT. R. 5:19-2(a)(1)–(a)(2) (2002); N.Y. FAM. CT. ACT § 341.1 (Consol. 1999); OKLA. STAT. tit. 10, § 7303-4.2 (Supp. 1997) (specifying presumptively closed proceedings for first-time offenders, but mandating public proceedings for subsequent adjudications); R.I. GEN. LAWS § 14-1-30 (2002); S.C. CODE ANN. § 20-7-755 (Law. Co-op. Supp. 2003); TENN. CODE ANN. § 37-1-124(d) (2001); VT. STAT. ANN. tit. 33, § 5523(c) (2001); W. VA. CODE ANN. § 49-5-2(i) (Michie 2001); WIS. STAT. § 48.299(1)(a) (2001-02); WYO. STAT. ANN. § 14-6-224(b) (Michie 2003).

[92] IDAHO CODE § 18-8402 (Michie Supp. 2003); MICH. COMP. LAWS § 769.1(13) (2000); OKLA. STAT. ANN. tit. 10, § 7308-1.3 (West Supp. 2004); *see* Stacey Hiller, Note, *The*

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of juvenile offenders;[93] juvenile drug courts and other specialty courts regularly share information with other public and private agencies;[94] interagency collaboratives facilitate the exchange of juvenile records among law enforcement officials, schools, and public housing authorities;[95] and some states now permit or even require law enforcement personnel to notify schools when students have been arrested.[96]

At the beginning of the twenty-first century, the public safety agenda continues to drive the debate on confidentiality and rehabilitation. Therefore, current discussions generally reflect both a utilitarian desire to improve public safety through threatened publicity and severe public consequences, and a retributive desire to punish young offenders with sanctions that approximate those for adults in criminal courts.[97] Public safety advocates expect that eroding juvenile confidentiality will deter crime, reduce recidivism, and empower the public to protect itself from known offenders. It is not at all clear, however, that publicity and punishment will generate these desired improvements in public safety, nor does it appear that rehabilitation has forever failed as a viable response to juvenile crime. The remainder of this Article attempts to address these questions.

Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure, 7 B.U. PUB. INT. L.J. 271 (1998) (arguing that public disclosure of juvenile sex offenders' identities under registration laws inhibits rehabilitation efforts); *see also In re* Welfare of C.D.N., 559 N.W.2d 431 (Minn. Ct. App. 1997) (holding that Minnesota's application of sex offender registration statute to juveniles does not violate due process).

[93] *See, e.g.*, ALA. CODE § 15-20-27 (2002); ARIZ. REV. STAT. ANN. § 13-610(E) (West Supp. 2003); MICH. COMP. LAWS ANN. § 712A.18k(9) (West 2000); N.J. STAT. ANN. § 53:1-20.20(b), (e) (West 2001); TENN. CODE ANN. § 40-35-321(b) (2003); *see* Jonathan Kimmelman, *Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking*, 28 J.L. MED. & ETHICS 209, 210, 219 (2000) (listing twenty-six states with laws including juveniles in DNA collection); Rochelle L. Haller, Note, *The Innocence Protection Act: Why Federal Measures Requiring Post-Conviction DNA Testing and Preservation of Evidence Are Needed in Order to Reduce the Risk of Wrongful Executions*, 18 N.Y.L. SCH. J. HUM. RTS. 101, 104 n.15 (2001) (stating that laws of twenty-six states include juvenile offenders in DNA collection); *see also In re* Appeal in Maricopa County, 930 P.2d 496 (Ariz. Ct. App. 1996) (holding mandatory DNA testing does not violate juveniles' right to privacy).

[94] IDAHO CODE § 19-5606 (Michie Supp. 2003); *see also* CAL. HEALTH & SAFETY CODE § 11970 (West Supp. 2004) (enacting temporary measure effective Sept. 30, 1998 to Jan. 1, 2004 enabling information exchange among state and county agencies).

[95] *See* discussion *infra* Part II.

[96] *See* discussion *infra* Part II.A.1(c).

[97] *See* Scott & Grisso, *supra* note 7, at 177–79 (pointing out that under utilitarian calculus, when society feels increasing need to punish to maintain safety, it affords less leniency to youthful offenders).

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D. *The Validity of Original Assumptions and the Viability of Rehabilitation Today*

Despite the prevailing legislative move to erode confidentiality, many child advocates still value confidentiality and retain hope for the prospects of rehabilitation in juvenile court.[98] In today's political climate, however, neither confidentiality nor the philosophy of rehabilitation can survive solely on the original hypotheses of the early juvenile court. In an effort to reinvigorate the debate, this Section draws from the work of several developmental psychologists who recently have revisited nineteenth-century theories about the malleability and culpability of children.

Recent research confirms that there are in fact important differences between children, adolescents, and adults, just as early juvenile court advocates believed. The studies specifically validate two of the key foundations of the early court: Children do tend to be more malleable and amenable to treatment than adults,[99] and cognitive and psychosocial differences between children and adults do affect the choices and decisions they each make.[100]

Contrary to recent arguments that most adolescent offenders of today are on their way to becoming career criminals,[101] current scientific data support the nineteenth-century theory that children will mature out of crime from the teen years to young adulthood.[102] Contemporary studies show that only a small group of young offenders will persist in a life of crime as adults and that criminal behavior by most adolescents will begin to decline at age seventeen.[103] It may be that young people who engage in crime during this period of adolescence, subconsciously or intentionally, set out to make a "personal statement[ ] of independence," but soon desist as they recognize the costs associated with crime, such as reduced employment opportunity.[104]

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98 *See* Butts & Mears, *supra* note 6, at 169–71; Slobogin, *supra* note 14, at 301.

99 Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles Be Treated as Adults?*, 63 FED. PROBATION 52, 53–54 (1999) [hereinafter Steinberg & Cauffman, *A Developmental Perspective*]; Laurence Steinberg & Elizabeth Cauffman, *The Elephant in the Courtroom: A Developmental Perspective on the Adjudication of Youthful Offenders*, 6 VA. J. SOC. POL'Y & L. 389, 411–14 (1999) [hereinafter Steinberg & Cauffman, *The Elephant in the Courtroom*].

100 Scott & Grisso, *supra* note 7, at 138–40. The social science research on adolescent culpability and amenability to treatment is new and developing. Thus the work of Cauffman, Grisso, Scott, and Steinberg has not yet been challenged or critiqued in other social science literature.

101 Funk, *supra* note 29, at 910–11.

102 Scott & Grisso, *supra* note 7, at 154, 188.

103 *Id.* at 154.

104 *Id.* at 156.

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Studies in developmental psychology, especially those led by Thomas Grisso and Elizabeth Scott, and Laurence Steinberg and Elizabeth Cauffman, also help us understand why children think differently than adults.[105] An individual's capacity to process information and think critically about the consequences of his actions will improve with age, in part because his general fund of information will increase and in part because his cognitive skills naturally will mature and develop.[106] Generally, the capacity to reason and understand develops progressively and substantially from preadolescence through the late teen years and adulthood. There is also new, though somewhat tentative, research that connects a child's decisionmaking with various psychosocial factors associated with adolescence.[107] For example, some evidence supports the traditional assumption that teens are more susceptible to peer influence than adults.[108] Because adolescents measure their own behavior by comparing and conforming it to the behavior of others, peer influence may lead to crime through either direct peer pressure or a more subtle desire for peer approval. The impact of peer influence appears to peak at about age fourteen, however, so peer pressure may help explain only the conduct of some younger adolescents.[109] For older adolescents, there is evidence that they, along with young adults, generally take more risks with health and safety than do older adults, because they are less aware of risks, calculate the probability of risks differently, and value risks differently.[110] Adolescents also appear to have different temporal perceptions than adults. An adolescent often will fail to weigh the importance of the future adequately and instead will focus on short-term consequences, especially in high-stress situations.[111]

Much of the research on cognitive differences between adults and children has been generated in connection with studies on the question of culpability—that is, the research seeks to determine whether there is an age below which individuals should not be held culpable for their actions by virtue of normal psychological immaturity.[112] While the research does not support a categorical presumption of non-

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105 *See generally id.*; Steinberg & Cauffman, *A Developmental Perspective*, *supra* note 99.

106 *See* Scott & Grisso, *supra* note 7, at 157 ("It is generally recognized that decision-making capacities increase through childhood into adolescence . . . .").

107 *Id.* at 162–67.

108 *Id.* at 162.

109 *Id.*

110 *Id.* at 163.

111 *Id.* at 164–65.

112 For a discussion of culpability and its relation to chronological age, see Steinberg & Cauffman, *A Developmental Perspective*, *supra* note 99, at 52–56.

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responsibility or nonculpability based solely on immaturity,[113] it does support a presumption of diminished capacity that is useful as it relates to the question of rehabilitation and adolescents' amenability to treatment.[114]

Several features of adolescence make individuals between the ages of twelve and seventeen particularly amenable to treatment. First, adolescence is a time when individuals experience significant and rapid change in their capacities.[115] In this growth period, experiences in the family, peer group, school, and other settings still may influence the child's course and development.[116] Thus family counseling and appropriate mentoring might direct a child's path away from crime. One also would expect to see the most evidence of "plasticity" in response to environmental change,[117] so that a significant change in the school or home environment is likely to bring change in the child. Although age alone cannot determine whether someone will be amenable to treatment, features of adolescence certainly give reason to believe that children can change.

Adolescents not only respond well to the positive influences of rehabilitation, but they also respond poorly to the negative influences of mistreatment and perceived injustice. Because adolescence is such an important formative period, negative and unresolved life experiences will become firmly established and increasingly difficult to alter.[118] Negative events that occur during adolescence often "cascade" into adulthood, particularly in the realms of education, work, mental and physical health, family, and interpersonal relationships.[119]

These findings tie directly into the current confidentiality debate. If eroding confidentiality does in fact cause stigma, peer rejection, family tension, and the loss of education or employment opportunities during adolescence,[120] then we should expect to see negative adolescent responses carry into adulthood with the decline of confidentiality protections. A child's negative view of authority figures may become firmly rooted when adolescents are rejected by teachers or prospec-

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113 *See* Scott & Grisso, *supra* note 7, at 160, 174 (finding that by mid-adolescence, "youthful capacities for reasoning and understanding approximate those of adults"); Steinberg & Cauffman, *A Developmental Perspective*, *supra* note 99, at 56 (stating that cognitive differences between young people and adults appear to level out at about age twelve or thirteen).

114 *See* Scott & Grisso, *supra* note 7, at 174 (noting that evidence shows that adults are distinguishable from most delinquents in ways that support reduced culpability for minors).

115 *See* Steinberg & Cauffman, *A Developmental Perspective*, *supra* note 99, at 53.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

120 *See* discussion *supra* Part I.A.

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tive employers who label them deviant, and the deteriorating interpersonal skills that result from these circumstances may have a life-long cumulative impact that is difficult to repair.[121] Policymakers cannot fairly resolve the debate on confidentiality without understanding the psychological impact of stigma on young people and should recognize that juvenile justice policies that generate a particularly negative response during adolescence may be costly.

Given current findings regarding differences in the psychological development of children and adults, distinctions between criminal and juvenile justice policy remain as scientifically appropriate now as they were at the inception of juvenile court. Children of today continue to age out of criminal conduct after adolescence and are no less amenable to treatment than psychologists believed at the end of the nineteenth century. These differences suggest that successful crime prevention will require different strategies for the two populations, and more importantly, that the use of inappropriate strategies with adolescents may yield costly, long-term consequences.

II

PRACTICAL IMPLICATIONS OF ERODING JUVENILE CONFIDENTIALITY THROUGH SYSTEMATIC INFORMATION SHARING WITH SCHOOLS AND PUBLIC HOUSING

Given that the shift in juvenile court policy in the 1980s and 1990s cannot be supported by any new revelations in the science of developmental psychology, as demonstrated in Part I, recent policy shifts may mean that lawmakers and the public remain largely uninformed about current social science. On the other hand, such shifts may indicate that policymakers consciously have rejected or discounted that science in favor of the practical benefits, such as improved public safety, which they expect to gain from eroding confidentiality or dismantling juvenile court.

If legislators are convinced that eroding confidentiality and increasing incarceration rates will have a more immediate impact on crime than will rehabilitation, then the viability of treatment and the differences between children and adults may become relatively unimportant. This utilitarian perspective may well be at the heart of deteriorating confidentiality among law enforcement, courts, schools, and public housing authorities. Part II.A looks closely at the erosion of confidentiality for schools, while Part II.B examines the erosion of confidentiality for housing authorities. Part II questions whether

[121] *See* Steinberg & Cauffman, *A Developmental Perspective*, *supra* note 99, at 53 ("[M]any adolescent experiences have a tremendous cumulative impact.").

HeinOnline -- 79 N.Y.U. L. Rev. 542 2004
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these new policies in schools and public housing will yield the expected gains in public safety and ultimately finds the efficacy of these policies to be questionable at best.

A. Schools, Courts, and Law Enforcement: Improving Public Safety?

The exchange of information among schools, courts, and law enforcement officials provides the greatest evidence of the systematic erosion of confidentiality. A review of changes in confidentiality law over the last decade reveals a pattern of formal legislative amendments and informal interagency agreements that permit, encourage, or even mandate exchange among these agencies. This Section gives examples of such interagency collaboration, summarizes relevant legislative changes across the country, and explores the practical ramifications of the combined impact of eroding confidentiality and school exclusion statutes.[122]

1. Information Sharing

(a) Interagency Collaboratives

Motivated by concerns for school safety and a desire to prevent delinquency, counties and local judicial districts across the country have begun to develop interagency collaboratives for the purpose of sharing information in an attempt to identify those students most likely to bring crime to school campuses.[123] Some of these collaboratives set regular meetings to discuss students' lives and share information about student conduct, while others have been created by statutes to facilitate the flow of information only under certain specified circumstances.[124]

The National District Attorneys' Association, in its publication of *The Prosecutor*, recently featured one collaborative project, the School Multi-Agency Response Team (S.M.A.R.T.) in Pima County, Arizona.[125] The S.M.A.R.T. program is a partnership among the

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[122] School exclusion statutes permit or require either fixed-term suspensions or permanent exclusion as a sanction for specified behavior. *See* discussion *infra* Part II.A.2.

[123] U.S. DEP'T OF JUSTICE, SHARING INFORMATION: A GUIDE TO THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT AND PARTICIPATION IN JUVENILE JUSTICE PROGRAMS 15 (1997).

[124] *See generally* Ronald D. Stephens & June Lane Arnette, U.S. Dep't of Justice, *From the Courthouse to the Schoolhouse: Making Successful Transitions*, JUV. JUST. BULL., Feb. 2000, at 3, 7, 15 (advocating open communication among all agencies involved in "helping delinquent youth reenter the education mainstream"), *available at* http://www.ncjrs.org/pdffiles1/ojjdp/178900.pdf.

[125] Verla R. O'Donovan, *Taking S.M.A.R.T. Action in Tucson: A County Prosecutor and Community Respond to School Violence*, 35 PROSECUTOR 31 (2001).

HeinOnline -- 79 N.Y.U. L. Rev. 543 2004
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county prosecutor's office, school administrators, law enforcement, and juvenile parole and probation officers. As a team, the collaborative declared a zero-tolerance policy on school crime and began to monitor juveniles whom they deem "at risk" of committing crimes on campus.[126] The team defines "at risk" to include any juvenile on probation who is most likely to reoffend and any juvenile not yet adjudicated who is at high risk to offend based on truancy, family problems, and school behavior.[127] Once a child is identified as "at risk," law enforcement officials, prosecutors, probation officers, and schools will exchange information about arrests, convictions, and probation. Schools receive information about the circumstances of the offense, the child's home situation, and current conditions of probation or parole.[128] In return, the schools will advise law enforcement about children who are truant, involved in gangs, failing classes, or disrupting others by bullying or other conduct.[129]

The Community Early Identification Program (CEIP) in Los Angeles County is another program hailed as an "innovative," school-based, multi-agency collaborative meant to identify and monitor potential juvenile offenders.[130] While the primary goal of this program is to combat truancy, with the understanding that truancy often precedes juvenile crime,[131] a referral can be made by any person who believes a child is at risk of gang involvement, drug use, or truancy.[132] Like S.M.A.R.T., CEIP's hallmark is collaboration among the court, school, and law enforcement personnel. The CEIP team, made up of probation officers, school administrators, police, parents, and the child, gathers information regarding a child's criminal record, school attendance, school conduct, and home life.[133] Although CEIP is a voluntary diversion program, students who are referred may feel compelled to participate in order to avoid prosecution.[134] Conditions of CEIP probation can include urine testing and random searches of the child without probable cause. Participants who fail to comply with the program may be sent to probation camps, community education cen-

126 *Id.* at 32.

127 *Id.*

128 *Id.* at 32–34.

129 *Id.* at 34.

130 Charles Edward Pell, Note, *Pre-Offense Monitoring of Potential Juvenile Offenders: An Examination of the Los Angeles County Probation Department's Novel Solution to the Interrelated Problems of Truancy and (Juvenile) Crime*, 73 S. CAL. L. REV. 879, 880 (2000).

131 *Id.* at 880, 883–84.

132 *Id.* at 894 & n.82.

133 *Id.* at 894–95.

134 *Id.* at 909.

HeinOnline -- 79 N.Y.U. L. Rev. 544 2004
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ters, and other "county schools."[135] Participants who significantly violate CEIP requirements may be referred for delinquency proceedings.[136]

Yet another example of this type of collaborative is the Interagency Gang Intervention Database Program (IGIDP) in Wichita and Sedgwick Counties, Kansas.[137] The IGIDP maintains a database that tracks information about juveniles who are suspected of some gang involvement or affiliation.[138] The Wichita Public School System, the County Sheriff, the police, the Department of Social and Rehabilitative Services, the court, and the District Attorney's office are all participating agencies in IGIDP, and all have access and may add information to the database.[139] In particular, the court may add information about any felony, drug, or weapons offense committed by a child, as well as information about any offense committed against a person. The court also may enter information about an offense of any nature and severity if the offending juvenile is sixteen years of age or older or is under the age of sixteen but previously has been adjudicated for three or more offenses. Finally, the court may include any information disclosed by a juvenile to a court services officer or other court-related personnel.[140] Whenever three agencies enter information about a child, a message automatically is sent to all participating agencies notifying them of the child's existence in the database.[141]

(b) Specialty Courts

Closely related to these interagency violence prevention collaboratives are the emerging "specialty" courts housed within juvenile and family courts. Juvenile drug courts, mental health courts, and other treatment courts have become increasingly prevalent since 1989.[142] By 1998 at least forty-three juvenile and family drug courts

135 *Id.* at 895, 897 n.103.

136 *Id.* at 898.

137 Martin, *supra* note 41, at 408.

138 *Id.* at 408–09. A child is included in the database if he or she meets two or more of the listed criteria: admitted membership in a gang; display of some knowledge of gang activities; identification by a "reliable source" as being a gang member; identification as a gang member by a source of uncertain reliability corroborated by independent information; residence in or visits to a particular area while wearing gang insignia, colors, or clothing; involvement in gang-related crime; or presence "several times" in the company of known gang members. *Id.*

139 *Id.* at 408 & n.93.

140 *Id.* at 409.

141 *Id.*

142 *See* Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 43–45 &

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were operating in the United States.[143] By September 2003, 285 juvenile drug courts were operating.[144] Specialty courts have multiplied as judges search for ways to identify and treat the underlying causes of delinquency.[145] Each of these courts is designed to bring together schools, courts, community resources, and other appropriate agencies to facilitate the treatment of juveniles.[146] In juvenile drug courts, a child will appear for frequent hearings where drug court probation officers will report not only on treatment progress but also on school attendance and other social factors.[147] In order to be effective, these courts must maintain close contact with schools to monitor attendance, behavior, and other conditions of probation.[148] The success of these programs is made possible by the relaxing of confidentiality.[149]

Specialty courts often avoid confidentiality limitations by requiring participants to sign confidentiality waivers.[150] Children on probation in specialty courts, and even in some voluntary diversion programs discussed above, will be asked to sign a waiver of rights granting schools permission to release information to courts and courts permission to release information to schools. While participants are technically free to decline the waiver, refusing to sign most likely will lead to rejection from the program and denial of benefits such as dismissals, reduction of charges, and early release from detention.

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n.39 (2000–2001) (citing development of specialized drug court in Miami, Florida in 1989 as first of its kind in adult court and noting growing interest in drug treatment courts since).

143 *Id.* at 44 n.54 (citing U.S. DEP'T OF JUSTICE, DRUG COURTS PROGRAM OFFICE FACT SHEET (1998)).

144 NAT'L DRUG COURT INST., DRUG COURTS TODAY, *at* http://www.ndci.org/courtfacts.htm (last visited Mar. 31, 2004) (on file with *New York University Law Review*).

145 *See* Gilbert, *supra* note 36, at 1168 & n.116 (describing expansion of therapeutic courts to include juvenile drug courts, courts serving only girls, and courts serving juveniles adjudicated for domestic violence offenses).

146 *Id.* at 1176.

147 *See* U.S. DEP'T OF JUSTICE, JUVENILE DRUG COURTS: STRATEGIES IN PRACTICE 7 (2003), *at* http://www.ncjrs.org/pdffiles1/bja/197866.pdf (last visited Oct. 15, 2003) (on file with *New York University Law Review*) (describing juvenile drug court team as involving individuals concerned with child's treatment, juvenile justice, social services, and school or vocational programs).

148 *See id.* at 46–48 (listing recommendations to drug courts for maintaining educational program involvement).

149 *See* Quinn, *supra* note 142, at 49 (explaining how defendants must waive all confidentiality rights in order to qualify for treatment court plea agreements). While Quinn does not specifically address *juvenile* court practice, she does note the prevalence of juvenile drug courts. *See id.* at 44 n.54.

150 *Id.* at 49.

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(c) Recent Developments in State Confidentiality Statutes and School Notification Provisions

Where waivers are not obtained, the legality of information sharing in these collaboratives and specialty courts depends on the confidentiality provisions of the respective states. The Arizona S.M.A.R.T. program, for example, does not appear to violate any state statutes, as Arizona is one of the few states in which juvenile code provisions make records available for public inspection.[151] Many other states, however, have modified confidentiality laws in order to make interagency agreements work. For example, Montana law now permits school officials, police, prosecutors, and courts to form interdisciplinary teams to facilitate the exchange of information.[152]

Other states have modified statutes to allow law enforcement agencies to notify schools when a juvenile is arrested for specific crimes. Statutes also permit juvenile courts to seek advice from and provide information to schools concerning the disposition of cases. At least nineteen states now require courts or law enforcement agencies to provide criminal or delinquency information to schools. Some of these states require information sharing only after a formal adjudication or finding of involvement.[153] Other states require notification immediately after arrest, charging, or preliminary investigation.[154] A

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151 ARIZ. REV. STAT. ANN. § 8-208 (West Supp. 2003).

152 MONT. CODE ANN. § 52-2-211 (2003).

153 States requiring notification after a finding of involvement are California, Colorado, Kentucky, Mississippi, Nevada, New York, and Virginia. CAL. WELF. & INST. CODE § 827(b)(2)(West 2004); COLO. REV. STAT. § 22-33-106.5 (2003); KY. REV. STAT. ANN. § 610.345(1) (Michie Supp. 2003); MISS. CODE ANN. § 37-11-29(2) (1999); NEV. REV. STAT. § 200.278(1) (2001); N.Y. CRIM. PROC. LAW § 380.90 (Consol. Supp. 2003) (requiring notice to "designated educational official" after sentencing in criminal court); VA. CODE ANN. § 16.1-305.1 (Michie 2003).

154 States requiring notification before formal adjudication are Connecticut, Florida, Illinois, Maryland, Missouri, Montana, New Jersey, North Carolina, South Carolina, and Texas. CONN. GEN. STAT. ANN. § 10-233h (West 2002) (requiring police to report arrested students to superintendent within one day for class A misdemeanor and felony offenses); FLA. STAT. ANN. § 985.207(1)(b) (West Supp. 2004) (requiring notification immediately after arrest if incident involves felony or crime of violence); 705 ILL. COMP. STAT. ANN. 405/1-7(A)(8) (West Supp. 2003) (enabling "appropriate school official" to be notified of students "arrested or taken into custody" for specific offenses under reciprocal reporting system); MD. CODE ANN., EDUC. § 7-303(b) (2001) (requiring that police "notify the local superintendent of the arrest and charges within 24 hours . . . or as soon as practicable"); MO. REV. STAT. § 167.115 (2000) (requiring law enforcement to notify superintendent within five days if student is charged with one of specified offenses); MONT. CODE ANN. § 41-5-215(3)(a) (2003) (requiring youth court to notify school district of student's suspected drug use or criminal activity after initial investigation if probation officer believes involvement bears "on the safety of children"); N.J. STAT. ANN. § 2A:4A-60(c) (West Supp. 2003) (requiring that information regarding juvenile charged with specified offenses "shall, upon request, be disclosed to . . . the principal"); N.C. GEN. STAT. ANN. § 15A-505 (West 2000) (requiring police to notify principal within five days of student's felony

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few states even require parents to report their child's delinquent conduct to schools.[155]

Illinois mandates reciprocal reporting between schools and the courts.[156] Under this system, law enforcement records must be transmitted to the appropriate school superintendent whenever a student has been arrested or taken into custody for a listed offense, such as a forcible felony or possession of a controlled substance.[157] School officials explicitly are excepted from provisions regarding confidentiality of juvenile records.[158] The schools hope that reporting requirements will help them identify students with a propensity for violence.[159] Some advocates of information sharing in Chicago suggest that these reporting requirements do not go far enough because they do not give reports directly to teachers.[160] In a few other states, such as California, Kentucky, and Missouri, statutes do require school superintendents to notify teachers and staff of juvenile arrests, at least on a need-to-know basis.[161]

Texas and Florida also have fairly expansive notification statutes. Although section 58.007 of the Texas Family Code attempts to preserve some juvenile confidentiality by presumptively closing delinquency records to the public when the child is under the age of fourteen,[162] Article 15.27 of the state's criminal code actually requires

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charge); S.C. CODE ANN. § 20-7-7205(C) (Law. Co-op. Supp. 2003) ("When a child is charged . . . for an offense which would be a misdemeanor or felony if committed by an adult . . . the law enforcement officer also shall notify the principal . . . ."); TEX. CRIM. PROC. CODE ANN. § 15.27 (Vernon Supp. 2004) (requiring that police "notify the superintendent . . . within 24 hours after the arrest" for felony or specified misdemeanor offenses).

155 Both Tennessee and Washington have passed laws requiring parents whose children have been adjudicated delinquent to notify schools of this status when the student enrolls, changes schools, or returns to a school. *See* Act of June 17, 1999, ch. 462, 1999 Tenn. Pub. Acts 1136 (current version at TENN. CODE ANN. § 49-6-3051 (Supp. 2003)); Act of Apr. 2, 1994, ch. 304, § 2, 1994 Wash. Laws 1983, 1984 (current version at WASH. REV. CODE ANN. § 28A.225.330 (West Supp. 2004)); Kim Brooks et al., *School House Hype: Two Years Later*, 8 KY. CHILD. RTS. J. 7, 16 (2000).

156 105 ILL. COMP. STAT. ANN. 5/10-20.14(b) (West Supp. 2003); *see* Noel M. Johnston, Comment, *The Chicago Public Schools and Its Violent Students: How Can the Law Protect Teachers?*, 48 DEPAUL L. REV. 907, 937-38 (1999).

157 705 ILL. COMP. STAT. ANN. 405/1-7(A)(8) (West Supp. 2003); *see* Johnston, *supra* note 156, at 937.

158 705 ILL. COMP. STAT. ANN. 405/1-7(A)(8) (West Supp. 2003).

159 Johnston, *supra* note 156, at 937–38.

160 *Id.* at 937. The author argues that notification "is of little use if the school official does nothing to inform the teacher of the violent propensities of certain students." *Id.*

161 CAL. WELF. & INST. CODE §§ 827(B)(2), 828.1 (West Supp. 2004); KY. REV. STAT. ANN. § 610.345(4)-(5) (Michie Supp. 2003); MO. REV. STAT. § 160.261(2) (2000).

162 Parties such as judges, attorneys, and agencies charged with a child's care by a delinquency court have automatic access, but others seeking access to records must request permission of the court and demonstrate a legitimate interest in the proceedings. Juvenile court proceedings are presumptively closed for children under age fourteen and may be

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any law enforcement officer who arrests or refers a child to juvenile court to determine if the child is enrolled in a public school and then to notify the superintendent within twenty-four hours of the arrest or referral.[163] The police must provide sufficient details of the arrest and of each act the child committed.[164] In turn, the superintendent must notify principals, teachers, and support personnel of the child's arrest or referral.[165] The prosecutor must inform the school district if its office refuses to prosecute or if the court finds the child not guilty only in situations where the district has transferred the child to an alternative education program.[166] The statute does not require superintendents to notify principals and teachers of these subsequent rulings.[167] In the 1999–2000 school year, Texas schools identified 1050 students who engaged in or who were alleged to have engaged in felony offenses off campus while not attending a school-related activity.[168] In the 2001–2002 school year, Texas identified 1212 students in that category.[169] The school system reported taking some disciplinary action in all of those cases. The impact of any dismissals or acquittals on action already taken by the school remains unclear.

In Florida the code requires mandatory notification by law enforcement to the school superintendent whenever a child is arrested for a felony or any crime of violence.[170] The state attorney's office also must notify the superintendent whenever a child is charged with any of the above offenses. Within forty-eight hours, the superintendent must inform the student's principal, who then immediately must

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closed at the discretion of the court for children fourteen and older. TEX. FAM. CODE ANN. § 54.08 (Vernon 2002).

163 *See* Steve Bickerstaff et al., *Preserving the Opportunity for Education: Texas' Alternative Education Programs for Disruptive Youth*, J.L. & EDUC., Oct. 1997, at 1, 27–28 (describing notice obligations of law enforcement and school officials under Texas law).

164 *Id.* at 28.

165 *Id.*

166 TEX. CRIM. PROC. CODE ANN. § 15.27(g) (Vernon Supp. 2004).

167 *Id.*

168 Carole Keeton Strayhorn, *Note from the Comptroller on School Safety: Four-Year Statewide Incident Statistics*, *at* http://www.window.state.tx.us/tspr/safety.html (last visited Mar. 15, 2004) (on file with *New York University Law Review*). The Texas Comptroller of Public Accounts reports disciplinary action for 574 students for "conduct occurring off campus while student is not in attendance at school related activity for felony offenses in Title 5[, Offenses Against the Person]." Eleven of those students were in elementary school, 187 were in middle/junior high school, and 376 were in high school. The Comptroller also reports disciplinary action for 576 students for "conduct occurring off campus while student is not in attendance at school related activity for felony offenses not in Title 5." Twenty-three of those students were in elementary school, 227 were in middle/junior high school, and 326 were in high school. *Id.*

169 *Id.*

170 FLA. STAT. ANN. § 985.04(7) (West Supp. 2004).

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notify the student's classroom teachers.[171] The Florida code has no provision for alerting schools when cases are later dismissed.

In contrast to Illinois, Texas, and Florida, California's general confidentiality provision states that only court personnel, the minor, his parents, and other persons designated by court order may view juvenile court records.[172] Any other person wishing to inspect, obtain, or copy juvenile court records generally must seek special permission of the juvenile court.[173] In determining whether to release juvenile records, the court will balance the interests of the child and other parties to the proceedings, the interests of the petitioner, and the interests of the public, permitting disclosure only as necessary to satisfy the need for the information.[174] Despite this general rule of confidentiality, however, California statutes have created a number of exceptions that grant schools automatic mandatory or presumptive access to delinquency records.[175] Specifically, California Welfare and Institutions Code section 827(A)(1)(F) grants school districts access to child dependency and delinquency records. California Court Rule 1423(f) and California Welfare and Institutions Code section 828 also explicitly state that information gathered by a law enforcement agency "regarding the taking of a child into custody" may be disclosed to another law enforcement agency, "including a school district police or security department, or to any person or agency that has a legitimate need for the information."[176] Law enforcement officers have a duty to notify schools when a child is arrested for any one of a wide range of specified misdemeanors and felonies.[177] Statutory exceptions and requirements like these illustrate a legislative determination that the schools' need for juvenile records outweighs a child's interest in maintaining his or her privacy. Programs like CEIP are possible because of confidentiality exceptions like those found in the California code and court rules.

(d) Reciprocal Information Sharing and FERPA

While the focus of this Article is on the flow of information from courts and law enforcement to schools and other institutions, advo-

171 *Id.*

172 CAL. WELF. & INST. CODE § 827(a)(1) (West Supp. 2004).

173 CAL. R. CT. 1423(b) (West 1996).

174 *Id.*

175 California Welfare and Institutions Code section 827.5 actually lifts all confidentiality protections for any minor at least fourteen years old who has been arrested for a serious felony under California Penal Code section 1192.7.

176 CAL. R. CT. 1423(f) (West 1996); *see also* CAL. WELF. & INST. CODE § 828 (West Supp. 2004).

177 CAL. WELF. & INST. CODE § 827(b)(2) (West Supp. 2004).

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cates of more global information sharing typically seek a reciprocal exchange of information among those agencies. Several states have adopted legislation to permit the disclosure of information from school files to local law enforcement agencies, juvenile courts, and social service agencies.[178] A number of states also require schools to report expulsions for crimes committed on campus to local law enforcement.[179] Collaboratives that facilitate this two-way transfer must be aware not only of state statutes that govern confidentiality of delinquency records, but also of state and federal regulations, such as the Family Educational Rights and Privacy Act (FERPA),[180] which limit schools' authority to share information. While a full discussion of school privacy regulations exceeds the scope of this Article, interagency agreements of this type had become so prevalent by 1997 that the U.S. Department of Justice, recognizing the need for clarification, published a guide to FERPA for states participating in juvenile justice programs.[181] The guide was specifically designed to help schools understand laws like FERPA that limit the schools' ability to share information with other agencies in the juvenile justice network.[182] Yet in Arizona, the S.M.A.R.T. collaborative avoided school confidentiality requirements by relying on FERPA language that defines "educational record" to include only written documents and reports.[183] Under this rule, information based on observation and personal knowledge or obtained by talking to children, parents, law enforcement, prosecutors, and probation officers would not be confidential.[184]

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178 *See, e.g.*, FLA. STAT. ANN. § 230.235(2) (West 1998); IOWA CODE ANN. § 280.25(1) (West Supp. 2003); MONT. CODE ANN. § 41-5-215(6) (2003).

179 ALA. CODE § 16-1-24.1(b) (2001) (requiring principal to notify law enforcement authorities when student violates substance abuse or weapons policies or threatens harm to another person); DEL. CODE ANN. tit. 14, § 4112 (Supp. 2002) (requiring school employees to report student behavior to police whenever they have reasonable belief that violent crime has been committed); IND. CODE ANN. § 20-8.1-5.1-10(g) (West Supp. 2003) (requiring superintendent to notify police immediately if student has brought firearm or destructive device onto school property); MISS. CODE ANN. § 37-11-29(1) (1999) (requiring superintendent to notify police of unlawful activity on school property); MO. REV. STAT. §§ 160.261, 167.117 (2000) (requiring school officials to report to police any of list of felonies committed on school property); 24 PA. CONS. STAT. § 13-1303-A (2002) (requiring schools to report to police any acts of violence; possession of weapon; and possession, use, or sale of controlled substance).

180 20 U.S.C. § 1232g (2000).

181 U.S. DEP'T OF JUSTICE, *supra* note 123.

182 *Id.* at 15–17.

183 O'Donovan, *supra* note 125, at 32; *see* 20 U.S.C. § 1232g(a)(4) (2000) ("'[E]ducation records' means . . . those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution . . . .").

184 *See* U.S. DEP'T OF JUSTICE, *supra* note 123, at 6–7.

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2. *Interplay of Eroding Confidentiality and School Exclusion Statutes*

In evaluating the prospects for improved safety in schools, new confidentiality policies must be viewed in conjunction with companion school exclusion statutes. Many school districts now require the involvement of law enforcement officials when they discipline students for engaging in delinquent conduct at school.[185] In addition, schools increasingly have begun to discipline children for conduct that occurs off campus and at non- school-related or school-sponsored events.[186] Schools look to juvenile justice records as a means to identify and isolate those students most likely to bring crime on campus and rely on those records as justification for exclusion from school or transfer from mainstream classes to alternative programs.

Schools hope that by weeding out potential troublemakers, they will keep crime from making its way onto school grounds. Schools also may fear liability in tort for failing to protect students and teachers from injuries caused by violence on campus or in workers' compensation claims by school employees who are injured on the job.[187] To avoid legal culpability, schools are taking affirmative steps

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[185] *See* 105 ILL. COMP. STAT. ANN. 5/10-20.14 (West Supp. 2003) (requiring school board to develop reciprocal reporting system with local law enforcement agencies to share information about students' criminal activity); 105 ILL. COMP. STAT. ANN. 5/10-21.7, 5/34-84a.1 (West Supp. 2003) (requiring superintendent to report incidents of intimidation and battery against school personnel to police); IND. CODE ANN. § 20-8.1-5.1-10(g) (West Supp. 2003) (requiring superintendent to notify law enforcement of weapons offenses committed on school grounds); MICH. COMP. LAWS ANN. § 380.1311(4) (West 1997) (requiring school district to report expulsions for weapons offenses, arson, and incidents of criminal sexual conduct to department of social services); NEB. REV. STAT. § 79-293(1) (1996) (requiring principal to report certain enumerated conduct if he or she believes it violates state criminal laws); TEX. EDUC. CODE ANN. § 37.015 (Vernon Supp. 2004) (requiring principal to notify police if certain enumerated conduct occurs); *see also* Cherry Henault, *Zero Tolerance in Schools*, 30 J.L. & EDUC. 547, 547 (2001) (describing how Gun-Free Schools Act of 1994, Pub. L. No. 103-382, § 14601, 108 Stat. 3907, 3907-08, *repealed by* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, 1986, mandated one-year expulsion for possession of weapon on campus and required schools to refer offending students to either criminal or juvenile justice system); Paul M. Bogos, Note, *"Expelled. No Excuses. No Exceptions."—Michigan's Zero-Tolerance Policy in Response to School Violence: M.C.L.A. Section 380.1311*, 74 U. DET. MERCY L. REV. 357, 376 & n.129 (1997) (noting that, according to Michigan law, local school boards must refer students to state and local law enforcement within three days of expulsion for violating weapons statute).

[186] Brooks, *supra* note 155, at 14–15 (stating that "[i]n the new post-Columbine legal environment," children are punished by removal from school for misconduct that occurs outside of school); *see also infra* notes 188–98 and accompanying text.

[187] *Cf.* Johnston, *supra* note 156, at 945 (arguing for greater school liability and more permissive compensation recovery when teachers are injured by students). Some have argued that schools owe some duty of care to the children under their supervision when they impose compulsory attendance requirements and serve *in loco parentis*. *See, e.g.*, Bogos, *supra* note 185, at 365–68; *see also* R. Craig Wood & Mark D. Chestnutt, *Violence*

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to address foreseeably dangerous conditions and exclude foreseeably dangerous students.

In the mid-1990s, a number of states rewrote school disciplinary statutes to grant school officials greater authority to discipline students for off-campus activity.[188] For example, Texas law was rewritten

in U.S. Schools: The Problems and Some Responses, 97 EDUC. L. REP. (West) 619, 632 (Apr. 1995) (explaining that schools have "general duty to supervise" and duty to take reasonable precautions if warned of specific danger). But the fear that schools face liability costs for school violence under tort and workers' compensation claims may be more perception than reality. Because schools are protected under theories of government immunity, teachers actually have some difficulty recovering in either tort or workers' compensation claims against school systems for student-inflicted injuries. Johnston, *supra* note 156, at 919–24, 945. Few successful liability claims are reported, and there does not appear to be any clear, discernable trend favoring these claims. Despite some highly publicized lawsuits against schools, most state courts have denied relief to students or teachers bringing failure-to-protect claims and have rejected § 1983 civil rights claims when students were injured by others on campus. State courts instead have held that a "state-created danger" or some special custodial relationship between the school and the child must exist. *See, e.g.*, Mickelson v. Sch. Dist. No. 25, 901 P.2d 508, 510 (Idaho 1995) (finding school district statutorily immune from liability where student was injured in fight with another student); Brum v. Town of Dartmouth, 704 N.E.2d 1147, 1160–61 (Mass. 1999) (denying liability for stabbing of student on campus under "state-created danger" exception because school committed no affirmative act that increased risk of harm). Some suits in state courts have been brought under a negligence standard. In these cases, claims sometimes have been upheld when the school was on reasonable notice to prevent the injury. *See, e.g.*, Mirand v. City of New York, 637 N.E.2d 263, 266–67 (N.Y. 1994) (concluding that school could be held liable for "foreseeable injuries proximately related to the absence of adequate supervision" where school was aware of prior altercations between students); Billinger v. Bd. of Educ., 706 N.Y.S.2d 178, 179 (N.Y. App. Div. 2000) (mem.) (holding that school district owed no duty of care when school could not anticipate gunshot fatality); Ross v. Maummee City Sch., 658 N.E.2d 800, 804–05 (Ohio Ct. App. 1995) (per curiam) (holding that school may be liable for employee's injury when school district had actual knowledge of student's uncontrollable violence and did not act to prevent future injury). *But see* Rudd v. Pulaski County Special Sch. Dist., 20 S.W.3d 310, 315 (Ark. 2000) (holding that sovereign immunity would preclude negligence claim against school district where student was shot on school bus, even though district was aware of shooter's violent history). Other state courts require a showing of malicious, willful, or wanton conduct by the school. *See, e.g.*, Thames v. Bd. of Educ., 645 N.E.2d 445, 448–49 (Ill. App. Ct. 1994) (holding that "special duty" exception to governmental immunity requires showing of affirmative acts or willful omissions by municipality).

188 Connecticut General Statute § 10-233d was amended in 1995. Act effective July 1, 1995, Pub. Act 95-304, § 5, 1995 Conn. Acts 1414, 1416 (Reg. Sess.) (current version at CONN. GEN. STAT. ANN. § 10-233d (West 2002)). Florida Statute chapter 985.04 was added in 1996. Act of May 31, 1996, ch. 96-388, § 18, 1996 Fla. Laws 2301, 2319–20 (current version at FLA. STAT. ANN. § 985.04(7)(b) (West Supp. 2004)). Massachusetts General Laws chapter 71, section 37H1/2 was added in 1993. Act of Jan. 4, 1994, ch. 380, § 2, 1993 Mass. Acts 1245, 1246 (codified at MASS. GEN. LAWS ANN. ch. 71, § 37H1/2 (West 1996)). Missouri Revised Statutes section 167.115 was added in 1996. Providing Safer Schools, Nos. 1301 & 1298, § 1, 1996 Mo. Laws 354, 372 (current version at MO. REV. STAT. § 167.115 (2000)). Texas Education Code Annotated section 37.006 was added in 1995. Act of May 30, 1995, ch. 260, § 1, 1995 Tex. Gen. Laws 2207, 2355 (current version at TEX. EDUC. CODE ANN. § 37.006 (Vernon Supp. 2004)).

HeinOnline -- 79 N.Y.U. L. Rev. 553 2004
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significantly in 1993 and 1995 to include notification requirements and disciplinary authority to address off-campus delinquent conduct by students.[189] As discussed above,[190] the Texas Criminal Code requires the police to notify a child's superintendent whenever he or she is arrested for any felony or specified misdemeanor.[191] Superintendents have the authority to remove a child from school and transfer the child to an alternative education program upon reasonable belief that he or she has engaged in conduct defined as a felony offense against a person. They also may transfer a student whom they believe has engaged in other felony conduct, if they also believe the child's presence in school poses a danger to others or "will be detrimental to the educational process."[192] Therefore, a school may discipline a student for off-campus conduct even if the child is never formally charged or adjudicated in a juvenile court proceeding. At least six other states have adopted similar disciplinary provisions.[193]

Even in states where statutes do not explicitly address discipline for off-campus conduct, many school discipline statutes are written implicitly to allow such intervention. In these states, schools may discipline a student whose conduct tends "to disrupt, obstruct, or interfere with orderly education processes"[194] or is "detrimental to the best

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[189] *See* Act of June 9, 1993, ch. 461, § 1, 1993 Tex. Gen. Laws 1850, 1850–51; Act of May 30, 1995, ch. 260, § 1, 1995 Tex. Gen. Laws 2207, 2355; TEX. CRIM. PROC. CODE ANN. § 15.27(a) (Vernon Supp. 2004) (describing law enforcement's obligation to notify school districts of students' off-campus arrests); TEX. EDUC. CODE ANN. § 37.006(b)-(e) (Vernon Supp. 2004) (describing circumstances allowing or mandating placement in alternative education program for students engaging in felony conduct on or off campus).

[190] *See supra* note 163 and accompanying text.

[191] TEX. CRIM. PROC. CODE ANN. § 15.27(a) (Vernon Supp. 2004).

[192] TEX. EDUC. CODE ANN. § 37.006(c)-(d) (Vernon Supp. 2004).

[193] States that explicitly allow schools to expel students for off-campus conduct without a felony conviction include Colorado, Connecticut, Massachusetts, Missouri, Tennessee, and Virginia. COLO. REV. STAT. § 22-33-106(c) (2003) (allowing suspension or expulsion for off-campus behavior detrimental to welfare or safety of students or school personnel); CONN. GEN. STAT. ANN. § 10-233c (West 2002) (allowing suspension for conduct off school grounds that violates school policy and seriously disrupts educational process); MASS. GEN. LAWS ANN. ch. 71, § 37H1/2 (West 1996) (allowing principal to suspend student with felony charge if student's continued classroom presence "would have a substantial detrimental effect on the welfare of the school"); MO. REV. STAT. § 167.161(2) (2000) (allowing school board to suspend student who is charged with, convicted of, or has pled guilty to felony); TENN. CODE ANN. § 49-6-3401(a)(12) (2002) (enabling school to suspend student for off-campus criminal behavior that results in felony charge if student's presence poses danger to others or "disrupts the educational process"); VA. CODE ANN. § 22.1-277.2:1(A) (Michie 2003) (permitting school board to transfer student to alternative program after student is charged with or convicted of certain offenses, regardless of where offense occurred).

[194] ARK. CODE ANN. § 6-16-307(b) (Michie 1999) (permitting expulsion for participating in any activity "which tends, in the opinion of the board, to disrupt, obstruct, or interfere with orderly education processes").

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interest and welfare of the pupils of [the] class as a whole."[195] Courts have read these and similar provisions broadly and have upheld expulsions for children arrested or convicted of crimes in juvenile courts.[196] Discipline for off-campus conduct may include suspension, expulsion, or mandatory transfer to an alternative school.[197] In at least two states, expulsions and/or suspensions are mandated for certain conduct that is especially serious or would be punishable as a felony if the child were an adult.[198] In those states, schools are left with no discretion to work with children who are one-time offenders, caught in a bad circumstance but otherwise good kids.

School expulsion policies have a tremendous impact on crime prevention and juvenile rehabilitation. Children who are in school and who develop strong, positive social ties to teachers, coaches, and schoolmates are more likely to be insulated from the lure of violence and drugs.[199] The greater a child's attachment to positive social influences, the less likely he or she is to engage in delinquent conduct.[200] In contrast, youth who are expelled, drop out, or express a low commitment to school are at greater risk of substance abuse and delin-

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195 ALA. CODE § 16-1-14 (2001); *see also* MD. CODE ANN., EDUC. § 7-305 (2001) (granting authority to principal to suspend student "for cause"); N.J. STAT. ANN. § 18A:37-2 (West 1999) (allowing suspension or expulsion for "conduct of such character as to constitute a continuing danger to the physical well-being of other pupils"); R.I. GEN. LAWS § 16-2-17 (2001) (permitting suspension if student "represents a threat" to rights of others).

196 *See* Smith v. Little Rock Sch. Dist., 582 F. Supp. 159, 162 (E.D. Ark. 1984) (mem.) (denying student's claim for preliminary injunctive relief against suspension for off-campus shooting on grounds that risk of harm to other students outweighs harm student may face from expulsion); Howard v. Colonial Sch. Dist., 621 A.2d 362, 365–66 (Del. Super. Ct. 1992) (holding that school district did not act arbitrarily in expelling student for selling drugs outside school at non-school-related activity); R.R. v. Bd. of Educ., 263 A.2d 180, 186 (N.J. Super. Ct. Ch. Div. 1970) (holding that student could be suspended for off-campus assault with weapon if school officials determined that student presented danger to others or to school property); Coghlan v. Bd. of Educ., 692 N.Y.S.2d 558, 559 (N.Y. App. Div. 1999) (mem.) (holding that district may suspend student for off-campus conduct occurring while school was not in session).

197 *See* Op. No. 97-0268, Op. Att'y Gen. of Miss. (June 13, 1997), 1997 WL 370210, at *5 (describing in-school suspension or transfer of student to alternative school as appropriate when student has been involved in violent behavior off campus).

198 CONN. GEN. STAT. ANN. § 10-233d (West 2002) (requiring expulsion for off-campus gun possession or drug sale or distribution); TEX. EDUC. CODE ANN. § 37.006(c)-(d) (Vernon Supp. 2004) (requiring suspension and transfer to disciplinary alternative education program when student, on or off school property, engages in conduct punishable as felony against person).

199 *See* Gilbert, *supra* note 36, at 1172 (reporting that young people with positive social bonds are less likely to risk upsetting those bonds by using drugs or committing other crimes); Bogos, *supra* note 185, at 383–84 (describing how alternative education programs for expelled students may help them develop commitment to school, form goals, encourage attachments to teachers and community coaches, and avoid further delinquency).

200 Laubenstein, *supra* note 5, at 1904–05.

HeinOnline -- 79 N.Y.U. L. Rev. 555 2004
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quency.[201] A 1992 Youth Risk Behavior Survey found that children who did not attend school were more likely to engage in high-risk behaviors such as carrying a weapon, engaging in physical fights, and using marijuana, cocaine, or alcohol.[202] Thus the community actually should anticipate a rise in crime from policies that exclude children from the school or classroom. Even if classrooms are safer for the moment, students and teachers may be at greater risk of encountering crime on the streets and sidewalks outside of school.[203] Students who drop out of school because they are expelled have the highest probability of becoming involved in criminal activities as compared with students who drop out for different reasons, such as employment, marriage, or pregnancy.[204]

Even when students are only temporarily suspended instead of expelled, the community still should be concerned about increased crime and the child's decreased prospects for a successful future. In one recent study of the correlation between delinquency and school exclusion, the Harvard Civil Rights Project found that states with higher rates of school suspension are more likely to have higher rates of juvenile incarceration.[205] Students who are suspended also face greater risk of dropping out permanently and becoming further involved with the courts.[206] Although there are no recently published studies on the correlation between suspension and permanent drop out, one national survey in 1986 revealed that thirty-one percent of

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201 *See* Gilbert, *supra* note 36, at 1169–71 (identifying child's lack of commitment to school as risk factor for substance abuse and delinquency); Kathleen Kelly, *The Educational Crisis for Children in the California Juvenile Court System*, 27 HASTINGS CONST. L.Q. 757, 759–60 (2000) (noting that most children in juvenile justice system have serious school problems, and many have disabilities such as mental retardation, emotional distress, or learning disabilities); Stephens & Arnette, *supra* note 124, at 2 (noting correlation between school drop out and prison sentence as adult); Florence Moise Stone & Kathleen B. Boundy, *School Violence: The Need for a Meaningful Response*, 28 CLEARINGHOUSE REV. 453, 464 (1994) (noting correlation between school drop out and/or expulsion and criminal involvement); Laubenstein, *supra* note 5, at 1905 (discussing how students with greater attachment to school and education are less likely to commit juvenile offenses).

202 Ctrs. for Disease Control & Prevention, *Health Risk Behaviors Among Adolescents Who Do and Do Not Attend School—United States, 1992*, 43 MORBIDITY & MORTALITY WKLY. REP. 129, 130 (1994), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00025174.htm (last visited Jan. 8, 2004) (on file with *New York University Law Review*).

203 *See* Bogos, *supra* note 185, at 359–60 (citing concern that expelling students for delinquency may result in criminal activity spilling over into streets).

204 Stone & Boundy, *supra* note 201, at 464.

205 Russell Skiba et al., *Consistent Removal: Contributions of School Discipline to the School-Prison Pipeline* (School to Prison Pipeline Conference: Harvard Civil Rights Project, May 16-17, 2003), at 16, *available at* http://www.civilrightsproject.harvard.edu/research/pipeline03/SkibaEXECv4.pdf (last visited Feb. 29, 2004) (on file with *New York University Law Review*).

206 Brooks, *supra* note 155, at 8.

HeinOnline -- 79 N.Y.U. L. Rev. 556 2004
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sophomores who dropped out had been suspended previously, as opposed to only ten percent of sophomores who stayed in school.[207] Another study that year identified prior involvement with school discipline as one of the strongest predictors of drop out among a constellation of contributing factors, including poor academic performance and low socioeconomic status.[208] Society should expect that expelled and suspended children will refine patterns of delinquency and assimilate into a culture of deviance.[209] Some communities might even find that expelled students will lure other students away from school. Given growing rates of expulsion across the country,[210] it is far from clear that teachers and students will be safer in the long run.

The child who is excluded from the classroom also will miss out on academic coursework and lose valuable opportunities to learn and develop critical thinking skills.[211] Children who leave school early have few prospects for a successful career, especially in the high-tech information-driven economy of today.[212] School is deemed so important to a child's prospects for the future that all fifty states have compulsory school attendance laws[213] and all fifty state constitutions contain provisions requiring the legislature to provide its citizens with

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207 RUSSELL J. SKIBA, ZERO TOLERANCE, ZERO EVIDENCE: AN ANALYSIS OF SCHOOL DISCIPLINARY PRACTICE 13 (Indiana Educ. Policy Ctr., Policy Research Report #SRS2, Aug. 2000), *available at* http://www.indiana.edu/~safeschl/ztze.pdf (last visited Mar. 30, 2004) (reporting study analysis of Ruth B. Ekstrom et al., *Who Drops out of High School and Why? Findings from a National Study*, 87 TCHRS. C. REC. 356, 360 (1986)).

208 *Id.* (reporting analysis of Gary G. Wehlage & Robert A. Rutter, *Dropping Out: How Much Do Schools Contribute to the Problem?*, 87 TCHRS. C. REC. 374 (1986)).

209 *Id.* at 14 (arguing that school suspensions may accelerate students' socialization with deviant peers, and that "the most well-documented outcome of suspension appears to be further suspension"); *see also* Henault, *supra* note 185, at 549 (explaining how inflexible zero-tolerance programs lead children to distrust authority figures and justice system generally); Bogos, *supra* note 185, at 380–81 (arguing that permanent expulsion limits students' non-criminal future options and pushes them out into streets, while traditional approaches to punishment may harden delinquent behavior patterns).

210 Nationwide, zero-tolerance policies contributed to the suspensions of over 3.1 million students in 1997 and the expulsions of over 87,000 students in 1998. Alicia C. Insley, Comment, *Suspending and Expelling Children from Educational Opportunity: Time to Reevaluate Zero Tolerance Policies*, 50 AM. U. L. REV. 1039, 1054 (2001). Maryland suspended almost eight percent of the state's entire kindergarten through twelfth grade student population during the 1998–1999 school year. *Id.* at 1054–55 (citing MD. ST. DEP'T OF EDUC., SUSPENSIONS—MARYLAND PUBLIC SCHOOLS 1998–1999, at 1 (Dec. 1999)). After the implementation of zero-tolerance polices in Chicago, annual expulsions rose from eighty-one to one thousand over three years. Eric Blumenson & Eva S. Nilsen, *How To Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 66 (2002).

211 Stone & Boundy, *supra* note 201, at 464.

212 Kelly, *supra* note 201, at 760; *see* Bogos, *supra* note 185, at 380–81 (noting that expelled students not given alternative education have limited career options).

213 Bogos, *supra* note 185, at 365.

HeinOnline -- 79 N.Y.U. L. Rev. 557 2004
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an education.[214] Excluding children from education when they have engaged in delinquent conduct truly deprives them of an opportunity for rehabilitation and instead may ensure them a life of crime and deviance. Even exclusion from team sports severs important social ties between the student, the coach, and his or her former teammates.[215] The child who is excluded from sports also may lose

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214 Yohance C. Edwards & Jennifer Ahern, *Unequal Treatment in State Supreme Courts: Minority and City Schools in Education Finance Reform Litigation*, 79 N.Y.U. L. REV. 326, 327 & n.2 (2004) (citing fifty state constitutional education clauses); *see, e.g.*, CAL. CONST. art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."). A number of state courts have interpreted these clauses to require provision of an "adequate" education. Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218, 230–31 (Timothy Ready et al. eds., 2002), *available at* http://www.nap.edu/books/0309083036/html/218.html; *see, e.g.*, Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 211–12 (Ky. 1989); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 667–68 (N.Y. 1995); Campbell County Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995); *see also* Plyler v. Doe, 457 U.S. 202, 223 (1982) ("By denying these children [of undocumented immigrants] a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation."); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

215 Many states have established rules permitting this type of disciplinary measure by statute, case law, or the decision of a school board or athletic association. *See* PA. STAT. ANN. tit. 24, § 5-511(a) (1992); Butler v. Oak Creek-Franklin Sch. Dist., 172 F. Supp. 2d 1102, 1107 (E.D. Wis. 2001) (describing school policy allowing up to one-year athletic suspension for second violation of school's Athletic Code); Farver v. Bd. of Educ., 40 F. Supp. 2d 323 (D. Md. 1999) (finding that enforcement of school code permitting suspension from extracurricular activities, including athletics and student clubs, for "constructive possession" of alcohol at off-campus party raised no federal Due Process or First Amendment concerns); Bush v. Dassel-Cokato Bd. of Educ., 745 F. Supp. 562 (D. Minn. 1990) (upholding school's extra- and co-curricular policy permitting athletic director to withhold varsity letter and suspend student from athletic participation for one week for attending party where alcohol was present); Brands v. Sheldon Cmty. Sch., 671 F. Supp. 627 (N.D. Iowa 1987) (denying student's preliminary injunction motion where school had declared him ineligible to participate in athletics due to sexual misconduct); L.P.M. v. Sch. Bd., 753 So. 2d 130 (Fla. Dist. Ct. App. 2000) (finding that suspension of student's "privilege" to participate in extracurricular activities due to alcohol use fell within scope of school's authority); Jordan v. O'Fallon Township High Sch. Bd. of Educ., 706 N.E.2d 137 (Ill. App. Ct. 1999) (finding no due process interest in student's expectation of athletic scholarship when school suspended student from football for one year after police picked him up for intoxication); Bunger v. Iowa High Sch. Athletic Ass'n, 197 N.W.2d 555, 564–65 (Iowa 1972) (invalidating athletic association rule that penalized consumption of alcohol by students as beyond association's scope of authority, while noting there was "no doubt that school authorities may make a football player ineligible if he drinks beer during football season"); French v. Cornwell, 276 N.W.2d 216, 219 (Neb. 1979) (finding that district's policy calling for six-week suspension following arrest for intoxication fell within superintendent's authority); Appeal of D.H., Decision No. 14,360, 39 Educ. Dep't Rep. 721 (N.Y. Educ. Comm'r May 16, 2000), *available at* http://www.counsel.nysed.gov/Decisions/

HeinOnline -- 79 N.Y.U. L. Rev. 558 2004
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opportunities for a college athletic scholarship.[216]

While most states provide some form of alternative education to expelled students under the age of compulsory school attendance,[217] some states, like Michigan and Massachusetts, have chosen not to require alternative education for students who commit particular offenses.[218] Even where alternative education is offered, school boards may be judicially relieved of their obligation if the child has been charged with certain enumerated offenses in juvenile court.[219]

In states such as Texas and Mississippi, where alternative programs do exist, students may be forced to transfer to alternative schools when they commit crimes.[220] Although alternative schools at least keep the child off the streets and provide some opportunity for continued education,[221] forced transfer to alternative programs may carry many of the same costs as expulsion. Students placed in alternative schools or in classrooms for students with behavior disorders do

volume42/d14858.htm (reviewing student's suspension from soccer for entire fall season, in accordance with school district's Code of Conduct for Interscholastic Athletes, after physically assaulting another student outside school).

216 Larry D. Bartlett, *The Courts' View of Good Conduct Rules for High School Student Athletes*, 82 EDUC. L. REP. (West) 1087, 1088, 1097–98 (July 1993).

217 *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-841 (West 2002) (allowing district to use alternative education program as alternative to suspension or expulsion); CAL. EDUC. CODE § 48915 (West Supp. 2004) (requiring referral of expelled students to alternative program of study); CONN. GEN. STAT. ANN. § 10-233d(3)(d) (West 2002) (requiring board to offer alternative education to expelled students under sixteen); GA. CODE ANN. § 20-2-751.1(c) (2001) (authorizing hearing officer, superintendent, or local school board to place student who brought weapon to school in alternative educational setting); N.M. STAT. ANN. § 22-5-4.7(B) (Michie Supp. 2003) (requiring districts to provide alternative education to disabled students suspended for bringing weapon to school, but requiring no alternatives for other students expelled for same offense); Bogos, *supra* note 185, at 376–77 & n.134.

218 MASS. GEN. LAWS ANN. ch. 71, § 37H(e) (West 1996) (stating that "no school or school district . . . shall be required to . . . provide education services" to students expelled for possession of dangerous weapon or controlled substance, or for assault against educational staff); MICH. COMP. LAWS ANN. § 380.1311(3) (West Supp. 2003) (leaving question of alternative education for students expelled for weapons offense to school district's discretion); TEX. EDUC. CODE ANN. §§ 37.006(m), 37.007 (Vernon Supp. 2004) (making provision of alternative education optional to students expelled for certain offenses, including weapons possession, aggravated assault or sexual assault, and drug possession or sales); Bogos, *supra* note 185, at 377, 380.

219 Walter v. Sch. Bd., 518 So. 2d 1331 (Fla. Dist. Ct. App. 1987) (holding that statute permitted but did not require school to provide expelled or suspended students with alternative education program when discipline is for drug possession); D.B. v. Clarke County Bd. of Educ., 469 S.E.2d 438 (Ga. Ct. App. 1996) (holding that district may limit student's access to public education in aggravated assault case through permanent expulsion, although action effectively would bar student from any public school in state).

220 TEX. EDUC. CODE ANN. § 37.006 (Vernon Supp. 2004); Op. No. 97-0268, Op. Att'y Gen. of Miss. (June 13, 1997), 1997 WL 370210, at *5.

221 *See* Bogos, *supra* note 185, at 359 (noting major criticism of zero-tolerance laws such as Michigan's that fail to keep delinquent youths off streets or provide them with alternative education).

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not receive the same curriculum as those in mainstream classes, and these students often are not expected to achieve the same goals and meet the same standards as their mainstream peers.[222] Students in alternative schools are also more likely to learn delinquent behavior and have an increased risk of engaging in or becoming a victim of violence.[223] For example, during the 1999–2000 school year, Texas schools reported taking disciplinary action in 7436 instances for "serious or persistent misconduct violating the student code of conduct while placed in [an] alternative education program."[224] During the 2001–2002 school year, Texas schools reported taking action in 11,506 instances in that category.[225] Alternative schools are often little more than warehouses for disruptive students and may offer little prospect for rehabilitation.[226]

As this Section demonstrates, eroding confidentiality carries considerable costs when notification statutes are paired with expansive expulsion and exclusion provisions. These costs raise serious concerns about a shift in juvenile policy justified solely on purported gains in public safety. Even if schools temporarily avoid crime on campus or in the classroom, they can expect crime to increase in nearby communities and eventually spill back into schools. Policymakers should not rely on the faulty assumption that weakening confidentiality protections will yield immediate or even net gains in reduced crime and improved safety for students, staff, and teachers as long as eroding confidentiality remains intertwined with broad school expulsion policies.

3. *Role of Record Sharing in the Rehabilitation of Children*

Absent school expulsion provisions, some limited erosion of confidentiality between schools and the courts actually may enhance a child's prospects for rehabilitation. The very juvenile justice information that has been used to exclude and alienate children could be used to improve the quantity and quality of rehabilitative services available to children in the juvenile system. Juvenile justice agencies that assume responsibility for a delinquent child's treatment plan need a full picture of the child's life circumstances, including information

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222 Patti Blackburn Tillman, Note, *Procedural Due Process for Texas Public School Students Receiving Disciplinary Transfers to Alternative Education Programs*, 3 TEX. WESLEYAN L. REV. 209, 230 (1996) (arguing that many alternative schools become "dumping grounds, especially for at-risk and special education students").

223 Bogos, *supra* note 185, at 384–85.

224 Strayhorn, *supra* note 168.

225 *Id.*

226 Bogos, *supra* note 185, at 384–85.

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about school attendance, school behavior, grades, and academic capacity. Legislative barriers that prevent juvenile justice agencies from collaborating with schools may prevent the agency from developing an accurate assessment of a child's needs and from implementing the most appropriate treatment or service plan for charged and adjudicated children.[227]

Schools may be included in the rehabilitative process not only as a source of information, but also as a potential source of rehabilitative services. Especially in jurisdictions where resources are limited, courts can work with schools to spread out responsibility for payment and management of services such as substance abuse treatment and individual or group counseling. A juvenile probation officer also may work with the school to secure psychological and psychiatric services for a child entitled to benefits under the Individuals with Disabilities Education Act.[228] Even when no additional services are provided, collaboration between courts and schools may lead to a more efficient distribution of services by avoiding duplication and preventing the child from becoming overextended with too many rehabilitative obligations.[229] Communication also may be logistically necessary to facilitate a child's successful return from juvenile detention to school or simply to explain a child's extended absence from school.[230] Considering the role of education in deterring crime,[231] greater school involvement in the rehabilitation of delinquent or at-risk children may improve campus safety and reduce recidivism among young offenders.

Some legislators may be reluctant to appropriate funding for treatment programs, in light of recent arguments that the philosophy of rehabilitation has failed. Ironically, any real or perceived failure of rehabilitation actually may have been caused, or at least amplified, by exclusionary policies. School exclusion is so incompatible with reha-

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227 Martin, *supra* note 41, at 408 (discussing need for interagency collaboration like Interagency Gang Intervention Database Program (IGIDP) in Wichita and Sedgwick Counties, Kansas); Stephens & Arnette, *supra* note 124, at 3.

228 20 U.S.C. § 1400 (2000).

229 U.S. DEP'T OF JUSTICE, *supra* note 123, at 15; *see* N.Y. CRIM. PROC. LAW § 380.90 cmts. (McKinney Supp. 2004) (Peter Preiser, Practice Commentaries) [hereinafter Preiser, Practice Commentaries] ("The avowed and sole purpose of [New York's notification statute] is to increase coordination between the criminal justice system and the schools . . . .").

230 *See* N.Y. CRIM. PROC. LAW § 380.90 (Consol. Supp. 2003) (requiring reports of criminal sentencing to school so that school can prepare for child's reentry); *see also* VA. CODE ANN. § 22.1-209.1:2(A)(iii) (2003) (requiring Board of Education to establish alternative schools to transition students who have been released from juvenile correctional centers).

231 *See* Pell, *supra* note 130, at 883–84 (noting well-established connection between poor school attendance and delinquent behavior); *see also supra* notes 199–210 and accompanying text.

HeinOnline -- 79 N.Y.U. L. Rev. 561 2004
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bilitation that any gains made in juvenile court are lost when an ostracized, excluded, or expelled child attempts to return to school. If legislators are serious about rehabilitation, they must repeal or amend school disciplinary statutes that permit or require expulsion solely on the basis of off-campus delinquency. Legislators also must be serious about committing the necessary time and resources to the rehabilitation of young offenders. In psychology, "amenability" refers to the extent to which an individual has the possibility or likelihood of changing regardless of his or her exposure to a particular intervention.[232] Some children may be amenable to treatment but do not improve because the intervention was inadequate, implemented improperly, or poorly designed to meet the child's particular needs. Without adequate funding, legislators should not expect rehabilitation to be successful.

Understandably, policymakers require convincing that programs will work and will be cost-effective over time. Not only do studies confirm the amenability of adolescents to treatment, but literature also identifies specific intervention and treatment programs that have been successful in preventing and reducing serious, violent, and chronic delinquency.[233] Some particularly effective programs involve multiple systems and require the participation of families, schools, peers, and employers.[234] Other demonstrably effective interventions include counseling programs, interpersonal skills training, and school-sponsored initiatives such as law-related education, athletic and recreational programs, and school-wide organizations that target at-risk children.[235] At least one study has shown that the most effective programs are not located within juvenile justice facilities but still are sponsored by the juvenile justice system, administered by juvenile justice personnel, and required by court order.[236] Other studies have begun to document the long-term savings that accompany rehabilitative programs in lieu of more costly and less effective incarceration.[237]

With doubts raised about the effectiveness of disclosing records and excluding students as a practical response to crime, and with the possibility of improving rehabilitation by encouraging school partici-

232 *See* Steinberg & Cauffman, *A Developmental Perspective*, *supra* note 99, at 56–57.

233 Slobogin, *supra* note 14, at 328.

234 *Id.* at 324; Butts & Mears, *supra* note 6, at 185.

235 Lipsey, *supra* note 83, at 628–29; Mark W. Lipsey et al., *Effective Intervention for Serious Juvenile Offenders*, JUV. JUST. BULL., Apr. 2000, at 3–4, *available at* http://www.ncjrs.org/pdffiles1/ojjdp/181201.pdf; *see also* Butts & Mears, *supra* note 6, at 186–89 (discussing two successful intervention programs: Boston Gun Project, and Families and Schools Together).

236 Lipsey, *supra* note 83, at 630–33.

237 Butts & Mears, *supra* note 6, at 184–86.

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pation, policymakers need to revisit priorities and rethink the structure of confidentiality statutes and expulsion provisions. Parts III and IV of this Article will return to these issues and attempt to develop a compromise that will best accommodate the concerns on both sides of the confidentiality debate in schools. Part II.B will explore the related matter of juvenile records confidentiality in the public housing context.

B. Public Housing, Courts, and Law Enforcement

The potential for eroding confidentiality between juvenile courts and public housing authorities presents a number of interesting parallels and contrasts to the erosion of confidentiality between courts and schools. Like schools, public housing authorities (PHAs) are searching for practical ways to reduce crime in their communities by identifying and removing those children and their families most likely to interfere with the safety and welfare of other tenants. Public housing officials believe that, unless they have full access to juvenile records, they cannot effectively implement recent federal legislation authorizing evictions or denials of public housing to tenants and applicants who engage in criminal conduct both on and off public housing property. This Section looks at the political environment and legal framework that spawned local PHAs' recent interest in juvenile records and questions the value of eroding confidentiality when paired with current eviction practices.

1. The Beginning of Information Sharing Between PHAs and Law Enforcement

While information about adult criminal activity is readily available to PHAs through public databases such as the National Criminal Information Center, housing authorities, to date, have little or no explicit statutory right to access juvenile records in any of the fifty states. Housing authorities may have direct knowledge of juvenile crime when housing officials observe the conduct, other residents report the conduct to housing police, or a child is arrested by local police on public housing property.[238] When PHAs do not have direct knowledge of delinquent conduct, they may obtain that information from informal, and potentially unlawful, collaboration between public housing police and local law enforcement agencies or through self-

[238] *See, e.g.*, Minneapolis Pub. Hous. Auth. v. Lor, 591 N.W.2d 700, 704 (Minn. 1999) (reporting that housing authority learned of off-site drive-by shooting after local police received tip that guns were located in child's public housing apartment and arrested child on public housing property).

HeinOnline -- 79 N.Y.U. L. Rev. 563 2004
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reporting by tenants and applicants seeking to comply with what appear to be mandatory reporting requirements in leases and applications. Housing authorities are now asking state legislatures to include them in formal statutory exceptions to juvenile confidentiality requirements.

(a) Relevant Legislation

While many states grant schools some access to juvenile court records, no state makes those records explicitly available to PHAs. In states where juvenile matters are presumptively open,[239] PHAs have access to juvenile records unless there is some specific objection by the child and an adverse ruling from the judge. In those states where juvenile records are presumptively confidential, PHAs can obtain records only if they fall within one of the state's exceptions to confidentiality. Many states have adopted generic exceptions that allow access to anyone who demonstrates a "legitimate interest" in the delinquency proceedings.[240] Although the statutes provide little guidance on what constitutes a legitimate interest, at least two federal housing provisions may help housing authorities claim "interest" in obtaining juvenile offender information. First, federal law allows a local housing authority to deny housing if officials determine

> that an applicant or any member of the applicant's household is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees . . . .[241]

Second, federal law provides that

> during the term of the lease, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near such premises, engaged in by a

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239 *See supra* note 89.

240 *E.g.*, ALA. CODE § 12-15-101(b)(3) (Supp. 2002); ALASKA STAT. § 47.12.300(e) (Michie 2002); CONN. GEN. STAT. ANN. § 46b-124(d) (West Supp. 2003); VA. CODE ANN. § 16.1-301(B)(3) (Michie Supp. 2002); *see also* D.C. CODE ANN. § 16-2331(b)(7) (Supp. 2003) (granting access, by special order of court, to "persons having a professional interest in the protection, welfare, treatment, and rehabilitation of the respondent or of a member of his family, or in the work of the Superior Court"); HAW. REV. STAT. § 571-41(b) (Supp. 2001) (authorizing judge to determine who has direct interest in child's case).

241 42 U.S.C. § 13661(c) (2000).

HeinOnline -- 79 N.Y.U. L. Rev. 564 2004
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> tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.[242]

Relying on generic confidentiality exceptions and the power conferred in these federal housing provisions, some PHAs have submitted formal written requests for access to juvenile records from local law enforcement agencies and juvenile courts. In Virginia, for example, the Richmond Redevelopment Housing Authority (RRHA) filed a petition with the Richmond Juvenile and Domestic Relations Court in April 2002, seeking authorization for the Richmond Police Department to disclose juvenile law enforcement records to members of the RRHA's Public Safety Division.[243] The housing authority argued that the court had authority, pursuant to Virginia Code section 16.1-301(B)(3), to disclose records to any person, agency, or institution with a "legitimate interest" in a juvenile case or police investigation of a juvenile case. The RRHA claimed a legitimate interest in juvenile matters because federal regulations required termination of leases of tenants who engaged in drug or other criminal activity on or near public housing premises.[244] The RRHA alleged that without access to juvenile records, it would be unaware of criminal conduct warranting the eviction of residents who threaten the safety of others in the community. Its petition was supported by a letter from the Richmond Chief of Police, who argued that recent collaborations between RRHA's Public Safety Division and the Richmond Police Department would have limited success in reducing crime in public housing if collaborating agencies could not share information.[245]

The RRHA request appears to have been motivated by the 2002 Supreme Court ruling in *Department of Housing and Urban Development v. Rucker*, which upheld the right of public housing authorities to evict families of children who engage in criminal or delinquent conduct, even if that conduct is unknown to the parents and does not occur on public housing property.[246] Despite speculation to the contrary, neither *Rucker* nor any federal statute or regulation equates the right to evict for delinquent conduct with the right to access juvenile

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242 *Id.* § 1437f(d)(1)(B)(iii).

243 Petition at 1, *In re* Richmond Redev. & Hous. Auth., Richmond Juv. and Dom. Rel. Ct. (n.d.) (on file with *New York University Law Review*).

244 *Id.* (citing 24 C.F.R. § 966.4(f)(12)(i) (2003)).

245 Letter from Theresa Gooch, Acting Chief of Police, Richmond Police Department, to the Richmond Circuit Court (n.d.) (on file with *New York University Law Review*).

246 535 U.S. 125, 133–36 (2002).

HeinOnline -- 79 N.Y.U. L. Rev. 565 2004
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records.[247] In fact, the federal housing act explicitly states that local PHAs can obtain tenants' or applicants' juvenile records *only* to the extent authorized under applicable state, tribal, or local law,[248] despite lobbying for juvenile records access during deliberation of the bill by then Housing and Urban Development Secretary Henry G. Cisneros.[249]

On behalf of the Richmond Tenants Organization, the Legal Aid Justice Center (LAJC) in Virginia wrote a letter threatening to file suit to prevent RRHA from accessing the requested records.[250] The LAJC argued that disclosure of juvenile records would constitute an adverse action against a tenant under 42 U.S.C. § 1437(d)(k) and was thus improper unless tenants received notice and opportunity for a grievance hearing. The LAJC also complained that the RRHA request was too broad, as it did not limit its request to records of juveniles actually living in the public housing complex.[251] In response to the threat of suit, the RRHA withdrew its request three days after the LAJC letter, and its executive director stated that

> after . . . reviewing the possible impact that this effort [, the request for records release,] would have on juveniles in and out of public housing communities, we felt that this was not an appropriate course of action . . . . We respect the privacy rights of all persons and will continue to pursue initiatives and resources that are available to us to advance crime-prevention efforts and maintain safe communities.[252]

Similar activity occurred in San Francisco. In 1997 the ACLU and the Asian Law Caucus brought suit alleging that the San Francisco Housing Authority routinely violated the privacy of juveniles by obtaining confidential juvenile records and making them public through public housing eviction proceedings.[253] The groups filed suit after the housing authority sought to evict a seventeen-year-

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247 *See* 42 U.S.C. § 1437d(q)(1)(A) (requiring law enforcement, upon PHA request, to provide *adult* criminal records); 24 C.F.R. § 5.903 (2003) (referring to procedures for obtaining access to criminal records of "adult household member[s]").

248 42 U.S.C. § 1437d(q)(1)(C).

249 Jeffrey L. Katz, *Reauthorization Bill Approved After Hot Debate on Crime*, 52 CONG. Q. WKLY. REP. 1634 (1994).

250 Letter from Mary Bauer, Litigation Director of Legal Aid Justice Center, to Godfrey T. Pinn, Jr., Esq., Attorney for Richmond Redevelopment and Housing Authority (May 10, 2002) (on file with *New York University Law Review*).

251 *Id.*

252 Alan Cooper, *RRHA Won't Seek Juveniles' Records: Petition for Access Had Opposition*, RICHMOND TIMES-DISPATCH, May 16, 2002, at B5.

253 Benjamin Pimentel, *Housing Authority Sued over Evictions*, S.F. CHRON., June 4, 1997, at A15; Press Release, ACLU, San Francisco Housing Authority Challenged For Use of Juvenile Arrest Records in Evictions (June 5, 1997), http://archive.aclu.org/news/n060597a.html.

HeinOnline -- 79 N.Y.U. L. Rev. 566 2004
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old and his family because of the minor's arrest for possession of marijuana. The charges against the child were dropped,[254] but the housing authority continued with the eviction proceedings as permitted by housing authority policy, which authorizes eviction on the basis of an arrest alone. The minor's confidential juvenile records became open to public inspection when they were incorporated into documents filed in civil court.[255]

The City of Paris Housing Authority in Texas also requested access to juvenile records from local police when it wanted law enforcement reports about a particular juvenile under investigation.[256] The Paris Police Department then sought guidance from the state Attorney General, who issued a formal opinion stating that, despite the very liberal disclosure of juvenile records to public schools, the housing authority was not entitled to the juvenile's offense report under any existing state law. The Attorney General decided that transfer of information is prohibited, even between government agencies, when state confidentiality statutes enumerate specific entities to which the release of information is permitted.[257] While juvenile justice agencies were included in the list of receiving agencies, public housing authorities were not.

One judge in Fresno County, California attempted to circumvent the statutory limitations on access to juvenile records by issuing a standing order granting the local housing authority access to juvenile records whenever the housing authority declares that records will be used solely for the purpose of eviction. Arguing that the standing order violated the California Welfare and Institutions Code, local legal services agencies challenged both the order and the admission of records obtained pursuant to the order in an eviction proceeding.[258] As in Virginia, California law gives judges some discretion to protect

254 Pimentel, *supra* note 253.

255 *Id.*

256 OR2001-1563, Op. Att'y Gen. of Tex. (Apr. 19, 2001), 2001 WL 949066, at *1.

257 *Id.* at *2 (concluding that Open Records Act does not entitle PHA to receive law enforcement offense report involving juvenile); *see also* Thomas S. Morgan & Judge Harold C. Gaither, Jr., *Juvenile Law and Practice*, 29 TEX. PRAC. SERIES § 545 (Supp. 2003).

258 *See* Defendant's Brief in Support of Motion in Limine at 2–3, Hous. Auth. v. Valverde (Central Valley Mun. Ct. Apr. 5, 1996) (No. C96300004-9) (arguing for exclusion of juvenile's police report in family's eviction proceeding); *see also* ACLU OF N. CAL., 1997 ANNUAL REPORT, *at* http://www.aclunc.org/annual97/criminal-justice.html (last visited June 14, 2003) (reporting filing of class action lawsuit requesting injunction against illegal dissemination of juvenile records and stay of eviction proceedings based on those records); Press Release, ACLU, News: San Francisco Housing Authority Challenged for Use of Juvenile Arrest Records in Evictions (June 5, 1997), *at* http://www.aclu.org/news/n060597a.html (last visited June 14, 2003) (same).

HeinOnline -- 79 N.Y.U. L. Rev. 567 2004
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or disclose juvenile records, but generally requires an individual case-by-case evaluation of each request for access.[259] Thus the court must balance the need for release against the effect on the individual child and his or her prospects for rehabilitation. Each child also is entitled to notice and an opportunity to be heard when a petition is filed to access his or her records.[260] Given these substantive and procedural requirements, a standing order like the one in Fresno would be improper, even where the judge believes that housing authorities always have a compelling need for juvenile records.

While recent amendments have significantly eroded the confidentiality of juvenile records and proceedings, PHAs still are bound by the state and local confidentiality protections that do exist. In at least one state, the legislature has identified potential penalties to curtail or deter unlawful acquisition and dissemination of juvenile records: In 1990, Massachusetts legislators granted the state's "criminal history systems board" the power to promulgate rules regarding the collection and use of criminal records by PHAs.[261] The legislators authorized the board to hear complaints of unlawful obtainment and dissemination of records of juvenile proceedings and to issue orders enforcing rules and regulations, including the imposition of fines.[262] In some states, juvenile records might be excluded in an eviction proceeding if they are obtained unlawfully or by deceit, as improperly obtained records are excluded in similar administrative contexts.[263] In other

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259 *See, e.g.*, T.N.G. v. Superior Court, 484 P.2d 981, 987–88 (Cal. 1971) (concluding that juvenile court has "exclusive authority" to decide whether to release records to third parties); P. v. Superior Court, 242 Cal. Rptr. 877, 878–79 (Cal. Ct. App. 1988) (finding review by juvenile court to be proper disclosure procedure to determine which records should be disclosed under state Evidence Code's balancing test); Navajo Express v. Superior Court, 231 Cal. Rptr. 165, 168 (Cal. Ct. App. 1986) (stating that confidentiality of records is "within the discretion of the juvenile court"). *But see* CAL. WELF. & INST. CODE § 827.5 (West Supp. 2004) (permitting disclosure of minor's name by law enforcement without prior authorization if child is fourteen years of age or older and charged with serious felony).

260 *In re* Keisha T., 44 Cal. Rptr. 2d 822, 834 (Cal. Ct. App. 1995); CAL. R. CT. 1423(d)-(e) (West 1996).

261 Act of Dec. 14, 1990, ch. 319, §§ 1–4, 1990 Mass. Acts 796, 796–97 (current version at MASS. GEN. LAWS ANN. ch. 6, § 168 (West Supp. 2003)).

262 *Id.*

263 *See, e.g.*, Redner v. Workmen's Comp. Appeals Bd., 485 P.2d 799, 806–07 (Cal. 1971) (finding that fraudulently obtained evidence in workers' compensation proceeding was inadmissible against applicant); Elder v. Bd. of Med. Exam'rs, 50 Cal. Rptr. 304, 315 (Cal. Dist. Ct. App. 1966) (applying exclusionary rule to administrative hearing involving right to continue to practice medicine); People v. N.Y. State Bd. of Parole, 397 N.E.2d 354, 358 (N.Y. 1979) (applying exclusionary rule to parolee's revocation hearing). *But see, e.g.*, Emslie v. State Bar of Cal., 520 P.2d 991, 1001–02 (Cal. 1974) (holding that balancing test should be applied when deciding admissibility of evidence obtained from unlawful search at attorney disciplinary hearing); Ahart v. Colo. Dep't of Corr., 964 P.2d 517, 523 (Colo.

HeinOnline -- 79 N.Y.U. L. Rev. 568 2004
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states, persons can be charged with a misdemeanor or held in contempt of court if juvenile records are unlawfully obtained or disseminated.[264]

(b) Public Housing Applications, Pre-Screening, and Lease Provisions

Criminal background checks have become a standard part of public housing applications. Although screening applicant backgrounds is not new,[265] PHAs have significantly enhanced criminal background checks and applicant screening procedures.[266] Concerned about the perceived increase in juvenile criminal activity,[267] housing officials argue that the release of juvenile records is essential to the implementation and enforcement of new eviction and application pol-

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1998) (determining through balancing test that Department of Corrections may use unlawfully obtained evidence in civil service disciplinary proceeding); Sheetz v. Mayor of Baltimore, 553 A.2d 1281, 1284–85 (Md. 1989) (ruling that evidence seized in violation of Fourth Amendment is admissible in discharge proceedings unless obtained in bad faith); Boyd v. Constantine, 613 N.E.2d 511, 514 (N.Y. 1993) (allowing evidence obtained through unlawful search into administrative disciplinary proceeding against state trooper on grounds that benefits gained from evidence outweighed deterrent effect of applying exclusionary rule).

264 For states imposing a misdemeanor charge if juvenile records are unlawfully obtained or disseminated, see ALASKA STAT. § 47.12.300(h) (Michie 2002); D.C. CODE ANN. § 16-2336 (2001); N.H. REV. STAT. ANN. § 169-B:36 (2001); N.M. STAT. ANN. § 32A-2-32(C) (Michie Supp. 2003); OKLA. STAT. tit. 10, § 7005-1.3(C) (1997); S.C. CODE ANN. § 20-7-690(A) (Law. Co-op. Supp. 2003). For states where persons who disclose juvenile information can be found in contempt of court, see MONT. CODE ANN § 41-5-216(2) (2003); NEB. REV. STAT. § 43-2,105 (1998); S.D. CODIFIED LAWS § 26-7A-38 (Michie 1999).

265 *See* Manigo v. N.Y. City Hous. Auth., 273 N.Y.S.2d 1003, 1004–05 (N.Y. Sup. Ct. 1966) (describing "desirability" assessment for public housing applicants to include "parental control over children, family stability, medical and other past history, . . . and criminal record," including adjudication as youthful offender or juvenile delinquent).

266 *See* John J. Ammann, *Criminal Records of the Poor and Their Effects on Eligibility for Affordable Housing*, 9 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 222, 224 (2000) ("Federal policy makers have joined the effort by requiring more careful scrutiny of the backgrounds of applicants for public and subsidized housing."); Helen Gao, *City to Check Tenants' Pasts: Probes Aimed at Curbing Criminal Activity*, L.A. DAILY NEWS, Mar. 28, 2002, at N3 (reporting that Department of Housing and Urban Development had ordered background checks in 2001 as part of Quality Housing and Work Responsibility Act); M. Scot Skinner, *You Gotta Be Good To Get Public Housing*, ARIZ. DAILY STAR, Oct. 12, 1998, at 1A (reporting that Tucson was conducting stricter background checks under federal "One Strike, You're Out" policy); Rebecca Walsh, *Housing Boss Applauds New Crime Policy*, SALT LAKE TRIB., Mar. 30, 1996, at D2 (noting that Salt Lake City Housing Authority began screening criminal records in 1990, six years before "One Strike, You're Out" policy).

267 *See, e.g.*, Thomas Edwards, *Housing Officials to Get Tough on Bad Tenants*, SAN ANTONIO EXPRESS-NEWS, Apr. 23, 1997, at 1B (quoting senior vice president of housing operations for San Antonio Housing Authority as saying, "How are we going to address the increase in criminal juvenile activity?").

HeinOnline -- 79 N.Y.U. L. Rev. 569 2004
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icies designed to improve public safety.[268] In the first stage of the process, applicants routinely are asked to "voluntarily" disclose criminal conduct by themselves or their family members on public housing applications.[269] While some housing applications specify that criminal background information is required only for adult household members,[270] other applications inquire more generally whether "any member" of the household has been convicted of a drug-related or violent crime.[271]

Housing authorities also may obtain juvenile records from local databases. There is evidence that some housing authorities attempt to screen for juvenile records despite state laws that limit or deny access. For example, as of March 2002, at least one housing authority in California admits to including minors in criminal background screenings of applicants despite laws to the contrary.[272] Presently, the Boston Housing Authority (BHA) requires all applicants thirteen years of age or older to sign a release allowing BHA to access his or her criminal record.[273] BHA screens for misdemeanor and felony crimes against property, crimes of fraud, crimes of violence, prostitution, larceny, and any drug-related crimes, including alcohol abuse, that might interfere with the health, safety, or peaceful enjoyment of the premises by other residents.[274] BHA may evict a family or deny an application for any of these offenses, even if the case has not yet

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268 *See id.* (reporting that PHAs may push for legislation to get courts to disclose juvenile records); *see also* Tanya Flanagan, *Striking Difference*, LAS VEGAS REV.-J., Dec. 22, 1997, at 1B (stating that police believe "One Strike, You're Out" policy has limited benefits because PHAs cannot access juveniles' records); Walsh, *supra* note 266 (explaining Salt Lake City Housing Authority executive director's view that protection of juvenile records allows "many troublesome youth [to] slip through the cracks").

269 *See, e.g.*, BOISE CITY/ADA COUNTY HOUSING AUTHORITY APPLICATION FOR ASSISTANCE, http://www.bcacha.org/Rental_Assistance_Application.pdf (last visited Jan. 8, 2004) ("Has any household member been charged with drug-related or violent criminal activity within the past three (3) years?"); COLUMBUS METRO. HOUS. AUTH., INITIAL TENANT APPLICATION, PUBLIC HOUSING PROGRAM, http://www.cmhanet.com/pdf/presumptive.pdf (last visited Jan. 8, 2004) ("Have you or any member of your household been convicted of the illegal distribution or manufacture of an illegal drug or other illegal controlled substance?").

270 Application procedures for New York City Housing Authority specify that criminal background checks will be conducted only for household members aged sixteen years and older. NEW YORK CITY HOUS. AUTH., PUBLIC HOUSING, http://www.nyc.gov/html/nycha/html/publichousing.html (last visited Jan. 8, 2004).

271 *See supra* note 269.

272 *See* Gao, *supra* note 266 (reporting on survey conducted by Glendale city staff members finding that one of twenty-one housing authorities questioned includes minors in screening process).

273 BOSTON HOUS. AUTH., ADMISSIONS AND CONTINUED OCCUPANCY POLICY FOR THE PUBLIC HOUSING PROGRAM 63, http://www.bostonhousing.org/detpages/deptinfo127.html (last visited Jan. 8, 2004).

274 *Id.* at 77–78.

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been decided.[275] Massachusetts confidentiality statutes shield juvenile records from public inspection unless the child is charged with a felony, is at least fourteen years of age, and has been adjudicated for two or more previous offenses.[276] Thus, the BHA legally could not conduct this type of screening without a signed release. Although the child voluntarily relieves the housing authority of confidentiality restrictions by signing the release, the child and his family clearly are forced to make a hard choice: either waive confidentiality or forego access to public housing.

The 1988 Anti-Drug Abuse Act requires PHAs to use leases that advise tenants that PHAs have discretion to evict for drug-related activity of household members and their guests.[277] Some lease provisions require leaseholders to disclose subsequent criminal conduct during the life of the lease. In York, Pennsylvania, the local housing authority learned of a child's alleged participation in a robbery and burglary when the guardian grandparents submitted, as required, a "personal declaration" statement indicating that their grandson had been arrested for the crimes.[278] The legality of reporting requirements such as the one in York will depend on local confidentiality laws.[279]

(c) Interagency Collaboratives

While less prevalent than criminal background screening in housing applications, a number of interagency collaboratives exist to link housing authorities with other public institutions such as local police departments, human service agencies, and the courts. In Buffalo, New York, for example, the Kensington Project was created in 2002 as a community-based program designed to reduce youth violence and build community connections in the neighborhoods surrounding local high schools and public housing developments. As in so many collaboratives, information sharing is identified as one of the highlights of the project. Probation and parole officers work with the

[275] *See id.* at 81–82 (noting that BHA will conduct checks for evidence of criminal charges that are still pending).

[276] MASS. GEN. LAWS ANN. ch. 119, § 60A (West 2003).

[277] Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (current version at 42 U.S.C. § 1437d(*l*)(6) (2000)).

[278] Hous. Auth. v. Dickerson, 715 A.2d 525, 525–26 (Pa. Commw. Ct. 1998). In *Dickerson*, federal regulations required tenants to submit these declarations. *Id.* at 525.

[279] The *Dickerson* court did not mention the child's age. Under Pennsylvania law, disclosure is not prohibited if the child is fourteen years or older and the alleged conduct would be a felony if committed by an adult, or if the child is twelve years or older and allegedly committed one of the more serious crimes as specified by statute. 42 PA. CONS. STAT. § 6336(e) (2002).

HeinOnline -- 79 N.Y.U. L. Rev. 571 2004
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police, schools, and PHA to identify, monitor and discipline high-profile youth offenders. Project members can draw upon resources from each of the collaborating agencies, which include the FBI, University of Buffalo School of Social Work, Buffalo Public Schools, Buffalo Police Department, Buffalo Municipal Housing Authority, and area health, human services, and employment agencies.[280]

Another example is the Tucson, Arizona alliance between local police and the local housing authority, where officials logged all public housing addresses into the Tucson Police Department computer system. If an officer ever is called to one of the addresses, public housing officials automatically will get a copy of the report, which they could use to evict an entire family based on a child's arrest.[281] This procedure appears to be lawful in Tucson since Arizona's confidentiality laws make delinquency records open for public inspection.[282]

In California, legislation enacted in 1999 mandated that three counties—Alameda, San Bernardino, and Ventura—create three-year interagency collaboratives. Through these collaboratives, the counties must develop integrated and coordinated case management systems to improve the delivery of services to families that face barriers to employment.[283] Family information is shared among member agencies, which may include mental health providers, school personnel, juvenile probation officers, housing authority representatives, and child welfare agencies, among others. Notably, the authorizing statute states that juvenile probation representatives may provide information to other team members, but these representatives may not receive information or records themselves.[284]

While some collaboratives are less explicit about their interest in sharing information concerning at-risk or delinquent juveniles, many appear implicitly designed to facilitate the flow of information in an effort to target and reduce crime. In many states, local police routinely are stationed on or near public housing property. Intuitively, collaboratives that significantly increase the contact between local police and housing authority officials also will increase the exchange of information, at least informally. In Superior, Wisconsin, for

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280 For information on the Kensington Project, see Christine Vidal, *The Kensington Project: Social Work Involved in Program To Reduce School Violence*, U. BUFFALO REP., Mar. 21, 2002, *at* http://www.buffalo.edu/reporter/vol33/vol33n22/n1.html (last visited Mar. 15, 2004).

281 Skinner, *supra* note 266.

282 ARIZ. REV. STAT. ANN. § 8-208 (West Supp. 2003).

283 CAL. WELF. & INST. CODE § 11325.9 (West 2001).

284 *Id.* § 11325.9(b)(2).

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example, the Superior Police Department created a Housing Authority Liaison Office and opened a police substation in the local housing development.[285] Likewise, in Fort Pierce, Florida, a local police officer has been assigned to work directly with housing authority staff and residents to enforce criminal laws and administrative rules vigorously.[286] Even if records are not formally exchanged, local police serving in these dual capacities may give PHAs access to information they otherwise could not obtain.

2. *Interplay of Eroding Confidentiality and Current Eviction Policies*

As in the school setting, public housing policymakers cannot measure the practical benefits of eroding confidentiality in a vacuum. The effectiveness of any new confidentiality policy must be evaluated in conjunction with related eviction practices. Many residents who fear that delinquent juveniles will jeopardize their safety or negatively influence their children support the combined disclosure and eviction policies. While these views certainly represent natural and valid parental concerns, the perspective may be somewhat shortsighted if it fails to account for the long-term impact on community safety. It is unclear whether disclosing juvenile records and evicting families will achieve the desired goal of reducing overall crime in public housing communities and nearby neighborhoods.

Disclosing records to PHAs actually may impede crime prevention by exacerbating risk factors already correlated with crime and delinquency and by making the rehabilitation of juvenile offenders more difficult, if not impossible. Research consistently has documented the correlation between delinquency and risk factors such as poverty and a poor home or community environment.[287] Juvenile record checks may create or further impact already tenuous family relations by pitting parents, guardians, or siblings against children with delinquent backgrounds.[288] Parents who become angry and resentful even may abuse children who make them lose housing.[289] Familial

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285 SUPERIOR POLICE, CRIME PREVENTION BUREAU, *at* http://www.ci.superior.wi.us/spd/bureau.htm#CP (last visited Jan. 8, 2004).

286 For information on this collaboration, see FORT PIERCE POLICE DEP'T, COMMUNITY POLICING UNIT, *at* http://www.fppd.org/commpol.html (last visited Jan. 20, 2004).

287 *See* Gilbert, *supra* note 36, at 1170, 1175 (reporting on Office of Juvenile Justice and Delinquency Prevention study involving twenty-two researchers that listed factors contributing to delinquency, such as community norms favorable toward crime, transience, family conflict, domestic violence in home, unemployment, and substandard living conditions).

288 Gao, *supra* note 266.

289 *See* Josephine Gittler, *The American Drug War, Maternal Substance Abuse and Child Protection: A Commentary*, 7 J. GENDER, RACE & JUST. 237, 244 n.28 (2003) (gathering

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rejection destroys important family ties and support systems essential to rehabilitating troubled youth. Parents even may force a delinquent child to leave home, either in retaliation for embarrassment brought on the family or simply to avoid eviction of other family members. Relying on federal regulations that give PHAs some discretion to permit nonoffending family members to remain in public housing after a crime,[290] some housing authorities have adopted a policy of dismissing evictions based on the conduct of one household member when the other tenants exclude the offending member from the tenancy.[291] Although it may offer a positive resolution for nonoffending parents and siblings, the policy puts parents in a very difficult position and brings added turmoil and conflict into the family. Nonoffending family members and their lawyers have great incentive to take advantage of these discretionary provisions, forcing children to move out while telling juvenile court judges that they refuse to accept the child back home at the time of arrest.

These children who are abandoned or rejected by their parents then generally are left with little discipline, monitoring, or supervision. The absence of attachment, supervision, and discipline are all significant preludes to delinquency.[292] In addition, children with multiple risk factors such as inadequate or erratic parental supervision combined with substandard living conditions have the greatest risk of subsequent delinquency.[293] Siblings of criminally involved juveniles also can be expected to reap the consequences of homelessness, familial instability, stress, and tension, and eventually may engage in delinquent conduct themselves. These siblings are likely to miss school and act out their frustrations through substance abuse, aggression, and violence. Furthermore, families who qualify for public housing are typically in the greatest need, and those who lose federally funded

studies documenting child abuse and neglect as disproportionately high among those living in poverty and subject to stressors such as inadequate and unstable housing).

290 24 C.F.R. § 966.4(l)(5)(vii)(B) (2003).

291 *See* Nelson H. Mock, Note, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Parties*, 76 TEX. L. REV. 1495, 1530 (1998) (noting that New York Housing Authority will dismiss evictions when tenant removes offending member from home); Skinner, *supra* note 266 (reporting that families can "evict" problem tenant in order to remain in public housing). Some local housing authorities will not consider mitigation and make eviction mandatory; however, the regulations explicitly allow PHAs to consider factors such as the seriousness of the offense, the extent of participation by other family members, and the effect eviction would have on family members not involved in the criminal activity. *See* Minneapolis Pub. Hous. Auth. v. Lor, 591 N.W.2d 700, 702–03 (Minn. 1999) (finding that federal regulations allow PHAs to formulate eviction policies that consider equitable factors such as eviction's impact on other family members).

292 Gilbert, *supra* note 36, at 1174.

293 *Id.* at 1175.

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housing will have great difficulty finding new affordable housing.[294] Thus children and families expelled from public housing are often forced into homelessness, temporary shelters, or overcrowded residences with extended family members who may be financially strained.[295] Finally, because public housing developments are often in the lowest income neighborhoods,[296] it is reasonable to expect that some evicted families will move to abandoned buildings or other low-income housing nearby. At a minimum, PHAs should expect that evicted children will return to visit friends and family who remain in housing.

Sharing records with PHAs also significantly may impede the juvenile justice system's efforts to rehabilitate children in its care. Juvenile court judges and other court officials have recognized the importance of the family in the effective rehabilitation of children.[297] Thus the absence of parental support and a stable family will affect decisions at every stage of a delinquency case. Even in deciding whether to petition a charge or divert a child from the system, prosecuting attorneys in some jurisdictions will consider the parent's willingness and ability to participate in any proposed diversion or counseling.[298] Parents who are angry with children who have embarrassed them or caused their eviction are unlikely to participate. At the initial pretrial hearing, the judge is unlikely to release the child to an unsupportive family pending trial, and at sentencing, the judge will be unlikely to give the child a chance on probation when the family expresses frustration and resentment.

Furthermore, children who are charged with delinquency eventually will return to the community, either because they are diverted or placed on probation for minor offenses, or because they are released to the community after detention or commitment for more serious crimes.[299] If juvenile records are disseminated to PHAs, the child's parents and siblings may have been evicted and the family may have dismantled by the time the child returns from detention. With the absence of vital family support upon release, any rehabilitation made by children in detention will be lost.[300] Likewise, any prospect for the

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294 Mock, *supra* note 291, at 1498–500.

295 *Id.* at 1499.

296 William F. Maher, *Wisdom Revisited: Judicial Intervention and the Exercise of Discretion in "Strict Liability" Public Housing Evictions*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. 218, 218 (1999).

297 *See* cases cited *supra* note 36; Gilbert, *supra* note 36, at 1167.

298 Gilbert, *supra* note 36, at 1188.

299 *See* Oddo, *supra* note 63, at 132.

300 See *supra* notes 279–81 and accompanying text for discussion of the family's impact on rehabilitation of delinquent children.

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rehabilitation of children on probation will be slim when family ties deteriorate and parents withdraw support. In this way, record sharing may impede or actually undo any successful rehabilitation by the courts.

Some PHAs have argued that access to juvenile records may serve as an added deterrent for potential offenders. When children are afraid that their parents will lose housing, the threat of eviction can help keep offenders in line,[301] and when parents are afraid, they may be encouraged to keep a greater watch on their children. However, parents in public housing—many of whom are single parents living below the poverty line, with difficulty securing even basic necessities like rent, food, and clothes[302]—cannot watch their children all the time. Given these circumstances, even if the threat of juvenile record checks will encourage some families to keep a closer watch on their children, the realities of public housing make close supervision difficult. It is therefore doubtful that disclosing juvenile records and threatening eviction can meaningfully affect parental behavior. Even if record sharing will deter some youth and affect some parents, it is unlikely that the benefits of deterring a few will outweigh the long-term or collective costs to society and to families when children are not deterred.

Policymakers now routinely are being asked to revisit confidentiality provisions as they apply to public housing authorities.[303] As demands increase, policymakers must determine whether record disclosure to PHAs actually will meet the stated goal of improving safety and consider what impact disclosure will have on the child, his family, and his home environment. Policymakers also should determine whether alternative strategies exist for reducing crime that do not impose such a great cost on evicted children and their families. The next Part of this Article weighs these competing costs and examines some alternative solutions in both the school and public housing contexts.

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301 Skinner, *supra* note 266.

302 Mock, *supra* note 291, at 1498–99.

303 *See, e.g.*, Edwards, *supra* note 267 (reporting that San Antonio Housing Authority is considering turning to state legislature in order to obtain juvenile records from courts); Gao, *supra* note 266 (reporting that Glendale Housing Authority is deciding whether minors should be included in criminal background checks); Adrian Walker, *BHA Seeks Powers for Tenant Screening*, BOSTON GLOBE, June 23, 1994, at 25 (reporting that guidelines for background checks accessing juvenile criminal records proposed by city officials would require new state law).

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III
EXPLORING THE COMPLEXITIES OF THE DEBATE AND AVOIDING OVERSIMPLIFICATION

Considering the practical concerns raised by eroding confidentiality in the school and public housing contexts, the major shifts in juvenile justice policy in the 1990s may be unwarranted. Policymakers seem all too quick to accept unsupported hypotheses about children's innate inability to respond to rehabilitation and have failed to consider alternative explanations for any increase in juvenile crime. Moreover, recent statistics show that current fears about the increase in juvenile crime may be more perception than reality. It appears that the most significant changes in confidentiality policy have been and continue to be implemented at a time when juvenile crime actually is decreasing, not increasing. Recent policy changes simply may have been the most politically expedient response to faulty public perception and may not yield the desired results.

Part III.A looks more closely at the issue of political expedience, reviews statistics on declining juvenile crime, and encourages a more careful identification and analysis of the competing interests raised in the confidentiality debate. Part III.B recognizes that even where eroding confidentiality between courts and schools carries a number of adverse consequences, sharing information may yield some short-term benefits in school safety and may assist juvenile courts in developing and implementing successful rehabilitation plans. This author hopes that legislators will better accommodate the coexisting, if sometimes competing, goals of rehabilitation and safety in schools, as described in Part III.C: first, by attempting to identify alternative public safety strategies that do not negatively impact prospects for rehabilitation; and second, by proposing a move away from blanket, overbroad confidentiality exceptions to a case-by-case disclosure of juvenile records at the discretion of a well-trained, well-guided school liaison. This author also concludes that the competing interests cannot be well accommodated in the public housing context.

A. Avoiding the Politically Expedient Response

The realities of politics require lawmakers to respond quickly to public anxiety that arises from major incidents of crime in the community. A study of the legislative history behind the adoption of confidentiality exceptions in several states provides evidence of this phenomenon. Missouri offers one such example. During the 1994 legislative session, a number of school safety measures were introduced, including a proposal for school access to juvenile records, but

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they did not get much attention or popular support.[304] Between the 1994 and 1996 sessions, a ninth-grade girl was sexually assaulted and beaten to death in a school bathroom in St. Louis. The violence was committed by a fifteen-year-old boy who had just transferred to the school the day before.[305]

In 1995, the Missouri Governor made the School Safety Act one of his highest priorities, and the bill passed in 1996 with the support of teachers and the community.[306] The Act gives schools access to juvenile court records, allows schools to suspend or expel students who have engaged in criminal conduct, and encourages but does not require alternative education. Whenever a child is charged with a listed offense, law enforcement officials must notify the school superintendent within five days of the filing of the petition.[307] A student then may be suspended or expelled if he is charged with, convicted of, or pleads guilty to a felony or if he engages in any conduct which is "prejudicial to good order and discipline in the schools or which tends to impair the morale or good conduct of the pupils."[308]

The changes in Missouri law were driven largely by speculation that the St. Louis crime could have been prevented if the school had been aware of the perpetrator's criminal background.[309] Ironically, speculation about the value of the perpetrator's record appears to be unfounded because the student did not actually have any prior contact with the juvenile court.[310] A more relevant source of information about the perpetrator was available in records from the student's former school. Those records, which were not transferred along with the student, indicated that the fifteen-year-old was a special education student who had been diagnosed with behavior disorders and who had a history of discipline problems at his previous school.[311] The

304 Telephone Interview with Steve McLuckie, Former Representative, Missouri House of Representatives (Oct. 16, 2002); Telephone Interview with Phil Smith, Former Representative, Missouri House of Representatives (Oct. 28, 2002).

305 Joe Holleman, *Youth Arrested in School Murder*, ST. LOUIS POST-DISPATCH, Jan. 26, 1995, at 6A.

306 Telephone Interview with Steve McLuckie, *supra* note 304.

307 MO. REV. STAT. §§ 167.115, .164 (2000).

308 § 167.161.

309 Susan Anderson, *The Safe Schools Act Protects Missouri Students*, 55 J. MO. B. 264, 264, 266 (1999).

310 Telephone Interview with Julie Cole Agee, Executive Director, Missouri Juvenile Justice Association (Oct. 31, 2002). Despite speculation in news reports that the assailant had prior juvenile court contact, Ms. Agee reported that he had never been referred to the juvenile court for any previous incident and had no court records, police records, prior charges, or adjudications.

311 Holleman, *supra* note 305; Phyllis Brasch Librach, *Community Is Still Haunted by the Brutal School Crime: Laws for Transfer Students Were Changed After the Killing*, ST. LOUIS POST-DISPATCH, Feb. 15, 1998, at A1.

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Missouri Juvenile Justice Association was the only organization to speak out against the Missouri legislation, arguing primarily that schools should only have access to juvenile justice records if they intend to use the information to "help" children.[312] The expulsion provisions and the absence of alternative schools offered little or no assurance that Missouri schools were interested in rehabilitating delinquent students. No statistics or studies on recidivism, juvenile rehabilitation, or future dangerousness were examined during the debate over whether and to what extent previous confidentiality protections should be lifted in Missouri.[313]

Legislative changes have been driven not only by specific local incidents, but also by national perception of high and rising crime. Despite statistics to the contrary,[314] public perception and fear of crime at school remained high as late as 1999.[315] That perception was due in large part to the rash of school shootings in the late 1990s[316] and to predictions in the early 1990s that juvenile crime would become a national crisis in the twenty-first century.[317] A number of states particularly became motivated to modify confidentiality provisions after the 1999 shooting in Columbine, Colorado. For example, in New York, a school safety task force appointed by Governor George Pataki before Columbine gained heightened urgency after the shooting.[318] The task force recommended that school administrators receive access to juvenile records,[319] and New York legislators proposed new school safety legislation that would require law enforcement officials to notify schools of students' juvenile court cases.[320] Governor Pataki also pushed for stringent enforcement measures and argued that individual teachers should have power to summarily eject troublemakers.[321] In contrast, the Mental Health Association (MHA) in New York cautioned against a "knee-jerk" response to the events in

312 Telephone Interview with Julie Cole Agee, *supra* note 310. The Missouri School Safety Act now also ensures that school records concerning juvenile charges and dispositions will follow a child whenever he transfers to a new school. MO. REV. STAT. § 167.115(6) (2000).

313 Telephone Interview with Julie Cole Agee, *supra* note 310.

314 *See infra* notes 317–28 and accompanying text.

315 Brooks, *supra* note 155, at 9.

316 During an eight-month period in 1997, six students killed two teachers and eleven students and injured forty-four others. Strayhorn, *supra* note 168.

317 JEFFREY BUTTS & JEREMY TRAVIS, URBAN INST., THE RISE AND FALL OF AMERICAN YOUTH VIOLENCE: 1980 TO 2000, at 2–3 (2002).

318 Teri Weaver, *Task Force Tests Privacy Issues*, POST-STANDARD (Syracuse, N.Y.), Oct. 9, 1999, at B1.

319 *Id.*

320 John Caher, *Pataki Proposes School Violence Bills*, TIMES UNION (Albany, N.Y.), Apr. 27, 1999, at B2.

321 *Id.*

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Columbine. The president of the MHA argued that a great deal of school violence is preventable with an increase in student services, such as mental health assistance and guidance programs.[322] The changes the New York legislature approved in 2000 included the school notification provisions, but not Governor Pataki's enforcement provisions.[323]

As to be expected, there also was considerable change in confidentiality provisions in Colorado. In the months following Columbine, an intense debate emerged about whether the shooters' (Eric Harris's and Dylan Klebold's) juvenile records would have been useful in preventing the shootings and whether access to other students' records would be useful in preventing future crime.[324] When a judge finally authorized release of the boys' records, it was unclear whether officials would have been able to anticipate and prevent the Columbine massacre based on the information contained in the reports. Although both boys had been arrested for breaking into a van fifteen months prior to the shooting, they were enrolled in a juvenile diversion program.[325] Both boys excelled in the program, were praised by probation officers, and were allowed to leave the program one month early.[326] Statistics from the diversion program showed that only eight to eleven percent of children who complete the program ever reoffend.[327]

Klebold's juvenile records showed a young man described by his probation officer as "intelligent" and "capable of making any dream happen."[328] His parents were active in his life and punished him when he disobeyed the rules. Klebold had described his relationship with his parents "as better than most kids, and [said] they are supportive, loving, dependable, and trustworthy."[329] Although Klebold's record did indicate that he was dealing with anger and loneliness and was at times disrespectful and intolerant of others,[330] he successfully com-

322 *Id.*

323 Project SAVE, Safe Schools Against Violence in Education Act, ch. 181, § 14, 2000 N.Y. Laws 721, 735 (codified at N.Y. CRIM. PROC. LAW § 380.90 (Consol. Supp. 2003)).

324 *Privacy for Murderers' Records? It's Absurd; Judge Asked to Release Diversion Records*, ROCKY MOUNTAIN NEWS, Oct. 21, 2002, at 38A; Kevin Vaughn & Jeff Kass, *DA Releases Harris Records; Prosecutor Defends Treatment Given to Columbine Killers*, ROCKY MOUNTAIN NEWS, Nov. 5, 2002, at 10A.

325 Associated Press, *Columbine Killer "Bright Young Man": 1999 Probation Report Released*, RECORD (Bergen County, N.J.), Nov. 23, 2002, at A8; Vaughn & Kass, *supra* note 324.

326 Vaughn & Kass, *supra* note 324.

327 *Id.*

328 Associated Press, *supra* note 325.

329 *Id.*

330 *Id.*

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pleted counseling as part of the diversion program.[331] If Klebold's records had been provided to his school, the school would have had little reason to anticipate any violence from him, and certainly not at the magnitude of the Columbine tragedy.

Harris's diversion records did reveal more troubling issues, including evidence of suicidal ideation and thoughts of homicide. Nonetheless, Harris's probation officer noted that Harris was seeing a therapist and taking medication to address these issues.[332] If the school had received Harris's court records, it might have concluded that Harris had benefited from mental health services, had been amenable to rehabilitation, and was unlikely to endanger his classmates. On the other hand, the school may have responded immediately by excluding Harris from the campus. It is unlikely that either response would have prevented the Columbine tragedy. Expelling Harris from school would only have added to his anger and would not have prevented him from firing upon students and teachers. As in St. Louis, other signs of trouble appeared outside of court records. Parents of a fellow Columbine student alleged that Harris had threatened to kill their son and had posted messages on the Internet about building pipe bombs and committing mass murder.[333]

In both Missouri and Colorado, the victims, their families, and the community at large were looking for answers and eager to assign blame for the crimes that occurred. Obviously, there are no easy answers; undoubtedly, many variables accounted for the tragedies in St. Louis and Columbine. These examples do demonstrate, however, that the dissemination of court records will not necessarily provide schools with the insight they need to prevent violence. Disseminating records in some cases actually may instigate violence when school officials and parents overreact, alienate students, and interfere with any rehabilitation that may be offered through the juvenile justice system.

The significant school tragedies of the 1990s drew reaction across the country and led many to believe that juvenile crime had reached an all-time high. Despite tragedies like those in St. Louis and Columbine, the current national perception of juvenile crime is unsupported by statistical reality. National crime statistics show that crime by children under the age of eighteen drastically declined between

331 Vaughn & Kass, *supra* note 324.

332 *Id.*

333 *Privacy for Murderers' Records? It's Absurd*, *supra* note 324; Vaughn & Kass, *supra* note 324.

HeinOnline -- 79 N.Y.U. L. Rev. 581 2004
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1994 and 2000.[334] The number of arrests involving juveniles in 2000 was 13% lower than the number in 1994, while arrests for serious charges fell even more significantly in that time frame. Arrests among juveniles dropped by 68% for murder, 51% for robbery, 33% for burglary, and 42% for vehicle theft.[335] The total decline in juvenile arrests would have been even greater if there had not been an increase in arrests for less serious, nonviolent offenses such as driving under the influence, liquor law violations, and drug use.[336] Across all age groups, criminal victimization rates were lower in 2000 than at any time since the federal victimization survey began in 1973.[337] Juvenile arrests also accounted for a smaller proportion of total arrests than in previous years. In 2000, juveniles comprised 9% of all arrests for murder, down from 17% in 1994, and 16% of all arrests on the Violent Crime Index, down from 19% in 1994.[338] The overall reduction in crime in the United States during this period is due primarily to the reduction in juvenile crime. Juveniles accounted for 33% of the overall decrease in violent crime between 1994 and 2000.[339]

With regard to schools, statistics also show that violent crime, particularly homicide, is relatively rare in our schools.[340] Even including the 1999 shootings, post-1997 statistics show a decline in school crime and a reduction in the number of weapons found at school.[341] Statistics generated in 1998 and 1999 by the Centers for Disease Control and the National School Safety Center show that violence in school is relatively rare and has declined over the last decade.[342] Studies indicate a decrease in fights, injuries, and weapons at school between 1993 and 1997 and no significant increase in property theft or damage.[343] Surveys from that period also indicate that there was no increase in the number of youth afraid to go to school; in fact, most children and teachers felt their schools were safe.[344] Data

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334 BUTTS & TRAVIS, *supra* note 317, at 4; *see also* Brooks, *supra* note 155, at 7 (noting forty percent decline in school-associated violent deaths between 1997–1998 and 1998–1999 school years).

335 BUTTS & TRAVIS, *supra* note 317, at 4.

336 *Id.*

337 *Id.* at 7.

338 *Id.* at 8.

339 *Id.* at 9.

340 OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, REPORTING SCHOOL VIOLENCE, Legal Series Bulletin #2, at 1 (2002), *available at* http://www.ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin2/ncj189191.pdf (last visited Jan. 31, 2004).

341 U.S. DEP'T OF EDUC., ANNUAL REPORT ON SCHOOL SAFETY iv (1998), *available at* http://www.ed.gov/PDFDocs/schoolsafety.pdf).

342 Brooks, *supra* note 155, at 9.

343 *Id.* (citing statistics by Centers for Disease Control).

344 *Id.* at 11. A 1999 phone poll conducted by the *New York Times* and CBS found that the number of children who feared being attacked in or around school dropped 16% since

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from the Bureau of Justice Statistics and the National Center for Education Statistics also show a decline in violence, serious violence, and theft among students at school and students traveling to and from school between 1993 and 1997.[345]

Unfortunately, because school boards and state legislatures often are guided by media perception and public opinion, current policies that erode juvenile confidentiality most likely are rooted in this faulty perception of rising crime. Quick legislative responses like the rapid revision of confidentiality protections may placate the public by seeming to satisfy both utilitarian and retributive needs of the community. These policies are particularly appealing because they allow legislators to take a highly visible stand against crime. Young delinquents are literally swept into the public eye for trial and judgment. Legislators also may get more mileage out of policies that offer immediate gains and are rewarded when the public feels safer, even if only for the moment. The rapid erosion of confidentiality laws and the development of interagency collaboratives may have been the politically expedient response to constituent fears over rising crime at schools.

Faulty perceptions and a decline in crime certainly do not mean that actual crime and fear in school should be ignored.[346] They do mean, however, that school boards should dissipate fears by releasing accurate information, and that legislators should draft confidentiality provisions that are well thought out and grounded in reliable data instead of tragic but isolated local events. Legislators also have great responsibility to weigh relevant policy implications and to reject those policies that only temporarily or superficially satisfy desired objectives.

1994, from 40% to 24%. A Metropolitan Life Insurance survey in 1998, conducted six months after five prominent school shootings, showed that twice as many students and teachers believed violence was declining in their schools as in 1993; 89% of students and 86% of teachers reported feeling as safe or safer during 1998 as they did the previous year.

345 *Id.* at 9–10 (indicating 29% decline in total reported crime at school; 34% decline in serious violent crime; 27% decline in violent crime; and 29% decline in thefts between 1993 and 1997).

346 Fear alone may have a serious emotional impact on students. Fear not only disrupts learning, as children who are afraid do not perform well, but fear also may lead children to cut classes or skip school altogether to avoid danger. Students also suffer when teachers are afraid and cannot focus on their educating role. *See* Bogos, *supra* note 185, at 363–64; Rachel Spaethe, *Survey of School Truancy Intervention and Prevention Strategies,* 9 KAN. J.L. & PUB. POL'Y 689, 691 (2000).

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B. Alternative Public Safety Initiatives

To the extent that public safety is and will remain an important consideration in confidentiality policy, policymakers must compare and contrast eroding confidentiality with alternative safety strategies. If other strategies will yield the same results in improved safety while avoiding the costs associated with disclosing records, then eroding confidentiality may be unnecessary. Even if confidentiality exceptions are rewritten to grant schools some limited access to juvenile records, schools can and should use alternative safety strategies in conjunction with revised confidentiality statutes.

Where schools have a dual interest in public safety and rehabilitation, public safety objectives may be achieved through strategies that focus on internal reform, without the compromising of rehabilitation that occurs when schools individually isolate, label, and exclude troublemakers. Alternative strategies include violence prevention programs that offer students training in conflict resolution, social skills development, peer mediation, peer counseling, and student courts.[347] Some communities also have developed amnesty programs that encourage voluntary surrender of weapons, while others have attempted to enforce parental liability for student conduct and have increased physical security on campus.[348]

Congress endorsed many of these alternative strategies in 1994 when it enacted the Goals 2000: Educate America Act.[349] The Act identifies eight national educational goals, one of which is to provide "safe, disciplined, and alcohol- and drug-free schools."[350] To further this goal, states can apply for money to fund violence prevention programs.[351] The Act lists specific examples, such as: training school personnel in violence prevention, conflict resolution, anger management,

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347 Brooks, *supra* note 155, at 18 (reporting on classroom-based violence prevention curriculum in Cleveland Public Schools for grades four through eight that saw forty-one percent reduction in aggression-related disciplinary incidents and sixty-seven percent decrease in suspensions for violent behavior during 1997–1998 school year); Wood & Chestnutt, *supra* note 187, at 628–29 (noting availability of federal funds for violence prevention projects in certain school districts).

348 *See* Bogos, *supra* note 185, at 373; *see also* Robert S. Johnson, *Metal Detector Searches: An Effective Means to Help Keep Weapons Out of Schools*, 29 J.L. & EDUC. 197, 200–01 (2000) (noting that metal detectors have been successful in preventing students from bringing weapons to school and in reducing school violence); Wood & Chestnutt, *supra* note 187, at 628–29 (discussing Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (current version at 20 U.S.C. §§ 5801–6084 (2000)), which includes metal detectors and security guards in list of possible violence prevention programs).

349 Pub. L. No. 103-227, 108 Stat. 125 (current version at 20 U.S.C. §§ 5801–6084 (2000)).

350 20 U.S.C. § 5812(7); *see* Stone & Boundy, *supra* note 201, at 456–60 (discussing Act).

351 20 U.S.C. § 5962; *see* Stone & Boundy, *supra* note 201, at 458–59.

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or peer mediation; programs for community education; activities in violence prevention and materials for social skills development of students, teachers, school personnel, and parents; and alternative after-school programs that provide safe havens for students, offering cultural, educational, and recreational activities, mentoring, and community service programs.[352] In the Goals 2000 Act, Congress explicitly noted that schools should develop alternative strategies to replace the routine expulsion and suspension of students who exhibit violent or antisocial behavior.[353]

Schools would do well to give attention to those students entitled to special education services. Statistics show that thirty-five percent of all children with learning disabilities drop out of school, and many end up in the juvenile and criminal justice systems.[354] Students who remain in school but perform poorly are often labeled "dumb" and feel alienated. Students with low cognitive skills and negative labels may lack the social skills they need to interact with their peers and resolve differences.[355] Moreover, roughly fifty percent of incarcerated juveniles have undetected learning disabilities.[356] When given individual attention, many show ability and enthusiasm for learning.[357] By designing curricula that allow every student to succeed in spite of his or her disability, schools further may prevent on-campus crime and violence.[358]

Students also would benefit from increased mental health services on campus.[359] Well-trained counselors and school officials always should be alert for signs of depression, low self-esteem, educational deficiencies, anger, and aggressiveness, all of which may lead to delinquency. Schools can make counseling available to or even required of students based on criteria not connected to the court. Schools should not limit the availability of mental health services to court-involved youth or to those youth who already have committed acts of violence on campus. By partnering with courts, schools can expand the pool of available rehabilitative resources and share

352 20 U.S.C. § 5965; *see* Stone & Boundy, *supra* note 201, at 459.

353 20 U.S.C. § 5965(a)(8)(B); *see* Stone & Boundy, *supra* note 201, at 459.

354 Kelly, *supra* note 201, at 759–60 & n.13.

355 *See* Stone & Boundy, *supra* note 201, at 454 (noting connection between students carrying these labels and school violence).

356 Kelly, *supra* note 201, at 760–61.

357 *Id.*

358 Stone & Boundy, *supra* note 201, at 454.

359 *See* Brooks, *supra* note 155, at 16 (noting that increasing mental health services in schools has been one legislative response to threat of school violence); Caher, *supra* note 320 (reporting on legislative proposal calling for increased mental health services in schools as preventive means of addressing school violence).

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responsibility for treatment, without singling out offenders. More global school strategies, like conflict resolution and mental health programming, also allow for a widespread distribution of resources. These global strategies can preserve privacy for individual students and cause less emotional harm to offenders and their families, while retaining their effectiveness as strategies for crime prevention.

By contrast, disclosing juvenile records alone does nothing to address problems such as poverty, inadequate housing, high unemployment, family dysfunction, and substance abuse, each of which has been connected to violence in schools and their surrounding communities.[360] Crime trends over the last two decades suggest that changes in violent crime may correlate to fluctuations in unemployment and economic distress.[361] Students who face high levels of daily stress brought on by poverty may react by bringing aggressive attitudes and disruptive behavior to school.[362] When students sense that discrimination and poverty stand in the way of meaningful opportunities, feelings of hopelessness and rage emerge, and students may act out through violence.[363] Students from particularly dysfunctional families have been described as "double victims" because they are first mistreated and neglected at home and then punished in school for acting out.[364] Strategies that address the root causes of crime may yield more long-term gains in safety and do less harm than disclosing juvenile records to schools that consciously or subconsciously label or exclude offending students.

Public housing communities may accomplish safety objectives by addressing the underlying causes of crime in those communities. Crime in public housing results in large part from dilapidated physical space, concentrated pools of poverty perpetuated by low income limits, poor management by local housing authorities, and the placement of public housing developments in crime-ridden areas.[365] As in the school context, alternative strategies, such as increased public spending to improve housing and the creation of social services, treatment, and recreational outlets for residents, may render greater long-term gains and avoid the costs associated with breaching the confiden-

360 Stone & Boundy, *supra* note 201, at 454.

361 BUTTS & TRAVIS, *supra* note 317, at 10.

362 Stone & Boundy, *supra* note 201, at 454.

363 *Id.*

364 *Id.* at 455.

365 Maher, *supra* note 296, at 218; *see also* Patrick E. Clancy & Leo Quigley, *HOPE VI: A Vital Tool for Comprehensive Neighborhood Revitalization*, 8 GEO. J. ON POVERTY L. & POL'Y 527, 536–41 (2001).

HeinOnline -- 79 N.Y.U. L. Rev. 586 2004
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tiality of juvenile arrests and adjudications.[366] In Omaha, for example, the Housing Authority earned a reputation for achieving one of the most successful public housing reforms by committing resources to an array of educational, recreational, drug-prevention, and scholarship programs.[367] Other successful housing authority reforms include child care, job training, tutoring, and prenatal care.[368]

Housing authorities also may improve public safety by committing resources to increased security. Safety measures may include twenty-four-hour patrolling of housing developments and the use of gated entrances that require residents to show identification and sign in guests.[369] Other cities have increased security by adding police substations, improving lighting, adopting identification card systems, and installing intercom systems and single security entrances.[370]

Successful reform also may require more comprehensive community redevelopment and construction renovations. PHAs may enhance safety by renovating dilapidated units and restoring vacant and vandalized buildings, which are often havens for drug use and distribution.[371] In the meantime, PHAs might collaborate with local police to patrol and search vacant property. Local governments also might spread out housing in a combination of single-family homes and medium-sized apartment complexes,[372] attempt to convert existing public housing communities into mixed-income neighborhoods, and ensure that new public housing facilities are constructed outside of economically impoverished and crime-ridden areas.[373] Government officials also might provide more vouchers allowing low-income families to choose among a wide range of housing options in the city as well as the suburbs.[374] Dispersing public housing in this way avoids the clustering of poverty and unemployment that are root causes of crime in public housing.

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366 *See* Clancy & Quigley, *supra* note 365, at 540–41 (discussing HOPE VI funds that transformed dangerous neighborhoods into viable communities with schools, retail, parks, recreation, physical security, and community development); Sean Zielenbach, *Catalyzing Community Development: HOPE VI and Neighborhood Revitalization*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 40, 40 (describing federal HOPE VI Urban Revitalization Demonstration Program as means of improving safety and quality of life in public housing through physical revitalization and provision of social services to residents).

367 Lisa Weil, *Drug Related Evictions*, 9 YALE L. & POL'Y REV. 161, 186 (1991).

368 *Id.* at 187; *see also* Clancy & Quigley, *supra* note 365, at 534.

369 Flanagan, *supra* note 268 (reporting that calls for police assistance declined considerably in both frequency and severity after local housing development became gated community, although some residents complain about security officers' harassment).

370 Weil, *supra* note 367, at 187.

371 *Id.* at 186–87.

372 *See, e.g.*, Skinner, *supra* note 266 (reporting such arrangement in Tucson, Arizona).

373 Clancy & Quigley, *supra* note 365, at 543; Zielenbach, *supra* note 366, at 43–44.

374 Clancy & Quigley, *supra* note 365, at 531–33.

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Finally, no structural or social service reform will be effective without competent, motivated management. PHAs should improve management practices, increase funding and training for management and maintenance staff, and allow greater participation by residents in the governance of public housing.[375] With greater commitment to social programming, physical security, and effective management, PHAs may achieve the primary goal of improved safety without accessing juvenile records and implementing inflexible eviction policies.

C. *Weighing Costs and Allocating Risks*

Although recent findings in adolescent psychology can help policymakers understand the differences between children and adults and recognize the potential for rehabilitation in young offenders, the research does not resolve the new juvenile justice debate entirely. Constituents still may urge legislators to reject or discount differences between adults and children in favor of more retributive policies. With tolerance for crime declining, voters may decide that the costs of juvenile crime outweigh the significance of any differences between children and adults. Others simply may value the rights of victims over the rights and concerns of an offending child, and legislatures may face tremendous pressure from teachers, parents, and neighbors who want information to protect themselves.

Whatever the political factors involved, deciding whether and when to disclose juvenile records ultimately requires an allocation of risks and a division of costs among competing stakeholders—the offender, the victims, and the community at large. Opting to keep records from schools and PHAs means that teachers, students, and neighboring families will assume the risks and bear the costs of victimization by future crime. Opting to share records, on the other hand, means that an offending child and his family will assume the risk of future ridicule, loss of employment opportunities, eviction from housing, and reduced prospects for successful rehabilitation and a productive future. The community at large also may bear the risk of future crime when children and their siblings react to being ostracized and excluded. The probability of harm to the child and his family is especially high, for example, in states with automatic expulsion provisions for off-campus crime and in public housing communities with automatic eviction policies for crime. The residual risk of rising crime in the larger community is also high in states without alternative edu-

375 *Cf.* Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 497, 550–51 (1993) (evaluating arguments that resident management may improve efficiency, safety, and quality of life in public housing).

HeinOnline -- 79 N.Y.U. L. Rev. 588 2004
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cation programs for excluded children or alternative housing options for evicted families. In these states, the costs of residual crime may outweigh any gains made in safety. On the other hand, if rehabilitation is actively pursued with young offenders, the risk of reoffending will be low, and teachers, students, and neighbors should not expect to be the victims of future crime. Therefore, schools and PHAs should be willing to forego access to records and assume the risk of crime where resources are available in the community for the successful treatment of young offenders. Even where school officials remain unwilling to forego access to court records, they may be willing to forego companion expulsion policies if schools are allowed to participate in children's rehabilitation. By performing a realistic assessment of the risks on both sides of the confidentiality debate, legislators may be able to negotiate compromises that better allocate costs between the child, the school, and the community.

In the school context, policymakers can begin to shift burdens and reallocate costs by rewriting overbroad confidentiality exceptions. In many states, confidentiality exceptions and school notification provisions require law enforcement officials to report all arrests, regardless of the nature and ultimate outcome of the charged offense and regardless of the child's prospects for rehabilitation. Under these statutes, children with little or no risk of reoffending will bear the cost of stigma and possible expulsion disproportionately, while schools will see minimal, if any, gains in safety. Allocating risks in this way is particularly troubling given recent studies showing that only a small group of adolescents ever becomes "life-course persistent" offenders.[376] Most arrested children will never reoffend, either because they are rehabilitated through the system or because the initial crime was a one-time mistake. In order to ensure future opportunities for these children who can and will change, it is especially important for the juvenile justice system to preserve confidentiality.[377] In Part IV, this Article offers a formula for rewriting confidentiality exceptions for schools in a way that will accommodate rehabilitation in a manner consistent with legitimate public safety concerns.

By contrast, no formula is offered to accommodate competing interests in the housing context. Because the immediate costs of eroding confidentiality for the offending child and his family are so great and because long-term gains for the community are so uncertain,

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[376] Scott & Grisso, *supra* note 7, at 139–40 ("The modern punitivist reforms tend to treat adolescent offenders as though most are young career criminals—a premise that is true of only a small group of offenders whose delinquency in adolescence is part of a persistent pattern of antisocial behavior, often beginning in early childhood.").

[377] *Id.* at 187.

HeinOnline -- 79 N.Y.U. L. Rev. 589 2004
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this Article concludes that juvenile records should not be disclosed to public housing authorities at this time. Even more than school confidentiality exceptions, current PHA screening policies and requests for juvenile records have been overbroad and overinclusive. Housing authority policies vary with respect to how far back they will screen juvenile criminal histories. While some housing authorities limit the screening to the past three years,[378] others screen applicants for criminal behavior during the previous five years,[379] and still others place no limits on the criminal background check.[380] Reporting juvenile crime that occurred even one year prior to the housing application prevents families from demonstrating that a child has benefited from rehabilitative services either through the courts, diversion programs, or community mental health agencies. Screening applicants for old juvenile crime fails to recognize that many children will age out of childhood mischief, and that some children who commit crimes away from home may be reluctant to engage in that conduct at or near home, where family, friends, and neighbors can identify them. Current screening policies do not differentiate between recidivists and first-time offenders and do not limit records by the nature and circumstances of the offense or the ultimate disposition of the case.[381] These policies not only capture repeat or violent offenders, but also those one-time offenders unlikely to threaten the health or safety of the public housing community. The poor drafting of these policies suggests that PHAs have not considered carefully and thoroughly the competing interests that arise in the juvenile confidentiality debate.

Even if PHAs drafted record requests more narrowly, the risks of residual crime and other long-term costs of eroding confidentiality eventually may outweigh any initial gains in community safety. When confidentiality exceptions are paired with mandatory eviction policies, costs may extend even more widely than in the school context. Not only do these policies impact the offending child, but they also directly

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[378] BOISE CITY/ADA COUNTY HOUSING AUTHORITY APPLICATION FOR ASSISTANCE, *supra* note 269; *see also* Skinner, *supra* note 266 (indicating that Tucson Housing Authority focuses background screens on previous three years).

[379] *See* Edwards, *supra* note 267 (reporting five-year criminal background checks by San Antonio Housing Authority); Flanagan, *supra* note 268 (reporting background searches conducted for previous five years by North Las Vegas Housing Authority).

[380] COLUMBUS METRO. HOUS. AUTH., *supra* note 269 (requiring tenants to disclose all past convictions without specifying time limit).

[381] In Richmond, the housing authority sought access to all juvenile records regardless of severity and evidence of recidivism. *See* Petition, *supra* note 243, at 2. The San Francisco PHA looked at juvenile arrest records without further inquiry into the ultimate resolution of the case. *See supra* notes 253–56 and accompanying text. The housing authority in Boston still screens for a range of delinquent conduct that includes both misdemeanors and felonies. *See supra* notes 273–77 and accompanying text.

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impact siblings and parents who are forced out of their homes and indirectly affect extended family members who feel obligated to take in evicted relatives.

Furthermore, parents in public housing communities may be in a better position to protect their children from crime in the housing complex than from crime at school. Because parents do not supervise their children at school, they cannot observe the conduct of other students and protect their children from physical harm or encourage them to avoid the negative influences of particularly troubled classmates. Parents instead must rely on teachers and other school officials to protect students and assume other quasi-parental responsibilities for children in their care. In contrast, children in public housing facilities remain under the supervision of their own parents and guardians, who will have at least some opportunity to observe the behavior of neighboring children and can attempt to separate their own children from negative influences at home. Schools also operate in a contained environment where students are required to attend classes and share space with one another. Public housing communities, on the other hand, have both public communal areas and private dwellings. Children who feel threatened in a public housing community can retreat, at least temporarily, into their parents' private residence, but children who feel unsafe at school may see no other option but not to attend at all.[382]

Further distinguishing the public housing context from the school context is the fact that PHAs have contributed even less to the rehabilitation of delinquent children to date than have schools.[383] Arguments in favor of eroding confidentiality for housing authorities have focused primarily on theories of retribution and accountability and have not even suggested that rehabilitation might be a valid justification for the change in policy. Proponents of record sharing and broad eviction policies consistently argue that adults with criminal records and adults who cannot control their children are less deserving of

382 *See supra* note 346 (discussing impact of fear in schools); *see also* June L. Arnette & Marjorie C. Walsleben, U.S. Dep't of Justice, *Combating Fear and Restoring Safety in Schools*, JUV. JUST. BULL., Apr. 1998, at 10-11 (reporting data from 1995 study of students' responses to violence), *available at* http://www.ncjrs.org/pdffiles/167888.pdf.

383 While the potential for "collaboration" between schools and juvenile courts has been demonstrated in some jurisdictions, that potential has remained largely unrealized in public housing. One example is a California initiative that required several counties to develop integrated and coordinated case management systems to improve the delivery of services to some families in its public housing communities. CAL. WELF. & INST. CODE § 11325.9 (West 2001). Legislative findings that led to the establishment of those collaboratives in 1999 reveal great concern over the impediments privacy imposes on the effective and efficient delivery of services. CAL. WELF. & INST. CODE § 11325.9 note (West 2001) (Historical & Statutory Notes).

HeinOnline -- 79 N.Y.U. L. Rev. 591 2004
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public housing.[384] These proponents also argue that criminal record checks will reduce the number of eligible public housing applicants, addressing the problem of public housing shortages and long waitlists in many jurisdictions.[385] Even if communities and legislatures are willing to allocate funds for rehabilitative services for delinquent children through public housing developments, those services may be better coordinated and more cost-effective in the school systems. Teachers and other school officials who have daily contact with students are in a better position than housing officials to identify students who need mental health services, regardless of whether they have become involved in the juvenile justice system. School officials also have greater power and authority than housing officials to compel students to attend counseling or violence prevention programming. Schools even may incorporate programs like conflict resolution, peer mediation, and social skills development into the regular academic curriculum, making them available to or required of the entire student body while serving crime prevention and rehabilitation goals.

Given each of these considerations, public housing officials appear to have less need for juvenile court records than do school officials. Particularly in light of pervasive eviction policies, housing officials have not, and arguably cannot, strike a fair balance between the competing objectives of improved public safety, successful juvenile rehabilitation, and a child's interest in confidentiality. For now, legislatures should preserve confidentiality provisions that prevent record sharing in the housing context. PHAs instead should rely on the juvenile justice system to detain or incarcerate the most violent offenders and look to other public safety measures, such as those identified in Part III.B, to address crime in public housing communities. If PHAs later prove willing to abandon inflexible eviction policies based on juvenile crime and demonstrate a commitment and ability to assist in the rehabilitation of delinquent children, only then should legislatures consider adopting confidentiality exceptions in the public housing context.

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384 Maher, *supra* note 296, at 224; Skinner, *supra* note 266.

385 *See, e.g.*, Skinner, *supra* note 266 (relaying statistics showing that 51,000 Tucson families qualify for 1500 housing units); Walsh, *supra* note 266 (stating that 14,500 families are waiting for public housing in Salt Lake City and Salt Lake County).

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IV

PROPOSAL FOR CASE-BY-CASE DISCLOSURE OF JUVENILE RECORDS TO SCHOOLS TO SATISFY MULTIPLE GOALS AND INTERESTS

The final Part of this Article attempts to develop a solution to the confidentiality debate in the school context that will accommodate competing concerns about the enduring impact of stigma on offending students, the need for teacher and student safety in schools, and the need to include schools in the rehabilitation of delinquent children. This Article specifically calls for the dismantling of confidentiality statutes that grant bright-line exceptions based on specified crimes or at a specified age and instead recommends that each juvenile court appoint a designated "liaison" or "ombudsman" who will determine on a case-by-case basis whether records should be disseminated to school officials, either to ensure the immediate safety of students or teachers or to coordinate rehabilitative efforts of the court.

New York's school notification statute provides the closest example of this type of liaison. It states:

> Whenever a person under the age of nineteen who is enrolled as a student in a public or private elementary or secondary school is sentenced for a crime, the court that has sentenced such person shall provide notification of the conviction and sentence to the designated educational official of the school in which such person is enrolled as a student. Such notification shall be used by the designated educational official only for purposes related to the execution of the student's educational plan, where applicable, successful school adjustment and reentry into the community. Such notification shall be kept separate and apart from such student's school records and shall be accessible only by the designated educational official. Such notification shall not be part of such student's permanent school record and shall not be appended to or included in any documentation regarding such student and shall be destroyed at such time as such student is no longer enrolled in the school district. At no time shall such notification be used for any purpose other than those specified in this subdivision.[386]

A "designated educational official" is defined in New York to include:

> (a) an employee or representative of a school district who is designated by the school district or (b) an employee or representative of a charter school or private elementary or secondary school who is

386 N.Y. CRIM. PROC. LAW § 380.90(2) (Consol. Supp. 2003). This is a statute of criminal procedure and thus does not apply to juvenile proceedings. Only adult convictions of school-aged students under the age of nineteen are subject to disclosure under this statute. However, a liaison could also be used to manage the dissemination of juvenile records.

HeinOnline -- 79 N.Y.U. L. Rev. 593 2004
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> designated by such school to receive records pursuant to this section and to coordinate the student's participation in programs which may exist in the school district or community, including: nonviolent conflict resolution programs, peer mediation programs and youth courts, extended day programs and other school violence prevention and intervention programs.[387]

Although the New York statute focuses primarily on the coordination of programs and services, a school liaison also may ensure safety if the statute gives the liaison power to notify the principal or other appropriate disciplinary official when a student poses a *real and immediate* threat to another student, teacher, or the school at large.

The designated liaison should make an individualized allocation of risks and costs—coordinating treatment and community adjustment for the affected student, ensuring safety on campus, and avoiding stigma for the offending child whenever possible. For this reason, the liaison is probably best employed within the local schools, and not the courts, as he or she will better understand the culture of the school, have access to school records and class schedules, and be familiar with services and programs available through the school. Because these liaisons undoubtedly will have some difficulty predicting the future dangerousness of court-involved youth, they will need training and guidance on the different factors that might affect a child's amenability to treatment and likelihood of reoffending at school.

Any legislative amendments that adopt the system of designated liaisons should start with a clear statement of purpose and explicitly limit record disclosure to the stated objectives. In New York, for example, the Practice Commentaries that accompany the notification statute report that

> [t]he avowed and sole purpose of the provision is to increase coordination between the criminal justice system and the schools, so that upon release of a student from incarceration the school can be aware of the fact that the absence was attributable to that circumstance and assist the student in his or her program reintegration following release to the community.[388]

The last sentence of the New York notification statute itself states that "[a]t no time shall . . . notification be used for any purpose other than those specified in this subdivision."[389] A replicate statute also might explicitly prohibit the use of delinquency records as the sole basis for student expulsion, suspension, or transfer to an alternative school.

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387 § 380.90(1).

388 Preiser, Practice Commentaries, *supra* note 229.

389 N.Y. CRIM. PROC. LAW § 380.90(2) (Consol. Supp. 2003).

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Even in California, where broad confidentiality exceptions for schools grant superintendents, principals, counselors, teachers, and other school employees liberal access to most delinquency records,[390] the Code attempts to limit the use and impact of such records to preserving school safety and coordinating rehabilitation. California Welfare and Institutions Code section 828.1(a) indicates,

> While the Legislature reaffirms its belief that juvenile criminal records, in general, should be confidential, it is the intent of the Legislature in enacting this section to provide for a limited exception to that confidentiality in cases involving serious acts of violence. Further, it is the intent of the Legislature that even in these selected cases the dissemination of juvenile criminal records be as limited as possible, consistent with the need to work with a student in an appropriate fashion, and the need to protect potentially vulnerable school staff and other students over whom the school staff exercises direct supervision and responsibility.[391]

The Code also states:

> While the Legislature reaffirms its belief that juvenile court records, in general, should be confidential, it is the intent of the Legislature in enacting this subdivision to provide for a limited exception to juvenile court record confidentiality to promote more effective communication among juvenile courts, family courts, law enforcement agencies, and schools to ensure the rehabilitation of juvenile criminal offenders as well as to lessen the potential for drug use, violence, other forms of delinquency, and child abuse.[392]

In addition to developing a clear statement of purpose, these statutes, and others like them, also should abandon bright-line confidentiality exceptions, prohibit the liaison from making any disclosure of juvenile court records except in the rare circumstance that safety is compromised, and set forth factors that a liaison should consider in deciding whether disclosure is warranted. Part IV.A discusses the administrative responsibilities the liaison would have, while Part IV.B identifies and evaluates many of the competing factors a liaison would consider in the disclosure decision.

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390 CAL. WELF. & INST. CODE §§ 827(a)(1)(F), 828 (West Supp. 2004); CAL. R. CT. 1423(f) (West 1996); *see* discussion *supra* Part II.A.1(c). Code section 827(b)(2) actually *requires* courts to provide superintendents written notice of any adjudication for a felony or any misdemeanor involving curfew, gambling, alcohol, drugs, tobacco products, carrying of weapons, certain sex offenses, assault or battery, larceny, vandalism, or graffiti. Superintendents are then required to notify the appropriate principals, counselors, teachers, and administrators.

391 CAL. WELF. & INST. CODE § 828.1(a) (West Supp. 2004).

392 § 827(b)(1).

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A. Ensuring Public Safety, Coordinating Rehabilitation, and Avoiding Stigma

Legislators can avoid or reduce the stigma that generally accompanies the disclosure of juvenile records by establishing meaningful and substantive limitations on (1) *who* may access the information, and (2) *how* the information may be used once obtained. Appointing a series of designated liaisons can address both of these issues. In the first instance, court records may be automatically provided, but specifically limited, to one designated school official or liaison. Court records should not be included with the student's school files or available to individual teachers, principals, or other school personnel unless deemed necessary—by the liaison—to satisfy a clear and specific need such as classroom or teacher safety. State confidentiality statutes should require schools to select liaisons with little or no direct, daily supervision over students in the school. Classroom teachers and principals make poor liaisons as they unconsciously may project negative expectations on the child or inadvertently allow knowledge of court involvement to affect subsequent disciplinary decisions. Guidance counselors, on the other hand, may be good liaisons because they rarely supervise students directly, already should abide by confidentiality standards, and hopefully will have and draw upon relevant expertise in child psychology.

In New York City, the school notification statute is implemented through the Department of Education's Office of School Safety and Planning (OSSP). When a student is convicted and sentenced, the court sends a report to the OSSP detailing the offense, the length of the sentence, and the projected date for the student's return to school. If the student is to be incarcerated, the OSSP will take the student off the school rolls. The OSSP then forwards the court notice to the relevant regional office, which in turn notifies the principal of the student's school. When the student returns to school, the OSSP can coordinate with the regional officer and the principal to monitor student attendance, school performance, and appropriate outreach services for the student, such as individual and family counseling or tutoring.[393] While OSSP's commitment to rehabilitation is commendable, OSSP might refine the process by selecting a more appropriate school official than the principal to receive information, as he or she remains susceptible to subtle discrimination in his or her daily dealings with the child.

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[393] Telephone Interview with Tasha Brown, Assistant to the Chief of Staff, Office of School Safety and Planning, New York City Department of Education (Oct. 29, 2003) (on file with *New York University Law Review*).

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Legislatures also may rely on the designated liaison to address school safety by training him or her to determine whether a child poses a particular threat to the school. In today's political climate, the community usually can rely on judges to detain violent or repeat offenders in juvenile detention facilities, and when a student is released, the community generally should feel confident that the child will not pose a danger to the schools. There may be times, however, when school officials are in a better position than the courts to know how off-campus conduct can adversely impact other students. In some instances the liaison may use juvenile records to prevent very specific acts of violence, such as on-campus retaliation by students who have been the victims of off-campus crime by one of their classmates.[394] In Arizona, for example, the S.M.A.R.T. team prevented a potential fight when a prosecutor in the interagency collaborative advised the school that a student charged with a serious assault against a classmate was being released the next day. The school adjusted the students' schedules to ensure they did not share any classes, buses, or lunch hours.[395] A school liaison, like the one proposed in this Article, might even adjust class schedules at an administrative level, without disclosing information to teachers or staff about a child's involvement in the juvenile justice system. School notification statutes that require superintendents to inform teachers *automatically* whenever law enforcement records are provided[396] are not essential to ensure campus or classroom safety. Even when a student manifests particular animosity toward a teacher, that teacher may be notified without a school-wide dissemination of the child's records. School security officers also might be appropriately alerted in some situations. In each case, the liaison's goal should be to reduce the risk of stigma by limiting the number of school personnel notified without compromising school safety. Although failing to notify all teachers and staff always involves some degree of risk, the narrow distribution of records by a school liaison offers a more balanced allocation of the total risks and costs in the confidentiality debate than do bright-line confidentiality exceptions.

Access to juvenile records also will help the school liaison determine whether and to what extent gangs are present in the school. The S.M.A.R.T. program actually started after a school stabbing between rival families.[397] Although the local law enforcement agency had been

394 O'Donovan, *supra* note 125, at 34.

395 *Id.*

396 *See, e.g.*, FLA. STAT. ANN. § 985.04(7)(b) (West Supp. 2004); MO. REV. STAT. § 167.115(3) (2000); TEX. CRIM. PROC. CODE ANN. § 15.27 (Vernon Supp. 2004).

397 O'Donovan, *supra* note 125, at 31.

HeinOnline -- 79 N.Y.U. L. Rev. 597 2004
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aware of the escalating feud and had been called to intervene in neighborhood fights, law enforcement had not provided any information to the schools. Many believe the incident could have been avoided if school officials had known about the problem.[398] With access to information about student gang involvement, designated liaisons might help school systems develop staff training in gang awareness or establish a youth gang task force.

It is essential that none of these proposed public safety solutions require automatic expulsion of students charged or arrested for delinquency. In the first S.M.A.R.T. example, the school altered the student's class schedule but continued to provide him with academic instruction and possible in-school services. An excluded child would have been denied educational services and may have become even more inclined to retaliate against adversaries. Although school expulsion statutes are not the primary focus of this Article, the interplay between expulsion provisions and eroding confidentiality cannot be ignored. Juvenile court records alone should rarely if ever be used as the basis for school exclusion. As discussed in Part III, as long as exclusion policies persist, the potential gains from eroding confidentiality ultimately may be lost.

Centralizing the flow of information through a designated liaison also will allow schools to participate in the rehabilitation of court-involved youth. A school liaison can provide the court with an initial needs assessment and identify rehabilitative services, such as counseling, tutoring, and conflict resolution, which the student can receive through the school. New York's notification statute offers particularly useful language in this regard. The statute assigns the designated educational official to "coordinate the student's participation in programs which may exist in the school district or community, including: nonviolent conflict resolution programs, peer mediation programs and youth courts, extended day programs and other school violence prevention and intervention programs."[399] The statute also specifies that notification shall be used in the "execution of the student's educational plan, . . . successful school adjustment and reentry into the community."[400]

Appointing liaisons and repealing automatic school expulsion statutes ultimately will improve juvenile offenders' prospects for successful rehabilitation without unduly compromising the safety of other students and teachers or unnecessarily exposing students who can be

398 *Id.*

399 N.Y. CRIM. PROC. LAW § 380.90(1) (Consol. Supp. 2003).

400 § 380.90(2).

HeinOnline -- 79 N.Y.U. L. Rev. 598 2004
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rehabilitated to harmful stigma. Including the liaison in the initial assessment or final diagnostic team will increase the court's fund of information about the child, the child's family, and the availability of services, both in the school and in the local community. Crime and recidivism may be avoided in schools where the liaison helps design and implement the treatment plan. A liaison even may refer a child for particular services or programs within the school without advising the school of the nature or extent of the child's court involvement. Ultimately, the liaison will be most successful in reducing stigma and improving rehabilitation if he or she can limit the number of school personnel who may access juvenile records and control how the records may be used.

B. Deciding When Records Should Be Disclosed

1. Understanding the Dubious Business of Predicting Future Dangerousness

Determining which students are most likely to pose an immediate threat to school safety is probably the greatest challenge the liaison will face. While some off-campus juvenile crime may provide a fair indication of a child's propensity for on-campus crime, it is dangerous and unfair to attach a predictive value to off-campus crime in every case. Current confidentiality exceptions granting schools blanket access to all juvenile justice records for every student are overinclusive and may lead school officials to overpredict a child's propensity for violence.

Predicting future dangerousness and assessing a child's propensity for crime are complicated endeavors in both the law and the sciences,[401] in part because crime may be caused by any number of individual or collective factors. A myriad of sociopsychological factors, such as the presence of anxiety or tension in a child's life, mental health problems, or the use of alcohol, drugs, or other intoxicating substances, may interact and contribute to crime. Neither the courts nor the schools can rely on one factor alone to predict fairly and accurately a child's propensity for crime.[402] Even evidence of prior violence cannot on its own predict future dangerousness.[403] One must consider prior crime and violence in the context of then-existing psychosocial conditions, narcotics use, and particular environmental

401 *See generally* A. Bauer et al., *Reflections on Dangerousness and Its Prediction—A Truly Tantalizing Task?*, 21 MED. & L. 495 (2002).

402 *Id.* at 497.

403 Eva E. Subotnik, Note, *Past Violence, Future Danger?: Rethinking Diminished Capacity Departures Under Federal Sentencing Guidelines Section 5K2.13*, 102 COLUM. L. REV. 1340, 1358–59 (2002).

HeinOnline -- 79 N.Y.U. L. Rev. 599 2004
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or circumstantial triggers.[404] If previous psychosocial conditions are altered through psychiatric or medical treatment, then the offender may no longer present a danger to others.[405] Similarly, if environmental contexts and circumstances are altered, then a child may never reoffend. A child who is relocated to a better housing environment or who benefits from family counseling, improved family relations, or increased parental support may no longer pose a threat of violence in either his home or the community. Furthermore, not every child who would engage in delinquent behavior off campus—away from adults and teachers—also would commit crime on campus, where the risks of getting caught are greater. A student involved in delinquency away from school may abstain from on-campus crime simply because he respects school authority or values education. The difficulty of predicting future dangerousness is particularly complicated in the case of juveniles who have greater prospects for rehabilitation than adults. Over time, with the right services and treatment, a child may be rehabilitated from or simply age out of delinquent behavior.[406]

Because there is no evidence of a per se connection between a child's off-campus crime and on-campus conduct, notifying schools of every arrest and adjudication will have limited value. Even worse, notifying schools of conduct that clearly has no bearing on school safety may do more harm than good when an otherwise good child is embarrassed and humiliated at school.[407] When students cannot see the connection between their off-campus offense and the school's response, disclosing records may fuel animosity and distrust between students and administrators.[408] Students later may have difficulty developing trusting relationships with other adults or a positive atti-

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404 *See* Bauer et al., *supra* note 401, at 498–99 (noting that triggers of dangerous behavior are circumstance- and context-specific).

405 *See* Subotnik, *supra* note 403, at 1359 (referring to one district court case where defendant's progress in counseling, employment, and education between formal charge and sentencing led judge to declare that defendant's "incapacitation is not necessary to protect the public").

406 *See* discussion *supra* Part I.D.

407 *See* Bunger v. Iowa High Sch. Athletic Ass'n, 197 N.W.2d 555, 564 (Iowa 1972) (finding nexus between school and off-campus alcohol use too tenuous to support suspension from extracurricular sports activities); Bd. of Educ. v. Ambach, 465 N.Y.S.2d 77, 78 (N.Y. App. Div. 1983) (upholding commissioner's decision that district had exceeded its authority when it suspended student for off-campus assault, as suspension statute "[wa]s not meant to empower school officials to punish students for actions which have no connection with their school").

408 *See* Henault, *supra* note 185, at 548 (stating that opponents of zero-tolerance policies argue such policies create rifts between students and administrators by teaching students to doubt concept of "innocent until proven guilty"); Bogos, *supra* note 185, at 380–81 (reporting National School Boards Association's view that harsh suspension and expulsion policies likely lead students to "distrust the authority that has rejected them").

HeinOnline -- 79 N.Y.U. L. Rev. 600 2004
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tude about fairness in the world at large.[409] Teachers even may risk retaliation by students who feel wrongly labeled or mistreated on campus.

The school liaison will face a considerable challenge identifying only those students who pose an immediate threat to school safety, without alienating or stigmatizing those other students who are amenable to rehabilitation or simply unlikely to commit a crime on campus. In the end, society may be forced to accept that every crime cannot be predicted and prevented. Some children will never leave clues to future conduct. Even with full access to Dylan Klebold's life history up to 1999, few if any people would have predicted Dylan's involvement in the Columbine massacre.[410] As long as the risk of tragedies like that in Columbine remains relatively low, the cost of overpredicting a child's propensity for future crime is ultimately more harmful than underpredicting that propensity. Particularly in states where juvenile justice records are used to expel young offenders, depriving a child of access to education is an especially egregious mistake when the risk of danger to other students is low.

2. *Limiting Discretion and Avoiding Liability*

To both guide and control the liaison, policymakers will need to protect against arbitrariness in liaison decisionmaking on the one hand and to ensure that liaisons do not create greater liability for the schools on the other. While bright-line rules preclude flexibility in record sharing, granting full discretion to the liaison may result in arbitrary judgments. Policymakers may begin to address arbitrariness by writing confidentiality statutes with a clear statement of purpose, requiring that liaisons participate in state-wide training, and establishing some basic standards and guidelines, as discussed below in Part IV.B.3. Guidelines might strongly discourage dissemination in certain prescribed circumstances, yet strongly encourage record sharing in other circumstances.

Even with training and standards, statutes that grant a school-based liaison control of disseminating records may increase the risk of liability for the school. That is, if the liaison chooses not to disclose records for a student who subsequently brings violence on campus, parents or teachers may seek recourse from the school. Moreover, when liaisons fear personal or school liability, they may feel compelled to overdisclose records to protect themselves. To avoid any real or perceived increase in liability, policymakers may consider

409 Henault, *supra* note 185, at 549.

410 *See supra* notes 324–33 and accompanying text.

HeinOnline -- 79 N.Y.U. L. Rev. 601 2004
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adopting some limited liability provision that balances the need for liaison accountability without exposing the school to excessive law suits or stifling liaison independence. While liability would not be appropriate after every purportedly "wrong" decision by the liaison, school liability may be warranted when the school fails to set any guidelines, fails to send the liaison to training, or selects a liaison who is ideologically opposed to ever sharing records with other school personnel. A balanced and limited liability provision would give the liaison freedom to weigh known and existing factors and account for the difficulties in predicting future dangerousness.

3. *Factors for Case-by-Case Assessment*

This Section discusses the factors a designated liaison might consider in deciding whether and when to share records with other school employees. As discussed above, the dissemination of records should never be premised on the basis of any single bright-line criterion such as the "seriousness of the crime" or the age of the offender. The liaison should consider an unlimited number and combination of factors, including age; patterns of aggression; prior court contact; the nature and circumstance of any charged or adjudicated conduct; evidence of mitigating circumstances; whether the victim of the child's conduct attends school with the child; the likelihood that the child will respond to available counseling, drug treatment, or other rehabilitative services; the likely impact any change in environment might have on rehabilitation; and evidence of contrition or remorse. In some cases, the liaison may deem it necessary to advise school officials immediately after a child's arrest and release from detention, while in other cases, disclosure will not be appropriate unless and until the child is adjudicated, as required in the New York statute set forth above.

(a) Age, Recidivism, and Amenability to Treatment

Policymakers and court liaisons first will need to avoid the trap of looking for some magical age at which a person moves from childhood to adulthood and is thus no longer amenable to treatment.[411] Although developmental psychology looks for patterns or generaliza-

[411] *See* Slobogin, *supra* note 14, at 326 (advocating that age should not be dispositive factor in determining amenability to treatment); Steinberg & Cauffman, *A Developmental Perspective*, *supra* note 99, at 53 (arguing that due to great variability within and among individuals, "adolescence does not lend itself to . . . precise partitioning" by chronological age).

HeinOnline -- 79 N.Y.U. L. Rev. 602 2004
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tions about physical, intellectual, emotional, or social development,[412] there always will be some exceptions to and deviations from the rule. Therefore, it may be difficult, if not impossible, to make generalizations about an adolescent's level of maturity and amenability to treatment based on any one factor, including age.[413] Given this difficulty, current statutes that set bright-line exceptions for confidentiality protections are not particularly useful. In California, a child loses confidentiality protections if he is fourteen years of age or older and has been charged with a serious felony;[414] in Kansas, if he is fourteen or older and has been charged with any offense;[415] and in Pennsylvania, if he is fourteen or older and charged with a felony or twelve or older and charged with certain serious felonies.[416] These troubling, simplistic formulas do not grant courts or law enforcement officials flexibility to preserve confidentiality for particular children in particular circumstances. They lump all youth into one category, regardless of the circumstances of the particular offense, and fail to consider whether the child is a first-time or repeat offender. More importantly, the criteria do not offer schools any useful means of addressing school safety. The fact that a fourteen-year-old was arrested for a felony does not tell us much, by itself, about a child's amenability to treatment or propensity to engage in future crime. Contrary to what one might expect, at least one study has shown that the older a child is at the time of his first delinquent conduct, the less likely he is to repeat that behavior at school or anywhere else.[417]

Granting discretion to a school liaison, in lieu of establishing finite, inflexible rules, will allow the liaison to consider individual differences between children based on sophistication and personality development. A court liaison should look for patterns in the child's criminal and non-criminal conduct to decide whether a child poses a real and immediate threat of danger at school. Children who begin offending and exhibit frequent, chronic aggression at a very early age are more likely to be violent than other delinquent peers.[418] Thus,

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412 Steinberg & Cauffman, *A Developmental Perspective*, *supra* note 99, at 52–53; Steinberg & Cauffman, *The Elephant in the Courtroom*, *supra* note 99, at 391.

413 Steinberg & Cauffman, *A Developmental Perspective*, *supra* note 99, at 53.

414 CAL. WELF. & INST. CODE § 827.5 (West Supp. 2004).

415 KAN. STAT. ANN. § 38-1607(b) (2000).

416 42 PA. CONS. STAT. § 6336(e) (2002).

417 Scott & Grisso, *supra* note 7, at 140 ("Youths who offend at a younger age (and who are thus less mature and less culpable) may be more likely to become adult career criminals than teens who first initiate even serious antisocial behavior in mid-adolescence or later.").

418 *Id.* at 180; *see also* Slobogin, *supra* note 14, at 317 (discussing research showing that any type of early antisocial behavior may serve as predictor for future violence).

HeinOnline -- 79 N.Y.U. L. Rev. 603 2004
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advising certain teachers and the principal may be appropriate when a child has exhibited a history of aggressive conduct or has demonstrated a clear pattern of hostility to authority figures.

The liaison also should consider a child's apparent amenability to treatment. If a liaison believes that a child is unlikely to change, then disseminating records may be appropriate; if the liaison believes a child is amenable to treatment, then disseminating records may be unnecessary or inappropriate. Several factors will affect a child's amenability to treatment, including responses to past treatment efforts; aspects of the child's school, family, and neighborhood environment that are subject to change; the child's maturity and sophistication; the child's willingness to participate in treatment; the availability of treatment; and the child's age.[419] In examining past treatment efforts, the liaison should avoid simply counting the number of programs in which the child has participated, but instead should determine whether meaningful and appropriate treatment efforts were made for that child.[420] If past treatment was not meaningful or uniquely and culturally tailored to the child's needs, then previously failed treatment efforts should carry less weight in the amenability determination.[421] Furthermore, liaisons should realize that successful treatment often requires trial and error,[422] and a pure evaluation of a child's amenability to treatment should not be confused with the issue of dangerousness as measured by counting the number of a child's past offenses.[423] In assessing a child's willingness to change, the liaison should look for differences between a child's unwillingness to receive help and an unwillingness to be "labeled" sick. The liaison also should recognize that some children initially may be unwilling to accept help because they have a long history of distrust, either of parental figures or the juvenile justice system as a whole.[424] If these children are appropriately aligned with caseworkers and counselors whom they can trust, they very well may relax and respond to treatment. Finally, although many believe that the more mature and streetwise a child is, the less likely he is to respond to treatment, liaisons should avoid the stereo-

419 Slobogin, *supra* note 14, at 305.

420 *See id.* at 308 (examining approach used by some courts that looks at whether juvenile received meaningful treatment, rather than merely counting number of programs attended).

421 *See id.* at 318 (arguing courts should consider whether juvenile received meaningful treatment after past offense in determining amenability).

422 *Id.* at 319.

423 *See id.* at 307–08 (noting that most courts simply look at number of past offenses, rather than evaluating circumstances in more depth).

424 *See id.* at 321–22 (pointing out that adolescents often are reluctant to admit that they need treatment and may fail to cooperate with treatment because they distrust system).

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type that every streetwise youth is beyond redemption.[425] Even the most seemingly mature youth might benefit from treatment to address issues of impulse control and lack of empathy.

Given studies that show that few children become "life-course persistent" offenders and that affirm early beliefs that adolescents are amenable to treatment,[426] juvenile records should rarely be disseminated when a child has had only one contact with the juvenile justice system. The liaison should expect that most children will respond positively to rehabilitation through the courts, that few children will reoffend at all, and that even fewer will bring off-campus crime onto campus. By including the school liaison in the diagnostic process and referring court-involved children to services available through the schools, liaisons should expect that rehabilitative efforts will become even more successful than in the past.[427] Thus it would be entirely reasonable for the liaison to share records only after initial rehabilitative efforts have failed.

Striking a balance between disclosing records too early and too late is a difficult decision liaisons will have to make. Delaying reporting until after initial rehabilitation certainly will leave some risk that schools will bear the cost of future crime on campus. If records are not immediately available to principals and teachers until after rehabilitation has failed or a pattern of aggression is demonstrated, then students and staff may be the victims of subsequent violence. Nevertheless, by giving the liaison discretion, the child's likelihood of reoffending in each case will be weighed against the long-term costs of stigma, alienation, and the risk of school exclusion. In the case of the first-time offender, the liaison may expect that the risk of reoffending will be low, but still disseminate records when warranted by the particular circumstances. Such dissemination might be appropriate where

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425 *Id.* at 320–21.

426 Michael L. Skoglund, Note, *Private Threats, Public Stigma? Avoiding False Dichotomies in the Application of Megan's Law to the Juvenile Justice System*, 84 MINN. L. REV. 1805, 1817 n.57 (2000) (claiming juvenile sex offenders may be more susceptible to treatment than adults because their pattern of offending is less deeply ingrained, they are still exploring their sexuality paths, and they still may learn reasonable social skills, and citing *Practice Parameters for the Assessment and Treatment of Children and Adolescents Who Are Sexually Abusive of Others*, J. Am. Acad. Child & Adolescent Psychiatry, Dec. 1999, at 68S–69S); *see also* Steinberg & Cauffman, *A Developmental Perspective*, *supra* note 99, at 53 (describing adolescence as important formative period of potential malleability). Most American citizens wish to maintain a juvenile justice system that will rehabilitate youthful offenders. Laubenstein, *supra* note 5, at 1905.

427 *See* Butts & Mears, *supra* note 6, at 191 (identifying lack of coordination and collaboration among various systems as important factor preventing successful rehabilitation); Slobogin, *supra* note 14, at 324 (naming multi-systemic approach that includes schools as most effective treatment model).

HeinOnline -- 79 N.Y.U. L. Rev. 605 2004
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a student has threatened another student at the school or has vowed revenge on a particular teacher.

(b) Nature, Circumstances, and Severity of the Delinquent Offense

Policymakers and liaisons also should avoid bright-line confidentiality exceptions based on the classification of the child's charged offense. Confidentiality exceptions for schools vary widely across the states in designating which crimes must be reported to principals and staff. While some states permit or require notification for only serious offenses,[428] other states, such as Florida, require notification after any felony,[429] and still others, such as South Carolina, require law enforcement officers to notify the principal whenever a child is charged with any offense.[430] None of these reporting schemes appear to demonstrate any logical consistency with regard to a child's future dangerousness or amenability to treatment. Like those based on age, statutes that require records dissemination in broad offense categories will overinclude those children who simply made a one-time mistake or are likely to benefit from rehabilitation. The broad classification of "felony" is particularly troubling, as it includes a host of nonviolent crimes such as passing bad checks or mail fraud that are unlikely to have any real impact on the physical safety of students and teachers at schools.

In some states, statutes enumerate a plethora of specified offenses that must be disclosed to school officials. In Colorado, schools must be notified of any crime involving violence, a controlled substance, or an unlawful sexual act,[431] and in Missouri, schools must be notified of any one of twenty-two listed offenses, ranging from first-degree murder and sexual assault to drug distribution and property damage.[432] While these statutes clearly reflect the school's desire to keep these particular crimes away from school campuses, it seems unlikely that simply disclosing juvenile records related to these crimes will offer any meaningful solution to the problem.

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428 VA. CODE ANN. § 16.1-305.1 (Michie 2003); W. VA. CODE ANN. § 49-5-17 (Michie 2001).

429 FLA. STAT. ANN. § 985.04(7) (West Supp. 2004).

430 S.C. CODE ANN. § 20-7-7205 (Law. Co-op. Supp. 2003); *see also* CONN. GEN. STAT. ANN. § 10-233h (West 2002) (mandating notification after arrest for any class A misdemeanor or any felony); TEX. CRIM. PROC. CODE ANN. § 15.27(h) (Vernon Supp. 2004) (mandating notification for any felony and certain specified misdemeanor arrests including unlawful use, sale, or possession of controlled substance and unlawful possession of any weapon).

431 COLO. REV. STAT. § 22-33-106.5 (2003).

432 MO. REV. STAT. § 167.115 (2000).

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The type of crime a child commits actually has little or no direct bearing on his or her likelihood of reoffending or offending at school. Recent studies show that a child's amenability to treatment is determined by the child's developmental characteristics and environmental circumstances, not simply by the type of crime charged.[433] One study on the effectiveness of rehabilitative programs even indicates that programs that are effective in reducing recidivism are equally effective regardless of the nature of the crime charged.[434] Again, individual assessments require a careful review of the child's complete record and overall circumstances.

None of this suggests that the liaison should ignore the severity and circumstances of a child's delinquent conduct. It does suggest that the liaison should look behind charging labels and make common sense, subjective evaluations of the circumstances surrounding the offense. The liaison should differentiate between conduct that is unlikely outside certain limited circumstances and conduct that manifests more broadly uncontrollable behavior. For example, a liaison might consider the difference between a domestic assault and an unprovoked assault on a stranger, or between an allegation of date rape by an intoxicated perpetrator and an allegation of a violent stranger rape. While all of the conduct is disturbing and devastating for the victims, each situation may have different implications for the safety of the school campus. Violence at home, which in some instances may arise out of tense family relations and be addressed through family counseling, does not necessarily mean that a child is generally aggressive or a threat to students at school. Violence against strangers, on the other hand, may indicate any number of issues, including deep-rooted anger and hostility or uncontrollable impulses, and may warrant protective measures that will ensure the safety of other students at school. In the date rape example, the liaison might conclude that the offender is not a threat to the school at large, but may nonetheless separate or remove the offender from a victim who attends the same school in order to prevent her from experiencing additional emotional harm. There are obviously no hard and fast rules for any factual scenario, as exceptions to every generalization always will exist. In every case, the liaison should be alert to unique environmental conditions and evidence of mitigating circumstances, such as self-defense, group action, peer pressure, and even intoxication, which may have contributed to the child's conduct.

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[433] Slobogin, *supra* note 14, at 317, 319–20.

[434] Lipsey, *supra* note 83, at 631.

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Beyond the most basic recording of crime statistics, there have been no extensive studies of patterns of crime and recidivism on school campuses. Policymakers could refine the process of anticipating future crime at school by (a) studying patterns of juvenile recidivism for specific crimes committed in the community; (b) surveying patterns of crimes initially committed in the community and then repeated in schools; (c) determining what percentage of students who commit crimes on campus previously were involved with the juvenile justice system; and (d) surveying the effectiveness of individual programs designed to rehabilitate children in the delinquency system.

(c) Timing of Disclosure

The timing of records disclosure is just as important as the decision to disclose. Under some current confidentiality statutes, such as that in New York, the police and the courts are required to notify schools only if and after a child is adjudicated or sentenced.[435] In many states, however, notification is required immediately after arrest, charging, or preliminary investigation, regardless of the ultimate resolution of the case.[436] In several states, the arresting agency must notify the school superintendent within one to five days of the

435 CAL. WELF. & INST. CODE § 827(b)(2) (West Supp. 2004); COLO. REV. STAT. § 22-33-106.5 (2003); KY. REV. STAT. ANN. § 610.345 (Michie Supp. 2003); MISS. CODE ANN. § 37-11-27(2) (1999); NEV. REV. STAT. 200.278(1) (2001); N.Y. CRIM. PROC. LAW § 380.90 (Consol. Supp. 2003); VA. CODE ANN. § 16.1-305.1 (Michie 2003).

436 CONN. GEN. STAT. ANN. § 10-233h (West 2002) (requiring police to report arrested students to superintendent no later than following weekday); FLA. STAT. ANN. § 985.207(1)(b) (West 2001) (requiring arresting authority to notify district superintendent immediately if incident involves felony or crime of violence); 705 ILL. COMP. STAT. ANN. 405/1-7(A)(8) (West Supp. 2003) (allowing for disclosure to "appropriate school official" under "reciprocal reporting system" following arrest of minor for specified offenses); MD. CODE ANN., EDUC. § 7-303 (2001) ("[T]he law enforcement agency making the arrest shall notify the local superintendent of the arrest and the charges within 24 hours of the arrest or as soon as practicable."); MO. REV. STAT. § 167.115 (2000) (requiring law enforcement to notify superintendent within five days if student is charged with one of specified offenses); MONT. CODE ANN. § 41-5-215(3) (2003) (requiring Youth Court to notify school district of student's suspected drug use or criminal activity after initial investigation if activity bears on safety of children); N.J. STAT. ANN. § 2A:4A-60(c) (West Supp. 2003) ("At the time of charge . . . information as to the identity of a juvenile charged with an offense, [and] the offense charged . . . shall, upon request, be disclosed . . . [to] the principal."); N.C. GEN. STAT. ANN. § 15A-505(c) (West 2000) (requiring law enforcement to notify principal within five days of felony charge); S.C. CODE ANN. § 20-7-7205 (Law. Co-op. 2001) (requiring police to notify child's principal following felony or misdemeanor charge); TEX. CRIM. PROC. CODE ANN. § 15.27(a) (Vernon Supp. 2004) ("[L]aw enforcement agency . . . shall orally notify the superintendent . . . within 24 hours after the arrest or referral is made.").

HeinOnline -- 79 N.Y.U. L. Rev. 608 2004
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arrest,[437] but only two of these states, Missouri and Texas, require prosecutors or courts to update schools on the final disposition or dismissal of a case.[438] Unfortunately, students often cannot undo sanctions or shake delinquency's negative label, even when schools eventually learn about dismissals.[439] Teachers remain on heightened alert and may be unduly suspicious of the child. In Texas, the superintendent may decide that the alleged conduct amounts to a felony despite court findings to the contrary.[440] The stigma that accompanies a juvenile record may be particularly unwarranted where a child is subsequently exonerated of the charges or they are dismissed in juvenile court.

To the extent that fear of publicity may be a meaningful deterrent, record sharing loses its value if disclosure is too early and not tied to actual crime. A child's incentive to abstain from crime is diminished if he believes that he will be condemned after any arrest, regardless of guilt or innocence. Children cannot be deterred from outcomes, such as false arrest, over which they have little or no control. Instead of deterring crime, early and unwarranted publicity may instead fuel hostility and resentment, which may in turn lead to aggression in the classroom.

Finally, an arrest alone is not a useful predictor of future dangerousness. As discussed above, the task of predicting future dangerousness is already a dubious proposition.[441] That task becomes even more problematic when the prediction is based on an uncertain or unfounded record of arrest. Moreover, there appear to be comparatively few disadvantages to delaying disclosure until after a conclusive finding of involvement. Earlier disclosure of juvenile records arguably could be justified on the theory that a child is dangerous at the moment he commits a crime, and might need to be removed from the school at the earliest point of detection. However, schools should

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437 CONN. GEN. STAT. ANN. § 10-233h (West 2002) (no later than following weekday); MD. CODE ANN., EDUC. § 7-303(b) (2001) ("within 24 hours of the arrest or as soon as practicable"); *see also* MO. REV. STAT. § 167.115(2) (2000) (within five days); N.C. GEN. STAT. ANN. § 15A-505(c) (West 2000) (same); TEX. CRIM. PROC. CODE ANN. § 15.27(a) (Vernon Supp. 2004) (within twenty-four hours or next school day).

438 MO. REV. STAT. § 167.115(2) (2000) (requiring juvenile officer or prosecuting attorney to send second notification to superintendent providing disposition of case); TEX. CRIM. PROC. CODE ANN. § 15.27(g) (Vernon Supp. 2004) (requiring prosecutor or juvenile officer to notify school district if office refuses to prosecute or if child found not guilty).

439 *See supra* notes 19–28 and accompanying text.

440 TEX. EDUC. CODE ANN. § 37.006(c)(3)–(d) (Vernon Supp. 2004) (allowing disciplinary action when superintendent "has a reasonable belief that the student has engaged in conduct defined as a felony").

441 *See* Bauer et al., *supra* note 401, at 498–99 (noting prior dangerous behavior as predictive but not conclusive factor).

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trust that judges will detain those students who pose the most immediate threat of danger to the school or community pending trial and should rely on liaisons to make an immediate assessment of other safety concerns. If the liaison is employed by the schools, he or she would have access to disciplinary reports, school attendance records, and grades. Assuming that school privacy restrictions are not violated, the liaison could provide the judge with this additional information in order to make better decisions about pretrial detention.

CONCLUSION

Resolving the confidentiality debate presents a significant challenge for policymakers. The traditional assumption that juvenile records should be shielded from the public eye has fallen away in the face of recent concerns about the perceived increase in juvenile crime and the purported failure of rehabilitation in juvenile court. With crime prevention high on every political agenda, and with institutions like schools and public housing authorities seeking access to juvenile records, legislators have been quick to revise confidentiality statutes. In this rush to appease public concerns, it appears that legislators have not engaged in a careful identification and balancing of all of the competing interests and concerns. Legislators have accepted faulty assumptions about adolescents' inability to respond to treatment in spite of recent social science findings to the contrary. They also have been motivated by unsupported expectations that record sharing will improve public safety by allowing schools and PHAs to weed out those young people most likely to bring crime on campus and into neighborhoods. This Article encourages policymakers to look closely at the practical implications of eroding confidentiality in these institutions and to allocate more efficiently the costs of disclosing records.

While limited confidentiality exceptions can be made to accommodate competing interests in schools, this Article concludes that no confidentiality exceptions should be made for public housing authorities. In the housing context, the high cost of eviction outweighs any benefits that might be gained by sharing records with PHAs, especially considering the relatively low risk that young offenders will become career criminals or even repeat offenders in their neighborhoods. In the school context, because teachers and staff have a special responsibility to students in their care and because schools may effectively assist in the rehabilitation of court-involved youth, some limited access to juvenile records seems appropriate. Therefore, each jurisdiction should appoint a series of school liaisons who will help in the development and coordination of the child's rehabilitation plan and

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have discretion to share records with school officials when necessary to preserve campus safety. This discretion must not be dictated by inflexible criteria that offer little or no guidance in predicting whether a child poses a real and immediate threat to school safety, but instead should result from a careful consideration of all relevant factors, including the importance of avoiding unnecessary stigma and a child's prospects for rehabilitation.

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