Removing Confidentiality Protections and the "Get Tough" Rhetoric: What Has Gone Wrong with the Juvenile Justice System?

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REMOVING CONFIDENTIALITY PROTECTIONS AND THE "GET TOUGH" RHETORIC: WHAT HAS GONE WRONG WITH THE JUVENILE JUSTICE SYSTEM?

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I. INTRODUCTION

The juvenile justice system was founded at the turn of the century on the central principle that juvenile delinquents could be rehabilitated.¹ The various aspects of the juvenile system, from intake to adjudication, were designed to promote rehabilitation.² Central to this purpose was the protection of delinquency proceedings and juvenile records from exposure to the media and public scrutiny.³ In this setting, a car thief could eventually become a successful real estate broker,⁴ a girl who ran numbers and served as a lookout for a whorehouse could become a well respected singer, and a boy who shot and killed his friend could become governor of Illinois, ambassador to the United Nations, and a candidate for President.⁵

However, as juvenile crime rates have risen, and the stories of juveniles committing serious and violent crimes have received widespread and sensationalized coverage, the public has increasingly perceived that the nation is under siege.⁶ This perception has driven many

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³ See Laubenstein, supra note 1, at 1897-1901.

⁴ See Ferdinand M. DeLeon, A Past Perhaps a Future-Man’s Troubled Times Prompts Him to Reach Out as Youth Mentor, Seattle Times, Mar. 3, 1997, at B1. George Noble, the subject of the article, stole cars and was convicted of assaulting a police officer as a juvenile. See id. He is now a successful real estate broker, associate minister, and a mentor for juvenile offenders in Seattle. See id.

⁵ See Ayers, supra note 2, at 89. Ella Fitzgerald spent time in a juvenile detention center for her petty crimes. See id. Adlai Stevenson killed a playmate when he was twelve with what he thought was an unloaded gun. See id.

⁶ See Catherine A. Guttman, Listen to the Children: The Decision to Transfer Juveniles to Adult
states to adopt stricter juvenile sentences, prosecute more juveniles as adults, and open more juvenile proceedings and records to media exposure. But what has driven us to this point, and what are the unintended consequences of this movement?

Part II of this note will provide a background on the tradition of confidentiality in the juvenile justice system. Part III will explore the changes that have been made under the rhetoric of "get tough" on juvenile crime, and illustrate how the erosion of confidentiality protections has been an integral part of these changes. Part IV will examine the recent legislation in Massachusetts as a case study of how these changes have been implemented. Finally, Part V will analyze the unintended consequences these changes have created, show how they embody an abandonment of the principle of rehabilitation, and advocate for their revision and a return to the principle of rehabilitation.

II. Evolution of the Juvenile Justice System and Confidentiality Protections

A. Underlying Principles of the Juvenile Justice System

If the criminal justice system has largely been driven by the need to protect society by punishing offenders, the hallmark of the juvenile justice system is the quite different presumption that young people who commit crimes can learn to do better if placed in the right setting and given the right care.

The juvenile system was born at the turn of the century, driven in part by the developing social sciences and an increased awareness of the special problems of juveniles. "Because children are not fully developed, physically or mentally, it was argued that they could not be held accountable for their wrongdoing" in the same manner, and to

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8 National Criminal Justice Comm'n, The Real War on Crime 130 (Steven R. Donziger ed. 1996) [hereinafter Real War].

the same degree, that adults are. Criminality was not seen as the result of a decision by a morally responsible individual; rather, it was a type of youthful illness which could be treated and the child rehabilitated. Thus, rehabilitation became the mainstay of the juvenile justice system. As the Supreme Court stated, the underlying objective of the juvenile system was "not to ascertain whether the child was 'guilty' or 'innocent,' but 'what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career."

The procedures used to rehabilitate the juveniles were to be clinical rather than punitive. The reasoning was twofold: children are amenable and responsive to treatment, and this treatment was necessary to make up for the care which they were denied for most of their young lives. Thus, cases were handed over to probation officers, reform school administrators, and other experts who were to develop and implement a rehabilitation program specifically tailored for each juvenile. Juveniles were adjudicated "delinquent," rather than found "guilty," and a conviction did not send them to jail. Overall, the goal was to provide juveniles with services to encourage rehabilitation and supervision to help them stay on the right path.

Following these principles, juvenile court proceedings have traditionally been distinguished from criminal trials by their general informality and by the exclusion of the public. Protection of the juvenile's confidentiality was essential to the attainment of rehabilitation. The principle of confidentiality served "to hide youthful errors from the

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10 McNulty, supra note 2, at 86.
11 Id.; see Ayers, supra note 2, at 25; Guttman, supra note 6, at 512.
12 See McNulty, supra note 2, at 86.
14 See id. at 15–16; Ayers, supra note 2, at 25; Fox Butterfield, States Revamping Laws on Juveniles as Felonies Soar, N.Y. TIMES, May 12, 1996, at 1.
15 See Guttman, supra note 6, at 510.
16 See McNulty, supra note 2, at 86.
17 See id.
18 See id.
19 See STATE RESPONSES, supra note 7, at 35.
full gaze of the public and bury them in the graveyard of the forgotten past."\(^{21}\)

As Justice Rehnquist wrote in *Smith v. Daily Mail Publishing Co.*, "The prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of his conduct . . . ."\(^{22}\) Rehnquist went on to explain that, "This exposure brings undue embarrassment to the families of youthful offenders and may cause the juvenile to lose employment opportunities or provide the hardcore delinquent the kind of attention he seeks, thereby encouraging him to commit further antisocial acts."\(^{23}\) In *Monroe v. Tielsch*, the Washington Supreme Court added, "[Rehabilitation] cannot be accomplished if the arrest mechanism seriously impedes the occupational or educational opportunities of the youth that are to be served by the juvenile justice system."\(^{24}\) As these comments illustrate, confidentiality was necessary to protect the juvenile from a stigma which would impede social, educational, and employment opportunities.\(^{25}\) To further this goal, restrictions were placed upon the public's access to the names of juveniles who were being investigated, juvenile delinquency hearings, and juvenile records.\(^{26}\)

Restricting access during the investigation and pre-arrest period was essential to preserve confidentiality.\(^{27}\) For various reasons, a juvenile who is investigated, or even arrested, is often not prosecuted.\(^{28}\) However, if that juvenile's name was released, the juvenile would still face the stigma of having been publicly connected with a crime.\(^{29}\) In addition, there are also occasions when other juveniles are involved in the activities in question, but are not yet charged.\(^{30}\) The confidentiality of these juveniles might be jeopardized by open proceedings as well.\(^{31}\)

Furthermore, once a juvenile's name is released to the press, the benefits of sealed juvenile records may be moot.\(^{32}\) A fully rehabilitated

\(^{21}\) *In re Gault*, 387 U.S. 1, 24 (1967).

\(^{22}\) 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring).

\(^{23}\) *Id.*


\(^{26}\) See Privacy Policy, *supra* note 20, at 9; Todd, *supra* note 9, at 931.


\(^{28}\) *See id.*

\(^{29}\) *See id.*

\(^{30}\) *See id.*

\(^{31}\) *See id.*

juvenile offender may find that his or her past problems present obstacles to success many years after the incident. Any person or potential employer can retrieve the information that the state sought to "bury" simply by searching through old newspapers or executing a search through an on-line search service. Traditional state policies reflect the belief that confidentiality could best be insured if the media was barred access to both the court proceedings and the records of juvenile offenders.

B. The Supreme Court Reshapes the Constitutional Landscape of the Juvenile Justice System

Beginning in the 1960s, as is evidenced by In re Gault, the constitutional framework within which the juvenile courts worked was redefined. Several Supreme Court cases reflected the growing dissatisfaction of the public and those within the juvenile system with the results it was producing, and the increasing belief that the system needed to be reformed. Thus, in Gault, the Court reviewed the inadequacies of the traditional juvenile court procedures, noted the need for change, and required due process in juvenile proceedings. The Court stated, "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." The Court, drawing from studies on the traditional secrecy in juvenile proceedings, expressed the belief that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure . . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment." As part of the due

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55 See id. An example of this problem can be seen in Gina Grant, a teenager who was honored by the Boston Globe as an extraordinary student who triumphed over the death of both her parents, but whose admission to Harvard University was rescinded once anonymous press clippings from South Carolina newspapers were sent to Harvard, revealing that when she was fourteen, she had killed her alcoholic and abusive mother. See Alice Dembner & Jon Auerbach, Pupils Past Clouds Her Future: Harvard Rescinds Offer After Learning That Honors Student Killed Her Mother, BOSTON GLOBE, Apr. 7, 1995, at 1; see also infra Part IV.B.1. (discussing Gina Grant).
57 See Laubenstein, supra note 1, at 1897–99.
58 387 U.S. 1, 13 (1967).
59 See Todd, supra note 9, at 931–32.
60 See id.
61 See id.
40 In re Gault, 387 U.S. at 13.
41 Id. at 18.
process requirement, the Court required that juveniles be allowed representation by an attorney at their delinquency hearings.\footnote{See id. at 34--42.}

Over the next decade, the Court went on to recognize that juveniles possessed other constitutional rights as well. The Court held in In re Winship that juvenile courts must use the same standard of reasonable doubt that is used to make a finding of guilt in adult criminal proceedings.\footnote{397 U.S. 358, 368 (1970).} Additionally, the Court determined in Breed v. Jones that juvenile courts must adhere to the double jeopardy clause.\footnote{421 U.S. 519, 541 (1975).} Regarding most of the constitutional protections accorded to criminal defendants and juvenile respondents alike, the Supreme Court acknowledged that there is little to distinguish a juvenile adjudicatory hearing from an adult criminal prosecution.\footnote{See Todd, supra note 9, at 913.}

\section*{C. The Reassessment of the Constitutionality of Confidentiality Protections}

Once the process of likening juvenile proceedings to adult court proceedings was underway, the issue of how much access the public would have, soon came to bear in the juvenile arena as well.\footnote{See Kintzinger, supra note 20, at 1471-73.} In adult court, the Supreme Court recognized a presumption of openness for criminal trials in Richmond Newspapers, Inc. v. Virginia.\footnote{448 U.S. 555, 573 (1980).} Chief Justice Burger noted:

\begin{quote}
[w]hen a shocking crime occurs, a community reaction of outrage and public protest often follows. Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. . . . The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is “done in a corner [or] in any covert manner.” [W]here the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process “satisfy the appearance of justice,” [which] can best be provided by allowing people to observe it.\footnote{Id. at 571-72 (second alteration in original) (internal citations omitted).}\
\end{quote}
However, precedent clearly indicates that this First Amendment right of access is not absolute. This presumption can be overcome by a showing that competing interests favor closed proceedings and records, such as when the media coverage will interfere with the Sixth Amendment guarantee to a fair trial.

The Supreme Court recognized this possibility in the landmark decision of *Sheppard v. Maxwell*. *Sheppard* stands for the proposition that trial courts must safeguard the paramount interests of a fair trial when balancing those interests against the rights of the press. In reaching this conclusion, the Court noted "the pervasiveness of modern communications" and that "unfair and prejudicial news comment on pending trials has become increasingly prevalent." One scholar commented, "Often the investigation or indictment of the accused gets such sensational and widespread media coverage that subsequent resolutions favorable to the accused are lost on the public."

Unlike adult courts, the Supreme Court has not found a presumption of openness for juvenile proceedings; rather, it has continued to allow for the protection and shielding of juveniles from the stigma of a public trial. This is evidenced in *Gault*, where even though the Court required due process for juvenile delinquency proceedings, it stated, "[T]here is no reason why, consistently with due process, a State cannot continue if it deems it appropriate, to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles."

However, constitutionally, states do not have to protect the confidentiality of juveniles. There may be times when competing policy considerations outweigh protecting juvenile confidentiality. The language in *News Group Boston, Inc. v. Commonwealth* illustrates that when

\[49 \text{ See United States v. A.D., 28 F.3d 1353, 1357 (3d Cir. 1994); United States v. Simone, 14 F.3d 833, 840 (3d Cir. 1994).}
\[50 \text{ See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 9 (1986).}
\[51 \text{ 384 U.S. 333, 333 (1966).}
\[52 \text{ See id. at 362.}
\[53 \text{ Id.}
\[55 \text{ See In re Gault, 387 U.S. 1, 25 (1967).}
\[56 \text{ Id.}
\[58 \text{ See News Group Boston, Inc. v. Commonwealth, 568 N.E.2d 600, 632 (Mass. 1991).}
state legislatures relax their interests in confidentiality, state courts grant them broad deference:

The Legislature could rationally conclude that the public interest in the proper disposition of a murder charge against a juvenile, the most serious of crimes (perhaps barring treason), warrants opening the courtroom to all proceedings. It is for the Legislature to balance the interests of juveniles and the juvenile justice system against the public’s interest . . . .

As the public has perceived an increase in juvenile crime and that the present juvenile system is inadequate to curb this increase, state policies towards juvenile offenders have increasingly moved away from protecting juvenile confidentiality. While forces have been at work to "get tough" on juvenile crime, the laws that protect the confidentiality of juveniles have been revised, and, for some juveniles, eradicated.

III. RECENT CHANGES IN JUVENILE JUSTICE LAWS

When a kid who commits a serious, heinous crime turns 18, he has no record. One reason he can get over [it] is that no one knows for certain, outside his block, that he is a criminal. But do you know who needs to know that record more than anyone else? The . . . community needs to know because they need to protect themselves against him. I don’t want his face hidden on television because he’s too young. I want his face seen so that other kids can know to stay away from him. I want

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59 Id. at 632. However a state decides to balance the interests, the critical issue of juvenile confidentiality must be addressed before the press is allowed into the courtroom or the police are allowed to release the names of juveniles they have arrested. See generally Smith v. Daily Mail Publ’g Co., 443 U.S. 96 (1979); Oklahoma Publ’g Co. v. District Court, 430 U.S. 308 (1977); Nebraska Press Assoc. v. Stuart, 427 U.S. 599 (1976). Otherwise, the problem of prior restraint will prevent the protection of juvenile confidentiality. See Todd, supra note 9, at 939. As the Court held in Oklahoma Publishing, the First and Fourteenth Amendments will not permit a state court to prohibit the press from publishing information which they had obtained when a judge had permitted them to attend a juvenile hearing. See 430 U.S. at 310. In Smith, the Court more forcefully stated that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 443 U.S. at 103. Where the sole interest advanced is the protection of the anonymity of the juvenile offender, the important rights created by the First Amendment must prevail. See id. at 104.

60 See State Responses, supra note 7, at xiv, 35; Laubenstein, supra note 1, at 1897.

61 See Guttman, supra note 6, at 508, 515.

62 See State Responses, supra note 7, at 35–37.
him to stay in jail under a regular [adult] prosecution, because I don’t want him out on the street next month or next year to commit another crime. Let’s not continue to make it seem that crime pays. We have to redesign the youthful-offender codes. They have not worked, and it is the number-one cause of the increase of violent crime among young people.63

This statement by Roy Innis, the National Director of the Congress of Racial Equality, illustrates the philosophical shift that has taken hold of the juvenile system.64 During the last decade, juvenile justice policy and court procedure have become highly debated political issues.65 Shock at horrendous crimes and a loss of faith in the prospect of rehabilitation have eroded the willingness of many to continue making a distinction between juvenile offenders and adult criminals.66 This has, in turn, prompted action by states to “get tough” on juvenile crime.67

A. General Trends in the Changes

Since 1992, almost every state has made substantive changes to their laws targeting juveniles who commit violent or serious crimes.68 The “get tough” measures fall into three general categories: subjecting more juveniles to the adult criminal system, increasing the severity of juvenile sentences, and reducing the protections of juvenile confidentiality.69

1. More Adult Prosecutions

The process by which a juvenile becomes susceptible to prosecution and punishment as an adult is known as the “transfer process.”70 Transfer to adult courts and prisons allows for longer incarceration periods and places emphasis on retribution rather than rehabilita-

63 LaVelle, supra note 6, at 86 (second alteration in original).
64 See id.
65 See SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, BALANCING JUVENILE JUSTICE 113 (1996); see also infra Part III (discussing the changes in juvenile laws and the reasons for such changes).
66 See LaVelle, supra note 6, at 85–86. Congress has considered several bills which would treat juvenile records the same as those of adult criminals. See James Kuhnhenn, Crackdown on Young Criminals, KANSAS CITY STAR, July 27, 1997, at A1.
67 See STATE RESPONSES, supra note 7, at xvi.
68 See id. at xv.
69 See id. at xi.
70 See Guttman, supra note 6, at 509.
Such transfer reflects the notion that society has given up on the possibility of rehabilitation for the particular juvenile. Traditionally, the transfer process has been grounded in the discretion of the trial judge with guidance from the relevant state statutes. Part of "getting tough" includes taking this discretion out of the hands of judges by lowering the age of adult jurisdictions and expanding the list of crimes for which transfer is mandated. For example, in Virginia, amendments to the juvenile justice laws require any child fourteen or older who is charged with murder to be automatically tried as an adult. This law also allows for the transfer of juveniles for crimes such as armed robbery and burglary. In Georgia, juveniles as young as thirteen can be sent to adult court for committing certain felonies.

2. Harsher Juvenile Sentences

Similarly, initiatives have been taken to make juvenile sentences more than just a slap on the wrist. As James Q. Wilson, a noted criminologist, observed, "There ought to be penalties from the earliest offense . . . so that juveniles are treated by the state the same way we treat our children. You don't ignore the fact that they're wrecking the house until they finally burn it down. You try to deal with it right away." The sentiment is that there must be a sanction for every crime in order to deter repeat offenses.

Initiatives in this category include increases for both maximum and minimum sentences. In Idaho, for example, the maximum felony sentence for juveniles was doubled and the maximum misdemeanor sentence was tripled. The new Idaho law increases the maximum sentence for juveniles from 90 to 180 days for the commission of a
felony, and from 30 to 90 days for a misdemeanor. In Texas, the legislature increased minimum sentences for juvenile offenders who commit first, second, and third degree felonies, or capital murder. This has been accomplished by establishing minimum sentences of one year for a third degree felony, two years for a second degree felony, three years for a first degree felony, and ten years for capital murder.

3. Eroding Confidentiality Protections

Furthermore, many states have also replaced traditional confidentiality provisions with open proceedings and records. Between 1992 and 1995, ten states opened juvenile proceedings to the public. Twenty-eight states now allow some access to juvenile records. In all, forty states now permit the release of a juvenile’s name, a picture of the juvenile, or both, to the media or general public under certain conditions.

The degree to which confidentiality has been eroded varies from state to state. In general, the more serious the crime, the less protection is afforded to a juvenile’s confidentiality. In Maryland, for example, all juvenile proceedings involving delinquent acts that would be felonies if committed by an adult are now open to the public. Cases involving acts that would be misdemeanors in adult court are still closed to the public, at the discretion of the judge. In Virginia,
juvenile court proceedings in felony cases are open to the public, and juvenile records are no longer expunged.\textsuperscript{93} Illinois not only releases juveniles’ names, but also their addresses and the specific offenses for which they were adjudicated delinquent.\textsuperscript{94}

In addition, juvenile records, which were traditionally sealed or expunged when the juvenile became an adult, have also been affected by the changes in the laws. Many states now either open juvenile court records to school officials or require that schools be notified when a juvenile is taken into custody for a crime of violence or for the use of a deadly weapon.\textsuperscript{95} In Idaho, court records of nearly every juvenile delinquency case may be disclosed.\textsuperscript{96} Exceptions are made only when the juvenile judge issues a written order specifically forbidding disclosure in a case.\textsuperscript{97} Kansas also provides for disclosure of records of all juvenile felons who are fourteen or older and subjects these records “to the same disclosure restrictions as the records of adults.”\textsuperscript{98}

It is clear that the changes in juvenile laws are widespread. The question is, what is driving these changes?

B. Reasons Behind the Changes in Juvenile Laws

1. Society’s Great Fears

a. Popular Perceptions

The current targeting of juveniles for societal retribution is predicated on the widespread perception that juvenile crime and violence have reached catastrophic levels.\textsuperscript{99} The image Americans hold of the typical criminal is increasingly described as that of a juvenile:\textsuperscript{100}

It’s five Brooklyn boys ranging in age from 14 to 18 charged in the brutal rape and assault of a 43-year-old jogger. It’s a

\textsuperscript{93} See Butterfield, \textit{supra} note 14, at 1.
\textsuperscript{94} See Blum, \textit{supra} note 57, at 378–79. Such disclosure is triggered in the case of first degree murder, attempted murder, aggravated criminal sexual assault, and criminal sexual assault. See \textit{id}. For juveniles who were over the age of thirteen when the offense was committed, disclosure is also triggered in the case of a felony committed as or on behalf of a gang member, a felony involving firearms, and certain drug offenses. See \textit{id}.
\textsuperscript{95} See \textit{STATE RESPONSES}, \textit{supra} note 7, at 36.
\textsuperscript{96} See Blum, \textit{supra} note 57, at 380.
\textsuperscript{97} See \textit{id}.
\textsuperscript{98} \textit{Id.} at 380 (quoting \textit{KAN. STAT. ANN.} § 8-1608(c) (supp. 1994)).
\textsuperscript{99} See \textit{PRIVACY POLICY}, \textit{supra} note 20, at 17.
\textsuperscript{100} See LaVelle, \textit{supra} note 6, at 85.
chubby-cheeked 10-year-old Detroit youngster who served as a lookout in a botched robbery that resulted in the shooting death of a pregnant woman. It’s also two 7-year-olds from Indianapolis who dragged a first-grade girl into a restroom and raped her.\textsuperscript{101}

Eighty-two percent of respondents to a national survey believed the amount of serious juvenile crime in their respective states increased during the last three years.\textsuperscript{102} Furthermore, sixty-two percent of respondents believed it increased substantially.\textsuperscript{103} This perceived increase in juvenile crime has fueled a belief that changes need to be made in the juvenile justice system.\textsuperscript{104}

The common belief, as reiterated by Paul J. McNulty, is that “the gap between lawbreaking and accountability must be significantly narrowed. Too many ‘minor’ crimes by young offenders, such as truancy and vandalism, are tolerated by law enforcers, sending the message that there is no sanction for illegal behavior.”\textsuperscript{105} People are expressing a desire to see more juveniles tried as adults. For example, sixty-eight percent of respondents to the poll wanted adult trials for juveniles charged with serious violent crimes; sixty-two percent wanted adult trials for juveniles charged with selling large amounts of drugs; and fifty percent believed that juveniles charged with a serious property crime should be tried as adults.\textsuperscript{106} The result of another national poll indicates that “[s]eventy-three percent of the national population believes that juveniles who commit violent crime should be tried the same as adults, while only nineteen percent think that violent juveniles should be given more lenient treatment in juvenile court.”\textsuperscript{107}

\textsuperscript{101} Id.
\textsuperscript{102} See Schwartz et al., \textit{supra} note 6, at 249. The survey was conducted by the Survey Research Center of the Institute for Social Research at the University of Michigan in 1991. \textit{See id.} at 246.
\textsuperscript{103} \textit{See id.} at 249.
\textsuperscript{104} \textit{See id.; McNulty, \textit{supra} note 2, at 84–85.
\textsuperscript{105} McNulty, \textit{supra} note 2, at 86. McNulty is president of First Freedom Coalition, an anti-crime advocacy group. \textit{See id.} He was also director of policy and communications in the Justice Department during the Bush Administration. \textit{See id.}
\textsuperscript{106} See Schwartz et al., \textit{supra} note 6, at 250.
\textsuperscript{107} Acton, \textit{supra} note 81, at 283–84 (citing \textbf{BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS: 1993}, at 197 tbl.2.50 (Kathleen Maguire & Ann L. Pastore eds., 1994)).
b. The Impact on Lawmakers

These public desires have not fallen on deaf ears among state officials. The issue of youth violence has been at or near the top of nearly every state legislature's and governor's agenda for the past several years. In Illinois, upon the introduction of new juvenile legislation, Governor Jim Edgar stated that "[t]he people of Illinois have been sending a clear message for months. They want us to get even tougher on those who commit violence and to escalate our efforts to take back our streets and neighborhoods." Similarly, Governor Tom Ridge of Pennsylvania declared:

Perhaps the most difficult challenge we face is juvenile crime . . . . Without regard for society or even self—without being held accountable—juveniles are committing adult acts of violence like never before. It's time they be held accountable. Youth will no longer be an excuse. I call upon you to begin the important process of juvenile justice reform . . . and once and for all, we will treat the worst violent juvenile offenders like the criminals they are. It's as simple as that.

Governors are not the only state officials reflecting these public perceptions and fears in their rhetoric. Politicians from all ideological perspectives are echoing the mantra that juveniles who commit violent crime should not be able to hide behind the juvenile system's shield of confidentiality. Gil Garcetti, Los Angeles County District Attorney, stated that "kids learn they can get away with it because there is no real punishment for the first few crimes." New York Attorney General, Dennis Vacco, promoting his plan for a comprehensive revision of juvenile justice laws which would provide more punishment and less confidentiality to juvenile offenders, agreed that "[t]he system is no longer equipped to handle the barrage of violent crimes being committed by juveniles in record levels. It is time that we develop a new juvenile justice system—one that rethinks the most basic assumptions about youth violence."

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108 See STATE RESPONSES, supra note 7, at 1.
109 Acton, supra note 81, at 279 (alteration in original).
110 Id. at 279–80 (alteration in original).
111 See Kuhnhenn, supra note 66, at A1.
112 Butterfield, supra note 14, at 1.
2. Goals of the New Laws

The destruction of confidentiality protections is integral to the overall scheme of the "get tough" rhetoric.\(^{114}\) It fosters the two main goals: accountability and public safety.\(^{115}\) In the policy of the new era, concern about the harmful effects publicity can have on rehabilitation of the juvenile has faded into the background.\(^{116}\)

a. Accountability

Inherent in many of the changes is the belief that serious and violent juvenile offenders must be held accountable for their actions.\(^{117}\) Since previous methods of deterring juvenile crime have proven inadequate, accountability is an avenue to be explored.\(^ {118}\)

Arguments have been made that removing confidentiality from the juvenile system will impose a stigma on juvenile offenders that will, in turn, impact future decisions to commit delinquent acts.\(^ {119}\) Fear of notoriety within the community and embarrassment to self or family, it is argued, will force accountability upon juveniles and motivate them towards socially acceptable goals.\(^ {120}\) Furthermore, if employers will not hire someone with a juvenile record, then the juveniles will not commit these acts in the first place.\(^ {121}\)

Accountability also encompasses the argument that exposing juvenile criminals will help deter and appropriately punish adult crime as well.\(^ {122}\) This aspect of the argument relies on the belief that the

\(^{114}\) See State Responses, supra note 7, at xiv, 35.

\(^{115}\) See Privacy Policy, supra note 20, at 103, 108.

\(^{116}\) See State Responses, supra note 7, at xiv, 35; Adam Pertman, States Racing to Prosecute Young Offenders as Adults, Boston Globe, Apr. 11, 1996, at 1.

\(^{117}\) See State Responses, supra note 7, at xi; McNulty, supra note 2, at 86–87.

\(^{118}\) See Blum, supra note 57, at 352–53. Marna McLendon, state attorney for Howard County in Maryland, stated, "Many children believe that juvenile court is a joke and that nothing happens to juvenile offenders." Caitlin Francke, Howard Juvenile Court Ready to Go Public; Open Trials for Youths Could Start This Month, Baltimore Sun, July 10, 1997, at 2B. McLendon asserted that her office, by asking judges to open felony and misdemeanor juvenile proceedings to the public, was "doing everything possible to change that impression and have juveniles understand the consequences of their acts." Id.


\(^{120}\) See id. at 136. "The law has to catch up with the problems of today," said Marna McLendon, state attorney for Howard County, Maryland, "The kids should be embarrassed." Francke, Full Youth Hearings, supra note 89, at 1B.


\(^{122}\) See id. at 913.
juvenile delinquents of today are the adult criminals of tomorrow. When adult criminals stand before a judge, their juvenile records are inadmissible and it is likely that their sentences will be considerably less than they would otherwise be. If juvenile records are no longer expunged or kept out of the sentencing procedure—that is, if juveniles no longer start with a clean slate when they turn eighteen—those with juvenile records will think twice before committing a crime as an adult, or they will face stiffer, more appropriate sentences as a result.

Proponents of these changes contend it is irrelevant whether juvenile offenders are stigmatized and thereby find it more difficult to obtain jobs and successful lives. These proponents assert that regardless of confidentiality, these juveniles are likely to offend again. Their argument is that "after all these years of insisting upon secrecy and confidentiality in order to help rehabilitate juvenile offenders, one thing is crystal clear—juvenile offenders are seldom rehabilitated." Only when the wall of confidentiality is lifted, will juveniles be held accountable for their actions.

b. Public Safety and the Right to Know

The media has historically held the responsibility of monitoring the court system to ensure effective and fair performance of the courts. Proponents of media access to juvenile proceedings draw on this historical role for several reasons.

First, arguments for media access embrace the notion that access and publication of juveniles' names serve an important educational service for society. In response to the debate over confidentiality as a part of juvenile proceedings, the National Council of Juvenile and Family Court Judges declared:

123 See id. at 914.
124 See id. at 921; Schulhofer, supra note 73, at 436; Richard Lacayo, Teen Crime; Congress Wants to Crack Down on Juvenile Offenders. But Is Throwing Teens into Adult Courts—and Adult Prisons—the Best Way?, TIME, July 21, 1997, at 26, 28.
126 See PRIVACY POLICY, supra note 20, at 108.
127 See id.
128 Id.
129 See Francke, Full Youth Hearings, supra note 89, at 1B.
131 See McIntyre, supra note 27, at 391.
Traditional notions of secrecy and confidentiality should be re-examined and relaxed to promote public confidence in the court’s work. The public has a right to know how courts deal with children and families. The court should be open to the media, interested professionals and students and, when appropriate, the public, in order to hold itself accountable, educate others, and encourage greater community participation.\(^\text{132}\)

When such a proceeding is open to public scrutiny, there is an opportunity to understand not only the workings of the court in a particular case, but the justice system as a whole.\(^\text{133}\) This “contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system.”\(^\text{134}\) As such, “open proceedings strengthen public confidence in the courts, increase public respect for the law, permit the public to obtain information about institutions it must support financially, and help prevent miscarriages of justice.”\(^\text{135}\)

In addition, arguments are made that laws which allow the disclosure of identities of juvenile offenders provide the people of the communities the benefit of a warning.\(^\text{136}\) Disclosure safeguards the interest that both victims and potential victims alike have in knowing who poses a threat to them.\(^\text{137}\) When proposing the opening of serious juvenile offenders’ records to public scrutiny, former Governor Stephen Merrill of New Hampshire said, “[A]s a matter of public safety, citizens have a right to know who is committing what crimes and where.”\(^\text{138}\) The alarming violence that juveniles are committing has been seen as justification for the states to be more concerned with protecting the public safety than it is with protecting the identities of juveniles.\(^\text{139}\)

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\(^{132}\) State Responses, supra note 7, at 36.

\(^{133}\) See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980).

\(^{134}\) Id. at 573 (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring)) (alteration in original).

\(^{135}\) Todd, supra note 9, at 944.

\(^{136}\) See Blum, supra note 57, at 388.

\(^{137}\) See id.

\(^{138}\) Acton, supra note 81, at 305.

\(^{139}\) See Blum, supra note 57, at 387–88.
IV. THE MASSACHUSETTS EXAMPLE

A. Recent Changes in Juvenile Justice Laws

Only when people see that justice is being done and teen predators are getting put away behind bars are we going to fully restore public confidence in our juvenile justice system.

—Governor William F. Weld

Massachusetts has been modifying its juvenile justice system for several years. As illustrated in Governor Weld’s statement above, the driving theme in these modifications has been to “get tough” on juvenile crime. More juveniles are being tried automatically as adults, stiffer juvenile sentences are being added, and access to juvenile proceedings and juvenile records has increased substantially. The most recent Massachusetts legislation is an example of the general changes sweeping the nation.

In 1991, Massachusetts was cited as one of the best state systems of juvenile corrections in the country by the National Council on Crime and Delinquency. It was presented as an example of a system to emulate because of its low recidivism rates among juveniles. Ironically, at the very instant that the Massachusetts system was praised, the calls for reform had already been made. The questions have to be asked, then, what has changed and why?

Under the then existing law, a juvenile between the ages of fourteen and seventeen was “eligible” to be transferred only under certain circumstances. A hearing was held after the juvenile was arrested,
and the decision whether or not to transfer the juvenile was left to the judge.\textsuperscript{150} If the judge determined that transferring the juvenile was appropriate, that conclusion had to be substantiated with written proof that the juvenile presented a significant danger to the public and that the juvenile was not amenable to rehabilitation within the juvenile system.\textsuperscript{151} While access to court proceedings and records was restricted under the discretion of the judge, provisions were made for the release of the juvenile’s name by the probation officer if the juvenile was a repeat offender between fourteen and seventeen, and the offense was such that an adult would have faced imprisonment for the offense.\textsuperscript{152}

The major legislative changes to the Massachusetts juvenile system since 1990 have all come after the news of a shocking juvenile crime and the public outrage at the lenient treatment the juveniles involved received.\textsuperscript{153} The first changes followed the shocking rape, beating, and murder of Kimberly Rae Harbour on Halloween night 1990 by a group of youths, five of whom were under the age of seventeen.\textsuperscript{154} In response, on December 5, 1990, the legislature made it easier to transfer juveniles accused of murder to adult court for trial and sentencing.\textsuperscript{155} The Commonwealth accomplished this by shifting the burden of proof regarding amenability to rehabilitation to the juvenile accused of murder, thereby creating a rebuttable presumption that juveniles accused of murder should be transferred to the adult system.\textsuperscript{156} Furthermore, the legislature mandated that transfer hearings be held for all juveniles charged with specifically designated crimes, including: murder, manslaughter, rape, kidnapping, or armed robbery which resulted in serious bodily injury.\textsuperscript{157} It also, for the first time, made clear that the

\textsuperscript{150} See id.
\textsuperscript{151} See id.
\textsuperscript{152} See Mass. Gen. Laws Ann. ch. 119, § 60A (West 1993). The statute states:

Notwithstanding the provisions of this section, the name of a child shall be made available to the public by the probation officer without such consent if the child is: alleged to have committed an offense while between his fourteenth and seventeenth birthdays; and has previously been adjudicated delinquent on at least two occasions for acts which would have been punishable by imprisonment in the state prison if such child had been age seventeen or older; and is charged with delinquency by reason of an act which would be punishable by imprisonment in the state prison if such child were age seventeen or older.

Id.

\textsuperscript{154} See Task Force, supra note 141, at 351–52.
\textsuperscript{157} See 1990 Mass. Acts 267, § 3; Task Force, supra note 141, at 352.
public had a right of access to juvenile court sessions involving minors charged with murder.\textsuperscript{158}

The following year, the legislature made it even easier for juveniles to be transferred to adult courts and for harsher sentences to be imposed on juveniles who commit murder.\textsuperscript{159} This bill was named after Charles Copney and Korey Grant, two young boys who were shot to death on the steps of their apartment building.\textsuperscript{160} The three boys accused of their murders were all juveniles at the time of the shooting.\textsuperscript{161} When the boy accused of actually firing the gun, Damien Bynoe, was not transferred under the transfer laws as amended in 1990, the push for stern action against juvenile murderers once again gained momentum.\textsuperscript{162} The resulting bill required that transfer hearings be held in eight categories of crimes.\textsuperscript{163} Furthermore, it required a judge to impose a mandatory minimum sentence for juveniles adjudicated delinquent by reasons of murder: a fifteen year sentence must be served before parole eligibility in first degree murder cases and a ten year minimum sentence in second degree murder cases.\textsuperscript{164} If the juvenile is not transferred and is adjudicated delinquent of murder, he will first be committed to the Department of Youth Services (DYS) and then transferred to prison at age twenty-one, or at age eighteen if DYS so requires, to serve out the balance of his sentence.\textsuperscript{165} This means that even those juveniles who the court deems amenable to rehabilitation will face a sentence in adult prison because of the nature of the crime they have committed.\textsuperscript{166}

The 1990 and 1991 legislative changes manifested the frustration and growing desire for retribution engendered by gruesome juvenile crimes.\textsuperscript{167} The proponents of these legislative changes, especially Governor Weld, argued that even if certain juveniles can be rehabilitated,
society has an obligation to exact retribution for at least some crimes. They contended that appropriate retribution cannot be achieved if these juveniles are retained in the juvenile system. Only by facilitating the transfer of violent offenders to the adult system and subjecting them to the corresponding stigma and punishment, would retribution be properly attained.

The changes enacted in 1996 are the latest phase of this “get tough” movement. The law declared in its first line that an “emergency” existed which required an immediate improvement in the Commonwealth’s justice system, and that this improvement was necessary for “the immediate preservation of the public safety and convenience.”

Like the 1990 and 1991 amendments, these changes were spurred by a shocking murder and the seeming inability of the juvenile system to adequately address the public shock and outcry. Much of the impetus for this “reform” came in the wake of the arrest of Edward O’Brien, Jr., the fifteen-year-old altar boy who was convicted of sneaking into a neighbor’s house and stabbing his friend’s mother ninety-eight times. When Judge Heffernan ruled that O’Brien should face trial as a juvenile, it sparked a public uproar.

As a result of the judge’s ruling, legislative leaders, district attorneys, the Attorney General and the Governor rallied behind the bill that now requires among other things, adult trials for juveniles accused

168 See id. at 355.
169 See id.
170 See id.
173 See Johnson, supra note 140; see also, e.g., O’Brien, A Death Next Door, supra note 171, at 12; Pertman, supra note 116, at 1; William F. Weld, Getting Tough Only Way to ‘Control Mayhem,’ MASS. LAW. WKLY., Feb. 26, 1996, at 11 (text of his Feb. 15, 1996 address to the Heritage Foundation Governors’ Forum in Washington, D.C.).
174 See Johnson, supra note 140; Pertman, supra note 116, at 1; The Young and the Violent, supra note 171, at 81.
of murder. Representative Paul R. Haley (D-Weymouth), who introduced the legislation into the House of Representatives, stated that the bill "is going to dramatically change the juvenile justice system. It will ensure serious offenders are given significant sanctions including adult prison. . . . No longer will kids think they can hide behind their youth to avoid facing a significant sanction for their criminal activity." Judge Peter Lawton, who has presided over several of Massachusetts' most infamous juvenile trials, expressed his belief that the changes restore balance to the judicial system.

In addition to automatic adult prosecution for murder cases involving defendants between the ages of fourteen and sixteen, the act also created a category of "youthful offender." The "youthful offender" category encompasses juveniles who commit serious offenses other than murder, who, at the prosecutor's option, can be indicted by the grand jury. When a judge adjudicates a juvenile as a "youthful offender," the judge must then impose one of three sentences: (1) an adult sentence consisting of any sentence which a judge could impose on an adult convicted of that offense; (2) a juvenile sentence involving commitment to DYS until the age of twenty-one; or (3) a combination sentence involving a commitment to DYS until the age of twenty-one, followed by a suspended adult sentence of incarceration.

Youthful offenders no longer have a right to confidentiality in the Commonwealth. Youthful offender trials and juvenile court records involving youthful offenders are open to the public as if it were an adult trial. Furthermore, if the Commonwealth has proceeded with an indictment, the general public will be allowed to attend the proceedings. Delinquency records, however, remain unavailable to the public except with a judge's approval.

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177 Phillips, supra note 176, at 1.
178 See Johnson, supra note 140.
180 See id. §§ 1-2.
181 See id. § 5.
182 See id. § 6.
183 See id.
185 See id.
B. Analysis of Changes in Massachusetts Law

1. Massachusetts’ Reaction to Gina Grant

The new law illustrates the philosophical shift from rehabilitation to retribution for a specific group of juveniles, and emphasizes both accountability and public safety. The fact that the 1996 amendments include substantial changes in juvenile confidentiality is a shift that seems ironic in light of the reaction that the public of Massachusetts had to the case of Gina Grant. Her situation was referred to as “the perfect case by which to prove that society has lost its sense of direction.” She was a serious offender, who, with the aid of sealed juvenile records, was able to rehabilitate herself, and become a national success story. Her story, however, is also a sad reminder of the problems which can ensue when a juvenile’s confidentiality is breached.

The nineteen-year-old orphan was profiled in the *Boston Globe Magazine* as a model of how resilient kids can be; she was a straight-A student, the captain of the tennis team, and a devoted tutor for disadvantaged kids. Grant also is a murderer who served a sentence for the highly publicized murder of her mother in South Carolina. As James Metts, the Lexington, South Carolina county sheriff described it, “Gina Grant beat her alcoholic mother to death with a candelabra, beat her face so that it was not recognized, then stuck a knife in her throat and then tried to make it look like that [sic] her mother had committed suicide.” In addition, the prosecutors thought Gina Grant exhibited no signs of remorse: “[I]t always was a question of what was truly in her heart, and I don’t think she was completely remorseful, and to what degree, my feelings [sic] is very little.”

Even though Grant was fourteen at the time, and this was a juvenile case, the media was allowed access to the courtroom, and her
name and picture were spread across the front page of the local papers. In fact, Myers said that this case had received more media attention than any juvenile case he had ever handled.

In exchange for a no contest plea to voluntary manslaughter, Grant served six months in state juvenile detention, and was then released to live with relatives in Massachusetts until her eighteenth birthday. Her juvenile record was sealed to prevent it from coming back to haunt her after she had repaid her debt to society. Once in Massachusetts, Grant became the model of rehabilitation.

Her confidentiality had, however, been effectively eradicated by the judge, who allowed the media coverage to grip South Carolina. Despite the sealed records, Grant's past was a "ticking time bomb given the local media attention the . . . case had attracted at the time." As one commentator aptly described it, "The story was always just one computerized search away from the light of day."

The truth of her past started to come to light in April 1995, when the Boston Globe Magazine did a focus story on Grant and her accomplishments. Regarding her mother's death, Grant only said that it was too painful to discuss. When an anonymous person began sending newspaper clippings of her trial to Harvard University (where she had gained early admission) and the Boston Globe, the horror of her past was revealed. Harvard quickly rescinded its offer of early admission to Grant, ostensibly because she had lied on her application by not notifying the university of this situation. Harvard's decision and the public support it engendered, along with the anonymous clippings, illustrate that although the law may erase from its memory this type of incident, "society's memory is not as easily expunged as a criminal record."

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195 See id.
196 See id.
197 See Goodman, supra note 34, at A7.
198 See Funk, supra note 121, at 890.
199 See Goodman, supra note 34, at A7.
200 See Auerbach, supra note 77, at 1.
201 Jurkowitz, supra note 32, at 15.
202 Id.
203 See id.
204 See Dembner & Auerbach, supra note 33, at 1.
205 See id.
206 See id. This is information which some lawyers have declared under Massachusetts law that Grant did not have to disclose to the university, and which the university had no right to ask her about. See Nightline, supra note 188 (statement of Margaret Burnham, Esq.).
207 Nightline, supra note 188 (statement of Ted Koppel).
Because Grant was a resident of Massachusetts, and Harvard was involved, this case brought the debate over juvenile confidentiality to the people of Massachusetts. In addition to Harvard rescinding her offer of admission, Grant also met negative feedback from the public. On her first day at Tufts University, where she matriculated after Harvard withdrew its offer, she was greeted by fliers accusing the university president and admissions director of admitting “killers” to the school.

However, a large outpouring of support for Grant and the confidentiality of her juvenile record arose. For example, in a question the Boston Globe posed to its readers, over 1,300 readers resoundingly responded that Grant had been wronged by Harvard’s action and the breach of her confidentiality, while only 700 expressed their belief that the right decision had been made. The typical responses were, “She has already paid her debt to society”... ‘She proved herself in the five years since the incident occurred’. ‘She is turning her life around and should not be put back down again.” One Harvard student stated, “I think that she should have been admitted to the college. I feel that she already paid for her mistakes, and she should have the chance to come to school [at Harvard], just like anyone else.” John Silber, then-president of Boston University, stated, “[W]hen a young person makes a mistake and completes the jail sentence and completes the probationary sentence, and if that person then proceeds to demonstrate very high qualities academically and is socially responsible, a new life has to be there.” He went on to encourage Grant to apply to Boston University, and intimated that a spot would be waiting for her if she did.

2. Responses to the Latest Changes

In such a climate, it is hard to imagine that the public of Massachusetts would want the same grief that befell Gina Grant to fall on its juvenile offenders. The problem, however, is that the latest changes to

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209 See Dembner, supra note 208, at 26; Hunt, supra note 187, at 20.
210 See Dembner, supra note 208, at 26.
211 See Hunt, supra note 187, at 20.
212 Id.
213 Nightline, supra note 188.
214 Id.
215 See id.
the juvenile law in Massachusetts do just that. If Grant had murdered her mother in Massachusetts, this new law would have automatically transferred her to adult court; if convicted she would face fifteen to twenty-five years, her confidentiality would be non-existent, and the story of Gina Grant would not be one of success for Massachusetts, but one of failure for the juvenile system. 216

The Gina Grant example illustrates that when people see the success the juvenile system has in rehabilitating a serious juvenile offender, they praise the juvenile system. 217 However, that praise easily gives way in light of one glaring failure. 218 The recent changes in Massachusetts in the wake of the Edward O’Brien, Jr. case illustrate this quite well. 219

Individuals prominent in the field of youth services warn of the dangerous path upon which Massachusetts has embarked. Jack Levin, professor of sociology and criminology at Northeastern University, stated that the shift towards treating juveniles as adults is “an error and a sharp break from the past.” 220 Paul Demuro, a child welfare consultant and former Massachusetts Department of Youth Services (DYS) official, said that “the juvenile justice system in Massachusetts was created a century ago to separate children from adults, ‘to hold them accountable, but recognize that they’re different.’” 221 Judge Francis G. Poitrast, a juvenile judge in the Massachusetts Juvenile Court, stated, “I don’t think in Massachusetts that we want to go back 150 years . . . Obviously the public is angry about the drive-by shootings . . . but you don’t put kids away unless you have to.” 222 Cynthia Kaplan, coordinator of the trauma program for adolescents at McLean Hospital in Massachusetts said, “Increasingly fed up with crime, the public is calling for stiffer sentences. But locking kids up until they are eighteen can backfire . . . Nobody’s really demonstrated that incarceration is successful in restoring people to normal functioning.” 223

216 See id.
217 See Cynthia Tucker, Saving All the Ones Who Can Be Saved, ATLANTA J. & CONST., Apr. 16, 1995, at 7B.
218 See id.
219 See Johnson, supra note 140.
220 Id.
221 Id.
222 Id. (second alteration in original).
As the Supreme Court said in *Davis v. Alaska*, juvenile confidentiality is an interest which the state should weigh against other competing interests. When Massachusetts decided to keep juveniles in juvenile jurisdiction, it did so reasoning that the juvenile can be rehabilitated. An essential ingredient in a juvenile’s rehabilitation, as the Court noted many years ago in *In re Gault*, is confidentiality. Keeping proceedings and records of youthful offenders open to media scrutiny, in effect, forecloses a juvenile’s chances at rehabilitation. If Massachusetts truly desires rehabilitation for this class of juveniles, it needs to rethink its treatment of juvenile confidentiality.

V. Analysis of the Changes in Juvenile Confidentiality Laws

Removing confidentiality protections for juveniles as part of the “get tough” rhetoric is an ill-conceived plan which falls far short of helping cure the problem of juvenile crime and delinquency. In the end, these measures will only serve to distance the juvenile justice system from the goal of rehabilitation, and will do nothing to address the real issue of how to prevent juvenile crime.

First, the removal of confidentiality protections hinders the possibility of rehabilitation for the juvenile. The existence of a juvenile police or court record and the publication of numerous cases of juvenile misbehavior and criminality have been identified as major obstacles to rehabilitation. The only empirical data about the effect of the availability of criminal history information to employers, educators or others indicates the result is less employment, educational or other opportunities for offenders. “When these doors are closed, offenders are more likely, not less likely, to return to criminal and anti-social conduct, thereby increasing, not decreasing, the danger to society.” If their records are no longer expunged, and the information is made available to potential employers, “[k]ids who get into trouble for any-

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225 See *Guttman*, *supra* note 6, at 509.
227 See *Laubenstein*, *supra* note 1, at 1897–98.
228 See *supra* notes 226–27 and accompanying text; see also *infra* notes 229–39 and accompanying text.
229 See *PRIVACY POLICY*, *supra* note 20, at 87.
230 See *id.* at 112.
231 See *id.*
232 *Id.*
thing," said Mark Soler of the Youth Law Center, "will get dogged for the rest of their lives."\textsuperscript{233}

Second, disclosing the identities of juveniles has no proven effect in decreasing juvenile delinquency.\textsuperscript{234} The reasons that juveniles commit crime are various and sundry, and cannot be cured by simply treating them as adult criminals. According to the Children’s Defense Fund, being abused or neglected as a child increases the likelihood of arrest as a juvenile by fifty-five percent.\textsuperscript{235} The Center for Disease Control also concluded that the strongest predictors of violent crime are personal and neighborhood income.\textsuperscript{236} Therefore, opening juvenile court proceedings would have little impact on further delinquency since most juveniles return home or to a youth facility where they are in the same environment which nurtured their criminal conduct.\textsuperscript{237} Most specialists agree that the best way to put a juvenile who has committed a crime back on track is to get her or him into a supportive situation, not in jail or exposed to public stigmatization.\textsuperscript{238} The evidence from the “Massachusetts Experiment” supports this.\textsuperscript{239} In the 1970s, Jerome G. Miller, the head of the juvenile correctional system in Massachusetts, closed all of the state’s reform schools, and shifted offenders into community-based alternatives.\textsuperscript{240} The result, according to a 1989 study, was that Massachusetts had the lowest recidivism rate in the country, and the number of juvenile offenders who eventually ended up in the adult system declined.\textsuperscript{241}

Third, disclosure does not satisfy the public, but creates false perceptions of out-of-control juveniles on a wild killing spree.\textsuperscript{242} and

\textsuperscript{233}Kuhnhenn, \textit{supra} note 66, at A1.
\textsuperscript{234} See McIntyre, \textit{supra} note 27, at 390.
\textsuperscript{235} See Ayers, \textit{supra} note 2, at 41.
\textsuperscript{236} See id. at 42.
\textsuperscript{237} See McIntyre, \textit{supra} note 27, at 391.
\textsuperscript{238} See Barry Krisberg & James F. Austin, \textit{Reinventing Juvenile Justice} 143 (1993). At least three studies have concluded that programs like Vision Quest and Homeward Bound, which emphasize rehabilitation, have a positive impact on juvenile recidivism rates. \textit{See id.} at 142-43. Critical components of successful juvenile correctional programs have been identified as: "(a) continuous case management, (b) careful emphasis on re-integration and reentry services, (c) opportunities for youth achievement and program decision making, (d) clear and consistent consequences for misconduct, and (e) a diversity of forms of family and individual counseling matched to individual adolescent needs." \textit{Id.} at 143.
\textsuperscript{239} See Sherman, \textit{supra} note 7, at 31.
\textsuperscript{240} See id.
\textsuperscript{241} See id.
leads to the passage of such overreaching laws as those now in place in Massachusetts.243 The public needs to be aware of the actual numbers involved, and understand that what we are facing is far from an epidemic.244

In Massachusetts, for example, DYS statistics show that the number of juvenile cases that were sent to adult court has increased from only eleven cases in 1989 to thirteen in 1994.245 A DYS lockup for serious offenders that opened in July 1994 holds forty-one youths, thirty-one of whom are there for murder.246 Furthermore, although there are roughly two million juvenile arrests in the United States each year, only six out of every 100 of these are for violent crimes.247 Arrests for rape and murder account for less than one-half of one percent of juvenile arrests.248 In 1994, fewer than one-half of one percent of all juveniles in the country were arrested for a violent offense.249 Additionally, only one-third of juvenile offenders ever commit a second offense, and chronic offenders represent only five to twenty-five percent of all juvenile offenders.250

The National Criminal Justice Commission (NCJC) has declared, “Although there has been a dramatic rise in juvenile firearms homicides, we are not in the midst of an ‘overall’ juvenile crime wave.”251 In comparing the arrest rates of juveniles for violent crimes over the last decade, the statistics show that in 1982, 0.3% of America’s juveniles were arrested for such crimes, while in 1992, the number was 0.5%.252 While some politicians have cited this sixty-six percent increase as evidence of a violent crime wave by juveniles, one commentator has more correctly described it as, “the tyranny of small number . . . That’s an increase from one insignificant number to another insignificant number . . . . What we’re involved in is a sort of manufactured crime wave.”253

243 See supra Part III.B.1.a-b. (discussing public perception of juvenile crime and its impact on lawmakers).
244 See infra notes 245–53 and accompanying text.
245 See Auerbach, supra note 77, at 1.
246 See id.
247 See REAL WAR, supra note 8, at 132.
248 See id.
250 See Kuhnhenn, supra note 66, at A1.
251 REAL WAR, supra note 8, at 132.
253 Id.
In light of these statistics, the “get tough” measures are a solution which can be equated with using a sledgehammer to kill a fly\(^{254}\)—they are too broad in scope and the damage they will inflict is worse than the cure. As the NCJC described the current situation:

[B]ecause gang killings, drive-by shootings, and high school arms buildups have gained headlines nationwide, we have shaped our policies in response to them, even where there are not such severe problems. But it is unrealistic to expect that the treatment of one part of the problem will properly cure the whole. Increasingly, the juvenile justice system has focused on punishing all offenders—violent and nonviolent alike—with harsh sentences while paying lip service to rehabilitation. Our “get tough” policies are perhaps even more severe when we are dealing with children. We celebrate judges who allow juveniles to be tried as adults. We allow the death penalty to be imposed against teenagers. But we have failed to solve the problem of juvenile violence.\(^{255}\)

None of this discounts the fact that there are some juvenile offenders for whom there can be no rehabilitation, and for whom the appropriate response is an extended period of confinement.\(^{256}\) However, their existence does not mean that the entire juvenile system should be dismantled, or that all juveniles should be treated as they would be in the adult system.\(^{257}\) In fact, the majority of juveniles in detention centers are nonviolent offenders.\(^{258}\) As such, allowing for continued discretion by the judge and those working in the field, accompanied with more funding for psychological, educational, and overall poverty-fighting services, would be more effective in the battle to stop juvenile crime.\(^{259}\) “[K]ids need alternatives to gangs and crime,

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Because the absolute number of juvenile arrests is far below the adult level, a larger percentage increase in juvenile arrests does not necessarily imply a larger increase in the actual number of arrests. For example, while the percentage increase in juvenile arrests for a weapons law violation was much greater than the adult increase between 1985 and 1994, the increase in the number of arrests was actually 27% greater for adults.

**Snyder et al., supra** note 249, at 12.


\(^{255}\) See *Real War*, *supra* note 8, at 132–33.

\(^{256}\) See Schulhofer, *supra* note 73, at 441–42.

\(^{257}\) See Tucker, *supra* note 217, at 78.

\(^{258}\) See *Ayers*, *supra* note 2, at 199.

\(^{259}\) See *supra* notes 237–41 and accompanying text.
programs that engage them and teach them and employ them and find a place for them, a positive role to play. 260

VI. CONCLUSION

The current get-tough policies do not ensure our collective well-being. They are expedient for politicians—a Chicago alderman I know said he had never heard of anyone losing votes by advocating more rigorous sanctions on kids—but they are also expensive and, in general, do not work. What is needed is a rich and varied continuum of community-based options for kids in trouble. 261

The increasing demands of the press to satisfy the public’s “right to know” about the working of its juvenile system and the identities of alleged offenders within the community conflicts with the promotion of privacy safeguards for juveniles. 262 The fundamental issue is how to balance the need to protect a juvenile’s right to privacy with the need to assure the community’s safety and provide juveniles with the services and supervision they need. 263

Before we abandon closed courtrooms and records for juveniles, we must consider the unintended consequences. Not all individuals who commit a wanton or malicious act during their teenage years are lost causes for society. 264 If society deems that a youthful offender should remain in the juvenile system, then that shows it has not given up on the juvenile’s chances for rehabilitation. 265 With this in mind, a state should be wary of giving up on juvenile confidentiality, for it will probably hinder the attainment of such rehabilitation. Society must reassess the direction it is taking in the area of juvenile justice, and instead of demanding that we “get tough” on juvenile crime, it should think about how it can better utilize its resources to prevent youths from entering the juvenile system in the first place.

260 AYERS, supra note 2, at 199.
261 Id.
262 See STATE RESPONSES, supra note 7, at 35; Jill K. McNulty, supra note 130, at 311.
263 See Kfoury, supra note 119, at 135.
264 See supra Part IV.B.1 (discussing Gina Grant).
265 See Guttman, supra note 6, at 509.