
Kara E. Nelson

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol81/iss4/10

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
THE RELEASE OF JUVENILE RECORDS UNDER WISCONSIN'S JUVENILE JUSTICE CODE: A NEW SYSTEM OF FALSE PROMISES

I. INTRODUCTION

Unlike adult criminal records, juvenile records have traditionally enjoyed a confidential status1 because of laws mandating confidentiality.2 These statutes reflected legislators' beliefs that confidentiality was necessary to avoid labeling a child as a criminal and to assure a juvenile's treatment, "rehabilitation, and reassimilation into the mainstream of society."3 Consistent with achieving these ends, the juvenile justice system's4 policy was "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past."5 Accordingly, to prevent a juvenile from being scarred by his delinquent acts, preventing the release of juvenile records was one of the juvenile justice

1. See Confidentiality of Juvenile Court Records: Hearing Before the Subcomm. on Juvenile Justice of the Comm. on the Judiciary, 98th Cong. 1-2 (1983) (opening statement of Hon. Arlen Specter, Chairman, Subcomm. on Juvenile Justice) ("Traditionally, information concerning juvenile offenders, unlike information relating to adult offenders, has been held on a confidential basis... ") [hereinafter Hearings]; ROBERT R. BELAIR, U.S. DEP'T OF JUSTICE, PRIVACY AND JUVENILE JUSTICE RECORDS 24 (1982) (explaining the primary rationale for permitting the public to access adult conviction records); see also Gilbert Geis, Publicity and Juvenile Court Proceedings, 30 ROCKY MTN. L. REV. 101, 102 (1957-58) ("Privacy has typically been among the few unchallenged keynotes in juvenile proceedings, though this policy is in sharp contrast to that of the adult criminal court... ").

2. See BELAIR, supra note 1, at 1 ("During most of this Century it has been a matter of policy that juvenile justice information be kept strictly confidential and used, with narrow exceptions, only within the juvenile and criminal justice systems.").

3. Hearings, supra note 1, at 1 (opening statement of Hon. Arlen Specter, Chairman, Subcomm. on Juvenile Justice); see also Geis, supra note 1, at 102 ("[P]ublicity does not deter juvenile misbehavior, but rather interferes with the possibility of rehabilitating the offender.").

4. "[The] 'juvenile justice system' is defined as 'an amalgamation of... institutions and activities which are used by our society to cope with the child who is at risk or who poses a risk.'" Linda F. Giardino, Note, Statutory Rhetoric: The Reality Behind Juvenile Justice Policies in America, 5 J.L. & POL'Y 223 n.1 (1996) (quoting Don McCorkell, Jr., The Politics of Juvenile Justice in America, in FROM CHILDREN TO CITIZENS 22 (Francis X. Hartmann ed., 1987)). The system includes "between 10,000 and 20,000 public and private agencies, with a total budget amounting to hundreds of millions of dollars." Id. (quoting LARRY J. SIEGEL & JOSEPH J. SEMMA, JUVENILE DELINQUENCY: THEORY, PRACTICE AND LAW 275 (1981)).

system's central goals. Today, the juvenile justice system's emphasis has changed, and the confidential status juvenile records traditionally enjoyed has started to erode.

Responding to the public's heightened concern regarding juvenile offenders and the arguably increasing juvenile crime rate, in the spring

---

6. See Geis, supra note 1, at 102. According to Geis, the release of juvenile records was something "devoutly to be avoided." Id. at 102.

7. See Barry C. Feld, The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes, 68 B.U. L. REV. 821, 821-22 (1988) ("[T]he trend of juvenile courts to employ a 'justice model'... rather than 'real needs' reflects a movement away from a rehabilitation-treatment based model."); Robert B. Acton, Note, Gubernatorial Initiatives and Rhetoric of Juvenile Justice Reform, 5 J.L. & POL'Y 277, 281 (1996) (stating that the "increasingly popular [get tough] approach to juvenile crime has 'drowned out' the juvenile justice system's long-standing emphasis on deterrence and rehabilitation.") (citation omitted); Mabel Arteaga, Note, Juvenile Justice With a Future... for Juveniles, 2 CARDOZO WOMEN'S L.J. 215, 219 (1995) ("Most states have redefined the purpose of their juvenile codes to focus on public safety, punishment and individualized accountability, in addition to the best interests of the child. This increasingly punitive approach has had the effect of overshadowing the original rehabilitative goals of the juvenile justice system.") (footnote omitted).

8. See Hon. 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, 395 (1995) ("Legislatures recently have attempted to cope with public dissatisfaction with and distrust of the juvenile system by limiting the shield of confidentiality...."); see also BELAIR, supra note 1, at 15 ("[T]he rethinking of the philosophy and goals of the juvenile justice system inevitably undermines support for juvenile justice confidentiality."); Arthur R. Blum, Comment, Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice, 27 LOY. U. CHI. L.J. 349, 354 (1996) (explaining that as states introduce accountability into the juvenile justice system they are "rescind[ing] their earlier promises to shield juvenile delinquents from society's stigmas"); Sally Mayne Pederson, Confidentiality: Juveniles' Rights Eroded, WIS. L.AW., Apr. 1996, at 26, 26 (stating that under Wisconsin's new Juvenile Justice Code, confidentiality of juvenile records "may become the exception, not the rule.").

9. Cries for abolishing the juvenile justice system, or at least drastically reforming it, stem from two sources: (1) public opinion; and (2) increasing juvenile crime. First, according to critics of the juvenile justice system, change is necessary because the public believes the system has failed and it is incapable of effectively dealing with juvenile crime. See, e.g., BELAIR, supra note 1, at 15, 17 ("[T]he public believes that a juvenile crime wave is underway.... [As a result] criminal justice officials, political figures and the public are calling for tougher measures against juveniles...."); Ralph A. Rossum, Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System," 22 PEPP. L. REV. 907, 907-09 (1995) (stating that the public believes the juvenile justice system has failed and that its treatment model actually contributes to juvenile crime); Acton, supra note 7, at 279 & n.10 ("[T]he increase in youthful violence has enraged the public and overwhelmed the juvenile justice system, leading state executives to devise, propose and adamantly advocate sweeping reform."); Michael Kennedy Burke, Comment, This Old Court: Abolitionists Once Again Line Up the Wrecking Ball on the Juvenile Court When All it Needs is a Few Minor Alterations, 26 U. TOL. L. REV. 1027, 1030 (1995) ("Much of the recent discussion concerning the juvenile court system's shortcomings has centered on... the perceived inability of the system to effectively address the problem [of increasing violent juvenile crime].").
of 1994 the Wisconsin Legislature decided to follow other states' leads by taking initiatives to "get tough" on juvenile offenders.10 From these

Despite these critical views of the system, supporters of the juvenile justice system argue that the public does not want the system's emphasis on rehabilitation to change. See Ira M. Schwartz et al., Public Attitudes Toward Juvenile Crime and Juvenile Justice: Implications for Public Policy, 13 HAMLINE J. PUB. L. & POL'Y 241, 241-44 (1992). According to these authors, the public continues to believe that "the primary purpose of the juvenile court should be to treat and rehabilitate" juvenile offenders rather than punish them. Id. at 244. Furthermore, they argue that the public's punitive attitudes toward juveniles are not related to the perceived inability of the system, but rather are "significantly related to the fear of being victimized by a violent crime." Id. at 241.

Second, critics of the juvenile justice system argue that change is necessary because of increasing juvenile crime rates. See Rossum, supra, at 907-08. Rossum asserts that: "Serious juvenile crime is skyrocketing. Between 1983 and 1992, the number of juveniles arrested for murder rose by 128%, and the number arrested for violent crime rose by 57%." Id. at 907. Similarly, according to the findings of the Juvenile Justice Study Committee, from 1988 to 1993 juvenile arrests in Wisconsin increased 100 percent. REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, JUVENILE JUSTICE: A WISCONSIN BLUEPRINT FOR CHANGE 1 (1995). Specifically, juvenile arrests for violent crimes have increased thirty-seven percent, and in Milwaukee County, juvenile arrests for violent crimes increased a startling eighty-seven percent. See id. Violent crimes include murder, forcible rape, robbery, and aggravated assault. See LINDA A. HALL & ANNE ARNESEN, WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, WISCONSIN'S JUVENILE JUSTICE PIPELINE 23 (1996) [hereinafter WISCONSIN COUNCIL ON CHILDREN AND FAMILIES].

Despite these findings, the perception of a national increase of juvenile crime is misguided. See Laureen D'Ambra, Essay, A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders is Not a Panacea, 2 ROGER WILLIAMS U. L. REV. 277, 277 (1997); see also JAY S. ALBANESE, DEALING WITH DELINQUENCY: THE FUTURE OF JUVENILE JUSTICE 20 (2d ed. 1993) (stating that nationwide the proportion of juveniles arrested for specific crimes has decreased during the last twenty years); Giardino, supra note 4, at 228 & n.13 (explaining that America's fears are unjustified because juvenile crime is not skyrocketing). As the current statistics of the Federal Bureau of Investigation demonstrate, in 1995 violent juvenile crime actually decreased nationwide. See D'Ambra, supra, at 277 & n.3 (citing Robert L. Jackson, FBI: Violent Crimes by Youths Decline, PROV. J. BULL., Aug. 9, 1996, at A1). Similar to the FBI findings, Albanese states that, when compared to the total number of arrests made during the last twenty years, the proportion of juvenile arrests has actually decreased nationwide. See ALBANESE, supra, at 20-21. For example, in 1970 juveniles accounted for approximately twenty percent of all arrests for forcible rape; in 1990, that proportion decreased to approximately fifteen percent. See id. at 20; see also Burke, supra, at 1027 (explaining that "[c]ontrary to popular belief, '[v]iolent] juvenile crime is not rising out of control'"") (second alteration in original) (citation omitted). In support of Albanese's position, "[a] recent study revealed that the arrest rate of juveniles committing serious crimes has actually decreased between the years of 1982 and 1992." Burke, supra, at 1027 (citing MICHAEL A. JONES & BARRY KRISBERG, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, IMAGES AND REALITY: JUVENILE CRIME, YOUTH VIOLENCE AND PUBLIC POLICY 2 (1994)). Thus, although many critics of the juvenile justice system claim that juvenile crime is increasing and is more violent, there is great disagreement regarding whether juvenile crime is currently increasing or decreasing. See BELAIR, supra note 1, at 16; see also ALBANESE, supra, at 23 ("[M]any have claimed that contemporary juvenile delinquency is more violent that in years past. The data do not support this conclusion.").

10. See REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 1;
initiatives, the Juvenile Justice Code, which became effective for offenses occurring after July 1, 1996, ultimately emerged. Wisconsin's new Juvenile Justice Code has dramatically changed the way Wisconsin deals with juvenile offenders. The goal of the Juvenile Justice Code has moved beyond solely trying to rehabilitate the juvenile offender and act in the juvenile's best interests. Instead, the Code's new philosophy forces rehabilitation and the juvenile's best interests to share the spotlight with, and arguably take the back seat to, such notable goals as personal accountability and societal protection.

Hon. Dennis J. Barry & Rep. Bonnie Ladwig, *Time Ripe for Change*, WIS. LAW., Apr. 1996, at 10, 12. The Juvenile Justice Study Committee's findings are consistent with the arguments that critics of the juvenile justice system assert for overhauling the system. *See supra* note 8 and accompanying text. "Wisconsinites are also very concerned. They see the state's juvenile justice system straining under the weight of the crime epidemic, and they perceive the system as a revolving door for troubled kids who are committing not only more crimes but more serious crimes—and at a younger age." REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, *supra* note 9, at 1.


12. *See* Hon. Dennis J. Barry, *Juvenile Justice: A Wisconsin Blueprint for Change*, WIS. LAW., Mar. 1995, at 30, 30-31 (outlining the notable changes in the new statute); *see also REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra* note 9, at 5. The Committee envisioned that its recommendations "[would] be another historical turning point for Wisconsinites to create both a philosophy and mechanism with which to combat juvenile crime in the 1990s and beyond." REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, *supra* note 9, at 5.


14. *See* Pederson, *supra* note 8, at 26. ("Under the new Juvenile Justice Code, the goals of citizen protection and juvenile accountability now share the spotlight with rehabilitation and the best interests of children."); *see also WISCONSIN LEGISLATIVE COUNCIL STAFF, Juvenile Justice Legislation, INFO. MEMORANDUM 96-1 (1996) (describing the substantive provisions of the Juvenile Justice Code and comparing the new statute with the Children's Code). Comparing section 938.01 of the Juvenile Justice Code to its counterpart under the Children's Code reveals that the Code's goals and purpose have changed dramatically from the goals codified in the Children's Code. *Compare WIS. STAT. § 938.01(2)(a)-(b), (f)-(g) (1995-1996), with WIS. STAT. § 48.01(1)(b)-(c), (2) (1993-94).*

Wisconsin Statute section 938.01 states:

(2) It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively. To effectuate this intent, the legislature declares the following to be equally important purposes of this chapter:

(a) To protect citizens from juvenile crime.

(b) To hold each juvenile offender directly accountable for his or her acts . . . .

(f) To respond to a juvenile offender's needs for care and treatment, consistent with the prevention of delinquency, each juvenile's best interest and protection
According to the Juvenile Justice Code's preamble, the Code's stated goals are equally valued and appreciated.\textsuperscript{15} Despite these promises, however, other sections of the Code demonstrate that, in truth, the Code favors societal protection and personal accountability over rehabilitation and the juvenile's best interests.\textsuperscript{16} This favoritism is most apparent in the Code's new confidentiality provisions\textsuperscript{17} that permit increased dissemination and disclosure of juvenile records. Specifically, Wisconsin's new Juvenile Justice Code now makes juvenile records,\textsuperscript{18}

\begin{quote}
of the public.....
\end{quote}

\textsuperscript{15}See Wis. Stat. § 938.01(2)(a), (b), (f) (1995-1996) (emphasis added). Under the Children's Code, section 48.01 stated that the legislative purpose was:

(b) To provide for the care, protection and wholesome mental and physical development of children....

(c) [T]o remove from children committing delinquent acts the consequences of criminal behavior and to substitute therefor a program of supervision, care and rehabilitation....

(2) The best interests of the child shall always be of paramount consideration, but the court shall also consider the interest of the parents or guardian of the child...and the interests of the public.

Wis. Stat. § 48.01 (1)(b)-(c), (2) (1993-94). See generally Giardino, supra note 4, at 228-37 & nn.18-38, for a discussion of other states' changing priorities, as reflected in their statutory preambles.

\textsuperscript{16}See Wis. Stat. § 938.01(2) (1995-1996); Barry & Ladwig, supra note 10, at 10, 13.

\textsuperscript{17}See Wis. Stat. § 938.396, amended by 1997-1998 Wis. Legis. Serv. Act 27 § 5275g-5275m, Act 35 § 567-68 (West); Pederson, supra note 8, at 26.

\textsuperscript{18}There are actually three distinct kinds of juvenile records that exist within the juvenile justice system. See Hearings, supra note 1, at 6 (opening statement of Hon. Arlen Specter, Chairman, Subcomm. on Juvenile Justice). First, there are police records. \textit{See id.} Police prepare and create these records, and they usually consist of "complaint reports, field contact reports, investigation reports, family interview notes, ... custody and arrest reports, and ... [referral records]." Edwin M. Lemert, \textit{Records in the Juvenile Court, in ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE} 355, 361 (Stanton Wheeler ed., 1969). Second, there are official court records. \textit{See Hearings, supra} note 1, at 6 (opening statement of Hon. Arlen Specter, Chairman, Subcomm. on Juvenile Justice). These records, known as legal records, primarily consist of the "pleadings in the juvenile court." \textit{Id.; BELAIR, supra} note 1, at 37. Finally, there are the court's social records. \textit{See Hearings, supra} note 1, at 6 (opening statement of Hon. Arlen Specter, Chairman, Subcomm. on Juvenile Justice). These records contain extensive information about the juvenile's family background, "recommendations of the probation officer, school records, reports of clinical examinations and tests, and finally, the prior records of offenses and misconduct." Lemert, \textit{supra}, at 369; \textit{see Hearings, supra} note 1, at 6 (opening statement of Hon. Arlen Specter, Chairman, Subcomm. on Juvenile Justice); BELAIR, \textit{supra} note 1, at 59. Traditionally, juvenile justice statutes gave "social records the highest degree of confidentiality ...." BELAIR, \textit{supra} note 1, at 38. Accordingly, while the juvenile court had access to the information contained in social records, access by others required court approval. \textit{See id.}

that were previously maintained in confidence, readily available to victims; insurance agencies and other state and federal agencies, school boards, school district administrators and teachers; and most notably, the general public.

What does increased dissemination and disclosure of juvenile records mean for juvenile offenders? It means that the public, school administrators, teachers, and prospective employers will have virtually unrestricted access to potentially damaging information. Furthermore, it means that juveniles' interests are given short-shrift in a system that, on its face, says it will rehabilitate, protect, and serve juveniles' best interests with equal force.

Because the confidentiality provisions of the Juvenile Justice Code permit dissemination and disclosure at every turn, it appears that, in
reality, rehabilitation and the juvenile’s best interests are not equally important goals. As such, in creating a juvenile justice system for the twenty-first century and beyond, the Wisconsin Legislature has gone too far. By favoring personal accountability and public protection, the confidentiality provisions lose sight of juveniles’ interests—interests the Code’s preamble expressly states it will continue to protect.

This comment examines confidentiality under Wisconsin’s Juvenile Justice Code, specifically the provisions governing the release of juvenile records. Within this context, it will demonstrate that despite the Code’s promises, in practice the Code fails to give equal consideration to rehabilitation and the juvenile’s best interests. Part II of this comment will examine and discuss the history and philosophy of the juvenile court and the special role confidentiality played within the juvenile court’s creation and development. Part III will discuss two major stimuli behind the nationwide reform of the juvenile justice system, specifically, (1) the “due process revolution” and (2) the fall of the “rehabilitative ideal” and the rise of “just deserts.” Part IV will examine and discuss

5275m, Act 35 §§ 567-68 (West).
28. See REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 5.
29. See WIS. STAT. § 938.01(2)(a)-(g). “Rehabilitation of offenders will remain a key goal; however, personal accountability and community protection will become equally important objectives.” Barry & Ladwig, supra note 10, at 10.
32. Id. at 376 & n.3 (quoting FRANCIS A. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 26 (1964)). According to Melli, Francis Allen defines the rehabilitative ideal as:

The rehabilitative ideal is itself a complex of ideas which, perhaps, defies an exact definition. The essential points, however, can be identified. It is assumed, first, that human behavior is the product of antecedent causes. These causes can be identified as part of the physical universe, and it is the obligation of the scientist to discover and to describe them with all possible exactitude. Knowledge of the antecedents of human behavior makes possible an approach to the scientific control of human behavior. Finally, and of primary significance for the purposes at hand, it is assumed that measures employed to treat the convicted offender should serve a therapeutic function; that such measures should be designed to effect changes in the behavior of the convicted person in the interests of his own happiness, health, and satisfactions
the history and development of Wisconsin's juvenile justice system and will examine the false promises inherent in Wisconsin's new Juvenile Justice Code as the Code's confidentiality provisions evidence. Part V suggests that the legislature should revise the Code's confidentiality provisions to require that police officers and courts use a case-specific balancing test in each case in which release is requested. As part of this alternative, Part V also discusses the arguments for and against confidentiality policies to provide a set of factors that police officers and juvenile court judges should consider when making a case-specific disclosure decision.

II. CREATION OF A SEPARATE SYSTEM: THE HISTORY AND PHILOSOPHY OF THE JUVENILE COURT

A. The Early Crusaders

In 1899, the Illinois Legislature established the United States' first juvenile court in Cook County, Illinois.\(^{33}\) Despite this innovative creation, the notion that children deserved special treatment and protection and in the interest of social defense.

\(\text{Id. at 376 n.3.}\)

33. See Feld, supra note 7, at 821-22 (1988). Feld states that "the trend of juvenile courts to employ a 'justice model,' which prescribes the appropriate sentence on the basis of 'just deserts' rather than 'real needs,' reflects a movement away from a rehabilitation-treatment based model." \(\text{Id.}\) Although Feld uses this term in the context of imposing stricter sentences on juvenile offenders, for this Comment, "just deserts" has a broader application and refers generally to the juvenile justice systems' new goals of individual accountability, societal protection, and punishment. \(\text{See id.}\)

34. See BELAIR, supra note 1, at 12; Melli, supra note 31, at 376. According to Belair, the Illinois Act created a separate system for adjudicating juvenile offenses and provided that:

\[\text{[A]ll juveniles, whether accused of conduct which would not be criminal for an adult such as truancy, or conduct which would be criminal if done by an adult, were to be handled by the same court. Its "hearings were to be informal and non-public records confidential... [C]hildren were not to be treated as criminals nor dealt with by the process used for criminals."}\]

BELAIR, supra note 1, at 12 (quoting EDWARD ELDEFONSO, LAW ENFORCEMENT AND THE YOUTHFUL OFFENDER 49 (3d ed. 1978)); see also Margaret Keeney Rosenheim, Perennial Problems in the Juvenile Court, in JUSTICE FOR THE CHILD: THE JUVENILE COURT IN TRANSITION 7 (Margaret Keeney Rosenheim ed., 1962) (discussing the historical development of the Illinois act). In her discussion, Rosenheim notes that under the Act:

The guiding principle was ... "that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents and that as far as practicable they shall be treated not as criminals but as children in need of aid, encouragement and guidance."

Rosenheim, supra, at 8 (citation omitted).
JUVENILE RECORDS UNDER WISCONSIN LAW

existed long before Illinois established the nation's first juvenile court.\(^{35}\) Ranging from specialized juvenile institutions to the *parens patriae* doctrine, the concept of treating juvenile offenders differently than adult offenders was firmly rooted in American society.\(^{36}\)

Two organizations, The Society for the Prevention of Pauperism and the Child Savers, were influential in establishing a separate system for juvenile offenders. Beginning in 1817, a group of upper-class Americans established the Society for the Prevention of Pauperism.\(^{37}\) Although the Society originally was established to assist the poor, its members also concentrated on reducing juvenile delinquency.\(^{38}\) To reduce juvenile delinquency, the Society discouraged the "prevailing practice of placing children in adult jails and workhouses"\(^{39}\) and instead advocated separating juveniles from adult offenders. Members viewed separation as essential to reducing juvenile delinquency, believing that exposing children to more seasoned adult offenders would increase the chances that the juveniles would become adult criminals.\(^{40}\) Members of the Society for the Prevention of Pauperism also criticized the punitive nature of penal institutions.\(^{41}\) Specifically, they believed that punishment could not effectively solve the problems associated with poverty.\(^{42}\) Instead, these reformers "envisioned an institution with educational facilities"

---

35. *See* Rosenheim, *supra* note 34, at 2. Even before Illinois created the first juvenile court, the belief that the public had an affirmative responsibility to protect children and provide specialized services and institutions had gained widespread acceptance in the United States. *See id.*

36. *See id.* at 1-6 (discussing the precursors to the first juvenile court); Edward Eldefonso & Walter Hartinger, *Control, Treatment, and Rehabilitation of Juvenile Offenders* 8 (1976) ("[O]ur juvenile justice system . . . is approximately seventy-five years old. However, the idea that children involved in criminal conduct should be handled differently from adult offenders goes back a lot further."); Orman W. Ketcham, *The Unfulfilled Promise of the American Juvenile Court*, in *Justice for the Child: The Juvenile Court in Transition, supra* note 34, at 22, 24. According to Ketcham, there are four distinct trends that lead to the establishment of the first juvenile court: (1) the equitable doctrine of *parens patriae*; (2) the increase in legislation designed to achieve humanitarian social ends; (3) the growing criticism of the traditional criminal practice which treated children over the age of seven as criminals; and (4) the rise of specialized correctional institutions for juvenile offenders. *See Ketcham, supra*, at 24.


38. *Id.* at 17.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*
which provided a “mental and moral regimen.” Eventually, influenced by the Society’s beliefs, New York, Philadelphia, and Boston established separate, non-punitive institutions that “accepted both children convicted of crimes and destitute children.” By creating these separate institutions, the Society’s efforts laid the structural foundation for separating juvenile offenders from adult criminals and providing a juvenile offender with “care more suitable for his impressionable condition.”

In addition to the Society for the Prevention of Pauperism, the Child Savers also heavily influenced the creation of a separate juvenile justice system. From the 1850s to the 1890s, the Child Savers developed additional ways to prevent juvenile delinquency. The Child Savers’ main goal was to “save children from depraved and criminal lives,” and they were different from the Society “only in that this group was more optimistic about the possibilities of reforming youths.” To achieve their goal, the Child Savers established centers in urban areas which “distributed food and clothing, provided temporary shelter for homeless youth . . .,” and taught children specialized trades. In carrying out their work, the Child Savers were driven by the traditional belief that family life was key to solving the delinquency problem. Reflecting this family ideal, the Child Savers criticized institutional care and developed creative methods to attack the delinquency problem. One such method was to place poor children with farm families on the western

43. Id. (citing R. MENNEL, THorns & THISTLES (1973)).
44. Id.; 2 Barbara Flicker, A Short History of Jurisdiction over Juvenile and Family Matters, in FROM CHILDREN TO CITIZENS: THE ROLE OF THE JUVENILE COURT, 229, 230 (Francis X. Hartmann ed., 1987). Separating juvenile offenders from adults actually is a practice that is nearly 2500 years old. ELDEFONSO & HARTINGER, supra note 36, at 8-13. In the United States, however, the practice dates back to the nineteenth century when houses of refuge were constructed. See Flicker, supra, at 230. New York, Boston, and Philadelphia were the first cities to create separate institutions for juveniles. See id.; KRISBERG & AUSTIN, supra note 37, at 17; Rosenheim, supra note 34, at 2. In 1825, the New York House of Refuge opened; it was an institution designed to deal specifically with juvenile offenders. See KRISBERG & AUSTIN, supra note 37, at 17; Rosenheim, supra note 34, at 2. Its founders “proposed a ‘correctional’ experience for young delinquents that would stress discipline and useful labor, at the same time that it protected them from the horrors of prison life.” Rosenheim, supra note 34, at 2. A year later, the Boston House of Reformation opened its doors. See KRISBERG & AUSTIN, supra note 37, at 17. Finally, in 1828 the Philadelphia House of Refuge opened and started admitting wayward youth. See id.
45. Rosenheim, supra note 34, at 2.
46. KRISBERG & AUSTIN, supra note 37, at 21 (citations omitted).
47. Id.
48. Id. Specifically, some youths were taught the shirt manufacturing trade. See id.
49. Id. at 21.
Reformers hoped that these farm families would provide "warmth, compassion, and morality... for wayward youth," thereby eradicating the delinquency problem. Although many criticized and resisted the Child Savers' work, their efforts, similar to the efforts of the Society for the Prevention of Pauperism, were responsible for creating specialized treatment for juvenile offenders.

Finally, while the achievements of these reform groups provided an institutional framework for dealing with juveniles in a separate system, borrowing the parens patriae doctrine from English chancery courts provided a "theoretical justification for nonpunitive, individualized handling of [juvenile] offenders..." By applying the parens patriae doctrine to children who had committed criminal acts, judges were given the power to protect and provide for juvenile offenders; this resembled the way a parent would care for his or her own child.

The child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian, because either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the in-
tervention of the public authorities . . .

With the theoretical and structural foundations in place, juvenile court proponents advocated for legislative recognition of a separate court system that emphasized rehabilitation and treatment of juvenile offenders.

55.

B. The Rehabilitative Philosophy and the Juvenile Court's Unique Characteristics

1. Rehabilitation: The Underlying Philosophy.

A significant impetus in creating separate juvenile courts was the manner in which the common law system treated juvenile offenders. Traditionally, criminal law failed to distinguish an adult offender from a juvenile offender who had achieved the age of criminal responsibility. Instead of rehabilitating juvenile offenders, the state demanded retribution from and punishment of both adults and juveniles.

The inherent problems of this severe regime eventually became apparent, and once recognized, reformers began constructing an institution that was different from the adult criminal system in almost every aspect. Specifically, they envisioned a juvenile court that focused on diagnosing crime-causing conditions and, through rehabilitation, devel-

55. Id.

56. See generally KRISBERG & AUSTIN, supra note 37, at 27-30 (discussing the historical developments between 1880 and 1920 that ultimately led to the creation of separate juvenile courts in 48 states by 1925).

57. See Mack, supra note 53, at 106; Jan L. Trasen, Note, Privacy v. Public Access to Juvenile Court Proceedings: Do Closed Hearings Protect the Child or the System?, 15 B.C. THIRD WORLD L.J. 359, 369 (1995). Juvenile offenders could escape criminal liability if they had not yet reached the age of criminal responsibility. See Mack, supra note 53, at 106. Some states followed the common law rule, declaring age seven as the age of criminal responsibility. See id. Some states, however, changed the age of criminal responsibility to age ten. See id.

58. See Mack, supra note 53, at 106. Mack notes that the criminal law's "fundamental thought" was not reforming the criminal; instead, it was to punish him because punishment served to vindicate society for the criminal's wrong-doing and to warn other potential wrong-doers. See id.

59. Id. at 106.

60. Rossum, supra note 9, at 911.
By embracing the "radical shift in the philosophy of crime" and the notion that juvenile offenders were different from adult criminals, juvenile court reformers were able to justify their new rehabilitative philosophy. Using positivism, juvenile court proponents argued that because of uncontrollable factors such as age, mental ability or family life, juveniles were not morally culpable for their actions. Early reformers argued that instead of punishing a juvenile for his wrongdoing, the country needed a system that focused on the causes of a juvenile's delinquency to treat and ultimately cure them. Similarly, applying the non-culpability theory, reformers also argued that juveniles lacked the ability to understand their criminal actions and could not form the requisite intent for criminal liability. Accordingly, reformers argued that

61. See Trasen, supra note 57, at 369 ("Juvenile court reformers envisioned a system in which the emphasis would be on rehabilitation rather than punishment, on treatment rather than retribution."); see also In re Gault, 387 U.S. 1, 15-16 (1967); Melli, supra note 31, at 376 ("The juvenile court movement was influenced by what has come to be called the rehabilitative ideal, which is a belief that human behavior can be modified.") (footnote omitted); Blum, supra note 8, at 360-61.

In summarizing the reformers' beliefs, the Gault Court stated that: "The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive." Gault, 387 U.S. at 15-16.

62. See Blum, supra note 8, at 358. The ascent of positivism contributed greatly to the creation of a separate juvenile court system. See ALBANESE, supra note 9, at 67. ("The establishment of the first juvenile court in 1899 corresponded with the rise of positivism . . ."); Blum, supra note 8, at 359-61. Generally, positivists believe that crime is a result of three major "determinants that are beyond the criminal's control." Blum, supra note 8, at 359. Specifically, these determinants are: "(1) defects in the criminal's environment, (2) defects in his physical makeup, and (3) defects in his psychological condition." Id. In the context of juvenile offenders, these uncontrollable determinants ultimately work to move the juvenile toward delinquency. See id. at 359-60. Because a juvenile is not responsible for his delinquency, positivists theorize 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. at 360.

63. See BELAIR, supra note 1, at 13 ("[Un]like adults, s]ince children are impressionable, malleable and not yet hardened to the criminal life, they are considered perfect candidates to respond to . . . treatment."); Melli, supra note 31, at 377-78 ("Children were seen as being much more vulnerable than adults, but also more amenable to change. This made them better prospects for rehabilitation.").

64. See supra note 62 and accompanying text.

65. See Blum supra note 8, at 359-61 ("Determinism allowed the early reformers to absolve juveniles from moral culpability.").

66. See id. at 360-61.

67. See BELAIR supra note 1, at 12 ("[C]hildren have neither the understanding nor the criminal motive of adults. Thus, they cannot form the criminal intent . . . that is necessary for criminal culpability.").
“children ... —like the insane—should not be punished for acts that they neither understand nor intend.” To the contrary, reformers believed that children should be treated.68

Individualized treatment and rehabilitation were also justified because of juvenile’s unique nature.70 Because juvenile offenders were seen as “impressionable, malleable and not yet hardened to the criminal life, they [were] considered perfect candidates. . .[for] treatment.”71 Reformers believed that treating juveniles like adult criminals actually prevented juveniles from becoming law-abiding citizens; instead, it encouraged them to become hardened adult criminals:

[The criminal justice system] did not aim to find out what the accused’s history was, what his heredity, his environments, his associations; it did not ask how he had come to do the particular act which had brought him before the court. It put but one question, “Has he committed this crime?” It did not inquire, “What is the best thing to do for this lad?” It did not even punish him in a manner that would tend to improve him; the punishment was visited in proportion to the degree of wrongdoing evidenced by the single act; not by the needs of the boy, not the by needs of the state.72

Juvenile court proponents were convinced that given the right treatment and care, juvenile offenders, unlike their adult counterparts, could be transformed into law-abiding citizens.73

68. Id.

69. See Rossum, supra note 9, at 910 (“The leaders of the juvenile court movement wanted the juvenile justice system to treat delinquents the way pediatric medicine treats children.”). Regardless of the offense, juvenile delinquents were to be treated, not punished:

For example, a juvenile who commits murder is not to be charged with, found guilty of, or punished for murder; rather, he is simply to be adjudicated delinquent and treated in such a way as to cure his disease of delinquency. His murderous conduct is a symptom of his disease of delinquency and his need for individually-tailored treatment to cure him of that disease. The same view applies to a juvenile who shoplifts; his misdeed establishes him as a delinquent—no more and no less than the murderer—and shows him to be equally in need of individualized treatment to cure his disease.

Id. at 914.

70. See supra note 63 and accompanying text.

71. BELAIR, supra note 1, at 13; see also Melli, supra note 31, at 377; Trasen, supra note 57, at 369.


73. Melli, supra note 31, at 377.
2. The Separate System’s Unique Characteristics.

The procedures and punishments juveniles confronted in the adult criminal justice system horrified juvenile court reformers.⁷⁴ Believing that the juvenile offenders were essentially good, reformers discarded the adult system’s formalities and designed a clinical system, instead of a punitive one.⁷⁵ By rejecting the ill-suited, punitive adult system and embracing the “rehabilitative ideal,”⁷⁶ the early reformers created an unique system for juvenile offenders, one that is unparalleled in our legal system.⁷⁷ Because of their efforts, a separate “informal, non-adversarial system [for juvenile offenders] in which the State acted as parens patriae, rather than as prosecutor and judge” ultimately emerged.⁷⁸

In addition to having separate system for juvenile offenders, juvenile proceedings were different from adult criminal trials in almost every aspect.⁷⁹ To eliminate the stigma associated with a criminal adjudication, juvenile court hearings were treated as civil proceedings, not criminal.⁸⁰ Because of this characterization, judges made findings and decisions without following traditional rules of criminal procedure.⁸¹ Reformers reasoned that procedural guarantees were unnecessary because the

---

⁷⁴ See Laubenstein, supra note 30, at 1899; see also In re Gault, 387 U.S. 1, 15 (1967) (“The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society’s duty to the child could not be confined by the concept of justice alone.”). The character of the new court system was also “influenced greatly by the expanding theories of child development.” WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 8; see Melli, supra note 31, at 376-78; Trasen, supra note 57, at 369 (“America’s juvenile courts were an important part of a broad reform movement intended to improve the welfare of children.”).

⁷⁵ See Gault, 387 U.S. at 15-16.

⁷⁶ Melli, supra note 31, at 376 & n.3.

⁷⁷ See Blum, supra note 8, at 361 (quoting Gault, 387 U.S. at 17).

⁷⁸ Trasen, supra note 57, at 370 (citing Kent v. United States, 383 U.S. 541, 554-55 (1966)).

⁷⁹ See Blum, supra note 8, at 362.


⁸¹ See Trasen, supra note 57, at 371 (explaining that criminal procedural rules were absent from a juvenile proceeding). Standard procedural rights include: (1) adequate notice of the charges; (2) the right to be represented by counsel; (3) the right to confrontation and the opportunity for cross-examination; (4) the privilege against self-incrimination; (5) the right to a speedy and public trial; and (6) the right to a jury trial. See Jan Costello, Rejuvenation: How to Reform the Juvenile Court, CAL. LAW., Oct. 13, 1993, at 63, 64 (citing Gault, 387 U.S. at 10, 29); see also Kent, 383 U.S. at 555.
court was acting as *parens patriae* and was not depriving the juvenile of life, liberty, or property. 82 Instead, in exercising its jurisdiction over the juvenile, the court was merely providing the juvenile with "the 'custody' to which the child [was] entitled."83 Furthermore, reformers argued that the many benefits the separate system provided greatly outweighed any disadvantages a juvenile suffered because of his or her denial of "normal due process."84

Rules of evidence were also absent from juvenile proceedings.85 Reformers believed that rules of evidence were inappropriate because in a juvenile proceeding the judge did not hear ordinary legal evidence.86 Instead, the judge heard evidence on the juvenile's heredity and environment, as well as the child's physical and mental condition.87 Accordingly, traditional rules of evidence were seen as too restrictive and prevented the judge from considering the information he or she needed to serve the child's best interests.88

In addition to relaxed procedural and evidentiary rules, juvenile court judges occupied a unique role within the separate system.89 Their responsibilities included more than simply focusing on the juvenile's guilt or moral culpability—they were to diagnose the juvenile's problem and develop a cure.90 In treating and rehabilitating a wayward youth, reformers envisioned that juvenile court judges would determine questions such as: "[w]hat [the juvenile] is, how has he become what he is, and what had best be done in his interest and in the interest of the state

---

82. See Blum, supra note 8, at 362 & nn.106-08 (citing Gault, 387 U.S. at 16-17); see also Kent, 383 U.S. at 555.
83. Gault, 387 U.S. at 17. According to early reformers, the court's intervention as *parens patriae* did not infringe upon a child's rights because juveniles did not have a right to liberty, only custody. See Blum, supra note 8, at 362 (quoting Gault, 387 U.S. at 17).
84. See Gault, 387 U.S. at 21.
85. See Melli, supra note 31, at 378-79 (citing Mack, supra note 53, at 120 (explaining that a juvenile court needs to be free to consider all the evidence in a juvenile court proceeding)).
86. See Mack, supra note 53, at 120; see also Melli, supra note 31, at 378-79; Feld, supra note 7, at 825 (explaining that in juvenile court proceedings the judge did not hear "details surrounding the commission of a specific crime").
87. See Mack, supra note 53, at 120.
88. See Melli, supra note 31, at 378-79 (Reformers believed that the rules of evidence were "inappropriate and too limiting in an endeavor where everyone was acting in the best interest of the child."); WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 8 ("The court was to be free to consider all relevant information without regard for rules of evidence which were seen as inappropriate in a system whose goal was to rehabilitate.").
89. See Mack, supra note 53, at 118.
90. See id. at 119.
to save him from a downward career." Due to their broadened responsibilities, a juvenile court judge's personality and background was a primary concern. The ideal juvenile court judge was to act like a "concerned father," a "brilliant psychologist," and a "dedicated social worker" who could "touch the heart and conscience of the erring youth [and provide the necessary] guidance and help, 'to save [the juvenile] from a downward career." Because of the judiciary's enhanced role, an attorney's presence in the courtroom was discouraged as well. Reformers argued that attorneys would not only burden the process with technicalities, but were unnecessary because the judge acted like defense counsel "as well as corrector of the juvenile . . . ."

To avoid the stigma associated with adult prosecutions, the juvenile court also featured a specialized vocabulary. A proceeding was initiated by a petition, rather than by a complaint or charge. Instead of a warrant, a summons was used to order a court appearance. The juvenile was not arrested but taken into custody, and instead of being held in jail, he was held in detention. Upon the proceeding's close, a juvenile was adjudged delinquent rather than guilty of committing a crime, and instead of imposing a sentence, there was a disposition of the case.

91. Mack, supra note 53, at 119-20; see Blum supra note 8, at 361; Trasen, supra note 57, at 370.
92. Mack, supra note 53, at 118-19. Mack described the ideal juvenile court judge: [The juvenile court judge] must be a student of and deeply interested in the problems of philanthropy and child life, as well as a lover of children. He must be able to understand the boys' point of view and ideas of justice; he must be willing and patient enough to search out the underlying causes of the trouble and to formulate the plan by which, through the cooperation, oft times, of many agencies, the cure may be effected.
Id. at 119.
94. Blum, supra note 8, at 361.
95. Id.
97. Melli, supra note 31, at 379; see WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 8.
98. Melli, supra note 31, at 379; see WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 8.
99. See Feld, supra note 7, at 825; Melli, supra note 31 at 380; Costello, supra note 81, at 63.
100. See Melli, supra note 31, at 380.
101. See id.
102. See id.
103. See id.; Feld supra note 7, at 825; Costello, supra note 81, at 63.
104. See Melli, supra note 31, at 380; Costello, supra note 81, at 63. The judge had com-
nally, if the juvenile was ultimately adjudged delinquent, he was committed, not sentenced, and was usually sent to a training school instead of prison.\(^{105}\)

C. Ensuring Rehabilitation Through Confidentiality

Despite attempts to differentiate the juvenile court system from the adult criminal system,\(^{106}\) juvenile court reformers "feared that the public might not share their belief that involvement with the juvenile justice process should confer no stigma."\(^{107}\) Instead, they believed that the public would brand a juvenile involved with the juvenile justice system as a wrong-doer.\(^{108}\) To avoid the "stigma of such wrongdoing,"\(^{109}\) reformers quickly came to appreciate the importance of confidentiality in successfully rehabilitating a juvenile offender.\(^{110}\)

Reformers fought for confidentiality in order to secure the goal of the juvenile justice system,\(^{111}\) namely rehabilitating juvenile offenders.\(^{112}\)

---

105. See Melli, supra note 31, at 380. Once the juvenile was rehabilitated, he was supposed to be released. See id. If rehabilitation failed, however, he was "kept in custody or under supervision until [he reached] the age of majority." Id.

106. See discussion supra Part II.B.


108. See id.

109. Id.

110. See BELAIR, supra note 1, at 14; Trasen, supra note 57, at 370-71.

111. See Gregory W. O'Reilly, Illinois Lifts the Veil on Juvenile Conviction Records, 83 ILL. B.J. 402, 402 (1995); see also BELAIR, supra note 1, at 14 ("The two basic principles of the juvenile justice system—non culpability and rehabilitation—generated strong pressures for confidentiality . . . .") According to O'Reilly, the reason for confidentially of juvenile records is both practical and theoretical. See O'Reilly, supra, at 403.

At the theoretical level, publicizing juvenile records has been viewed as punishment and thus inconsistent with the theory behind juvenile court. At the practical level, by keeping records confidential, the courts could hide youthful mistakes and prevent children from being stigmatized, suffering harm to their employment prospects, and gaining the attention they may have sought.

Id. (footnote omitted)

112. See BELAIR, supra note 1, at 14 (explaining that publicity "interferes with a child's rehabilitation and reassimilation into society"); Allyson Dunn, Note, Juvenile Court Records: Confidentiality vs. The Public's Right to Know, 23 AM. CRIM. L. REV. 379, 381 (1986) ("The state believes its goal of rehabilitating the child is best served by confidentiality . . . ."); Trasen, supra note 57, at 370-71 (noting that confidentiality was "crucial to the successful rehabilitation of juvenile offenders").
Reformers theorized that a juvenile's successful rehabilitation and re-assimilation into society depended on saving him from the "brand of criminality" that attaches for life. Consequently, reformers adamantly opposed disclosing and disseminating any information regarding a juvenile's misconduct. They argued that revealing a juvenile's wrongdoings would "seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public." Accordingly, juvenile justice confidentiality became an important feature of the caring, treatment-oriented system. The revered policy was "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past."

D. The New System in Place

As state legislatures embraced the framework and philosophy juvenile justice proponents developed, the notion of a separate system for juvenile offenders began to explode. Within ten years of the founding of the first juvenile court, ten states had established similar children's courts. By 1912, twenty-two states had a separate juvenile justice system, and by 1925, all but two states, Maine and Wyoming, had enacted

---

113. BELAIR, supra note 1, at 14 (quoting Mack, supra note 53, at 109). According to Mack, confidentiality was necessary "[t]o get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life ...." Mack, supra note 53, at 109. Rehabilitation could only be achieved by protecting the juvenile from the stigma of his misconduct instead of "first stigmatizing and then reforming." Id.

Justice Rehnquist explained the rationale of confidentiality 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 misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State." 443 U.S. 97, 107-08 (1979) (Rehnquist, J., concurring).

114. See Trasen, supra note 57, at 370-71.

115. Id. (quoting Daily Mail Publ'g Co., 443 U.S. at 107-08 (Rehnquist, J., concurring)). In addition to interfering with rehabilitation, reformers also believed that disclosure was punitive in nature as it brought "shame and humiliation upon the juvenile and her family ...." Dunn, supra note 112, at 381.

116. See Trasen, supra note 57, at 370 ("An essential component of this kinder, gentler juvenile justice system envisioned by reformers was an assurance of confidentiality within the system."); see also O'Reilly, supra note 111 at 403 ("The practice of keeping juvenile criminal records confidential developed along with the juvenile court system.").


118. See Ketcham, supra note 36, at 24 ("The innovation met with widespread approval. . .").

119. See KRISBERG & AUSTIN, supra note 37, at 30.
juvenile court laws. Today, every state has a separate juvenile court system.

III. OVERTHROWING THE SYSTEM—PERIODS OF REFORM WITHIN THE JUVENILE JUSTICE SYSTEM

During the last thirty years, the juvenile justice system has been the subject of heavy attack. Critics argue that the juvenile court system has simply failed to "live up to the Progressive ideal." These criticisms have resulted in two distinct periods of reform within the juvenile justice system. The first period of reform, "the due process revolution," occurred in the 1960s when critics sought procedural protections for juvenile proceedings. The second distinct period of reform, the "just deserts" revolution, began in the 1980s. During this period, state legislatures began to criminalize the juvenile court, reacting to a "perceived increase in serious criminal conduct by juveniles" and the "perception that the increase [was] somehow related to the failure of the juvenile court."

A. The Due Process Revolution

Because of instances of abuse within the juvenile justice system, beginning in the 1950s critics began to focus on achieving legal fairness within the system. Specifically, critics asserted that because juvenile

120. See id.; see also Ketcham, supra note 36, at 24.
121. See Gault, 387 U.S. at 14 ("From the juvenile court statute adopted in Illinois in 1899, the system has spread to every State in the Union, the District of Columbia and Puerto Rico.").
122. See Trasen, supra note 57, at 371 (explaining that recently juvenile justice policy has become the subject of severe criticism); see also Melli, supra note 31, at 383 ("The juvenile court as an institution has been greatly affected by developments in the latter half of the Twentieth Century, particularly the last three decades.").
123. Feld, supra note 7, at 826.
124. See Melli, supra note 31, at 383.
125. Id.
126. See Blum, supra note 8, at 372; Melli, supra note 31, at 383-84 (explaining how the justifications for rejecting "traditional due process protections" ultimately failed).
127. Feld, supra note 7, at 822.
128. See Melli, supra note 31, at 391. ("Beginning in the 1980s, states began to amend their legislative purpose statutes to place protection of the public and accountability as important objectives. Such changes signal that juvenile justice codes are taking on more characteristics of the adult criminal justice system.").
129. Id. at 383.
130. Id. at 390-91.
131. See ALBANESE, supra note 9, at 72. In re Gault provides an telling example of the
courts had not achieved the rehabilitative ideal, the lack of procedural safeguards was no longer justified. By the 1960s these reformers were able to convince the Supreme Court that “[d]epartures from established principles of due process . . . frequently resulted not in enlightened procedure, but in arbitrariness” and some type of reform was necessary. Thus, when the Supreme Court was confronted with the choice between “traditional due process requirements” or the “informal procedures of the juvenile court,” it made a critical choice and chose due process.

The Court’s decision in Kent v. United States foreshadowed its abuses that were present within the system. See Melli, supra note 31, at 385 (citing In re Gault, 387 U.S. 1, 4-10 (1967) (“In re Gault, epitomized the failures of the juvenile court system that the due process critics had been raising.”)) (footnote omitted). Gerald Gault, then fifteen-years-old, was committed to a state boys’ home for six years after being adjudged a juvenile delinquent for making obscene phone calls. See Gault, 387 U.S. at 7-8. The same offense, if committed by an adult, would have carried a fine of five to fifty dollars or imprisonment for not more than two months. See id. at 8-9. Neither Gerald nor his parents were adequately notified of the hearings, and his parents were not even notified of his original apprehension by the police. See id. at 5, 31. The juvenile court also failed to advise Gerald or his parents of their right to counsel and proceeded with the hearing despite the absence of either counsel or an express waiver of the right. See id. at 34. At the hearings, Gerald admitted to making the obscene phone calls in question. See id. at 42. His admissions, however, were secured in violation of the privilege against self-incrimination. See id. at 42-44. Furthermore, Gerald was never given the opportunity to confront and cross-examine the complainant. See id. at 7, 42. Instead, when Gerald and his parents requested the complainant’s presence, the judge stated that it was unnecessary. See id. at 7, 56. Ultimately, Gerald’s parents challenged the constitutionality of the state’s juvenile code and were successful. See id. at 10, 13, 14, 56.

132. See Melli, supra note 31, at 384. The founders of the juvenile court assumed that the state, acting as parens patriae, would “exercise [] its jurisdiction in the best interest of the child” and would “so fully protect the juvenile that there would be no need for traditional due process protections.” Id. at 383-84. The reality, however, proved to be quite different from reformer’s aspirations:

The juvenile court was and has always been underfunded. Crowded court conditions and racial, cultural and class distinctions have sometimes resulted in father judges who were not concerned parents but who were high-handed and capricious—or what is perhaps worse—uninterested. Significant decisions about the lives of juveniles were sometimes made without adequate fact finding and sometimes without a clear indication of what law, if any, the juvenile had violated.

Id. at 384 (footnotes omitted).


134. See Gault, 387 U.S. at 29-30 (“So wide a gulf between the State’s treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide.”).


136. Id.

137. See In re Gault, 387 U.S. 1 (1967); Melli, supra note 31, at 385 (citing Gault, 387 U.S. 1).

preference for due process. Although the Court's holding was limited to the required procedures for a valid waiver order, the Court expressed concern regarding the continuing "justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses . . . ." Specifically, the Court questioned the continued validity of exempting juvenile offenders from due process protections because it was apparent that juvenile offenders did not experience the rehabilitative care the system had promised.

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults . . . . There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.

Despite the Kent Court's holding that a hearing was required for a waiver order, the Court did not require complete parity with "criminal trial[s] or even . . . . the usual administrative hearing." Instead, waiver proceedings only had to "measure up to the essentials of due process and fair treatment." The Court, however, failed to define what the "essentials of due process and fair treatment" required and refused to decide whether it was constitutional to deny juvenile offenders the procedural safeguards available to adults. Because of its silence on these issues, the Kent Court set the stage for In re Gault.

Like the Kent Court, the Gault Court recognized that the absence of due process requirements in juvenile proceedings had lead to numerous

139. See Melli, supra note 31, at 386 (construing Kent, 383 U.S. at 551-52).
140. See Kent, 383 U.S. at 557. The court held there were three conditions to a valid waiver order: (1) a hearing; (2) access to the "social records and probation or similar reports which presumably are considered by the court"; (3) "a statement of reasons for the Juvenile Court's decision." Id.
141. Id. at 551.
142. See id. at 555-56.
143. Id. (footnotes omitted) (quoted in Melli, supra note 31, at 386.).
144. Id. at 562.
145. Id.
146. Id.
147. Id. at 551-52.
instances of abuse. Specifically, the Court noted that the "absence of substantive standards ha[d] not necessarily meant that children receive careful, compassionate, individualized treatment." To the contrary, the lack of procedural safeguards actually led to arbitrariness. Having identified these problems, the Court offered a solution.

Analogizing juvenile delinquency proceedings, where confinement was possible, to adult criminal proceedings, where incarceration was possible, the Court "turned to the criminal law for guidance." Finding delinquency and criminal proceedings were functionally equivalent, the Court concluded that the due process demanded procedural regularity in both contexts. In support of this conclusion, the Court reasoned that "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court." Accordingly, the Court mandated that juvenile courts follow procedural safeguards in adjudging juvenile delinquency.

The Supreme Court extended the rationale of Gault in subsequent decisions, forcing the juvenile court to recognize additional procedural safeguards. In In re Winship, the Court held that the state must

---

149. See ALBANESE, supra note 9, at 72; Melli, supra note 31, at 385.
150. Gault, 387 U.S. at 18
151. Id. at 19; see also Blum, supra note 8, at 372-73 (citing Gault, 387 U.S. 1).
153. See Feld, supra note 7, at 827.
155. Id. at 28.
156. Specifically, the Gault court held that a juvenile is entitled to notice of alleged conduct before the scheduled court proceeding. See Gault, 387 U.S. at 33. A juvenile in a delinquency proceeding must be notified of his or her right to the assistance of counsel. See id. at 35-36, 40, 41. Juveniles are also entitled to the "constitutional privilege against self-incrimination ...." Id. at 55. Finally, the Court held that the ability to cross-examine witnesses is "essential for a finding of 'delinquency.'" Id. at 56. See generally Feld, supra note 7, at 826 (discussing the procedural rights to which a juvenile is entitled in a delinquency proceeding).
157. Feld, supra note 7, at 826 & n.18 (citing Gault, 387 U.S. at 31-57); see also Melli, supra note 31, at 385 ("Based on criminal due process requirements, [the Supreme Court] held that Gerald Gault was denied due process because he did not have adequate notice of the charges, did not have the opportunity to confront and cross-examine his accuser, had not been provided with counsel, and had not been warned of his right against self-incrimination.") (footnotes omitted).
158. See Feld, supra note 7, at 827 ("In subsequent juvenile court decisions, the Supreme
prove delinquency beyond a reasonable doubt rather than by a preponderance of the evidence or by clear and convincing evidence. Additionally, in *Breed v. Jones*, the Court held that the Fifth Amendment double jeopardy clause prohibited the state from re-prosecuting a juvenile in adult criminal court when the juvenile had been convicted on the same charges in juvenile court. Finally, in *McKeiver v. Pennsylvania* the Court considered whether due process required a jury trial in delinquency proceedings. Answering in the negative, the Court refused to find that the Constitution gave juveniles the same rights that adults enjoyed when they were accused of a crime. Instead, in delinquency adjudications, due process merely required fundamental fairness with respect to fact-finding procedures. Stating that a jury is not a "necessary component of accurate fact-finding," the Court refused to find that the Constitution required a jury trial in juvenile delinquency adjudications. Although the *McKeiver* Court halted the due process revolution, the Court's prior decisions had already fundamentally changed the nature of juvenile court proceedings.

---

Court elaborated upon the procedural and functional equivalence between criminal and delinquency proceedings.


160. See *Winship*, 397 U.S. at 368; see also Feld, *supra* note 7, at 826 & n.23 (citing *Winship*, 397 U.S. at 368); Melli, *supra* note 31, at 386 & n.53 (citing *Winship*, 397 U.S. 358).


162. See *id.* at 541; see also Feld *supra* note 7, at 828, n.26 (citing *Breed* 421 U.S. at 541).

163. 403 U.S. 528 (1971).

164. See *id.* at 530.

165. See *id.* at 533, 545-51; see also Feld, *supra* note 7, at 828 (citing *McKeiver*, 403 U.S. at 545); Melli, *supra* note 31, at 387 (citing *McKeiver*, 403 U.S. at 543, 545).

166. See *McKeiver*, 403 U.S. at 543.

167. *Id.* at 543.

168. *Id.* at 545. The court articulated thirteen reasons for its holding. See *id.* at 545-51. Among the most significant reasons were that the Court wanted to: (1) avoid “taking the easy way” out by “holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding”; and (2) avoid making the “juvenile proceeding into a fully adversary process” thus ending the “idealistic prospect of an intimate, informal protective proceeding.” *Id.* at 545.

169. See Melli, *supra* note 31, at 387 (“Notwithstanding this retreat from expanding due process rights, the fact remained that juvenile court proceedings had been fundamentally changed.”); see also Feld, *supra* note 7, at 826 (“*Gault* fundamentally altered the operation of the juvenile court.”).
B. Losing the Rehabilitation Battle and the Retreat to "Just Deserts"\textsuperscript{170}

Beginning in the 1980s the public began to pressure state legislators to get tough on juvenile crime.\textsuperscript{171} These pressures stemmed from the public's belief that the "rehabilitative ideal" of the juvenile justice system had failed and that these failures were causing an increase in juvenile crime.\textsuperscript{172} Wanting to please their constituents and calm their fears, legislators responded.\textsuperscript{173} Specifically, they responded by introducing individual accountability, punishment, and societal protection into the system while downplaying, and arguably eliminating, the dominant role that rehabilitation once occupied.\textsuperscript{174} Claiming to embrace the public's

\textsuperscript{170} Feld, supra note 7, at 822.


\textsuperscript{172} See Melli, supra note 31, at 390-91; Rossum, supra note 9, at 908-09; Sheffer, supra note 171, at 485-86. According to Rossum:
The juvenile courts fail to teach juveniles that they will be held responsible for their criminal acts; that the more serious and frequent their acts, the more responsible they will be held; and that the older they are, the more responsible they will be expected to be. As a consequence, serious juvenile crime is soaring while the public's confidence in juvenile justice is plummeting.

Rossum, supra note 9, at 925-26.

\textsuperscript{173} See Melli, supra note 31, at 391; Sheffer, supra note 171, at 485. See generally Acton, supra note 7, at 277 (discussing gubernatorial initiatives to reform the juvenile justice system).

\textsuperscript{174} See Feld, supra note 7, at 842 ("[R]ecent amendments of juvenile code purpose clauses downplay the role of rehabilitation in the child's 'best interest' and acknowledge the importance of public safety, punishment, and individual accountability in the juvenile justice system."); Rossum, supra note 9, at 918-20; Blum, supra note 8, at 385-86 ("Today, several states are finding increasing support for the proposition that delinquents are responsible for their crimes and should, therefore, be held accountable to the community."); Giardino, supra note 4, at 245-46 ("[T]here has been a movement away from placing the primary focus of the juvenile justice system on treatment. Several jurisdictions have included public safety, accountability and punishment as the primary purposes of their juvenile laws.").

Rossum discusses the specific ways in which individual responsibility and system accountability have been introduced into the juvenile justice system:
The justice model pursues individual responsibility by closely linking dispositions to delinquent acts and by utilizing dispositions, such as restitution, that encourage juveniles to recognize their obligations to the community and to the victims of their criminal acts. It pursues system accountability through its insistence that dispositions must be limited, deserved, uniform, and justified . . . . Thus, the disposition in any case depends upon the nature and gravity of the criminal offenses, the age of the offender, and the number, recency, and seriousness of any prior offenses. Also, consistent with accountability, the justice model provides the public with the opportunity to scrutinize the performance of juvenile courts through its requirements that all hearings and all records (other than the juvenile's social file) be open to the public.
demands, state legislatures have campaigned for and achieved extensive reform of the juvenile justice system. Legislatures have placed rehabilitation and the juvenile's best interests on the back burner to make room for "just deserts." As a result, instead of being therapeutic and rehabilitative in nature, juvenile courts, like the criminal justice system, "act in the offender's interest only to the extent that such efforts are compatible with the safety and security of the community." Reflecting the system's changed emphasis, "criminal justice officials, political figures and the public are calling for tougher measures against juveniles, including a relaxation of secrecy standards."

Rossum, supra note 9, at 919-20 (footnotes omitted).

175. See Acton, supra note 7, at 279-83. Recent reforms demonstrate that state lawmakers believe "juvenile offenders no longer deserve special treatment by the criminal justice system . . . . [T]oday's youths are not capable nor worthy of being effectively rehabilitated and should, instead, be treated like adult criminals." Id. at 283. "Emphasizing the need for juvenile justice reform [Illinois'] Governor Jim Edgar (R. Ill.) explained '[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." Id. at 279 (citation omitted).

176. Feld, supra note 7, at 822; see Acton, supra note 7, at 281; Arteaga, supra note 7, at 219-20 ("This increasingly punitive approach has had the effect of overshadowing the original rehabilitative goals of the juvenile justice system."). Dr. David Altschuler, a juvenile expert, criticizes the new punitive approach because it has "drowned out" the juvenile justice system's long-standing emphasis on deterrence and rehabilitation." Acton, supra note 7, at 281 (citing David M. Altschuler, Tough and Smart Juvenile Incarceration: Reintegrating Punishment, Deterrence and Rehabilitation, 14 ST. LOUIS U. PUB. L. REV. 217, 236 (1994)); see also Sheffer, supra note 171, at 487 (explaining that societal protection "has taken its place beside rehabilitation as a major goal of many juvenile justice systems").

Recent changes within the juvenile justice system demonstrate rehabilitation's decreased role. These changes include, but are not limited to amending purpose clauses to include accountability and punishment, lowering the age of juveniles who fall within the juvenile court's jurisdiction, reducing the age at which juveniles can be waived into adult criminal courts, automatically waiving juveniles into adult court for certain types of offenses and offenders, offense-based sentencing practices; and opening up juvenile court proceedings and juvenile records. See generally SIMON I. SINGER, RECRIMINALIZING DELINQUENCY: VIOLENT JUVENILE CRIME AND JUVENILE JUSTICE REFORM (1996) (summarizing the new punitive approach to juvenile justice); Feld, supra note 7, at 841-42 (discussing recent amendments to purpose clauses); Barry C. Feld, The Transformation of the Juvenile Court, 75 MINN. L. REV. 691, 696-718 (1991) (discussing waiver of juvenile offenders to criminal court and punishment within the juvenile justice system); Hon. Gordon A. Martin, Jr., The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation, 25 CONN. L. REV. 57, 65-83 (1992) (discussing the evolution and current status of transfer laws); Melli, supra note 31, at 391-92 (discussing the enlargement of criminal court jurisdiction); Acton, supra note 7, at 293-300 (discussing the expansion of sentencing options that are now available); discussion infra Part V. (discussing the erosion of confidentiality).


178. BELAIR, supra note 1, at 17.
Contrary to state lawmaker’s beliefs, we are not experiencing a juvenile crime wave,\(^{179}\) and the public is not demanding that juvenile offenders be punished instead of rehabilitated.\(^{180}\) Although state legislators claim their new policies reflect the public’s wishes and demands, their claims are untrue.\(^{181}\) According to national surveys, the American public believes that the juvenile court’s primary purpose is to treat and rehabilitate young offenders, not to punish them.\(^{182}\) Furthermore, even when juveniles are convicted of serious, violent offenses, the public’s response is more sympathetic than punitive.\(^{183}\) Consequently, legislative reforms are often based on policy-makers’ own self-serving beliefs rather than what the public, scholars, or juvenile justice professionals advise.\(^{184}\)

IV. THE CREATION AND DEVELOPMENT OF WISCONSIN’S JUVENILE JUSTICE SYSTEM

A. Historical Development

In 1901, the first juvenile court was established in Wisconsin.\(^{185}\) Although originally the statute created only one court system, located in Milwaukee County, by 1911 the statute provided for a juvenile court in every county.\(^{186}\) In 1919, the legislature compiled these various juvenile court laws into a chapter of the state statutes entitled “Child Protection

---

179. See supra note 9 and accompanying text.

180. See Giardino, supra note 4, at 236 & n.40 (citing Ira M. Schwartz, Juvenile Crime-Fighting Policies: What the Public Really Wants, in JUVENILE JUSTICE AND PUBLIC POLICY 214, 216 (Ira M. Schwartz ed., 1992)) (“[T]he public does not particularly favor sentencing juveniles to adult prisons or giving juveniles the same sentences as adults.”). According to Schwartz, “[d]epending upon the type of crime, between 88-95 percent of [people asked in a national opinion survey] want juveniles who commit serious property, drug-related, and violent crimes treated and rehabilitated if at all possible.” Giardino, supra note 4, at 236 n.41 (quoting Schwartz, supra, at 216.).

181. See Schwartz et al., supra note 9, at 242; Giardino, supra note 4, at 236.

182. See Schwartz et al., supra note 9, at 242-44; Giardino, supra note 4, at 236. A 1982 survey revealed that seventy-three percent of the respondents believed that “the primary purpose of the juvenile court should be to treat and rehabilitate.” Schwartz et al., supra note 9, at 242. In 1988, the National Council on Crime and Delinquency surveyed approximately 1,100 adults; roughly sixty-eight percent of the respondents believed that “juvenile courts should be oriented towards treatment and rehabilitation as opposed to punishment.” Id. at 242-43.

183. See Schwartz et al., supra note 9, at 243; Giardino, supra note 4, at 236.

184. See Schwartz et al., supra note 9, at 260.

185. See REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 4; WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 9.

186. See WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 9.
and Reformation." 187 Ten years later, in 1929, the legislature revised and re-titled the chapter the "Children's Code." 188

Since the 1929 revisions, the Children's Code has undergone substantial changes. 189 The first significant period of revision occurred during the 1953-1955 legislative session. 190 These revisions reflected the growing concern that the juvenile courts' informal and non-adversarial nature had resulted in abuses rather than treatment and care. 191 In response, the legislature enacted a number of procedural requirements for the juvenile courts to follow. 192 Because of growing criticism and mandates from the United States Supreme Court, in 1978 the legislature revised the Children's Code again. 193 These revisions provided two significant changes. First, responding to concerns about the juvenile court's informal nature, the legislature intended for these reforms to provide "more precise guidelines for the exercise of discretion by juvenile judges." 194 Second, the 1978 reforms cemented the system's goals—

187. See id.
188. See id. at 9-10.
189. See id. at 10-11; REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 5.
190. See WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 10.
191. See id.
192. See id. "For example, ... [the revisions] provided for the appointment of an attorney for the juvenile at the discretion of the court." Id.
193. See REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 5; WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 10. See generally In re Winship, 397 U.S. 358, 368 (1970) (holding that disciplinary charges must be proved beyond a reasonable doubt); In re Gault, 387 U.S. 1, 33, 34, 40, 55 (1967) (requiring adequate notice of charges, the right to counsel, the right to be protected from self-incrimination, and the right to confront and cross-examine witnesses); Kent v. United States, 383 U.S. 541, 554 (1966) (holding that before being waived into adult court, a juvenile is entitled to a hearing where counsel is present); discussion supra Part III.A.
194. WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 10; see REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 5. The 1978 revisions provided the following guidelines:

[The 1978 Code] concentrated on the role of attorneys in juvenile court, requiring both prosecution and defense attorneys, and on more formalized procedures. It clarified and formalized the procedure for the transfer of juveniles to adult court. It provided for determinate one year sentences with extensions authorized by the courts. It took the so-called status offenses (truancy, runaways and alcohol and drug abuse) out of the delinquency jurisdiction of the juvenile court. It limited the use of correctional institutions and required that to be committed to an institution, a juvenile had to commit a crime with a possible sentence of six months or more and be found to be a danger to the public and in need of restrictive custodial treatment.

The new code limited the use of detention and required that the least restrictive dispositional alternative must be employed.

WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 10.
protecting and rehabilitating juvenile offenders—into place.\textsuperscript{195} In the 1980s, the public became increasingly concerned about juvenile crime.\textsuperscript{196} Responding to these concerns, in 1987 the legislature created a Juvenile Justice Task Force to study juvenile crime and make recommendations for changing the Children's Code.\textsuperscript{197} During the 1990s, the “public's edginess over juvenile crime continued to grow.”\textsuperscript{198} Consequently, in 1994 the legislature created a Juvenile Justice Study Committee to study juvenile delinquency and review the Children's Code.\textsuperscript{199} Specifically, the Committee was to determine if the legislature should modify the provisions of the Children's Code governing the juvenile justice system.\textsuperscript{200} Ultimately, the Committee reported its recommendations to the legislature.\textsuperscript{201} From these recommendations, the legislature enacted the new Juvenile Justice Code in December of 1995.\textsuperscript{202}

\textit{B. Wisconsin's New Juvenile Justice Code}


Before the Juvenile Justice Code's enactment, the Children's Code dealt with a variety of subjects.\textsuperscript{203} In addition to delinquency matters, the Children's Code covered “termination of parental rights, adoption of children, children who [were] abandoned, children who [were] neglected, and children who [were] sexually or physically abused.”\textsuperscript{204} The Juvenile Justice Committee found the broad coverage of the Children's Code problematic, believing there were obvious differences between children who were victims of circumstances beyond their control and

\begin{itemize}
  \item \textsuperscript{195} See Report of the Juvenile Justice Study Committee, \textit{supra} note 9, at 5.
  \item \textsuperscript{196} See \textit{id}.
  \item \textsuperscript{197} See \textit{id}. The Task Force made several recommendations on several areas “including the availability of judicial options, the effectiveness of dispositional alternatives, the adequacy of restitution provisions, juvenile detention and detention facilities, alcohol and other drug abuse by juveniles, and prevention of juvenile truancy.” \textit{Id}.
  \item \textsuperscript{198} \textit{Id}.
  \item \textsuperscript{199} See Wisconsin Council on Children and Families, \textit{supra} note 9, at 10-11; see also Report of the Juvenile Justice Study Committee, \textit{supra} note 9, at 5.
  \item \textsuperscript{200} See Wisconsin Council on Children and Families, \textit{supra} note 9 at 10-11; Barry & Ladwig, \textit{supra} note 10, at 12.
  \item \textsuperscript{201} See Wisconsin Council on Children and Families, \textit{supra} note 9, at 11.
  \item \textsuperscript{202} See \textit{id}.
  \item \textsuperscript{203} See Barry & Ladwig, \textit{supra} note 10, at 12; see also Report of the Juvenile Justice Study Committee, \textit{supra} note 9, at 9.
  \item \textsuperscript{204} Report of the Juvenile Justice Study Committee, \textit{supra} note 9, at 9; see Barry & Ladwig, \textit{supra} note 10, at 12-13.
\end{itemize}
"young people who choose to violate society's laws." Furthermore, although the Committee recognized that there may be a "relationship between the two categories," the Committee believed it was "illogical to use basically the same procedural system to deal with both categories of young people." Accordingly, the Committee recommended creating a separate chapter in the statutes dealing exclusively "with young law breakers," the legislature agreed. Consequently, Chapter 938 is a separate set of laws designed to deal exclusively with delinquency-related issues.

The Juvenile Justice Code's language and location are also quite different from its predecessor. With respect to the language of the Children's Code, the Committee recommended that it was "misleading" and "inappropriate" to refer to juvenile offenders, who are "physically and mentally mature and who have demonstrated a willingness to engage in serious and even heinous acts," as children. Accordingly, the Committee recommended substituting the word "juvenile" for "child" and recommended the title "Juvenile Justice Code" for laws governing delinquency issues. As the Code demonstrates, the legislature adopted these recommendations.

In addition to the changed terminology, the Committee recommended that the Juvenile Justice Code be placed adjacent to the Criminal Code, which begins at Chapter 939. The motivation behind the

---

205. REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 9.
206. See id.
207. Id.
208. See id.
209. See Barry, supra note 12, at 30 ("[T]he committee proposed a separate set of laws for each [category]. The new Juvenile Justice Code would take from Chapter 48 those sections that focus on juvenile offenders."); Barry & Ladwig, supra note 10, at 12 ("Perhaps the most noticeable change in the philosophical focus of the new law is the creation of Chapter 938, which is devoted to delinquency matters.").
211. REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 9; Barry & Ladwig, supra note 10, at 13 ("The [Juvenile Justice Code] acknowledges the inappropriateness of using the term 'child' to describe a 16-year-old armed robber or a 15-year-old who has accumulated a record of 20 or more delinquency adjudications.").
212. See REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 9.
213. See id. at 11; Barry & Ladwig, supra note 10, at 13. While the Committee favored placing the Juvenile Justice Code close to the Criminal Code, the Committee did not want the Juvenile Justice Code to be part of the Criminal Code. See REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 11.
Juvenile Justice Code’s placement was primarily symbolic. It was designed to demonstrate the Code’s new philosophy and remind juveniles that “although society does not yet classify [their] actions as criminal, they are ‘almost there.’” The Committee also believed that this symbolism would provide juveniles with powerful incentives to modify their behavior. As Chapter 938 evidences, the legislature adopted the Committee’s recommendations.

2. The Juvenile Justice Code’s Changed Philosophy.

Responding to “skyrocketing juvenile crime statistics” and the fact that “young people were capable of committing extremely violent acts,” the Juvenile Justice Code also expresses a very different legislative intent. Unlike the Children’s Code, which focused on the best interests of the child, including care and rehabilitation, the Juvenile Justice Code emphasizes protecting citizens and holding juveniles accountable for their actions.

Although “[r]ehabilitation continues to be a primary focus of the Juvenile Justice Code,” the Committee recommended adding personal accountability and community protection to the Code’s expressly stated purposes. Personal accountability was added as one of the Code’s purposes to ensure that “young lawbreakers’ ages no longer . . . insulate them from [the] consequences of their unlawful behavior.” Similarly, the Committee recommended that community protection be added as


215. Id.; see REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 11.

216. See REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 11; Barry & Ladwig, supra note 10, at 13. “While society does not yet classify young offenders’ actions as criminal, it is hoped this juxtaposition will provide incentive for some young offenders to change their behavior before they are considered ‘criminals’ and prosecuted as such under the Criminal Code.”


218. Id.

219. See WIS. STAT. § 938.01 (1995-1996); REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 9-10; WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 11.


221. See WIS. STAT. § 938.01 (1995-1996); WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, supra note 9, at 11.

222. Barry & Ladwig, supra note 10, at 13; see WIS. STAT. § 938.01.

223. See REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 10.

one of the Code’s purposes because “all members of our society (young and old alike) deserve to feel and be safe from gangs, guns and those who commit crime, and that protection of those who chose to follow the law should never be secondary to society’s treatment of those who violate it.”

The Committee recommended that these goals be carefully balanced to serve both the juvenile’s and society’s best interests. In reality, however, providing a juvenile with care and treatment and protecting the juvenile’s best interest are listed second to last among the Code’s seven objectives. The legislature’s false promises did not stop there. Other sections of the Code, such as the confidentiality provisions, demonstrate the legislature’s preference for societal protection and individual accountability. Contrary to the legislature’s expressed intent, community protection and personal accountability greatly outweigh rehabilitation, and the so-called continued focus on rehabilitation is actually pure rhetoric.

C. Lifting the Shield of Confidentiality


The Children’s Code, unlike the Juvenile Justice Code, maintained

---

225. Id.
226. See id.; see also REPORT OF THE JUVENILE JUSTICE STUDY COMMITTEE, supra note 9, at 10 (“The committee recommends adopting an approach which balances rehabilitation, personal accountability and public protection and which best serves both the offender and society.”).

Some “just deserts” critics argue that rehabilitation and punishment cannot be balanced because these goals work “at cross purposes” with each other. Lemert, supra note 18, at 355. Furthermore, “[w]hile every state may wish to ideally reconcile all competing interests, each is ultimately ‘forced to make choices regarding the emphasis and preference [to] attach to each value’ . . . .” Giardino, supra note 4, at 225 (quoting Jeffrey L. Bleich, Legislative Trends, in FROM CHILDREN TO CITIZENS 31, 31 (Francis X. Hartmann ed., 1987)).

227. See WIS. STAT. § 938.01(2)(a)-(f) (1995-1996) (protecting “citizens from juvenile crime” and holding the “juvenile offender directly accountable for his or her acts” are listed before responding to “a juvenile offender’s needs for care and treatment . . . [and] responding to “each juvenile’s best interests . . . .”); see also Giardino, supra note 4, at 244 (discussing the purpose of Florida’s juvenile justice code).

228. See WIS. STAT. § 938.396, amended by 1997-1998 Wis. Legis. Serv. Act 27 §§ 5275g-5275m, Act 35 §§ 567-568 (West). This imbalance is reflected in the erosion of confidentiality for juvenile records. See Pederson, supra note 8, at 26-29 (discussing the confidentiality provisions of the Juvenile Justice Code); discussion infra Part IV.C.2. See generally Giardino, supra note 4 (discussing the different types of statutory purpose clauses that state legislatures have enacted).
confidentiality of juvenile records thereby fulfilling its promises. The Wisconsin Supreme Court’s 1978 decision in *Herget v. Circuit Court* was instrumental in ensuring that the Children’s Code kept its promises.

In *Herget*, the court considered whether juvenile police records were discoverable in a civil action arising from the juvenile’s delinquent acts. Ultimately, the court held that juvenile records are discoverable, but only under certain circumstances. However, because the statute was silent on when, if ever, disclosure was appropriate, the court was forced to create its own rule. In doing so, the court considered the legislature’s intent, other provisions of the Children’s Code, and the theoretical justifications for confidentiality.

In articulating a rule, the *Herget* court relied upon the legislature’s intent as reflected in the legislative purpose clause. According to the court, the purpose clause provided that “it is the intent of [the Children’s Code] ‘to promote the best interests of the children of this state.’” The purpose clause also provided guidance on interpreting the Children’s Code, stating that its provisions must be “liberally construed ...”. Furthermore, the statute instructed that in interpreting the Children’s Code, “the best interest of the child shall always be of paramount consideration, but the court shall also consider the interest of the parents or guardian of the child and the interest of the public.”

In addition to the legislative purpose clause, the court relied upon other provisions of the Children’s Code. Reading these provisions together, the court concluded that the Children’s Code “mandate[d] confidentiality of [juvenile] records as the general principle and disclosure

---

230. See Herget v. Circuit Court, 267 N.W.2d 309, 316-17 (Wis. 1978).
231. See generally id. at 311-15. Although Herget addressed discoverability issues, the court’s analysis and discussion of the confidentiality statute is instructive because it provides an excellent discussion of the Wisconsin Legislature’s intent in enacting the confidentiality provisions of the Children’s Code. See id. at 315-17.
232. See id. at 317. The court held that juvenile records are discoverable pursuant to a court order but only after a court reviews the records in camera and determines that the “need for confidentiality is outweighed by the exigencies of the circumstances.” Id.
233. See id. 315-16.
234. See id. at 316. “While section 48.26 ... does not prescribe the standards a court should apply in determining whether to order the disclosure of all or any part of the police records of a juvenile investigation, other provisions of ch. 48 ... suggest that the interests of the juvenile must be given paramount consideration.” Id.
235. Id.
236. Id. (quoting Wis. Stat. § 48.01 (3) (1977-1978)).
237. See id. The court read Sections 48.26, 48.38, and 48.78 together. See id.
The court reasoned that this mandate reflected the legislature’s belief that “the best interests of the child and the administration of the juvenile justice system [required] protecting the confidentiality of police, court, and social agency records relating to juveniles ....”239 In other words, the legislature strongly valued confidentiality of juvenile records, believing that confidentiality was in the public’s interest and was key to furthering the goals of the Children’s Code.240

Finally, in creating a standard the court also examined the theoretical justification for maintaining confidentiality of juvenile records.241 The court concluded that “[c]onfidentiality is essential to the goal of rehabilitation, which is in turn the major purpose of the separate juvenile justice system.”242 The court reasoned that confidentiality helped achieve that goal in two ways.243 First, confidentiality encourages juveniles and others to “furnish information which they might not otherwise disclose ....”,244 and second, “confidentiality also reduces the stigma to the youth resulting from the misdeed.”245

Because of the legislature’s intent, the substantial public interest in protecting the confidentiality of juvenile records, and the key role confidentiality played in achieving rehabilitation, the court favored a restrictive release standard.246 Despite its preference, the court did not overlook plaintiffs’ needs for access.247 Instead, the court stated that the public’s need to know was an important factor for trial courts to consider.248 As such, the court created a standard that allowed disclosure if the “exigencies of the circumstances,” outweighed the “need for confidentiality.”249 Before making this determination, however, the court in-

238. Id.; see Wis. Stat. § 48.396 (1993-94) (current version at Wis. Stat. § 48.396 (1995-1996)); see also Wisconsin Council on Criminal Justice, Juvenile Justice Standards and Goals, Goal No. 16 at 115 (1975) (“All information relating to a juvenile shall be collected, stored and disseminated in a manner which protects the privacy of the child and is utilized on in his/her best interest.”).
239. Herget, 267 N.W.2d at 317.
240. See id. at 316-17.
241. See id. at 316.
242. Id.
243. See id.
244. Id.
245. Id.
246. See id. at 316-317.
247. See id. at 317.
248. See id.
249. Id.
structured that the trial court must make a preliminary finding. Specifically, the trial court must find that the information "is essential to [the] plaintiffs' cause and [that it] cannot be obtained with reasonable effort from other sources . . . ." After doing so, the trial court "must balance the plaintiffs' need for the information requested against society's interest in protecting the confidentiality of juvenile . . . records." In balancing these interests, the court must consider "the victim's interest in recovering for the damage he has suffered and the juvenile's interest in rehabilitation and in avoiding the stigma of revelation; the redress of private wrongs through private litigation and the protection of the integrity of the juvenile justice system." The Herget balancing test, although it may favor confidentiality of juvenile records, does not preclude a court from considering, or finding in favor of, the public's safety. Given the appropriate situation, confidentiality may be outweighed and disclosure required. The appropriate situation arose in In re Peter B. In In re Peter B., the Wisconsin Court of Appeals addressed whether the public's interest in apprehending a dangerous person outweighed a juvenile's interest in confidentiality such that the juvenile's name, address, birth date, and photograph could be released to the media. Holding that disclosure was appropriate, the court agreed with the trial court that confidentiality is "not an absolute

250. Id.
251. Id.
252. Id. The court also stated that a careful examination in every case would not "overburden . . . the trial court with examining voluminous material" and would not force the trial court to make "decisions which can properly and effectively be made only by an advocate . . . ." Id. at 317 n.18 (citing Dennis v. United States, 384 U.S. 855, 874 (1966)).
253. Id. at 317.
254. See id. Following the Herget balancing test, a court may allow disclosure only after reviewing the records in camera and determining that the "need for confidentiality is outweighed by the exigencies of the circumstances." Id. A version of this balancing test is codified in the confidentiality provisions of the Juvenile Justice Code. See Wis. Stat. § 938.396(5)(a)-(e) (1995-1996). This test only applies, however, when a requester is denied access to police records. See id.
255. In re Peter B., 516 N.W.2d 746, 749 (Wis. Ct. App. 1994). Although In re Peter B. addresses the issue of whether a court may disclose a juvenile's name, address, date of birth, and photograph to the local broadcast and print media, the court's discussion and analysis is instructive because it demonstrates an application of the Herget balancing test. See id. at 747. Applying the Herget balancing test, the trial court determined "that the need for confidentiality . . . [was] outweighed by the exigencies of the present circumstances." Id. at 749. The court of appeals affirmed. See id. at 747.
256. 516 N.W.2d 746 (Wis. Ct. App. 1994).
257. See id. at 747.
privilege or an absolute right; instead, it's conditional. It is conditioned on the "exigencies of the present circumstances," and whether those circumstances outweigh the "need for confidentiality." Weighing the competing interests, the court held that the need to protect the community outweighed Peter B.'s need for confidentiality. In re Peter B. demonstrates that under the Children's Code, the public's interest was considered, and when appropriate, could outweigh the juvenile's interest in rehabilitation.

2. Confidentiality under the Juvenile Justice Code.

In response to the supposed increase of juvenile crime, many state legislatures have started chipping away at the special provisions for juvenile confidentiality. Wisconsin Statute section 938.396 mirrors this trend.

Although the Code's legislative purpose clause states that all of the Code's purposes are equally important, this language is merely a false promise. The tremendous reduction of confidentiality given to juvenile offenders under Chapter 938 demonstrates that individual accountability and community protection are favored over the juvenile's rehabilitation and best interests. Consequently, although the Children's Code's presumption of confidentiality continues in the new code, there are so many exceptions and mandatory disclosures that, in reality, the pre-

258. Id. at 749.
259. Id.
260. Id.
261. See id. In balancing the competing interests, the court stated that confidentiality is necessary to protect a juvenile in "future endeavors," namely to protect his chances of getting a job, and to protect his family from embarrassment. Id. These factors were outweighed in this case, however, because Peter was originally charged with "possession of a dangerous weapon by a child"; he ran away from a residential treatment center while awaiting a change of placement hearing; he failed to appear in court for his change of placement hearing; and after being caught, he escaped from the secure detention facility. Id. at 748.
262. See id. at 752-53. The trial court stressed that it was giving "paramount consideration to the juvenile's interest, but even by doing that," the public's interest in the juvenile's apprehension "clearly outweighs the juvenile's interest in confidentiality." Id. at 749.
263. See id. at 748-49.
264. BELAIR, supra note 1, at 15.
266. See WIS. STAT. § 938.01(2)(a), (b), (f), (g).
267. See Pederson, supra note 8, at 26; see also WIS. STAT. § 938.396, amended by 1997-1998 Wis. Legis. Serv. Act 27 § 5275g-m, Act 35 § 567-68 (West).
The legislature’s preference for accountability and community protection has effectively eliminated the shield of confidentiality within the juvenile justice system, making confidentiality “the exception, not the rule.”268 The elimination of confidentiality is most obviously reflected in the subsections that govern police and court records.270

Although the Juvenile Justice Code continues to state the general rule that “law enforcement officers’ records of juveniles must not be open to inspection or their contents disclosed,”271 there are many new exceptions to the rule.272 These new exceptions not only permit greater access to police records, they also give law enforcement officers greater discretion.273 Specifically, under the Juvenile Justice Code, law enforcement officers, instead of the court, have the authority to decide whether to disclose confidential information.274 The most startling aspect of this

268. See Pederson, supra note 8, at 26; see also Wis. Stat. § 938.396(1b)-(1m)(a), (b), amended by 1997-1998 Wis. Legis. Serv. Act 27 § 5275g-m (West), (1r)-(1t), amended by 1997-1998 Wis. Legis. Serv. Act 35 § 567 (West), (2)(ag)-(fm), (2m)(a)-(b), 7(a)-(e), (8).

269. Pederson, supra note 8, at 26.

270. See Wis. Stat. § 938.396(1)-(1t), amended by 1997-1998 Wis. Legis. Serv. Act 27 § 5275g-m, Act 35 § 567 (West), (2)(a)-(fm), (2m)(a)-(b).

271. Pederson, supra note 8, at 28 (summarizing Wis. Stat. § 938.396 (1)).

272. Wis. Stat. §938.396(1b), (1d), (1g), (1m)(a)-(b), (1r), (1t), amended by 1997-1998 Wis. Legis. Serv. Act 27 §§ 5275g-5275m, Act 35 § 567 (West); Pederson, supra note 8, at 28-29. Section 938.396(1) provides: "Law enforcement officers’ records of juveniles shall not be open to inspection or their contents disclosed except under ... [the statutory exceptions] or by order of the court." Wis. Stat. § 938.396(1).

273. See Pederson, supra note 8, at 28. According to Pederson, these exceptions are "noteworthy[] not only because they allow much greater access to police records of juveniles but because they authorize the police, rather than the court, to exercise discretion in determining whether to disclose confidential information." Id. But see Lemert, supra note 18, at 363. Lemert argues that police will not unnecessarily disclose juvenile records because they are not “motivated to impugn the reputations of run-of-the-mill juvenile misdoers ... .” Id.

274. See Pederson, supra note 8, at 28. As originally enacted, the police could only release information upon receiving a request. See Wis. Stat. § 938.396(1)- (1t). Once a request was made, the police had the authority to determine if the requesting individual fit within one of the stated exceptions and if so, whether inspection was permitted. See Wis. Stat. § 938.396(1)-(1t). Recent amendments, however, give the police even greater authority. For example, the amendments authorize law enforcement agencies to give information to a school district administrator or designee by their “own initiative” or by a request. 1997-1998 Wis. Legis. Serv. Act 27, § 5275g-m (West).

Because of their new authority, law enforcement agencies also will now bear the burden of ensuring that only the authorized information is released and that requesters are informed about the “statutory limits placed upon their use and future disclosure of information.” Pederson, supra note 8, at 28. Police must utilize great care in exercising their discretion. If police officers fail to use due care, requesters may receive more information than is statutorily authorized, and they may have unrestricted use of that information. Police have little incen-
grant of authority is that the Code fails to provide any meaningful standards to guide law enforcement officers’ exercise of discretion.\textsuperscript{275} Admittedly, the Code does contain some limits on the release of juvenile records. Several of the exceptions limit both the types of information that can be revealed and the purposes for which the information can be used, and several provisions state that any decision is “subject to official agency policy.”\textsuperscript{276} These limitations, however, fail to provide any intelligible guidance for law enforcement officers. Without any guidance, law enforcement officers may decide to disclose information without carefully weighing the interests involved. Because officers are not required to engage in any type of balancing test before deciding to disclose, records may be disclosed even when the juvenile’s need for confidentiality outweighs community protection and accountability. These discretionary disclosure provisions demonstrate that the legislature’s claim—that rehabilitation and the juvenile’s best interests share equal importance with societal protection and individual accountability—is merely a false promise.

While the Code emphasizes increased discretion for police, there is also a mandatory disclosure provision that strips police of all decision-making authority.\textsuperscript{277} This provision is just as egregious as the discretionary...
ary disclosure provisions. By stripping all discretion from the police, the mandatory disclosure provision keeps officers from considering the juvenile’s best interests and rehabilitation, even when the need for confidentiality might outweigh individual accountability and community protection in a particular case. Consequently, the elimination of discretion also demonstrates that the legislature’s continued promise of protecting juvenile’s best interest is merely a false one.

Increased dissemination and disclosure of juvenile court records also reflects the legislature’s disregard of juveniles’ interests. Similar to police records, the general rule continues that “court records shall not be open to inspection or their contents disclosed except by . . . [court order] or as permitted under . . . [Chapter 938].” This language is deceptively restrictive, because “as permitted under” Chapter 938 includes an extensive list of exceptions. Notwithstanding their extensive nature, the most remarkable aspect of these exceptions is that all of them require the court to open the particular record for inspection. Thus, by

ords to a victim-witness coordinator. See id. Section 938.396(1g) provides:

If requested by the victim-witness coordinator, a law enforcement agency shall disclose to the victim-witness coordinator any information in its records relating to the enforcement of rights under the constitution, this chapter and s. 950.04 [(the basic bill of rights for victims and witness)] or the provision of services under s. 950.05 [(outlining the services for victims and witnesses)].

Id. (emphasis added).

278. See Pederson, supra note 8, at 28. (“The presumption that juvenile court records are confidential has been weakened in the new code.”).

279. WIS. STAT. § 938.396(2); Pederson, supra note 8, at 28 (summarizing Wis. STAT. § 938.396(2)).

280. See Wis. STAT. §§ 938.396(2)(a)-(fm), (2m)(a)-(b); Pederson, supra note 8, at 28. Pederson has summarized these exceptions:

Upon request, the parent, guardian, legal custodian or child aged 14 or older shall have access to court records unless the court finds, after due notice and hearing, that inspection of the records would result in “imminent danger” to [anyone]. The court also must grant access to any person who has been provided written permission from the parent, guardian, legal custodian or child aged 14 or older to inspect any records specifically identified. The code requires the court to open juvenile court records to various other persons for specific purposes: to the defense counsel to prepare the client’s defense; to the district attorney or criminal court representative to determine whether a person illegally possessed a firearm; to the victim-witness coordinator to enforce the victim’s rights and provide services to the victim; to the victim’s insurer the amount of restitution ordered, if any; to the Department of Corrections to provide a person’s offense history to the Department of Justice or the district attorney; to the Department of Health and Social Services, the Department of Corrections or a federal agency in accordance with federal social welfare regulations; or to a law enforcement agency to investigate gang activity.

Pederson, supra note 8, at 28.

281. See Wis. STAT. §§ 938.396(2)(a)-(fm), (2m)(a)-(b).
eliminating the juvenile court’s ability to prevent inspection, essentially the legislature has stripped juvenile courts of their power to protect confidentially of juvenile records. Again, this vast list of mandatory disclosure exceptions is indicative of the Code’s false promises; favoring disclosure at every turn equates to favoring community protection and individual accountability at every turn.

The most significant exception demonstrating the code’s new philosophy is the “requester” provision. Under the requester provision, record disclosure is linked to the “allegations made against the juvenile.” To trigger the exception, the required allegations must be made. Once triggered, however, disclosure is mandatory; the court has no authority to prevent release. Furthermore, once the information is released, there are no limitations attached to the requester’s use and future disclosure. Instead, the requester is free to disclose the information to anyone at his or her discretion. Not all of the informa-

282. Several of the exceptions allow the juvenile court to prevent inspection if inspection “would result in imminent danger to anyone.” Wis. Stat. § 938.396(2)(ag), (am). Furthermore, the requester provision prevents certain information, such as sensitive personal information, from being disclosed. See Wis. Stat. § 938.396(2m)(b).

283. Pederson, supra note 8, at 28 (citing Wis. Stat. § 938.396(2m)(a)-(b)).

284. Id.; see Wis. Stat. § 938.396(2m)(a)-(b).

285. See Pederson, supra note 8, at 28; Wis. Stat. § 938.396(2m)(a)-(b). The allegations that trigger section 938.396(2m)(a) are the typical “three strikes crimes.” Pederson, supra note 8, at 28. These crimes include, but are not limited to conspiracy, § 939.31; first-degree intentional homicide, § 940.01; first-degree reckless homicide, § 940.02; felony murder, § 940.03; second-degree intentional homicide, § 940.05; first-degree sexual assault, § 940.225; kidnapping § 940.31; robbery by use or threat of use of a dangerous weapon or explosive container, § 943.32 (2); and sexual assault of a child, § 948.02(1). See Wis. Stat. § 938.396(2m)(a) (citing § 938.34(4h)); see also §§ 939.31, 940.01, 02, .03, .05, .255, .31, 943.32(2), 948.02(1) (providing the required elements for each offense). To trigger the exceptions in Section 938.396(2m)(b), the juvenile must have been “alleged to be delinquent for committing a violation that would be a felony if committed by an adult if the juvenile has been adjudicated delinquent at any time preceding the present proceeding and that previous adjudication remains of record and unreversed.” § 938.396(2m)(b); see Pederson, supra note 8, at 28.

286. See Wis. Stat. § 938.396(2m)(a)-(b) (1995-1996) (“[U]pon request, a court shall open for inspection by the requester the records of the court . . . .”) (emphasis added); see Pederson, supra note 8, at 28.

287. See Pederson, supra note 8, at 28.
tion contained in the court record is subject to disclosure however.288 A requester cannot inspect records that concern "sensitive personal information of the juvenile and the juvenile's family",289 "reports of physical, psychological, mental or developmental examinations",290 or "dispositional court reports made pursuant to section 938.33."291 While these restrictions may appear to favor the juvenile's best interests, when compared to the information that is disclosed, these restrictions provide minimal protection. As such, the requester provision indicates the legislature's preference for individual accountability and community protection.

The erosion of confidentiality under the Juvenile Justice Code demonstrates that the legislature is willing to sacrifice rehabilitation to promote its new goals—accountability and community protection. Although the legislature expressly promises to balance rehabilitation against accountability and community protection to determine which should prevail, as the confidentiality statute demonstrates, these promises are erroneous.

V. A TRULY BALANCED APPROACH TO CONFIDENTIALITY

The Wisconsin Legislature should revise the confidentiality provisions of the Juvenile Justice Code to eliminate mandatory disclosure of juvenile records and to provide a standard that would guide law enforcement officers and courts in their discretionary disclosure decisions. Specifically, this revision should require that law enforcement officers and courts carefully weigh case-specific factors before making a decision whether to disclose information.292 The arguments for and against confidentiality provide an excellent set of factors for law enforcement officers and courts to use in applying a case-specific balancing test.

288. See id. (summarizing Wis. Stat § 938.396(2m)(a)-(b)).
289. Wis. Stat. §938.396(2m)(a)-(b); see Pederson, supra note 8, at 28 (summarizing Wis. Stat. § 938.396(2m)(a)-(b)).
290. Pederson, supra note 8, at 28 (summarizing Wis. Stat. § 938.396(2m)(a)-(b) which cites Wis. Stat. § 938.295, referring to physical, psychological, mental or developmental examinations).
291. Pederson, supra note 8, at 28 (summarizing Wis. Stat. § 938.396(2m)(a)-(b) which cites § 938.33, covering dispositions and court reports).
292. See Belair, supra note 1, at 103 ("[M]ost participants ... advocate a moderate approach which balances confidentiality and publicity interests."); Dunn, supra note 112, at 396-398 (proposing an alternative that, among other things, makes confidentiality depend on the severity of the juvenile's offense.)
A. Arguments for Disclosing and Disseminating Juvenile Records

There are approximately seven different arguments confidentiality opponents advance for lifting the veil of confidentiality.

1. Disclosure “Promotes Public Safety.”

Confidentiality opponents assert that disclosure of juvenile records is necessary because society has a valid interest in protecting itself against dangerous offenders. These critics argue that the higher incidence of serious, violent crime committed by juveniles and the increasing recidivism rate indicate that rehabilitation is more fact than fiction. Because rehabilitation has failed, confidentiality “makes the courts a kind of sanctuary for the most vicious among the criminal young.” Accordingly, opponents opine that if the juvenile courts have failed to rehabilitate delinquents, then the justification for confidentiality no longer exists. Furthermore, if confidentiality is no longer justified, then society should demand disclosure because confidentiality prevents society from discovering the identities of those juveniles who jeopardize public safety. As some opponents believe, when juveniles are committing more serious and heinous crimes the public has a right to know who its “young terrorists” are.

293. BELAIR, supra note 1, at 111.
294. See id. (“Proponents of [disclosure] argue that publication of information about juvenile offenders is important because it serves society's valid need for identification of dangerous offenders.”).
295. See, e.g., Hearings, supra note 1, at 1 (opening statement of Hon. Arlen Specter, Chairman, Subcomm. on Juvenile Justice) (discussing recidivism rates and the system's failure to rehabilitate juvenile offenders); T. Markus Funk, A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records, 29 U. MICH. J.L. REFORM. 885, 902-07 (1996); Blum, supra note 8, at 396 (“The frequency and severity of today's juvenile violence make efforts at rehabilitation unrealistic.”).
296. Funk, supra note 296, at 902 (quoting RITA KRAMER, AT A TENDER AGE: VIOLENT YOUTH AND JUVENILE JUSTICE 7 (1988)).
297. See, e.g., BELAIR, supra note 1, at 108 (“[I]f confidentiality is necessary and proper only, or at least primarily, because it promotes rehabilitation and if rehabilitation turns out to be illusion, then there is little reason to worry about maintaining confidentiality.”); Blum, supra note 8, at 368-69.
298. Blum, supra note 8, at 369 (“The alarming violence that juveniles are committing today has forced communities to demand that the state be more concerned with protecting the lives and safety of the public than it is with protecting the identities of juvenile felons.”).
299. Gilbert Geis, Publication of the Names of Juvenile Felons, 23 MONT. L. REV. 141, 151 (1962) (citing J. Edgar Hoover); BELAIR, supra note 1, at 16; Blum supra note 8, at 388. In 1957 Hoover launched a campaign “calling for the public branding in newspapers of juvenile delinquents.” Geis, supra note 1, at 120. Hoover criticized the system as being too soft on juvenile offenders:
2. Disclosure Allows the Public to Supervise the System.

Opponents also maintain that confidentiality prevents the public from evaluating the juvenile court system. According to confidentiality critics, because the public is uninformed it is quick to doubt the system's performance. Opponents contend that eliminating secrecy would restore the public's confidence and trust in the juvenile justice system.

Opponents also argue that confidentiality actually does a disservice to juvenile offenders. Because decision-making within the juvenile justice system occurs behind closed doors, confidentiality subjects juvenile offenders to unfettered decision-making, which can lead to abuse. Accordingly, critics opine that eliminating secrecy would "function as a check on the abuse of power by judges, probation officers and other public officials." By lifting the veil of confidentiality, the public could eliminate or at least would discourage "decisions based on secret bias or partiality."

Are we to stand idly by while fierce young hoodlums—too often and too long harbored under the glossy misnomer of juvenile delinquents—roam our streets and desecrate our communities ...? Recent happenings in juvenile crime shatter the illusion that soft hearted mollycoddling is the answer to this problem ... Publicizing names of as well as the crimes for public scrutiny, releases of past records to appropriate law enforcement officials ... are all necessary procedures in the war on flagrant violators, regardless of age. Local police and citizens have a right to know the identities of the potential threats to public order within their communities.

Id. (quoting Hoover, 26 F.B.I. LAW ENFORCEMENT BULL. 1 (Feb. 1957)).

300. See BELAIR, supra note 1, at 113; Note, supra note 177, at 1549-50.

301. See BELAIR, supra note 1, at 113.

302. See Martin, supra note 8, at 400 (quoting United States v. A.D., 28 F.3d 1353, 1357 (Fed. Cir. 1994) (quoting United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982))). "Public confidence in and respect for the ... system can be achieved only by permitting full public view ..." Id.


304. See Martin, supra note 8, at 401.

305. Note, supra note 177, at 1550 (footnote omitted).

306. Martin, supra note 8, at 401 (quoting A.D., 28 F.3d at 1357 (quoting Criden, 675 F.2d at 556))). In response, confidentiality proponents argue "oversight of the juvenile justice system is not dependent upon the disclosure of personally identifiable information. Provided that the public and its elected representatives are sufficiently interested in the juvenile justice system, there are ample opportunities for review and oversight." BELAIR, supra note 1, at 114; see Laubenstein, supra note 30, at 1905-06 ("[R]eporting on the more general aspects of the juvenile court system rather than focusing on particular cases will adequately satisfy the public's need for information.").
3. The Effects of Labeling are Speculative.

One of the primary reasons for hiding a juvenile’s indiscretions from the public gaze is to protect juveniles from the stigma associated with involvement in the juvenile justice system. Confidentiality proponents argue that stigma prevents rehabilitation and "imposes a form of punishment in a system of justice supposedly free from retribution." Additionally, proponents opine that secrecy helps a child reintegrate into society and deters future employers, teachers, and school administrators from denying a juvenile certain benefits and opportunities because of his juvenile record. Opponents assert, however, that "the harm sought to be avoided...remains speculative." They argue that the "stigma of being classified a delinquent has been overestimated," and publicity does not "seem likely to intensify the psychological identification process ...." Opponents also contend that a delinquency label reduces neither job nor educational opportunities. In one study of delinquent boys, only a small proportion felt that their encounter with the police or juvenile court was a handicap; most "perceived no substantial change in interpersonal relationships with family, friends, or teachers." Accordingly, opponents believe that access to juvenile records will not adversely affect a juvenile offender.

4. Dissemination and Disclosure Provides Individual Accountability and Deters Future Delinquent Behavior.

Responding to the alleged juvenile crime epidemic, confidentiality

307. See Geraghty & Raphael, supra note 30, at 75 (quoting In re Gault, 387 U.S. 1, 24 (1967)).
308. Id.
309. See, e.g., id. at 75.
310. Note, supra note 177, at 1556.
311. Id. at 1557 (footnote omitted).
312. Id. at 1557-58
313. See id. at 1558. Confidentiality opponents believe that contrary to confidentiality proponent's beliefs, employers will not search out a prospective employee's juvenile records when making hiring decisions. Id. Furthermore, some opponents argue that employers have a right to this information because "an applicant's past criminal history" can predict "trustworthiness." Funk, supra note 295, at 926 (citation omitted). Secrecy also prevents employers from taking necessary precautions to reduce potential security and business risks. See id. at 926-29; see also Carlton J. Snow, Expungement and Employment Law: The Conflict Between an Employer's Need to Know About Juvenile Misdeeds and an Employee's Need to Keep Them Secret, 41 WASH. U. J. URB. & COMTEMP. L. 3, 9 (1992).
314. Note, supra note 177, at 1557 & n.111 (citing Foster et al. Perceptions of Stigma Following Public Intervention for Delinquent Behavior, 20 SOC. PROBS. 202 (1972)).
315. See BELAIR, supra note 1, at 17.
opponents argue that legislatures should eliminate confidentiality provisions for juvenile offenders to ensure that they are held accountable for their actions. 316 Instead of hiding youthful errors from the public’s gaze, confidentiality opponents argue that juvenile offenders should face personal responsibility for their acts, especially as those acts become more frequent and violent. 317 Opponents contend that confidentiality allows juveniles to escape the consequences of their actions; given the current juvenile crime problem, this is no longer a popular idea. 318 Because “many young offenders today are hard-core criminals who have long arrest records for serious crimes by the time they are eighteen[,]” 319 they should be held accountable. Accordingly, confidentiality opponents argue that allowing disclosure of juvenile records would require juveniles to take greater responsibility for their behavior. 320

Critics further maintain that exposing juvenile offenders “to the full glare of publicity” deters future delinquent behavior. 321 Fearing exposure, a juvenile would conform his behavior to nondelinquent activities because he would not want to embarrass himself or his family. 322 Similarly, critics argue that disclosure would encourage parents to exercise more control over their children, wanting to avoid the embarrassment of disclosure as well. 323 Because of the embarrassment associated with disclosure, lifting the veil of confidentiality would steer potential juvenile offenders away from delinquency. For these reasons, secrecy critics opine that disclosure would deter repeat delinquency because publicizing a juvenile’s offenses would “motivate juveniles towards socially acceptable goals.” 324

5. Secrecy is “More Rhetoric Than Reality.” 325

Opponents argue that the juvenile justice system should abandon confidentiality because, in reality, juvenile information is easily accessible and frequently released. 326 To support their claims, critics rely on the

316. See, e.g., Kfoury, supra note 25, at 56.
317. See Blum, supra note 8, at 382-86.
318. See id. at 382.
319. Id. at 384.
320. See, e.g., Kfoury, supra note 25, at 56.
322. See Kfoury, supra note 25, at 56; see also Geis, supra note 299, at 154.
323. See Shepherd, supra note 321, at 50; Note, supra note 177, at 1558.
324. Kfoury, supra note 25, at 56.
326. See BELAIR, supra note 1, at 88. “[A]lthough juvenile justice records are supposed
Supreme Court's findings in *In re Gault* about the secrecy of juvenile records.\(^3\)\(^2\)\(^7\) The *Gault* court expressed great cynicism about the confidentiality of juvenile records.\(^3\)\(^8\) The Court recognized that most police officers and courts have great discretion over the decision to release juvenile records; consequently, disclosure is a common occurrence.\(^3\)\(^9\)

Opponents also reason that confidentiality is not essential because many private individuals simply seek information about a juvenile's misconduct from the juvenile himself.\(^3\)\(^\circ\)\(^\circ\) For example, many employment applications contain questions such as, "Have you ever been arrested?"\(^3\)\(^\circ\)\(^\circ\)\(^\circ\) By wording their applications such that delinquency information is produced, the information is released notwithstanding the juvenile justice system's shield of confidentiality.\(^3\)\(^\circ\) Therefore, if confidentiality does not truly exist, critics assert that it is unnecessary.

6. Confidentiality is an Inferior Interest.

The Supreme Court has never expressly decided whether an adjudicated juvenile delinquent has a constitutional right to confidentiality.\(^3\)\(^\circ\)\(^\circ\)\(^\circ\)

---

\(^3\)\(^2\)\(^7\) See id. (quoting *Gault*, 387 U.S. at 24) ("The Supreme Court ... has cynically observed that the claim of juvenile justice secrecy 'is more rhetoric than reality.'").

\(^3\)\(^8\) See *Gault*, 387 U.S. at 24.

\(^3\)\(^9\) See *id.* (quoting *Gault*, 387 U.S. at 24).

\(^3\)\(^\circ\)\(^\circ\) See *id.*. "Disclosure of court records is discretionary with the judge in most jurisdictions ... . [T]he evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers." *Id.* Furthermore, "[p]olice departments receive requests for information from the FBI and other law-enforcement agencies, the Armed Forces, and social service agencies, and most of them generally comply." *Id.* at 25.

\(^3\)\(^\circ\)\(^\circ\)\(^\circ\) See *BELAIR*, supra note 1, at 90 ("A second factor often cited as instrumental in permitting the release of juvenile record information to non-criminal justice agencies is the alleged practice of employers, the military, licensing boards and certain other private sector decisionmakers of seeking such data from the juvenile himself.").

\(^3\)\(^\circ\)\(^\circ\)\(^\circ\)\(^9\) Id. at 91 (quoting *T.N.G. v. Superior Court*, 484 P.2d 981, 988 (Cal. App. Dep't Super. Ct. 1971)).

\(^3\)\(^\circ\)\(^\circ\) See *Gault*, 387 U.S. at 25; *BELAIR*, supra note 1, at 90-91.

\(^3\)\(^\circ\)\(^\circ\)\(^\circ\) See *Blum*, supra note 8, at 375 ("Although the Supreme Court has never decided a case that required it to consider the constitutionality of a juvenile's right to confidentiality, a series of decisions dealing with juvenile courts has led federal and state appellate courts to conclude that this right is not constitutional in nature.") (footnote omitted); see also Bruce W. Clark, *The Constitutional Right to Confidentiality*, 51 GEO. WASH. L. REV. 133, 134 (1982) ("[T]he Supreme Court has never directly addressed the constitutionality of the government disclosing personal information ... .") ; *Kfoury*, supra note 25, at 57 ("The United States Supreme Court has not attempted to define a constitutional right of confidentiality for an adjudicated delinquent."); *Martin*, supra note 8, at 397-98 ("[T]he United States Supreme Court has never proclaimed a constitutional right of confidentiality for alleged delinquents, and the
However, the Court has decided several cases in which confidentiality conflicted with another individual's constitutional rights. In each case, the Supreme Court held that confidentiality must yield to the conflicting right. Consequently, although confidentiality may be a legitimate state interest, it is not a very significant one. Without great significance, opponents advocate that confidentiality can and should succumb to more substantial interests and rights, including protecting the public.

7. Interagency Confidentiality Burdens the System.

Opponents argue that secrecy restricts interagency sharing of information, and impedes state agencies' ability to effectively rehabilitate
and treat juveniles. According to critics, without full information juvenile justice agencies cannot fully diagnose and work to eliminate the causes of juvenile delinquency. Opponents assert that the free flow of information among agencies permits agencies to efficiently and accurately evaluate a juvenile's situation. Protecting secrecy may actually obstruct the system's goal of rehabilitation and acting in the juvenile's best interest.

Opponents also argue that restrictions on disclosure impedes effective policing by law enforcement. Critics opine that confidentiality actually prevents police from deterring criminal action and from effectively investigating criminal conduct when it does occur. Consequently, if police were given greater access to juvenile court records, police could better perform their most vital functions—improving crime prevention and investigation.

Although the arguments for lifting the confidentiality veil are persuasive, the adverse effects from disclosing and disseminating juvenile records must also be equally considered.

B. Arguments For Maintaining Confidentiality of Juvenile Records

The arguments favoring confidentiality stem from the rehabilitative ideal. Because disclosure adversely affects rehabilitation, proponents argue that confidentiality is an fundamental component of the juvenile justice system. There are four primary arguments for maintaining confidentiality of juvenile records.

338. See, e.g., Martin, supra note 8, at 406.
340. See, e.g., Martin, supra note 8, at 408.
341. See id.
342. See, e.g., Funk, supra note 295, at 924; Trasen, supra note 57, at 380.
343. See Funk, supra note 295, at 924-25.
344. See id.
345. See Geraghty & Raphael, supra note 30, at 75 ("[T]he articulated advantages of anonymity are grounded in a juvenile justice philosophy which sees rehabilitation of the child as the major goal of the system."); Jonas, supra note 30, at 296 ("The arguments in favor of shielding the juvenile from adverse publicity are rooted in the theme of rehabilitation.").
346. See, e.g., Charles E. Cashman, Confidentiality of Juvenile Court Proceedings: A Review, 23 JUV. JUST. 30, 30-31 (1973); see also Jonas, supra note 30, at 296.
347. See BELAIR, supra note 1, at 103.
1. Disclosure and Dissemination Actually Rewards and Reinforces Criminal Behavior.

Confidentiality proponents argue that notoriety actually encourages delinquent behavior among some juveniles. Notoriety bolsters delinquency because some juveniles, especially those with no other opportunity for social recognition, may actually commit crimes to gain public recognition. Publicity then becomes the end that juveniles seek because it gives a juvenile an audience before whom he can perform and gain admiration. "[P]ublicity, ironic as it might appear, may be viewed as a form of social recognition, a recognition somewhat hostile and grudging on the part of the upper echelons of the society, but replete with outright admiration when accorded by the delinquent's peers." Instead of protecting society and deterring future delinquent behavior, proponents argue that disclosure "plays directly into the hands of a large number of delinquents ...." In this way, disclosure may actually "contribute to the initial act of delinquency as well as subsequent recidivist behavior." Juveniles who enthusiastically welcome notoriety or who envy the attention their peers receive will not be directed toward conforming behavior; instead, they will be directed toward delinquent behavior and more of it. Recognizing this, proponents assert that preventing disclosure may be a more effective way of controlling juvenile crime.

2. Disclosure and Dissemination Stigmatizes Juvenile Offenders.

Although not a criminal conviction, a delinquency adjudication has the same stigmatizing effect in practice. This stigma can have serious,

348. See, e.g., Geis, supra note 299, at 152-55.
349. See Jonas, supra note 30, at 297 (citing Geis, supra note 299, at 154.)
350. See Geis, supra note 1, at 124-25.
352. Id.
353. Laubenstein, supra note 30, at 1903.
354. See id. 1903-04; see also Geis, supra note 299, at 155. Geis' article describes several youths' comments regarding publicity; one youth commented: "Many of us ... are like Pete, demanding attention, and doing nearly anything to get it. Often from broken homes, we are ... able to thrive gloriously for weeks on even the slightest word of praise or any kind of notice." Geis, supra note 299, at 155 (quoting NEESE, PRISON EXPOSURES 73 (1959)).
355. See David C. Howard et al., Publicity and Juvenile Court Proceedings, 11 CLEARINGHOUSE REV. 203, 208-11 (1977), for a case study discussing the effects of public exposure.
356. See In re Gault, 387 U.S. 1, 23-24 (1967) (noting that the term delinquent "has come to involve only slightly less stigma than the term 'criminal' applied to adults.


adverse consequences for a juvenile offender and his chances for rehabilitation. Because of these adverse effects, proponents contend that it is imperative that juvenile records remain confidential.

Society perceives delinquency as deviant behavior; therefore, society responds negatively to juveniles who have been labeled delinquent. Specifically, once aware of the juvenile's label, as well as his deviant acts, society responds differently to the juvenile, attempting to ostracize him from the community. At this point, the juvenile becomes aware of his delinquency label and his self-image is adversely affected. The juvenile begins to believe that "he is no good or that he can't make it on the outside." Eventually, the juvenile "becomes committed to deviant activities and peers" and views himself as a deviant. Unable to escape society's label, the juvenile engages in more delinquent behavior. Consequently, the label's stigma creates a self-fulfilling prophecy that tends to incite and exacerbate the very behavior that was complained about in the first instance. Therefore, confidentiality proponents argue that if society was unaware of the juvenile's status, negative perceptions would not exist, and the juvenile's self-image and behavior would

357. See Belair, supra note 1, at 106 ("Many proponents of juvenile confidentiality also argue . . . that publicity, rather than rewarding juveniles, may actually traumatize and scar them so that emotionally they are less susceptible to efforts at rehabilitation and assimilation into the mainstream of society."); Lister, supra note 107, at 210 ("The creation and preservation of a stigma of wrongdoing may prevent the effective restoration of the juvenile's social status and opportunities . . . .").


360. See id.

361. See Donald J. Shoemaker, Theories of Delinquency: An Examination of Explanations of Delinquent Behavior 210-11 (2d ed. 1990); see also Cashman, supra note 346, at 34.

362. Cashman, supra note 346, at 34.

363. Rankin Mahoney, supra note 359, at 584

364. See id.

365. See Cashman, supra note 346, at 34; Rankin Mahoney, supra note 359, at 584.

not be altered.\textsuperscript{367}

3. Releasing Juvenile Records Prevents a Juvenile’s Re-assimilation into Society.

Confidentiality proponents also argue that disclosing and disseminating juvenile records is a “serious impediment”\textsuperscript{368} to re-assimilating the juvenile into society.\textsuperscript{369} These proponents contend that when schools, friends, employers, and police are aware of the juvenile’s delinquency status, he is never given the opportunity to start anew:\textsuperscript{370} “If a person is stereotyped a criminal or ‘bad guy’ the person will never be able to live up to their positive potential. If you’re glued to your past you can never move on or change .... Everyone wants to stay out of trouble. They need a chance!!”\textsuperscript{371}

Confidentiality advocates assert that revealing a juvenile’s wrongdoing creates numerous “civil disabilities.”\textsuperscript{372} Specifically, publicity not only embarrasses a juvenile and his family,\textsuperscript{373} it may also thwart employment and educational opportunities\textsuperscript{374} and may subject a juvenile to heightened police suspicion.\textsuperscript{375} Proponents assert that publicity impedes

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{367} See Laubenstein, \textit{supra} note 30, at 1903. Society’s knowledge of a juvenile’s delinquent behavior may play a substantial role in determining whether that behavior will be repeated:
\begin{itemize}
\item A youth commits an act, perhaps on a whim or as a reaction to a particular set of circumstances, such as peer pressure or boredom. If the act is not noticed or reacted to by others, it may be denied by the youth as not being part of his usual mode of behavior and not repeated. If he is not labeled, the youth may “grow out” of his delinquent behavior. However, if individuals or institutions in the community respond to his behavior as “bad,” the youth may come to define it and eventually himself as “bad.”
\item Rankin Mahoney, \textit{supra} note 359, at 584-85.
\end{itemize}
\item \textsuperscript{368} Lister, \textit{supra} note 107, at 210 (quoting \textit{In re Contreras}, 241 P.2d 633 (1952)) (“Viewed realistically, a juvenile justice record is both a blight upon the character of a child and a ‘serious impediment’ to the future.”).
\item \textsuperscript{369} See, e.g., BELAIR, \textit{supra} note 1, at 107 (citations omitted) (“Both common sense and a relatively large body of empirical data insist that publicity and the availability of juvenile justice record information stigmatizes the juvenile and makes it much harder for him to obtain a job, join the military, get credit, obtain licenses, or otherwise constructively participate in society.”); Cashman, \textit{supra} note 346, at 33.
\item \textsuperscript{370} See Cashman, \textit{supra} note 346, at 33-34.
\item \textsuperscript{371} \textit{Attorney General’s Youth Task Force on Juvenile Justice}, 20 WM. MITCHELL L. REV. 693, 705 (1994) (emphasis omitted).
\item \textsuperscript{372} Howard et al., \textit{supra} note 355, at 204.
\item \textsuperscript{373} See Lister, \textit{supra} note 107, at 210; discussion \textit{infra} Part V.B.4.
\item \textsuperscript{374} See Howard, et al., \textit{supra} note 355, at 204.
\item \textsuperscript{375} See Spalty, \textit{supra} note 274, at 469; Rankin Mahoney, \textit{supra} note 359, at 598; Lemert, \textit{supra} note 18, at 380.
\end{itemize}
\end{itemize}
\end{footnotesize}
a juvenile's employment possibilities because employers may refuse to hire someone with a record. Furthermore, even if a juvenile delinquent secures employment, it is usually an unskilled or semiskilled position about which "employers are concerned with little beyond the worker's ability to perform on the job." Although a juvenile may be able to secure employment, his employment may not be economically stable or provide upward mobility. Similarly, proponents argue that disclosing a juvenile record may jeopardize a juvenile's educational opportunities. They argue that opening juvenile records to school administrators and teachers is dangerous because if teachers have access to juvenile records, they will discriminate against juvenile delinquents, stereotype them as "bad guys," and believe they lack potential. Finally, greater access to juvenile records may subject a juvenile to increased police scrutiny and harassment. A juvenile who is labeled a delinquent and who is known to the police by his record is watched more closely by the police; will be detained and questioned on less substantial grounds than a juvenile without a record; and will be the target of police suspicion when a crime occurs in his neighborhood. Because a juvenile court record has the potential to handicap a juvenile for his entire life, confidentiality proponents believe that the juvenile justice system must maintain secrecy.

376. See Rankin Mahoney, supra note 359, at 598. These opportunities are limited even if the juvenile has only been arrested and not adjudged delinquent. See id.
377. Lemert, supra note 18, at 378.
378. See id. at 378-79. This lack of opportunity can cause juveniles to "develop a kind of world view that the 'game isn't worth the candle'; in other words, that the rewards of effort are too few or are greatly outweighed by the penalties associated with stigmatized status." Id. at 379.
379. See Howard et al., supra note 355, at 204.
380. See Attorney General's Youth Task Force on Juvenile Justice, supra note 371, at 705, 724; Rankin Mahoney, supra note 359, at 600 (explaining that one researcher who "studied the reactions to delinquent labels by teachers and students in a junior high school...found that students and teachers alike perceived the labeled boys less favorably than the unlabeled boys.")

The Task Force's article reflects youth's perspectives on juvenile crime and the release of juvenile records. See Attorney General's Youth Task Force on Juvenile Justice, supra note 371, at 694-95. Regarding disclosure to teachers and school district administrators, one youth stated: "I think what people do on the street and what they do in school are two different things so their records shouldn't be open to the teachers and principals because they'll treat him differently or think about him differently and I think everyone deserves a fair start in school." Id. at 724.
381. See Rankin Mahoney, supra note 359, at 598; Spalty, supra note 274, at 469.
382. See Spalty, supra note 274, at 469; Rankin-Mahoney, supra note 359, at 598.
383. See Cashman, supra note 346, at 32. According to Cashman, a juvenile record is a
Proponents also contend that exposing the juvenile's delinquency not only adversely affects the juvenile's educational opportunities, employment prospects, and law enforcement contacts, it also "increase[s] the likelihood that the juvenile will commit further delinquent acts." Because the juvenile cannot escape his delinquency label, he becomes committed to delinquent activities and peers, and his delinquent behavior continues. As such, disseminating juvenile records ultimately "may defeat the beneficent and rehabilitative purposes of a State's juvenile court system." Consequently, proponents opine that if states maintained confidentiality, then the serious impediments to rehabilitation would be removed, the juvenile's delinquent status would be hidden, and his delinquent behavior would cease.

4. Disclosing and Disseminating Juvenile Records Affects the Juvenile's Family Relationship.

Confidentiality advocates also contend that secrecy is essential because it protects the family relationship. Protecting the family is crucial because a strong family relationship is necessary to the juvenile's successful rehabilitation and re-assimilation into society.

constant torment in a juvenile offender's life:
The grim truth is that a juvenile court record is a lengthening chain that its riveted possessor will drag after him through childhood, youthhood, adulthood and middle age. Even when the ill-starred child becomes an old man the record will be there to haunt, plague and torment him. It will be an ominous shadow following his tottering steps, it will stand by his bed at night and it will hover over him when he dozes fitfully in the dusk of his remaining day.... It will be a witness against him in the court of business and commerce; it will be a bar sinister to him in the court of society where the penalties inflicted for deviation from conventional codes can be as ruinous as those imposed in any criminal court; it will be a sword of Damocles hanging over his head in public life; it will be a weapon to hold him at bay as he seeks respectable and honorable employment.

Id.

384. See Laubenstein, supra note 30, at 1905. For example, public exposure may burden a juvenile's relationships with non-delinquent juveniles, which effectively forces the juvenile to associate with other delinquent youths. See id. at 1904-05. Additionally, public exposure may cause a juvenile to lose employment opportunities and may encourage him to engage in more delinquent acts. See Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 108 (1979) (Rehnquist, J., concurring).

385. See Rankin Mahoney, supra note 359, at 584.

386. Laubenstein, supra note 30, at 1905 (quoting Daily Mail Publ'g Co., 443 U.S. at 108 (Rehnquist, J. concurring).

387. See, e.g., Laubenstein, supra note 30, at 1905.

388. See Rankin Mahoney, supra note 359, at 600.

389. See Laubenstein, supra note 30, at 1904.
Publicly exposing juvenile records may seriously strain the family. Proponents argue that a family may perceive the juvenile's delinquency as either "evidence of its own failure or as a threat to the well-being and respectability of other family members." As a result, family members may withdraw their support, isolating the juvenile from the family. Secrecy proponents also assert that a family may fear that "the official labeling of one of its members will increase the possibility of future official labeling of other family members." Again, to resist contaminating the other family members, the family may retreat, ostracizing the juvenile delinquent. Without parental support, a juvenile's delinquency label becomes even more oppressive. Unable to escape the oppression, the juvenile will engage in more delinquent behavior, making the possibility of rehabilitation even more remote. Accordingly, proponents argue that releasing juvenile records thwarts the juvenile's reentry into a healthy family unit, deprives the juvenile of cherished family encouragement, and reduces the juvenile's chances for rehabilitation.

Some confidentiality proponents also contend that there are parents who either do not or cannot control their child's behavior, despite their fear of publicity. As a result, releasing juvenile records is either ineffective or unjust. Publicity is ineffective for those parents who are intentionally unaware of their child's actions. If exposure will not force the parent to exercise greater control, then disclosure is meaningless. Similarly, publicity is unjust because some parents simply cannot control their children's actions, even if they are responsible parents. Accord-

390. See Rankin Mahoney, supra note 359, at 601.
391. Id.
392. See id. "Since each labeling incident of any member is to some extent a labeling of the family, the family may feel threatened by the labeled member and react strongly to isolate him from the family group." Id.
393. Id.
394. See id.
395. See Laubenstein, supra note 30, at 1904.
396. See id.; see also discussion supra Part V.B.2.
397. See, e.g., Kfoury, supra note 25, at 56; Laubenstein, supra note 30, at 1904.
398. See, e.g., O'Reilly, supra note 111, at 409.
399. See id.; see also BELAIR, supra note 1, at 109 ("Obviously, it is harsh and unfair to publicly embarrass the innocent parents and siblings of a juvenile offender."); Jonas, supra note 30, at 296 ("[I]t is viewed as both cruel and counterproductive to punish the parents of a delinquent child by publicizing the child's misbehavior.").
400. See Rankin Mahoney, supra note 359, at 600 ("[Y]ouths may find a lack of concern among family members or attitudes neutralizing the importance of the court experience.").
401. But see Shepherd, supra note 321, at 50; Note, supra note 177, at 1558.
402. See O'Reilly, supra note 111, at 409.
ingly, confidentiality proponents argue that it is unfair and counterpro-
ductive to punish these parents when "the child, not the parents, is di-
rectly at fault."\textsuperscript{403}

\textbf{C. Striking the Balance}

Because the presumption of juvenile record confidentiality continues
in the Juvenile Justice Code, the confidentiality provisions consider re-
habilitation on their face.\textsuperscript{404} Rehabilitation is quickly dismissed, how-
ever, as the many exceptions that allow disclosure demonstrate.\textsuperscript{405} Be-
cause disclosure is statutorily authorized, and in some situations
mandated, in practice community protection and individual account-
ability transcend considerations of rehabilitation and the juvenile's best
interests.\textsuperscript{406} Ultimately, this imbalance will result in disclosure and dis-
semination even when it is detrimental to the juvenile's rehabilitation
and does nothing to promote community protection and individual ac-
countability.

The Code's confidentiality provisions contain two major flaws. First,
the mandatory inspection provisions\textsuperscript{407} are flawed because they force
police and courts to release juvenile records, even when the particular
situation may indicate that inspection is improper. Second, the discre-
tionary release provisions\textsuperscript{408} are problematic because they fail to provide
courts and police with any intelligible guidelines. As a result of these
flaws, under the new Code police officers and courts will overlook criti-
cal and significant factors when releasing juvenile records. These flaws
can be resolved, however, by implementing a scheme that allows the
police and courts to use guided discretion in every disclosure decision.
By providing for guided discretion, the Code would allow police officers
and juvenile court judges to consider the specifics of each case according
to a list of factors. Using these factors, police officers and judges could
determine which set of the Code's stated goals should prevail.

Before permitting the disclosure of juvenile records, the Code's con-
fidentiality provisions should force courts and police officers to consider

\begin{footnotesize}
\begin{enumerate}
\item Jonas, \textit{supra} note 30, at 296.
\item See Wis. STAT. § 938.01 (1995-1996); Pederson, \textit{supra} note 8, at 26.
\item See Wis. STAT. § 938.396(1b)-(1f), amended by 1997-1998 Wis. Legis. Serv. Act 27 §
  5275g-m, Act 35 § 567 (West), (2)(a)-(fm), (2m)(a)-(b), (7)(a)-(c), (8) (1995-1996).
\item See id.
\item See Wis. STAT. §§ 938.396(1g), (2)(a)-(fm), (2m)(a)-(b).
\item See \textit{id.} at §§ 938.396(1b), (1d), (1m)-(1t), amended by 1997-1998 Wis. Legis. Serv.
  Act 27 § 5275g-m, Act 35 § 567 (West).
\end{enumerate}
\end{footnotesize}
the complete picture." Specifically, juvenile court judges and police officers must be allowed to consider "evidence that focuses specifically on the juvenile in question" to determine which of the Code's stated purposes should prevail. In making their decision these actors should consider such factors as: (1) the effect disclosure has on the juvenile's prospects for rehabilitation and re-assimilation; (2) the impact disclosure has on the juvenile's family and surrounding community; (3) any stigmatizing harm the juvenile will suffer if his or her record is released; (4) the seriousness of the alleged offense; (5) whether the juvenile is an habitual offender; (6) the requester's identity; (7) the purpose for which the information will be used; and (8) whether the public's safety is threatened. Using this "holistic approach" and balancing the particular facts of each case, police officers and courts can consider the particular circumstances each case presents and determine the degree of confidentiality that is necessary. Furthermore, case-specific balancing will lead to an accurate balancing of the statute's goals instead of always favoring one set of goals over the other.

Because the statutory goals would be accurately balanced using a

409. See Laubenstein, supra note 30, at 1931 ("Courts should view the total picture when considering the probable impact publicity will have on the juvenile's prospects for rehabilitation and reform."); see also Herget v. Circuit Court, 267 N.W.2d 309 (Wis. 1978) (providing the framework for a modern-day balancing test under the Code's confidentiality provisions); In re Peter B., 516 N.W.2d 746 (Wis. Ct. App. 1994) (applying Herget-type balancing test and illustrating an accurate balancing of the competing interests).

410. Laubenstein, supra note 30, at 1931.


412. See Laubenstein, supra note 30, at 1932; discussion supra Part V.B.2.

413. Laubenstein, supra note 30, at 1932; see discussion supra Part V.B.3, 4.

414. See discussion supra Part V.A.3, B.2-4.

415. See Dunn, supra note 112, at 397 ("Statutes which permit limited disclosure when the behavior is deemed serious but maintain confidentiality for lesser offenses best satisfy the concerns of each faction.") (footnote omitted); see also WIS. STAT. § 938.396(2m)(a) (The seriousness of the juvenile's offense is considered under the statute's requester provision.).

416. See Dunn, supra note 112, at 397. ("[P]erhaps a more liberal disclosure policy is warranted for habitual offenders."); see also WIS. STAT. § 938.396(2m)(b) (disclosure under subsection (2m)(b) of the requester provision depends on whether the juvenile is a repeat offender).

417. See generally WIS. STAT. § 938.396 (discussing different disclosure rules depending on who the requester is).

418. See discussion supra Part V.A.7.

419. See discussion supra Part V.A.1.

420. Laubenstein, supra note 30, at 1931.

421. Id. at 1938.

422. Id.
holistic approach, police and courts would release juvenile records when deserved, but maintain confidentiality when disclosure is inappropriate. As one commentator noted:

The public wants to know what became of the youth who murdered her math teacher; it is less concerned with the disposition of the youngster who spread peanut butter on the mayor’s house. . . . [Furthermore] if a juvenile has been detained for the same offense on several different occasions, the likelihood of recurrence is high enough to justify making those individuals interacting with the juvenile, such as teachers, employers, and youth agencies, aware of her record. A community continually victimized by the same juvenile is willing to “forgive and forget” only so many times.

By using a case-by-case approach, the Code’s true objective would be realized and neither goal would predominate.

Implementing a case specific approach to confidentiality would not require a drastic overhaul of the system, as this approach is already commonplace within the system. First, as the Wisconsin Supreme Court’s decision in Herget v. Circuit Court and the Wisconsin Court ofAppeal’s decision in In re Peter B. demonstrate, the use of case-specific balancing is firmly rooted in the system and provides the appropriate degree of confidentiality. The Herget decision instructed trial courts to make a preliminary finding regarding the plaintiff’s need for the information and then to engage in a case-specific balancing of the interests involved in the case. Specifically, in making a decision to disclose juvenile records, trial courts need to weigh the “the victim’s interest in recovering for the damage he has suffered . . . [and] the redress of private wrongs through private litigation” against “the juvenile’s interest in rehabilitation and in avoiding the stigma of revelation . . . [and] the protection of the integrity of the juvenile justice system.” Follow-

423. See Dunn, supra note 112, at 397. For example, disclosure is probably appropriate when faced with a serious, repeat offender who cannot be rehabilitated and who threatens society. See id. Confidentiality should be maintained, however, for juveniles who commit lesser offenses, do not threaten the community, and can, given the opportunity, be rehabilitated. See id.

424. Id.

425. See Wis. Stat. § 938.01(2).

426. 267 N.W.2d 309 (Wis. 1978).


428. See 267 N.W.2d at 317.

429. Id.

430. Id.
ing this case-specific balancing test, the court held that disclosure is permitted only after finding that the “need for confidentiality is outweig\ud220ht by the exigencies of the circumstances.” Applying Herget, the In re Peter B. court engaged in a similar case-specific balancing before determining if disclosure was appropriate. Balancing the competing interests, the court of appeals affirmed the trial court’s finding that the “exigencies of the present circumstances” and the public’s interest in safety outweighed the juvenile’s need for confidentiality.

Second, the Juvenile Justice Code itself also codifies a form of case-specific balancing. Specifically, the confidentiality provisions codify a version of the Herget case-specific balancing test. This test has limited application, however, as it is used only in court proceedings where a person is denied access to police records.

Finally, the Code instructs courts to make a case-specific determination when considering whether to waive a juvenile into adult criminal court. Specifically, section 938.18 provides that a court must “base its decision” on certain criteria. Some of these criteria include:

- The personality and prior record of the juvenile . . . , the juvenile’s motives and attitudes, the juvenile’s physical and mental maturity, the juvenile’s pattern of living, prior offenses, prior treatment history and apparent potential for responding to future treatment; the type and seriousness of the offense . . . [and] the extent to which it was committed in a violent, aggressive, premeditated or willful manner . . . ; and the adequacy and suitability of facilities, services and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system . . . .

These examples demonstrate that implementing case-specific balancing or decisionmaking would be an easy transition, as the juvenile justice system is already familiar with its application.

---

431. Id.
432. See 516 N.W.2d at 748-49, 751-52.
433. Id. at 749, 752.
435. See id.
437. Id.
438. See id. § 938.18(5)(a)-(c).
VI. CONCLUDING OBSERVATIONS

As the confidentiality provisions of the Juvenile Justice Code demonstrate, the Wisconsin Legislature had difficulty creating a juvenile code that adequately satisfies its goals—balancing rehabilitation and the juvenile’s best interests with individual accountability and community protection. Instead of carefully balancing these goals and assigning equal weight to each, community protection and individual accountability appear to outweigh rehabilitating and serving the juvenile’s best interests. The superior position the Code’s new goals occupy has resulted in the erosion of juvenile records’ confidentiality.

The public should recognize the legislature’s false promises and should reject the confidentiality provisions’ arbitrary and sometimes mechanical approach to disclosure of juvenile records. Instead of competing with each other, rehabilitation, protecting the community and individual accountability should be reconciled by using a case-by-case, holistic approach. In doing so, the appropriate result, be it disclosure or confidentiality, will be reached.

KARA E. NELSON

---


440. See id. § 938.01(2); Dunn, supra note 112, at 396 (“It is difficult for lawmakers to formulate statutes which satisfy the interests of both confidentiality and the public’s right to know.”).

441. See Wis. STAT. §§ 938.01, .396, amended by 1997-1998 Wis. Legis. Serv. Act 3, § 221, Act 27, § 5275g-m, Act 35, §§ 567-68 (West).


443. See Laubenstein, supra note 30, at 1935-38.