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Privacy Versus *Parens Patriae* the Role of Police Records in the Sentencing and Surveillance of Juveniles

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PRIVACY VERSUS *PARENS PATRIAE*: THE ROLE OF POLICE RECORDS IN THE SENTENCING AND SURVEILLANCE OF JUVENILES

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The purpose of this article is to examine juvenile record systems maintained by police authorities. A primary thesis is that current procedures governing the creation and dissemination of such records are so severely misguided by underlying *parens patriae* concepts that they often result in the purposeless stigmatization of a far greater range of youths than the juvenile justice system has any justification in attempting to deal with. Indeed, increasing evidence suggests that the net effect of such record keeping is to ensure that many of the subject juveniles will mature into confirmed delinquents.

From the standpoint of the civil libertarian, existing procedures often seem Orwellian—at least until one finds that the system is as inefficient and pointless as it is punitive. Thus, a subsidiary theme of this article is that current procedures blend benevolent motive and authoritarian practice in such a way that no interest, including that of law enforcement, is well served. In their ambiguity and apparent purposelessness, juvenile police record systems and procedures seem not so much Orwellian as Kafkaesque.

There is a larger significance to this analysis of record-keeping procedures in the juvenile justice system. The key issues involved in juvenile record keeping—the adverse impact of labeling upon the individual, the invasion of privacy, the conflicting interests of the record custodian, and the capacity for unintended distortion in even the most well intentioned data handling system—are equally pressing in the many other fields in which the state has begun to assemble, code, and use personal data.

Assessments and characterizations of record systems are premature at this point, however. The very phrase "juvenile record system" is probably without meaning to many since the topic has largely escaped serious attention. Even after the Supreme Court's decision in *In re Gault*,[1] the unpublicized institutions of the juvenile justice system have

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1 387 U.S. 1 (1967). Attempts to survey the juvenile justice field date back only a

remained legal *terra incognita*. Yet in the wake of the Court's recent decision in *McKeiver v. Pennsylvania*[2] that jury trials are not constitutionally required in juvenile deliquency prosecutions, a shift in the orientation of juvenile law reform seems inevitable. While *Gault* encouraged concentration on the trial or "adjudicatory stage of the juvenile court," *McKeiver* may herald a refocusing of attention on the pre-judicial stages of juvenile justice—an area which the President's Commission on Law Enforcement and Administration of Justice (upon whose findings *McKeiver* heavily relied) has described as a "vast continent of sublegal dispositions . . . outside of and hence beyond the guidance and control of articulated policies and legal restraints."[3]

Before exploring this continent, however, it seems wise to clarify the specific topic. This article is the outgrowth of a lawsuit, *Cuevas v. Leary*,[4] brought by the author and other legal services attorneys to challenge juvenile record procedures in New York City. Specifically, *Cuevas* challenged the New York Police Department's "Y.D.-1" (Youth Division) card system, under which police records on juveniles were created and widely disseminated—all without either a formal "arrest" or review mechanism. Essentially, plaintiffs claimed that the records

few years. A seminal legal work, cited often in *Gault*, was Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966). Earlier, sociologists had focused on the same area. *See* A. CICOUREL, THE SOCIAL ORGANIZATION OF JUVENILE JUSTICE (1968); Piliavin & Briar, *Police Encounters with Juveniles*, 70 AM. J. SOCIOLOGY 206 (1964); *cf.* Ferster & Courtless, *The Beginning of Juvenile Justice, Police Practices, and the Juvenile Offender*, 22 VAND. L. REV. 567 (1969).

2 403 U.S. 528 (1971).

3 THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 82 (1967) [hereinafter cited as CRIME COMM'N REPORT]. The term "pre-judicial stage" is widely used in discussions of the juvenile justice system to refer to court diversionary procedures which can lead to dispositions of criminal charges against juveniles, by either police officers or probation officials attached to the intake section of the juvenile court, without a formal "finding" of guilt.

4 No. 70-2017 (S.D.N.Y., filed May 21, 1970). The request for a preliminary injunction was withdrawn when the New York City Police Department entered into a stipulation satisfactory to plaintiffs. The stipulation forbade the dissemination of the juvenile records at issue to other government agencies, including the probation department and the New York City courts, which had previously used such records in the formulation of presentence and probationary reports. In addition, a full scale study was to be conducted by the mayor's Criminal Justice Coordinating Committee (CJCC) and completed within one year, at which point the parties would determine, based upon the CJCC's recommendations, whether a dispute still existed. *See* N.Y. Times, Aug. 9, 1970, at 34, col. 1. In addition to the author, Oscar Chase and Lawrence McGaughey (of Community Action for Legal Services) were of counsel.

Upon completion of that study, the parties agreed to revised procedures requiring both the annual destruction of all Y.D. reports on juveniles who had reached their seventeenth birthday during the intervening year and the cessation of the circulation of such records outside the Police Department.

created were unreliable and subjected the juvenile to a "de facto adjudication of guilt" based solely on the opinion of the individual patrolman who filed the Y.D. report.

The Y.D.-1 procedure will later be examined in detail; at present, a summary of how it operates gives some idea of the possible scope and significance of juvenile record systems.

Accused by an unidentified complainant of either a crime or simply "misconduct," a youth is detained, questioned, or brought to the police station, but never formally arrested. For any of a variety of reasons—insufficient evidence, unwillingness of the complainant to prosecute, distaste on the part of the police for excessive court appearances, or simply well meaning benevolence—he is informed that no prosecution will result, but that he has been "registered" as a juvenile delinquent and that a permanent record of the incident will be filed in the Police Department's Central Records Bureau. The scenario may vary: police observation rather than a complaint may trigger the questioning, the juvenile may never be actually detained, or he may not be informed that a field report has been sent to the Central Records Bureau. In any event, the consequence of the incident is the creation of a police dossier without further opportunity for rebuttal or amplification by the juvenile. The agencies, public and private, to which the record may be disseminated include virtually all the agencies that deal with juveniles: courts, the probation department, schools, and welfare agencies. Each will likely read the report with what one writer has called "the presumption of regularity":[5] the belief that trained policemen do not often err but rather act only upon sufficient proof. Unlike adult arrest records, such prearrest reports appear complete on their face and are often disseminated before a dispositional notation is inserted.[6] The contents of the record vary, ranging from the simple notation of a numerical offense code or a sketchy summary of the incident to a lengthy description of the juvenile and his family.

It must be underscored at the outset that it is by no means certain that practices such as those just described amount to a legally recognizable injury. Considerable doubt exists that procedures at the prejudicial stages of juvenile court proceedings are subject to judicial re-

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[5] J. SKOLNICK, JUSTICE WITHOUT TRIAL 198 (2d ed. 1967).

[6] In New York City, for instance, adult arrest records are required to bear a notation as to the eventual disposition of the case. N.Y. CITY POLICE DEP'T, RULES AND PROCEDURES ch. 9; §§ 54.0-54.1 (1956). Even where this is not the case or where such requirements are not obeyed, however, the layman should understand that an arrest is only the first step in a criminal prosecution. Standing alone, an arrest record does not imply that guilt has been found.

view. Whether the individual has a right to complain of the inaccuracy or irrelevance of information during the sentencing process is another unresolved problem. We will later examine possible avenues for reforming the sentencing process in order to minimize the impact of inaccurate or irrelevant data. Again, a question of justiciability is central: what legal controls can or should be formulated to protect the individual who faces sentence? Finally, the question of the juvenile's right to privacy, although far from settled, cannot be ignored. The ultimate issue, broadly stated, is what legal restrictions should be placed on the maintenance and dissemination of personal data when the state is the record custodian.

I

Parens Patriae TODAY

> The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. . . . [T]here is no trace of the doctrine in the history of criminal jurisprudence. *In re Gault.*[7]

With these words, the *Gault* decision in 1967 seemed to signal the demise of *parens patriae*. Five years later in *McKeiver*, however, the Court appears to have come full circle from its original skepticism of *parens patriae* to a concern for the preservation of the "paternal attention that the juvenile court system contemplates."[8] Yet *McKeiver* is a decision that is difficult to interpret. The case was decided by a mere four-justice plurality.[9] Moreover, the plurality opinion by Justice Blackmun reveals a basic ambivalence. Blackmun traces the history of the juvenile court movement, acknowledges its shortcomings, and even seems to concede the plausibility of appellant's argument that, without a jury, there exists the possibility of "prejudgment" of the juvenile de-

7 387 U.S. 1, 16 (1967).

8 McKeiver v. Pennsylvania, 403 U.S. 528, 550 (1971).

9 Justice Harlan concurred, maintaining his opposition to the decision in Duncan v. Louisiana, 391 U.S. 145 (1968), which extended the sixth amendment right of jury trial to the states. Justice Brennan concurred in *McKeiver*, but dissented in the companion cases on the ground that a juvenile's due process rights were adequately protected against possible "judicial oppression" in the absence of a jury only as long as the trial was public and the press permitted to attend. 403 U.S. at 550. Justice Douglas, with whom Justices Black and Marshall joined, dissented, noting the danger of prejudgment because of "'reports already submitted to [the judge] by the police or caseworkers in the case.'" *Id.* at 563, *quoting In re* McCloud (Providence, R.I. Fam. Ct. Jan. 15, 1971).

fendant, either because of the judge's "awareness of the juvenile's prior record and of the contents of the social file," or because of his familiarity with certain police and probation witnesses who might communicate the prior record to the court.[10] Yet Justice Blackmun was not prepared to conclude that the proposed remedy—the jury trial—would cure these deficiencies; rather, he saw it as a "disruptive" force which would terminate the juvenile court experiment. Notwithstanding its revitalization of the *parens patriae* rationale, *McKeiver* thus concedes that serious problems remain in the juvenile courts.[11] It may not, therefore, as it seems at first glance, signify the end of judicial reform of the juvenile court; rather, it may merely demonstrate an insistence that proposed reforms relate directly to alleged abuses, and that they involve a minimum disruption of the "beneficial" innovations of the juvenile court.

The fundamental problem, however, is determining when the juvenile court's innovations are beneficial and when they result in abuse. Two contradictory ideas are enunciated in *McKeiver*. First, the danger of misuse of juvenile records is tacitly acknowledged. Next, the innovations of the juvenile court which should not be sacrificed are asserted to be its "informality and flexibility" at the pre-judicial and dispositional stages—exactly the preconditions for the misuse of those records.

The danger that pre-judicial procedures will allow the misuse of confidential data is documented in detail in the report of the President's Commission on Law Enforcement and Administration of Justice, and of its special Task Force on Juvenile Delinquency.[12] *McKeiver* relies heavily on these reports while at the same time stressing the preferability of informality to rigid due process procedures. *McKeiver* is not the first

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10 403 U.S. at 550. The danger of prejudgment was attributable to the fact that the juvenile court judges in the defendant states could examine the probation file *before* trial. *See* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 14 (1966).

In some states the presentence report is even considered a public document open to all. *See* Manson, *Studying the Offender Before the Court*, 33 FED. PROBATION, June 1969, at 17. At the federal level, Rule 32 of the Federal Rules of Criminal Procedure prevents inspection prior to a plea of guilty or a verdict. *See* Gregg v. United States, 394 U.S. 489 (1969). Some courts have held pretrial disclosure of juvenile records to the trial judge to constitute reversible error. *In re* Corey, 266 Cal. App. 2d 295, 72 Cal. Rptr. 115 (1st Dist. 1968). Thus it is interesting to speculate whether the same result would have been reached in *McKeiver* if plaintiffs had not specifically sought a jury trial, but rather a reversal because of disclosure of records.

11 403 U.S. at 543-45.

12 PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967) [hereinafter cited as TASK FORCE REPORT].

case to seem inconsistent in this regard. In *Gault*, Justice Fortas relied extensively upon the lack of confidentiality in reports of police contacts with minors to discredit the idea of the juvenile court as a benevolent agency.[13] That decision twice took notice of the counterproductive effect of informal "adjustment" procedures at the pre-judicial stage.[14] But *Gault*, for all this emphasis, isolated the "adjudicatory stage" of the juvenile court as the proper subject for judicial scrutiny and reform. Indeed, the opinion expressly stated, "[W]e are not here concerned with . . . the pre-judicial stages of the juvenile process."[15]

This deliberate refusal to consider the pre-judicial stage, however, appears to be more the product of judicial caution than of lack of concern. While juvenile records are misused, the locus of the abuse is within an area the Court has declined to enter in the belief that it might disrupt desirable experimentation. The Court's policy of salutary neglect of the pre-judicial area is probably motivated by the same foreboding that seems to have dissuaded it from applying an equal protection analysis to juvenile courts,[16] namely the fear that truly

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[13] In most States the police keep a complete file of juvenile "police contacts" and have complete discretion as to disclosure of juvenile records. Police 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. Private employers word their application forms to produce information concerning juvenile arrests and court proceedings, and in some jurisdictions *information concerning juvenile police contacts is furnished private employers as well as government agencies.*

387 U.S. at 24-25 (emphasis added).

[14] *Id.* at 26, 51. Such procedures have been found to "engender in the child a sense of injustice provoked by seemingly all-powerful and challengeless exercise of authority by judges and probation officers." CRIME COMM'N REPORT 85. *See* S. WHEELER & L. COTTRELL, JUVENILE DELINQUENCY: ITS PREVENTION AND CONTROL 32-33 (1966).

[15] 387 U.S. at 13. More recently, in *In re* Winship, 397 U.S. 358 (1970), Justice Brennan emphasized that this limit still held. *Id.* at 359 n.1. He was answering the complaint of Justice Harlan that the Court was approaching a requirement of "automatic congruence" between adult and juvenile judicial administration. *But see* text accompanying note 3 *supra*.

[16] *Gault* never cites the equal protection clause for its holding, and is therefore a "due process" case. The significance of this has been frequently commented upon. *See* Dorsen & Rezneck, *In re Gault and the Future of Juvenile Law*, I FAMILY L.Q., Dec. 1967, at 1; Glen, *Juvenile Court Reform: Procedural Process and Substantive Stasis*, 1970 WIS. L. REV. 431. A general consensus appears to exist that the Court has adopted much the same "selective incorporation" approach with regard to the juvenile court that it has applied for two decades to the states. The failure to utilize equal protection as a basis for reform is open to considerable criticism. Presumably, if special aspects of the juvenile justice system are in fact beneficial or rehabilitative, their preservation would be justified even within an equal protection framework, since a rational basis would exist for the distinction between adult and juvenile procedures. *See* Note, *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 161 n.23 (1970).

beneficial innovations of the juvenile court might have to be abandoned simply because they deviated from procedures at the adult criminal level. Yet, limiting the penetration of the Bill of Rights to the adjudicatory stage can be justified only if problems at the pre-judicial stage are considered to be basically peripheral.

Since *Gault*, a number of lower court opinions have relied on its philosophy, rather than on its holding, to review questions of pre-judicial procedures.[17] However, a process of judicial education remains necessary. Appellate courts have not yet been sensitized to the real significance[18] of pre-judicial procedures. Perhaps the most telling fact about the juvenile court is that the majority of juveniles taken into custody are subjected to station house or probation department procedures without an opportunity for a hearing or chance for review of official action, and that these procedures usually involve the creation of a police record and often the imposition of sanctions.[19] Ultimately, the importance of the pre-judicial stage is such that a policy of benign neglect by the courts cannot be justified. Particularly through the use of record systems, personnel in the pre-judicial stage have in effect begun to parallel and even preempt the role of the juvenile court judge as the legally authorized fact finder and dispositional authority. Reform of the adjudicatory stage, which was the thrust of the cases from *Gault* to *McKeiver*, without more, may prove to be a myopic and futile exercise. The advantages, disadvantages, and abuses of current pre-judicial and dispositional practices must be analyzed, balanced, and reconciled.

17 *See* Cooley v. Stone, 414 F.2d 1, 13 (D.C. Cir. 1969) (requiring probable cause inquiry at detention hearing); Conover v. Montemuro, 304 F. Supp. 259 (E.D. Pa. 1969) (holding justiciable the question of whether the juvenile has a right to a preliminary hearing and presentment to a grand jury prior to referral to juvenile court); Baldwin v. Lewis, 300 F. Supp. 1220 (E.D. Wis. 1969) (requiring probable cause inquiry at detention hearing); Pilard v. Clark County Juv. Ct. Serv., 457 P.2d 523 (Nev. 1969) (right to speedy trial recognized). A good but no longer up-to-date discussion of these issues is in Glen, *supra* note 16. For recent studies of the intake stage, see CLEARINGHOUSE REV., May 1971, at 12.

18 Even before *Gault*, students of juvenile court had argued that its handling of the predelinquent child was particularly deficient, and that youths had often been abandoned to the indifferent attention of the pre-judicial stages. For a short recital of the pre-*Gault* criticism, see Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1231-33 (1966).

19 While a variety of statistical estimates exist, they agree that the majority of juveniles taken into custody (using only the formal test of whether they were brought into the station house) are handled either within the police agency or by referral to "social welfare" agencies. For FBI statistics see FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS—1969, at 104 (1969). *See also* TASK FORCE REPORT 1-40.

II

AN OVERVIEW OF THE POLICE-JUVENILE ENCOUNTER

A. *The Practice in New York City*

In 1969, 53,681 juveniles received Y.D.-1 records in New York City.[20] Also in 1969, the Youth Records Section of the New York Police Department made at least 41,392 "record searches" to determine a juvenile's Y.D. report history, either at the request of another agency or court or to determine whether a subsequent incident should be "adjusted" or formally prosecuted.[21] The record that is the subject of this intense activity is a small snap-out form, carried by each individual patrolman, upon which he enters basic identification data about a juvenile and a legal conclusion (for example, "shoplifting," "harassment," or "disorderly conduct") based either on the patrolman's observations or upon a complainant's report.[22] The patrolman's immediate superior, the precinct desk officer, may review the record when submitted and decide that the incident does not deserve more serious treatment, that is, arrest. Alternatively, if the youth has been arrested, the desk officer may decide to reduce the police action to a Y.D. report.[23] In either event,

20 Youth Aid Div., N.Y. City Police Dep't, Annual Report: 1969, at 1. The year 1969 was employed by the CJCC staff in making all statistical comparisons, as 1969 was the last complete year in which procedures were unaffected by *Cuevas v. Leary*. In that year, 18,238 "juveniles" (minors under the age of 16) and 54,393 "youths" (ages 16-21) were arrested or detained. *Id.* Since Police Department regulations, although inconsistent, do not seem to intend to authorize the filing of Y.D. cards on minors over the age of 16, and since such over-16 Y.D. reports are in any event rare (*see* note 26 *infra*), the 53,681 figure seems to imply that a 3:1 ratio exists between the issuance of a Y.D. report and the making of a formal arrest in the cases of those juveniles who fall within the scope of the procedure.

21 Youth Aid Div., *supra* note 20. This figure, however, represents only the tip of the iceberg, since the same records are also stored at each of the 17 regional Youth Aid Division headquarters and often at local precincts, where they are more readily accessible to the police and probation officers of that particular area.

22 In addition to the original or "yellow sheet" form, three carbon copies are filed by the patrolman. One is sent to the Police Department's Statistical and Records Office, which prepares a monthly computer printout of all Y.D.-1 cards issued. The other two copies are sent to the appropriate Youth Aid Unit covering a geographical area; from there they are communicated to the Central Records Bureau of the Police Department. The original is kept by the precinct in which the card was issued. Roughly similar procedures are followed in the case of Y.D. reports issued by the other uniformed police forces in New York.

23 The basic authorizing regulation for the Y.D. card reads as folllows:

> Any other case of a child under 16 accused of a violation of law shall be immediately brought to the attention of the desk officer of the precinct of occurrence. In these cases, the desk officer may direct the preparation of Y.D. 1 or, at his discretion, that the child be taken into custody and charged with juvenile delinquency . . . . In the exercise of such discretion, desk officers shall

no further attempt is made to determine the accuracy of the report before it is permanently recorded; indeed, no systematic procedure exists to supplement or revise the report even if its invalidity is subsequently conceded in an investigation by the Youth Aid Division. Such a follow-up investigation will result if the incident is deemed serious or if similar reports have been filed on the subject juvenile. From the moment the Y.D. report is filed, further activity only seeks to determine if the youth has reformed or if referral to another agency, including the courts or the probation department, is necessary.

Although the Y.D. system is in part a lesser alternative to arrest, it is also much more. From its inception, according to the commanding officer of the Youth Aid Division, the Y.D. system has been " 'directed toward locating those youngsters . . . whose repetitive police contacts ultimately point to a pattern of incipient delinquency.' "[24] This aim was to be realized " 'by establishing a police program broader than the historical and conventional police approach for the enforcement of laws dealing with adults.' "[25] In short, Y.D. reports seem intended to constitute a distant early warning system for the detection of certain forms of social deviance[26] on the theory that such deviance will ultimately be

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consider the manner in which the act charged was committed, the *child's previous record as ascertained from records of the precinct and the Youth Records Section,* the recommendation of a member of the Youth Aid Division, if present, and any other pertinent facts and circumstances.

N.Y. CITY POLICE DEP'T, RULES AND PROCEDURES ch. 9, § 62.2 (1956) (emphasis added).

24 SPECIAL COMM. ON THE YD 1 SYSTEM OF THE CRIMINAL JUSTICE COORDINATING COUNCIL, STAFF REPORT: JUVENILE RECORD-KEEPING IN NEW YORK CITY 23 (K. McMahon & N. Dubler eds. 1971) [hereinafter cited as STAFF REPORT]. This report was a summary of the various research projects conducted under the auspices of the CJCC on the Y.D.-1 system pursuant to the *Cuevas* stipulation. Its methodology and recommendations will be discussed *infra.* For the complete text of the commanding officer's statement, see STAFF REPORT app. B, exhibit V. Although this article will cite data and conclusions made by the *Staff Report,* it is not intended as a summary of that report, nor does it endorse the *Staff Report's* conclusions in all respects. In particular, the point of view expressed herein is divergent from that of the *Staff Report* on the desirability of a low noncriminal threshold of police attention and the benevolent effects of that attention on juveniles.

25 STAFF REPORT 23.

26 Although the regulation governing the procedure for filing Y.D. reports (note 23 *supra*) seems to speak in terms of actual "violation of law," New York City Police Department regulations make clear the breadth of situations in which Y.D. reports are to be issued:

JUVENILE REPORT FILE

6/58.0 The following complaints shall be on Y.D. 1 (Juvenile Report):
a. Juvenile delinquency . . .
b. Petty violations by minors where no summonses are served or arrests made
. . .

transformed into criminal behavior. Serious questions may be addressed to the Y.D. system: (*1*) does the record system's receptivity to a wide scope of data, along with the absence of controls, invite distortion and innaccuracy? (*2*) is it realistic to entrust the handling of sensitive data to a police agency? and (*3*) what is the likelihood that the collection of data will be counter-productive by causing the subject juvenile to modify his own behavior in the belief that he has been identified as a "delinquent"?

1. *Issuance*

Data compiled as a result of *Cuevas* emphasized two principal differences at the issuance stage in the Y.D. report system.[27] No common standard for the issuance of Y.D. reports was found to exist, making it possible for observed conduct in one precinct to go unreported while identical conduct in another precinct was reported.

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c. Persons in need of supervision . . .
d. Wayward minors . . .
e. Male children under 16 years of age or female children under 18 years of age who are neglected
f. Children under 16 years of age who are the subject of a crime
g. Intoxicated minors under 18 years of age . . .
h. Males under 16 and females under 18 years of age found in a house of prostitution . . .
i. Stranded and runaway males 16 to 21 years of age . . .
j. Runaway males under 16 and females under 18 years of age . . .
k. Child unlawfully present in licensed premises . . .
l. Truant . . . bootblack and newsboy violations.

N.Y. CITY POLICE DEP'T, RULES AND PROCEDURES ch. 6, § 58.0 (1956). Even this list is incomplete. For additional legal categories see *id.* ch. 6, §§ 59.0-59.2.

[27] Since the initiation of suit in *Cuevas,* information on Y.D. reports has become available from three basic sources. First, there is the basic statistical data supplied by the Police Department to the CJCC pursuant to the stipulation, as well as its explanation of the reasons for the Y.D. system. Secondly, the research conducted by the CJCC's volunteer staff included extensive field studies and interviews by members of a graduate law seminar of New York University Law School who accompanied individual policemen on patrol. Some 37 individual field reports were submitted by law students accompanying police and Transit Authority patrolmen, or observing locations of high Y.D. activity. *See* STAFF REPORT 7-8. From these two sources comes the bulk of the following information on the factual settings in which Y.D. reports were issued and the extent of their disssemination. Similar, if less extensive, field studies were conducted by officials of The Legal Aid Society and The Vera Foundation of Justice following *Cuevas.* A third, and probably the most revealing source of data, was an analysis of Y.D. records by a team of political scientists who, using basically statistical techniques, evaluated (*1*) the clarity of the actual entries on the Y.D. reports as well as the frequency of distortion in the data handling process, and (*2*) the relationship between a juvenile's history of Y.D. reports and the disposition of a current Y.D. report on him. Hanna, Zeitz & Ferns, *A Qualitative and Quantitative Analysis of YD 1 Cards Issued in 1969,* in STAFF REPORT app. A [hereinafter cited as *Statistical Study*]. The authors were members of the political science faculty of both the University of the City of New York and Hunter College.

Paralleling this discrepancy there appeared to be widely variant understandings with regard to the purpose of the Y.D. procedure—whether it should be punitive or therapeutic. Additionally, the determinative factor in the issuance decision, given the wide range of incidents which could result in a Y.D. report, was found to be the interplay between the juvenile's attitude and the police officer's background and tolerance.

The Police Department's own statistics reveal the limited effort that is made to ensure the accuracy of the data entered on Y.D. reports. These statistics show that nearly eighteen percent of Y.D. reports were issued simply on the complaint of a citizen without police investigation.[28] Thus the *Cuevas*-inspired Criminal Justice Coordinating Committee (CJCC) *Staff Report* concluded that a subsidiary function of the Y.D. system was "to 'take the heat off' when a citizen demands that some sort of action be taken."[29]

Even more pointed was the finding that the New York City Transit Authority (a separate uniformed police force responsible for New York City's subways), which in fact regularly issues more Y.D. reports than the Police Department, had little conception of the procedure's benevolent purpose and saw it instead as a form of summary punishment. Faced with the problem of 350,000 juveniles using the subways during school rush hours and with situations which made arrest impractical, the Transit Authority patrolmen viewed the Y.D. report primarily as a device to maintain order. Any form of loud or boisterous behavior in a subway station, or behavior which signified disrespect for authority by a juvenile, was likely to result in a Y.D. report, simply to dampen potential disruption in the larger group.[30] In contrast the Housing

28 SOURCE OF Y.D.-1 REPORTS—1969

Source	Percent
N.Y.C. Police Dep't	35.3
Transit Police	38.9
Other Police	2.1
Individuals	17.7
Schools	3.8
Parents & Relatives	1.0
Personal Applications	0.9
Social Agencies	0.3

Youth Aid Div., *supra* note 20, at 5.

29 STAFF REPORT 28.

30 "[M]ost felt that overlooking disrespectful attitudes, particularly in front of a group of other juveniles, could only diminish their authority before the children, and thus reduce their capacity to keep order."
Id. at 31.

One transit officer is quoted to the effect that where groups of children were involved

Authority police disdained the use of the Y.D. report in dealing with minor incidents.[31] Instead, Housing Authority officers were the only major law enforcement officials who employed the Y.D. card in situations where a felony arrest might otherwise have been made.[32]

As to the factors that determined whether marginal conduct would receive a Y.D. report, the *Staff Report* noted:

> [O]bservers in general reported that regardless of the severity of the offense, a brash, antagonistic, unrepentant, and, most important, disrespectful child was almost assured of receiving a card. At the other end of the continuum, for all but the most serious offenses, a repentant attitude was the best assurance of avoiding one. A number of reports also stressed the setting in which the incident took place: a less repentant attitude, or a more serious offense might be excused if the child were alone, but if the conduct occurred in the presence of others, officers felt obliged to take a strict approach.[33]

Variations in the officer's own background and attitude were also important. Officers with "a social service outlook" (in the words of the *Staff Report*) tolerated conduct and attitudes which would have led more disciplinarian officers not only to issue a Y.D. card, but to register the incident under the most severe offense category available.[34] There was a similar division, at least among lower echelon police officers interviewed, as to whether the function of the Y.D. card was to build a record for future punitive action or to find means for social assistance to troubled youths.[35]

Except for the observation that many youths regarded Y.D. cards as "status symbols" and actually solicited them,[36] the effect of the issuance of a Y.D. report upon the subject youth was ignored by the *Cuevas* studies.

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he would issue a report over a "dropp[ed] gum wrapper" in order "to soften them up." *Id.* at 30. It is interesting to speculate whether such an attitude does not invite demonstrations of juvenile defiance.

31 A more effective sanction employed by Housing Authority police in marginal cases where the other police units would issue Y.D. reports was to threaten the parents of the juvenile with eviction. *See id.* at 32.

32 The decision between such an arrest and issuance of a Y.D. card would usually be made, it was found, after the Housing Authority patrolman telephoned the local police precinct station to check the youth's past Y.D. record. *Id.*

33 *Id.* at 31. *See also id.* at 28, 57.

34 *Id.* at 29. One police officer stated that he describes the offense as severely as possible because the Y.D. reports are "nails in the coffin." *Id.* at 28.

35 *Id.*

36 *Id.* at 29. Attorneys for the plaintiffs in *Cuevas* invited the staff of the CJCC to interview various juveniles to gauge their attitudes. The offer, however, was declined.

2. *Content*

If Y.D. records are to serve any useful purpose—either punitive or therapeutic—it must be assumed that identical notations on the records are at least intended to correspond to similar incidents, and that dissimilar notations are not meant to describe the same fact pattern. Yet neither of these assumptions proved valid in the *Cuevas* studies. On the contrary, the *Statistical Study* commissioned by the CJCC found that: (*1*) the offense descriptions entered on the Y.D. record were vague, often consisting only of a legal conclusion (for example, "harassment" or "disorderly conduct"), and that such notations could be based on a wide range of conduct, from the trivial to the serious; and (*2*) the elaborate nomenclature of offense categories devised to facilitate classification of Y.D. reports tended to classify the same behavior under a variety of different categories.[37]

In short, what the police officer or citizen-complainant allegedly observed was translated into recorded data which consistently failed to distinguish insignificant incidents from more serious ones and which sorted similar incidents into different overlapping categories. From whatever perspective a subsequent decision maker thus approached the data, he would be unable to discern from it the specific facts that would be most useful to him.

The New York Police Department has developed an offense code of some 180 categories into which individual Y.D. reports are classified in order to simplify data handling. A police officer filling out a Y.D. report, or a subsequent Youth Aid investigator to whom the card is referred, will use this five-digit code to indicate offenses ranging from the serious ("menacing a police officer") to the trivial ("objectionable play").[38] The officer is also expected to write a brief description of the offense, although this offense description appears regularly to be condensed to the numerical offense code only when the data is transmitted to agencies. Employing a random sampling technique, the *Statistical Study* concluded that in only sixty percent of the Y.D. reports was the specific statement of the misconduct clear.[39] Frequently the description added little to the offense code: for example, "X was disorderly at time and place of occurrence," or "defendant with one other did loiter in basement of apartment house."

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37 *Statistical Study* 12, 20.

38 For the complete Y.D. code list, dated as of December 12, 1969, see STAFF REPORT app. B, exhibit VI. Coding, it appears, is most often done at the Youth Aid Division. Thus the person doing the coding is not the officer who saw the act or received the complaint. *See id.* at 59. Such a division of responsibility does little to ensure accuracy.

39 *Statistical Study* 15.

The sixty percent figure in fact understates the degree of ambiguity found. In the case of certain offense categories—most notably "runaway" and "truant"—the vast majority of reports either contained no particularization of the incident or were so muddled in their descriptions that the researchers had to classify them as "vague."[40] Considerably more serious, however, is the existence of entirely nonspecific categories. An example of this is the "disorderly conduct" notation.[41] "Disorderly conduct" was the offense category in approximately twenty percent of the Y.D. reports issued in 1969. In practice the accompanying description was commonly only a statement that the youth was "loud and boisterous" or "annoying to passersby." The use of such a category raises two quite distinct problems.

First, it obviously invites subjective judgment as to what constitutes an offense by failing to specify the factors that should influence that judgment. In all likelihood it also invites the patrolman to equate behavior of which he disapproves with illegality.[42] The finding that Y.D. reports of nonspecific offenses (for example, "harassment," "loitering," and "disorderly conduct") were considerably more ambiguous in their description of incidents than those of specific offenses substantiates this possibility.[43] Secondly, because nonspecific categories overlapped other categories, it was possible for identically written descriptions of the same observed behavior to be accompanied by different offense codes. The choice of category is not insignificant: whether a scuffle is characterized as "harassment" or "assault" can possibly influence future decision makers.[44]

Misclassification was also found to occur simply as the result of

40 "Vague" was used as a term of art by the *Statistical Study* to mean, in addition to sheer incomprehensibility, that the supporting steps in a legal conclusion were lacking. *See id.* at 8-15.

41 Offenses that were grouped under this heading in the random sample analyzed by the *Statistical Study* included: "theft," "demonstrations at Board of Education," "causing crowd to gather," "skylarking on elevators," "urinating in station," "fighting," and "extortion." *See id.* at 19-20. The third most popular category, "harassment, unclassified," encompassing five percent of Y.D. reports, covered almost as wide a range of behavior. Under this heading were typically grouped trespassing, theft, and disorderly conduct, as well as any incident in which some sort of physical assault, serious or minor, occurred. *See id.* at 20.

42 *Cf.* Coates v. Cincinnati, 402 U.S. 611 (1971); Palmer v. City of Euclid, 402 U.S. 544 (1971). Recently a federal court found New York's "wayward minor" statute unconstitutionally vague. Gesicki v. Oswald, 336 F. Supp. 371 (S.D.N.Y. 1971). Thus juvenile law is not exempt from the requirement that criminal statutes prescribe precise substantive standards.

43 *Statistical Study* 15.

44 Another example is throwing rocks at trains, which was alternately classified as "reckless endangerment," "criminal mischief," or "disorderly conduct." *Id.* at 21.

coding errors. For example, facts describing a fight might be given the code number for shoplifting. The extent of misclassification found in the *Statistical Study*'s random sample was staggering: over twenty-five percent of the Y.D. reports for "disorderly conduct" and forty-four percent of those issued for "harassment, unclassified" were deemed to be improperly classified, either because a more specific offense code category existed or because the facts as described plainly fell within another category.[45]

In summarizing its findings the *Statistical Study* concluded that nearly half of 1969's Y.D. cards were "issued for behavior which, exercising discretion differently, might not have been administratively acted upon."[46] In these cases the subject juvenile may have suffered a double injury: (*1*) the system under which he has been reported lacks substantive standards to ensure that similar conduct elsewhere will also be reported; and (*2*) the significance of the report is distorted by the tendency of the record system to lump dissimilar events under a common notation and to classify similar events under different notations.

3. *Follow-up Procedures*

The basic rationale of the Y.D. record system is that the reports will be employed to locate youths who need some form of social assistance. To implement this purpose a copy of every Y.D. report is sent to the appropriate Youth Aid Division for investigaton. Eventually, the recipient Youth Aid Division will add a "closing code" to the record, signifying its disposition of the case.

The following data show the range of dispositions in 1969:[47]

Disposition	*All 1969 Y.D.'s (percent)*
Precautionary Letter	30.0
No Other Service Indicated (NOSI)	20.0
Referrals	39.4
Other	10.3

The first two categories, encompassing fifty percent of 1969's Y.D.-1 reports, represent situations in which the Youth Aid investigation did not progress beyond the mailing of a form letter or a cursory preliminary investigation. Disposition is mechanical and automatic. The final category, "other," included a potpourri of resolutions, such as the disap-

45 *Id.* at 16.
46 *Id.* at 41.
47 *Id.* at 23, table 6. Difference from 100% results from rounding.

pearance of the youth[48] or even a decision that the charge was unfounded. Again, however, no further social inquiry occurs. While over thirty-nine percent of the reports were referred to "agencies," this proportion includes referrals to agencies where no counseling or therapeutic programs exist, such as the Bureau of Attendance in the case of "truancy" Y.D. reports. Although these percentages do not establish that the Y.D. system is ineffective in isolating the true "problem" child and referring him to social assistance, they do suggest that the system is fundamentally overloaded in that it acquires more data than it can put to meaningful use.

A second deficiency is the follow-up procedure's indifference to the accuracy or inaccuracy of the initial Y.D. report. In at least forty percent of Y.D. cases (the precautionary letter and the "other" dispositions), no attempt is made to check "the validity of the initial decision to classify the behavior as an offense."[49] Although the Youth Aid Division officers are empowered to use "unfounded" as a closing code on Y.D. reports (in which event the card is still permanently preserved), such a notation is officially discouraged.[50] Moreover, the exclusive purpose of the follow-up investigation is to determine what referral should be made,[51] that is, how to "correct" the juvenile's incipient social deviance. The juvenile's protestations of innocence may be seen as evidence of an "unrepentent" attitude, and might lead to court referral.[52] Because the procedure is intended to assist the child, innocence appears to be irrelevant.

The *Statistical Study* also demonstrated a one hundred percent correlation between a past history of four or more Y.D. reports and a

48 Approximately 40% of cases in the "other" category have the subclassification "unable to locate." The frequency of this designation plus the casual issuance procedure suggests that a number of youths simply evade the procedure by giving an alias. Several youths reported this technique (or that of giving a friend's name) to the author.

49 *Statistical Study* 41.

50 According to the Police Department's own *Definition and Clarification of Closing Codes*, "Investigators should be especially thorough regarding cases closed as *unfounded* and shall interview all persons concerned with the complaint before closing the case. Stamp all cases UNFOUNDED *after* Unit Supervisor approves and signs case." STAFF REPORT app. B, exhibit IX (emphasis in original). Although only eight percent of the "other" category, or less than one percent of the total Y.D. cards issued, are labeled "unfounded," the *Statistical Study* found that careful analysis of other closing codes showed that the investigator often believed the matter to have been in fact unfounded; yet the "unfounded" designation was not employed. *Statistical Study* 24.

51 *Statistical Study* 38.

52 An important factor, according to the *Statistical Study*, in whether a case was closed or referred (possibly to a court) was the "impression made by the youth and/or his family." The claim of innocence was seen to show an uncooperative attitude. The safe response to avoid referral was, "yes, officer, my son needs help." *Id.* at 37.

"referral."[53] Conversely, the odds were high that youths without a prior Y.D. record would receive only a precautionary letter or a NOSI disposition. Obviously, where past citations are simply for "disorderly conduct" or a similar offense, an automatic referral policy is highly questionable.[54] Again, widely differing forms of behavior are equated because of imprecise record-keeping procedures with the result that the discretion of subsequent decision makers is prejudiced.

4. *Dissemination*

Until the CJCC investigation, the number of public and private agencies having official access to Y.D. reports was largely unknown. Even the official dissemination list maintained by the Youth Records Section of the Police Department proved incomplete.[55] Basically, however, recipients fell within four categories: (*1*) public agencies authorized to deal with juvenile misconduct (for example, the courts and the probation department); (*2*) social welfare agencies concerned with juveniles; (*3*) public bodies seeking personal information; and (*4*) cer-

53 *Id.* at 30. For juveniles with no Y.D. history, referral occurred in only 20% of the cases. Juveniles with one to three cards had a 40% chance of referral. The study concluded: "[T]he number of a youth's previous offenses is a clear determinant in the two discretionary decisions . . . of the Y.D. 1 process: whether to investigate and whether to refer." *Id.* at 45.

This finding is confirmed at least in part by Jack Whalen of The Vera Institute for Justice. Interview, Oct. 15, 1970. When a juvenile acquires what the Youth Division characterizes as an "accordian file, namely one that is expanding at a rapid rate, it may decide that it is in the juvenile's best interest to be referred to court. The police therefore determine in advance to seize upon the next Y.D. report, however minor, as an occasion for court referral. Such referral also may be initiated either by the Youth Division officials, (*1*) inducing the youth's parents to file a PINS (Person in Need of Supervision) petition against the child; (*2*) filing one themselves; or (*3*) convincing a probation officer to file a petition alleging a violation of any previous order of disposition if the juvenile had been earlier adjudicated a delinquent. Inducing the parent to file a petition after other agencies have refused to file a Neglect or PINS petition is apparently common. After trial the file of past Y.D. reports will be tendered at the dispositional hearing—with an effect that often may well surprise the parents or other parties who believed their petitions would trigger only a mild court warning.

54 In approximately 20% of the cases, the euphemism "referred" means referral directly to court and the probable initiation of a prosecution. *Statistical Study* 27, table 8A. Over 5,600 Y.D. cases were referred to court in 1969. Youth Aid Div., *supra* note 20, at 5.

"Referral" can also imply civil commitment as a narcotics addict or psychotic, or criminal commitment for parole violations (which in 1969 did not require a court hearing).

55 For the official list see STAFF REPORT app. B, exhibit IV. The *Staff Report* revealed additional authorized recipients, but concluded that even its list may have been incomplete. *Id.* at 43. In at least one instance a juvenile's Y.D. record was given by the Police Department to the press. *See* N.Y. Times, Dec. 13, 1970, at 67, cols. 1-2.

tain specialized miscellaneous agencies (for example, branches of the armed forces and the Civilian Complaint Review Board). The *Staff Report* summarized its findings with regard to the flow of Y.D. information in the form of a variant of Parkinson's Law: "The use of information, once filed, will expand to the capacity of the system."[56]

The CJCC staff studied only access to the centralized Y.D. files. Two separate investigations conducted respectively by a staff member of The Vera Institute for Justice and by a staff attorney of The Legal Aid Society[57] focused on practices at divisional and precinct headquarters where the cards are also filed. The Vera observer found that Y.D. reports were regularly disseminated to such varied organizations as the Boy Scouts, Catholic Charities, and community anti-poverty corporations.[58] Prior to *Cuevas* such practices were neither illegal nor unauthorized, since police regulations permitted dissemination to any "authorized agency concerned with the welfare of the child."[59] The Legal Aid Society study found additionally that prospective employers often consulted a juvenile's probation officer to ascertain his complete history, including Y.D. reports.[60]

In addition, the type and extent of information transmitted varies widely, as the *Staff Report* noted.

> The information may be released in a variety of forms; one agency may request only the number of offenses, while another may seek the categories of offenses, still another summaries of the complaints, while one may actually ask for the information available. Any or all of the above may or may not ask for the disposition accorded the complaint by the Youth Aid Unit.[61]

Given the vagueness of the offense categories and the fact that the offense coding is only infrequently done by the patrolman issuing the

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56 STAFF REPORT 71.

57 Sussman, *Confidentiality of Records on Juveniles in Family Court*, N.Y.L.J., Jan. 8, 1971, at 1, col. 4.

58 Interview, *supra* note 53. During the greater part of 1970 Mr. Whalen was involved with a project seeking to design a community based probation system and, as a result, was a regular observer at various Youth Aid Division proceedings. In contrast the CJCC staff was denied permission to attend Youth Aid Division conferences with juveniles.

59 "Authorization" appears to have been the prerogative of the divisional commander, with the central list of the Youth Records Section only an "indication" of authorized agencies. STAFF REPORT 54.

60 Sussman, *supra* note 57, at 1, col. 5. *See In re* Smith, 63 Misc. 2d 198, 200 n.4, 310 N.Y.S.2d 617, 620 n.4 (N.Y. City Fam. Ct. 1970); N. Y. Times, Sept. 18, 1970, at 49, col. 1 (reporting widespread illegal sale of police records).

61 STAFF REPORT 54.

card, such fragmentary transmission makes distortion virtually unavoidable.[62]

In fairness to probation officials, it should be noted that they often recognize Y.D. cards as an unreliable source of information. Yet a definite possibility exists that well meaning officials will still be influenced by information they admit to be of limited reliability or relevance. As the *Staff Report* indicated, the hunger for data may convert inferences into fact and ambiguity into injury:

> One may observe a Gresham's Law of information in operation: the bad information drives out the good, simply because the latter is less accessible. In context this means that it is easier and quicker to rely on what purports to be a past "record" than to discover the relevant information from other sources, such as interviews with the defendant, his family and those who have continuing contact with him.[63]

In other words, overworked agencies such as the probation department may rely on doubtful data merely because they must reach a conclusion and have no time for independent investigation.

B. *The National Practice*

Nationally, most offenses for which a juvenile is taken into custody are handled solely by the station house and the pre-judicial adjuncts of juvenile court.[64] The process by which charges are adjusted, that is, the

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62 To understand fully the variety of injuries this distortion can cause, one must understand the breadth of discretion accorded the Office of Probation and the Youth Council Bureaus in New York. Of the cases referred to family court, some 36% to 40% are "adjusted" at intake annually. *See* LEGAL REPRESENTATION OF THE POOR: THE NEW YORK CITY EXPERIENCE 139 (PLI 1970) (statement of Marion M. Brennan, Deputy Dir., N.Y. City Office of Probation). The Office of Probation emphasizes its efforts to avoid court hearings in the belief that they are an "acculturation to delinquency." *Id.* at 140.

"Adjustment" means simply that the youth is never arraigned or required to plead. A maximum 60-day period of probation may follow. Intake is basically an *ex parte* proceeding at which attorneys seldom appear. *See* Rosenheim & Skoler, *The Lawyer's Role at Intake and Detention Stages of Juvenile Court Proceedings*, 11 CRIME & DELINQUENCY 167, 173 (1965) (presence of an attorney at the intake stage is a rarity and in some courts is not known to occur); Note, *The Role of the Attorney in Juvenile Court Intake Processes*, 13 ST. LOUIS L.J. 69 (1968). Distortion of facts from fragmentary transmissions of data (as where only the number of Y.D. reports is considered) may influence the decision to "adjust" at intake. Analogous opportunities for nonjudicial disposition of young adults also exist at the criminal court, where the Y.D. file again is frequently consulted.

63 STAFF REPORT 77.

64 According to Professors Joel Handler and Margaret Rosenheim, approximately 80% of adolescents who are taken into custody never make an appearance before a judge. This

procedures that are employed, the criteria used, and the range of sanctions assigned, however, varies considerably.[65] It is known that the frequency of record dissemination and the occasions for consequent injury at the juvenile level are far greater than at the adult level.[66] The adjustment process often seems intended as a form of summary punishment; minor deprivations such as special curfews, restrictions on sports or dating, and even freedom of movement, are regularly assigned as an alternative to formal court appearances.[67]

Ironically, the sanction for refusal to accept adjustment is court referral and the creation of permanent, but generally confidential, court records, while the police records created by adjustment are likely to be at least as lasting and far more accessible.[68] In addition, arrest

figure would include cases adjusted both by the police and by the probation staff at intake. Some 70% of Chicago's juvenile cases are handled within the Police Department. Handler & Rosenheim, *Privacy in Welfare: Public Assistance and Juvenile Justice*, 31 LAW & CONTEMP. PROB. 377, 395 (1966). *See* Note, *supra* note 1, at 776 n.5. FBI statistics substantiate these estimates. *See* FEDERAL BUREAU OF INVESTIGATION, *supra* note 19.

The national significance of juvenile records is underscored by the American Bar Foundation's recent study on sentencing practices. The study found that probation officials preparing presentence reports on juveniles seldom seek court records, because they have found much fuller and more accessible files in the youth divisions of police departments (which files seldom contain the dispositions following arrest). *See* R. DAWSON, SENTENCING: THE DECISION AS TO TYPE, LENGTH, AND CONDITIONS OF SENTENCE 28-30, (1969) [hereinafter cited as SENTENCING]; *cf.* D. NEWMAN, *supra* note 10, at 15.

65 Much of the information available is strictly anecdotal. *See, e.g.*, L. RICHETTE, THE THROWAWAY CHILDREN 5-15 (1969), for a view of the process from the vantage point of a juvenile court attorney in Philadelphia.

66 For a discussion of the procedures employed at the adult level, see L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 73-80 (1967). In New York City a practice at the adult level analogous to the Y.D. system has, following *Cuevas*, been terminated. A document known as the "liability notice" was sent to a landlord indicating that a person had been arrested on his property (usually for narcotics or prostitution), and that the landlord might be vicariously liable for permitting such activities to continue. The notice was sent without regard to the disposition of the tenant's or other person's case. Following *Cuevas*, the New York Civil Liberties Union filed suit to enjoin this practice and obtained a stipulation terminating its use unless a conviction ensued. N.Y. Times, March 7, 1971, at 34, col. 1.

67 For a description of Kansas City's "grounding system," under which a juvenile might be ordered not to leave his house or to change his hair style or personal appearance, or face prosecution on the original charge, see Note, *supra* note 1, at 784.

68 A family court may seal the record of a conviction (or "finding of delinquency"). *E.g.*, N.Y. FAMILY CT. ACT §§ 166, 781-82 (McKinney 1963). New York City's Family Court Rules also establish a principle of strict confidentiality of records. *See In re* Smith, 63 Misc. 2d 198, 200 n.2, 310 N.Y.S.2d 617, 620 n.2 (N.Y. City Fam. Ct. 1970). In contrast, police records on juveniles are more readily accessible. *See* Note, *supra* note 1, at 785. In *Smith*, Judge Dembitz took judicial notice that private investigators could easily secure police arrest records. 63 Misc. 2d at 200 n.4, 310 N.Y.S.2d at 620 n.4. *See* Menard v. Mitchell, 430 F.2d 486, 492 n.33, 493 n.35, (D.C. Cir. 1970); Note, *Rights and*

records may reflect the police officer's desire to allege the highest possible offense category.[69]

The likelihood that a juvenile's encounter with the police will result in the application of a sanction substantially varies among rural, suburban, and urban communities.[70] Police discretion appears to be the critical factor in determining how a juvenile will be treated. To an increasing extent that discretion has been formalized in regulations making determinative the juvenile's demeanor and the presence or absence of a record in the department's juvenile files.[71] If this is the case, then the propensity of youth divisions to focus police surveillance activity on low-income "problem" families suggests that they are essentially creating self-fulfilling prophecies: the greater the police focus, the more information is recorded, and the more information recorded, the greater the chance that police discretion will be influenced by the records created thereby.[72]

The economic and social injury that a police record may engender has been fully documented. Surveys have shown that seventy-five percent of New York City employment agencies and ninety percent of private employers will not accept a job applicant with an arrest record.[73] Civil service commissions appear similarly reluctant.[74] Even where con-

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Rehabilitation in the Juvenile Courts, 67 COLUM. L. REV. 281 (1967). In part, the different treatment of police and court records is attributable to judicial uncertainty about the power of courts over police records. *Compare* Weisberg v. Police Dep't, 46 Misc. 2d 846, 260 N.Y.S.2d 554 (Sup. Ct. 1965) (holding that courts lack authority), *with* Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969) (holding that "ancillary" jurisdiction exists).

In some states a statute provides for expungement even of court records of conviction of juveniles. *See, e.g.,* CAL. WELF. & INST'NS CODE § 781 (West Supp. 1971). For critical analysis see Karst, *"The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data,* 31 LAW & CONTEMP. PROB. 342, 369-71 (1966).

69 *See* Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status,* 1966 WASH. U.L.Q. 147, 168-78.

70 Ferster & Courtless, *supra* note 1, at 571.

71 *Id.* at 575-81; Piliavin & Briar, *supra* note 1, at 209-12.

72 *See* Ferster & Courtless, *supra* note 1, at 579.

73 E. SPARER, EMPLOYABILITY AND THE JUVENILE "ARREST" RECORD 5 (1966); Schwartz & Skolnick, *Two Studies of Legal Stigma,* 10 SOCIAL PROB. 133, 134-38 (1962). This latter survey was based on a hypothetical arrest for assault and showed that even an acquittal would not make over two-thirds of private employers willing to consider the applicant.

74 The New York City Civil Service Commission has frequently attempted to disqualify employees on the basis of arrest records. *See, e.g.,* Adler v. Lang, 21 App. Div. 2d 107, 248 N.Y.S.2d 549 (1st Dep't 1964); Cuccio v. Department of Personnel—Civil Serv. Comm'n, 40 Misc. 2d 345, 243 N.Y.S.2d 220 (Sup. Ct. 1963); *cf.* Anonymous v. New York City Transit Authority, 4 App. Div. 2d 953, 167 N.Y.S.2d 715 (2d Dep't 1957), *aff'd,* 7 N.Y.2d 769, 163 N.E.2d 144, 194 N.Y.S.2d 39 (1959).

fidentiality rules exist, waivers signed by the youth regularly enable the employer to gain access.[75]

The President's Commission on Law Enforcement and Administration of Justice, although extremely critical of the character of adjustment procedures and the low-visibility practices which often accompany them,[76] still concluded that their retention in a modified form was the best of several imperfect alternatives since their total rejection would lead to an increase in the number of juveniles formally arrested.[77] The Commission, however, while recommending that informal adjustments be administered by civilian authorities,[78] recognized that some danger resided in even the most benevolent program:

> Official action may actually help to fix and perpetuate delinquency in the child through a process in which the individual begins to think of himself as delinquent and organizes his behavior accordingly. . . . The most informed and benign treatment of the child . . . contains within it the seeds of its own frustration and itself may often feed the very disorder it is designed to cure.[79]

An uneasy compromise thus seems apparent. The Commission saw "ad-

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75 The armed forces use such waivers as a matter of course. *See In re* Smith, 63 Misc. 2d 198, 200 n.3, 310 N.Y.S.2d 617, 619 n.3 (N.Y. City Fam. Ct. 1970). A waiver is also required when a juvenile requests youthful offender treatment but information so obtained may not be used against the offender at trial. People v. Rhem, 52 Misc. 2d 853, 276 N.Y.S2d 751 (Sup. Ct. 1966).

76 Informal and discretionary pre-judicial dispositions already are a formally recognized part of the process to a far greater extent in the juvenile than in the criminal justice system. . . .

. . . .

There are grave disadvantages and perils, however, in that vast continent of sub-legal dispositions. It exists outside of and hence beyond the guidance and control of articulated policies and legal restraints. It is largely invisible . . . and hence beyond sustained scrutiny and criticism. Discretion too often is exercised haphazardly and episodically, without the salutary obligation to account and without a foundation in full and comprehensive information about the offender and about the availability and likelihood of alternative dispositions. Opportunities occur for illegal and even discriminatory results, for abuse of authority by the ill-intentioned, the prejudiced, the overzealous. Irrelevant, improper considerations—race, nonconformity, punitiveness, sentimentality, understaffing, overburdening loads—may govern officials in their largely personal exercise of discretion. The consequence may be not only injustice to the juvenile but diversion out of the formal channels of those whom the best interests of the community require to be dealt with through the formal adjudicatory and dispositional processes.

CRIME COMM'N REPORT 82.

77 *Id.* The Commission recommended that youths be detained only on specific grounds for suspicion—a lesser standard than "probable cause." *Id.* at 79. The Commission also suggested that pre-judicial functions be transferred to a civilian agency—"a Youth Services Bureau." *Id.* at 82-84.

78 *Id.* at 82-84.

79 *Id.* at 80.

justment" procedures as a preferred alternative[80] to a uniform policy of arrest. Nonetheless, it recognized that such procedures might well prove counterproductive because of their potential for stigmatization. Hence it hoped to minimize this stigma by shifting the responsibility for adjustment to a civilian agency.

The Commission's doubts about adjustment procedures are substantiated by the theory of sociologists Martin Gold and Jay Williams that extended police-juvenile contacts ensure the juvenile's future participation in deliquent acts.[81] Gold and Williams divided the 847 adolescents they studied into two groups: (*1*) those who had been apprehended for various small crimes; and (*2*) a control group consisting of those who had committed similar crimes and who matched the first group in background characteristics but had escaped detection. The apprehended juveniles subsequently committed a significantly greater number of delinquent acts. From this, Gold and Williams concluded that apprehension contributes to future delinquency. They also found "no differences in subsequent delinquent activity between those referred to court and those only warned and released by police."[82] Other statistical studies have drawn similar conclusions.[83]

The idea that the labeling process involved in record keeping encourages future delinquency has also been advanced from a psychological perspective. It is often said that it is ultimately a juvenile's "self concept" which determines whether or not he will become a delinquent.[84] If so, then to the extent that adjustment procedures modify

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80 *Id.* at 82. The Commission emphasized three reasons why discretionary procedures (as opposed to mandatory arrest) seem desirable. In summary, it stated: (*1*) application of the full criminal process is too severe in many cases, and a need exists "to meditate between generally formulated laws and the human values"; (*2*) legislatures tend to "overcriminalize" human conduct and to employ the penal code for other purposes than crime prevention; and (*3*) the sheer volume of cases demands that screening devices be employed. TASK FORCE REPORT 10.

81 Gold & Williams, *National Study of the Aftermath of Apprehension*, 3 PROSPECTUS 3 (1969).

82 *Id.* at 10-11.

83 "Self-reporting" studies have consistently revealed that most citizens have committed crimes which have not been detected or reported to the police. *See, e.g.*, Chambers & Nagasawa, *On the Validity of Official Statistics: A Comparative Study of White, Black, and Japanese High School Boys*, 6 J. RESEARCH IN CRIME & DELINQUENCY 71 (1968). For a rigorous examination of the concept of stigmatization, see Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 SOCIAL PROB. 133 (1962).

84 "The answer [to whether the juveniles studied will become delinquent] . . . will depend on their ability to maintain their present self-images in the face of mounting situational pressures." Reckless, Dinitz & Murray, *Self Concept as an Insulator Against Delinquency*, in READINGS IN CRIMINOLOGY AND PENOLOGY 248, 252 (D. Dressler ed. 1964).

that "self concept" so as to induce the juvenile to conceive of himself as delinquent, they are intrinsically self-defeating.[85]

Though law enforcement officials cannot cease to apprehend juveniles for illegal acts, they can minimize the stigmatization involved. The Commission's recommendation that adjustment activities be transferred to civilian agencies is a useful step, but hardly a final one. Other essential reforms include: (*1*) the development of standards limiting the types of "misconduct" that might trigger police-initiated "adjustment"; (*2*) the creation and enforcement of confidentiality rules for any records created; and (*3*) the introduction of a principle of juvenile autonomy under which, at least in some circumstances, the juvenile could decline to participate in whatever counseling program was offered. One writer has suggested on the basis of the Gold and Williams study that the juvenile be given the right to forbid police notification of his family or neighborhood agencies when only minor misconduct is involved.[86]

It is admittedly premature to accept the work of Gold and Williams or other writers as conclusive, but the policy implications of their research seem clear: if delinquency is a period that can be prolonged and encouraged by hasty stereotyping, then there is a strong social interest in protecting the juvenile's privacy. Society cannot afford to embrace procedures that convince the juvenile that he is a delinquent.

III

THEORIES OF RELIEF

The remainder of this article will be concerned with the means for, and obstacles to, according the juvenile legal controls over adverse information about him that may be collected and disseminated.

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[85] When a young person is defined as being delinquent by society, he is far more likely to act in aggressive and antisocial ways. When his arrest record blocks his future employment in legitimate activities . . . , it is quite likely that today's delinquent will become tomorrow's adult criminal.

JOINT COMM. ON MENTAL HEALTH OF CHILDREN, REPORT: CRISIS IN CHILD MENTAL HEALTH: CHALLENGE FOR THE 1970's 376 (1970).

It is not only the juvenile's self-concept that is altered by the dissemination of seemingly objective records. One study demonstrated that teacher expectations based even on false information profoundly modify student performance, even on standardized comprehensive tests. R. ROSENTHAL & L. JACOBSON, PYGMALION IN THE CLASSROOM (1968).

[86] Drinan, *Aftermath of Apprehension: A Family Lawyer's Response*, 3 PROSPECTUS 32-34 (1969). The parents of a minor, however, may possess the right to compel disclosure of records on their child. For example, in New York the parents of a school child have the right to inspect his entire school record. Dachs v. Board of Educ., 53 Misc. 2d 13, 277 N.Y.S.2d 449 (Sup. Ct. 1967); Van Allen v. McCleary, 27 Misc. 2d 81, 211 N.Y.S.2d 501 (Sup. Ct. 1961).

A. *Reforming the Sentencing Process*

Under the standard "bifurcated hearing" procedure, proceedings in which a juvenile has been adjudicated a delinquent or a "person in need of supervision" are customarily adjourned in favor of a subsequent dispositional hearing. At that hearing the probation officer will submit an extensive report and all interested parties may, and regularly do, offer information bearing on the case. Many experienced juvenile court attorneys believe that the conduct of the dispositional hearing and the information tendered at it are far more determinative of disposition than the nature of the precipitating offense. Because of the serious attempt to achieve truly individualized sentencing in the juvenile justice system, the juvenile court judge is confronted with a considerably wider range of data than that which is included in the normal presentence report employed in the adult criminal system.[87] Because the juvenile court needs to know more about the defendant, there is a heightened vulnerability, and the court is apt to rely more heavily on speculative records such as Y.D. reports.

It would seem an obviously justiciable injury that a youth might be denied probationary status or have his sentence determined upon the basis of inaccurate, misleading, or simply unverified accusations. No important state interest can be said to underlie the memorialization and use of records which offer little assurance of accuracy. Two remedies for this apparent due process violation seem possible: (*1*) the defendant might be given the right through counsel to challenge and supplement adverse information presented at sentencing; or (*2*) per se exclusionary rules could be formulated to bar the receipt of, or even to expunge, particular kinds of data such as that commonly recorded on the Y.D. card. These remedies, however, have not yet been accepted. The courts, including the Supreme Court, have consistently refused to curtail the sentencing judge's discretion. A brief review of the cases is necessary to understand the context within which the search for remedies must operate.

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87 The best recent study on sentencing procedures is the American Bar Foundation's survey of the administration of criminal justice, *Sentencing: The Decision as to Type, Length, and Conditions of Sentence*, prepared by Professor Robert O. Dawson. The study concludes that little knowledge exists about administrative procedures designed to assure the accuracy of presentence reports and less of their efficacy. SENTENCING 5-6; *cf.* D. NEWMAN, *supra* note 10, at 15. In New York family courts, as in the federal courts, disclosure of the presentence report to defense counsel prior to sentencing is a matter of judicial discretion. N.Y. FAMILY CT. ACT § 746 (McKinney Supp. 1971); FED. R. CRIM. P. 32(c).

1. *Judicial Discretion and the "Modern" View of Sentencing*

More than twenty years have passed since the Supreme Court recognized in *Townsend v. Burke*[88] that misreading a defendant's past criminal record could amount to a violation of due process of law.[89] Cases applying this principle, however, have usually involved egregious blunders on the part of the sentencing judge, and the principle is regularly qualified by the caveat that a court possesses wide discretion to "predicate sentence on habitual misconduct, whether or not it resulted in convictions."[90] Thus limited, the few cases that have granted relief based on a judge's erroneous interpretation of a defendant's past criminal record represent only a modest inroad upon the general appellate rule of nonreview of sentencing decisions.[91]

Behind this judicial passivism lies, in part, simple ignorance. Appellate courts have either not understood how sentencing information is acquired or they have conceived the sentencing process to be basically ministerial, dealing with only "privileges" and not "rights."[92] A more fundamental obstacle to judicial reform of sentencing, however, has been the fear that courts might be forced to apply all of the rigid rules of the trial process to sentencing. For decades, all attempts to reform the sentencing process have been rejected with the argnment that any limitation of the trial judge's discretion would hopelessly burden the criminal process, and could even result in greater injustice to the accused, because the rules of evidence might also foreclose the consideration of redeeming information. According to this argnment formalization of the sentencing process might force courts to revert to standardized sentences. Although the reasoning involved is often less than lucid, the conclusion is invariably reached that any significant reform of sentencing would result in the sacrifice of rehabilitative ideals.

The foremost example of this argnment is the Supreme Court's

88 334 U.S. 736 (1948) (reversing a state court sentence where the trial judge confused arrests with convictions and read his mistake into the record).

89 *Id.* at 740-41.

90 *E.g.*, United States v. Malcolm, 432 F.2d 809, 816 (2d Cir. 1970). The Second Circuit in *Malcolm* expanded the *Townsend* holding into the following proposition: "Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." *Id.* The court added, however, that other "aggravating circumstances" were present, namely that a plea bargain made by the prosecution had been ignored by the judge. *Id.* at 816-19.

91 *See* Note, *Appellate Review of Sentencing Procedure*, 74 YALE L.J. 379 (1964).

92 SENTENCING xxi. Today the right-privilege dichotomy has been thoroughly discredited. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). In Goldberg v. Kelly, 397 U.S. 254 (1970), the majority decision suggested that a concept of "entitlement" should replace the old distinction. *Id.* at 262 n.8.

decision in the landmark case of *Williams v. New York.*[93] In *Williams* a convicted murderer was sentenced to death, despite the jury's recommendation for leniency, because of the sentencing judge's explicit reliance on portions of a presentence report which were never disclosed to the defense, and which stated that the defendant had been "identified as the perpetrator" of some thirty other crimes. At first blush, the case would seem to be controlled by *Townsend,* decided earlier that same year.[94] Speaking for the Court, however, Justice Black saw the defendant's objections as threatening to confine the sentencing judge within the narrow boundaries of the common law rules of evidence.[95] The Court praised the idea of flexible sentences geared to rehabilitative purposes and assumed, with little justification, that if strict rules of evidence were made applicable, redeeming information would have to be excluded in the same manner as damaging information.

93 337 U.S. 241 (1949). *See also* Williams v. Oklahoma, 358 U.S. 576 (1959), in which the state's attorney was permitted to make an extensive address to the sentencing judge regarding the defendant's cruelty, citing matters not in evidence, resulting in the imposition of capital punishment.

94 Although the facts are similar, these cases are distinguishable in three respects. First, in *Williams v. New York* the defendant was represented by counsel at the sentencing proceedings and his attorney made a statement in his behalf. Second, the accuracy of the information contained in the investigation report was not formally challenged at sentencing. Finally, the judge did not mistakenly believe that defendant had actually been *convicted* of the 30 other crimes although he "had information" that the defendant had confessed to some and had been identified in others. 377 U.S. at 244-45.

95 Referring to the report, Justice Black said: "To deprive sentencing judges of this kind of information would undermine modern penological procedural policies . . . ." *Id.* at 249-50.

Because defense counsel failed to object at sentencing to the use of the presentence report, the exact scope of the *Williams* holding has long been debated. On appeal defense counsel were forced to stress the confrontation clause argument that cross-examination should be allowed before any sentencing data could be reported to the judge. This proved too much for the Court to accept. Subsequently, several writers have argued that the *Williams* holding applies only where counsel has failed to demand inspection of the sentencing report, and that when such demand is made *Williams* does not prevent the assertion of a due process right to review and supplement the information. *See, e.g.,* Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay,* 47 TEXAS L. REV. 1 (1968). However, as the author notes, the Advisory Committee Note to Rule 32 of the Federal Rules of Criminal Procedure (which Rule gives the defendant the old common law right of "allocution," the right to present mitigating information to the sentencing judge) interprets *Williams* more broadly: "It is not a denial of due process of law for a court in sentencing to rely on a report of pre-sentence investigation without disclosing such report to the defendant or giving him an opportunity to rebut it." *Id.* at 13.

This interpretation of *Williams* seems to suggest that the defendant's sentencing rights do not go beyond addressing a few remarks to the bench. In addition, courts have regularly noted that Rule 32 places no limit on the relevancy of the information tendered. *See* United States v. Schipani, 315 F. Supp. 253 (E.D.N.Y.), *aff'd,* 435 F.2d 26 (2d Cir. 1970), *cert. denied,* 401 U.S. 983 (1971).

Although the decision raised the spectre of endless procedural hearings and of a return to totally standardized sentencing, it never explained clearly why a formal hearing is needed to dismiss information which borders on idle gossip. Nor did it consider the possibility raised recently by such decisions as *Goldberg v. Kelly*[96] that an informal hearing would suffice.[97] Moreover, *Williams* fails to distinguish between the *scope* of the information received and its *reliability*, assuming apparently that the necessity for a wide range of information justifies a permissive attitude towards its accuracy as well. Similarly, the argument that the rules of evidence are too burdensome disregards the possibility that other rules could be fashioned which could feasibly regulate the type of information allowed to be tendered at sentencing. Thus, for instance, a firm rule that police prearrest records may not be tendered would present no procedural problem for the trial court.

As vulnerable to criticism as *Williams* is, however, it has been repeatedly reaffirmed by the Supreme Court and followed by lower courts.[98] Additionally, the juvenile sentencing process would seem to be doubly insulated by the Supreme Court's isolation of juvenile adjudicatory proceedings as the sole focus of its concern.[99] But the precise holding of *Williams* is still subject to some doubt. Does it reject only the assertion that hearsay can never be received, or does it really constitute a justiciability decision to the effect that the entire area of sentencing cannot be subjected to due process standards? If *Williams* can be construed simply to reject the imposition of the impossible procedural burden of requiring the court to hear formal evidence as to the appropriate sentence and to allow confrontation and cross-examination, then it would not pose an obstacle to rules which focus on records themselves. Such rules might uniformly proscribe the admission of specified data of insufficient relevance or reliability in individual sentencing proceedings and thus avoid ensnarling the trial court in procedural technicalities.

A recent Supreme Court reference to *Williams* emphasized its

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96 397 U.S. 254 (1970).

97 In *Goldberg*, which required a pretermination hearing for AFDC (Aid to Families with Dependent Children) recipients, the Court noted: "Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence." *Id.* at 269.

98 *See* Specht v. Patterson, 386 U.S. 605 (1967); Williams v. Oklahoma, 358 U.S. 576 (1959); United States v. Schipani, 435 F.2d 26 (2d Cir. 1970); United States v. Fischer, 381 F.2d 509 (2d Cir. 1967), *cert. denied*, 390 U.S. 973 (1968). In Hill v. United States, 368 U.S. 424 (1962), the Supreme Court suggested that its power to review sentencing procedures is derived from its supervisory power over the lower federal courts, and not from the Constitution.

99 *See* note 15 and accompanying text *supra*.

narrower interpretation that the sentencing judge need not conduct a formal hearing.[100] In addition, the Fourth Circuit recently required the sentencing judge to disclose to the defendant those portions of a presentence report which dealt with his criminal record, apparently on the theory that inaccuracies in this area can be quickly rebutted by the defendant and that such disclosure will not necessitate revealing confidential police sources of information.[101]

Adding further support to a narrow interpretation of *Williams* are two recent Supreme Court decisions dealing with analogous situations. In both cases the Court subjected hearings to due process standards. In *Mempa v. Rhay*,[102] the Court ruled unanimously that counsel must be provided at probation revocation hearings where the defendant had initially received a suspended sentence. Lower courts following *Mempa* have interpreted it as a rejection of the once popular view that sentencing is primarily a matter immune from intrusion by appellate courts.[103] Of more significance is the Court's decision in *Kent v. United States*,[104] where it ordered not only that counsel be permitted to appear at waiver

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100 We held in *Williams v. New York* . . . that the Due Process Clause of the Fourteenth Amendment did not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed.

Specht v. Patterson, 386 U.S. 605, 606 (1967).

101 Baker v. United States, 388 F.2d 931 (4th Cir. 1968).

102 389 U.S. 128 (1967). The decision is susceptible to restrictive interpretation. Justice Marshall emphasized the defenses that would be waived under state law if counsel were not present to assert them at sentencing. In addition, a suspicion of plea bargaining pervades the decision. New York courts have extended the decision's applicability to the revocation of a juvenile's parole. *See* People *ex rel.* "F" v. Hill, 29 N.Y.2d 17, 271 N.E.2d 911, 323 N.Y.S.2d 426 (1971).

103 In Hester v. Craven, 322 F. Supp. 1256 (C.D. Cal. 1971), a federal district court rejected the argument that a defendant given an indeterminate sentence could have his parole revoked without a due process hearing where sentence was redetermined at the parole revocation proceeding:

> It has been suggested by the respondent that the decision to redetermine (the sentence) is prognostic and since it is based upon subjective factors involving such intangibles as the extent of the petitioner's rehabilitation and his ability to get along in society, the procedure ought not to be subject to due process requirements. This view of the redetermination procedure is inconsistent with the facts of this case.

Id. at 1264. *See* Dunn v. California Dep't of Corrections, 401 F.2d 340 (9th Cir. 1968); *In re* McLain, 55 Cal.2d 78, 357 P.2d 1080, 9 Cal. Rptr. 824 (1960), *cert. denied*, 368 U.S. 10 (1961).

104 383 U.S. 541 (1966). A further decision of importance is Baxstrom v. Herold, 383 U.S. 107 (1966), in which the Court held that an inmate confined in a mental institution must be given a full civil commitment hearing if he is to be held beyond the expiration of his criminal sentence. In United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969), the Second Circuit extended the civil hearing requirement to all transfers of prisoners to mental institutions.

hearings (the proceedings by which juveniles accused of serious crimes are transferred to the adult criminal process), but also that counsel be allowed to view and challenge the probation file the judge would examine. Without mentioning *Williams* the Court rejected the idea that the role of counsel should be limited simply to the presentation of redeeming information about the juvenile:

> [I]f the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter. There is no irrebuttable presumption of accuracy attached to staff reports. . . . [I]t is equally of "critical importance" that the material submitted to the judge . . . be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation.[105]

The ease with which *Kent* reached a result so contrary to *Williams* seems best explained by the Court's reference to the "theory of the Juvenile Court Act."[106] *Kent's* holding may thus be based on statutory interpretation rather than on constitutional considerations.[107] In any event, no court has yet extended *Kent* beyond waiver hearings to the dispositional stage. Indeed, the Uniform Juvenile Court Act[108] expressly permits the receipt of hearsay testimony at the dispositional hearing.[109] Yet neither the *Kent* nor the *Mempa* rationale can be meaningfully confined to the limited situations of probation revocation and waiver hearings.

Even apart from *Kent*, legislative revisions of the Juvenile Court Act in some states have given defense counsel the right to examine the probation file and even to cross-examine witnesses.[110] The Model Rules for Juvenile Courts have gone even further, requiring the probation

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105 383 U.S. at 563. In *Kent*, however, the Court also stated unequivocally that a juvenile court may receive "*ex parte* analyses" from its staff, even though "secret information" in a youth's social reports could not be relied upon. *Id.* The Court emphasized that an informal proceeding would suffice.

106 *Id.* at 554-55. Both *Kent* and *Mempa* are also distinguishable from *Williams* in that waiver and probation revocation proceedings are much less frequent than ordinary sentencing proceedings, and thus can more conveniently implement procedural guarantees.

107 By construing the District of Columbia Juvenile Court Act, which requires a "full investigation" at a waiver hearing and authorizes persons having a "legitimate interest" to obtain access to the juvenile's social records (*id.* at 561-63), the Court found that the statute authorized some "adversarial tactics" at the waiver stage.

108 UNIFORM JUV. CT. ACT § 29(d), in NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, HANDBOOK 267 (1968).

109 *Id.*; *cf.* N.Y. FAMILY CT. ACT § 745 (McKinney 1963), which stipulates that only information that is "material and relevant" can be admitted at a dispositional hearing.

110 Revisions in the Juvenile Court Rules of Maryland (MD. JUV. CT. R. 913, § a(2) (Supp. 1971)) and Washington (WASH. JUV. CT. R. 5.2(b) (Supp. 1971)), and statutory change in Minnesota (MINN. STAT. ANN. § 260.161(2) (1971)), require disclosure.

officer to defend his investigation and recommendations from the witness stand.[111] In New York, where disclosure of the presentence report to defense counsel is still discretionary, a leading family court judge has indicated that she may, under certain circumstances, require even psychiatric evaluations to be subjected to cross-examination.[112] In short, notwithstanding *Willams*, procedures at the dispositional stage of the juvenile court evidence an evolving adversarial remedy.

The critical issue, however, is whether such a change will in reality protect juveniles from the introduction of unreliable data.[113] For several reasons the adversarial approach, dependent as it is on disclosure to defense counsel, appears inadequate. The basic deficiency of an adversarial remedy, apart from the time-consuming burdens it imposes, is the inability of the juvenile's counsel to rebut fully the inferences created by a misleading record. At best, a probation officer through cross-examination might be made to admit his unfamiliarity with the data he is reciting. An ineffectual pro forma objection in most instances will be the defense counsel's only counter to the introduction of misleading records. In the final analysis, disclosure to defense counsel for impeachment purposes can be considered an effective remedy only if we postulate the most impartial of judges and the most zealous of defense counsels. The exclusion of police records should not depend upon the ability of the individual attorney to convince the individual judge that particular records are unreliable. The remedy that *Kent* presages—an individual voir dire over each piece of information tendered—is both cumbersome and insufficient: the prejudice created by misleading rec-

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111 NATIONAL COUNCIL ON CRIME & DELINQUENCY, MODEL RULES FOR JUVENILE COURTS, R. 30 (1969) and W. SHERIDAN, STANDARDS FOR JUVENILE AND FAMILY COURTS (HEW 1966) propose that the probation officer defend his investigation and recommendations from the stand. Similarly, a proposed draft of Rule 32 of the Federal Rules of Criminal Procedure has been submitted which would generally make presentence reports available. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE 62-67 (Prelim. Draft 1970).

112 *In re* Baine, 54 Misc. 2d 248, 256-57, 282 N.Y.S.2d 359, 367 (Queens County Fam. Ct. 1967).

113 The standard rebuttal to the advocates of disclosure to defense counsel is that revealing the sources of the probation department's information will "dry them up," by subjecting them to reprisals. *See* SENTENCING 27. This article has not attempted to analyze such arguments because it finds the remedy of disclosure to defense counsel itself inadequate to protect the defendant's rights. In any event, it is clear that police records, unlike unrevealed sources, will not "dry up." For a general discussion of the disclosure issue, see Note, *Disclosure of Social and Psychological Reports*, 7 OSGOODE HALL L.J. 213 (1969). On the federal level, disclosure of presentence reports is within the discretion of the trial court under FED. R. CRIM. P. 32(e). United States v. Fischer, 381 F.2d 509, 512-13 (2d Cir. 1967), *cert. denied*, 390 U.S. 973 (1968).

ords cannot be overcome simply by their disclosure to defense counsel, especially if they are not even subjected to cross-examination.[114]

2. *Beyond Disclosure: The Need for Per Se Rules*

A more satisfactory alternative to disclosure is the development of procedures for the expungement or, at least, the quarantine of certain classes of records. Though expungement, insofar as it does not involve the sentencing judge, might prevent the problems *Williams* sought to avoid, it faces formidable and ancient obstacles.

As a general rule arrest records have been cognizable in sentencing despite the absence of conviction.[115] Juvenile prearrest records are, of course, distinguishable from arrest records on a number of grounds: (*1*) a major state interest served by the preservation of arrest records is absent in the case of juvenile prearrest records since identification data—fingerprints and photographs—are not included; (*2*) since no official arrest has been made there is considerably less assurance that the standard of "probable cause" supports the record's accusations; (*3*) the police contact reported need not involve the violation of a criminal statute since only the vague standard of "misconduct" limits what the police officer may report; and (*4*) the failure to make the arrest in the original instance contradicts any subsequent claim as to the value and validity of prearrest data. Real as such distinctions are, they do not imply reasons for the maintenance and dissemination of arrest records when no conviction occurs. The use of both arrest and prearrest records violates the vaunted Anglo-American principle of presumed innocence. Accordingly, a showing that the use of Y.D. records is even more irrational than

114 A committee of the American Bar Association has also recognized the need for overall ground rules: "Arrests, juvenile dispositions short of an adjudication, and the like, can be extremely misleading and damaging if presented to the court as part of a section of the report which deals with past convictions." ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROBATION § 2.3, at 37 (Tent. Draft 1970), *cited* in Menard v. Mitchell, 430 F.2d 486, 491 n.23 (D.C. Cir. 1970).

115 For a discussion of the controversy over the use of arrest records, see W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965); Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CRIME & DELINQUENCY 494 (1967); Schwartz & Skolnick, *supra* note 83; Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1971). *See also* McGovern v. Van Riper, 140 N.J. Eq. 341, 54 A.2d 469 (Ch. 1947) (holding that statute providing for fingerprinting and photographing of persons arrested for indictable offenses did not constitute an unconstitutional invasion of privacy); Kolb v. O'Connor, 14 Ill. App. 2d 81, 142 N.E.2d 818 (1957) (holding that the retention of photographs, fingerprints, and identification records by the city police did not constitute an invasion of privacy). For an opposite result prohibiting the dissemination of rogues gallery portraits, see Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905).

traditional arrest record practices may not persuade those who refuse in the first instance to concede the injustice of the use of arrest records.

Recently, however, federal courts have expunged arrest records in a series of unprecedented cases. A variety of justifications has been employed, ranging from Title VII of the Civil Rights Act of 1964,[116] to the first amendment, to judicial discretion in certain situations.[117] In recent cases courts have expunged arrest records either immediately after acquittal or even years later when plaintiff was able to demonstrate that "probable cause" did not exist to support the arrest.[118] In all these

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116 42 U.S.C. § 2000e (1970).

117 In Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969), *vacated and remanded*, 401 U.S. 987 (1971), the court found North Carolina's vagrancy statute unconstitutional and ordered expungement of arrest records of plaintiffs who belonged to a hippie commune which was repeatedly subjected to police raids. The court's analysis of the limited utility of police records is particularly interesting:

> Arrest records exist to facilitate criminal investigation, but the plaintiffs' records here perform no such function. Plaintiffs have committed no crimes, and retention of their arrest records cannot be justified as a "criminal identification."
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> . . . .
>
> The existence of the records could harm plaintiffs unfairly, and this possibility suggests expunction where criminal investigation is not subserved in the least by retention of the files. . . . [O]n the facts of this case, *including the youth* of the plaintiffs, their innocence of any crime, the extreme misbehavior of the police in making arrests without probable cause, and the absence of any benefit to society . . . , we think expunction should be allowed.

Id. at 65-66 (emphasis added). Although this decision has been reversed in part by the Supreme Court (401 U.S. 987 (1971)) and remanded for "reconsideration in light of Younger v. Harris, 401 U.S. 37 (1971)," it would appear that the reversal does not affect the expungement aspect of the case, but rather only the voiding of the North Carolina vagrancy statute. To the same effect see Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968). In United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967), a youth charged with draft evasion offered to enlist and the charges against him were dropped. The defendant then motioned the court to expunge his arrest record. The court did so in order that he not be "haunted" by the record. It added in an even broader statement than that of the *Wheeler* court: "[W]hen an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by retention of criminal identification records." *Id.* at 970. In United States v. McLeod, 385 F.2d 734 (5th Cir. 1967), the court ordered expungement of all arrest and conviction records of civil rights workers.

118 In Morrow v. District of Columbia, 417 F.2d 728, 731, 742 (D.C. Cir. 1969), the District of Columbia Circuit Court summarized at length the injuries caused by retention of arrest records in upholding a lower criminal court judge's decision to expunge the record in a case where the evidence was particularly weak. Several state cases are also worthy of note. In *In re* Smith, 63 Misc. 2d 198, 310 N.Y.S.2d 617 (N.Y. City Fam. Ct. 1970), New York family court Judge Nanette Dembitz discussed in remarkable detail the injuries to a New York juvenile when an arrest record is preserved. Apart from constitutional considerations, she found the legislative intent of the Family Court Act to require expungement. *Id.* at 204-05, 310 N.Y.S.2d at 624. In Henry v. Looney, 65 Misc. 2d 759, 317 N.Y.S.2d 848 (Sup. Ct. 1971), a New York supreme court expunged a juvenile's arrest record (at least to the extent of ordering the obliteration of his surname from the

cases, however, expungement has occurred on an ad hoc basis with the plaintiff seemingly required to prove his innocence.[119]

In the most important of the expungement cases, *Menard v. Mitchell*,[120] the District of Columbia Circuit took the first step towards a general statement of the individual's right to prevent the adverse use of information stemming from his contacts with the police.[121] The facts of *Menard* are simple. Dale Menard was arrested in California and released two days later without being formally charged. Subsequently, he discovered that his fingerprints and a summary of the incident were on file with the FBI. Since a California statute characterized the contact as a "detention" rather than an arrest, he sued to expunge his record on the theory that the FBI had authority to maintain only criminal records. The court of appeals dealt only summarily with this point of statutory interpretation and focused instead on the absence of information in the record upon which to determine if probable cause for arrest had existed. It held neither side was entitled to summary judgment and remanded for a further hearing. In dictum, the court considered the problem of an arrest based upon possible cause followed by exoneration. "[I]f the FBI has actual knowledge that further investigation exonerated appellant, *it may be under a duty at the very least to supplement its files*

record and enjoining its dissemination in any form), after deciding that the record was "logically probative" of nothing. The court, however, first made extensive findings as to the evidence underlying the arrest in order to determine the absence of probable cause. Similarly, in Irani v. District of Columbia, 272 A.2d 849 (D.C. App. 1971), a District of Columbia appellate court reversed a lower court and ordered it to exercise discretion and, if appropriate, to expunge a student's arrest record where the student was able to demonstrate that he had in no way been involved in a protest march which resulted in mass arrests. In these cases the plaintiffs were able to make a strong showing of innocence. It is not clear whether the same courts would expunge the arrest record of an unconvicted defendant against whom circumstantial evidence existed.

119 *But cf.* Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), where Litton Industries was enjoined by a federal district court from soliciting, obtaining, or considering arrest records in the recruitment of personnel on the theory that the disproportionate number of arrests experienced by Negroes made consideration of these records a violation of Title VII of the Civil Rights Act (42 U.S.C. § 2000e (1970)). Alone, *Gregory* seems to stand for the proposition that arrest records are per se unreliable. *Gregory* has been ably discussed in a recent article, Note, *Arrests as a Racially Discriminatory Employment Criterion*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 165 (1970) which deals with the unique problems of Title VII litigation. *Cf.* N.Y. Times, Nov. 30, 1971, at 36, col. 5, noting the commencement of operation of the FBI's computerized criminal history data bank that will eventually give law enforcement agencies access to arrest records from any state and from federal investigative agencies.

120 430 F.2d 486 (D.C. Cir. 1970).

121 *But see* Herschel v. Dyra, 365 F.2d 17 (7th Cir.), *cert. denied*, 385 U.S. 973 (1966), where the Seventh Circuit in a terse and uninformative opinion concluded that a demand for expungement did not state a claim for relief under the Civil Rights Statute (42 U.S.C. § 1983 (1970)).

to indicate that fact."[122] The court qualified this rule by recognizing that substantial discretion existed in the agency to determine how detailed its criminal identification files would be, but added that the extent of that discretion depended in turn upon "the extent to which the information may be disseminated."[123]

Menard, strictly construed, insists only upon correction of a record known to be erroneous.[124] But the decision's rationale has broader implications. Chief Judge Bazelon indicated that arrest records are per se misleading where no conviction ensues and that full scale expungement might be necessary.[125] In addition, *Menard*'s central concept of a "right to amplification" measured by the extent of dissemination of the record goes to the heart of the issue much more directly than does *Kent*'s reasoning.

On remand District Judge Gesell found that the ultimate disposition of the individual whose arrest records were disseminated by the FBI seldom became known to the recipient, and that the FBI could not independently determine the accuracy or reliability of the data it was handling. Avoiding the constitutional issue,[126] he narrowly interpreted the statute granting the Attorney General authority to collect and classify criminal identification records as precluding the dissemination of arrest records by the FBI "for employment, licensing or related pur-

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122 430 F.2d at 492 (emphasis added). *Menard* did not involve the situation of an arrest followed by an acquittal. The court does, however, speak of "assumptions regarding the meaning of an arrest" which unfairly prejudice the accused where the arrest lacks "prohable cause." *Id.* at 491-92. Turning to the case of a legal arrest followed by exoneration (through further investigation, not through acquittal), the court suggests that the plaintiff may possess "a right to limit [the record's] dissemination or to require its amplification." *Id.* at 491-93. The court did not consider the arrest followed by neither exoneration nor conviction, but adjustment, *i.e.*, the typical juvenile situation. Here amplification of the record to the extent of recording the disposition would only enhance the distorted inference of guilt; restricting dissemination appears to be the only adequate way to protect a youth.

123 *Id.* at 492.

124 This principle alone would seriously undermine Y.D. reports because no procedure exists for modification or expungement even if the report is determined to be "unfounded."

125 "[T]he only adequate remedy may lie either in severely curtailing any use of records of arrest, or in eliminating altogether their maintenance in a file associated with the individual's name." 430 F.2d at 495 n.51.

126 [A]ccusations not proven, charges made without adequate supporting evidence when tested by the judicial process, ancient or *juvenile transgressions long since expiated by responsible conduct*, should not be indiscriminately broadcast under governmental auspices. . . . Systematic recordation and dissemination of information about individual citizens is a form of surveillance and control which may easily inhibit freedom to speak, to work, and to move about in this land.

Menard v. Mitchell, 328 F. Supp. 718, 725-26 (D.D.C. 1971) (emphasis added).

poses."[127] At the same time, however, he refused to expunge plaintiff's arrest record "where its dissemination outside the Federal Government is limited to law enforcement purposes."[128] Two things are immediately significant about Judge Gesell's opinion: (*1*) it does not look to the evidence of plaintiff's guilt or innocence, but rather to the incomplete and uncertain character of the data; and (*2*) it creates an extremely ambiguous exception to its overall rule of no access—that of "law enforcement purposes." Exactly what is the scope of "law enforcement purposes"? For example, can the data disseminated by the FBI be used in a presentence report prepared in a state different from that of the original arrest, even though it is known that the record may be incomplete or distorted?[129] Is it available for use in the exercise of prosecutorial discretion? Whether the court simply iguores such problems or whether it would rely on a right-privilege distinction to deny that a defendant is entitled to record accuracy is not clear. What is clear, however, is a disparity between the evident judicial concern for the economic injury caused by an arrest record and the court's insensitivity to the possibility of prejudice from the same inaccurate data should the defendant reappear in the criminal justice system.

The reluctance to provide for expungement in sentencing is evidenced in cases where the defendant has sought to exclude illegally seized evidence when offered at sentencing. In *United States v. Schipani*[130] the Second Circuit, relying heavily on the rationale of *Williams*, held that the fourth amendment's exclusionary rule does not extend to sentencing, and that illegally seized evidence might be offered in the interest of providing the sentencing judge with the maximum amount of

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127 *Id.* at 727.

128 *Id.*

129 If there actually has been an acquittal and this is not shown in the record (and the presentence report was not disclosed to defendant), it seems likely that Townsend v. Burke, 334 U.S. 736 (1948) (notes 88-91 and accompanying text *supra*) should apply (if somehow defendant learned of the mistake).

130 435 F.2d 26 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971).

> A sentencing judge's access to information should be almost completely unfettered in order that he may "acquire a thorough acquaintance with the character and history of the man before [him]." . . .
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> . . . .
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> This policy permits the broad acceptance of hearsay in the sentencing procedure.

Id. at 27, *quoting* United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965) (brackets in original). *Cf.* Verdugo v. United States, 402 F.2d 599 (9th Cir. 1968), *cert. denied*, 402 U.S. 961 (1971) (exclusionary rule applied to illegally seized evidence which had been specifically seized to influence sentence). Whether or not the fourth amendment's exclusionary rule should extend to sentencing is a question beyond the scope of this article, except insofar as the issues of reliability and relevance of tendered arrest records are raised.

information. *Schipani* does contain, however, two important caveats: (*1*) the illegally seized evidence must not have been "gathered for the express purpose of improperly influencing the sentencing judge" and (*2*) the evidence must be "reliable."[131] Although the court failed to examine the difficulties involved in the sentencing judge's determination of whether the information tendered is reliable, reliability is at least acknowledged as a limit upon the sentencing court's discretion.[132]

Until recently, discussion of the likelihood and probable direction of sentencing reform would stop at this point. Little more could be said than that arrest records cases, although offering possible avenues for the expansion of the embryonic principle of *Townsend* that a defendant should not be sentenced on inaccurate information, were more concerned with economic injuries than with the greater peril to a defendant who reappears in the criminal justice system.[133] Today, however, the activism of the Ninth Circuit in two recent cases has changed this picture.

In the first of these cases, *Tucker v. United States*,[134] the Ninth Circuit held that resentencing was required when the sentencing judge considered uncounseled convictions obtained before *Gideon v. Wainwright*.[135] The decision relies on the Supreme Court's language in *Burgett v. Texas*[136] that uncounseled convictions may not be "used against a person either to support guilt or *enhance punishment for another offense* . . . ."[137] *Burgett*, however, involved a case where the criminal act (violation of a recidivist statute) required a prior conviction as an element of the offense. Thus *Tucker* was an extension of *Burgett* insofar as it holds that certain information must acually be excluded from the sentencing process. The distinction is important since *Tucker*, so construed, fashions a per se sentencing rule and embraces exactly the ex-

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131 435 F.2d at 28.

132 In the case of juvenile records, the "improper influence" limitation may be more significant, since records such as the Y.D. card appear to be gathered and maintained for the particular purpose of "building a record." *See* notes 20-26 and accompanying text *supra*.

133 Several state courts and legislatures, however, have recently increased either the defendant's access to, or his right to cross-examination of, presentence reports. *See* Kuh, *For a Meaningful Right to Counsel on Sentencing*, 57 A.B.A.J. 1096 (1971). Federal courts, except for the Ninth Circuit, have been generally recalcitrant. *See* United States v. Bakewell, 430 F.2d 721 (5th Cir.), *cert. denied*, 400 U.S. 964 (1970); United States v. Holder, 412 F.2d 212 (2d Cir. 1969).

134 431 F.2d 1292 (9th Cir. 1970), *aff'd*, 92 S. Ct. 589 (1972).

135 372 U.S. 335 (1963).

136 389 U.S. 109 (1967).

137 *Id.* at 115 (emphasis added).

clusionary approach which *Schipani* rejected with regard to illegally seized evidence.

On appeal, the Supreme Court affirmed,[138] citing both *Townsend* and *Williams*, and reconciling them in the following words: "[W]e deal here not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded *at least in part upon misinformation of constitutional magnitude.*"[139] What misinformation is of constitutional magnitude appears to have become the issue. Here *Tucker* is ambiguous. On the one hand it suggests that only materially false assumptions about an individual's criminal record will suffice.[140] Elsewhere it refers to "factual circumstances of the respondent's background [which] would have appeared in a dramatically different light at the sentencing proceeding."[141] Such language suggests that any form of material misinformation could be of constitutional magnitude.

While the case can be strictly construed as simply an extension of *Gideon v. Wainwright*,[142] a persuasive argument might be made that *Tucker* requires the exclusion of arrest records in sentencing since the record of an uncounseled conviction certainly possesses no less probative value than the record of a mere arrest.

To date the Supreme Court has never directly faced the issue of expunging arrest records although it has, in *Schware v. Board of Bar Examiners*,[143] required the admission to the Bar of an applicant with a record of arrests. In doing so it unequivocally rejected the probative value of arrest records: "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct."[144] It is possible, of course, to distinguish the situation of an applicant to the Bar from that of a defendant facing sentence. Yet such a distinction is irrelevant to the question of the probative value of arrest records. Moreover, involving as it often does probable differences of class and race, such a distinction seems highly unfortunate. The presumption of innocence should be distributed equally.

Another Ninth Circuit case decided before the Supreme Court's affirmance in *Tucker* further limits the information a sentencing judge may consider. In *United States v. Weston*,[145] a defendant convicted of

138 United States v. Tucker, 92 S. Ct. 589 (1972).

139 *Id.* at 591-92 (emphasis added).

140 *Id.* at 592.

141 *Id.*

142 *Tucker* concludes by stating that the Court will not permit "[e]rosion of the *Gideon* principle." *Id.* at 593.

143 353 U.S. 232 (1957).

144 *Id.* at 241.

145 448 F.2d 626 (9th Cir. 1971).

possession of marijuana had been given a maximum twenty-year sentence based upon the unsworn testimony of an anonymous informer who identified the defendant as a principal West Coast drug supplier. Noting that such information could not have supported even an arrest warrant but that it had apparently multiplied the length of the sentence, the court stated: "To us, there is something radically wrong with a system of justice that can produce such a result. The problem is what, if anything, can be done about it."[146] The cause of the "problem," of course, was *Williams v. New York*.[147] After struggling with *Williams* at length, the court distinguished it by utilizing an exclusionary analysis very similar to that suggested here. In *Williams*, it said, appellant unsuccessfully attacked two procedures employed at sentencing: the receipt of hearsay and the lack of due process safeguards. In contrast, at issue in *Weston* was the accuracy of information. Upon this distinction the court rested its decision to give relief: "There is a difference between reviewing a sentence and deciding that certain types of information should not, for various reasons, be considered in sentencing."[148] *Weston* then appears to formulate a per se exclusionary rule regarding unverified reports of anonymous informers. But more important is the decision's methodology. Henceforth sentencing data will apparently be susceptible to classification on the basis of reliability, with appellate courts determining if the information is sufficiently unsubstantiated so that it should have been excluded at sentencing. Such an approach may well be "an end run around *Williams v. New York*,"[149] but given time it could generate an urgently needed body of case law governing the character of information upon which a man may be committed to prison. Without such rules, as the *Weston* court noted, there is something radically wrong with any system of justice.

B. *The Right to Privacy*

The right to privacy has been defined as "control over knowledge about oneself."[150] The juvenile's situation, however, involves unique privacy problems. In the case of the juvenile it is not simply the usual array of potential employers, creditors, salesmen, and the like who seek data, but rather a number of specialized institutions and agencies

146 *Id.* at 631.

147 377 U.S. 241 (1949); *see* notes 93-101 and accompanying text *supra*.

148 448 F.2d at 631.

149 *Id.* at 634.

150 Fried, *Privacy*, 77 YALE L.J. 475, 483 (1968). For a nearly identical definition, see A. WESTIN, PRIVACY AND FREEDOM 7 (1967): "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."

which are authorized by law to make certain determinations for him in his own "best interest." Included among these questionably "benevolent" agencies, are the youth division of the police department or the probation department, the school system, and the welfare department. At present, to deny the request of one of these agencies for information is often to risk the loss of important benefits. For example, in the case of Y.D. reports, a refusal to give information or to cooperate with "adjustment" efforts could result in court referral. Ultimately the juvenile's denial of certain information to these agencies is a claim for partial autonomy—for greater freedom from the state's *parens patriae* authority. If this is true, then "the right to be let alone," as Justice Brandeis termed the right of privacy,[151] is therefore antithetical to and in a sense subversive of the premises upon which a great number of institutions dealing with juveniles operate, including the underlying idea of juvenile law that the juvenile is not sufficiently mature to deserve full constitutional rights.[152]

The concept of delayed entitlement to constitutional rights should be inapplicable to a juvenile's claim of privacy; rather, the concern should be with the juvenile's often relatively greater need for privacy. Studies have indicated that the practice of close state surveillance is self-defeating; the more a juvenile is observed and his conduct noted, the greater the possibility of antisocial conduct.[153] Some degree of privacy, even apart from the constitutional arguments, seems to be essential to "normal" development; an unremitting search for juvenile misconduct only obstructs social goals. Moreover, the idea of a "right to a fresh start" has long been central to American society.[154] The

151 Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

152 *See* Ginsberg v. New York, 390 U.S. 629 (1968), especially the concurring opinion of Justice Stewart characterizing the juvenile as "not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." *Id.* at 649-50.

Conversely, recent cases dealing with the right of the student to maintain a personal appearance of which the school disapproves, have largely concluded that the juvenile's choice is constitutionally protected, at least where no compelling need for conformity is shown. Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970); Richards v. Thurston, 304 F. Supp. 449, 451 (D. Mass. 1969), *aff'd*, 424 F.2d 1281 (1970); Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); *cf.* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969).

153 *See* notes 84-85 and accompanying text *supra*.

154 Americans throughout their history have accepted as a central pillar of their national mythology the notion of the second opportunity. Just as it is assumed that all men ought to be equal in their opportunities, so it has been . . . believed that every man, however outrageous or disreputable his past, should be permitted a second start. The origins of the doctrine presumably may be traced to the character and practical requirements first of the earliest settlements and later of frontier life. The repentant ne'er-do-well might go to America, to the

crucial question is what limitations on data gathering, maintenance, and dissemination are desirable.[155] There are a number of considerations upon which such limitations may rationally be based.

1. *The Scope of the Inquiry: Is the Data Functionally Relevant?*

An obvious consideration limiting the scope of police records is a functional one: the specific data recorded should be relevant to the recording agency's responsibilities.[156] The problem with such a limitation is to determine exactly what are an agency's responsibilities towards the juvenile. An example is the situation of one of the plaintiffs in *Cuevas* who received a Y.D. report with regard to his status as an illegiti-

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west or to the city, but he was always thought to have discarded the limitations of his past. The hagiology of American history is populated largely by men who overcame youthful indiscretions and settled into steady lives of unrelenting respectability.

L. Lister, The Confidentiality of Pupils' School Records 69 (Russell Sage Foundation 1969) (unpublished).

155 A considerable debate has surrounded the question of whether the right to privacy should proceed from exegesis of the existing cases or from consideration of the fundamental values involved. Dean William Prosser delineated four principal injuries which the case law has made actionable: (*1*) the publication of information which places the aggrieved in an incomplete light; (*2*) the public disclosure of embarrassing private facts; (*3*) the intrusion upon a person's seclusion or solitude, or into his private affairs; and (*4*) the appropriation by another of a person's name or likeness. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). Thus, as the first two listed injuries make clear, even under the common law's narrow view of privacy, truth has not always been a complete defense. *See* Melvin v. Reed, 112 Cal. App. 285, 297 P. 91 (4th Dist. 1931). Professors Edward Bloustein and Charles Fried in particular have criticized Prosser on his conservative approach to the definition of privacy, *See* Bloustein, *Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962 (1964); Fried, *supra* note 150, at 477.

If the concept of privacy as a protected right is derived simply from resort to the tort law doctrines of defamation and invasion of privacy, two principal obstacles face the potential plaintiff: (*1*) disclosure must be made to an extensive audience regardless of the prejudicial character of the information; and (*2*) the doctrine of privilege will be likely to protect the private investigator or the government body seeking information. *See* Karst, *supra* note 68, at 347. *But see* York v. Story, 324 F.2d 450 (9th Cir. 1963) (in which dissemination of nude photographs solely within the police department was found actionable).

Professor Arthur Miller has concluded that there is foundation in common law for finding actionable (*1*) the dissemination of "evidence of present or past actions or associations to a wider audience than the subject consented to or anticipated" and (*2*) the introduction of "factual or contextual inaccuracies that create an erroneous impression of the subject's actual conduct or achievements in the minds of those to whom the information is exposed." Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089, 1109 (1969).

156 The only case in this area appears to be United States v. Rickenbacker, 309 F.2d 462 (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963), upholding the validity of census questions which were not "unduly broad and sweeping," and which preserved the individual's anonymity.

mate father. Youth Aid Division investigators subsequently made extended inquiries into his continuing relationship with the girl involved. The purpose of the inquiry was unclear, but it appears to have been motivated by a vague desire to "help the child." The police arguably have responsibilities in such situations to notify appropriate social welfare agencies. It hardly follows, however, that the incident should be permanently memorialized.

Information about a juvenile's home life, affiliations, and welfare status generally seem outside the proper concern of the police. Yet if the position of the police vis-à-vis the juvenile is similiar to that of a general welfare agency, then all data is potentially pertinent. To limit the data which the police are allowed to record it is first necessary to insist upon jurisdictional limits to their authority.

The President's Commission's recommendation that police authorities should not attempt to exercise benevolent authority over minors beyond referral to social welfare agencies suggests a possible jurisdictional limit.[157] The proper scope of police inquiry need not go beyond the occasion which gave rise to the police-juvenile contact. Thus, for example, police might justifiably ask a juvenile to explain his presence near the scene of a crime, but not ask if he regularly attends school.

Another consideration is whether an agency receiving reports of police contacts can make meaningful use of reported data. Too often the traditional technique (often referred to as the "case attribute" approach) is to amass every available "fact" about an individual without consideration of its relevance or reliability. The result may be a highly nonrigorous, impressionistic methodology—one which does not ensure the utility of the data collected. In questioning the wisdom of current efforts at extensive data collection, penologist Donald Grant has shown that judgments as to the likelihood of parole violations by potential parolees, even when made by experienced administrators based upon a reading of case histories, are less accurate than the results obtained by random selection.[158]

The fundamental premise of the "case attribute" approach seems to be that any fact is relevant: a youth's past sexual history, attitudes

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157 CRIME COMM'N REPORT 82-83. The Commission has also recommended that attempts at police questioning of minors be confined to "situations where there is objective, specifiable ground for suspicion." *Id.* at 79.

158 Grant, *Various Uses of Prediction Procedures*, in READINGS IN CRIMINOLOGY AND PENOLOGY 607, 608-10 (D. Dressler ed. 1964). *See* Schuessler, *Parole Prediction: Its History and Status*, in *id.* at 598. Ironically, however, accurate prediction is possible with regard to the behavior of parole boards. One study predicted with a high degree of accuracy parole board decisions based on intake information. *See* Grant, *supra* at 611.

towards teachers, political outlook, social affiliations—all are presumed somehow to be of value. In a perfect system such data might be intelligently evaluated; but in our less than ideal reality this quest for every detail is both damaging and senseless, because the recipient of the information is not informed whether or not the characteristics recorded distinguish the subject juvenile from other youths in the same environment who have not been apprehended for delinquency. For example, in a ghetto neighborhood where eighty percent of the youths are truant and dependent on welfare, but only ten percent are "delinquent," inclusion of truancy or welfare data in a police report prejudices a youth without communicating a distinctive portrait of him. Thus the *selection* of even objective facts may entail an unintended evaluative conclusion. The recipient of such information naturally assumes that all facts presented are material.

A better approach would be for the data collection agency to record only information that it believes will distinguish the individual from his contemporaries.[159] At a minimum such an approach would substitute deliberate discretion and interpretation for random implication. Compelling reasons support such curtailment of data collection. Sociologist Stanton Wheeler has observed that, at present, the more a juvenile court conducts presentence social study, the more likely it is to send youths who come before it to institutions.[160] The danger is that information in juvenile records may not be carefully evaluated but rather the court may simply proceed on the assumption that the more data, the higher the risk of probation.[161]

2. *The Extent of Dissemination*

Different agencies may give different interpretations to the same "fact" in a juvenile report. Even among the agencies customarily dealing with youths there exist profoundly different definitions of deviance. Data

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159 *See* W. RECKLESS, THE CRIME PROBLEM 32-43 (1955).

160 Wheeler, *Introduction* to CONTROLLING DELINQUENTS 1, 6 (S. Wheeler ed. 1968):

> Juvenile crime rates are higher in communities with enlightened, professional police departments than in those with more traditional police departments . . . .
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> . . . .
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> . . . Judges who adopt the modern juvenile court philosophy appear to commit more youth to institutions than do those operating with a more formal and legalistic judicial view . . . .

161 This appears to be Grant's conclusion.

> Correctional agencies, like other social agencies, have two main concerns: keeping case records and making decisions. Both represent . . . expenditures of time and money, but the two activities have little influence on each other. The information-collectors are busy describing the whole person. The decision-makers are busy trying to cope with a multitude of pressures in a field where little systematic study or body of facts is available.

Grant, *supra* note 158, at 609-10.

viewed as inconsequential by one agency may evoke a strongly negative or moralistic response from another. Thus while the school and the probation department usually acknowledge to varying degrees that deviance is a product of social circumstance, other agencies, such as the police, necessarily operate upon the premise of free will and individual guilt.[162] If privacy may be defined in terms of personal autonomy, it is essential that the juvenile possess some capacity to present himself in different lights to different audiences.[163] To be sure, the right of privacy is not synonymous with a privilege to deceive; but to the extent that the individual perceives the differences in agencies' normative assumptions and chooses to reveal information about himself in response to one set of institutional values, he may not anticipate dissemination beyond the boundaries of the receiving institution's value structure. Where a juvenile thus relies upon the seemingly tolerant bias of a youth division and in the course of an adjustment conference offers information which could prejudice him when viewed in light of stricter moralistic standards, he can be said to be unfairly injured by the preservation of such information in a central records bureau.[164]

In addition, different agencies use the data for very different purposes. Dissemination to an agency providing counseling services is more easily justified than tender of the same information to governmental personnel offices or civil service commissions which possess the power to deny the subject access to significant potential benefits. Even a single agency can occupy several positions with respect to one individual. For instance, in the case of the probation department, a single official may in succession perform a variety of conflicting roles including jailer, screener, arbitrator, magistrate, investigator, and counselor.[165] Controls

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162 *See* Nelson, *Organizational Disparity in Definitions of Deviance and Uses of Authority: Police, Probation and the Schools*, in SCHOOLS IN A CHANGING SOCIETY 21 (A. Reiss ed. 1965).

163 Consider the following comprehensive definition of privacy:

> The essence of privacy is . . . the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, *the extent to which, his attitudes, beliefs, behavior and opinions are to be shared with or withheld from others.*

Ruebhausen & Brim, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1189 (1965) (emphasis added).

164 Such information need not implicate him in actual crimes to be prejudical. It might, for example, reveal him to be a chronic school truant or a member of a juvenile gang.

165 A three-man panel appointed by the Appellate Division's First and Second Departments to study juvenile detention facilities in New York City recently reported that "the Office of Probation is presently performing a number of functions, some of which conflict with others from legal, philosophic and practical viewpoints." N.Y.L.J., Jan. 29, 1971, at 1, col. 8.

governing confidentiality within a single agency, and even expungement after the data have been tendered to the appropriate recipient agency, should be considered.[166]

3. *Relative Confidentiality*

Where adjustment procedures exist at juvenile court intake, the need for police station interviews and for the preservation of data by police diminishes. Probation officers are presumably better equipped for the investigatory task; moreover, the element of coercion is diminished and the record created comes within the court's protective seal.[167] This last protection is necessary because even statutes that require confidentiality or permit expungement after a period of good behavior have not successfully curtailed access to police files.[168]

4. *The Occasion for Inquiry*

Where probable cause for arrest is lacking, what juvenile information should police be allowed to record and preserve? The fourth amendment, augmented by the exclusionary rule, has traditionally been the bulwark against overzealous police activity. In the recent case of *Davis v. Mississippi*[169] even simple fingerprinting was proscribed when based on an illegal arrest.[170] Clearly, however, the exclusionary rule is only an effective deterrent to unauthorized police practices in situations where a trial will occur. How is privacy to be protected in situations where there is no trial? If privacy is a fundamental right, it must be sheltered by specific rules which regulate not only what information may be preserved or admitted into evidence, but the occasions and requisite quantum of evidence that trigger the recording process. Al-

166 Truancy reports, for example, should not be maintained by police record custodians after the information is tendered to the school system.

167 For the relative confidentiality of police and court records, see Karst, *supra* note 68, at 365; Note, *supra* note 1, at 805.

168 *See* Karst, *supra* note 68, at 369-71. *In re* Smith, 63 Misc. 2d 198, 200 n.4, 310 N.Y.S.2d 617, 620 n.4 (N.Y. City Fam. Ct. 1970), Judge Dembitz took judicial notice of the inability of the police to protect their records from unauthorized examination.

Both *Smith* and Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970), discuss the state's responsibility for injury caused by the improper or unauthorized use of data. *Smith* cites Watkins v. United States, 354 U.S. 178, 198 (1957) and NAACP v. Alabama, 357 U.S. 449, 463 (1958), for the proposition that government inflicted stigma may create vicarious liability on the part of the state. 63 Misc. 2d at 203 n.11, 310 N.Y.S.2d at 622 n.11. *Menard* cites National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969), to indicate that governmental liability may exist for improper use of disseminated material by third parties. 430 F.2d at 492 n.34.

169 394 U.S. 721 (1969).

170 The Court indicated that a search warrant was probably not required for fingerprinting. *Id.* at 727. Virtually all the arrested suspects in this case were juveniles.

though probable cause is unnecessary to place an individual under police surveillance or to file reports about him, courts might reasonably rule in situations indicating harassment that suspicion of an objective, specific illegal act was a prerequisite to at least the more overt forms of surveillance.[171]

The justification for such a limitation on surveillance may be found in the Constitution. In the first amendment cases, the "obtrusiveness" of the surveillance has often been a determinative factor.[172] If records will actually be disseminated, the absence of illegal conduct arguably renders the record-keeping procedure constitutionally questionable.[173] If the record is not disseminated, however, courts to date appear to be reluctant to find the requisite "chilling effect" on first amendment freedoms.[174]

5. *Limitations on Timeliness*

While individuals change over time, information, once recorded, tends to remain static. This alone provides considerable potential for distortion. The problem is complicated, moreover, by stringent controls

171 *But see* Wyman v. James, 400 U.S. 309 (1971), in which the Supreme Court upheld the right of welfare caseworkers to make warrantless home inspections. The decision, however, made clear its assumption that no law enforcement purpose was being pursued.

172 *See* Bee See Books, Inc. v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968) (enjoining New York City Police Commissioner from posting uniformed officers in book stores that were alleged to have sold pornographic materials, on the theory that their presence "chilled" the exercise of first amendment rights); Local 309 v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948).

In Anderson v. Sills, 56 N.J. 210, 265 A.2d 678 (1970), *rev'g* 106 N.J. Super. 545, 256 A.2d 298 (Ch.), the New Jersey Supreme Court overruled a lower court decision that surveillance of protest demonstrations pursuant to a state attorney general's directive "overbroadly" impaired first amendment rights. The lower court had used the overbreadth doctrine because the directive had failed to distinguish lawful from unlawful protest activities, even though the resulting reports were available only to law enforcement bodies.

Technically, the New Jersey Supreme Court reversed the summary judgment and remanded for further findings. The court made clear, however, its feeling that the existence of files alone was an inadequate "chill" to merit injunctive relief: "The basic approach must be that the executive branch may gather whatever information it reasonably believes to be necessary to enable it to perform the police roles, detectional and preventive." 56 N.J. at 229, 265 A.2d at 688. However, the court emphasized where the nature of the surveillance was "obtrusive" or where intent to chill could be shown, judicial relief was appropriate. *Id.* at 226-27, 265 A.2d at 687.

173 In Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970), the Public Printer and the Superintendent of Documents were enjoined from distributing a House Internal Security Committee report concerning the participation of "New Left" political activists in campus "disorders."

174 ACLU v. Westmoreland, 323 F. Supp. 1153 (N.D. Ill. 1971) (finding that "only the thin-skinned" could have been chilled by what the court termed a "Keystone Cops" form of surveillance of political activists by United States Army agents).

governing the destruction of state records.[175] Particularly in the case of the juvenile, it is clear that yesterday's record does not accurately describe today's individual.[176] Thus, temporal limitations under which "stale" data are discarded must be created. For example, it has been suggested that when the juvenile exceeds the maximum age for Y.D. reports and thus escapes the attention of the Youth Division his file should be destroyed.[177]

CONCLUSION

The problems of controlling the collection and dissemination of personal data have not yet been seriously faced by records custodians. Formulation of meaningful controls on the most elemental level requires that three types of safeguards be implemented: (*1*) limitations on access; (*2*) establishment of criteria of relevancy to govern both dissemination and the authorized scope of inquiry; and (*3*) formalization of a methodology to assure objectivity.

On the juvenile level, reform should ensure at a minimum the exclusion of prearrest data from the sentencing process and the total transfer of responsibility for adjustment of lesser charges to civilian agencies. The receipt of unverified police information by these latter agencies, however, presents a closer question. Court diversionary procedures are obviously preferable to prosecution of all juveniles, but such transfers should not be accompanied by unanswerable data which implies guilt. The juvenile should be given some opportunity to challenge the accuracy of such reports and thereby supplement or, in an appropriate case, expunge the record.[178] Indeed, he should have the right to

175 A general doctrine that public records may not be destroyed except under careful controls appears to have been codified in most states. *See, e.g.*, N. Y. PUB. OFFICERS LAW § 65-b (McKinney 1952).

176 The relationship between records and expectations demonstrated by Robert Rosenthal and Lenore Jacobson in their *Pygmalion* experiments is particularly relevant in this regard. R. ROSENTHAL & L. JACOBSON, *supra* note 85,

177 STAFF REPORT 79. If state law required the retention of records in some form, the *Staff Report* further proposed that the Y.D. file be, in effect, sterilized by removing the youth's name from all master cross-reference files. *Id.* Under the final stipulation in *Cuevas*, all Y.D. cards on juveniles over the age of 17 were to be destroyed annually. Note 4 *supra*.

178 Expungement statutes have been recently drafted in regard to credit information. *See, e.g.*, New York's recent Credit Data Reporting Act (N.Y. GEN. BUS. LAW §§ 370-76 (McKinney Supp. 1971)), which allows a person denied credit to demand the disclosure and to challenge the accuracy of information on him contained in credit agency files. Juvenile expungement statutes to date, however, have focused only on whether the youth is "rehabilitated" and not on the validity of the charge. *See* Karst, *supra* note 68, at 369-70. The proper issue, of course, is the accuracy of the information.

resist efforts at "adjusting" his behavior where he maintains his innocence. In such situations he should be able to insist that the charges be prosecuted or dismissed and not ambiguously left open.

Controls on the scope of police inquiry and the occasions on which reports may be recorded are also essential if harassment and stigmatization are to be prevented. This article has not attempted to set hard and fast rules to remedy these problems in the belief that a balancing process might be more beneficial. Moreover, the urgent questions concerning the record-keeping activities of states still face threshold problems of justiciability—problems which cases such as *Menard* and *Weston* have just begun to address.

Once these initial barriers are overcome, there still remain other subtle and perplexing problems. The scope of this article has been limited to police records. Yet police records which present particularly acute problems are not unique. Information equally speculative and anecdotal flows regularly from various other sources to agencies dealing with juveniles. This article has not examined the separate problems of school, welfare, or clinical records, but to a large degree such records raise issues similar to those involved in police records.

According to conventional wisdom, juvenile welfare can be successfully served only if the activity of all public agencies dealing with minors is jointly planned and conducted.[179] Essential to this effort is the "careful sharing of data"[180] by those agencies which are said to occupy a "case finding"[181] position with respect to the child. The practical consequence of such a theory is the extensive dissemination of collected data. Thus the American Bar Foundation survey found that even the files of psychiatric clinics are customarily accessible to probation workers.[182] Similarly, sociologists David Goslin and Nancy Bordier have reported that in a majority of the school systems they surveyed, the entire file of a student was accessible to various law enforcement officials although usually closed to parents.[183]

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179 Brown, *Coordinating Professional Efforts for Children with School Problems*, 15 CHILDREN 214 (1968); Buxton, *Developing Guides for Cooperation Between the Juvenile Court, Welfare Department, and Schools*, 47 CHILD WELFARE 266 (1968).

180 Brown, *supra* note 179, at 218.

181 Stickney, *Schools Are Our Community Mental Health Centers*, 124 AM. J. PSYCHIATRY 1407, 1409-10 (1968).

182 SENTENCING 34-35; *cf.* D. NEWMAN, *supra* note 10, at 15.

183 Goslin & Bordier, *Record-Keeping in Elementary and Secondary Schools*, in ON RECORD: FILES AND DOSSIERS IN AMERICAN LIFE 29, 56-57 (S. Wheeler ed. 1969). In the majority of cases the entire file was available to FBI and other federal agents, while in a minority of cases the full file was accessible to local law enforcement officials. For the standard form sent by intake officials in New York City's Family Court to schools and

Even assuming that interagency cooperation is indeed essential, the absence of systematic review or evaluation of data tendered makes possible distortions at least as great as those possible in police records.[184] Ironically, tender of these records frequenlty seems to occur in situations that violate the school's or welfare department's oft-proclaimed *in loco parentis* responsibility towards the child.[185]

Implicit in these practices is a basic confusion of responsibilities.[186] Is the record custodian an agent of the general public welfare or does he owe a paramount duty of confidentiality to the child?[187] At present

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other agencies, see J. Coffee & L. McGaughey, Materials on School and Police Record-Keeping 4-5 (unpublished paper presented at the Conference on Youth Law, Nat'l Institute for Educ. in Law & Poverty, Sept. 10-12, 1970). The form requests information about the youth's behavior at school and the results of the school's efforts to remedy deviant behavior. The author has on occasion seen three- or four-page replies tendered by schools to intake officials.

184 A good summary of the range of accessible data is provided by the report of a recent national conference on student records:

> The total set of student personnel data extant in a school at a given time ranges from tentative nncorroborated reports on alleged student behavior to highly stable information. To illustrate: on one end of the continuum a memo may contain a report or allegation that a particular student molested a child, disrupted a class, or wept for several hours yesterday; at the other extreme records will show that a student has completed grade five, that he received a specified score on a nationally standardized test, and that he has a particular attendance record. These differing kinds of data require differing arrangements for security and access.

RUSSELL SAGE FOUNDATION, GUIDELINES FOR THE COLLECTION, MAINTENANCE AND DISSEMINATION OF PUPIL RECORDS 20 (1970). *See* J. Coffee & L. McGaughey, *supra* note 183, at 6, 16.

185 A classic case of failure to recognize fiduciary obligations recently occurred in New York City: student attendance records were for a brief time referred to a local welfare center. The welfare center would then terminate the public assistance of students whose eligibility was conditioned upon school attendance.

186 Illustrative of the contradictory position of many agencies is N.Y. STATE DEP'T OF EDUC., MANUAL ON PUPIL RECORDS (1970), which elaborately affirms the student's constitutional right to privacy, and then quietly accepts a principle of implied consent:

> [T]ransfer of pupil information must not be made without the consent, expressed or implied, of the pupil's parents. Parental consent may reasonably be implied where the student transfers to another school; where he has applied for admission to another school; where he has applied for admission to an institution of higher learning; or where he has made application for employment.

Id. at 11.

Such an artificial presumption of consent vitiates the concept of privacy and ignores the very likely possibility that a student may wish to find employment without disclosing records. What "implied consent" really means is that the school feels it has a primary obligation to protect employers or other institutions rather than the student.

187 Another case illustrative of the tensions under which public custodians of records function recently occurred in the New York City school system. On October 28, 1970, Chancellor Scribner issued a directive embodying the recommendations of a national conference on school records conducted under the auspices of the Russell Sage Foundation, to the effect that:

"[I]n keeping with the individnal's right to privacy, all school personnel are re-

it appears that the custodians of juvenile records still conceive of government as a monolith without conflicting purposes, within which any form of data can be legitimately circulated. In answer, a counter-rationale needs to be formulated that the interest of the state in being well informed is not absolute. Nor is it a unified interest, but rather a collection of competing and often conflicting subsidiary interests. Ultimately, the ability of American society to recognize the priority of privacy over its bureaucracy's hunger for data will be a measure of its maturity.

> minded that no information concerning any student in our schools may be made available to any person or agency" unless there is written consent by a parent . . . or there is a court order for such information.

N.Y. Times, Nov. 7, 1970, at 23, col. 5. Challenging the directive, the High School Principals' Association asserted that such a rule would create "chaos" and "adversely affect the welfare of many students" by curtailing the power of school authorities to send recommendations to employers or information to police officials. *Id.* at cols. 4-5. In reality, this criticism translates into a statement that the school system has a duty to protect the public by forewarning it of misbehaving students. Such a position may in extreme instances be defensible, but it is hardly compatible with the school's *in loco parentis* power over its students.