

# Databasing Delinquency

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*Technological advances in recent decades have enabled an unprecedented level of surveillance by the government and permitted law enforcement to gather, store, and retrieve in real time enormous amounts of data. After nearly a century of limited record-making and enhanced confidentiality regarding juveniles, these data collection practices have quickly expanded to include youth. This Article uncovers the vast extent of modern data collection and distribution about juveniles by the criminal justice system from juvenile sex offender registration and their inclusion in gang and DNA databases, to schools turned into mandated law enforcement informants, to police and courts increasingly sharing juvenile records with employers, public housing authorities, colleges, and the general public.*

*The expansion of this modern culture of “dataveillance” to youth has profound implications. It not only harms individual youth in permanent and stigmatizing ways, it reshapes the very meaning of childhood, breaching its protected space and contradicting the special understandings that dominate the regulation of youth. It also distorts perceptions of juveniles in ways that have lasting policy consequences. Moreover, this distortion is visited especially heavily on minority youth and constitutes an engine of racial bias and punitive reforms in its own right.*

*Putting the developmental characteristics of youth, and childhood, at the center of the analysis, this Article reveals the incoherence and destructiveness of databasing delinquency. Mindful of the public safety benefits and inevitability of law enforcement information gathering, it calls for reforms that would limit the amount of information gathered, stored, and shared about juveniles. These reforms would add appropriate restraints to law enforcement data collection so that public safety gains from databasing do not come at the expense of juvenile privacy, juveniles’ life chances, or childhood itself.*

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## INTRODUCTION

Technological and scientific advances in recent decades have enabled an unprecedented level of surveillance and permitted law enforcement to gather, store, and retrieve in real time enormous amounts of data. From computerized rap sheets and DNA databases to sex offender and other registries, records of a person's contact with the criminal justice system no longer rest in a file folder or card catalog in a

local precinct. Instead, they reside indefinitely on law enforcement servers and, in many cases, the publicly searchable Internet.<sup>1</sup>

For most of the last century, the criminal justice system limited recordmaking and increased the confidentiality of data about juveniles.<sup>2</sup> That reticence and protectiveness no longer prevails because it has been overwhelmed by technology and a fervid commitment to data collection. Today, the criminal justice system collects and stores a tremendous amount of information about juveniles.<sup>3</sup> State and federal laws compel thousands of young people to register as sex offenders and provide personal information that is posted online, and mandate DNA collection from juveniles as a result of delinquency adjudications and arrests. Children as young as ten years old are entered into databases of known and suspected gang members (often in the absence of an arrest or even a suspicion of wrongdoing). Public schools across the nation are required to notify law enforcement when students commit certain behaviors at school, and law enforcement agencies return the favor, providing schools with criminal or delinquency information.<sup>4</sup> All of this supplements the information collected by police during street encounters and bookings and the records amassed and maintained by criminal and juvenile courts, the numbers of which have also greatly expanded in recent years. Public and private services aggregate much of this information, making it available to law enforcement nationwide, private employers, public housing authorities, colleges, and the general public, often at no cost.<sup>5</sup>

In the late 1980s, Roger Clarke offered the term “dataveillance” as a way to conceptualize the new forms of surveillance facilitated by the

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1. See SIMSON GARFINKEL, *DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY* (Deborah Russell ed., 2000); Erin Murphy, *Databases, Doctrine and Constitutional Criminal Procedure*, 37 *FORDHAM URB. L.J.* 803, 805–10 (2010) (recounting the rise of databases in criminal justice).

2. Juvenile courts and law enforcement long restricted the information they gathered about juveniles, limited the length of time it was stored, and protected the information gathered from disclosure. JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 114 (2015) (“The practice of sealing and expunging criminal records was pioneered in the juvenile justice system.”). For example, as recently as 1988, only a quarter of law enforcement agencies fingerprinted juveniles. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, *JUVENILE RECORDS AND RECORDKEEPING SYSTEMS* (1988).

3. See *infra* Part II. A note on terminology: This Article primarily contemplates youth aged ten to seventeen. I variously refer to them as juveniles, youth, young people, and adolescents. However, because of the binary approach of criminal law (that is, an accused is treated either as a child and processed in juvenile court, or as an adult subject to the criminal court’s jurisdiction), I occasionally use child, children, and childhood throughout the piece.

4. See *infra* Part II.B.

5. See MARGARET COLGATE-LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* 279–80 (2013) (identifying state “central repositories . . . , the courts, private vendors which prepare reports from public sources, and even correctional institutions and police blotters” as sources of criminal histories).

widespread use of computer-based technology.<sup>6</sup> This Article critically examines the expansion of the modern culture of “dataveillance” to youth. Collectively, the robust and expanding data collection and distribution practices described in this paper produce what I call criminal justice biographies of young people.<sup>7</sup> These one-sided, negative biographies written by a coercive institution label youth in permanent and stigmatizing ways. This harms individual youth and distorts the perceptions of them as a group with lasting policy implications. Yet, the literature on law enforcement surveillance on the one hand, and traditional juvenile justice on the other, have yet to recognize, much less fully grapple with, the databasing of delinquency.

This Article reveals the incoherence and destructiveness of databasing delinquency, and argues that we must rethink this practice. Mindful of the public safety benefits and inevitability of law enforcement information gathering, it calls for reforms that limit the amount of information gathered, stored, and shared about juveniles. This would not prevent data collection, but would instead add appropriate restraints so that public safety gains from databasing do not come at the expense of privacy, juveniles’ life chances, or childhood itself.

Part I sets the context. Instead of widely discussed constitutional protections like the Fourth Amendment or privacy,<sup>8</sup> this Article examines delinquency databasing through the lens of the constructed category of childhood. Too little legal scholarship has critically examined the role of the concept of childhood in shaping law and social practices, and the role that law and social practices play in shaping the conceptions of childhood.<sup>9</sup> This vacuum leaves juvenile justice scholarship less nuanced than it could be. Drawing on the insights of critical childhood studies,<sup>10</sup> Part I establishes the prevailing conception of childhood as a protected space separate from

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6. Roger A. Clarke, *Information Technology and Dataveillance*, 31 COMM. ACM, May 1988, at 498, 499, 502–04.

7. See Ray McDermott & Jason Duque Raley, “*The Tell-Tale Body*”: *The Constitution of Disabilities in School*, in HANDBOOK OF SOCIAL JUSTICE IN EDUCATION 431, 438 (William Ayers, Therese Quinn & David Stovall eds., 2009) (describing school records of misbehavior and missing behavior as “the institutional biographies that record a child’s problems in school files forever”).

8. These more traditional doctrinal approaches to assessing law enforcement data collection offer little promise at the present time as limiting forces. On privacy, see Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008) and Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083 (2002). Similarly, Fourth Amendment jurisprudence offers juveniles fewer protections than it does to adults because young people are considered to have a reduced expectation of privacy. See Kristin Henning, *The Fourth Amendment Rights of Children at Home: When Parental Authority Goes Too Far*, 53 WM. & MARY L. REV. 55, 55 (2011) (“[Y]outh generally receive less constitutional protection than adults.”).

9. See, e.g., Annette Ruth Appell, *Accommodating Childhood*, 19 CARDOZO J.L. & GENDER 715, 715 (2013) (“[T]he legal academy has bestowed scant critical examination on the category of childhood.”).

10. See DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* (2d ed., 2004); see also ALLISON JAMES & ADRIAN L. JAMES, *CONSTRUCTING CHILDHOOD: THEORY, POLICY AND SOCIAL PRACTICE* 20 (2004).

adult society. Marshaling adolescent brain science, psychosocial research, and recent Supreme Court jurisprudence, it shows that young people's vulnerability, their capacity for change, and their future as adult members of society each play an important background role in guiding public policy regarding youth.

Part II uncovers the vast extent of modern delinquency databasing. It explains how, despite youths' vulnerability to harm and capacity for change, juveniles now find themselves indefinitely cataloged in sex offender registries, gang databases, and DNA databases. It documents the unprecedented breadth and permanence of law enforcement and court recordkeeping. It shows how schools have become mandated law enforcement informants. And it maps the many ways that this information travels within and outside of the criminal justice system.

While extensive data collection and publicly available criminal records can be a rational law enforcement strategy that promotes public safety, Part III identifies the many harms that databasing delinquency inflicts on juveniles. They include devastating impacts on their immediate lives in the form of punishment, restrictions on their life choices, stigma, and (perhaps) increases in recidivism. Compiled early in the life of their subject, when identities and character are still taking shape,<sup>11</sup> and skewed in content, these criminal justice biographies also distort perceptions of juveniles in ways that facilitate support for punitive policies toward youth and discrimination against them. This distortion and discrimination is visited especially heavily on minority youth and constitutes an engine of racial bias in its own right.

Part III further shows that databasing delinquency reshapes the very meaning of childhood, breaching its protected space and contradicting the special understandings that guide the regulation of youth.<sup>12</sup> Rather than honoring the particular developmental characteristics of youth, databasing delinquency ignores them and treats young people like adults. This contradicts the long-dominant diversionary approach to juvenile wrongdoing<sup>13</sup> and gainsays the fundamental message of a quartet of recent Supreme Court cases that criminal law and the police cannot proceed against young people "as though they were not children."<sup>14</sup>

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11. *Roper v. Simmons*, 543 U.S. 551, 570 (2005) ("[T]he character of a juvenile is not as well formed as that of an adult. The personality traits . . . are more transitory, less fixed.").

12. See *infra* Part I.

13. See Franklin E. Zimring, *The Common Thread: Diversion in Juvenile Justice*, 88 CALIF. L. REV. 2477 (2000).

14. *Miller v. Alabama*, 132 S. Ct. 2455, 2466 (2012) (holding mandatory life without parole sentences for juveniles violate the Eighth Amendment); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011) (holding law enforcement must consider age when deciding whether an individual is in custody for purposes of providing a *Miranda* warning); *Graham v. Florida*, 560 U.S. 48, 75 (2010) (outlawing life without parole sentences for individuals who committed non-homicide crimes under the age of

Cognizant that this is a critical time in the rebuilding of juvenile justice norms,<sup>15</sup> Part IV proposes limitations on what information law enforcement should gather, how long that information should be stored, and with whom the information may be shared. The principles and values discussed in Part I—young people’s vulnerability, their capacity for change, and their future as adult members of society—inform the recommendations. The proposed reforms would reduce the short and long-term harms caused by databasing delinquency, enabling the criminal justice system to promote public safety and hold juveniles accountable without unduly hindering their development into productive adults.

### I. CHILDHOOD

We recognize and accommodate many values when we choose how to marshal technology’s unprecedented data collection abilities for law enforcement purposes. That we have extended the reach of law enforcement dataveillance to juveniles necessarily injects the developmental characteristics of youth and the purpose and meaning of childhood into the debate. Therefore, a brief introduction to the concept of childhood is necessary.

Childhood is an essential and permanent component of the social order.<sup>16</sup> It is a natural fact—children are different from adults in known and measurable ways.<sup>17</sup> Yet childhood marks something more than empirical, biological realities or chronological age.<sup>18</sup> It is also a social construction, a contingent category whose boundaries are not inevitable or fixed, but are instead defined and maintained by law.<sup>19</sup> As such, childhood is the product of our collective imagination, reflecting prevailing societal priorities and aspirations.<sup>20</sup> This leads to varying definitions of the scope of childhood: individuals cannot lawfully drive a vehicle until sixteen, vote

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eighteen); *Roper*, 543 U.S. at 572 (declaring unconstitutional to impose capital punishment for crimes committed by someone under the age of eighteen).

15. Terry A. Maroney, *The Once and Future Juvenile Brain*, in *CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE* 189, 211 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (calling the current era of juvenile justice reform “the rebuilding”).

16. ARCHARD, *supra* note 10, at 23 (“There are good reasons for thinking that all societies at all times have had the concept of childhood.”); JAMES & JAMES, *supra* note 10; *THE SOCIOLOGY OF CHILDHOOD: ESSENTIAL READINGS* (Chris Jenks ed., 1982).

17. Brief for Am. Psych. Ass’n, et. al. as Amici Curiae Supporting Petitioners, *Graham v. Florida*, Nos. 08-7412, 08-7621, 2009 WL 2236778, \*3-4 (2009) (citing neuroscience research showing adolescent brains are not yet fully developed in regions related to higher-order executive functions such as impulse control, planning ahead, and risk evaluation).

18. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (“But youth is more than a chronological fact.”).

19. ARCHARD, *supra* note 10, at 27; Appell, *supra* note 9, at 735.

20. ARCHARD, *supra* note 10, at 33; Appell, *supra* note 9, at 736 (“[D]evelopmental facts do not dictate the contours or boundaries of childhood. Ideology does.”).

until eighteen, or drink alcohol until twenty-one.<sup>21</sup> The variety in cut-offs is inevitable, as different activities require different levels of skill or maturity. Wherever the lines between childhood and adulthood rest, the expressive function of the law then feeds the law's definition(s) of childhood back to society, shaping or reinforcing popular views of childhood.<sup>22</sup>

The prevailing conception of childhood today is “a protected space separated from . . . the broader adult society.”<sup>23</sup> Childhood is separate from adulthood because children are different from adults and require their own spaces, rules, and institutions.<sup>24</sup> Childhood is protected because young people are vulnerable. They make mistakes and have a greater capacity for change than adults. As a result, the law applies special rules to young people.<sup>25</sup> Indeed, it provides an entirely separate forum for adjudicating juvenile matters<sup>26</sup> that delivers youth-focused services and developmentally-appropriate levels of accountability. As a matter of first principles, the law aims to avoid imposing harsh, enduring consequences and stigmas so that juveniles do not carry the burden of their youthful mistakes into adulthood.<sup>27</sup> The ultimate goal is “to shepherd children into a self-sufficient, democratic, productive, and autonomous adulthood.”<sup>28</sup>

This Part explains how three foundational truths about youth—that they are vulnerable, that they change, and that they are future adults—guide the law's approach to childhood.

#### A. YOUTH ARE VULNERABLE

Young people by definition are immature. Juveniles are in “the earlier stages of their emotional growth, their intellectual development is incomplete, they have had only limited practical experience, and their value systems have not yet been clearly identified or firmly adopted.”<sup>29</sup> Their immaturity profoundly impacts how they live their lives. First and foremost, it makes them vulnerable. According to leading juvenile

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21. Jonathan Todres, *Maturity*, 48 Hous. L. Rev. 1107, 1116 (2012) (“[B]enchmarks of maturity in the law frequently occur at different points in time.”).

22. *Id.*

23. REINVENTING CHILDHOOD AFTER WORLD WAR II ix (Paula S. Fass & Michael Grossberg eds., 2012); ARCHARD, *supra* note 10, at 37 (“[T]he most important feature of the way in which the modern age conceives of children is as meriting separation from the world of adults.”).

24. *Miller v. Alabama*, 132 S. Ct. 2455, 2469–70 (2012) (identifying developmental science and common sense as the bases for the fact that “children are different”).

25. *Id.* at 2470 (“[I]t is the odd legal rule that does *not* have some form of exception for children.”) (emphasis in original).

26. Juvenile courts in all fifty states handle child welfare and delinquency matters.

27. See DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* (2004).

28. Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 Hous. L. Rev. 703, 709 (2009).

29. *Schall v. Martin*, 467 U.S. 253, 265 n.15 (1984); ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* (2008).

developmental psychologist Laurence Steinberg, “[a]dolescence is often a period of especially heightened vulnerability.”<sup>30</sup>

Two particular vulnerabilities of youth—their susceptibility to poor decisionmaking and their physical and emotional immaturity—shape the legal regulation of juveniles. Juveniles’ incomplete cognitive and psychosocial development undermines their ability to make competent decisions.<sup>31</sup> Young people are less able to process information quickly and thoughtfully, and have less general knowledge and experience to draw upon, leading to poorly reasoned choices.<sup>32</sup> In addition, adolescents are less likely to consider the long-term consequences of their actions, and are more reward sensitive and less risk averse than adults.<sup>33</sup> This poor impulse control is compounded by the fact that they are profoundly attuned to and influenced by peers.<sup>34</sup> Taken together, these qualities often lead to delinquent behavior. Indeed, largely on account of these attributes, offending peaks during late adolescence,<sup>35</sup> leading many to consider delinquency a part of the normal life course.<sup>36</sup>

Their physical and emotional immaturity also makes youth especially vulnerable to harm. Young people suffer specific, and often greater, harms as youth, and they are more likely to suffer them because of their youth.<sup>37</sup> They are, for example, more susceptible to suffering psychological harms than their adult counterparts under similar circumstances.<sup>38</sup> They are especially vulnerable to victimization in adult institutions, and are at a greater risk than adult inmates of psychological harm and suicide.<sup>39</sup> Young people are also particularly vulnerable to

30. Laurence Steinberg, *Cognitive and Affective Development in Adolescence*, 9 TRENDS IN COGNITIVE SCI. 69, 69 (2005).

31. SCOTT & STEINBERG, *supra* note 29, at 35.

32. *Id.* at 36; Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEV. PSYCHOBIOL. 216, 217 (2010).

33. SCOTT & STEINBERG, *supra* note 29, at 37.

34. *Id.* at 38; Franklin E. Zimring, *Kids, Groups and Crime: Some Implications of a Well-Known Secret*, 72 J. CRIM. L. & CRIMINOLOGY 867, 867 (1981) (“[A]dolescents commit crimes, as they live their lives, in groups.”).

35. MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* 124 (1990) (stating the age-crime curve has “remained virtually unchanged in 150 years”); Alex R. Piquero et al., *The Criminal Career Paradigm*, 30 CRIME & JUST. 359 (2003).

36. Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993) (Delinquent behavior is “a normal part of teen life.”).

37. ARCHARD, *supra* note 10, at 61.

38. *State ex rel. Juvenile Dep’t of Multnomah Cty. v. Millican*, 906 P.2d 857, 861 (1995) (De Muniz, J., dissenting) (“[S]hackling is likely to be more psychologically jarring for children than adults.”).

39. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, *JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT* (2000). Even institutions specifically designed for youth, such as juvenile detention centers and foster care group homes, inflict significant harms on youth. See BARRY HOLMAN & JASON ZIEDENBERG, JUSTICE POLICY INST., *THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES* (2006).

lasting problems as a result of stigma, including mental health problems, substance abuse, and re-offending.<sup>40</sup> Moreover, particular practices, such as a life-long criminal record or a life without parole sentence, impose greater harms on juveniles by virtue of the simple fact that juveniles will live with the sanction longer.<sup>41</sup>

On account of their immaturity and vulnerability, the regulation of youth has long been infused with the idea that they deserve special protections.<sup>42</sup> This protective regime first came to legal fruition in the late nineteenth century, when Progressive Era reformers (the so-called “child savers”) passed compulsory education laws, restricted child labor, and created the child welfare system and juvenile court.<sup>43</sup> Over one hundred years later, it still prevails. Rules protect juveniles from being subjected to the same procedures and punishments imposed on adults. In civil tort proceedings, for example, children are judged by a “reasonable person of like age, intelligence, and experience under like circumstances” standard that leads to limited civil responsibility for damages they cause.<sup>44</sup> To protect minors from “foolishly squandering their wealth through improvident contracts with crafty adults who would take advantage of them in the marketplace,”<sup>45</sup> a contracting minor may repudiate the contract at any time before reaching majority or within a reasonable time afterwards.<sup>46</sup>

The protective approach to childhood necessarily includes the criminal law. The juvenile court was founded over a century ago on the proposition that children are different from adults and should avoid the punitive and stigmatizing consequences imposed by criminal court.<sup>47</sup> It survives today because society continues to recognize that youth deserve a separate, more protective forum that will impose accountability while

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40. Franklin E. Zimring et al., *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 *CRIMINOLOGY & PUB. POL’Y* 507 (2007) (noting research on adolescent brain development indicates that youth are particularly vulnerable to the stigma and isolation that registration and notification create).

41. *Graham v. Florida*, 560 U.S. 48, 71 (2010) (“This reality [that life without parole is a longer sentence for a juvenile than an adult] cannot be ignored.”).

42. TANENHAUS, *supra* note 27.

43. See ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* (1969). In *The Child Savers*, Anthony Platt aims to “destroy[] the myth that the child-saving movement was successful” and argues that the Progressives “helped to create special judicial and correctional institutions for the labeling, processing, and management of ‘troublesome’ youth” that “subjected more and more juveniles to arbitrary and degrading punishments.” *Id.* at xliii, 3.

44. RESTATEMENT (SECOND) OF TORTS § 283.A (1965); see also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 10 (2005) (“(a) A child’s conduct is negligent if it does not conform to that of a reasonably careful person of the same age, intelligence, and experience, except as provided in Subsection (b) or (c); (b) A child less than five years of age is incapable of negligence . . .”).

45. *Halbman v. Lemke*, 298 N.W.2d 562, 564 (1980).

46. E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* 230–31 (2d ed. 1998).

47. TANENHAUS, *supra* note 27.

honoring the childhood of those before the court. Many protections extend to those juveniles processed in criminal court.<sup>48</sup> For instance, the Supreme Court has held that the death penalty cannot be constitutionally imposed on juveniles because their “vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”<sup>49</sup> Their vulnerability similarly prevents law enforcement from ignoring childhood during criminal investigations.<sup>50</sup>

This is not to say that youth are innocents. While vulnerable, juveniles are autonomous actors who have the ability to recognize right from wrong, and they exercise that autonomy by choosing, at times, to do bad things.<sup>51</sup> Moreover, they require and respond to accountability. But youths’ reduced culpability and increased vulnerability to harm mean that the quantity of accountability appropriate for juvenile behavior is necessarily limited.<sup>52</sup>

## B. YOUTH CHANGE

Young people are developing in almost every arena: physically, biochemically, intellectually, emotionally, and psychosocially. Their physical bodies undergo a growth spurt between the ages of ten and eighteen,<sup>53</sup> and neuroscientists describe adolescence as a period of profound social cognitive change.<sup>54</sup> It is also a time when identity is taking

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48. Elizabeth S. Scott, “*Children Are Different*”: *Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 (2013) (“[T]he Court has announced a broad principle grounded in developmental knowledge that ‘children are different’ from adult offenders and that these differences are important to the law’s response to youthful criminal conduct.”).

49. *Roper v. Simmons*, 543 U.S. 551, 570 (2005).

50. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403–04 (2011) (finding law enforcement must consider age when deciding whether an individual is in custody for purposes of providing a Miranda warning because youth are more vulnerable to outside pressures than adults).

51. SCOTT & STEINBERG, *supra* note 29, at 36.

52. ANITA L. ALLEN, *WHY PRIVACY ISN’T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY I*, 29 (2003) (noting that young people are “typically excused from the high level of accountability imposed on adults”); R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 164–65 (1994).

53. JAMIE STANG & MARY STORY, *GUIDELINES FOR ADOLESCENT NUTRITION SERVICES I* (2005), [www.epi.umn.edu/let/pubs/img/adol\\_ch1.pdf](http://www.epi.umn.edu/let/pubs/img/adol_ch1.pdf) (“A myriad of biological changes occur during puberty including sexual maturation, increases in height and weight, completion of skeletal growth accompanied by a marked increase in skeletal mass, and changes in body composition.”).

54. LAURENCE STEINBERG, *ADOLESCENCE* (9th ed. 2010); Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 50 CT. REV. 70, 70 (2014) (“There is now incontrovertible evidence that adolescence is a period of significant changes in the brain structure and function.”); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 95–103 (2009) (summarizing the many findings about adolescent brain development).

shape and character forms.<sup>55</sup> As the Supreme Court observed, “the signature qualities of youth are transient.”<sup>56</sup>

The dynamism of youth matters greatly to the law’s response to juvenile offending. As explained above, youths’ immaturity contributes to delinquent behavior. Yet most youth desist from delinquency as they mature into adulthood.<sup>57</sup> Studies frequently find that only five percent to ten percent of adolescent offenders continue offending in adulthood.<sup>58</sup> This is because many of the factors associated with antisocial, risky, or criminal behavior lose their intensity as individuals become more developmentally mature.<sup>59</sup> In fact, it has proven nearly impossible to researchers to identify which few among the many youthful offenders will persist into adulthood.<sup>60</sup>

Courts and policymakers have regularly affirmed the relevance of youths’ capacity for change to the proper regulation of childhood. It goes a long way in explaining why juvenile court was invented, and why it aims to privilege rehabilitation over punishment. The notion of change pervaded the words of one of the nation’s earliest juvenile court judges, who explained that the purpose of the juvenile court was “not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.”<sup>61</sup> As such, delinquency adjudications do not necessarily become part of a young person’s permanent criminal record.<sup>62</sup> Instead, stricter confidentiality provisions protect them against disclosure, and juvenile court records

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55. JANE KROGER, *IDENTITY IN ADOLESCENCE: THE BALANCE BETWEEN SELF AND OTHER* (2004) (describing adolescence as a time of self-definition and identity formation).

56. *Johnson v. Texas*, 509 U.S. 350, 368 (1993); SCOTT & STEINBERG, *supra* note 29, at 32 (“[Adolescence] is transitional because it is marked by rapid and dramatic change within the individual in the realms of biology, cognition, emotion, and interpersonal relationships . . .”).

57. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1015 (“[T]he typical delinquent youth does not grow up to become an adult criminal . . .”).

58. See Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. PSYCHOPATHOL. 453, 462 (2010) (finding after following over 1000 male adolescent offenders over the course of three years that only 8.7% were “persisters” in that their offending remained constant throughout the thirty-six-month period); see also Robert Sampson & John Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 CRIMINOLOGY 301, 315 (2003) (“Aging out of crime is thus the norm—even the most serious delinquents desist.”).

59. Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 297 (2012).

60. *Roper v. Simmons*, 543 U.S. 551, 573 (2005) (“It is difficult even for expert psychologists to differentiate between the [youthful] offender whose crime reflects unfortunate yet transient immaturity, and the rare [youthful] offender whose crime reflects irreparable corruption.”).

61. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1910).

62. John C. Coffee, *Privacy Versus Parens Patriae: The Role of Police Records in the Sentencing and Surveillance of Juveniles*, 57 CORNELL L. REV. 571, 617 (1971) (“Particularly in the case of the juvenile, . . . yesterday’s record does not accurately describe today’s individual.”).

typically can be sealed or expunged when the young person reaches a particular age.<sup>63</sup>

Youth's capacity for change likewise protects them when they are charged in criminal court. In a trio of recent sentencing cases, the Supreme Court recognized that "the character of a juvenile is not as well formed as that of an adult" and that their "personality traits . . . are more transitory, less fixed."<sup>64</sup> Because juveniles are more capable of change than are adults, "their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."<sup>65</sup> In short, "a greater possibility exists that a minor's character deficiencies will be reformed."<sup>66</sup> As a result, the law seeks to protect them from conclusive judgments and permanent legal disabilities. According to the Supreme Court, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult."<sup>67</sup> The Constitution thus forbids the imposition of the death penalty and mandatory life without parole sentences for crimes committed by youth, and protects youthful offenders from life without parole for non-homicide crimes.<sup>68</sup>

### C. YOUTH (IDEALLY) BECOME (PRODUCTIVE) ADULTS

Childhood is "a time-limited developmental category."<sup>69</sup> As leading critical childhood scholars Allison James and Adrian James observed, "all children do grow up and, in doing so, leave their 'childhood' behind them."<sup>70</sup> That young people will leave childhood and become adults has two important consequences for the regulation of childhood. First, children must be taught social norms, including that society imposes consequences for misbehavior.<sup>71</sup> Second, that lesson must be delivered in a way that preserves their chances for a productive adulthood.<sup>72</sup>

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63. See Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?*, 79 N.Y.U. L. REV. 520, 525-30 (2004) (criticizing the erosion of confidentiality protections regarding juvenile court records).

64. *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012); *Graham v. Florida*, 560 U.S. 48, 89 (2010); *Roper*, 543 U.S. at 569-70.

65. *Graham*, 560 U.S. at 68.

66. *Roper*, 551 U.S. at 570.

67. *Id.*

68. See *supra* note 13.

69. Appell, *supra* note 28, at 708.

70. JAMES & JAMES, *supra* note 10, at 20.

71. ALLEN, *supra* note 52, at 4 (noting that "a society cannot afford to fully leave people alone"); Appell, *supra* note 28, at 708. In this vein, Theodore Roosevelt described the early juvenile justice system as a "manufactory of citizens." JACK M. HOLL, *JUVENILE REFORM IN THE PROGRESSIVE ERA: WILLIAM R. GEORGE AND THE JUNIOR REPUBLIC MOVEMENT* 9 (1971).

72. FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE 18-19* (2005) ("Above almost all else, we seek a legal policy that preserves the life chances for those who make serious mistakes . . . [and that gives] young law violators the chance to survive our legal system with their life opportunities still intact . . . [.]").

The juvenile court was created to accomplish both those tasks.<sup>73</sup> Its purpose was to divert juveniles from the criminal process, and its debilitating punishments and stigma, to a forum where their cases would be handled by trained specialists dedicated to imposing accountability while promoting the youth's rehabilitation.<sup>74</sup> Because children are future adults, the criminal justice system as a whole—including law enforcement and criminal courts—has a greater interest in promoting youth development and rehabilitating those who offend than punishing, stigmatizing, and marginalizing them. Thus, some jurisdictions have recently sought to make transfer of youth charged with crimes to adult court more difficult<sup>75</sup> and attempted to minimize the consequences for youth processed in criminal court through legislatively created classifications like “Youthful Offender” status.<sup>76</sup> Other statutes limit the amount of restitution juveniles may be ordered to pay to avoid saddling them with debts that would cripple their transition to independent adulthood.<sup>77</sup> These policies aim to protect youth from full accountability to preserve their future life chances.

These protective impulses reflect the view that severe punishments, permanent disabilities, and lasting stigma for youthful mistakes do not serve the long-term interests of society. While reforms have not gone as far as they might,<sup>78</sup> the vulnerability of youth, their capacity for change,

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73. Mack, *supra* note 61, at 109 (“To get away from the notion that the child is to be dealt with as a criminal; to save it from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma—this is the work which is now being accomplished by [the juvenile court].”).

74. See ZIMRING, *supra* note 72, at 18–19.

75. See Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143, 158–59 (2014).

76. For example, in New York, “Youthful Offender” status is available to a limited number of young people charged in criminal court: those at least sixteen but not yet nineteen, facing certain charges and without certain criminal history. N.Y. CRIM. PROC. § 720.10. Those who qualify benefit from a sealed accusatory instrument, may have their arraignment and all proceedings conducted in private, can receive reduced sentences that do not carry the same consequences as a conviction, and court records are confidential. CRIM. PROC. §§ 720.15, 720.20, 720.35.

77. See, e.g., N.Y. FAM. CT. ACT § 353.6 (capping the amount of restitution that a juvenile may be ordered to pay at \$1500). According to the National Juvenile Defender Center, eight jurisdictions place a cap on the amount of restitution that may be imposed on a juvenile. See *Juvenile Restitution Statutes*, NAT’L JUVENILE DEF. CTR., <http://njdc.info/juvenile-restitution-statutes/> (last visited Dec. 18, 2015).

78. See, e.g., Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501 (2012) (identifying duress, provocation, and felony murder as potential areas of future reform). Many states have delayed implementing the *Miller* decision outlawing mandatory life without parole sentences for juveniles. See THE SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE (2014). Even where juveniles are able to get resentencing hearings, many are being resentedenced to life without parole. Ranjani Chakraborty, *Imprisoned at 14, Illinois Inmate Gets Resentenced to Life Without Parole*, AL JAZEERA (May 4, 2015, 5:20 PM), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/5/4/adolfo-davis-life-parole.html>.

and their future as adults have taken a more central role in policymaking in the twenty-first century.

One notable exception to this trend is law enforcement data collection, where special protections for youth are falling away. Compiling criminal justice biographies of youth disregards their vulnerability, discounts their capacity for change, and makes more difficult the transition to adulthood. The next Part describes those practices.

## II. THE DELINQUENCY DATABASES

From street observation to cultivating informants, to fingerprints, body measurements, and rap sheets, law enforcement has always collected and stored data to help solve and prevent crime.<sup>79</sup> For decades, law enforcement stored its data in the memories of individual constables and beat officers, or in physical card catalogs at the station house.<sup>80</sup> The computer revolution of the last thirty years has changed that, exponentially increasing the ability of law enforcement to collect, store, retrieve, and share data. Computer technology has enabled networked storage, powerful search capacity, real time updating, and near instantaneous retrieval by officers in the station house and the field.

This data and database revolution has received significant attention.<sup>81</sup> Still, few have considered the particular concerns raised by aggregating data about young people.<sup>82</sup> As Part II of this Article demonstrates, in contrast to decades of practices that mostly shielded young people from accumulating law enforcement records, the criminal justice system today largely treats juveniles like adults when it comes to the collection and retention of information.

All told, the criminal justice system collects a remarkable amount of information about youth: contacts with police, suspicions, misbehavior, arrests, charges, convictions, and sentences. But it is not just criminal information that is being collected, stored, and shared. Law enforcement collects genetic samples from juveniles; it catalogs their friends, family, associations, and movements; and the law requires that personal information of youth convicted or adjudicated delinquent of sex offenses, such as their home address and school, be posted on the Internet.

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79. SIMON A. COLE, SUSPECT IDENTITIES: A HISTORY OF FINGERPRINTING AND CRIMINAL IDENTIFICATION (2001); JACOBS, *supra* note 2; ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009).

80. Murphy, *supra* note 1, at 807 (2010) (“Old databases were typically paper files or punch cards that were physically kept and stored in diffused, and at times difficult to access, locations.”).

81. *See id.* (arguing for better regulation of law enforcement databases); GARFINKEL, *supra* note 1.

82. James B. Jacobs, *Juvenile Criminal Record Confidentiality*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 149, 157 (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (“[T]he history of juvenile justice has always been court-centric, paying much less attention to police and corrections.”).

The following subpart exposes the broad, interconnected content of this databasing. It then explains how these practices collectively result in criminal justice biographies of youth.

#### A. GANG DATABASES

Law enforcement often collects data on individuals long before a crime is committed or reported. It regularly compiles dossiers on and surveils those who it believes are likely to be involved in crime. Just who gets enhanced attention changes over time.<sup>83</sup> Today, a prime police target is poor, urban, minority youth, especially those allegedly linked to the scourge of gangs.<sup>84</sup> Anticipating that these youth will become offenders, law enforcement seeks to gather as much information as it can about them. The modern tool it uses to collect, organize, and disseminate intelligence information prior to a criminal case is the gang database.

Gang databases are repositories for information about known and suspected gang members. The Los Angeles County Sheriff's Department instituted the first modern gang database in 1987.<sup>85</sup> Similar gang databases are now maintained across the nation at the local, state, and federal levels.<sup>86</sup> Gang databases can include almost anything, but typically record the youth's name, address, dress, tattoos, locations, behaviors, criminal histories, vehicles, school, family, and friends.<sup>87</sup> Law enforcement collects the information entered into the database primarily through routine stops on the street and in schools.<sup>88</sup>

Gang membership is not a crime, and a conviction is not necessary before an individual's information can be entered into a gang database.<sup>89</sup> Indeed, neither an arrest nor a criminal investigation need precipitate the categorization of a youth as gang-involved.<sup>90</sup> Instead, police decide who gets included.<sup>91</sup> Inclusion can be triggered by street encounters with police, self-admission, or a combination of other indicators. In some jurisdictions,

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83. JACOBS, *supra* note 2, at 32 (identifying past targets as communists, Mafioso, and Black militants).

84. NAT'L GANG INTELLIGENCE CTR., 2013 NATIONAL GANG REPORT.

85. YOUTH JUSTICE COAL., TRACKED AND TRAPPED: YOUTH OF COLOR, GANG DATABASES AND GANG INJUNCTIONS 2 (2012) (referencing the Gang Reporting, Evaluation, and Tracking System ("GREAT") that stored and analyzed personal information about alleged gang members).

86. Julie Barrows & C. Ronald Huff, *Gangs and Public Policy: Constructing and Deconstructing Gang Databases*, 8 CRIMINOLOGY & PUB. POL'Y 675, 683 (2009).

87. K. Babe Howell, *Gang Databases: Labeled for Life*, CHAMPION 28 (2011).

88. YOUTH JUSTICE COAL., *supra* note 85, at 2.

89. James B. Jacobs, *Gang Databases: Context and Questions*, 8 CRIMINOLOGY & PUB. POL'Y 705, 705 (2009).

90. YOUTH JUSTICE COAL., *supra* note 85, at 4.

91. Rebecca Rader Brown, *The Gang's All Here: Evaluating the Need for a National Gang Database*, 42 COLUM. J.L. & SOC. PROBS., 294, 319 (2009) ("[D]ocumentation procedures in most localities are characterized by high levels of discretion in identification, review, and processing of information.").

qualifying criteria are statutory. While that ostensibly limits police discretion, the qualifying criteria can include vague (and perfectly lawful) things such as “[being] in a photograph with a known gang member,” “correspond[ing] with known gang members,” frequenting a gang area, or wearing certain clothing.<sup>92</sup> In Victor Rios’s study of Oakland youth, he described how a fifteen-year-old who was not in a gang ended up in a gang database after he was attacked while sitting on his front door steps talking with friends.<sup>93</sup> Because the attackers were gang members, detectives assumed that the victim was as well, and registered him as an active gang member.<sup>94</sup>

The broad criteria for inclusion in gang databases, and the discretion afforded to law enforcement in deciding whom to include, make it difficult for young people living in gang-heavy communities to avoid qualifying criteria. Law enforcement’s desire to collect as much intelligence and potential evidence as possible about those it expects to be offenders encourages it to be over-inclusive in its classifications.<sup>95</sup> The lack of age limits for inclusion in gang databases means that children as young as ten are present in gang databases.<sup>96</sup>

While the particularities of gang databases vary, most use a software platform that enables the aggregation and organization of information.<sup>97</sup> Typical of gang databases is that of California, known as CalGangs. It is a web-based intranet system accessible by police via a computer, phone, or web browser. The California Attorney General described it as a “wide area, low cost, easy to use, securely networked, relational, intelligence database.”<sup>98</sup>

Gang databases impact the lives of juveniles in many ways. Law enforcement uses gang databases as an investigatory starting point filled with prime suspects.<sup>99</sup> They influence which individuals and communities are targeted for policing. Those known or suspected to be in a gang

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92. Howell, *supra* note 87, at 33.

93. VICTOR M. RIOS, PUNISHED: POLICING THE LIVES OF BLACK AND LATINO BOYS 77–78 (2011).

94. *Id.* at 78.

95. Barrows & Huff, *supra* note 86, at 677 (“[M]any if not most law-enforcement agencies include marginal gang associates in their databases.”).

96. YOUTH JUSTICE COAL., *supra* note 85, at 11 (noting that as of December 2012, the CalGang database included 23,789 (out of 201,094) individuals age nineteen or younger: 460 individuals aged ten to fourteen, and 23,329 aged fifteen to nineteen).

97. Rader Brown, *supra* note 91, at 301 n.43 (noting that GangNet® is used by at least twelve states, the District of Columbia, and multiple federal agencies, and Canada). At the federal level, the FBI’s National Gang Intelligence Center integrates gang intelligence from federal, state, and local law enforcement. *Gangs*, FED. BUREAU OF INVESTIGATION, [https://www.fbi.gov/about-us/investigate/vc\\_majorthefts/gangs/ngic](https://www.fbi.gov/about-us/investigate/vc_majorthefts/gangs/ngic) (last visited Dec. 18, 2015).

98. CALGANG®, OFFICE OF ATT’Y GEN., CAL. DEP’T OF JUST., <http://oag.ca.gov/calgang> (last visited Dec. 18, 2015).

99. K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 U. DENV. CRIM. L. REV. 1, 4 (2015).

appear to receive harsher treatment at every stage of the investigation and adjudication processes. In Tampa, Florida, for example, an individual without an arrest record was erroneously placed in a gang database and then stopped four times in three months, barred from the public housing project where he lived, and arrested for being there.<sup>100</sup> Documented gang members, and those living in gang-dense neighborhoods, are more likely to be charged with a crime, more likely to be remanded while awaiting trial, and if a juvenile, more likely to be tried as an adult (which has been shown to increase recidivism).<sup>101</sup> Courts may impose special probationary conditions on gang members, forbidding them from associating with other known or suspected members.<sup>102</sup> At sentencing, gang enhancement statutes allow courts to add additional years for gang members and gang-related crimes. Some jurisdictions forbid plea bargains and require prosecutors to seek the highest penalty possible in gang-related prosecutions.<sup>103</sup> School officials use gang information to direct security resources and assign counseling resources.<sup>104</sup>

The structure and management of gang databases make it difficult, if not impossible, to know whether a particular person has been classified as a gang member. The information in gang databases is not publicly available. According to the California Attorney General website, “[r]elease of CalGang® Criminal Intelligence Information is on a Right-To-Know (A Law Enforcement Officer) and Need-To-Know (Legitimate Law Enforcement Purpose) basis only.”<sup>105</sup>

Only a few gang databases have provisions that require law enforcement to notify parents when youth are classified as gang members.<sup>106</sup> Moreover, law enforcement typically does not offer a procedure for individuals to contest their inclusion or to seek or confirm their purging from a gang database. This means that youth classified as gang involved by police can remain in a gang database (often unbeknownst to them) for years. Even where purging procedures are in place, they are rarely carried out.<sup>107</sup> There is little incentive for law enforcement to purge

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100. Will Hobson, *Police Gang Lists Can Have Life-Long Impacts and Are Questioned by Legal Experts*, TAMPA BAY TIMES (Sept. 15, 2012, 7:08 PM), <http://www.tampabay.com/news/publicsafety/crime/police-gang-lists-can-have-life-long-impacts-and-are-questioned-by-legal/1251855>.

101. Rader Brown, *supra* note 91, at 322.

102. *Id.*

103. *Id.* at 321 (“At least 23 states also impose increased mandatory sentences for gang crimes . . .”).

104. Jacobs, *supra* note 89, at 706–07.

105. CALGANG®, *supra* note 98.

106. Rader Brown, *supra* note 91, at 322 (urging notification procedures on account of the legal and social consequences of gang classification for young people).

107. Jacobs, *supra* note 89, at 708 (“Realistically, scrutiny of the gang database is not going to be a high police-department priority. I think it is likely that auditing will be conducted shoddily or not at all.”); Rader Brown, *supra* note 91, at 325–26 (“[C]urrent methods of populating and maintaining gang

records from their intelligence databases. And because of how the guidelines governing many gang databases work (purging is allowed only if no new information is entered regarding an individual for two or five years),<sup>108</sup> police can intentionally avoid purging by checking in on someone regularly, entering gang-related information gained during the encounter (perhaps about friends or family members of the juvenile).

Though gang databases are not publicly available, and despite the fact that many youth never know they have been classified by law enforcement as a gang member, the information in gang databases leaks beyond law enforcement. As a general matter, criminal law scholar James Jacobs noted that “[o]nce information is entered into an investigative or intelligence database, it can easily migrate to other public and private databases and, therefore, can become more difficult to purge or edit effectively.”<sup>109</sup> Specific studies of gang database information have found this to be true. According to one study, “information collected [in CalGang] has been shared with employers, landlords, Public Housing and Section 8, and school administrators.”<sup>110</sup> Others have found that police share gang information with schools.<sup>111</sup>

#### B. SCHOOLS AS INFORMANTS

Schools have increasingly become a contact point for youth and the criminal justice system. Scholars in many fields, including law, education, political science, and sociology, have traced the rise of the culture of control in the classroom, and its devastating impacts on youth.<sup>112</sup> From metal detectors and fingerprint identification required for entry, to video surveillance and police presence on campuses, schools are policed more than ever.<sup>113</sup> In addition, schools have criminalized normal adolescent behavior: pushing and shoving has become battery, swiping a classmate’s

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databases are of questionable reliability and utility. Even where official criteria and processes are established, implementation and oversight are lacking.”).

108. Rader Brown, *supra* note 91, at 320.

109. Jacobs, *supra* note 89, at 705.

110. YOUTH JUSTICE COAL., *supra* note 85, at 6.

111. Charles M. Katz, *Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit*, 49 CRIME & DELINQ. 485, 504 (2003).

112. AARON KUPCHIK, HOMEROOM SECURITY: SCHOOL DISCIPLINE IN AN AGE OF FEAR (2010); SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION (Torin Monahan & Rodolfo D. Torres eds., 2010); see also Jason P. Nance, *School Surveillance and the Fourth Amendment*, 79 WIS. L. REV. 79 (2014).

113. SCHOOLS UNDER SURVEILLANCE, *supra* note 112. Between the 1996–97 and 2007–08 school years, the number of public high schools with full-time law enforcement and security guards tripled. JACOB KANG-BROWN ET AL., VERA INST. OF JUSTICE, A GENERATION LATER: WHAT WE’VE LEARNED ABOUT ZERO TOLERANCE IN SCHOOLS 2 (2013). Racial minority youth are disproportionately subjected to these surveillance and policing practices. Aaron Kupchik, *The School-to-Prison Pipeline*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 4, 96 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

headphones has become theft or robbery, and talking back to staff has become disorderly conduct or obstructing.<sup>114</sup> As a result, young people are intentionally and increasingly diverted from the classroom to the juvenile and criminal justice systems.<sup>115</sup> These practices are particularly prevalent in urban public schools attended primarily by minority youth,<sup>116</sup> a disparity that is “not explained by more frequent or more serious misbehavior by students of color.”<sup>117</sup>

The upshot of these changes is that schools are less likely to handle disciplinary matters internally.<sup>118</sup> This “criminalization of school discipline”<sup>119</sup> makes schools “the first institution in which most youth have an opportunity to be marked as failures, criminals, or deviants.”<sup>120</sup> The fact that schools increasingly turn to law enforcement to deal with misbehavior reinforces the perceived criminality of the acts. In the last two decades, legislatures across the country have turned schools into mandated informants, requiring school officials to report to law enforcement a wide variety of behaviors and suspected acts by students at school. As a result, all sorts of behavior and suspicions that in the past would have stayed on

114. Kupchik, *supra* note 113, at 96 (“Students today often face suspension, expulsion, or arrest for behaviors that at one time led to detention or a verbal reprimand at the principal’s office.”).

115. CATHERINE Y. KIM, DANIEL J. LOSEN & DAMON T. HEWITT, *THE SCHOOL-TO-PRISON PIPELINE: STRUCTURING LEGAL REFORM* (2012); *What Is The School-To-Prison Pipeline?*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/racial-justice/what-school-prison-pipeline> (last visited Dec. 18, 2015) (“The ‘school-to-prison pipeline’ refers to the policies and practices that push our nation’s schoolchildren, especially our most at-risk children, out of classrooms and into the juvenile and criminal justice systems.”).

116. Nance, *supra* note 112, at 90 (“[L]arge, urban schools serving primarily low-income or minority students are more likely to create intense surveillance environments than other schools, [and] . . . tend to rely on heavy-handed, punitive-based measures to maintain order and control crime” and “are more inclined to coerce students into compliance and to promote safety by identifying, apprehending, and excluding students that school officials perceive as being dangerous, disruptive, or low-performing.”).

117. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., *DEAR COLLEAGUE LETTER ON NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE* 4 (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>; Jason P. Nance, *Students, Security, and Race*, 63 *EMORY L.J.* 1 (2013) (finding that student race and student poverty were strong predictors for whether a school chose to employ high surveillance security methods even after controlling for factors that might influence the school officials’ decisions to employ strict security measures, such as school crime, neighborhood crime, and school disorder).

118. Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 *WASH. U. L. REV.* 1, 1 (forthcoming 2015) (“In the past, certain lower-level, common offenses that occurred at school, such as fighting or threats without use of a weapon, traditionally were handled only by educators, not by police officers.”).

119. Henry A. Giroux, *Racial Injustice and Disposable Youth in the Age of Zero Tolerance*, 16 *INT’L J. QUALITATIVE STUD.* 553, 557–58 (2010); Paul J. Hirschfield, *Preparing for Prison?: The Criminalization of School Discipline in the USA*, 12 *THEORETICAL CRIMINOLOGY* 79 (2008).

120. Kupchik, *supra* note 113, at 94.

campus are now shared with law enforcement.<sup>121</sup> This leads to more criminal justice contact for youth, disruptions in their education, and negative outcomes.<sup>122</sup>

One main reason that schools are now in the collecting and reporting business is that Congress has incentivized it. Two major pieces of legislation do most of the work. The Improving America's Schools Act of 1994 provided funds to public schools that demonstrated an existing crime problem, compelling schools nationwide to develop data-collection systems and define crimes broadly so that they could qualify for federal funds.<sup>123</sup> Many of these funds were spent on school-police partnerships, such as hiring security or law enforcement officers to patrol school campuses.<sup>124</sup> The mere presence of these officers both facilitates reporting and makes more crime possible as refusing to follow the orders of these school security officers is a crime.<sup>125</sup> Then, in 2001, the No Child Left Behind Act required school districts receiving federal funds to have a policy requiring that any student who brings a firearm or weapon to school be referred to law enforcement.<sup>126</sup>

With federal money tied to documenting crime in school and reporting it to law enforcement, it is no surprise that almost all states require school officials to report to law enforcement suspected violent crimes or incidents that involve deadly weapons or dangerous instruments.<sup>127</sup> Other states go much farther. Many, including California, require schools to

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121. See Nancy E. Dowd, *What Men?: The Essentialist Error of the "End of Men,"* 93 B.U. L. REV. 1205, 1219 (2013) (noting the "increasing use of arrest as a form of school discipline for behavior that in the past would have been handled within school").

122. According to a Texas study, a single suspension or expulsion for a discretionary offense that did not include a weapon almost tripled a student's likelihood of becoming involved in the juvenile justice system in the following academic year. TONY FABELO ET AL., JUSTICE CTR. & PUB. POLICY RESEARCH INST., *BREAKING SCHOOLS' RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS' SUCCESS AND JUVENILE JUSTICE INVOLVEMENT* (2011).

123. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518; Aaron Kupchik & Nicole L. Bracy, *To Protect, Serve, and Mentor?, in* SCHOOLS UNDER SURVEILLANCE: CULTURES OF CONTROL IN PUBLIC EDUCATION 21, 22 (Torin Monahan & Rodolfo D. Torres eds., 2010); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 214-20 (2007).

124. In 2000, the U.S. Department of Justice Office of Community Oriented Police Services ("COPS") awarded \$68 million in grants to schools across the country specifically for the hiring of school resource officers. *Supporting Safe Schools*, CMTY. ORIENTED POLICING SERVS., <http://www.cops.usdoj.gov/Default.asp?Item=2687> (last visited Dec. 18, 2015).

125. In New York, the charge is "obstructing governmental administration." N.Y. PENAL LAW § 195.05; Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 281 (2009) ("[M]ost crime occurring at schools historically has not been reported to police, yet having a police officer available and accessible at school facilitates reporting.").

126. 20 U.S.C. § 7151(h)(1) (2001).

127. A tremendous thank you to Jason P. Nance, Assistant Professor of Law at the University of Florida Levin College of Law, who shared with me his initial fifty-state survey of laws requiring schools to report to law enforcement.

report when students use, sell, or possess drugs or alcohol.<sup>128</sup> Connecticut requires principals to notify law enforcement when the principal “believes that any acts of bullying constitute criminal conduct,”<sup>129</sup> and Illinois requires principals to notify law enforcement of “each incident of intimidation . . . and each alleged incident of intimidation which is reported to him or her.”<sup>130</sup> Kansas requires an immediate report to law enforcement by or on behalf of any school employee who knows or has reason to believe that a misdemeanor was committed at school or a school supervised activity.<sup>131</sup> Given the funding incentives, schools are likely to err on the side of reporting, even when they do not believe (or know) that an act constitutes a crime.

The failure of a school employee to report incidents to law enforcement can carry consequences. For example, it is a Class B misdemeanor in Kansas to willfully and knowingly fail to report suspected crimes to law enforcement,<sup>132</sup> and it is an infraction punishable by a fine of up to \$1000 in California for “any employee of a school district [who] is attacked, assaulted, or physically threatened by any pupil” to not promptly report the incident to the appropriate law enforcement authorities.<sup>133</sup>

Schools are not just sharing behavioral information with law enforcement. Reports have surfaced of schools sharing records with noncriminal justice government agencies, such as immigration enforcement authorities.<sup>134</sup>

Information also flows from law enforcement to the schools. At least nineteen states now require courts or law enforcement agencies to provide criminal or delinquency information to schools.<sup>135</sup>

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128. See, e.g., CAL. EDUC. CODE § 48902 (West 2014); DEL. CODE ANN. tit. 14, § 4112(c) (West 2014).

129. CONN. GEN. STAT. ANN. § 10-222d(b)(15) (West 2014); N.Y. EDUC. LAW § 13 (McKinney 2014) (raising that harassment, bullying, or discrimination constitutes criminal conduct). Nebraska also requires reports of bullying. NEB. REV. STAT. § 79-293 (2014).

130. 105 ILL. COMP. STAT. ANN. 5/34-84a.1 (LexisNexis 2014).

131. KAN. STAT. ANN. § 72-89b03 (2014).

132. KAN. STAT. ANN. § 72-89b04 (2014).

133. CAL. EDUC. CODE § 44014 (West 2014).

134. Kirk Semple, *Immigration Agency's Tactic Spurs Alarm*, N.Y. TIMES, Sept. 18, 2010, at A15 (describing subpoena issued by Immigration and Customs Enforcement (“ICE”) to the New York City Department of Education seeking the school records of a student enrolled in a public school and noting that “[a] spokesman for the immigration agency said that it regularly asked schools around the country for student records, and that most were ‘completely cooperative’”).

135. Henning, *supra* note 63, at 547; MINN. STAT. § 121A.28 (2014) (indicating that law enforcement must report a drug or alcohol violation to schools); MINN. STAT. § 260B.171 (2014) (stating that law enforcement must report certain juvenile court dispositions to schools, and must notify schools if there is probable cause to believe a juvenile committed certain offenses).

### C. POLICE AND COURT RECORDS

While gang databases and schools as informants are relatively recent phenomena, criminal justice recordkeeping is nothing new. Traditional forms of data collection include rap sheets, intelligence gathered by police during street encounters, and court recordkeeping. Technology has transformed the quantity of information that can be gathered and the ability to retrieve that information at will. At the same time, the criminal justice system has expanded the kind and amount of information it keeps about young people. Moreover, juvenile records are increasingly accessible to the media, employers, schools, government agencies, victims, and others.<sup>136</sup>

#### 1. Policing Data

Legislatures and law enforcement have a history of restricting law enforcement's ability to create records of juveniles. For decades, most states prohibited police or juvenile authorities from taking fingerprints or photographs of juvenile suspects, unless taking them was necessary to an investigation or was otherwise approved by a court.<sup>137</sup> Such restrictions were "an extension of the efforts to protect the identities of juveniles and to make their contact with the police and the court less like that experienced by adult offenders."<sup>138</sup> By restricting the practice, they sought to "safeguard[] the child from unwarranted indicia of misconduct becoming a part of police and court records" and protect their privacy.<sup>139</sup>

Identity records of juveniles, once created, benefitted from enhanced confidentiality and other protections compared to adult law enforcement records. Juvenile records kept by police were typically held in decentralized, local systems, apart from adult criminal records.<sup>140</sup> This confined knowledge about a juvenile's prior contact with the police to the juvenile's locality. Statutory confidentiality, combined with sealing and expungement provisions, further ensured against any lasting effect of

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136. JUVENILE LAW CTR., FAILED POLICIES, FORFEITED FUTURES: A NATIONWIDE SCORECARD ON JUVENILE RECORDS 6 (2014).

137. *United States v. Sechrist*, 640 F.2d 81, 87 (7th Cir. 1981) (Congress sought to "ensure that a juvenile's fingerprints or photograph would not be taken unnecessarily and that once taken, they would remain secret."); *Vovos v. Grant*, 555 P.2d 1343, 1347 (Wash. 1976); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 188 (2008).

138. MARY E. MURRELL & DAVID LESTER, INTRODUCTION TO JUVENILE DELINQUENCY 147, 173-74 (1981).

139. BARRY C. FELD, CASES AND MATERIALS ON JUVENILES JUSTICE ADMINISTRATION 373 (4th ed. 2013) ("[P]hotographing and fingerprinting connote a criminal process that may stigmatize or self-label a youth.").

140. BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, PRIVACY AND JUVENILE JUSTICE RECORDS: A MID-DECADE STATUS REPORT 3 (1997).

criminal records.<sup>141</sup> These practices continued well into the late twentieth century. As recently as 1988, only a quarter of law enforcement agencies fingerprinted juveniles.<sup>142</sup>

Today, these protections have faded. Juvenile law enforcement records increasingly resemble adult law enforcement records: they are more regularly created, include more information, are stored with adult records, and are more widely available. Nearly every state allows juveniles to be fingerprinted at arrest.<sup>143</sup> All states allow juvenile arrestees to be photographed, and nearly all send information about juvenile arrestees to statewide repositories.<sup>144</sup> The FBI authorizes the inclusion of juvenile criminal history record information in the FBI's National Crime Information Center ("NCIC") database on the same basis as adult records.<sup>145</sup> The Supreme Court has held that the media cannot be stopped from disclosing a juvenile arrestee's identity as long as it acquired the information lawfully.<sup>146</sup>

The impact of eroded protections for youth has been multiplied because technology has enabled law enforcement to record, store, organize, and retrieve more data than ever. A traditional method for police to gather information on individuals is the Field Interview ("FI") card. Known by different names, these are forms filled out by police officers after encounters with individuals.<sup>147</sup> They record pedigree information (such as name, address, and date of birth) and details about the encounter.<sup>148</sup> Police often complete FI cards after routine encounters

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141. *Id.*

142. BUREAU OF JUSTICE STATS., U.S. DEP'T OF JUSTICE, JUVENILE RECORDS AND RECORDKEEPING SYSTEMS v (1988) (calling juvenile fingerprinting "one of the most intrusive procedures in the juvenile justice process").

143. *Id.*

144. HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT (2006), <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/nr2006.pdf>.

145. 57 Fed. Reg. 31,315, 31,315 (July 15, 1992); 28 C.F.R. § 20.32 (1999) ("Criminal history record information maintained in the III System and the FIRS shall include serious and/or significant adult and juvenile offenses."); BUREAU OF JUSTICE STATS., *supra* note 140; Jacobs & Crepet, *supra* note 137, at 188-90.

146. *Smith v. Daily Mail Publ'g*, 443 U.S. 97, 103 (1979) (holding that state cannot prevent media from disclosing juvenile arrestee's identity via statute); *Okla. Pub. Co. v. Dist. Ct. of Okla.*, 430 U.S. 308, 309 (1977) (holding that state cannot prevent media from disclosing juvenile arrestee's identity via court order).

147. For example, in New York City, every stop-and-frisk is supposed to be recorded in an official UF-250 police report. See Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809, 862-63 n.210 (2011) ("According to the NYPD's Patrol Guide, a police officer who stops and frisks an individual must complete a UF-250 if a person is (1) stopped by force; (2) stopped and frisked or searched; (3) arrested; or (4) stopped and refuses to identify oneself. . . . In situations that fall outside these four contexts, a police officer may fill out a form if he or she desires to do so.") (citation omitted).

148. For an example from Texas, see *Texas Law Enforcement Field Interview Card*, TEX. DEP'T OF PUB. SAFETY, <http://www.txdps.state.tx.us/internetforms/Forms/INT-7.pdf>.

done without probable cause, a great many of which did not end in an arrest.<sup>149</sup>

The FI card practice has been transformed by technology. Law enforcement staff used to record and organize the information by hand, a laborious manual entry process. The information is now aggregated and stored in computers, making it easy to search and retrieve. Software companies have developed computer and smartphone applications that allow officers to complete FI cards using their smartphones.<sup>150</sup> These applications eliminate the need to manually enter information recorded by the officer on the paper form into a database, because both processes happen at once. This reduces the amount of time required for data entry, enabling law enforcement to record more information after more encounters.<sup>151</sup> It also makes retrieval and analysis of the information gathered much easier.

The archetypal police record, the Record of Arrest and Prosecution (“rap sheet”), is a lifetime record of an individual’s arrests. Developed at the beginning of the twentieth century, the rap sheet was “created by police for police use,” to enable police to link records with people.<sup>152</sup> Rap sheets are no longer just for the police. Congress and states have directly authorized certain industries, businesses, and other groups to obtain criminal histories from the FBI for job applicants, employees, and volunteers.<sup>153</sup> In 2012, the FBI processed some seventeen million criminal background checks for employment and licensing purposes (made possible by networked computers).<sup>154</sup> Moreover, “some police departments . . . go beyond what constitutional and statutory law requires, aggressively disseminating arrestee information.”<sup>155</sup> As a result, a “system created by police for the police is now more often used to provide criminal biographies for non-criminal justice purpose.”<sup>156</sup>

Law enforcement agencies across the nation also maintain a variety of intelligence databases that store much more than just records of arrests, including the gang databases already mentioned, as well as tattoo

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149. JACOBS, *supra* note 2.

150. *See, e.g., Police Field Interview FI Card*, <https://play.google.com/store/apps/details?id=com.wavesystems.ficard&hl=en>.

151. Paul Clinton, *LAPD Rampart’s Special Problems Unit*, POLICE: THE LAW ENFORCEMENT MAGAZINE (Mar. 15, 2013) (Special Problems Unit officers “relentlessly fill out field interview cards to build a record of every vehicle stop or contact. Several of the officers use the Field Contact mobile app to store suspect data including photos, tattoos, and gang affiliation.”).

152. JACOBS, *supra* note 2, at 33.

153. *Id.* at 43 (including, for example, banks, housing authorities, and organizations that provide child care services).

154. MADELINE NEIGHLY & MAURICE EMSSELLEM, NAT’L EMP’T LAW PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT I (2013).

155. JACOBS, *supra* note 2, at 160–61.

156. *Id.* at 46–47 (discussing the inscrutability of rap sheets, which contain state criminal code numbers, abbreviations, and jargon that are difficult to interpret by lay users).

databases, birthmark and scar databases, teeth databases, and many others.<sup>157</sup> Information in these databases comes from all the information collected by officers during street encounters and reported in FI cards, as well as from bookings, 911 calls, complaints by victims, reports on accidents, and moving violations.<sup>158</sup> Photograph databases collect images taken at arrests and those gathered from surveillance cameras.<sup>159</sup>

The granddaddy of all law enforcement databases is the NCIC, “an electronic clearinghouse of crime data that can be tapped into by virtually every criminal justice agency nationwide, 24 hours a day, 365 days a year.”<sup>160</sup> The NCIC includes fourteen person files that include records on individuals on probation, parole, supervised release, released on their own recognizance, or during pretrial sentencing; records on violent gangs and their members; records on individuals for whom a federal warrant or a felony or misdemeanor warrant is outstanding; and records of persons with a violent criminal history and persons who have previously threatened law enforcement.<sup>161</sup> Automated criminal history record information contained in the Interstate Identification Index is accessible through the same network as NCIC.<sup>162</sup> Beginning in 1992, the FBI allowed juvenile criminal history record information in NCIC on the same basis as adult records.<sup>163</sup>

Together, these technology-enhanced data collection, organization, and retrieval systems provide law enforcement with more information than ever on those they have and will encounter on the streets.

## 2. Court Recordkeeping

Court records document what happens when formal criminal charges are filed against an individual. Whether they are criminal court or juvenile court records, they include more than just a charge and the end result of the proceeding. Court records can contain arrest records, detention history, school records, medical, psychological, and behavioral records, and family and social history.<sup>164</sup>

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157. See Michael S. Schmidt, *Have a Tattoo or Walk with a Limp? The Police May Know*, N.Y. TIMES, Feb. 18, 2010, at A19.

158. *Id.*

159. Jennifer Lynch, *FBI Plans to Have 52 Million Photos in Its NGI Face Recognition Database by Next Year*, ELECTRONIC FRONTIER FOUND. (Apr. 14, 2014), <https://www.eff.org/deeplinks/2014/04/fbi-plans-have-52-million-photos-its-ngi-face-recognition-database-next-year>.

160. *National Crime Information Center*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ncic> (last visited Dec. 18, 2015).

161. *NCIC Files*, FED. BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/cjis/ncic/ncic\\_files](http://www.fbi.gov/about-us/cjis/ncic/ncic_files) (last visited Dec. 18, 2015). The system contains images in addition to document records.

162. *National Crime Information Center*, *supra* note 160.

163. 28 C.F.R. § 20.32(a) (1999) (“Criminal history record information maintained in the III System and the FIRS shall include serious and/or significant adult and juvenile offenses.”).

164. JUVENILE LAW CTR., *supra* note 136.

For those 200,000 juveniles processed annually in criminal court,<sup>165</sup> convictions and court records are recorded as they are for adults. Other than the limited availability of “youthful offender” status, and its narrow protections, no special provisions protect the records of juveniles convicted in criminal court.<sup>166</sup> This is significant because criminal court records have long been available for public inspection. According to Jacobs, “only the United States and Canada permit anyone to look at case files without having to persuade a judge or clerk that she has a good reason to see the file.”<sup>167</sup> Before the computerization of court records, though, they were difficult to access.<sup>168</sup> Review required physical travel to the local courthouse or record repository and time spent retrieving and reviewing the records.

Today, court records are much more accessible, meaning that police and non-law enforcement personnel can access an individual’s court history with minimal effort. Most state court systems have websites that allow anyone (sometimes for a fee) to search docket sheets and retrieve criminal court record information on individuals. Approximately twenty state court systems sell copies of their criminal court docket sheets to commercial information vendors.<sup>169</sup>

The vast majority of juveniles charged with crimes have their cases handled in a juvenile court instead of a criminal court.<sup>170</sup> Consistent with the institution’s diversionary aim to “prevent children from being treated as criminals,”<sup>171</sup> juvenile courts have offered more robust protections against the creation of a criminal dossier. At its inception, juvenile court proceedings were held in private, before only a judge and not a jury. By design, such proceedings were not criminal and resulted in something other than a criminal conviction.<sup>172</sup> Most states limited disclosure of information about juveniles’ adjudications, and required court case files

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165. UCLA SCH. OF LAW JUVENILE JUSTICE PROJECT, THE IMPACT OF PROSECUTING YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM: A REVIEW OF THE LITERATURE 2 (2010).

166. See *supra* note 76 (explaining Youthful Offender adjudication).

167. JACOBS, *supra* note 2, at 55.

168. *Id.* (describing court records as enjoying “practical obscurity” before court-record centralization).

169. See FRANCIS X. AUMAND III & RONALD P. HAWLEY, SEARCH, NAT’L CONSORTIUM FOR JUST. INFO. & STATS., REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 5 (2005).

170. CHARLES PUZZANCHERA ET AL., NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2008, 6 (2011), <http://www.ncjj.org/pdf/jcsreports/jcs2008.pdf> (noting courts with juvenile jurisdiction handled an estimated 1.65 million delinquency cases in 2008).

171. MIRIAM VAN WATERS, YOUTH IN CONFLICT 217 (1927).

172. Juvenile courts issue an adjudication, which is not a criminal conviction. See, e.g., CAL. WELF. & INST. CODE § 203 (West 2014) (“An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding.”).

to be automatically sealed when the juvenile turned twenty-one.<sup>173</sup> When judicial opinions regarding delinquency proceedings were issued, they protected a juvenile's identity by using the juvenile's initials instead of her full name.

Many of these protective policies remain today. There still are no juries,<sup>174</sup> and case opinions continue to mask the juvenile's identity. Delinquency adjudications do not necessarily become part of a young person's permanent criminal record. Instead, stricter confidentiality provisions protect against disclosure of juvenile adjudications, and juvenile court records typically can be sealed or expunged at a particular age.<sup>175</sup>

But as with police records, these confidentiality provisions have eroded over time. Juvenile court proceedings today are less likely to be closed to the public.<sup>176</sup> Juvenile court records are also more broadly available, as no state completely protects juvenile court records from dissemination to certain entities outside the court and law enforcement.<sup>177</sup> Only nine states require a court order before juvenile court records can be released. Only eighteen states ensure that juvenile record information is not available to the public or accessible on any online database.<sup>178</sup> In Maine, for example, anyone can obtain a person's delinquency adjudications for a thirty-one-dollar fee.<sup>179</sup> Juvenile records can be obtained in Florida for twenty-four dollars.<sup>180</sup> Arizona and Idaho provide no confidentiality protections to juvenile court records.<sup>181</sup> Compounding the significance of this confidentiality erosion, the Supreme Court has

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173. TANENHAUS, *supra* note 27.

174. *McKeiver v. Pennsylvania*, 403 U.S. 528, 549–51 (1971) (holding that juveniles do not have constitutional right to jury trial in juvenile delinquency proceeding under either Sixth Amendment or Due Process Clause of Fourteenth Amendment).

175. *See* HENNING, *supra* note 63, at 525–30.

176. Thirty-nine states now permit or require juvenile delinquency hearings to be open to the public, either for all proceedings or with certain age/offense requirements influencing the decision. KRISTEN RASMUSSEN, REPORTERS COMM. FOR FREEDOM OF PRESS, MINORS MAKING NEWS: A STATE-BY-STATE GUIDE TO JUVENILE COURTS NATIONWIDE 4–5 (2012); LINA A. SYZMANSKI, NAT'L CTR. FOR JUVENILE JUSTICE, CONFIDENTIALITY OF JUVENILE DELINQUENCY HEARINGS I (2008), [http://www.ncjj.org/PDF/Snapshots/2008/vol13\\_no5\\_confidentiality2008.pdf](http://www.ncjj.org/PDF/Snapshots/2008/vol13_no5_confidentiality2008.pdf) (“The trend has been for much greater openness in juvenile delinquency hearings.”).

177. RIYA SAHA SHAH & LAUREN FINE, JUVENILE LAW CTR., JUVENILE RECORDS: A NATIONAL REVIEW OF STATE LAWS ON CONFIDENTIALITY, SEALING AND EXPUNGEMENT 6 (2014), <http://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf>.

178. *Id.*

179. Jacobs, *supra* note 82, at 161 (“[i]n at least 30 states the names and photos of violent and repeat juvenile offenders can be released to the public”).

180. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME 61 (2014), <http://www.nacdl.org/restoration/roadmapreport> (“[Y]ou could actually, right now, purchase every juvenile record for 24 bucks in the state of Florida, even if it was a seven-year old, even if it was dismissed. It doesn't matter. You can get the record.”).

181. SHAH & FINE, *supra* note 177, at 6.

also ruled that state laws cannot protect testifying witnesses from impeachment by these juvenile records.<sup>182</sup>

While juvenile courts used to seal or expunge juvenile court records on their own initiative, today only five states automatically expunge juvenile records.<sup>183</sup> In all other states, the youth, or another party, must file a petition and convince a court at a hearing to seal or expunge a juvenile court record.<sup>184</sup> In many of those states, youth are not advised of their obligation to initiate sealing or expungement. And as a result, many do not. Even when juveniles do initiate sealing or expungement procedures, more than half the states include statutory exceptions to sealing and expungement based on age at time of offense, the nature of the offense, and the amount of time that has passed since the case was closed.<sup>185</sup>

The end result is that police and courts create more records about youth than ever. The records last longer, and they are more accessible by those outside of courts and law enforcement than ever before.

#### D. DNA DATABASES

Another controversial criminal justice practice that has similarly expanded to include juveniles is DNA profiling. In short it works as follows: a biological sample containing a person's entire genetic code is collected via buccal swab or blood draw,<sup>186</sup> and analyzed by a laboratory to create a DNA profile.<sup>187</sup> DNA profiles are then entered into one or more government databases.<sup>188</sup> The Combined DNA Information System ("CODIS") is a software program that facilitates the matching of the DNA profiles of known offenders or arrestees to profiles generated from crime scene DNA evidence.<sup>189</sup>

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182. *Davis v. Alaska*, 415 U.S. 308, 320–21 (1974).

183. JUVENILE LAW CTR., *supra* note 136, at 9.

184. *Id.* at 19.

185. *Id.* at 43–45.

186. JULIE E. SAMUELS ET AL., URBAN INST., JUSTICE POLICY CTR., COLLECTING DNA FROM JUVENILES 32–35 (2011), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412487-Collecting-DNA-from-Juveniles.PDF>.

187. Erin Murphy, *Relative Doubt: Familial Searches of DNA Databases*, 109 MICH. L. REV. 291, 294–97 (2010). A DNA profile consists solely of numbers describing the number of times certain known sequences repeat themselves and identifying information for the agency that provided the DNA sample; it does not contain any personal information (such as the name and address) of the individual to whom it belongs. H.R. REP. NO. 106-900, pt. 1, at 27 (2000).

188. These government databases include the State DNA Index System ("SDIS"), the Local DNA Index System ("LDIS"), and the National DNA Index System ("NDIS"). SAMUELS ET AL., *supra* note 186, at 10.

189. *Frequently Asked Questions (FAQs) on the CODIS Program and the National DNA Index System*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited Dec. 18, 2015).

DNA databasing is a powerful tool that makes it possible to solve crimes quickly and confidently, including very old crimes, and can even exonerate the wrongfully convicted.<sup>190</sup> Collection of biological samples is accomplished primarily through contact with the criminal justice system. The federal government and all fifty states compel DNA collection from anyone convicted of a felony in criminal court.<sup>191</sup> In every state except Hawaii, this includes any juvenile convicted of any felony in criminal court.<sup>192</sup> All but four states also mandate collection from all persons convicted of certain misdemeanors, including juveniles.<sup>193</sup>

DNA collection from juveniles is not limited to those charged as adults. Twenty-nine states compel DNA samples from juveniles following a finding of juvenile delinquency.<sup>194</sup> Of those twenty-nine states, twenty collect DNA for all felony adjudications, while nine collecting only for a subset of felony adjudications.<sup>195</sup> Nineteen states mandate DNA collection from juveniles adjudicated delinquent for a misdemeanor.<sup>196</sup>

Neither a conviction nor a delinquency adjudication is a necessary predicate for DNA collection. In some states, a mere arrest can trigger compulsory DNA collection. As of 2014, the federal government and twenty-seven states require individuals arrested but not yet convicted or adjudicated delinquent to provide DNA samples.<sup>197</sup> Of the twenty-seven, nineteen permit collection from juveniles at arrest.<sup>198</sup>

190. *Maryland v. King*, 133 S. Ct. 1958, 1966 (2013) (“[L]aw enforcement, the defense bar, and the courts have acknowledged DNA testing’s ‘unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices.’”).

191. 42 U.S.C. § 14135a(a)(1)(A) (2000). Federal law permits the use of force in taking the DNA sample. *Id.* § 14135a(a)(4)(A); Collection of DNA Samples, 28 C.F.R. § 28.12(d) (2014). Those who fail to cooperate in DNA collection face a Class A misdemeanor charge punishable by up to one year in prison. 42 U.S.C. § 14135a(a)(5); 18 U.S.C. § 3559(a)(6) (2012). States have similar provisions.

192. HAW. REV. STAT. § 844D-31 (2014) (“Any person, except for any juvenile, who is convicted of, or pleads guilty or no contest to, any felony offense . . . shall provide buccal swab samples”).

193. Hawaii, Idaho, Indiana, and Wyoming collect only for felonies. *See* HAW. REV. STAT. § 844D-31 (2014); IDAHO CODE § 19-5506 (2014); IND. CODE § 10-13-6-10 (2014); WYO. STAT. ANN. § 7-19-403 (2011). New York has the broadest regime, mandating collection following a conviction for any felony and any misdemeanor except first-time, low-level marijuana possession. N.Y. EXEC. LAW § 995(7) (McKinney 2013).

194. *See* Kevin Lapp, *As Though They Were Not Children: DNA Collection from Juveniles*, 89 TUL. L. REV. 435, 452 (2014) (collecting citations).

195. *Id.* at 454.

196. *Id.*

197. *Id.* at 458. After *King* (upholding preconviction DNA collection), the number of states authorizing arrestee DNA collection is likely to rise. At the time *King* was decided, several states had yet to begin or fully implement their arrestee DNA law. JULIE E. SAMUELS ET AL., COLLECTING DNA AT ARREST: POLICIES, PRACTICES, AND IMPLICATIONS, URBAN INST. 24 (2013), [http://www.urban.org/research/publication/collecting-dna-arrest-policies-practices-and-implications/view/full\\_report](http://www.urban.org/research/publication/collecting-dna-arrest-policies-practices-and-implications/view/full_report).

198. Eight of the nineteen explicitly authorize collection from arrested juveniles, and another eleven implicitly authorize it by mandating collection from “persons” or “individuals” and not

Law enforcement also acquires DNA samples from juveniles based on consent. Most notable in this regard is Orange County, California's "DNA Collection and Crime Deterrence Program," known colloquially as the "spit and acquit" program.<sup>199</sup> In place since 2007, "spit and acquit" permits individuals who are arrested to have their charges dismissed or reduced if they provide law enforcement with a DNA sample.<sup>200</sup> This DNA collection initiative has reportedly generated over 90,000 DNA profiles.<sup>201</sup> The program does not restrict collection from juveniles.

Even in the absence of such organized DNA collection initiatives, law enforcement seeks DNA samples from juveniles based on consent. For example, police went to Albert Einstein Middle School in Sacramento, California, to obtain DNA cheek swabs from adolescents as part of a murder investigation.<sup>202</sup> Authorities in Brighton, Colorado, similarly acquired consent-based DNA samples from a twelve and eleven-year-old when their parents were not home as part of an investigation into car break-ins.<sup>203</sup>

All told, law enforcement has already compiled DNA profiles of hundreds of thousands of juveniles.<sup>204</sup> Going forward, as many as several hundred thousand juveniles could be required each year to provide a genetic sample for purposes of DNA profiling.<sup>205</sup>

explicitly defining juveniles out of those categories. See LAPP, *supra* note 194, at 459 (collecting citations).

199. Elizabeth N. Jones, "Spit and Acquit": *Legal and Practical Ramifications of the DA's DNA Gathering Program*, ORANGE COUNTY LAW MAG., Sept. 2009, at 18.

200. *Id.*

201. Joseph Goldstein, *Police Agencies Are Assembling Records of DNA*, N.Y. TIMES (June 12, 2013), <http://www.nytimes.com/2013/06/13/us/police-agencies-are-assembling-records-of-dna.html> (noting several cities, including New York City, Denver, Palm Bay, Florida, are building their own DNA databases).

202. *Police Collect DNA from Middle-Schoolers in Murder Investigation*, L.A. TIMES (Apr. 17, 2012, 8:39 AM), <http://latimesblogs.latimes.com/lanow/2012/04/police-collect-dna-from-8th-graders-for-murder-investigation.html>. In a news report about the DNA collection, Deputy Jason Ramos of the Sacramento County Sheriff's Department said, "We don't require the consent of a parent if we're doing it with someone of a younger age." *Id.*

203. See Brian Maass, *Brighton Police Say Taking DNA from Child Victims an 'Oversight'*, CBS DENVER (Nov. 16, 2011, 11:58 PM), <http://denver.cbslocal.com/2011/11/16/brighton-police-say-taking-dna-from-child-victims-an-oversight>.

204. According to a 2011 Urban Institute report, ten states that provided data had a total of over 121,000 DNA profiles as of the end of 2008 that came from individuals who were juveniles at the time of collection, representing 6.2% of all DNA profiles uploaded by these states. SAMUELS ET AL., *supra* note 186, at 17. Taking that ratio as a baseline, 6.2% of the current CODIS DNA profile database would be approximately 800,000 juvenile profiles. *CODIS—NDIS Statistics*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/lab/biometric-analysis/codis/ndis-statistics> (last visited Dec. 18, 2015).

205. Courts with juvenile jurisdiction handle over 1.5 million delinquency cases annually. PUZZANCHERA, *supra* note 170, at 6. Moreover, in 2012, almost one million arrests of persons under age eighteen were made in the United States. *FBI Uniform Crime Reports: Table 36*, FED. BUREAU OF INVESTIGATION (2012), <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/36tabledataoverviewpdf>.

#### E. SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION

While most criminal justice databases collect information primarily for criminal justice system use, some serve a much broader purpose. They seek to publicize criminal record information about those who have committed particularly heinous offenses. In doing so, they enable public shaming and lasting discrimination.

The leading example of these data systems are sex offender registries. Under various federal and state laws, juveniles convicted in criminal court or adjudicated delinquent in juvenile court for sex offenses can be required to register with law enforcement on sex offender registries and provide personal information that is made publicly available via community notification procedures. In some jurisdictions, these juveniles must register as sex offenders and are subject to community notification for the rest of their lives. In others, registration and community notification are time-limited.

Federal law requires juveniles convicted in adult court of sex offenses to register on par with adults.<sup>206</sup> Prior to 2006, federal law did not specify whether juveniles adjudicated delinquent were subject to sex offender registration, and the states decided themselves whether such juveniles were subject to registration.<sup>207</sup> Some states required juveniles adjudicated delinquent to register, but most protected them from it.<sup>208</sup> In 2006, Congress passed the Adam Walsh Child Protection and Safety Act, which included the Sex Offender Registration and Notification Act (“SORNA”).<sup>209</sup> SORNA requires mandatory registration for any juvenile over fourteen adjudicated delinquent for certain sex offenses.<sup>210</sup> SORNA has three tiers of offenses, and the burdens of registration and notification flow directly from one’s classification. The term of registration is twenty-five years or life.<sup>211</sup> For certain sex offenses, SORNA permits, but does not require, states to make juveniles’ personal

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206. 42 U.S.C. § 16911 (2006) (no exceptions for minors convicted in criminal court).

207. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. §§ 14071–73 (repealed 2006).

208. NICOLE I. PITTMAN & QUYEN NGUYEN, A SNAPSHOT OF JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS: A SURVEY OF THE UNITED STATES 32 (2011).

209. The statute is codified at 42 U.S.C. § 16901-62 (2009).

210. 42 U.S.C. § 16911(8) (2006) (defining the term “convicted” to include individuals “adjudicated delinquent as a juvenile . . . , but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse”). States that are not in substantial compliance with SORNA forfeit federal funds. PITTMAN & NGUYEN, *supra* note 208, at 7. (“States that fail to comply . . . in a timely manner will forfeit 10% of their Byrne Memorial Justice Assistance Grant (JAG) Omnibus Crime federal funding.”).

211. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111, 120 STAT. 588.

information publicly available on the Internet (under what are commonly called “community notification” requirements).<sup>212</sup>

Despite the distinctive concerns and goals of juvenile court, including its greater emphasis on rehabilitation and confidentiality, thirty-four states subject juveniles adjudicated delinquent of a sex offense to register as sex offenders in some manner.<sup>213</sup> In some of these states, the minimum age for registration is lower than SORNA’s age of fourteen, or there is no minimum age requirement for registration.<sup>214</sup> Twenty-five states disclose juveniles’ personal information to the public via some form of community notification.<sup>215</sup> And despite evidence that juvenile sex offenders have exceptionally low recidivism rates,<sup>216</sup> at least six states impose lifetime registration for juvenile sex offenders.<sup>217</sup>

Juveniles subject to sex offense registration must provide personal information (such as name, date of birth, current address, school, and employer) to law enforcement.<sup>218</sup> A federal database collects all sex offender registrants and is available to federal, state, and local law enforcement.<sup>219</sup> In addition, community notification statutes require law enforcement to publish a registrant’s personal identifying information to law enforcement, interested parties, and the public. Today, much of this personal information is accessible via the Internet. The Dru Sjodin National Sex Offender Public website<sup>220</sup> provides links to all public registries. Users can search particular names or access a map that indicates the residences of registered sex offenders. Residency restriction laws prohibit registered sex offenders from living within a designated distance of places where children gather, such as schools, playgrounds, parks, and even bus stops.<sup>221</sup> To top it all off, in many states those subject

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212. The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030 38,032 (July 2, 2008).

213. PITTMAN & NGUYEN, *supra* note 208, at 32.

214. See N.C. GEN. STAT. ANN. § 14-208.26(a) (West 2014) (subjecting juveniles at least eleven years of age at the time of the commission of the offense to sex offender registration); *In re Ronnie A.*, 585 S.E.2d 311 (S.C. 2003) (holding registration of eleven-year-old juvenile who was nine at time of offense did not violate due process).

215. PITTMAN & NGUYEN, *supra* note 208, at 32.

216. Michael F. Caldwell et al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 PSYCHOL. PUB. POL’Y & L. 89, 105 (2008).

217. 42 U.S.C. § 16911(5)(C) (2014); PITTMAN & NGUYEN, *supra* note 208, at 32.

218. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of chapters 18, 22, 27 and 42 of the U.S.C.) (requiring sex offenders to report their enrollment in or employment at an institution of higher learning).

219. Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, 42 U.S.C. § 14072 (1996).

220. NAT’L SEX OFFENDER PUB. WEBSITE, U.S. DEP’T OF JUST., <http://www.nsopw.gov/> (last visited Dec. 18, 2015).

221. NICOLE PITTMAN & ALISON PARKER, HUMAN RIGHTS WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE US 40 (2013).

to sex offender registration must pay registration fees. Depending on the jurisdiction and the registrant's classification level, registration fees can cost anywhere between fifty and several hundred dollars.<sup>222</sup>

While the impetus for sex offender registration stems from the heinousness of the underlying offense, the scope of behavior that can trigger registration as a sex offender for juveniles is quite broad. Sex offenses are many and varied—they range from fondling another over the clothes and grabbing classmates in a sexual way at school, to consensual sexual intercourse with other minors, to date and stranger rape.<sup>223</sup> This wide net leads to approximately 15,000 sexual offense arrests of juveniles in the United States each year.<sup>224</sup>

SORNA does not allow judges any discretion to except a juvenile who has committed a registerable offense from the registration requirements.<sup>225</sup> Federal law requires registration whether the offense is an adjudication of delinquency or a criminal conviction, whether it is the juvenile's first adjudication, whether the juvenile agrees to participate and successfully completes a counseling or rehabilitation program, and whether the juvenile poses a very low recidivism risk.

Since juveniles first became subject to sex offender registration, legislatures have consistently expanded the number of juveniles subject such registration. In the last two decades, state and federal legislatures have imposed on juvenile sex offenders longer registration terms, have required more juvenile sex offenders to disclose more information about themselves publicly, and have increasingly restricted their movements and activities, including outfitting sex offenders with electronic GPS monitoring units.<sup>226</sup> Legislation has also been amended to turn offenses that were nonregisterable at the time of conviction or adjudication into triggers of registration, and reclassified registerable offenses as more serious, increasing the registration or notification burdens and the consequent restrictions.<sup>227</sup>

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222. *Id.* at 5 (noting that failure to pay fees can lead to rearrest). Colorado imposes a registration fee of between \$150 and \$400, depending on the seriousness of the sex offense. COLO. REV. STAT. § 18-21-103 (2015). Michigan charges \$50 annually. Sex Offenders Registration Act, MICH. COMP. LAWS § 28.725a(6) (2014).

223. DAVID FINKELHOR, RICHARD ORMROD & MARK CHAFFIN, JUVENILE JUSTICE BULLETIN, U.S. DEP'T OF JUSTICE, JUVENILES WHO COMMIT SEX OFFENSES AGAINST MINORS 3 (2009), <http://www.unh.edu/ccrc/pdf/CV171.pdf>.

224. CALDWELL ET AL., *supra* note 216, at 105; CHARLES PUZZANCHERA, JUVENILE OFFENDERS & VICTIMS: NAT'L REPORT SERIES, U.S. DEP'T OF JUSTICE, JUVENILE ARRESTS 2011, at 3 (2013), <http://www.ojjdp.gov/pubs/244476.pdf> (noting that in 2011, 15,400 juveniles were arrested for sex offenses).

225. Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 22 (2013).

226. 42 U.S.C. § 16981 (2008).

227. *See, e.g., Lemmon v. Harris*, 949 N.E.2d 803, 804–05 (Ind. 2011) (involving defendant who was originally required to register for ten years was reclassified to require lifetime registration).

Sex offender registration profoundly impacts a person's life. It frustrates access to education, housing, and employment;<sup>228</sup> disrupts families;<sup>229</sup> and causes social isolation and shame,<sup>230</sup> all of which increase the risk of delinquency.<sup>231</sup> Some of these disabilities are mandated by law while others flow from the publicity of the offense. As one juvenile sex offender put it, "[O]ur mistake is forever available to the world to see. There is no redemption, no forgiveness. You are never done serving your time. There is never a chance for a fresh start. You are finished."<sup>232</sup>

Courts predominantly uphold juvenile sex offender registration, juvenile participation in community notification schemes, and restrictions on juvenile sex offenders. Many courts have found that such requirements are collateral consequences of a conviction or adjudication, and not punishment, and therefore do not run afoul of the Eighth Amendment.<sup>233</sup> Concerns about the propriety and impact of imposing registration and community notification on juveniles has recently led to some movement away from juvenile sex offender registry.<sup>234</sup>

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228. Elizabeth E. Mustaine et al., *Residential Location and Mobility of Registered Sex Offenders*, 30 AM. J. CRIM. JUST. 177, 190 (2006).

229. Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 68 (2005); Richard Tewksbury & Matthew Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 SOC. SPECTRUM 309, 331–32 (2006).

230. *Smith v. Doe*, 538 U.S. 84, 99 (2003) ("It must be acknowledged that notice of criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything that could have been designed in colonial times."); Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CALIF. L. REV. 163 (2003).

231. Indeed, one study suggested that including juveniles in SORNA Tier 3 could actually create a greater risk to community safety. CALDWELL ET AL., *supra* note 216, at 106.

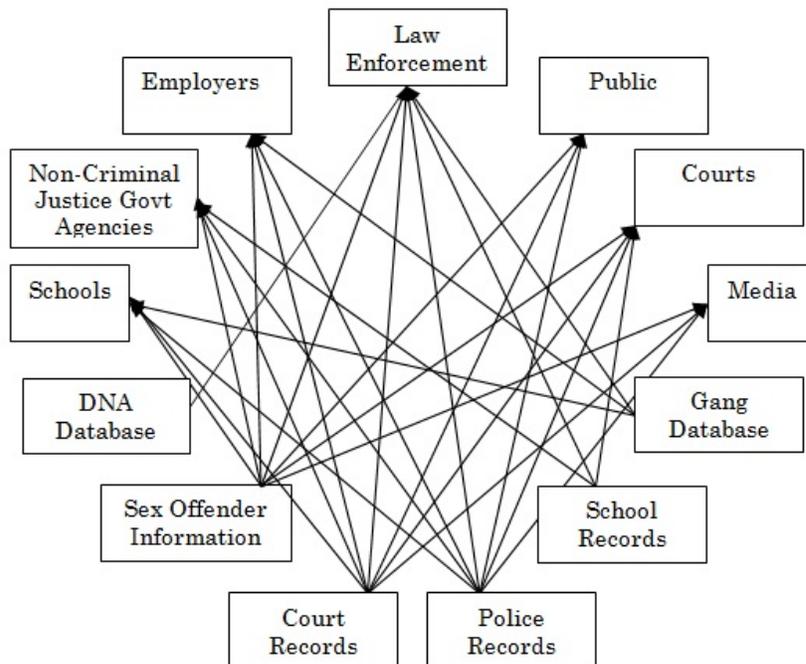
232. PITTMAN & PARKER, *supra* note 221, at 52.

233. *United States v. Juvenile Male*, 670 F.3d 999, 1010 (9th Cir. 2012) (holding that requiring juvenile sex offenders to register in a database is not cruel and unusual punishment); *In re J.W.*, 787 N.E.2d 747, 760 (Ill. 2003) (holding that lifetime juvenile sex offender registration did not constitute cruel and unusual punishment post-*Roper*, partially because juveniles' registration information is not publicly disseminated).

234. *See infra* Part IV.

The following graphic, Figure 1, illustrates the web of access to the information collected by law enforcement.

FIGURE 1



Databasing delinquency is a massive commitment to data collection by the criminal justice system about youth. Collectively, the data collection, retention, and distribution practices described above produce criminal justice biographies of the lives of youth.<sup>235</sup> The breadth of these biographies, including not only formal convictions or adjudications but also arrests and suspicions, and family, friends and associations, make them a damning record of a particular individual's life.<sup>236</sup> That they are compiled and distributed by such a powerful and coercive institution, upon which so many public agencies and private employers rely for background information, make these criminal justice biographies profoundly important. They unavoidably reflect the race and class

235. See McDermott & Duque Raley, *supra* note 7, at 438 (describing school records of misbehavior and missing behavior as “the institutional biographies that record a child’s problems in school files forever”).

236. NIGEL HAMILTON, *BIOGRAPHY: A BRIEF HISTORY* (2010).

enforcement skews in the criminal justice system, making them particularly troubling. As juvenile justice scholar Barry Feld observed, “[a]t every stage—arrest, intake, referral, petition, detention, trial, and disposition—youth of color fare less well than do their White counterparts.”<sup>237</sup> This results in racial skews in data collection, as law enforcement is more likely to collect and retain information on minorities because it disproportionately makes contact with people of color.<sup>238</sup> The criminal justice system also skews against the poor: approximately eighty percent of people charged with crime are poor, and poor defendants are more likely to be convicted and incarcerated.<sup>239</sup> As a result, the great bulk of criminal justice biographies of youth are written about the poor, and people of color (and especially poor people of color).

Rational reasons can explain why the criminal justice system in the United States has come to write biographies of poor, minority youth. Broad data collection and sharing helps law enforcement manage and solve crime, and has some role in promoting offender rehabilitation via deterrence and shaming.<sup>240</sup> Accurate and complete police records, including precise physical descriptions and biometric data, enable law enforcement to correctly and speedily identify apprehended individuals.<sup>241</sup> Records also provide officers with valuable information about the people they encounter.<sup>242</sup> The increasing ties between law enforcement and schools allow schools to address the sometimes significant crime problems inside and around campus, and remove those who distract from the learning environment.<sup>243</sup> It also provides law enforcement with more information about the behavior and associations of young people who spend a great part of their lives at school. And there are dozens of stories of how DNA databasing restarted a stalled investigation and helped solve an old

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237. See Donna M. Bishop & Michael J. Leiber, *Racial and Ethnic Differences in Delinquency and Justice System Responses*, in THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 445 (Barry C. Feld and Donna M. Bishop eds., 2012); BARRY C. FELT, COPS, KIDS, AND CONFESSIONS: INSIDE THE INTERROGATION ROOM 10 (2013); NAT’L COUNCIL ON CRIME & DELINQ., AND JUSTICE FOR SOME: DIFFERENTIAL TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM (2007).

238. See FELT, *supra* note 237, at 10.

239. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2181 (2013); see also DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999).

240. The deterrent value of databasing is contested. See, e.g., SHELDON KRIMSKY & TANIA SIMONCELLI, GENETIC JUSTICE: DNA DATA BANKS, CRIMINAL INVESTIGATIONS, AND CIVIL LIBERTIES 148 (2011) (“Currently there is no empirical evidence to support the often-stated claim that DNA databases deter crime.”).

241. See *Maryland v. King*, 133 S. Ct. 1958, 1971 (2013).

242. For example, when an officer pulls over a driver and runs the license plate, and learns that the owner of the vehicle has prior arrests or convictions for weapons or violent offenses, the officer can more prudently approach the individual.

243. Nance, *supra* note 112, at 96–97.

crime, bringing a perpetrator to justice or freeing an innocent inmate.<sup>244</sup> Simply put, robust, accessible databases prevent some criminals from avoiding detection and continuing to terrorize communities.

The information in these records can also improve the efficiency and effectiveness of policing and sentencing. Police access to the historical information in these databases makes it easier for law enforcement to form probable cause to arrest an individual.<sup>245</sup> It also allows law enforcement to identify and target high-crime areas, and may enable them to identify individuals who are more likely to offend.<sup>246</sup> Since peak offending rates occur during late adolescence,<sup>247</sup> there is arguably no more critical time for law enforcement to know so much about these individuals. Complete, accessible records also increase the ability of judges to impose appropriate sentences, taking full account of an individual's past acts and likelihood of reoffending.

Mindful of the potential benefits of data collection, the next Part shows how databasing delinquency harms youth and undermines childhood.

### III. DATABASING HARMS YOUTH AND UNDERMINES CHILDHOOD

Databasing delinquency inflicts a cascade of harms on juveniles. It leads to extra policing of their lives and communities, and triggers enhanced punishments and lasting, destructive stigma. It restricts job, housing, and educational opportunities. Databasing delinquency also distorts our view of the young people subject to data collection. By creating one-sided, negative accounts of their lives, it reinforces fears and stereotypes about juvenile offenders, promoting more adult-like punitive juvenile justice policies. Not insignificantly, this distortion is visited

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244. *CODIS—NDIS Statistics*, *supra* note 204 (“As of August 2015, CODIS has produced over 293,808 hits assisting in more than 279,741 investigations.”); see *DNA Exonerations Nationwide*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/DNA\\_Exonerations\\_Nationwide.php](http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php) (last visited Dec. 18, 2015) (providing an account of the 330 post-conviction DNA exonerations to date).

245. Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 330 (2015) (imagining a situation where police investigating a series of robberies use facial recognition software that matches a person walking down the street in the vicinity of the robberies to an arrest photo from a computerized database, and that person's criminal history [instantly displayed in the patrol car] shows prior robbery arrests and convictions).

246. *Id.* at 370–71 (noting that predictive policing technologies are already in use, and that several jurisdictions maintain lists of individuals they predict will commit crimes in the future); Robert L. Mitchell, *Predictive Policing Gets Personal*, *COMPUTERWORLD* (Oct. 24, 2013, 7:00 AM), <http://www.computerworld.com/article/2486424/government-it/predictivepolicing-gets-personal.html> (quoting the Charlotte, N.C. Chief of Police as saying “We could name our top 300 offenders. . . . So we will focus on those individuals . . .”).

247. Piquero, Farrington & Blumstein, *supra* note 35, at 424; see also Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 555 (1983) (The age-crime curve “has remained virtually unchanged in 150 years . . .”).

especially heavily on minority youth and constitutes an engine of racial bias in its own right.

Databasing delinquency also threatens childhood itself. It reflects a narrow conception of the protective sphere of childhood at odds with longstanding legal principles, undisputed scientific knowledge, and recent Supreme Court jurisprudence. By treating young people like adults, it denies certain juveniles the protections of childhood despite their remaining legally and developmentally children. This reshapes the very meaning of childhood, breaching its protected space and contradicting the special understandings that dominate the regulation of youth.

#### A. DATABASING HARMS YOUTH

This Subpart identifies the many ways that gathering information, storing information, and sharing information about the wrongs and mistakes of youth harms juveniles. Some of these harms, such as enhanced punishments and restricted opportunities, are the very point of databasing delinquency. Others, like self-stigma, are less apparent, or perhaps even unintended, but are nevertheless significant. The heightened vulnerability that marks adolescence amplifies the harms caused by these dataveillance practices. That these harms appear at a critical point in young people's lives, as they transition into independent adulthood, further increases the short and long-term damage.

##### 1. *Gathering Information Invades Privacy and Stigmatizes Youth*

The criminal justice biographies compiled by delinquency databases include far more than just convictions or adjudications. They include records of arrests and incidents at school, many of which are not followed by criminal charges. They document the youth's friends, families, and associations. They can publicize a young person's home address, school, and employer.<sup>248</sup> And they include biological samples containing a person's entire genetic code.<sup>249</sup>

However lawful under the Fourth Amendment,<sup>250</sup> or rationalized by claims of public safety, the profound amount of information found in delinquency databases nevertheless constitutes a significant invasion of a young person's privacy.<sup>251</sup> This invasion of privacy constitutes a harm even if it is considered a lawful one.

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248. See PITTMAN & PARKER, *supra* note 221, at 40.

249. Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1329 (2008) (noting that most states allow indefinite retention of the DNA sample containing the individual's entire genetic code).

250. Murphy, *supra* note 1, at 805–10.

251. Courts have, for example, acknowledged the "vast amount of sensitive information that can be mined from a person's DNA and the very strong privacy interests that all individuals have in this information." *United States v. Amerson*, 483 F.3d 73, 86 (2d Cir. 2007); see also GARFINKEL, *supra* note 1.

As with adults, invasions of privacy can also lead to psychological harm in adolescents.<sup>252</sup> This is what privacy scholar M. Ryan Calo characterizes as the subjective harm of data collection.<sup>253</sup> It includes the anxiety, embarrassment, or discomfort that accompany the belief that you have lost control over information about yourself and are being, will be, or have been watched or monitored.<sup>254</sup> Registered juvenile sex offenders and young people who live in gang-riddled communities illustrate this kind of subjective harm. Registered sex offenders cannot know who in the community knows of their criminal history, but certainly feel anxiety, embarrassment, and discomfort because their information has been gathered.<sup>255</sup> Likewise, urban youth feel the “perception of unwanted observation,” especially those who get extra attention from law enforcement because they have been tagged as gang members.<sup>256</sup>

Databasing delinquency causes more than just privacy harm. Gathering the kind of information included in the delinquency databases has profoundly stigmatizing effects. Stigma refers to a mark or label of disgrace, shame, or discredit that isolates certain individuals or groups.<sup>257</sup> Convictions, delinquency adjudications, and other criminal justice contacts negatively label young people. “Juvenile delinquent” is, itself, a stigmatic label.<sup>258</sup> The Supreme Court has long recognized this. *In re Winship* identified the stigma that results from being adjudged a delinquent as a liberty interest of “immense importance.”<sup>259</sup> *In re Gault* found the amount of stigma associated with the delinquent label “disconcerting.”<sup>260</sup>

Researchers Bruce Link and Jo Phelan have shown how stigmatic labels impact those upon whom they are placed. The process involves five components: labeling, stereotyping, separation, status loss, and discrimination.<sup>261</sup> Labeling is the way differences are marked. Delinquency

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252. Gary B. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 NEB. L. REV. 455, 475, 477 (1983).

253. M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1133 (2011).

254. *Id.* at 1145 (“Many subjective privacy harms . . . will be backward looking insofar as the offending observation has already ended at the time of discovery (or because of it).”).

255. PITTMAN & PARKER, *supra* note 221, at 51–52.

256. Calo, *supra* note 253, at 1133; *see also* RIOS, *supra* note 93, at 78 (“When the police classified Spider as a gang member, school staff, community workers, and other adults in the community also adopted this categorization.”).

257. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 3 (2d ed. 1963); *Stigma*, OXFORD ENGLISH DICTIONARY 689 (2d ed. 1989) (denoting that in Greek, the mark or brand known as stigma was used to identify those who were not full members of ancient Greek society); W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 146 (2011).

258. Ball, *supra* note 257, at 148.

259. *In re Winship*, 397 U.S. 358, 363 (1970); Ball, *supra* note 257, at 139.

260. *In re Gault*, 387 U.S. 1, 23 (1967).

261. Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 380 (2001).

databases mark young people as delinquents, sex offenders as perverts,<sup>262</sup> school kids as “thugs” and future criminals,<sup>263</sup> and inner-city youth as gang-bangers.<sup>264</sup> Stereotypes are the negative attributes linked (however rationally or persuasively) to the labels. The negative label often serves to separate “them” from “us.” Research has shown how delinquent or criminal labels “embed juveniles into deviant social groups through association and exclusion.”<sup>265</sup> In some cases, “the stigmatized person is thought to be so different from ‘us’ as to be not really human.”<sup>266</sup> This has certainly happened with juvenile offenders, most infamously in the mid-1990s when John DiIulio described teenaged offenders as “severely morally impoverished juvenile super-predators.”<sup>267</sup>

These attitudes have internal and external effects. Having your youthful mistakes and wrongs cataloged leads to an internal stigma that impacts life chances and choices. According to labeling theory, stigmatic labels are self-fulfilling prophecies: when juveniles are identified as deviants or criminals, they are more likely to act like criminals.<sup>268</sup> Delinquency databasing communicates to the juveniles subject to it that the state believes they already committed crimes that data collection will help solve, and that they will commit crimes in the future.<sup>269</sup> Juveniles then internalize this label, which leads to marginalization and additional offending.

More recent research has suggested a slightly different mechanism for how stigmatic criminal labels impact individuals and lead to deviance. “Modified labeling theory” posits that “the individual’s desire to manage shame leads him to follow strategies such as withdrawal and secrecy,” which generate “secondary deviance.”<sup>270</sup> Sex offender registration and

262. PITTMAN & PARKER, *supra* note 221, at 50; CHRYSANTHI S. LEON, *SEX FIENDS, PERVERTS, AND PEDOPHILES: UNDERSTANDING SEX CRIME POLICY IN AMERICA* (2011).

263. ANN ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* 2–3 (2000); Nance, *supra* note 112, at 97 (Schools have “recast disruptive students as criminals who must be reformed through punitive measures.”).

264. RIOS, *supra* note 93; Barrows & Huff, *supra* note 86, at 678 (“[P]olice often target the wrong individuals, thereby potentially driving them into gang membership because they are treated as, and known as, gang members.”).

265. Ball, *supra* note 257; Jon Gunnar Bernburg, Marvin D. Krohn & Craig J. Rivera, *Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory*, 43 J. RES. CRIME & DELINQ. 67, 69 (2006).

266. Link & Phelan, *supra* note 261, at 370.

267. John J. DiIulio Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, NOV. 27, 1995, at 23.

268. EDWIN LEMERT, *SOCIAL PATHOLOGY* (1951); GOFFMAN, *supra* note 257; Bernburg, Krohn & Rivera, *supra* note 265.

269. William D. Payne, *Negative Labels: Passageways and Prisons*, 19 CRIME & DELINQ. 33, 35 (1973) (Negative social labels stimulate antisocial behavior; they create the expectation that an individual will conform to the label and “play an important part in an individual’s passage from merely having committed a questionable act to possessing a ‘deviant character.’”).

270. Ball, *supra* note 257, at 146; Bruce G. Link et al., *A Modified Labeling Theory Approach to Mental Disorders: An Empirical Assessment*, 54 AM. SOC. REV. 400, 402–03 (1989); Terri A. Winnick &

community notification requirements, for example, cause sex offenders to isolate themselves in the community, away from support systems that help prevent recidivism.<sup>271</sup> The harm is magnified for juveniles. The label of “sex offender,” “child molester,” or “sexual predator” can cause profound damage to a child’s development and self-esteem.<sup>272</sup> The stigma continues even when a juvenile is no longer subject to registration, and law enforcement no longer publishes her information on a website.<sup>273</sup> Perhaps it is no surprise then that evidence indicates that sex offender registration actually raises the risk of recidivism amongst juveniles.<sup>274</sup>

Likewise, including marginal youth in gang databases (so-called “wannabes”)<sup>275</sup> “potentially driv[es] them into gang membership because they are being treated as, and known as, gang members.”<sup>276</sup> Rather than reducing the crime problem linked to gangs, it exacerbates it. The same effect appears when schools, “the first social institution outside of the family in which most youth have an opportunity to be marked as failures, criminals, or deviants,”<sup>277</sup> serve as informants and share information with law enforcement about misbehavior at school. And at least one international court has recognized the risk of stigmatization brought by collecting DNA from juveniles.<sup>278</sup>

Stigmatic labels lead criminal justice actors and others to stop seeing young people as children and to instead see and treat them as criminals.<sup>279</sup> This is the external stigma of databasing delinquency. Status

Mark Bodkin, *Anticipated Stigma and Stigma Management Among Those to be Labeled “Ex-Con”*, 29 *DEVIANT BEHAV.* 295, 301 (2008) (“[S]econdary deviance is not a direct result of labeling, but rather an indirect result of coping, or stigma management, which has the ironic effect of shaping the conditions under which secondary deviance is more likely.”).

271. *Smith v. Doe*, 538 U.S. 84, 115 (2003) (Ginsburg, J., dissenting) (identifying the “profound humiliation and community-wide ostracism” that attends sex offender community notification); Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 *HARV. L. REV.* 2187 (2003); Tewksbury, *supra* note 229, at 68 (identifying lost friends and harassment and rude treatment among the many stigmatizing effects of sex offender registration).

272. PITTMAN & PARKER, *supra* note 221, at 50.

273. Once information gets on the Internet, it stays there, even after a person has been removed from the sex offender registry. *Id.* at 44.

274. Caldwell et al., *supra* note 216, at 106 (including juveniles in SORNA Tier 3 could actually create a greater risk to community safety).

275. K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 *ST. THOMAS L. REV.* 620, 647 (2011) (“While Wannabes may commit crimes or delinquent acts either on their own, as members of wannabe delinquent groups, or to obtain reputation and membership, the acts are not done for the gang so much as to enhance the individuals’ reputation.”).

276. Barrows & Huff, *supra* note 86, at 678; Howell, *supra* note 87, at 30–31.

277. Kupchik, *supra* note 112, at 94.

278. *S. & Marper v. United Kingdom*, 2008-V Eur. Ct. H.R. 167 (noting the risk of stigmatization in treating persons who have not been convicted in the same way as convicted persons by retaining their DNA); compare FELD, *supra* note 139, at 373 (“[P]hotographing and fingerprinting connote a criminal process that may stigmatize or self-label a youth . . .”).

279. See *infra* Part III.A.2.

loss follows, which is then accompanied by formal and informal discrimination.<sup>280</sup> It should not be forgotten that juveniles have less mobility than adults, making it “more difficult for them to escape from a community in which harmful information has cast them in an unfavorable light.”<sup>281</sup>

In short, collecting information harms youth by invading their privacy and imposing stigma. As David Ball has succinctly put it, “[s]tigma is a sentence of its own, with real impacts on juveniles’ lives.”<sup>282</sup> Juveniles’ heightened vulnerability to psychological harm exacerbates the stigmatizing impact of delinquency databasing.

## 2. *Storing Information Distorts Perceptions of Developing Youth*

The length of time that the criminal justice system keeps the information it collects in the delinquency databases imposes additional harms on youth. As shown above, the duration of storage can be indefinite. Sex offender registration can last a lifetime, DNA samples and profiles are maintained indefinitely, and gang databases are rarely purged.<sup>283</sup> Law enforcement undoubtedly retains the information because it believes that the information remains valuable long after the events recorded took place, both for its crime-solving and crime-detering purposes.

Adolescence, however, is a time of change. Because “the signature qualities of youth are transient,”<sup>284</sup> youthful behavior does not reflect an individual’s true character. Delinquency is developmentally normal. Offending peaks at seventeen to eighteen, and quickly and steadily falls thereafter.<sup>285</sup> As a result, youthful offending is unlikely to be evidence of “irretrievably depraved character.”<sup>286</sup> Indeed, experts agree that it is nearly impossible to predict which juvenile offenders will persist into adulthood.<sup>287</sup> Therefore, because the vast majority of juveniles desist, stored criminal history information has much less value than it does for adults.

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280. See *infra* Part III.A.3.

281. INST. OF JUDICIAL ADMIN., AM. BAR ASS’N, STANDARDS RELATING TO JUVENILE RECORDS AND INFORMATION SYSTEMS 2 (1979).

282. Ball, *supra* note 257, at 148.

283. *Id.*

284. Johnson v. Texas, 509 U.S. 350, 368 (1993); Scott, *supra* note 48, at 86 n.80 (“Much adolescent criminal activity is the product of developmental influences and not of bad character.”).

285. See Moffitt, *supra* note 36, at 675 (“[T]he rates for both prevalence and incidence of offending appear highest during adolescence; they peak sharply at about age 17 and drop precipitously in young adulthood . . . by the early 20s, the number of active offenders decreases by over 50%, and by age 28, almost 85% of former delinquents desist from offending.”).

286. Graham v. Florida, 560 U.S. 1, 68 (2009).

287. See Roper v. Simmons, 543 U.S. 551, 573 (2004) (“It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.”).

In addition, juveniles are less deterrable, meaning that the ostensible crime-preventing value of databasing delinquency is minimal. Often sold as tools of deterrence,<sup>288</sup> little empirical data supports a deterrence justification for aggregate data collection.<sup>289</sup> Whatever deterrence it may provide is diminished, if not entirely lost, with regard to juveniles. As a group, juveniles assess risk differently, are more subject to peer influence, and discount the future more than adults. Each reduces any deterrent effect derived from the increased likelihood of getting caught in the future or suffering punishment created by delinquency databases.<sup>290</sup> As juvenile law experts Christopher Slobogin and Mark Fondacaro put it, the traits that mark adolescence tend to produce offenders “for whom the deterrent force of the criminal law is likely to be, literally, an afterthought.”<sup>291</sup>

Databasing delinquency ignores these truths about juveniles. Much more than solving and deterring crime, it marks youth subjected to it as trouble. As a result, storing data risks producing a community-wide feedback loop. It is well established that minorities, and minority communities, are policed more heavily than Whites.<sup>292</sup> DNA databases, primarily populated by arrests and convictions, are racially skewed.<sup>293</sup> Gang databases are similarly filled with a disproportionate share of minorities.<sup>294</sup> Sex offender registries also exhibit racial disparities.<sup>295</sup> The

288. The enacting legislation in several states, for example, includes a finding that DNA databasing is an important tool in deterring recidivist acts. *See, e.g.*, NEB. REV. STAT. § 29-4102 (2010) (“The Legislature finds that DNA data banks are an important tool . . . in deterring and detecting recidivist acts”).

289. *See, e.g.*, KRIMSKY & SIMONCELLI, *supra* note 240, at 148 (“Currently there is no empirical evidence to support the often-stated claim that DNA databases deter crime.”). *But see* AVINASH BHATI, JUSTICE POLICY CTR., URBAN INST., QUANTIFYING THE SPECIFIC DETERRENT EFFECTS OF DNA DATABASES 56 (2010), [http://www.urban.org/uploadedpdf/412058\\_dna\\_databases.pdf](http://www.urban.org/uploadedpdf/412058_dna_databases.pdf) (finding two to three percent reductions in recidivism risk attributable to specific deterrence for robbery and burglary resulting from DNA databasing).

290. SCOTT & STEINBERG, *supra* note 29, at 56 (“[T]he research on the general deterrent effect of legal regulation on juvenile crime is sparse and gives no clear answer to the question of whether . . . punitive measures reduce juvenile crime.”).

291. Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 44 (2009).

292. FELD, *supra* note 237, at 10 (“At every stage—arrest, intake, referral, petition, detention, trial, and disposition—youths of color fare less well than do their white counterparts . . .”); Bishop & Leiber, *supra* note 237.

293. KRIMSKY & SIMONCELLI, *supra* note 240, at 252 (describing racial disparity in DNA databanks). DNA databases have been referred to as a “Jim Crow database.” HARRY G. LEVINE ET AL., DRUG ARRESTS AND DNA: BUILDING JIM CROW’S DATABASE 4 (2008), <http://www.councilforresponsiblegenetics.org/pagedocuments/orrxbggaei.pdf>.

294. Of the 201,094 in the CalGang database (as of December 2012), for example, nearly 20% are African American (6.6% of California population); 66% Latino (38% of California population). YOUTH JUSTICE COAL., *supra* note 85, at 8–9.

data on school discipline and referrals to law enforcement are no different. Minority students are punished disproportionately relative to their violations of school rules, and schools serving higher percentages of Black students are more likely to suspend, expel, or refer students to law enforcement officials for violating school rules.<sup>296</sup> As a result, the negative labeling that results from delinquency databasing falls disproportionately on youth of color. Extensive recordkeeping then becomes evidence that minorities are more likely to offend, and their communities more likely to be places of crime, thus generating continued heavy policing and a greater likelihood of formal intervention.<sup>297</sup>

This feedback loop can produce disturbing results. Designed to prevent reoffending, storing information may *increase* recidivism or delay desistance. By placing juveniles in the pool of usual suspects, databasing increases the likelihood of their suspicion, detection, and punishment.<sup>298</sup> Evidence suggests that contact with the criminal justice system is criminogenic, particularly for juveniles.<sup>299</sup> As such, databasing delinquency may cause perverse effects, “produc[ing] a cohort of more hardened criminals.”<sup>300</sup>

Storing prior criminal history can also lead people to wrongly interpret lawful behavior as suspicious or criminal. Andrew Guthrie Ferguson has shown how police access to the kind of data gathered in these databases makes it easier for law enforcement to believe that probable cause exists to arrest an individual.<sup>301</sup> According to Guthrie Ferguson, “[i]f officers view those individualized and particularized identifying characteristics—such as prior convictions, gang associations, and GPS coordinates near the scene of the crime—as suspicious, then

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295. Daniel M. Filler, *Silence and the Racial Dimension of Megan's Law*, 89 IOWA L. REV. 1535, 1538 (2004) (noting that community notification provisions have a significantly disparate racial impact; African Americans are overrepresented on public registries of criminals).

296. Nance, *supra* note 117, at 48.

297. Coffee, *supra* note 62, at 591 (“[T]he 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.”).

298. Indeed, that is the point of law enforcement intelligence gathering.

299. ANTHONY PETROSINO ET AL., CAMPBELL SYSTEMATIC REVIEWS, FORMAL SYSTEM PROCESSING OF JUVENILES: EFFECTS ON DELINQUENCY (2010), <http://www.campbellcollaboration.org/lib/download/761/> (finding in a comprehensive meta-analysis that juvenile system processing appears not to have a crime control effect but instead appears to increase delinquency across all measures); Tamar R. Birkhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 97 (2012) (discussing studies finding criminogenic effect of juvenile court processing).

300. Jennifer L. Doleac, *The Effects of DNA Databases on Crime* 26 (Dec. 2, 2012) (working paper) (noting that when young offenders “have little (non-criminal) human capital in the form of education, employment experience, or ties to friends and family to rely on when they are released”).

301. Ferguson, *supra* note 245, at 327 (imagining a situation where police investigating a series of robberies use facial recognition software that matches a person walking down the street in the vicinity of the robberies to an arrest photo from a computerized database, and that person's criminal history [instantly displayed in the patrol car] shows prior robbery arrests and convictions).

otherwise innocent actions might create a predictive composite that satisfies the reasonable suspicion standard.<sup>302</sup> Examples abound of young people who experienced a number of police stops after they were erroneously entered into a gang database,<sup>303</sup> and registered sex offenders suffering repeated police contact and suspicions as a result of complaints from residents or false accusations and arrests.<sup>304</sup>

Finally, the challenges of maintaining accurate databases cannot be ignored.<sup>305</sup> Law enforcement databases suffer from significant accuracy problems. A National Employment Law Project study recently found that half of FBI records are flawed.<sup>306</sup> Rap sheets frequently include erroneous information and do not record arrest dispositions, misleading many to conflate an arrest with a conviction.<sup>307</sup> Often times, records that were ordered sealed or expunged are not (despite easy and available technological solutions).<sup>308</sup> In two recent Supreme Court cases, erroneous information in law enforcement and court databases led to unlawful arrests of individuals.<sup>309</sup> Ramsey County, Minnesota stopped using a gang database in 2011 because of concerns about the accuracy of the information it contained.<sup>310</sup>

This proclivity to inaccuracy heightens the harmful impact of delinquency databases. As discussed in the next section, that the mistaken or misleading information is widely distributed (by law enforcement, courts, and private information vendors) compounds the problem. Even if it does get corrected, the false or outdated information likely remains available on the Internet.<sup>311</sup>

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302. *Id.* at 335.

303. Will Hobson, *Overhaul Coming to Pinellas Gang Intelligence Database*, TAMPA BAY TIMES (June 9, 2013, 4:30 AM), <http://www.tampabay.com/news/courts/criminal/overhaul-coming-to-pinellas-gang-intelligence-database/2125725> (describing story of person who was erroneously placed in database and got pulled over/stopped a bunch of times as a result); Howell, *supra* note 87, at 30–31.

304. PITTMAN & PARKER, *supra* note 221, at 3.

305. *Herring v. United States*, 555 U.S. 135, 155 (2009) (Ginsburg, J., dissenting) (“The risk of error stemming from these databases is not slim. . . . Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty.”).

306. NEIGHLY & EMSELLEM, *supra* note 154, at 1.

307. JACOBS, *supra* note 2, at 134–35; LEGAL ACTION CTR., *THE PROBLEM OF RAP SHEET ERRORS: AN ANALYSIS BY THE LEGAL ACTION CENTER* 5 (2013).

308. LEGAL ACTION CTR., *supra* note 307, at 5 (noting that between five percent and fifteen percent of New York rap sheets contained information about dismissed cases or violations that should have been sealed); Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 750 (2012). Allocating resources to auditing databases, especially with regard to old information, is unlikely to ever be a high law enforcement priority.

309. In both *Arizona v. Evans*, 514 U.S. 1 (1995) and *Herring v. United States*, 555 U.S. 135 (2009), errors in a law enforcement database indicating an outstanding arrest warrant led to an unlawful arrest and subsequent search by police that produced contraband.

310. Brady Gervais, *Ramsey County Pulling Plug on Controversial Gang Database*, PIONEER PRESS (Aug. 3, 2011, 12:01 AM), [http://www.twincities.com/ci\\_18604634](http://www.twincities.com/ci_18604634).

311. JACOBS, *supra* note 2, at 307.

The inaccuracy problem could be minimized if law enforcement offered a procedure for youth to seek or confirm the purging of their information from a database. But it rarely does. As described above, those required to register as sex offenders cannot exit the registry until their term of registration expires, no matter how much evidence of rehabilitation they can provide. While purging is available in certain circumstances for DNA and gang databases, it is difficult, and the burden to initiate and substantiate is almost always placed on the youth.<sup>312</sup> Where purging procedures are in place, they are rarely carried out.<sup>313</sup>

By storing negative information and including inaccurate or outdated information, databasing delinquency ignores the foundational principle that youth change, and instead fixes a criminal label to young people that may increase offending.

### 3. *Sharing Information Frustrates the Transition to Adulthood*

The information in delinquency databases is valued by more than just law enforcement. Employers want access to it.<sup>314</sup> Colleges want access to it.<sup>315</sup> Landlords want to know about it.<sup>316</sup> Journalists want to publish it.<sup>317</sup> Curious neighbors want access to it.<sup>318</sup>

Law enforcement has traditionally restricted access to information it has about juveniles. Today, through a combination of legislation, information vendors, and the World Wide Web, all of those people and more can often learn what contacts people had with the criminal justice

<sup>312</sup>. *See id.*

<sup>313</sup>. SAMUELS ET AL., *supra* note 186, at 7 (finding few DNA profiles are ever expunged from databases); Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. CIV. RTS. & CIV. LIBERTIES 115, 115 (2005) (“responsible agencies systematically fail to adhere to policies requiring names to be purged after specified amounts of time without criminal or gang activity.”).

<sup>314</sup>. Ninety percent of employers conduct background checks on prospective employees. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT I (2011).

<sup>315</sup>. The Common Application, used by over 500 colleges, asks about criminal conviction and school disciplinary records. *See* THE COMMON APPLICATION, <https://www.commonapp.org/Login> (last visited Dec. 18, 2015); CTR. FOR CMTY. ALTS., THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS RECONSIDERED I (2011), <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf> (finding that sixty-six percent of colleges surveyed collect criminal history information from applicants).

<sup>316</sup>. David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5 (2008).

<sup>317</sup>. In the wake of the Ferguson, Missouri death of Michael Brown, the St. Louis Post-Dispatch filed a petition seeking Michael Brown’s juvenile records. Jeremy Kohler, *Judge Denies Request for Michael Brown’s Juvenile Records*, ST. LOUIS POST-DISPATCH (Sept. 9, 2014, 4:45 PM), [http://www.stltoday.com/news/local/crime-and-courts/judge-denies-request-for-michael-brown-s-juvenile-records/article\\_43dfd98b-32ec-550d-b399-750133f69203.html](http://www.stltoday.com/news/local/crime-and-courts/judge-denies-request-for-michael-brown-s-juvenile-records/article_43dfd98b-32ec-550d-b399-750133f69203.html).

<sup>318</sup>. Nico Savidge, *Cottage Grove Man Arrested on Suspicion of Burning House Intended for Sex Offender*, WIS. ST. J. (Feb. 26, 2015), [http://host.madison.com/news/local/crime\\_and\\_courts/cottage-grove-man-arrested-on-suspicion-of-burning-house-intended/article\\_083d6199-5d56-5147-8a5e-db19123cbcec.html](http://host.madison.com/news/local/crime_and_courts/cottage-grove-man-arrested-on-suspicion-of-burning-house-intended/article_083d6199-5d56-5147-8a5e-db19123cbcec.html).

system when they were young.<sup>319</sup> As depicted in Figure 1 in Part II.E, law enforcement, noncriminal justice government agencies, courts, schools, employers, the media, and the general public all have some form of access to court records, police records, and sex offender information. Law enforcement, noncriminal justice government agencies, and courts each have access to behavior information about youth at school. Schools and employers are privy to information stored in gang databases.

This liberal sharing produces many harms. Foremost among them are the innumerable formal and informal collateral consequences of contact with the criminal justice system. As Devah Pager put it, “the ‘credential’ of a criminal record, like educational or professional credentials, constitutes a formal and enduring classification of social status, which can be used to regulate access and opportunity across numerous social, economic, and political domains.”<sup>320</sup>

A vast literature recounts the devastating collateral consequences of criminal justice contact on individual lives.<sup>321</sup> Juveniles no less than adults suffer these consequences.<sup>322</sup> Accessible arrest and court records restrict their ability to attend school and secure housing and employment.<sup>323</sup> According to studies, ninety percent of employers check criminal histories.<sup>324</sup> The negative impacts arise even when an arrest did not lead to a conviction or adjudication.<sup>325</sup> Sex offender registration frustrates access

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319. *See supra* Part I.

320. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 4 (2007).

321. *See, e.g.*, Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 16 (Marc Mauer & Meda Chesney-Lind eds., 2002) (explaining that collateral consequence laws constitute “invisible punishment,” because they “operate largely beyond public view, yet have very serious, adverse consequences for the individuals affected”); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 *STAN. L. & POL’Y REV.* 153, 155 (1999).

322. Christopher Gowen, Lisa Thureau & Meghan Wood, *The ABA’s Approach to Juvenile Justice Reform: Education, Eviction, and Employment: The Collateral Consequences of Juvenile Adjudication*, 3 *DUKE F.L. & SOC. CHANGE* 187 (2011); Eisha Jain, *Arrests as Regulation*, 67 *STAN. L. REV.* 809 (2015).

323. Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 *CRIME & DELINQ.* 471, 472 (2014) (“There is substantial research showing that arrested youth are not only more likely to experience immediate negative consequences such as contact with the justice system, school failure and dropout, and family difficulties, but these problems are likely to reverberate long down the life course in terms of additional arrests, job instability, lower wages, longer bouts with unemployment, more relationship troubles, and long-term health problems including premature death.”).

324. NAT’L EMP’T LAW PROJECT, *supra* note 314, at 1.

325. While some states prohibit employers from asking job applicants to disclose arrests, many do not. *See Are Employers Permitted to Ask Applicants About Arrests on Job Applications?*, NAT’L HIRE NETWORK, <http://hirenetwork.org/content/are-employers-permitted-ask-applicants-about-arrests-job-applications> (last visited Dec. 18, 2015) (identifying thirty-eight states that allow employers to ask about arrests); *see also* U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *POLICY GUIDANCE ON THE CONSIDERATION OF ARREST RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS*

to education, housing, and employment;<sup>326</sup> disrupts families;<sup>327</sup> and causes social isolation and shame,<sup>328</sup> all of which increase the risk of delinquency.<sup>329</sup> Some of these disabilities are mandated by law; others flow from the publicity of the offense. As one juvenile sex offender put it, “Our mistake is forever available to the world to see.”<sup>330</sup>

That the penalties and barriers come at a particularly crucial time for young people, as they transition to an independent adulthood, enhances the chance that databasing will produce profound negative effects.<sup>331</sup> Young adults lack social capital and experience, and their long-term success can turn on their ability to earn a living wage, begin a career, and start a family in early adulthood.<sup>332</sup> By making all of these things more difficult, databasing delinquency frustrates the juvenile justice system’s rehabilitative goals for youthful offenders, marginalizing them and hindering their participation in civil society.<sup>333</sup> According to the Ohio Supreme Court:

For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken. With no other offense is the juvenile’s wrongdoing announced to the world. Before a juvenile can even begin his adult life, before he has a chance to live on his own, the world will know of his offense. He will never have a chance to establish a good character in the community. He will be hampered in his education, in his relationships, and in his work life. His potential will be squelched before it has a chance to show itself. A juvenile—one who remains under the authority of the juvenile court and has thus been adjudged redeemable—who is subject to sex offender notification will have his entire life evaluated through the prism of his juvenile adjudication. It will be a constant cloud, a once-every-three-month reminder to himself and the world that he cannot escape the mistakes of his youth. . . . It will define his adult life before it has a chance to truly begin.<sup>334</sup>

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ACT OF 1964, AS AMENDED, 42 U.S.C. §§ 2000E–2000E17 (1990), [http://www.eeoc.gov/policy/docs/arrest\\_records.html](http://www.eeoc.gov/policy/docs/arrest_records.html).

326. Mustaine et al., *supra* note 228, at 190.

327. Tewksbury, *supra* note 229, at 68; Tewksbury & Lees, *supra* note 229, at 331–32 (2006).

328. *Smith v. Doe*, 538 U.S. 84, 99 (2003) (“It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything that could have been designed in colonial times.”); Garfinkle, *supra* note 230, at 204.

329. Indeed, one study suggested that including juveniles in SORNA Tier 3 could actually create a greater risk to community safety. Caldwell et al., *supra* note 216, at 106.

330. PITTMAN & PARKER, *supra* note 221, at 52.

331. For the importance of the emergence into adulthood, see Jeffrey Jensen Arnett, *Emerging Adulthood: What Is it and What Is it Good For?*, CHILD DEV. PERSPS. 68 (2007).

332. LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).

333. See *In re J.B.*, 107 A.3d 1, 14 (Pa. 2014) (finding lifetime registration for juvenile sex offenders unconstitutional).

334. *In re C.P.*, 967 N.E.2d 729, 741–42 (Ohio 2012).

Of course, suffering consequences for wrongs, including stigma, is not, by itself, troublesome. As law and philosophy scholar Anita Allen has explained, “accountability for conduct is a pervasive feature of human association.”<sup>335</sup> Accountability includes being accountable to individuals, often in the form of providing information about oneself, and accountable for conduct, typically in the form of negative consequences for wrongs.<sup>336</sup> Criminal law and law enforcement are strong forms of accountability. Modern surveillance and the data collection practices discussed above represent a technologically supercharged form of informational accountability.<sup>337</sup>

Some amount of accountability is necessary to regulate childhood.<sup>338</sup> As future full members of society, children must be taught social norms, and learn that society imposes consequences for misbehavior.<sup>339</sup> No one maintains that children not be held to some amount of accountability under the law. The characteristics that define youth, however, mean that the quantity of accountability appropriate during childhood is necessarily limited.<sup>340</sup> And the harms imposed by databasing delinquency, which frustrate juveniles’ ability to succeed in adulthood, go too far.

#### B. DATABASING UNDERMINES CHILDHOOD

Childhood is fragile.<sup>341</sup> Shifts in public mood can lead to profound changes in the rights and responsibilities of young people. One such shift took place in the late 1980s and 1990s, when a spike in violent crime by young people triggered a moral panic about juvenile offending.<sup>342</sup> Events like the 1988 “Central Park Jogger” case, where five youth were convicted of a beating and rape that left a woman comatose (a crime, it turned out, that none of the five committed),<sup>343</sup> and school shootings like the one at Columbine High School,<sup>344</sup> ignited the panic. Academics in the

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335. ALLEN, *supra* note 52, at 1.

336. *Id.* at 196 (Accountability promotes order by enforcing norms, deterring unwanted behavior through punishment or the threat of sanctions. It also dignifies individuals by “presupposing intelligence, rationality, and competence.”).

337. *Id.* at 15 (describing “The New Accountability” for private life as “bold, democratic, and super-powered by technology”).

338. One main purpose of juvenile court is juvenile accountability.

339. ALLEN, *supra* note 52, at 4 (noting that “a society cannot afford to fully leave people alone”).

340. *Id.* at 29 (stating young people are “typically excused from the high level of accountability imposed on adults”); WALLACE, *supra* note 52, at 164–65.

341. APPELL, *supra* note 9, at 736 (“[D]evelopmental facts do not dictate the contours or boundaries of childhood. Ideology does.”); ARCHARD, *supra* note 10, at 33.

342. SCOTT & STEINBERG, *supra* note 29, at 109–12.

343. SARAH BURNS, *THE CENTRAL PARK FIVE: THE UNTOLD STORY BEHIND ONE OF NEW YORK CITY’S MOST INFAMOUS CRIMES* (2012).

344. House Bill 1501 and Senate Bill 254 were passed by the House and Senate, respectively, in the wake of the Columbine shooting, and each sought to impose enhanced sanctions for juveniles. See H.R. 1501, 106th Cong. § 2 (1999) (lowering the minimum age for federal prosecution of certain crimes

popular press fueled the flame by promising a coming generation of “severely morally impoverished juvenile super-predators.”<sup>345</sup> In the public eye, juveniles ceased to be wayward youth in need of help, and became hardened criminals in need of being locked up.<sup>346</sup>

Reforms throughout the criminal justice system led to more juveniles being increasingly treated like, and punished alongside, adults.<sup>347</sup> Sentences increased and laws changed permitting the prosecution of more juveniles in criminal court. The Supreme Court refused to extend or recognize special protections for youth.<sup>348</sup> Confidentiality waned. As the authors of a 1989 report on juvenile records wrote, “[i]f an individual wishes to be protected under the law, then that individual must first act within the law. When a juvenile chooses a lifestyle of crime and violence, that individual should not expect to have these activities shielded from disclosure to others.”<sup>349</sup>

Juvenile justice scholar Franklin Zimring calls this the “forfeiture theory,” where “[l]oss of the protected status of youth becomes in effect one penal consequence of the forbidden act.”<sup>350</sup> Juveniles who break the law are seen as having forfeited, by their conduct, the protections typically afforded to youth.<sup>351</sup> The forfeiture happens despite their remaining chronologically, developmentally, and legally children. As Zimring observed, “[t]here is certainly no logically necessary reason that protective features of youth policy are only for nice kids.”<sup>352</sup>

Databasing delinquency is a stout and expanding remnant of the forfeiture era. It subjects juveniles to record practices and consequences

to 14); S. 254, 106th Cong. § 102 (1999). See DAVE CULLEN, *COLUMBINE* (2009), for a comprehensive and compelling account of the Columbine tragedy.

345. DeIulio, *supra* note 267, at 23; Alfred S. Regnery, *Getting Away with Murder: Why the Juvenile Justice System Needs an Overhaul*, 34 *POL’Y REV.* 65, 68 (1985) (contending that juvenile offenders “are criminals who happen to be young, not children who happen to commit crimes” and that “there is no reason that society should be more lenient with a 16-year-old first offender than a 30-year-old first offender.”).

346. *Dole Seeks to Get Tough on Young Criminals*, *L.A. TIMES*, July 7, 1996 (quoting Bob Dole during his 1996 presidential campaign as saying “[a] violent teenager who commits an adult crime should be treated as an adult in court and should receive adult punishment”); Virginia Ellis, *Lungren to Seek Lower Age for Trial as Adult*, *L.A. TIMES*, Jan. 15, 1993, at A3 (quoting California Attorney General Dan Lungren: “[I]f you commit an adult crime, you’d better be prepared to do adult time.”).

347. Maroney, *supra* note 15, at 189 (calling this period the “superpredator era”).

348. See *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004) (rejecting argument that failure to consider juvenile’s age in determining custody for *Miranda* purposes clearly violated federal law); *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (upholding death penalty for juveniles).

349. JAMES A. RAPP, RONALD D. STEPHENS & DONNA CLONTZ, *THE NEED TO KNOW: JUVENILE RECORD SHARING* 4 (1989).

350. Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 *CRIME & JUST.* 477, 483 (1998).

351. See JAMES & JAMES, *supra* note 10, at 179 (“[W]hen the idealized images of childhood are shattered by the actions of children themselves, the protective mantle of adult care that normally provides protection and nurture, as a response to the special needs of children, is suddenly set aside.”).

352. Zimring, *supra* note 350, at 483.

akin to those for adults (including juveniles who have committed no crimes). Sex offender registration, gang databases, DNA collection, and laws turning schools into informants all emerged after 1980. Holistically, they reflect a narrower conception of the protective space of childhood than the prevailing notion, and are at odds with developmental science, the continued existence of juvenile courts, and recent Supreme Court jurisprudence. As a result, databasing delinquency does more than cause immediate and lasting harm to individual juveniles. It reshapes the very meaning of childhood, breaching its protected space and contradicting the special understandings that policymakers insist must dominate the regulation of youth.

The prevailing concept of childhood, and the necessity and propriety of enhanced protections, is grounded in part on a notion of childhood as innocence.<sup>353</sup> That childhood is marked by innocence is certainly contested, and undoubtedly false, especially with regard to adolescents. Despite their immaturity, juveniles are autonomous actors who have the ability to recognize right from wrong, and exercise such autonomy by choosing, on occasion, to do bad things.<sup>354</sup> Indeed, delinquency appears to be a normal part of adolescence.<sup>355</sup> Their offenses, however, do not make them adults.

Yet, the criminal justice system, more so than other arenas, tends to treat young people who do not fit the innocent image as outside of childhood, and thus not cloaked by (or deserving of) its protections. In the last decade, however, a shift back to first principles has been evident. The “superpredator era” has been replaced by “the rebuilding.”<sup>356</sup> From the appropriate amount of punishment to the proper treatment by police, courts and legislatures have displayed a renewed commitment to the primacy of special protections for youth.<sup>357</sup> In the wake of a sharp and steady decline in juvenile offending since 1994,<sup>358</sup> (and perhaps in response to the punitive extremes of 1990s reforms), courts and legislatures have made it clear that the law must take account of the differences between

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353. ALLISON JAMES, CHRIS JENKS, & ALAN PROUT, *THEORIZING CHILDHOOD* 13 (1998) (tracing the roots of the archetype of the innocent child).

354. SCOTT & STEINBERG, *supra* note 29, at 36.

355. Therefore, using innocence as the fulcrum for childhood ignores the characteristics of adolescence and denies special protections to many youth.

356. Maroney, *supra* note 15, at 189.

357. See Scott, *supra* note 48, at 72 (“the Court has announced a broad principle grounded in developmental knowledge that ‘children are different’ from adult offenders and that these differences are important to the law’s response to youthful criminal conduct”); see *infra* Part IV (explaining that the shift has been driven in large part by empirical findings about juvenile development).

358. *Juvenile Arrest Rate Trends*, OFFICE OF JUVENILE JUSTICE & DELINQ. PREVENTION, U.S. DEP’T OF JUSTICE, [http://www.ojjdp.gov/ojstatbb/crime/JAR\\_Display.asp?ID=qa05201](http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05201) (last visited Dec. 18, 2015) (briefing national violent crime rates amongst juveniles declined substantially from the peak in 1994 to historic lows in 2012).

youth and adults.<sup>359</sup> As a result, several juvenile justice policies grounded in the forfeiture theory have been rejected in recent years.<sup>360</sup>

Yet it is not just the dubious forfeiture theory that undergirds delinquency databasing. Minority youth need not break the rules before they lose the protections of childhood.<sup>361</sup> For them, by virtue of being black or brown, they are perceived as more likely to be criminal, more culpable for the same behavior committed by White youth, and older than their actual chronological age. Race, it seems, overrides youth within the criminal justice apparatus. As a result, minority youth exit childhood's protective space sooner, justifying their subjection to adult-like law enforcement practices like databasing.

Americans have long associated blackness and criminality.<sup>362</sup> The perceived link between blackness and criminality has contributed to racial disparities throughout criminal justice, including skews in enforcement and punishment of Black juveniles.<sup>363</sup> One study, for example, found that African American youth are disproportionately arrested in twenty-six of twenty-nine offense categories, overrepresented in cases referred to juvenile court, more likely to be formally charged, more likely to be waived into adult court, and disproportionately detained in both juvenile and adult facilities.<sup>364</sup> These enforcement skews then result in racial skews in data collection, as law enforcement is more likely to collect and retain information on minorities because it disproportionately makes contact with minorities.<sup>365</sup>

Emerging research connects this racial perception and skew data to the expanding surveillance of minority youth. Researchers have found that Black youth are seen as older than their actual age, and more culpable for the same behavior as White youth. In one study, researchers tested 176 police officers in large urban areas, mostly White males,

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359. See Scott, *supra* note 48, at 72 (“the Court has announced a broad principle grounded in developmental knowledge that ‘children are different’ from adult offenders and that these differences are important to the law’s response to youthful criminal conduct”).

360. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005).

361. Most of research discussed here goes to perceptions of Black youth. This is, in large part, due to the peculiar legacy of slavery in the United States. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). Still, research is finding similar effects with regard to Latino youth.

362. “The stereotype of Black Americans as violent and criminal has been documented by social psychologists for almost 60 years.” Jennifer L. Eberhardt, et al., *Seeing Black: Race, Crime, And Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004) (showing that the associations between blackness and crime is bidirectional, from black to crime and crime to black); Dorothy E. Roberts, Foreword, *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999).

363. See FELD, *supra* note 237 (“At every stage—arrest, intake, referral, petition, detention, trial, and disposition—youths of color fare less well than do their white counterparts . . .”); Bishop & Leiber, *supra* note 237.

364. NAT’L COUNCIL ON CRIME & DELINQ., *supra* note 237, at 1–3.

365. See *id.*

average age thirty-seven, and 264 mostly White, female undergraduate students from large public U.S. universities, to determine their levels of certain types of bias.<sup>366</sup> They found that Black youth were more likely to be mistaken as older than their actual age, by an average of 4.5 years.<sup>367</sup> The same study found that White undergraduate female students judged children up to nine years old as equally innocent regardless of race, but considered Black children significantly less innocent than other children in every age group beginning at age ten.<sup>368</sup>

In another study, researchers had a nationally-representative sample of White Americans participate in an online study about support for life without parole sentences for juveniles.<sup>369</sup> Participants read a sample about a recipient of the sentencing option: a fourteen-year-old male with seventeen prior juvenile convictions on his record who brutally raped an elderly woman. Researchers manipulated just one word across the two study conditions: in the description of the example recipient of the sentencing option, the juvenile was described as either Black or White. The researchers found that “in the Black prime condition, participants perceived juveniles as more similar to adults in blameworthiness . . . than they did in the White prime condition.”<sup>370</sup> This led participants in the Black prime condition to express more support for life without parole sentences for juveniles in non-homicide cases than did those in the White prime condition.<sup>371</sup> In short, when test subjects knew the subject of a potential criminal justice sanction was Black, they showed increased support for punitive policies.<sup>372</sup>

This effect is occurring in schools as well. Professor Ann Arnett Ferguson spent over three years observing a racially mixed public intermediate school (grades four to six).<sup>373</sup> She concluded that African American boys are not seen as childlike but “adultified,” as “naturally naughty,” and as “willfully bad.”<sup>374</sup> Their misbehavior was not seen as typical childishness, but was “likely to be interpreted as symptomatic of

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366. Phillip Atiba Goff et al., *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. PERSONALITY & SOC. PSYCHOL. 526 (2014).

367. *Id.* at 532.

368. *Id.* at 540. This correlates with similar research in the school context which found that Black students were more likely to be suspended than Whites, even for the same behavior. KUPCHIK, *supra* note 112; Nance, *supra* note 112.

369. Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction between Juveniles and Adults*, 7 PLoS ONE 1 (2012).

370. *Id.* at 2.

371. *Id.*

372. See KUPCHIK, *supra* note 112, at 97 (“Black youth are singled out for punishment because they are perceived to be more threatening, more loud and disruptive, their style of dress and manners of speaking viewed as ‘thug-like’, and they are seen as more disrespectful than others to teachers.”) (collecting citations); FERGUSON, *supra* note 263.

373. FERGUSON, *supra* note 263.

374. *Id.* at 80.

ominous criminal proclivities.”<sup>375</sup> In one example, a White teacher described African American children who borrowed books from a classroom without returning them as “looters.” As Ferguson put it, “what might be interpreted as the careless behavior of children is displaced by images of adult acts of thefts that conjure up violence and mayhem.”<sup>376</sup> As a result of this adultification, Black male youth became exempted from “the dispensations granted the ‘child’ and the ‘boy’”, justifying increased surveillance and harsher, more punitive responses to rule-breaking behavior.<sup>377</sup>

This research shows that race profoundly affects the degree to which juveniles are afforded the established protection associated with childhood status.<sup>378</sup> This happens even in the absence of wrongdoing. Indeed, race appears to override youth when it comes to support for punitive juvenile justice policies. Black youth are viewed as older than their actual age, are associated with criminality, and are seen as responsible for their actions at an age when White youth remain protected by the reduced culpability conception of childhood. As a result, law enforcement practices like the databasing described here that treat youth of color like adults flourish.

#### IV. REFORMS

There is ample evidence that policymakers are rethinking the punitive, adult-like policies adopted in a climate of fear and hostility toward juvenile offenders in the late twentieth century.<sup>379</sup> This momentum toward first principles led juvenile justice scholar Terry Maroney to describe the current era as the “rebuilding” of juvenile justice.<sup>380</sup>

In that spirit, this Part offers three recommendations to curbing delinquency databasing that would realign law enforcement data collection practices with current developmental research and the prevailing conception of childhood as a separate, protected space. First, to account for juveniles’ unique vulnerability to harms, laws should limit the amount of information that law enforcement may collect about juveniles. Second, because most juveniles do not persist in offending but instead mature into law-abiding individuals, laws should limit the length of time that gathered information can be retained. Third, in recognition of juveniles’

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375. *Id.* at 89; Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 J. SCH. PSYCHOL. 455, 455 (2008) (arguing teachers perceived African American students as more defiant, disrespectful, and rule-breaking than other groups).

376. FERGUSON, *supra* note 263, at 83.

377. *Id.* at 90 (including carefully preserved data files as proof of wrongdoing).

378. Rattan et al., *supra* note 369, at 4 (“[J]uvenile status may be more fragile than previously considered.”).

379. *See supra* Part III.

380. Maroney, *supra* note 15, at 211.

future lives as adults, laws should restrict law enforcement's ability to share the information it gathers and stores. This would have no impact on law enforcement's mission, and would facilitate access to the employment, higher education, and housing that is so critical as youth transition to adulthood.

#### A. LIMITING WHAT INFORMATION IS GATHERED

The easiest way to limit the harms caused by databasing delinquency is to not gather the information in the first place.<sup>381</sup> It would avoid the privacy intrusion attendant to the gathering of information, and would prevent the additional punishments and stigma discussed above that ensue. It would also eliminate the long shadow of a young person's mistakes, helping to ensure that juveniles enter adulthood with the greatest chance for a productive life.

But law enforcement will not be prohibited from gathering information in any foreseeable future. A feasible focus becomes limiting law enforcement's data collection abilities. Deciding how much to limit it depends in part on the role of law enforcement with respect to juveniles. If the police play a role similar to that of a general welfare agency, then all data is potentially pertinent, and the limitations proposed here will not come to be.<sup>382</sup> But if law enforcement's mission is limited to crime solving and suppression, then much of the information about a young person gathered in the delinquency databases loses its value to law enforcement. Instead, a narrower universe of data collection is justified. This is especially so for data collection that occurs before a young person has become the target of a criminal investigation.

It seems safe to say that the police are not child welfare officials,<sup>383</sup> and therefore every last bit of information about young people is not of police concern. Gathering data about the friends and associations of juveniles, or logging reports from schools of bullying, especially in the absence of a criminal investigation that would make the information relevant, is thus difficult to justify. On the other hand, it is difficult to cull the information that has, or might have, intelligence value to law enforcement from that which does not.<sup>384</sup> Indeed, the belief that it is

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381. Edward R. Spalby, *Juvenile Police Record-Keeping*, 4 COLUM. HUM. RTS. L. REV. 461, 461 n.6 (1972) ("[I]t seems both fairer and easier to control access to the youth's record by controlling the formation of the record.").

382. Coffee, *supra* note 62, at 612.

383. That is not to say that they do not look out for the welfare of young people. They most certainly do. But their primary job is to detect and prevent crime, and to catch offenders.

384. Anyone who has listened to the NPR podcast *Serial* will surely understand how seemingly stray pieces of information (was there a phone booth in a Maryland Best Buy parking lot in 1998?) can become key pieces of evidence in a criminal matter. *Serial*, CHICAGO PUB. MEDIA & IRA GLASS, <http://serialpodcast.org/> (last visited Dec. 18, 2015).

better to have information and not need it than to need it and not have it, and the lure of complete collection, has proven irresistible to the government.<sup>385</sup> One guiding principle could be that law enforcement may only collect information relevant to an individual's identity or to a specific investigation.

Restrictions on law enforcement's ability to gather information are not impossible. The Fourth and Fifth Amendments stand as foundational hurdles to unrestricted government data collection.<sup>386</sup> And states still maintain protective rules for children with regard to police identity records. Take fingerprints as an example. While some states, such as Alaska, make no distinctions between juvenile and adult fingerprinting, many others maintain distinct rules, limiting fingerprinting of youth by age, charge, conviction, or some combination thereof.<sup>387</sup>

Recent reforms have limited the content of criminal justice biographies of youth. In several states, both legislative and judicial efforts have restricted what information law enforcement may gather with respect to juvenile sex offender registration. As of June 2014, only seventeen states were considered substantially in compliance with SORNA.<sup>388</sup> Federal officials report that requiring juveniles to register is the "most significant barrier" to compliance.<sup>389</sup> In a letter from the State

385. See generally Ellen Nakashima, *NSA Chief Defends Collecting Americans' Data*, WASH. POST (Sept. 25, 2013), [http://www.washingtonpost.com/world/national-security/nsa-chief-defends-collecting-americans-data/2013/09/25/db2583c-25f1-11e3-b75d-5b7f66349852\\_story.html](http://www.washingtonpost.com/world/national-security/nsa-chief-defends-collecting-americans-data/2013/09/25/db2583c-25f1-11e3-b75d-5b7f66349852_story.html) (describing the NSA's warrantless collection of domestic e-mails and phone call content and the separate bulk metadata collection program exposed in 2013).

386. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); U.S. CONST. amend. V (No person "shall be compelled in any criminal case to be a witness against himself.").

387. ALASKA STAT. § 47.12.210 (2013); N.J. STAT. ANN. § 2A:4A-61 (West 2014) (limiting juvenile fingerprinting to those age fourteen and above if charged, unless a juvenile consents, is detained, or is adjudicated delinquent of an act which, if committed by an adult, would constitute a crime); OHIO REV. CODE ANN. § 109.60 (West 2014) (mandating fingerprints from adults arrested for felonies and certain misdemeanors but only mandating fingerprints from juveniles for felonies or an offense of violence).

388. See PITTMAN & NGUYEN, *supra* note 208 ("States that fail to comply with the Federal SORNA in a timely manner will forfeit 10% of their Byrne Memorial Justice Assistance Grant (JAG) Omnibus Crime federal funding."); Halbrook, *supra* note 225, at 55 (those that are not compliant forgo federal funding); SORNA, SMART, OFFICE OF JUST. PROGRAMS, <http://ojp.gov/smart/sorna.htm> (last visited Dec. 18, 2015) (states refusing to comply include Arizona, Arkansas, California, Nebraska, and Texas).

389. Donna Lyons, *Sex Offender Law: Down to the Wire*, NAT'L CONF. OF ST. LEGISLATURES (June 2011), <http://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-law-down-to-the-wire.aspx>; U.S. GOV'T ACCOUNTABILITY OFFICE, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: JURISDICTIONS FACE CHALLENGES TO IMPLEMENTING THE ACT, AND STAKEHOLDERS REPORT POSITIVE AND NEGATIVE EFFECTS 10 (2013). In 2010, the mandatory community notification requirements were also removed from the SORNA Guidelines in response to juvenile advocates' arguments. Supplemental Guidelines for Sex Offender Registration and Notification, 75 Fed. Reg. 27,362, 27,363 (May 14, 2010) (codified in scattered sections of 42 U.S.C.). The final guidelines allow states to withhold information about juveniles from the public registry and still be considered to be in substantial compliance.

of New York, explaining its decision not to fully comply with SORNA, the Director of the Office of Sex Offender Management wrote, “New York has a long standing public policy of treating juvenile offenders differently from adult offenders so that juveniles have the best opportunity of rehabilitation and re-integration. The federal requirement that juveniles be placed on the Sex Offender Registry under SORNA is in direct conflict with that public policy.”<sup>390</sup> Out of similar concerns, the State of Washington abolished child sex offender registration completely.<sup>391</sup> Courts have also found juvenile sex offender registration unconstitutional because it “frustrates two of the fundamental elements of juvenile rehabilitation: confidentiality and the avoidance of stigma.”<sup>392</sup>

Calls for severing the link between schools and law enforcement grow louder each year. In 2013, Attorney General Eric Holder said in a speech before the American Bar Association (“ABA”) that “[a] minor school disciplinary offense should put a student in the principal’s office and not a police precinct.”<sup>393</sup> The American Academy of Pediatrics and the American Psychological Association have likewise called for an end to harmful disciplinary policies that lead to criminal justice involvement, urging instead that students be disciplined on a case-by-case basis and in a developmentally appropriate manner.<sup>394</sup> Across the country, state departments of education and municipal school districts are moving away from zero tolerance policies and regular law enforcement involvement in school matters.<sup>395</sup> In some places, federal civil rights litigation has led to barriers between the criminal justice system and school information. In Mississippi, for example, a 2012 Department of Justice Civil Rights Division lawsuit challenged the City of Meridian’s practice of arresting youth for minor school-based offenses and Lauderdale County’s practice of incarcerating youth on probation for school suspensions and

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Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630 (Jan. 11, 2011) (permitting states to withhold information including e-mail addresses and other Internet identifiers); see 42 U.S.C. § 16915(a) (2008). States therefore have the discretion to disseminate juveniles’ information publicly, but are not required to do so. Halbrook, *supra* note 225, at 24–25.

390. Letter from Risa S. Sugarman, Deputy Comm’r, Office of Sex Offender Mgmt., to Linda Baldwin, Dir., SMART Office, Office of Justice Programs, U.S. Dep’t of Justice (Aug. 23, 2011).

391. WASH. REV. CODE ANN. § 9.94A.540 (West 2013).

392. *In re J.B.*, 107 A.3d 1, 19 (Pa. 2014) (finding lifetime registration for juvenile sex offenders unconstitutional); see also *In re C.P.*, 967 N.E.2d 729, 746 (Ohio 2012); *People v. Dipiazza*, 778 N.W.2d 264, 274 (Mich. Ct. App. 2009) (holding ten year juvenile sex offender registration requirement cruel and unusual punishment as applied to a Romeo and Juliet case).

393. Eric Holder, Att’y Gen., Remarks at the Annual Meeting of the American Bar Association’s House of Delegates (Aug. 13, 2013).

394. AM. ACAD. OF PEDIATRICS, OUT-OF-SCHOOL SUSPENSION AND EXPULSION (2013); AM. PSYCHOL. ASS’N, ARE ZERO TOLERANCE POLICIES EFFECTIVE IN THE SCHOOLS?: AN EVIDENTIARY REVIEW AND RECOMMENDATIONS (2008).

395. JACOB KANG-BROWN ET AL., A GENERATION LATER: WHAT WE’VE LEARNED ABOUT ZERO TOLERANCE IN SCHOOLS 6 (2013).

expulsions.<sup>396</sup> An agreement was reached in June 2015 prohibiting Meridian police officers from arresting youth for “behavior that is appropriately addressed as a school discipline issue” and limiting the state’s ability to recommend incarceration for violations of probation that would not otherwise be detainable offenses (i.e., school suspensions).<sup>397</sup>

That said, the ship full of robust data collection restrictions regarding youth has likely sailed. Law enforcement agencies need complete and accurate information to successfully investigate crimes, identify suspects and perpetrators, and maintain criminal statistics. Broader data collection further helps law enforcement manage and solve crime, and plays some role in promoting rehabilitation via deterrence and shaming. Too many crimes have been solved (and perhaps prevented) because law enforcement collected the otherwise unknown offender’s DNA<sup>398</sup> or knew who a gang member regularly associated with, to roll back data collection at anywhere other than the margins. Given the ease, low cost, effectiveness, and popularity of delinquency databases, it would require a sea change in attitude to generate support for more widespread limits on the information gathered by law enforcement about juveniles. Even then, the benefits to juveniles (in reduced privacy and stigma harms) may not outweigh the public safety harms of increased crime. For that reason, the best chances to minimize the harms caused by dataveillance rest in restricting the storage and dissemination of criminal information about youth.

#### B. LIMITING WHAT INFORMATION IS STORED

Youth change. While many participate in some form of delinquency during adolescence, most desist as they mature into adulthood.<sup>399</sup> This is because many of the factors associated with antisocial, risky, or criminal behavior lose their intensity as individuals become more developmentally mature.<sup>400</sup> That youth change means that “[p]articularly in the case of the juvenile, . . . yesterday’s record does not accurately describe today’s

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396. Complaint, *United States v. City of Meridian*, 4:12-CV168-HTW-LRA (S.D. Miss. filed Oct. 24, 2012).

397. Proposed Settlement Agreement at 4, *United States v. City of Meridian*, 3:13-CV-978-HTW-LRA (S.D. Miss. filed June 19, 2015).

398. See Juan A. Lozano, *Hundreds of DNA Matches as Houston Clears DNA Backlog*, ASSOC. PRESS, Feb. 23, 2015.

399. Mulvey et al., *supra* note 58, at 475 (tracking over one thousand male adolescent offenders over the course of three years and finding that only 8.7% of participants were “persisters” in that their offending remained constant throughout the thirty-six-month period); Piquero, Farrington & Blumstein, *supra* note 35 (between five percent and ten percent of adolescent offenders become adult career criminals); Steinberg & Scott, *supra* note 57, at 1015 (“[T]he typical delinquent youth does not grow up to become an adult criminal.”).

400. Levick et al., *supra* note 59, at 297.

individual.”<sup>401</sup> In recognition of this truth, limits on the length of time that law enforcement can retain records about juveniles should be imposed. These limits would enable law enforcement to keep information during peak offending years while also protecting young people from the long shadow of youthful mistakes.

Numerous proposals have sought to limit the length of time that law enforcement can retain records about juveniles. Before the dawn of computerized dataveillance, the ABA issued a report entitled *Standards Relating to Juvenile Records and Information Systems*.<sup>402</sup> In it, the ABA recommended that juvenile police and court records be destroyed if a juvenile who is arrested or detained is not referred to a court.<sup>403</sup> The report emphasized that unless the juvenile’s police record is also destroyed when the court record is destroyed, “the destruction of the court record alone would become a relatively meaningless reform.”<sup>404</sup> In a foreshadowing of what has become, the report acknowledged that the “increasing use of computers to disseminate arrest records magnifies the risks created by the existence of arrest records.”<sup>405</sup> The juvenile crime wave of the 1980s and early 1990s, and the punitive reforms that followed, meant the ABA’s proposal was not heeded.

Similar reform proposals are now making headway as policymakers have begun to reimpose limitations on how long juvenile records may be maintained. In 2014, Washington state passed a law allowing for most juvenile records to be automatically sealed when the youth turns eighteen.<sup>406</sup> In explaining the bill, Representative Ruth Kagi said that “up until today, youth in Washington had their mistakes follow them forever. The sealing of juvenile records will give youth the chance to get an education, a job, housing, and a productive life.”<sup>407</sup> Senators Rand Paul and Cory Booker proposed a similar bill at the federal level in 2014. Their REDEEM Act would automatically seal juvenile criminal records for nonviolent offenses.<sup>408</sup>

The movement toward protective juvenile record policies is not limited to the United States. In recent commentary on the European

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401. Coffee, *supra* note 62, at 617.

402. INST. OF JUDICIAL ADMIN., *supra* note 281.

403. *Id.* at 35 (providing an exception “if the chief law enforcement officer of the agency . . . certifies in writing that certain information is needed for a pending investigation involving the commission of a felony, that information, and information identifying the juvenile, may be retained in an intelligence file until the investigation is terminated or for one additional year, whichever is sooner”).

404. *Id.* at 152.

405. *Id.* at 150.

406. H.R. 1651, 63d Leg., Reg. Sess. (Wash. 2014).

407. Press Release, Columbia Legal Servs., Youth Opportunities Act Opens Doors to Thousands of Young Adults Across Washington State (Apr. 4, 2014).

408. S. 2567, 113th Cong. (2014).

rules for juvenile offenders, the Council of Europe advised that “[s]anctions and measures imposed on juvenile offenders should not be held against them for the rest of their lives. . . . [R]ecords of the offences of juveniles should not be kept for longer than absolutely necessary.”<sup>409</sup>

Just how long is necessary would undoubtedly be subject to great debate. Empirics on juvenile offending help to identify an appropriate target. Expunging police and court records could be triggered when juveniles hit a particular age, such as eighteen or twenty-one. This would accord with offending data which shows that offending peaks at seventeen and then sharply and steadily decreases.<sup>410</sup> As a result, the intelligence value to law enforcement of all that the delinquency databases contain drops off just as sharply and steadily into the future. Since it is increasingly unlikely to be actionable information, there is less justification for continuing to store it. The value of the information about friends and associations, such as that which fills gang databases, diminishes even more sharply with time as social groups and activity change. That databasing causes such extensive harms, not just from the mere gathering of the information but also from the retention of erroneous information and the broad sharing of information, increases the need for limiting its storage.

Alternatively, records could be expunged when a juvenile avoids a conviction or adjudication for a certain period of time. This would be expungement earned not by simply growing old, but by behavior. Data about desistance would support such an approach. Researchers have found that individuals with a prior criminal justice contact who stay arrest free for seven years or more pose very little risk of future crime.<sup>411</sup> Moreover, that low risk converges with the risk of a same-aged individual from the general population at around seven years after contact, and approaches (though never equals) that of same-aged individuals with a clean criminal record.<sup>412</sup> Therefore, for juveniles who avoid arrests and conviction, there would be little risk to public safety of destroying their old records. The upside would be reduced stigma and fewer barriers to housing, education, and employment.<sup>413</sup>

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409. COMM. OF MINISTERS, COUNCIL OF EUROPE, COMMENTARY TO THE EUROPEAN RULES FOR JUVENILE OFFENDERS SUBJECT TO SANCTIONS OR MEASURES (2008).

410. Moffitt, *supra* note 36, at 675 (“[T]he rates for both the prevalence and incidence of offending appear highest during adolescence; they peak sharply at about age 17 and drop precipitously in young adulthood . . . [B]y the early 20s, the number of active offenders decreases by over 50%, and by age 28, almost 85% of former delinquents desist from offending.”).

411. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009).

412. *Id.*; see also Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571, 1627–28 (2012) (collecting studies).

413. But note the thorny Internet problem, where information, once it gets there, stays even if official records are sealed or destroyed.

Indeed, record sealing or destruction mechanisms are already in place. All states enable the destruction, expunging, or sealing of some juvenile records.<sup>414</sup> New York, for example, requires fingerprint records to be destroyed when a person adjudicated delinquent reaches the age of twenty-one or has been discharged from placement for at least three years and has no intervening criminal convictions or pending criminal actions.<sup>415</sup> There are even protections in some states for juveniles charged in criminal court. Under “Youthful Offender” statutes, accusatory instruments can be sealed and records that would otherwise be public kept confidential.<sup>416</sup>

The software that enables the delinquency databases could easily accomplish automatic record deletion. All that it would seemingly require would be an allocation of resources from the government to develop programs that could identify records due for sealing or destruction and accomplish the sealing or destruction.

### C. LIMITING WHAT INFORMATION IS SHARED

As described above, many are able to access the information in the delinquency databases. Law enforcement, noncriminal justice government agencies, courts, schools, employers, the media, and the general public all have some form of access to court records, police records, and sex offender information. Law enforcement, noncriminal justice government agencies, and courts each have access to behavior information about youth at school. Schools and employers are privy to information stored in gang databases. According to leading criminal records scholar Jacobs, “[t]he United States, which invented a juvenile court committed to confidentiality, now is exceptional for the amount of juvenile offender information that is disclosed to diverse government agencies and the public.”<sup>417</sup>

Once the information gets beyond law enforcement, and into the hands of employers, school officials, and landlords, the harmful impacts are felt immediately. Moreover, once the information gets beyond law enforcement, it is almost impossible to make it go away or control the havoc it wreaks.<sup>418</sup> As a result, its impact is lasting.

This liberal policy regarding disclosure is in part linked to the American commitment to open government and the freedom of the press. And it is also a result of the gradual shift of law enforcement records from

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414. JUVENILE LAW CTR., *supra* note 136.

415. N.Y. FAM. LAW § 354.1(7) (McKinney 2014).

416. *See* Taylor-Thompson, *supra* note 75.

417. Jacobs, *supra* note 82, at 163.

418. Jacobs, *supra* note 2, at 307.

a system created by police for police to one used heavily by noncriminal justice actors like employers and schools.

Distributing the information is particularly harmful because of its devastating impacts on an individual's ability to secure employment, housing, and school that accompany sharing criminal history.<sup>419</sup> Not only does criminal history information sharing frustrate the ability of young people (and adults with a youthful criminal record) to earn a living, educate themselves, and find a place to live, all of these factors are linked to desistance.<sup>420</sup>

Instead of punishing youth far into the future, the law should cabin the information that is gathered and stored by law enforcement to law enforcement as much as possible. This is especially true for intelligence information like that gathered in gang databases and nonconviction records, like those for arrests. Noncriminal justice actors (like employers) are likely to believe that an arrest reflects a guilty act, when upwards of fifty percent of arrests are not followed by a conviction.<sup>421</sup> Moreover, the presumption of innocence, "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law,'"<sup>422</sup> demands that the criminal justice system only share police record information when it reflects certainty that the act was committed.

A number of reforms limiting the sharing of law enforcement records have recently been put in place. As discussed above, jurisdictions are limiting the extent to which juveniles are subject to sex offender registration, and federal guidelines do not require that juveniles be subject to community notification procedures.<sup>423</sup> There is a nationwide movement to restrict what criminal history information employers can access.<sup>424</sup> Colleges are beginning to add nuance to their use of criminal history information in admissions instead of using it as a blunt sorting

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419. *See supra* Part III.A.3.

420. *See supra* Part III.A.3.

421. *See, e.g.*, N.Y. STATE OFFICE OF THE ATT'Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES 8 (Nov. 2013) (finding that close to half of all stop-and-frisk arrests from 2009 to 2012 did not result in conviction).

422. *In re Winship*, 397 U.S. 358, 363 (1970).

423. States have the discretion to disseminate juveniles' information publicly, but are not required to do so. Halbrook, *supra* note 225, at 56. SORNA guidelines allow states to withhold information about juveniles from the public registry and still be considered to be in substantial compliance. Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630 (Jan. 11, 2011) (permitting states to withhold information including e-mail addresses and other Internet identifiers); *see* 42 U.S.C. § 16915(a) (2008).

424. NAT'L EMP'T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES TO REDUCE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS (2014).

tool.<sup>425</sup> Public schools have also been seeking ways to minimize law enforcement involvement in school matters.<sup>426</sup>

As these efforts demonstrate, limiting what criminal history information gets shared beyond law enforcement is probably the most attainable reform proposal. It is also arguably the most important. Cabining the information to law enforcement reduces the negative impact the criminal justice biography may have. While they are still subject to privacy invasions and stigma harms, and law enforcement is more likely to police them and their communities (each no small consequence), law enforcement does not hire them for jobs, accept them to colleges, or act as their landlord. Without access to the information, employers, colleges, and landlords will not be able to so easily discriminate against individuals based on criminal history.

#### CONCLUSION

Because adolescents are vulnerable, because they change, and because they are future adults, we must strive for a constellation of practices that protect them from harm and promote their positive development. The criminal justice system is a critical part of that constellation. With renewed vigor, courts, legislatures, and policymakers today are correcting the missteps of the 1990s that favored treating juveniles like adults in the criminal justice system by reinstating the primacy of special protections for youth.

Databasing delinquency—a broad data collection, retention, and distribution system that treats juveniles on par with adults—reveals that two pernicious distortions continue to inform this aspect of juvenile justice policy. First, youth who break the rules are seen as having forfeited the protections of childhood. Second, childhood status is particularly fragile for minority youth, who age out of childhood's protective space sooner than White youth. As a result, many youth are saddled with a record of mistakes and suspicions that haunt them into adulthood.

The unwillingness to forgive and forget youthful mistakes embedded in databasing delinquency ignores the fundamental nature of adolescence. Rather than pursuing adult-like surveillance practices in the name of public safety that inflict debilitating short and long-term harms, the developmental characteristics of youth and the purpose and meaning of childhood must guide juvenile justice policy. To that end, we must avoid practices that unduly stigmatize, that permanently punish, and that promote or entrench criminal behavior. By limiting the information that

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425. CTR. FOR CMTY. ALTS., *supra* note 315.

426. JUSTICE POLICY INST., EDUCATION UNDER ARREST: THE CASE AGAINST POLICE IN SCHOOLS 29 (2011).

the criminal justice system gathers, stores, and shares about juveniles, we can avoid those harms without frustrating public safety.