

# OPEN JUVENILE RECORDS IN WASHINGTON STATE: PROCESS, EFFECTS, AND COSTS OF PROTECTIVE MECHANISMS

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## Executive Summary

Under Washington state law, juvenile court files and proceedings are open to the public. While many states have recently restricted public access through acts of the state legislature, Washington remains one of eight states that provide open public access to juvenile records, and only one of three that sells data contained in juvenile court files. Aiming to provide relief from the collateral consequences commonly associated with having ex-offender status, Washington provides youth with the opportunity to seal their records. As a result of expanded eligibility induced by recent legislative action, most juveniles are eligible to seal their record.

A review of the literature reveals that open juvenile records may be problematized by the emerging nature of records as a form of data, allowing millions of records to be transferred – or illicitly divulged – in mere seconds.

Several methods are used to adduce the process associated with sealing one's record, the effect derivative of this action, and the costs associated with current policy and alternative proposals:

- 1) Quantitative analysis of juvenile records. Analysis was conducted of over 200,000 juvenile offender records, associated with individuals receiving contact over a three-year timespan.
- 2) Semi-structured interviews with individuals and juvenile justice professionals. Interviews were conducted with a host of stakeholders, including individuals who had prior contact with the juvenile justice system.
- 3) Cost analysis of current and alternative policies. Current policy and two alternative proposals are considered from a cost framework.

Following constitute the key findings of this report:

- 9 in 10 individuals who are estimated to be eligible for sealing still have open records. Overall, 6.0% of eligible records are sealed.
- Records that did not result in a charge were less likely to be sealed than records that did result in an adjudication or conviction
- Youth of color – including Native Americans, Latinos, and African Americans – were significantly less likely to seal their record than White Americans. Sealing rates may serve as an additional indicator of disproportionate minority contact.
- Sealing rates are low due to multiple factors, including the high costs, the arduous nature of the process, and lack of awareness regarding rights and eligibility.
- Compared with current policy, keeping all juvenile records confidential would likely generate significant cost-savings. Open juvenile records as default also poses substantive latent costs.

It is recommended that Washington State Legislature pass a bill to protect juvenile records confidentiality by closing juvenile court files and records. As evidenced by the analysis, this represents an efficacious, equitable and cost-effective solution for aligning the state's treatment of juvenile records with its commitment to rehabilitation.



## Introduction

Washington State provides members of the public with access to data and information contained in unsealed juvenile records.<sup>1</sup> In this paper, I use multiple methods – including data analysis, interviews, and cost analysis – in order to examine the process, effects, and fiscal costs of *records sealing*, the only mechanism that allows such individuals to recover their privacy. Over 200,000 state-level juvenile records are analyzed using logistic regression in order to adduce a greater understanding of *who* is sealing their juvenile record. Based upon analysis of differential sealing rates, the state’s system for ensuring confidentiality of eligible juvenile records may in fact *intensify* the disproportionate outcomes faced by youth of color.

This research provides a roadmap showing how sealing rates may serve as a proxy for adducing the state of juvenile records confidentiality in Washington State. In many ways, Washington’s juvenile justice system serves as a model for others through its reliance upon evidence to guide policy. Such proposals, however, have typically shied away from the state’s handling of juvenile records.<sup>2</sup> The evidence presented here suggests that the state’s handling of juvenile records is incongruent with its core commitment to ensuring fair, just, and rehabilitative outcomes for Washington’s youth.

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<sup>1</sup> Legal Action Center, *After Prison: Roadblocks to Reentry*. 14 states make all juvenile conviction records available on the Internet, Washington is amongst the unique states that allow even non-conviction data to be disseminated.

<sup>2</sup> For example, see Task Force on Race and the Criminal Justice, *Juvenile Justice and Racial Disproportionality: A Presentation to the State Supreme Court*.

## Background: Juvenile Records in Washington

Every year in the United States, approximately two million juveniles come into contact with a local juvenile court.<sup>3</sup> In over 80% of states, the information deriving from this contact is held in confidence, with access delimited to several entities, including agencies with juvenile custody, prosecutors, juvenile court judges, law enforcement, probation officers, and criminal court staff.<sup>4</sup> In Washington, members of the public can access physical and electronic records pertaining to this contact, including charges that were dismissed or were otherwise not adjudicated.<sup>5</sup>

Various iterations of juvenile records are accessible through multiple public agencies, including the State Patrol, local law enforcement agencies, and the Administrative Office of the Courts.<sup>6</sup> The publicly available record includes original petition motions, memorandums, briefs, findings of the court, and court orders.<sup>7</sup> While the state linguistically differentiates juvenile charges by labeling them as *adjudications* (contrasted with an adult *conviction*), the record itself is not dissimilar to the charges faced by adults, and is subject to the same court rules.

### History of Juvenile Records in Washington

When Washington's juvenile justice system was originally constructed, records and proceedings were held in confidence.<sup>8</sup> For over 50 years, confidentiality-centric policies were upheld by a social contract built upon sparing juveniles from stigma and the harsh punishment-oriented perspective offered by adult courts.<sup>9</sup> This system was also contiguous with common societal views of adolescence during the early 20<sup>th</sup> century, where juvenile systems emphasized benevolent treatment over retributive punishment.<sup>10</sup> A key element of this system was maintaining youth privacy by restricting records and holding proceedings in confidence.<sup>11</sup>

When the Juvenile Justice Act was passed by the state legislature in 1977, juvenile records became open to public viewing.<sup>12</sup> At the time of the Act's passage it was seen as the "most substantial reform of a state

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<sup>3</sup> Petrosino, Turpin-Petrosino, and Guckenburg, "Formal System Processing of Juveniles: Effects on Delinquency."

<sup>4</sup> Bureau of Justice Statistics, *Privacy and Juvenile Justice Records: A Mid-Decade Status Report*.

<sup>5</sup> Washington State Partnership Council on Juvenile Justice, *The Public Access of Juvenile Criminal History Records in Washington State and Collateral Consequences*.

<sup>6</sup> Ambrose and Millikan, *Beyond Juvenile Court: Long-Term Impact of a Juvenile Record*.

<sup>7</sup> Administrative Office of the Courts, "A Guide to Sealing and Destroying Court Records, Vacating Convictions and Deleting Criminal History Records." See also Jacobs and Crepet, "The Expanding Scope, Use, and Availability of Criminal Records."

<sup>8</sup> Boerner and Lieb, "Sentencing Reform in the Other Washington."

<sup>9</sup> Etten and Petrone, "Sharing Data and Information in Juvenile Justice."

<sup>10</sup> National Center for Juvenile Justice, *Washington: Purpose Clause*. The goals of Washington's juvenile justice system are further elaborated in RCW 13.40.010

<sup>11</sup> Office of Juvenile Justice and Delinquency Prevention, *Juvenile Proceedings and Records*.

<sup>12</sup> Lieb, Fish, and Crosby, *A Summary of State Trends in Juvenile Justice*. These trends were heavily influenced by trends outside the juvenile justice system, including the criminal justice system aimed at adults.

juvenile code that has occurred anywhere in the United States.”<sup>13</sup> From the date Act was passed, the only way for individuals to protect against public dissemination of their records is to have them sealed. In later years, several additional laws were passed, requiring that particular juvenile crimes were considered as part of an adult's criminal history.<sup>14</sup>

Initially, sealing was only open to individuals with relatively minor adjudications. In recent years, the Legislature has advanced several bills expanding sealing eligibility. For example, in 2008, Rep. Mary Helen Roberts, (D-Edmonds) introduced a bill that would bolster privacy by automatically destroying records associated with diversion agreements.<sup>15</sup> With several amendments, HB 1141 passed unanimously in both the House and the Senate. Other reforms have focused on expanding the eligibility of the sealing process, demonstrated by a bill in 2010, which allowed individuals with Class A felonies to file for sealing after fulfilling a 5-year waiting period.<sup>16</sup>

Recently, legislators have sought to re-examine juvenile records at a more systematic level. In 2011, the Legislature passed SHB 1793, establishing the rubric for eventual reform through creation of the Joint Legislative Task Force on Juvenile Record Sealing.<sup>17</sup> This Task Force was charged with finding cost-effective solutions to ensure the confidentiality of juvenile records, with specific focus on confidentiality mechanisms that would *not* require individuals to file a petition. In the end, the task force produced mixed results: a majority of members recommended that the state treat juvenile records as confidential; however, the group failed to reach finality on a consensus proposal.<sup>18</sup> Based upon the preference on the task force majority, a far-ranging bill to restrict confidentiality of all juvenile records was brought before the House, spearheaded by a group of three students from University of Washington's School of Law. The bill would ensure the confidentiality of juvenile records, hence effectively restricting public access.<sup>19</sup> While the bill was passed unanimously by the House with only minor amendments, it faced substantive revisions in the Senate and was eventually tabled.

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<sup>13</sup> Task Force on Race and the Criminal Justice, *Juvenile Justice and Racial Disproportionality: A Presentation to the State Supreme Court*. Also see Henning, “What’s Wrong with Victims’ Rights in Juvenile Court?”.

<sup>14</sup> Lieb, Fish, and Crosby, *A Summary of State Trends in Juvenile Justice*.

<sup>15</sup> Rep. Mary Helen Roberts, *Modifying Diversion Records Provisions*. A diversion is “is an alternative to prosecution that is offered to youth who have committed a first time offense, or a relatively minor offense.”

<sup>16</sup> SB 6561 – 2009-10. The bill also loosened the requirements to seal class B and C felonies, misdemeanors, and diversions.

<sup>17</sup> Joint Legislative Task Force on Juvenile Record Sealing, “Patterns of Juvenile Record Confidentiality in the United States.”

<sup>18</sup> As noted in the group’s final report, “not all members responded to the options provided. Some of the members who responded remained neutral on some proposals while expressing favor or disfavor for others.”

<sup>19</sup> The bill would leave several records, including sex offenses and serious violent offenses, open to the public. Additionally, the court maintained the option of releasing records “upon good cause shown.”

## A Comparative Perspective: WA is One of Eight States with Open Records

Washington is one of eight states where juvenile records are open to members of the public, and one of only three states where juvenile records data is sold to private data providers.<sup>20</sup> While Washington continues to allow public access to juvenile records, many state legislatures have reconsidered the importance of records confidentiality, resulting in the passage of various laws built around expanding the availability and accessibility of sealing and expungement.<sup>21</sup> Between 2009 and 2011, nine states passed legislation to increase the confidentiality of juvenile records.<sup>22</sup> Exemplary of this, Ohio passed a law providing for the automatic expungement of juvenile records when the individual turns 23 years old.<sup>23</sup> The bill also changed the sealing waiting period. As a result, juveniles with relatively minor crimes are allowed to petition for sealing as soon as 6 months after the adjudication was filed.<sup>24</sup>

In Michigan, juvenile-records confidentiality is seen as an essential component within reform of the juvenile justice system, driven by calculations of societal costs and benefits. In 2012, Michigan instituted new provisions – passed unanimously by the House and Senate – allowing individuals to request expungement of three juvenile misdemeanor records every year.<sup>25</sup> The bill also shortened the waiting period from five years to one year, and reduced the eligibility age threshold from 24 to 18 years.<sup>26</sup>

Such laws are increasingly recognized by fiscal conservatives as a way to control expenditures. Michigan’s legislation was originally introduced by a Republican, Representative Joe Haveman, and received unanimous support by Democrats and Republicans. When championing the bill, Rep. Haveman observed the tricky dynamics associated with the proposed legislation, stating that “everyone is so gun-shy on this because they think we need to be tough on crime, and it’s politically correct to be tough on crime.” Reflecting an increasing concern salient to fiscal conservatives regarding the hidden costs associated with the juvenile justice system, Haveman stated at the time that “we can certainly look at alternatives if people are behaving themselves. And then they can be *paying taxes instead of draining taxes.*”<sup>27</sup>

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<sup>20</sup> Thomas, “The Real Cost of Selling Juvenile Records for Pennies Per Name.”

<sup>21</sup> Jacobs and Larrauri, “Are Criminal Convictions a Public Matter?”; Ruddell and Winfree Jr, “Setting Aside Criminal Convictions in Canada A Successful Approach to Offender Reintegration”; Joint Legislative Task Force on Juvenile Record Sealing, “Patterns of Juvenile Record Confidentiality in the United States.” As of 2000, only nine states allowed public release without restrictions: Arizona, Idaho, Iowa, Kansas, Michigan, Montana, New York, Oregon, and Washington.

<sup>22</sup> National Juvenile Justice Network, *Advances in Juvenile Justice Reform: Confidentiality and Expungement*. At the same time, no states decreased the confidentiality of youth records.

<sup>23</sup> Office of the Ohio Public Defender, “Sealing and Expunging Juvenile Court Records.”

<sup>24</sup> Ibid.

<sup>25</sup> The bill was unanimously passed in the Senate and House.

<sup>26</sup> Swift, “Michigan Law Makes It Easier for Juvenile Offenders to Expunge Criminal Records.”

<sup>27</sup> Quoted in Gray, “New Law on Expunging Records Helps Michigan’s Juvenile Offenders Make a Clean Start.”

## Washington’s Administrative Office of the Courts Maintains and Sells Access to Juvenile Records

In Washington State, juvenile courts track case information and records through a statewide information system called Judicial Information System (JIS).<sup>28</sup> Hosted by the Administrative Office of the Courts, one of the primary features of the system is that it allows members of the public to efficiently access relevant information on court cases via the court’s website. While the features of the system allow marking non-offender cases as confidential, juvenile records remain accessible by members of the public.<sup>29</sup>

Recognizing an emergent market for personal data and information, the AOC monetizes records through the sale of two products:<sup>30</sup>

1. **Public Superior Court Criminal Index.**<sup>31</sup> For \$1,800 per year, this index provides access to all case dispositions statewide – including juvenile adjudications – for the past 5 years. The data are updated four times per year.
2. **JIS-Link.** This database is based upon a Pay-as-you-go model, and requires an annual subscription of \$100, in addition to \$0.065 per keyboard command.

In order to protect against the dissemination of records that have been sealed, the AOC requires licensees to update their data system to reflect the sealed status of juvenile records.<sup>32</sup> In 2005, a report commissioned by the National Task Force on the Commercial Sale of Criminal Justice Record Information found that governments are generally accurate and timely in furnishing such updates. Accuracy, however, was found to come at the price of expediency: while some states furnish updates to licensees daily, many states maintain monthly or quarterly updated schedules.

Washington generally reflects this pattern: after individuals complete the sealing process at the county clerk’s office, the change is instantaneously reflected on JIS; however, it could take as long as three months for the data held by commercial providers to reflect the record’s current status. This lag time represents the best-case scenario, as it bends upon the critical assumption that private consumer reporting agencies immediately process all requested changes. The Task Force also found that many private companies fail to abide by federal and state laws regulating the usage of criminal and juvenile

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<sup>28</sup> Technically, the record itself is not imaged on JIS. As encountered when a member of the public seeks to search the index of cases (<http://dw.courts.wa.gov/?fa=home.namesearchTerms>), the governing agencies provide *no* guarantees as to the accuracy or timeliness of the data.

<sup>29</sup> Alfasso, “The Judicial Information System (JIS) and Juvenile Offense Records.” Confidentially-held records encompass cases pertaining to mental illness, juvenile dependency, and adoption. Recent proposals set forth before the Data Dissemination Committee would restrict mass dissemination of juvenile offender cases.

<sup>30</sup> *Ibid.*

<sup>31</sup> In late May 2013, AOC’s Data Dissemination Committee considered a policy change that would limit transfer of information from the juvenile court file that is contained in a single data file. This would effectively discontinue access of juvenile court records through bulk transfer of records. JIS-Link would be unaffected by this proposal.

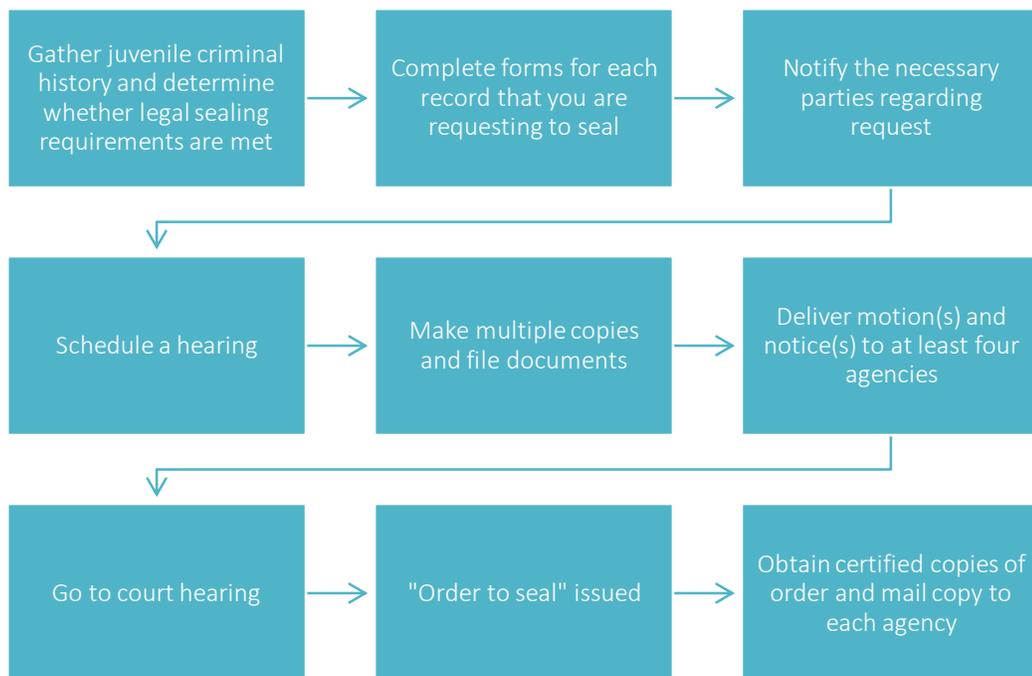
<sup>32</sup> Administrative Office of the Courts, “Data Transfer Subscription and Licensing Agreement for Public SCOMIS Criminal Index.”

records.<sup>33</sup> One potential problem pertains to the incentives embedded for licensees; while several federal and state laws regulate the usage of criminal and juvenile records, no such cases have been brought forth in Washington.

### Youth May Petition the Court to Seal their Records

Contrary to widespread belief, juvenile records are not automatically sealed or expunged once an individual turns 18. If eligible to seal one's record, then, the privacy of their record becomes a matter of personal election: if the individual's case is not set into diversion status, an individual who seeks privacy must ultimately petition the court to have it sealed.<sup>34</sup> Eligibility for sealing is primarily determined by the fulfillment of a defined waiting period, the existence of pending offender cases, and outstanding restitution.<sup>35</sup> Additionally, some cases are ineligible to be sealed.<sup>36</sup> Figure 1 depicts the process to seal one's record.

FIGURE 1: PROCESS FOR SEALING JUVENILE RECORD IN WASHINGTON STATE<sup>37</sup>



<sup>33</sup> This has frequently been examined through circumventions of the Federal Credit Reporting Act (FCRA). While better known for regulating credit reporting, FCRA also establishes safeguards regarding the usage of public record information for employment purposes.

<sup>34</sup> For more about the sealing process, see TeamChild, *Sealing Juvenile Records in Washington State*.

<sup>35</sup> For Class A felonies, 5 years must have passed since the adjudication was filed; Class B, class C, gross misdemeanor, and misdemeanor offenses and diversions, the waiting period is 2 years.

<sup>36</sup> Several cases are ineligible to be sealed, including records corresponding with an individual who has a pending conviction, cases in which restitution has not been paid, and certain sex offenses.<sup>36</sup>

<sup>37</sup> Source: TeamChild, *Sealing Juvenile Records in Washington State*.

Once an individual has filed their paperwork, and the court has issued an *order to seal*, the record is updated in JIS, and can subsequently be treated as if it never occurred. When an interested party attempts to access the record, they are met with the note that the record is sealed. While sealing eligibility requirements are codified under state law (and are therefore consistent), each juvenile court offers varied iterations of the process itself. Several courts, for example, require individuals to access a set of forms distinct from the state’s generically issued forms. Most courts – but not all – require applicants to pay any outstanding restitution before they are allowed to petition for sealing. These additional requirements are depicted in Figure 2.

FIGURE 2: ADDITIONAL REQUIREMENTS FOR SEALING JUVENILE RECORD IN WASHINGTON STATE, BY COUNTY

Payment required	Clallam (eligibility check; sealing)	Douglas (forms)
	Jefferson (sealing)	Skagit (forms)
Specific forms required	Pierce	Thurston
Long process	Clark (4 months)	
Prosecutor petition	Grays Harbor	
Increased mandatory age	Adams (23 years old)	

### Limited Access to Sealing

Some individuals elect to use private attorneys to navigate the process. With average costs ranging from \$300 to \$1,500, however, such costs are prohibitive for most young adults.<sup>38</sup> In response to these challenges, several teams – consisting of pro-bono attorneys, child advocacy organizations, and universities – have formed legal clinics to offer sealing-specific legal assistance for low-income individuals. In Washington, there are two such clinics.<sup>39</sup> In addition to free one-on-one assistance, the sealing clinics offer resources and guides to help get the word out about the sealing process. Additionally, they help inform individuals regarding their “right to seal” their record. The American Civil Liberties Union of Washington and Center for Children and Youth Justice also play a role in advancing awareness and uptake through free legal support.

<sup>38</sup> Ambrose, “Unlocking the Future.”

<sup>39</sup> Ibid.

In spite of these attempts to improve uptake, sealing rates appear to be low, shown by anecdotal evidence and official reports. In a fiscal note analysis of a 2004 bill, the Administrative Office of the Courts recognized the low rate of sealing by attributing it to the individual decision, rather than limited access: “Currently, few juveniles come to the court to request sealing of their records. This may be because after a number of years, the juveniles do not think about their juvenile record.”<sup>40</sup>

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<sup>40</sup> Fiscal note can be accessed at <https://fortress.wa.gov/ofm/fnspublic/legsearch.asp?BillNumber=3078&SessionNumber=58>.

## Research Questions

Several research questions are set forth to guide this inquiry:

1. How frequently is sealing used as a way to protect against the pejorative consequences of a juvenile record?
2. How do sealing rates differ according to demographics, severity of crime, and geographic region?
3. Additionally, what are the fiscal and non-fiscal costs with keeping Washington’s juvenile records confidential?

In order to address these questions, this report employs several methods, including data analysis, semi-structured interviews, and a review of recent legislative bills and fiscal notes.

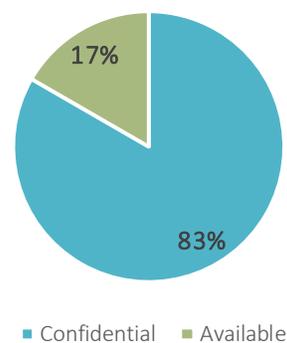
## Literature Review

### Accessibility and Privatization of Juvenile Records

In the early 1980s, the scholar Diana Gordon predicted that governments’ increased willingness for tracking its citizens would lead to an “electronic panopticon” of records.<sup>41</sup> Her warning – while certainly prescient – may have been directed at the wrong agent. Rather than government agencies, private companies – including consumer-reporting agencies – have led the way in expanding access and knowledge on members of the public through various data-mining and matching techniques. In response to states’ austere budget situations, such companies have leveraged the low cost of data-mining and storage in order to procure large data sets of juvenile criminal records for minimal cost to the state. Today, the private deployment of information databases allows thousands of records to be transferred in mere seconds. By combining records from courts covering multiple jurisdictions, such companies provide “one-stop shopping” for various clienteles, including businesses and landlords.<sup>42</sup>

The information age has engendered shifts in how records are viewed and used: increasingly, the underlying information contained in a court records is being organized, searched, and mined as *data*.<sup>43</sup> With the emergence of such tools, data-brokers

FIGURE 3: PERCENT OF EXPUNGED RECORDS STILL AVAILABLE, STUDY BY SALT LAKE TRIBUNE



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<sup>41</sup> Gordon, “The Electronic Panopticon.”

<sup>42</sup> Ibid. Exemplary of this trend, Backgroundchecks.com claims “effortless access to over 430 million criminal records.”

<sup>43</sup> For a thorough treatment of the technical features, see Hawley, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information*.

have been able to aggregate and construct a “mosaic” of individual identity.<sup>44</sup> Inasmuch as Washington courts provide quick access to large datasets covering hundreds of thousands of criminal and juvenile records, such portraits are increasingly likely to encompass one’s juvenile indiscretions. By the accounts set forth by industry, such companies provide valuable public functions while lowering transaction costs and alleviating costs that would otherwise be borne by public institutions.<sup>45</sup>

Before data systems became commonly accessible, juvenile records were located and retrieved in physical court archives. In order to view these records, interested parties would employ the services of a “runner.”<sup>46</sup> This was a time-intensive and costly process; as a result, the threshold for deciding to seek such information was fairly high.<sup>47</sup> This led one observer to remark that traditional records have been held in “relative obscurity,”<sup>48</sup> connoting that the mode of access has a direct effect upon the privacy and confidentiality accorded to a given record.<sup>49</sup>

### Protection of Sealed Records

With few federal or state regulations establishing safeguards against the release of sealed records, several questions are directed towards the efficacy of sealing. Such questions generally focus upon the existence of records in the public domain after they have been sealed. While there is no way to precisely calculate how many individuals are impacted by the release of sealed data,<sup>50</sup> several studies suggest that the concern is not merely theoretical. Recently, the National Consumer Law Center discovered that less than 1% of background screening agencies are externally audited to check for compliance with basic standards and legal protections, citing “bulk dissemination” of records as the leading cause of errors.<sup>51</sup>

Many commercial agencies have responded to potential liabilities through overt disclaimers, noting the possibilities of inaccuracies. For example, Intelius.com – a leading provider of such services – warns that “customers should use extreme caution when interpreting the results of a criminal or civil background search...Positive or false matches in criminal or civil searches may not provide confirmation of an individual's criminal or civil background.”<sup>52</sup> In 2011, the *Salt Lake City Tribune* examined the records of thirty individuals who had their records expunged, which is a more protective form of concealment than sealing. They found that five records were still accessible through a major consumer-reporting agency,

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<sup>44</sup> Peltz-Steele, *The Evolving Doctrine of Court Record Access*.

<sup>45</sup> Hawley, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information*.

<sup>46</sup> Ibid.

<sup>47</sup> Jacobs and Crepet, “The Expanding Scope, Use, and Availability of Criminal Records.”

<sup>48</sup> Alternatively, the costs associated with sending someone else to do this work was prohibitive and reserved when it was considered *essential*.

<sup>49</sup> Public policy deliberations have often overlooked such effects. See Love, “Paying Their Debt to Society.”

<sup>50</sup> Wayne, “The Data-Broker Threat.”

<sup>51</sup> Yu, *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses*.

<sup>52</sup> Intelius.com, Intelius Terms and Conditions, <http://www.intelius.com/useragreement.php>

LexisNexis. In response, some states have enacted harsher penalties for the dissemination of sealed records.

### Collateral Consequences Associated with Open Juvenile Records

Open juvenile records may serve as an impediment for youth who seek employment, housing, and education by contributing to the intensification of *collateral consequences*.<sup>53</sup> The application of collateral sanctions appears to be trending upwards, with the effect intensifying over the last few years.<sup>54</sup> As a result, such consequences have been recognized as potentially more significant than the assigned sentence itself.<sup>55</sup> A collateral consequence is a form of punishment that is “located outside the criminal code, implemented by institutions outside the judicial and penal systems proper, and not defined as criminal penalties by courts.”<sup>56</sup> Traditionally, collateral consequences have served various purposes, including prevention, denunciation and retribution.<sup>57</sup> “One practical and symbolic result of burgeoning collateral-sanctions laws is to place many Americans in a condition of severely diminished citizenship, facing enduring legal limitations on their ability to work, vote, serve in the military, own firearms, and engage in other political and social activities.”<sup>58</sup> The following constitutes a brief summary of collateral consequences faced by ex-offenders:

#### Employment

Individuals with a history of contact with the juvenile justice system are often categorically excluded from jobs on the basis of their record.<sup>59</sup> Over 80% of employers ordinarily solicit criminal background information as part of the hiring process.<sup>60</sup> It has been posited that this figure represents an increase, attributable to several recent factors, including depressed economic conditions,<sup>61</sup> as well as the increase in restrictive occupational licensing processes,<sup>62</sup> which jointly create a “handicap” for those who have had contact with the system.<sup>63</sup> This trend has been documented by recent audit studies.<sup>64</sup> In summarizing the

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<sup>53</sup> See Pinard, “Collateral Consequences of Criminal Convictions”; Gowen, Thurau, and Wood, “ABA’s Approach to Juvenile Justice Reform”; Kirk and Sampson, “Juvenile Arrest and Collateral Educational Damage in the Transition to Adulthood”; Hagan and Dinovitzer, “Collateral Consequences of Imprisonment for Children, Communities, and Prisoners”; Brisman, “Double Whammy: Collateral Consequences of Conviction and Imprisonment for Sustainable Communities and the Environment.”

<sup>54</sup> Love, “Paying Their Debt to Society.”

<sup>55</sup> Gowen, Thurau, and Wood, “ABA’s Approach to Juvenile Justice Reform.”

<sup>56</sup> Ewald, “Collateral Consequences in the American States.”

<sup>57</sup> Demleitner, “Preventing Internal Exile.”

<sup>58</sup> Ewald, “Collateral Consequences in the American States.”

<sup>59</sup> Western and Beckett, “How Unregulated Is the US Labor Market? The Penal System as a Labor Market Institution”; Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*.

<sup>60</sup> Pager and Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men*.

<sup>61</sup> O’Neill, “Thinking Outside the Box.”

<sup>62</sup> Cox, “Crime, Incarceration, and Employment in Light of the Great Recession.”

<sup>63</sup> Gowen, Thurau, and Wood, “ABA’s Approach to Juvenile Justice Reform.”

<sup>64</sup> Pager, “The Mark of a Criminal Record.”

findings deriving from this research, Princeton sociologist Devah Pager discovered that “the widespread dissemination of criminal record information produces a public marker of contact with the criminal justice system, and a marker that, in many contexts, does not fade with time.”<sup>65</sup> This trend – of employers discriminating against individuals with criminal records – has been well documented in several studies using various methodologies.<sup>66</sup>

Such collateral consequences are intensified for individuals living in states with strong open-records protections. Exploiting the exogenous shift when various states moved to open public access to criminal and juvenile records, a labor-market economist has demonstrated that a decline in aggregate-level employment outcomes suffers based upon a state’s public dissemination of juvenile and criminal records data.<sup>67</sup>

### Rational Calculations of Risk

In hiring, employers consider applicants’ criminal and juvenile records in order to gain a better understanding of potential risk.<sup>68</sup> Under assumptions of rationality, the risk of recidivism will be weighed in tandem with other factors regarding a potential employee’s candidacy.<sup>69</sup> By this logic, any attempts to restrict access to records could potentially intensify the problem of asymmetric information that hiring managers already face.<sup>70</sup>

However, this perspective is increasingly challenged by evidence suggesting that while employers use the rhetoric of actuarial risk in justifying their decision to exclude “risky” individuals, many actually fail to incorporate actuarial data in their hiring process. Using the lens of econometrics, researchers have examined risk levels and found that differential risk level lingers for an average of 6 to 7 years after an arrest is made. The risk levels for younger men, however, look quite similar to those with no criminal history, and are subject to fewer years to return to average risk levels.<sup>71</sup> Other actuarial models of risk have confirmed that criminal records quickly lose validity in predicting various outcomes of risk, with younger first-time offenders posing a less serious risk than older offenders.<sup>72</sup> Along these lines, research

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<sup>65</sup> Pager, “Evidence-Based Policy for Successful Prisoner Reentry.”

<sup>66</sup> Pager and Western, “Identifying Discrimination at Work.” The use of the audit methodology, has been underutilized by key federal authorities to detect employment discrimination. As a result, such studies have not widely attracted publicity.

<sup>67</sup> Finlay, “Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-Offenders and Non-Offenders.”

<sup>68</sup> Lam and Harcourt, “The Use of Criminal Record in Employment Decisions.”

<sup>69</sup> Nakamura, *Redemption in the Face of Stale Criminal Records Used for Background Checks*.

<sup>70</sup> Funk and Polsby, “The Problem of Lemons and Why We Must Retain Juvenile Crime Records.”

<sup>71</sup> Kurlychek, Brame, and Bushway, “Scarlet Letters and Recidivism.”

<sup>72</sup> Blumstein and Nakamura, “Redemption in the Presence of Widespread Criminal Background Checks.” Nakamura has found that the hazard rates associated with an 18-year old *violent* offender are virtually identical to an 18-year old *non-violent* offender

has shown that the presence of a juvenile record often fails to predict an individual's productivity levels in the workplace.<sup>73</sup>

When attempting to objectively weigh risk associated with a potential employee, employers will often bend upon "irrational" factors, and are prone to exaggerate the risk posed by an individual with a criminal record. Heuristics and mental biases have been shown to play a substantive role in hiring processes.<sup>74</sup> The challenge is magnified by the fact that the delivery mechanism for background check reports is often garbled and sometimes unreadable: convictions are rarely differentiated from arrests, crimes are not universally coded, and information is often misreported. The judgments made based upon this imperfectly presented information are often wrapped in objective criteria, creating an "illusion of validity" where the decision is rationalized upon fair criteria.<sup>75</sup>

Further, it has been shown that hiring officials are as subject to implicit bias as anyone else,<sup>76</sup> and will resort to fears, myths and stereotypes when evaluating employers who are known to have a criminal record.<sup>77</sup> Such biases are often well concealed, yet remarkably resilient.<sup>78</sup> Even when it is possible to justify discrimination on account of the risk posed by a possible employer, exceptions are often granted to members of a favored race or economic class.<sup>79</sup>

## Education

In the United States, a recent survey found that 20% of colleges have policies denying admission based upon the severity of one's juvenile record, and 33% of colleges collect criminal-justice data during the application process.<sup>80</sup> This trend appears to be growing; recently, the Common Application – used by over 400 schools – began asking applicants to disclose prior juvenile adjudications.<sup>81</sup> In Washington State, only one public university – Central Washington University – appears to refrain from collecting this information.<sup>82</sup>

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<sup>73</sup> Roberts et al., "Predicting the Counterproductive Employee in a Child-to-adult Prospective Study."

<sup>74</sup> Reskin, "The Proximate Causes of Employment Discrimination."

<sup>75</sup> Kahneman and Tversky, *Choices, Values, and Frames*; Nier and Gaertner, "The Challenge of Detecting Contemporary Forms of Discrimination."

<sup>76</sup> Hausman, "How Congress Could Reduce Unconscious Job Discrimination by Promoting Anonymous Hiring."

<sup>77</sup> Earp, "Forty-Three and Counting: EEOC's Challenges and Successes and Emerging Trends in the Employment Arena."

<sup>78</sup> Nier and Gaertner, "The Challenge of Detecting Contemporary Forms of Discrimination."

<sup>79</sup> Backman, "Vocabularies of Motive Among Employers Conducting Criminal Background Checks."

<sup>80</sup> Peterkin, "Colleges Grapple With Applicants' Criminal Data, Including Juvenile Records."

<sup>81</sup> Gowen, Thurau, and Wood, "ABA's Approach to Juvenile Justice Reform."

<sup>82</sup> Interview with Kathy Gaer-Carlton. Ms. Gaer-Carlton noted that "if by chance we do receive anything we would send to our CWU Police Department.... in my 17 years at CWU I'm not sure we've ever gotten anything."

### Stigma as a Collateral Consequence

Regardless of the details revealed by a juvenile record, the binary data regarding the record's existence *in and of itself* may create negative value in the public and private marketplace. A court record serves as an overt public display, leading observers to ascribe the record's symbolic value as a "scarlet letter"<sup>83</sup> and "negative curriculum vitae."<sup>84</sup> As originally conceptualized within juvenile justice circles, such stigma were to be proactively mitigated, rather than assigned.<sup>85</sup> This belief was epitomized by the following commentary:

"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 dealing even with most of the delinquent children through the court that represents that *parens patriae* power of the state, the court of the chancery."<sup>86</sup>

Stigma would then encourage the juvenile to adopt a deviant self-image and reduce the likelihood of rehabilitation within the juvenile justice system.<sup>87</sup> Stigma has been found to possess other negative consequences by directly threatening ex-offenders' ability to build rapport with potential employers. As noted by a recent study "applicants with stigmatizing characteristics (such as minority status or a criminal background) may face special barriers to establishing such a rapport, even if possessing otherwise highly appealing characteristics."<sup>88</sup>

In an era of expanded electronic access, this may be particularly troublesome. In an examination of the intersection of stigma, technology, and criminal records, a team of scholars from Carnegie Mellon generated a sobering picture through their examination of how emerging technologies have engaged a new potential "to unleash collective retribution." In what may be an omen for Western states, creative circumventions of state intervention in China have triggered the generation "human flesh search engines," lending towards a form of vigilantism that punishes "wrongdoers" through mass retribution.<sup>89</sup> With the increasingly fungible nature of stigmatizing data in open-records such as Washington, such tools are not inconceivable.

Lastly, the stigmatizing effect experienced by ex-offenders of minority racial status may be intensified, compared with the effect experienced by white ex-offenders. It has been observed that many employers are "predisposed to consciously or subconsciously associate black youth with crime and dangerousness,"

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<sup>83</sup> Murphy et al., "The Electronic 'Scarlet Letter'."

<sup>84</sup> Jacobs and Crepet, "The Expanding Scope, Use, and Availability of Criminal Records."

<sup>85</sup> Gowen, Thurau, and Wood, "ABA's Approach to Juvenile Justice Reform."

<sup>86</sup> Horne, "The Movement to Open Juvenile Courts Realizing the Significance of Public Discourse in First Amendment Analysis."

<sup>87</sup> Butts and Mitchell, *Brick by Brick*.

<sup>88</sup> Pager, Western, and Sugie, "Sequencing Disadvantage."

<sup>89</sup> Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records*.

resulting in pervasive stereotypes regarding their propensity for violence and crime, as well as their unwillingness to work.<sup>90</sup> Elliot Bronstein – a public information officer for the City of Seattle – summarizes the effect directly through his observation that “the effect of the use of widespread criminal record checks in employment has the effect of hanging out a sign that says, ‘African-American and Latino candidates need not apply.’ and that is chilling.” The consequences, he goes on to state, “are beyond huge.”<sup>91</sup>

## Federal and State Regulation

Two federal acts provide sparse regulation regarding the dissemination of criminal and juvenile records: the Fair Credit Reporting Act and Title VII of the Civil Rights Act.<sup>92</sup>

### Fair Credit Reporting Act

The use of criminal history data for varying purposes – including employment and housing – is subject to the federal Fair Credit Reporting Act (FCRA). While non-conviction data can be reported for only seven years, convictions “are reportable for any time period without restriction.”<sup>93</sup> Many private agencies with access to juvenile records consider themselves outside the confines of this regulatory framework. In a national study, it was found that 90% of agencies that provide access to criminal and juvenile records consider themselves exempt from the requirements of the FCRA.<sup>94</sup> These brokers elude the FCRA’s mandate, by claiming that its uses are *not* for purposes that are protected under FCRA – including employment and housing – and are therefore exempt from FCRA’s requirements.<sup>95</sup> As a prime example, Intelius.com – a self-described “people search leader” – states with upfront intention that it “is not a consumer reporting agency as defined in the Fair Credit Reporting Act,” with further mention that the information contained “has not been collected in whole or in part for the purpose of furnishing consumer reports, as defined in the FCRA.”<sup>96</sup>

Recently, the federal agency in charge of enforcing FCRA – the Federal Trade Commission – has claimed success in cracking down on rogue data brokers.<sup>97</sup> One such company, Spokeo, was recently fined \$800,000 for failing to ensure the accuracy of the criminal records data it was providing.<sup>98</sup> In December

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<sup>90</sup> Henning, “Criminalizing Normal Adolescent Behavior in Communities of Color.”

<sup>91</sup> Quoted in O’Neill, “Thinking Outside the Box.”

<sup>92</sup> Jacobs and Crepet, “The Expanding Scope, Use, and Availability of Criminal Records”; Jacobs, “Mass Incarceration and the Proliferation of Criminal Records.”

<sup>93</sup> Geffen and Letze, “Chained to the Past.”

<sup>94</sup> Watstein, “Out of Jail and Out of Luck.” A ‘consumer reporting agency’ is a defined term in the FCRA that is encompasses any individual or company who transmits any information to an employer (or other third party)

<sup>95</sup> Bosch, “FTC Is Investigating ‘Data Brokers.’ How Much Do These Companies Know About You?”

<sup>96</sup> Intelius

<sup>97</sup> Wyatt, “Spokeo Is Penalized by F.T.C. in Sale of Personal Data.”

<sup>98</sup> Federal Trade Commission, “Spokeo to Pay \$800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA.”

2012, the FTC also opened a wider inquiry into companies that fail to disclose the nature of their data collection methods.<sup>99</sup>

### Title VII of the Civil Rights Act

Title VII of the Civil Rights Act prohibits hiring practices that are discriminatory, or create “disparate impact.”<sup>100</sup> As the agency responsible for implementing the Act’s protections, the Equal Employment Opportunity Commission recently re-examined its guidance to employers regarding the use of criminal records under Title VII. Undergirded by its finding that “criminal record exclusions have a disparate impact based on race and national origin,” the EEOC found that “barring candidates based on arrest records can almost never be justified” with several exceptions related to the nature of the crime and the relevance to the position.<sup>101</sup> EEOC further reiterated the difference in how conviction and non-conviction data should be treated.<sup>102</sup> For many observers, the EEOC’s guidance fell short by their abstention from banning any discrimination based upon criminal history.<sup>103</sup>

Even if regulation was clarified, the problems associated with open records are not easily solvable. A study by the National Employment Law Project examined exclusionary statements on job listing websites, and found that over 300 companies violated federal law by banning all criminal record.<sup>104</sup> Routinely, entry level-positions make their qualifications clear with exhortations, such as “No Exceptions!... No Misdemeanors and/or Felonies of any type ever in background.”<sup>105</sup> Some advocates have suggested that EEOC’s next step should be to classify “ex-criminals” as a protected class.<sup>106</sup> In the meantime, some states have responded to the ambiguities at the federal level by providing additional protections against employment discrimination.<sup>107</sup> In New York, for example, legislators passed a bill to criminalize the

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<sup>99</sup> Bosch, “FTC Is Investigating ‘Data Brokers.’ How Much Do These Companies Know About You?”

<sup>100</sup> Watstein, “Out of Jail and Out of Luck.”

<sup>101</sup> Rodriguez and Emsellem, *65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment*. The EEOC has provided the so-called *Green Test* for employers for analyzing the import of the ex-criminal’s history: 1) “the nature and gravity of the offense”; 2) “the time that has passed since the conviction”; and 3) “the nature of the job held or sought.”

<sup>102</sup> *Ibid.*

<sup>103</sup> Greenhouse, “Equal Opportunity Panel Updates Hiring Policy.” During this process, many advocates for the outright repeal of “ban the box.” See O’Neill, “Thinking Outside the Box.”

<sup>104</sup> Rodriguez and Emsellem, *65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment*.

<sup>105</sup> *Ibid.*

<sup>106</sup> Aukerman is quoted in Watstein, “Out of Jail and Out of Luck.” This position has not received universal acceptance amongst criminal justice advocates, however.

<sup>107</sup> Jacobs and Crepet, “The Expanding Scope, Use, and Availability of Criminal Records”; O’Neill, “Thinking Outside the Box”; Brisman, “Double Whammy: Collateral Consequences of Conviction and Imprisonment for Sustainable Communities and the Environment.” Four states ban the use criminal history information during the initial application process.

dissemination of sealed records by placing publication under the same category as prostitution and third-degree sexual abuse.<sup>108</sup>

### ‘Adultification’ of Juvenile Records

Disclosure of juvenile records and case information has varied according to several historical epochs, as shown by several studies of juvenile records confidentiality.<sup>109</sup> Across the nation, state and local agencies originally held juvenile records as confidential and private properties. During the Progressive Era, this perspective was reinforced by the belief that juveniles are subject to a lower standard of criminal responsibility due to the continuing development of moral reasoning. One important aspect of this era came in the recognition that children who came into contact with the system were not “accused” of crime per se; rather, the courts offered assistance and, seeing children in need of guidance.<sup>110</sup> As a result of these widespread attributions of ordinary delinquent behavior, juvenile court prosecutors were given broad discretion to investigate the underlying behavioral factors in order to apply a proper balance of sanctions and rehabilitative services.<sup>111</sup>

The tides began to shift in the 1970s, when state legislatures responded to public fears with various attempts to prove their toughness on crime. Commitments to rehabilitative notions of differential treatment slowly gave way under this auspice.<sup>112</sup> In 1982, a national report concluded that the public’s faith in the potential for rehabilitating juvenile offenders had “eroded,” providing the basis to revamp a decade old social contract upholding juvenile record confidentiality.<sup>113</sup> As an effect of shifting philosophical beliefs on the nature of the juvenile justice system, policies for processing and maintain adult and juvenile records policies have increasingly converged.<sup>114</sup> The wider development undergirding this trend has been labeled “adultification.”<sup>115</sup> Before the 1970s, juvenile justice interventions were targeted at the *depth of an offender’s trouble*; with this trend, intervention – often oriented more around

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<sup>108</sup> Papagianis, *More States Attempting to Seal Criminal Records*.

<sup>109</sup> Joint Legislative Task Force on Juvenile Record Sealing, “Patterns of Juvenile Record Confidentiality in the United States”; Kogon and Loughery, “Sealing and Expungement of Criminal Records. The Big Lie”; Bureau of Justice Statistics, *Privacy and Juvenile Justice Records: A Mid-Decade Status Report*; Butts and Mitchell, *Brick by Brick*; Mears, “Sentencing Guidelines and the Transformation of Juvenile Justice in the 21st Century.”

<sup>110</sup> Harden, “Rethinking the Shame.”

<sup>111</sup> Butts and Mitchell, *Brick by Brick*.

<sup>112</sup> Bureau of Justice Statistics, *Privacy and Juvenile Justice Records: A Mid-Decade Status Report*.

<sup>113</sup> *Ibid.*

<sup>114</sup> Butts and Mitchell, *Brick by Brick*. McGowan et al., “Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review.”

<sup>115</sup> While a majority of the focus lies on the pejorative shifts, one contravening perspective is offered by the Urban Institute’s Daniel P. Mears, who offers evidence as to the countervailing trends of “prevention, early intervention, rehabilitation, and the use of specialized courts,” trends that began in the early 21<sup>st</sup> century. See Mears, “Sentencing Guidelines and the Transformation of Juvenile Justice in the 21st Century.”

punishment – was explicitly aimed at the *gravity of the offense*.<sup>116</sup> In many ways, Washington’s system appears to reflect this essential logic.<sup>117</sup>

In a contravening trend, policymakers have increasingly sought to understand the connection between biological and behavioral accounts of adolescence and the imperatives of a rehabilitative juvenile justice system.<sup>118</sup> Reflecting original conceptions set forth many years ago, youth are now increasingly recognized as more susceptible to negative influence and outside pressure, and have a harder time weighing the long-term consequences of their decisions.<sup>119</sup> Further, juveniles are less likely to respond to the deterrent effect of collateral consequences.<sup>120</sup> In line with these posits, researchers have confirmed that there are significant differences in the cognitive development of adolescents that affect their ability to make sound judgments.<sup>121</sup> Youth crime and delinquency is now increasingly viewed as a pattern of normal adolescent development.<sup>122</sup> Recidivism data appears to lend credence to this perspective of limited delinquency. About 3 in 4 kids who come into contact with the juvenile justice system will experience one or two arrests, and never see the system again.<sup>123</sup> Evidence also suggests that delinquency experiences a linear decline as juvenile youth grow older, and rarely serves as a statistical indicator of a lifelong pattern of crime.<sup>124</sup>

### Juvenile Privacy v. Public Access

Washington’s treatment of juvenile records is said to derive from the state’s constitutional provisions related to open government.<sup>125</sup> At the same time, public access to court records has never been defined as an absolute right, and is traditionally balanced with the Constitution’s privacy provision.<sup>126</sup> The fight over juvenile records confidentiality represents the crosshairs of this battle, between two sides whose contrasting social objectives do not appear reconcilable.<sup>127</sup> Several questions lead this discussion: at what

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<sup>116</sup> Butts and Mitchell, *Brick by Brick*.

<sup>117</sup> For example, Washington’s juvenile system increasingly relies standardized sentencing guidelines. See Task Force on Race and Criminal Justice System 2012; Gowen, Thurau, and Wood, “ABA’s Approach to Juvenile Justice Reform”; Butts and Mitchell, *Brick by Brick*.

<sup>118</sup> For a further overview of developmental perspectives on juvenile justice, see Grisso and Schwartz, *Youth on Trial*.

<sup>119</sup> Henning, “Criminalizing Normal Adolescent Behavior in Communities of Color.”

<sup>120</sup> Harden, “Rethinking the Shame.”

<sup>121</sup> Ziedenberg, *Models for Change: Building Momentum For Juvenile Justice Reform*; Westman, *Breaking the Adolescent Parent Cycle*.

<sup>122</sup> Soung, “Social and Biological Constructions of Youth.” This has been further confirmed by National Institute of Health psychiatrists, for example, who write that brain research “confirms a long-held, common sense view: teenagers are not the same as adults in a variety of key areas such as the ability to make sound judgments when confronted by complex situations, the capacity to control impulses, and the ability to plan effectively” Also see Weinberger, Elveg, and Giedd, *The Adolescent Brain: A Work in Progress*.

<sup>123</sup> Dowd, *Justice for Kids*.

<sup>124</sup> Blumstein and Nakamura, “Redemption in the Presence of Widespread Criminal Background Checks.”

<sup>125</sup> Washington State Constitution, Art. 1

<sup>126</sup> Alfasso, “The Judicial Information System (JIS) and Juvenile Offense Records.”

<sup>127</sup> Wilson and Petersilia, *Crime and Public Policy*.

point do privacy rights enter into the conversation? Who are the members of the *public* that are entitled to juvenile records? And how does case law shed light upon these important questions. In general, two opposing sides of the debate are broadly distinguished:

### Constitutional Imperative and Functional Role of Open-Records

One viewpoint is distinguished by the fervor with which it maintains the public's right to illuminate and request access to proceedings, records, and other documentation pertaining to the work of government agencies. For this group, the idea of balancing several competing social objectives obfuscates the role that records play in resolving public disputes about law and justice. In Washington State, this perspective is rationalized through reference to the state constitution, which mandates that justice should be conducted openly.<sup>128</sup> When access is delimited, "society loses the value of those decisions," causing policies and institutions to stagnate.<sup>129</sup> A further claim along these lines concerns the role of open records in advancing public dialogue, allowing us to closely examine "that thread of values, perspectives, and experiences that helps define who we are."<sup>130</sup>

Uniting these various rationales is the belief that sealing off juvenile records is seen as a threat to the core democratic function provided by citizen oversight.<sup>131</sup> By this logic, hearings and processes held in secret actually disrupt the power balance in favor of powerful – and potentially tyrannical – government bodies. Public proceedings assure impartiality and help bolster confidence in public institutions. From a theoretical standpoint, individuals holding this position chagrin recent state-level policy developments that focus on providing juveniles with greater access to sealing and expungement, by warning that such information belongs to the public domain, and may actually possess harmful effects for non-offenders.<sup>132</sup> At the same time, others in this camp generally recognize the rationale for providing some level of relief for ex-offenders.<sup>133</sup>

### Balance Privacy and Openness

A second position is distinguished by its more subtle approach in juggling competing social objectives pertaining to public safety, rehabilitation and privacy. In a nutshell, such a position recognizes the dueling

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<sup>128</sup> Washington State Constitution, Art. 1, Sect. 10

<sup>129</sup> Horne, "The Movement to Open Juvenile Courts Realizing the Significance of Public Discourse in First Amendment Analysis." Mr. Horne is a former state Superior Court judge in Minnesota who draws connections between open records and oversight.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> Funk and Polsby, "The Problem of Lemons and Why We Must Retain Juvenile Crime Records." Funk and Polsby drawn an explicit parallel between the effects of sealing as that of actively creating asymmetric information, tantamount to Dr. George Akerlof's famed "market for lemons" posit.

<sup>133</sup> Byrne, "Access to Online Local Government Public Records"; Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records*.

claims of public access and privacy, and seeks to mediate with a focus upon rehabilitation and public costs.<sup>134</sup> The following argument encapsulates a line of reasoning focused upon balance:

“What makes the protection of ex-offenders’ rights different from other ‘negative’ rights is the perceived conflict with another ‘negative’ right, the right of the public at large to feel safe and secure. Promoting the right of ex-offenders to employment may also infringe upon the employer’s right to use his or her property at will. Therefore, the issue involves balancing the potentially competing rights of various groups.”<sup>135</sup>

The underlying perspective is that open juvenile records represent a grave threat – both materially and symbolically – and shows disregard for the developmental stages that define adolescence. For many who ascribe to this perspective, government tyranny does not loom when juvenile records are not public; a greater concern related to government is the erosion of civil liberties. This is seen as a contrary interest of public safety, and may underestimate the societal costs associated with the subordination of civil liberties.<sup>136</sup>

Beyond the constitutional argument, a pragmatic rationale tends to thread together various ideological perspectives: open juvenile records are seen to harm communities by inflaming recidivism patterns. With a lack of opportunities due to the stigma of their record, juveniles are seen as having no other choice than to resort to crime.<sup>137</sup> By having their record available to any potential employer, landlord, or future educator, it is believed that rehabilitated youth in Washington State are situated at a disadvantage, compared with their counterparts in the 42 states that hold records confidentially. Reflecting this position, state legal codes are increasingly bent to recognize the right to privacy. A recent change to the Ohio Revised Code, for example, recognizes the precedent of sealing juvenile records over maintaining the public’s right to access for all but the most violent of cases.<sup>138</sup> This position is further affirmed by Washington’s juvenile justice purpose clause, which reflects philosophies of balance and restorative justice.<sup>139</sup>

### Racial Bias and Disproportionate Minority Contact

Lastly, a review of the literature suggests that youth of color experience sharp disparities in treatment when they come into contact with the juvenile justice system. As a result, communities of color continue to disproportionately suffer from collateral consequences.<sup>140</sup> This can be observed through the lens of disproportionate minority contact (DMC), a trend composed of several distinctive indicators and factors,

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<sup>134</sup> Byrne, “Access to Online Local Government Public Records.”

<sup>135</sup> Lam and Harcourt, “The Use of Criminal Record in Employment Decisions.”

<sup>136</sup> Glaser, “Intergroup Bias and Inequity.”

<sup>137</sup> Leung, “Delinquency, Social Institutions, and Capital Accumulation.”

<sup>138</sup> Bergeron and Eberwine, “One Step in the Right Direction.”

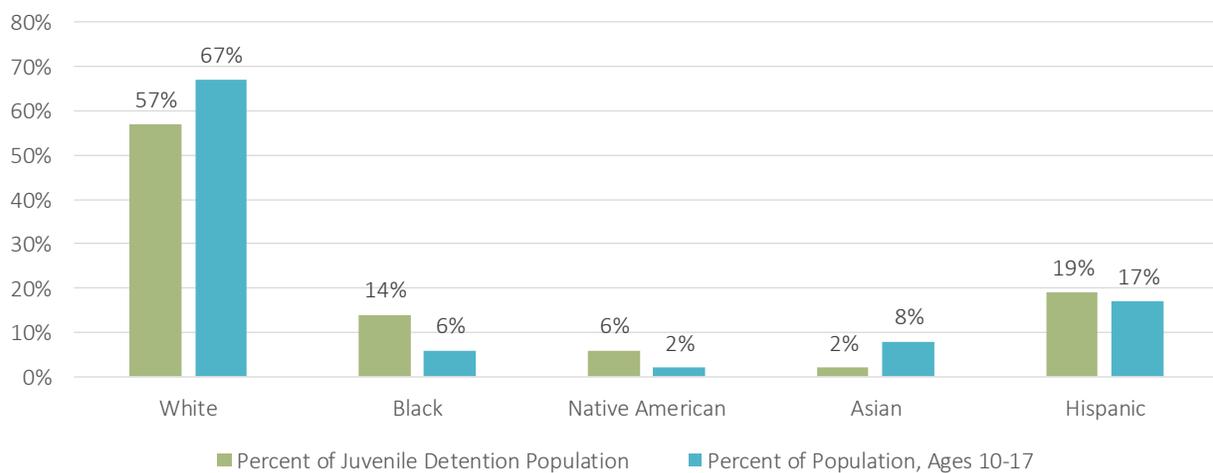
<sup>139</sup> National Center for Juvenile Justice, *Washington: Purpose Clause*.

<sup>140</sup> Legal Action Center, *After Prison: Roadblocks to Reentry*.

operating at different levels within the juvenile justice system.<sup>141</sup> As a result, DMC has been deemed “multi-determined and multi-expressed.”<sup>142</sup>

Today, DMC continues to impact the juvenile justice system at the national and state levels. A recent meta-analysis of studies conducted from 1989 through 2011 discovered that approximately two-thirds of the research reported that youth, primarily African Americans and Native Americans, received more severe outcomes relative to White youth.<sup>143</sup> In Washington State, specific studies of DMC have uncovered evidence suggesting that Native American and Black youth, in particular, are over-represented by several indicators of contact within the juvenile justice system, including arrests, court offense referrals and detentions.<sup>144</sup> According to the Washington State Partnership Council on Juvenile Justice, approximately 41% of juveniles held in detention facilities statewide were minority youth, and 56% of Juvenile Rehabilitation Administration population.<sup>145</sup> By contrast, the overall minority youth population was approximately 33% in 2010. Using a comparative index, a 2013 report also found that between 2007 and 2009, cases involving African American youth were referred to juvenile courts at rates 2.5 times that of cases involving white youth, with diversions occurring at significantly lower proportions. During the same timeframe, Native Americans experienced similar treatment, with referrals at rates 2.2 – 2.4 times higher than cases with white youth. Figure 5 depicts the most recent data regarding offense referrals by race and ethnicity, compared with their share of Washington’s overall youth population.

FIGURE 4: 2010 JUVENILE OFFENSE REFERRALS IN WASHINGTON STATE, BY RACE AND ETHNICITY<sup>146</sup>



<sup>141</sup> Pullmann et al., *Washington State Disproportionate Minority Contact Assessment*.

<sup>142</sup> Ibid.

<sup>143</sup> Pope, Lovell, and Hsia, *Disproportionate Minority Confinement: A Review of the Research Literature from 1989 through 2001*.

<sup>144</sup> Department of Health and Human Services, *2011 Juvenile Justice Annual Report*.

<sup>145</sup> Washington State Partnership Council on Juvenile Justice, *Legislative Impact Statement, Bill HB 1651*.

<sup>146</sup> Department of Health and Human Services, *2011 Juvenile Justice Annual Report*.

Several studies have provided corroborating evidence for the claim that black job applicants experience greater impediments due to their criminal history than white peers with a similar criminal history.<sup>147</sup> Additional evidence suggests that juveniles of color are *less* likely to be recognized for developmental immaturity, with racial stereotypes negatively affecting employer judgments regarding “adolescent culpability, maturity, risk of recidivism, and deserved punishment.”<sup>148</sup>

Even after isolating the impact of stigma, individuals of color with a criminal history are more likely to experience discrimination on the basis of their criminal record when compared with white individuals with a criminal history.<sup>149</sup> In one audit study, whites with criminal records actually received more favorable treatment (17%) than blacks *without* criminal records (14%).<sup>150</sup> This suggestion – that black applicants are hit harder with the presence of a criminal record than white applicants – is further corroborated by recent research by Pager and Western (2012), which found that black applicants received consideration for low-wage jobs at a rate of approximately one-half of white applicants.<sup>151</sup> This suggests that white young adults are more likely to have the resources at their disposal to elude the collateral consequences associated with a criminal record.

### Perspectives of Juvenile Justice Professionals

Lastly, the perspectives of those who are most acquainted with the juvenile justice system can be examined through the results of a survey conducted between 2005 and 2007, entitled the National Survey of Juvenile Justice Professionals. The survey queried 534 juvenile court judges, chief probation officers, prosecutors, and public defenders in 44 states and the District of Columbia with over 200 questions encompassing a variety of juvenile justice issues.<sup>152</sup> In the survey, participants were asked to respond to six distinctive statements regarding the association of reduced confidentiality to six desired outcomes, including recidivism, efficiency and fulfillment of the justice system’s mission.

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<sup>147</sup> Pinard, “Collateral Consequences of Criminal Convictions”; Geffen and Letze, “Chained to the Past.”

<sup>148</sup> Soung, “Social and Biological Constructions of Youth.”

<sup>149</sup> Bertrand and Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal?*.

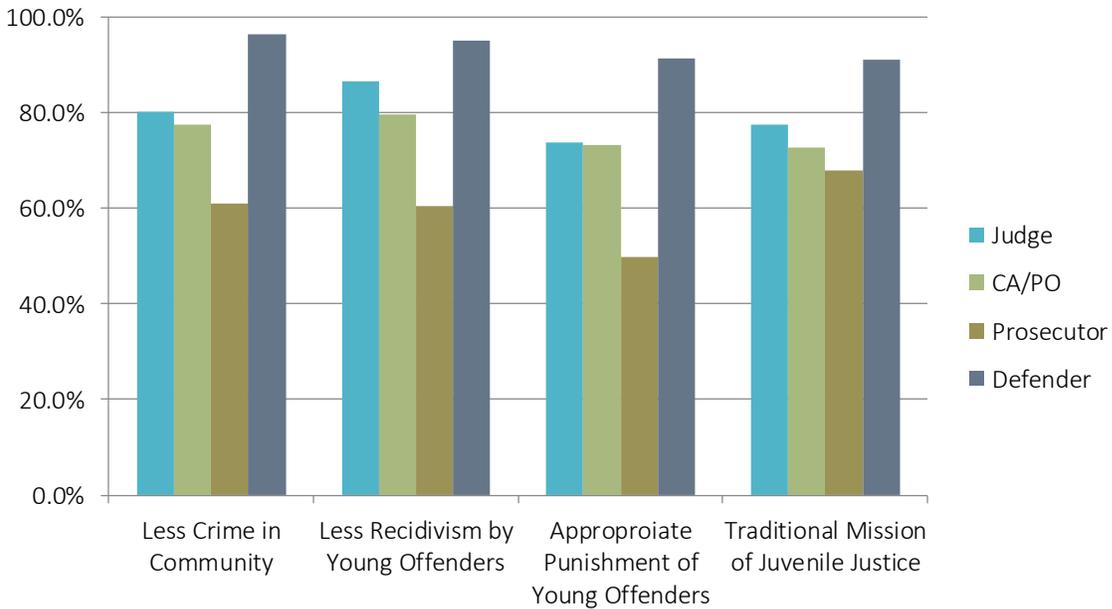
<sup>150</sup> Pager, “The Mark of a Criminal Record.”

<sup>151</sup> Pager and Western, “Identifying Discrimination at Work.”

<sup>152</sup> Willison et al., “National Survey of Juvenile Justice Professionals, 2005-2007.”

As shown in Figure 5, for all six of the survey’s questions that focused upon juvenile records confidentiality, over 60% of the professionals *disagreed* or *strongly disagreed* with the notion that reduced confidentiality engenders favorable juvenile justice outcomes. In response to the statement “Reduced confidentiality of juvenile court records and proceedings promotes the traditional mission of juvenile justice,” for example, over 3 in 4 professionals stated “strongly disagree” or “disagree.”

FIGURE 5: PERCENT WHO DISAGREE OR STRONGLY DISAGREE THAT REDUCED CONFIDENTIALITY LEADS TO SELECTED OUTCOME<sup>153</sup>



<sup>153</sup> Data set is available through the National Archive of Criminal Justice Data at <http://www.icpsr.umich.edu/icpsrweb/NACJD/ssvd/studies/26381/variables?q=records>

## Analysis of Sealed Records

Results are presented from a data analysis of concatenated, statewide dataset containing the sealed status of 234,237 juvenile offender records, obtained from Washington State’s Administrative Office of the Courts. This is the first known study that applies quantitative methods to a dataset of original juvenile records to produce a statistical measure of sealing uptake. The evidence produced in this study allows policymakers in Washington State to peer behind the curtain of juvenile records, and understand how well the only mechanism that is being used to mitigate collateral consequences is working.

Another important and central intent of this analysis is to discern how race and economic status may serve as potential features. The disproportionate burden faced by youth of color in the juvenile justice system has been well documented.<sup>154</sup> Through logistic regression analysis, this paper attempts to isolate race as a causal factor to determine whether youth of color face disproportionate access barriers in sealing their record, isolated from the effect of confounding variables.

As depicted in the literature review, many studies ascribe the problems associated with possessing a juvenile record in an “open-records” state such as Washington.<sup>155</sup> However, such studies often rely upon assumptions regarding the uptake of measures that are intended to “regain” one’s confidentiality, such as sealing. A separate stream literature has developed in response to “disproportionate minority contact”. Studies and research in this field have adopted sophisticated statistical methods to better understand how various points of a juvenile’s contact with the justice system may belie systemic patterns of differential treatment by race and ethnicity. These patterns are often measured by the Relative Rate Index, a tool that allows policymakers to quickly observe racial disparities within the system.<sup>156</sup> But lacking within *this* realm is a commensurate understanding of how sealing – or the lack thereof – intensifies or mitigates DMC.

### Methods

The dataset obtained from the Administrative Office of the Courts (AOC) includes several indicators pertaining to juvenile offender records for individuals who came into contact with a Washington State juvenile court system between January 1, 2005 and December 31, 2008.<sup>157</sup> Several hypotheses were drawn and tested. With no prior empirical research on the topic of juvenile records-sealing, factors were

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<sup>154</sup> Alexander, *The New Jim Crow*.

<sup>155</sup> Several recent studies focused specifically on issues involving confidentiality of juvenile records include Gough, “Expungement of Adjudication Records of Juvenile and Adult Offenders”; Stiegelmeier et al., *An Exploration of Juvenile Records Maintenance Across America: A Way Forward for the Commonwealth*.

<sup>156</sup> See, for example, Washington State Center for Court Research’s methodological framework and breakdown of the Relative Rate Index at <http://www.courts.wa.gov/wscrr/?fa=ccr.datameans>.

<sup>157</sup> The dataset encompasses charges for all years as of the date of the request, not just charges incurred between 2005 and 2008.

selected based upon a review of recent academic literature on juvenile records, known problems associated with disproportionate minority contact in Washington State, and the availability of data. With the collection of individual record data, analysis is possible according to disaggregated variables, including geographic locale, race, gender and severity of crime.

The following constitute the key variables that were available for each of the 234,237 juvenile records contained in the dataset:

- **Type of offense**, including the citation number under the Revised Code of Washington and description.
- **Indicator of sealed status**, noted by a dichotomous variable.
- **Demographic information**, including current mailing ZIP code, race, gender, and ethnicity.

### Phase 1: Primary Data Collection

The dataset was obtained in May 2013 via public records request with the Administrative Office of the Courts. This request was filed pursuant to the Office's Data Dissemination Policy clause, which allows the dissemination of sealed records data for academic and research purposes.<sup>158</sup> All provided data, including sealed status of records, was verified by the AOC as current as of the date on which it was sent.

Data were organized and sorted for visual inspection using Microsoft Excel 2013. Several data integrity analysis checks were conducted to confirm the integrity of the data source. Based upon this analysis, several records were removed from the dataset.<sup>159</sup> Subsequently, data were translated into a format readable for SPSS 20.0 and Tableau 8.0, software tools that were respectively used for data analysis and data visualization.

### Phase 2: Establish Inclusion Criteria

One important methodological task is to adduce eligibility to seal a set of records at an individual level. Multiple variables affect one's eligibility to seal. The foremost disqualifier lies in the time that has passed after the adjudication has been filed. As shown in Table 1, individuals with Class A felonies must wait five years before petitioning the court, while individuals with less severe charges (Class B, C, or D felonies, or misdemeanors) must wait two years.

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<sup>158</sup> Administrative Office of the Courts, "Data Dissemination Policy."

<sup>159</sup> Excluded records did not contain consistent patterns with respect to the variables of interest.

TABLE 1: ELIGIBILITY FOR SEALING, IMPLIED BY DATE OF LAST ADJUDICATION

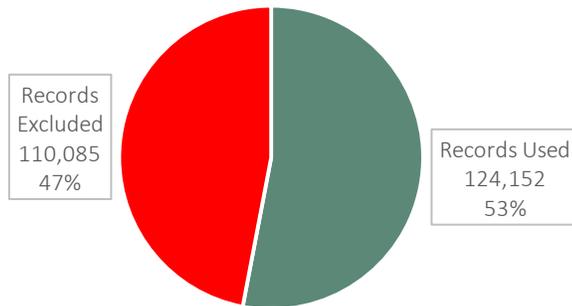
CHARGE	WAITING PERIOD	IMPLIED ELIGIBILITY <sup>160</sup>
CLASS A FELONY	5 years	2007 or before
CLASS B, C OR D FELONY; MISDEMEANOR	2 years	2010 or before

Several means were considered for incorporating the waiting period into the analysis. One solution considered was to construct an eligibility code for each of the cases, based upon the identified charge. This would allow the researcher to calculate an “implied eligibility” date for each record, based upon the severity of the crime. This proved infeasible, however, due to the over 600 RCW codes listed in the dataset.

Alternatively, it is feasible to apply a filter to exclude all cases corresponding with individuals who accrued at least one Juvenile Offender record after 2007.<sup>161</sup> By associating the charge listed under each record, the analysis accounts for the severity of the crime, which constitutes the most important indicator of eligibility. 124,152 Juvenile Offender records matched the following criteria:<sup>162</sup>

- **Estimated time eligibility.** All juvenile adjudication charges for individual were filed in 2007 or before.
- **Seriousness of offense.** Offender charge was not classified as a sex offense, murder or manslaughter.<sup>163</sup>

FIGURE 6: ANALYSIS OF DATASET, BY PERCENTAGE OF RECORDS INCLUDED/EXCLUDED



<sup>160</sup> This estimate is based upon the individual’s most recent episode of contact with the court.

<sup>161</sup> TeamChild, *Sealing Juvenile Records in Washington State*.

<sup>162</sup> Records that are associated with cases referred to adult courts are not included in the sample. Per the *2011 Juvenile Justice Annual Report*, 177 juvenile cases (less than 0.5%) were transferred to adult courts in 2010. Records accrued in the adult courts are ineligible to be sealed under the juvenile records sealing statute.

<sup>163</sup> In July 2011, most juvenile sex offenders became eligible to petition the court to have their records sealed. To err on the side of conservative analysis, *all* juvenile records have been excluded from this sample.

### Phase 3: Understand and Respond to Data Limitations

Analysis may be confounded by several limitations, with most deriving from the filtering mechanisms used to adduce eligibility. In particular, two unknown variables may bias the results by influencing an ex-offender's eligibility. First, the dataset did not include information that would allow the researcher to adduce whether they had adult offender charges.<sup>164</sup> Second, the data do not include information regarding any restitution the ex-offender may owe. Responding to these possible confounders, a conservative estimator was used to adduce the particular criterion pertaining to the number of years since the adjudication was filed. By excluding records associated with *all* individuals (not just those who committed class A felonies) who received a juvenile adjudication after 2007, the sample statistics may actually overestimate sealing amongst the overall population, by increasing the average number of years since the adjudication was filed.<sup>165</sup>

### Phase 4: Conduct Statistical Analyses

General sample characteristics and sealing rates are calculated and provided in descriptive tables. These data were disaggregated by variables of interest, including race, record type, total count of juvenile cases, and the numbers of years since the last adjudication.

Logistic regression is used to identify relationships between various indicator variables and a dichotomous outcome variable. Here, the likelihood of having one's record sealed is examined according to demographic and record-type characteristics. In order to identify the most salient factors contributing to sealing rates, a logistic regression was conducted. Records were aggregated by individual, using a de-identified "person number" provided by the Administrative Office of the Courts. Subsequently, a dichotomous variable was created, noting the following:

- 0 = no – or some – juvenile cases files are sealed
- 1 = all juvenile cases file are sealed

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<sup>164</sup> To conjure an estimate of the likelihood of a juvenile offender recidivating as an adult – hence extending their waiting period for sealing their juvenile record – one can reference a brief study conducted in 1996 by the Washington State Institute for Public Policy. It found that 91% of juveniles with non-violent misdemeanors (constituting the largest share of juvenile offender charges, both in 1996 and in today's context) had *no* felony convictions by the age of 25

<sup>165</sup> The logistic regression model also accounts for the time-factor of sealing by including a measure for the number of years from the year that the juvenile accrued a record with a Washington court.

Coefficients and odds ratios are estimated for multiple variables, including the following:

- **Race and gender.** Listed as dummy variables, where each individual record is coded based upon the most frequent classification received.
- **Record type.** Multiple dummy variables, based upon the nature of the crime using a typology that closely tracks categories identified in the RCW.<sup>166</sup>
- **Count of juvenile cases.** Treated as continuous variable, counting the number of juvenile cases incurred as of May, 2013.
- **Years since last adjudication.** Continuous variable, tracking the number of years since the last adjudication was filed.

## Findings

### Descriptive Analysis

28,922 individuals are estimated to be eligible to seal their juvenile records under Washington statutes.<sup>167</sup> Amongst these individuals, only 8.5% have sealed at least one of their juvenile records. Even fewer have had all their records sealed (7.5%). Sealing rates – disaggregated by gender, race, ethnicity, number of total cases, type of charge, and year of last adjudication – are listed in Table 2, along with demographic characteristics.

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<sup>166</sup> Individuals can be classified as having multiple record types; for example, it is plausible that an individual who received a charge for possession of marijuana also had court contact for a matter of public disturbance.

<sup>167</sup> Within this group of individuals, it is estimated that 124,152 juvenile records are eligible for sealing. See Appendix 2 for further record-level characteristics

TABLE 2: SAMPLE CHARACTERISTICS AND SEALING RATES, INDIVIDUALS ELIGIBLE TO SEAL JUVENILE RECORD

	SEALING	SAMPLE	
	% Cases Sealed	Number	Percent
<b>TOTALS</b>	7.5%	28,922	100%
<b>GENDER</b>			
MALE	8.0%	20,389	29.3%
FEMALE	7.0%	8,470	70.5%
UNKNOWN	6.3%	63	0.2%
<b>RACE</b>			
AMERICAN OR ALASKAN NATIVE	2.0%	1,096	3.8%
ASIAN OR PACIFIC ISLANDER	9.7%	1,009	3.5%
BLACK	5.8%	3,351	11.6%
UNKNOWN	5.7%	2,835	9.8%
WHITE	7.9%	20,361	71.3%
<b>ETHNICITY</b>			
HISPANIC	4.1%	3,352	11.6%
NON-HISPANIC	8.4%	25,570	88.4%
<b>NUMBER OF TOTAL CHARGES</b>			
1	8.0%	9,491	32.8%
2	10.0%	5,599	19.4%
3	7.6%	3,260	11.3%
4	7.4%	2,301	8.0%
5	6.6%	1,566	5.4%
6	6.6%	1,331	4.6%
>6	3.3%	5,674	18.6%
<b>TYPE OF CHARGE</b> <sup>168</sup>			
ALCOHOL	4.3%	9,670	33.4%
ASSAULT	6.5%	9,612	33.2%
BURGLARY	6.5%	6,915	23.9%
FRAUD	8.0%	399	1.4%
NON-CHARGE	3.7%	6,020	20.8%
PUBLIC DISTURBANCE	4.6%	1,021	3.5%
VEHICLE-RELATED	4.4%	1,913	6.6%
THEFT	6.2%	12,886	44.6%
<b>LAST JUVENILE CHARGE</b>			
2005	6.8%	9,780	33.8%
2006	7.1%	9,457	32.7%
2007	8.0%	9,685	33.5%

<sup>168</sup> This category is not mutually exclusive; an individual could have been listed for multiple types of charges (within one case or spanning multiple cases)

## Logistic Regression

As shown in Table 4, several variables serve as statistically significant predictors of having all records sealed at an individual level. As expected, individuals with further years removed from their last adjudication were more likely to seal all their records. Additionally, individuals with more records were predicted to seal at a higher rate. Amongst types of charges, those who had received a drug or alcohol charge were considered the least likely to seal, followed by individuals with vehicular-related offenses and public disturbance penalties. Individuals with fraud charges were the most likely to seal, followed by burglary/trespass penalties. Interestingly, individuals with non-conviction charges were significantly less likely to seal their record.

Even after controlling for these variables, however, being a male and a racial minority are negative predictors of having all juvenile records sealed. In particular, Native Americans, Blacks, and Latinos were less likely to have their records sealed, compared with Female and White individuals.<sup>169</sup>

TABLE 3: LOGISTIC REGRESSION ANALYSIS: PREDICTORS OF HAVING ALL JUVENILE RECORDS SEALED

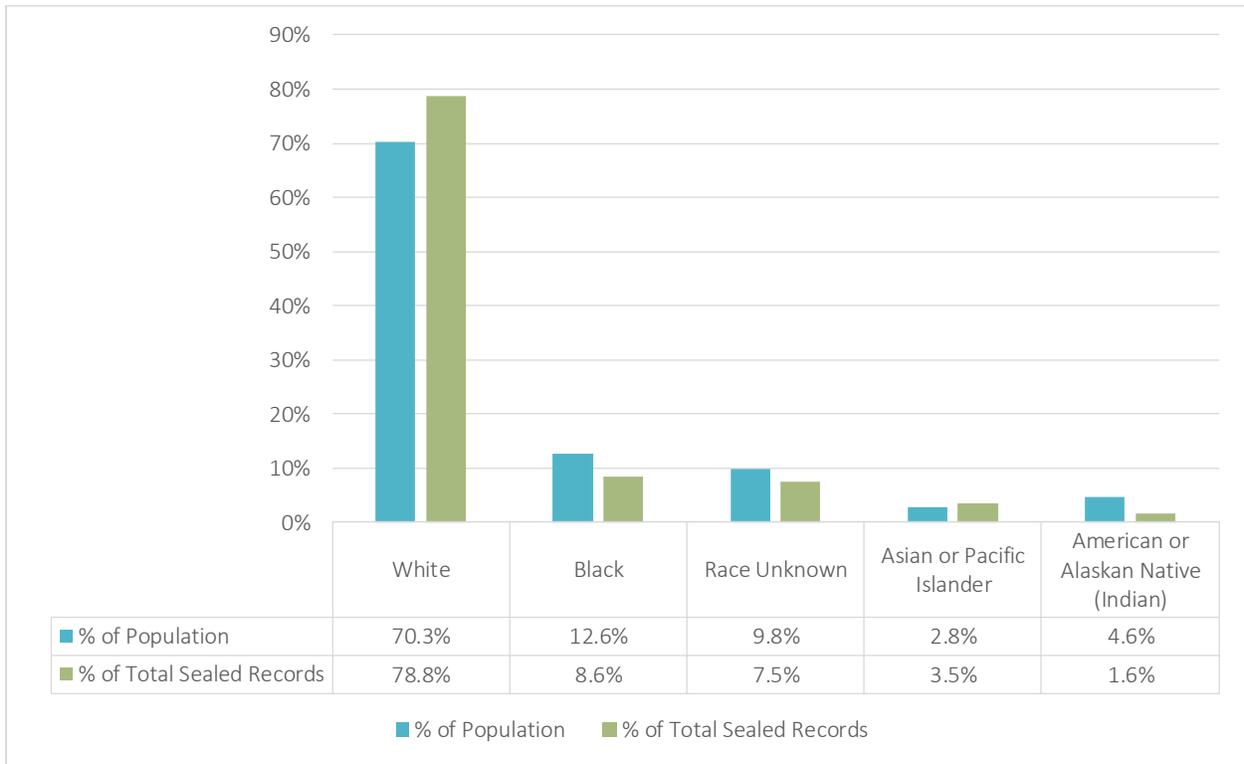
	B	S.E.	WALD	DF	SIG.	EXP(B)
<b>CONSTANT</b>	-1.246	0.200	38.773	1	0.000	0.288
<b>RACE/GENDER</b>						
WHITE			73.460	4	0.000	
NATIVE AMERICAN	-1.339	0.218	37.780	1	0.000	0.262
ASIAN	0.121	0.111	1.202	1	0.273	1.129
BLACK	-0.355	0.079	20.097	1	0.000	0.701
RACE UNKNOWN	-0.375	0.086	19.202	1	0.000	0.687
MALE	-0.115	0.050	5.199	1	0.023	0.891
<b>RECORD SPECIFICS</b>						
NUMBER OF TOTAL CASES	-0.033	0.009	13.191	1	0.000	0.967
YEARS FROM LAST CHARGE	-0.076	0.028	7.684	1	0.006	0.926
NON-CONVICTION	-0.798	0.075	113.715	1	0.000	0.450
<b>CHARGE TYPES</b>						
ALCOHOL OR DRUG	-0.718	0.061	140.496	1	0.000	0.488
ASSAULT	-0.142	0.056	6.379	1	0.012	0.867
BURGLARY/TRESPASS	0.043	0.062	0.486	1	0.486	1.044
FRAUD	0.087	0.190	0.212	1	0.645	1.091
PUBLIC DISTURBANCE	-0.224	0.155	2.108	1	0.147	0.799
VEHICULAR-RELATED OFFENSE	-0.276	0.118	5.497	1	0.019	0.759
THEFT/ROBBERY	-0.254	0.052	23.486	1	0.000	0.776

<sup>169</sup> For all three racial categories,  $p < .001$

### A Closer Look: Disparity in Sealing Rates by Race and Ethnicity

Disaggregated by known racial categories, Native Americans had the lowest sealing rates (2.0%), followed by African-Americans (5.8%), Whites (7.9%), and Asian/Pacific Islanders (9.7%). Table 5 illustrates the composition of eligible records, compared with the composition of sealed records. While white individuals represent 70.3% of the population of eligible records, they represent 78.8% of sealed records. By contrast, black individuals hold 12.6% of eligible records, yet only possess 8.6% of sealed records. An even larger gap appears for American Native individuals: they comprise 4.6% of eligible records, yet only 1.6% of sealed records.

TABLE 4: ELIGIBLE AND SEALED RECORDS AS PERCENT OF ALL RECORDS, BY RACE



Another way to understand the racial disparities is to look at sealing rates by race *within* charge categories. By disaggregating by charge type, a key confounding variable of crime severity is essentially controlled. As can be seen in Table 6, for the ten most popular crimes committed, 8.0% of records associated with an Asian individual were sealed, 6.7% of records associated with a White youth were sealed, 4.0% of records associated with Black individuals were sealed, and 1.6% of American Native youth were sealed.

TABLE 5: PERCENT OF ELIGIBLE RECORDS SEALED, MOST FREQUENT CHARGES, BY RACE

Charge	Asian/ Pacific Islander	White	Black	American or Alaskan Native (Indian)	Total
Theft-3	6.0%	5.5%	3.7%	2.1%	5.0%
Assault 4th Degree	7.9%	7.2%	4.5%	1.7%	6.5%
Minor Possession/Consume Liquor	7.1%	4.8%	1.5%	0.7%	4.4%
Malicious Mischief-3	8.8%	6.6%	2.7%	0.6%	6.0%
Residential Burglary	10.9%	8.8%	4.2%	2.3%	8.0%
Marijuana Possession <40 Grams	6.5%	6.2%	2.6%	1.1%	5.6%
Harassment	7.7%	8.7%	4.6%	2.4%	7.8%
Assault-4	7.5%	6.7%	6.9%	3.7%	6.6%
Burglary 2nd Degree	5.9%	8.1%	4.0%	0.8%	7.3%
Take Vehicle W/O Permission-2	10.9%	8.7%	3.2%	0.0%	7.6%
Total	8.0%	6.7%	4.0%	1.6%	6.1%

One can also view this trend by analyzing the types of cases that are most and least likely to be sealed. Amongst the five least frequently sealed cases, 46.2% of records were tied to individuals of color. By contrast, 36.5% of all eligible records are linked to individuals of color.

TABLE 6: LEAST FREQUENTLY SEALED CASES, >50 SEALABLE RECORDS

Charge	Number of Records	Percent of Records Sealed	Percent of Records Associated with Youth of Color
Malicious Mischief-3 Graffiti	326	1.2%	40.7%
Protection Order Violation	93	1.1%	55.5%
Escape 2nd Degree	327	0.9%	59.8%
Purch/Poss/Obtn Tobacco By Minor	162	0.6%	52.7%
Obstruct Law Enforce Officer Pen	174	0.6%	20.4%
Total	1,082	0.9%	46.2%

Likewise, individuals of color were *under-represented* amongst cases that were most likely to be sealed. Amongst the five most frequently sealed cases, only 29.9% of records were tied to individuals of color.

TABLE 7: MOST FREQUENTLY SEALED CASES, >50 SEALABLE RECORDS

Charge	Number of Records	Percent of Records Sealed	Percent of Records Associated with Youth of Color
Explosive Lic Required	57	38.6%	8.8%
Identity Theft-2	103	33.3%	21.7%
Bomb Threat-Intent To Alarm	147	24.1%	28.5%
Tampering With A Witness	59	22.0%	47.5%
Assault-3 Bodily Harm	257	20.6%	35.0%
Total	623	25.3%	29.9%

## Interviews

In order to understand levels of awareness amongst individuals who are eligible to seal their record, interviews were conducted with multiple stakeholders closely connected to the sealing process, including individuals who had sealed their record through a sealing clinic. A secondary purpose of the interviews was to investigate and gain insight into how young adults navigate the sealing process. Lastly, interviews provide a mechanism to account for the details encountered by individuals with the sealing process itself, as well as some of the obstacles and opportunities encountered by adults after their record had been sealed.

### Methods

Semi-structured interviews provide illumination of complex and sensitive issues, while empowering those most affected by relevant policy and process to speak in their own words.<sup>170</sup> In this case, interviews also serves as important means for generating hypotheses to guide data analysis.<sup>171</sup> Interview participants – all of whom were above the age of eighteen – were fully informed regarding the elective nature and risks of participating in this research. Several times, it was reiterated that participation was entirely voluntary, and that participation would have no effect upon the status of their juvenile records. The semi-structured interviews lasted approximately .75 – 1.5 hours, and focused on three distinct themes:<sup>172</sup>

- **Eligibility:** how did the individual become aware of the option to seal their record?
- **Process:** what was the length, impediments, and satisfaction with the service provided?
- **Policy:** what is the individual’s perception of Washington State’s handling of juvenile records?

In order to provide further context on important issues related to the sealing process, interviews were also conducted with a wide variety of stakeholders, including advocates, media interests, judges, clerks, and members of the State Legislature. This provides “triangulating” evidence that enhances the credibility and trustworthiness of the research study.<sup>173</sup> In sum, 11 interviews were conducted, yielding approximately 40 pages of field notes, consisting of interview data and analysis. Generalizing the data drawn from interviews is a challenge, with consideration of the heterogeneity of the population and limited sample size. With consideration of the small number of interviews, results were analyzed using informal content analysis.

In line with Institutional Review Board protocols at the University of Washington, several precautions were maintained in order to maintain the confidentiality of informants. First, interviews were *not* recorded, providing additional safeguard against the dissemination of confidential conversations. Second,

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<sup>170</sup> Saldaña, “Fundamentals of Qualitative Research.”

<sup>171</sup> Elliott, *Using Narrative in Social Research*.

<sup>172</sup> The interview guide is available in the Appendix \_

<sup>173</sup> Saldaña, “Fundamentals of Qualitative Research.”

information that could be used to personally identify informants was not explicitly collected or noted. Descriptive information collected only focused upon observable characteristics, including race, gender, and ethnicity.

### Sampling and Access

Sampling was driven by a convenience approach, which recognizes the time-constraints and limitations of access. The researcher gained access to several former clients of the King County Sealing Clinic, where they had undergone the sealing process with assistance from clinic staff. Over 60 individuals were contacted and presented with a brief description of the research by sealing clinic staff. Upon receiving their verbal consent to participate, contact information was relayed to the researcher. In total, three former sealing clinic clients agreed to share their experience with the sealing process. Interviews were conducted in various public and private meeting locations, based upon the preference of the informant.

### Limitations

The interview sample is delimited to individuals who have undertaken the sealing process. As such, the data cannot be said to represent all juvenile ex-offenders in Washington State; rather, it only reflects the experience of clinic participants who completed the sealing process with assistance.

Another limitations pertains to geographic limitations. All ex-offender interview participants had records in King County. While this delimits the generalizability of the findings, such perspectives are still useful inasmuch as they provide access to individuals' encounter with the sealing process, a subject of primary concern in this paper.

### Findings

Awareness of sealing rights, the process, and the necessity of sealing one's record to ensure confidentiality is extremely low, a reality that is seen as the largest impediment towards greater sealing uptake. In interviews, no individual I spoke with was made aware of their right to seal, nor were alerted to the collateral consequences associated with not doing so, while they were in contact with the juvenile justice system

Interviews also revealed that the process of sealing one's record is arduous, and varies greatly by county. As earlier noted, Washington juvenile courts have differential rules and processing norms. The lack of a standardized process statewide engenders confusion and frustration, especially for individuals with records in multiple jurisdictions. Free legal clinics are available in several parts of the state including Seattle and Spokane. However, the extremely limited capacity is not able to accommodate the number of youth that are eligible to seal.<sup>174</sup> Further, over half of eligible individuals had records outside of the locales where sealing clinics exist, which poses a limitation because the clinics often possess expertise

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<sup>174</sup> For example, the King County Legal Sealing Clinic is available for three hours per month.

limited to the local juvenile court located within their jurisdiction. Therefore, for individuals with records in multiple counties, the sealing clinic may be unable to provide one-on-one assistance.

Some juveniles not only lacked information notifying them of the collateral consequences of their record, but rather were actively *misinformed* by court staff that their record would be held in confidence. One middle-aged woman was told that her minor indiscretion that she had committed her teens in the 1980s, one employee of the juvenile court shared that her record would not be publicly divulged if she did not recidivate. After staying clean for over 20 years, she encountered a rude awakening when she went to apply for a job opening over 20 years later when the employer notified her that she was ineligible for a position due to the juvenile record. The consequence was potentially inflamed by her having marked “no” in response to the question regarding her record. According to advocates closely familiar with the process, stories of misinformation amongst juveniles are quite common.

Lastly, despite the promise of enhanced confidentiality through traditional channels of public access, individuals who went through the process revealed their fears that their record was still accessible after it had been sealed. In response to repeated stories of such fears coming true, sealing clinic volunteers now actively divulge to clients that sealing only protects the information disseminated through public channels.

## Fiscal Analysis

In this section, long-term state and local costs of maintaining and restricting access to juvenile records through sealing are estimated. In order to understand the fiscal effects of various options to ensure the confidentiality of juvenile records, several recent proposals are analyzed from a cost framework. Including the current policy, three alternatives were considered and analyzed for costs over 20 years.

1. **Maintain current system.** Retain general public access to all juvenile records and provide sealing on a self-elected basis.
2. **Make all juvenile records confidential.** Restrict public access to all juvenile offender records. This would require substantive modification of various data systems facilitated by AOC.<sup>175</sup>
3. **Make only non-conviction records confidential.** Restrict public access to non-conviction records, while providing individuals with convictions the opportunity to seal their record under the current statute.

### Methods

Using the search function on Washington State Legislature’s website, a list of bills with substantive focus upon “juvenile records” was solicited, dating back to the 2003-04 biennium. Fiscal notes were written in response to 12 proposed bills (including bills that were substantively amended). Appendix 4 provides a detailed chart of these findings.

State fiscal notes that have been posted in response to legislatively proposed juvenile-records bills were reviewed.<sup>176</sup> The purpose of this review is to understand the estimated short-term costs of implementation, as well as provide a set of consistent assumptions for the independent fiscal analysis. In response to proposed legislation, legislative fiscal notes provide a broad overview of the short-term costs associated with expanding sealing eligibility and/or setting confidentiality as the default. Such reviews are focused upon the direct fiscal costs experienced by the agency in charge of implementing the law as defined. Written by the agencies that would be implementing any potential changes in the laws, these estimates have rarely been subjected to outside critique.

As written, the fiscal notes fail to illuminate the current cost structure of maintaining and concealing access to juvenile records. One can adduce and estimate these costs, however, by matching and expanding several key assumptions from recent AOC fiscal notes regarding the total number of juvenile records sealed per year, the time it takes to seal a record, and the costs per FTE assigned with the task of sealing records. Estimates of the current costs entailed with sealing records are undergirded by the following assumptions:

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<sup>175</sup> HB 1651, as originally proposed in Washington’s House in 2013, is exemplary of this proposal. Note that this would likely still restrict access to certain classes of records.

<sup>176</sup> This timeframe encompassed 6 total biennium from 2001, and includes the regular legislative session of 2013.

- **2,000:** annual number of records sealed. This estimate is based upon a 2010 fiscal note written by the AOC.<sup>177</sup>
- **30 minutes:** Time required to seal each record imposed at the state and local levels. This is a conservative estimate; a recent fiscal note estimated that it would take one hour to process records in the past, with the aside that *this* was a conservative estimate.<sup>178</sup>
- **1,672:** annual number of juvenile records sealed per FTE. This figure is adduced from a fiscal note written for SB 1793, which estimated that 5.98 additional FTEs would be required to seal 10,000 additional records (these were projected as the incremental costs of sealing all juvenile diversion records).
- **\$60,562:** annual pay and benefits per FTE. This figure is adduced from a 2010 fiscal note<sup>179</sup> for SB 6561, which estimates FTE costs for clerk and county staff.<sup>180</sup>

## Findings

Based upon analysis of three distinct proposals to provide confidentiality of juvenile records in Washington State, it is estimated that creating a system to restrict public access to juvenile records represents the most cost-effective solution. Concealing juvenile records through targeted investments in JIS’ data architecture would yield significant savings over a 20-year timespan. As shown in Table 8, the total cost-savings of this proposal is \$692,000 over a 20-year time span. The savings are largely attributable to the savings deriving from the laborious practice of sealing records, which has been variously estimated as encompassing 30 minutes – 3 hours per record. The full results are available in Appendix 5.

TABLE 8: COST ANALYSIS, POLICY OPTIONS TO ENSURE CONFIDENTIALITY OF JUVENILE RECORDS<sup>181</sup>

PROPOSAL	DISCOUNTED COSTS, 20 YEARS
Keep All Records Confidential	\$518,400
Current Policy	\$1,161,312
Seal Non-Conviction Records	\$2,039,856

By contrast, a second alternative proposal to automatically restrict non-conviction records – while still providing sealing rights under current statutes – would bear additional incremental costs. This is attributable to the fact that 2,000 additional records would need to be processed by clerks, requiring additional estimated expenditures of \$71,023 annually.

<sup>177</sup> Footnote HB 1793. A further conservative estimate that sealing rates *do not increase* from 2010. With expansion of sealing eligibility, it is likely that additional costs would be imposed.

<sup>178</sup> Track this note.

<sup>179</sup> Footnote 6561 S SB

<sup>180</sup> This figure *is not adjusted* for inflation, and hence may represent an underestimation.

<sup>181</sup> Assumes 5% discount rate; 2% cost-of-living adjustments for salaried clerks

## Discussion

This report illuminates the effects associated with sealing one’s record, the costs associated with maintaining open juvenile records while providing an option to seal, and the overall uptake of sealing. Based upon these analyses, several themes become apparent:

### More than 90% of Juvenile Ex-Offenders Still Have Open Juvenile Records

About 9 in 10 individuals who are eligible to seal their set of records still have juvenile records open to public disclosure. The data analysis provides strong evidence that sealing is underutilized as a mechanism to protect the confidentiality. In this way, the results of the data analysis highly resonate with claims regarding low sealing rates that have been based on anecdotal evidence.

One problem encountered with the current system involves the incentives experienced by juvenile courts. Courts rely upon sealing a small percentage of eligible records annually.<sup>182</sup> Without having the appropriated resources necessary to seal all eligible records – together with the failure of fiscal notes to account for the costs of expanding sealing eligibility<sup>183</sup> – juvenile courts have no incentive to expand sealing, and may decide to erect additional barriers to restrict access. This is represented by the high amount of counties that erect additional barriers, detailed earlier in the overview sections.

With few prior research studies focused specifically on the rate of sealing for juvenile records, the results from the data analysis are, however, hard to further contextualize. For example, one may consider the question: what is a reasonable rate of sealing? At what point does the balance between confidentiality and public safety become satisfied? And can sealing rates alone adduce this? While attempts are made to answer these questions, the lack of policy guidance at a federal or state level constitutes a challenge in legitimating the responses.

### Sealing Rates by Race and Income are Highly Disproportionate

By revealing statistically significant findings on several key indicators of race and sealing take-up, the analysis strongly suggests that youth of color – especially Native Americans, Latinos, and Blacks – may experience further barriers in accessing just and fair juvenile justice outcomes. Records sealing, hence, may not serve to mitigate well-established patterns of racial disparity in experiencing collateral consequences, and instead, may actually serve to intensify disproportionate patterns.

Low sealing uptake by individuals of color may serve as an additional indicator of disproportionate minority contact. As shown in Table 9, almost every decision-making point in the juvenile justice system is fraught with such disparate treatment. Such figures are traditionally adduced by comparing outcomes between white individual and individuals of varying minority classes at a host of “contact points” resulting

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<sup>182</sup> Currently, the AOC estimates that 2,000 records are sealed on an annual basis.

<sup>183</sup> All fiscal notes that failed to quantify the cost involved with expanding sealing eligibility.

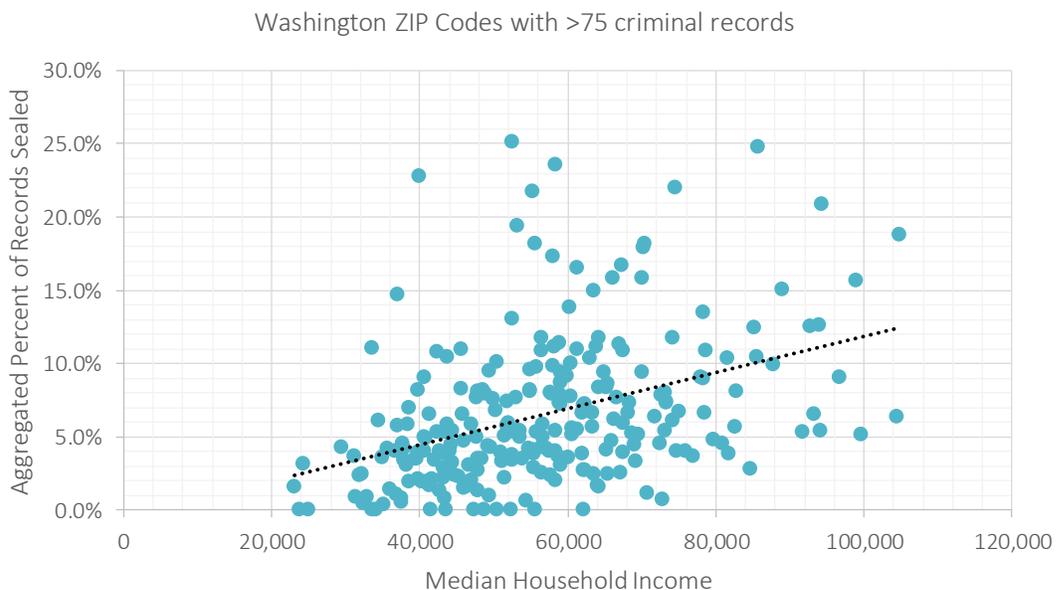
in an indicator labeled the “Relative Rate Index.”<sup>184</sup> These data have shown established patterns of disparate treatment; when treated within this context, the disproportionate sealing of records may be seen as further evidence demonstrating the problem of disproportionate minority contact.

TABLE 9: DISPROPORTIONATE MINORITY CONTACT (DMC) INCREMENTAL RELATIVE RATE INDEX, BY DECISION POINT<sup>185</sup>

	Black	Hispanic	Asian/Pacific Islander	Native American
<i>Juvenile Arrests</i>	1.83	-	0.32	1.03
<i>Referrals to Juvenile Court</i>	2.46	1.09	0.45	1.81
<i>Cases Filed</i>	1.29	1.19	0.98	1.31
<i>Cases Adjudicated</i>	1.01	1.00	0.99	0.92
<i>JRA Dispositions</i>	1.50	0.94	1.14	0.89
<i>Transfer to Adult Court</i>	3.42	2.86	2.44	1.93
<b><i>Records Sealed</i></b>	<b>1.35</b>	<b>1.92</b>	<b>0.81</b>	<b>3.94</b>

The results of the logistic regression failed to produce strong evidence regarding the claim that individuals residing in low-income areas were less likely to seal their record. However, as evidenced in Figure 7, a moderate positive correlation is found between the median household income for a given locale and the aggregated percent of records sealed for youth who reside within the given locale.

FIGURE 7: SEALING UPTAKE BY MEDIAN HOUSEHOLD INCOME<sup>186</sup>



<sup>184</sup> The Washington State Center for Court Research has conducted much of this research.

<sup>185</sup> Author analysis of sample data supplemented with Puzanchera et al, *Washington DMC Databook: 2005-2012*.

## Limited Awareness of Open Records Policy and Sealing Rights

While advocates use creative media and well-designed information materials various attempts to raise the salience of open juvenile records, many ex-offenders are still unaware that their court file is in the public domain. Public agencies representing Washington’s juvenile system system— including juvenile courts – are not required to share information regarding rights and the sealing process. Low levels of awareness may therefore attributable to the timing of the message: juveniles are least likely to receive information regarding public records and sealing rights during the time that their record is most visibly salient.

Several states are increasingly recognizing the importance of raising awareness through official channels, rather than relying solely upon the limited resources of advocacy organizations. In a bill proposed by Assembly Member Mariko Yamada during California’s 2013 legislative session, courts and probation departments would be required to notify persons regarding their eligibility – as well as the procedures – for sealing their juvenile record. In essence, the bill shifts agency for ensuring that *all* records have been sealed away from the individual and unto the state.<sup>187</sup> The bill passed the General Assembly unanimously, and was pending action by the State Senate as of June 2013.<sup>188</sup>

Information, however, may not always lead to the desired outcome of increased sealing. Recognizing the lack of opportunities and channels, one researcher finds that “access to the information does little, if anything, to provide youth with the facts critical to expunging and sealing records.”<sup>189</sup>

## Confidentiality Outcomes of Sealing May Be Limited

In light of evidence suggesting that sealed data are frequently available through private channels, the positive effect of sealing may be overestimated.<sup>190</sup> Inasmuch as sealed records can still be accessed by employers, marking *no* on the job application may have unintended collateral consequences beyond marking *yes*, and choosing to explain and rationalize their youthful indiscretions. As noted by Dr. Richard Freeman, “the flow of cheap information about past criminal behavior is not a genie that can readily be put back in Aladdin’s lamp.”<sup>191</sup>

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<sup>186</sup> Note: each data point represents a Washington ZIP code locale with over 75 juvenile offender records.

<sup>187</sup> Specifically, AB-1006 reads: “The court shall send a copy of the order to each agency...directing the agency to seal its records and stating the date thereafter to destroy the sealed records.” By contrast, Washington requires individuals to notify every agency that maintains control of the juvenile’s record.

<sup>188</sup> <http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml;jsessionid=622bba20a68a35ac9198cb6b0e9f>

<sup>189</sup> Gowen, Thureau, and Wood, “ABA’s Approach to Juvenile Justice Reform.”

<sup>190</sup> Love, “Paying Their Debt to Society”; For a thorough treatise regarding the logic of sealing, see Bernard Kogon & Donald L. Loughery, “Sealing and Expungement of Criminal Records, see Kogon and Loughery, “Sealing and Expungement of Criminal Records. The Big Lie.”

<sup>191</sup> Freeman, “Incarceration, Background Checks, And Employment In A Lower Crime Society.”

The frequent availability of sealed data therefore creates a set of perverse incentives for the individual who has sealed their record. The only way to be completely sure is to contact every licensee that had received access to their record. This process arduously involves the submission of several documents, including court dispositions. Some data brokers will require that an individual present a screenshot of the data they are contesting, which in effect forces ex-offenders to buy reports of their own records in order to discover whether they are protected.<sup>192</sup>

Lastly, the effects of sealing may be further delimited as a result of the information that is still available through public access channels. As set forth in a JIS-LINK Customer Manual, searches for a sealed case will still return multiple data, including “litigant name, case number, and cause of action/charge.”<sup>193</sup> Juvenile records may also continue to be accessed by agencies that are deemed to have a special interest in knowing an individual’s offender history. The various problems associated with the sealing process have led some to consider the dependency on “antiquated and unreliable relief mechanisms” to constitute a powerless response to the challenges presented by the lack of strong regulations.<sup>194</sup>

### Fiscal Costs of Current System and Alternatives

In a review of prior legislative proposals – as well as the fiscal notes written in response – several themes are apparent regarding the costs borne by government agencies in Washington. First, the costs of the status quo – as well as any implemented alternative – are borne by several agents. The state’s Administrative Office of the Courts bear initial costs, mostly attributable to the capital expenses required to adjust records-keeping systems (primarily through the Judicial Information System). Juvenile courts – which currently bear much of the administrative costs pertaining to sealing – may experience an uptick or decrease in sealing requests, depending on the specified alternative. Less frequently mentioned in prior discussions are the multiple legal-services and advocacy organizations that have provide free and low-cost sealing services to low-income individuals with juvenile records. By expanding access to sealing, such providers bear substantive costs that are unseen by fiscal analyses focused upon the explicit costs to local and state governments.

Second, the costs of automatically sealing all eligible records - retroactively and in the future – are quite high. In a 2011 fiscal note written in response to a proposal that would provide automatic sealing for A, B, C, gross misdemeanor and misdemeanor offenses and diversions,<sup>195</sup> the upfront costs for automatically

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<sup>192</sup> Wayne, “The Data-Broker Threat.”

<sup>193</sup> [www.courts.wa.gov/JisLink/manual/JIS-Link%20Customer%20Manual.pdf](http://www.courts.wa.gov/JisLink/manual/JIS-Link%20Customer%20Manual.pdf)

<sup>194</sup> Kogon and Loughery, “Sealing and Expungement of Criminal Records. The Big Lie”; Love, “Paying Their Debt to Society.”

<sup>195</sup> Washington State Legislature, HB 1793 (2011)

sealing juvenile case files were estimated at \$975,996, with an additional \$355,114 on an annual basis.<sup>196</sup> Closing juvenile non-conviction data is a similar proposal that would also require laborious manual sealing, with costs estimated at approximately \$1.5 million. As noted in a fiscal note analyzing a proposed amendment of HB 1651, this would require 5.4 full-time employees over a span of over 56 consecutive weeks to implement the automatic sealing of non-conviction data.<sup>197</sup> Further, it is claimed that restricting access to non-conviction data would entail costly modifications to the Judicial Information System.

Compared with “automatic sealing,” instituting a wholesale change in the confidentiality of juvenile records from the point of incurrance represents a cost-effective alternative. JIS modifications would likely be required, but by eradicating the incremental costs involved with sealing individual records, such a system would also bear cost-savings that are likely to build over time.

Lastly, there is a failure to account for potential non-fiscal costs associated with sealing reform. While the task of quantifying the effect of open records and restricted sealing mechanisms is hard,<sup>198</sup> several states have begun to question the social costs associated with open records. The open availability of records may threaten the instrumental goal of rehabilitation and re-entry by intensifying stigma<sup>199</sup> and creating a new class of exiles.<sup>200</sup> These costs may impact both the individual, as well as society.<sup>201</sup> Calling on the law to “find a way to be forgiving,” emerging understandings of the costs and benefits of formalized processing upend the equation that has traditionally driven cost-benefit analyses of juvenile justice programs, and may contribute insight to the state’s processing of juvenile records.<sup>202</sup>

### Failure to Regulate and Audit Data Licensees

As one of only three states that sells records data and information on juvenile offenders en masse, the state has every incentive to approach the controversial issue with caution by placing strict regulations on the usage of juvenile records data. The AOC, however, fails to adequately protect through regulation, audit, and enforcement mechanisms. In essence, a *principal-agent* problem is created, where licensees

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<sup>196</sup> Joint Legislative Task Force on Juvenile Record Sealing, “Patterns of Juvenile Record Confidentiality in the United States.” 87,420 unsealed cases would have become retroactively eligible for automatic sealing. It was also estimated that 20,000 records per year would become eligible for automatic sealing.

<sup>197</sup> Office of Financial Management, State of Washington, “Fiscal Notes, 1651 HB”

<sup>198</sup> Interview with Michael Curtis.

<sup>199</sup> Gowen, Thureau, and Wood, “ABA’s Approach to Juvenile Justice Reform.”

<sup>200</sup> Love, “Paying Their Debt to Society.”

<sup>201</sup> Nagin et al., “Public Preferences for Rehabilitation Versus Incarceration of Juvenile Offenders.”

<sup>202</sup> Love, “Paying Their Debt to Society.” “Unless we as a society are comfortable living with a growing class of ‘internal exiles’ who have no way to pay their debt to society and return to its good graces, with its attendant public safety risks and moral dilemmas, we should be looking for a more effective way of giving convicted individuals a fair chance to become fully integrated and productive members of society.”

are required to purchase data updates, yet there is no way to enforce or provide supervision that such actions are being conducted.<sup>203</sup>

This problem is partially derivative from the glaring loopholes contained within the state's contracts with licensees. Without any requirements to immediately update their records, licensees have few incentives to extract and expunge sealed records from their databases. Per contract, licensees may also exchange the data with other companies, provided that the exchange target also holds a license with the state. Further, the AOC employs few enforcement and audit mechanisms to ensure that records are properly maintained and kept current, thus allowing updates to ultimately be carried out at the discretion of private data-brokers. Since data are only updated on a quarterly basis, it is conceivable that a sealed record is available, even *providing that everyone follows the rules*. The critical assumptions to be examined are the frequency with which private consumer reporting agencies abide by the terms of the contract, as well as how the information is processed upon receipt. Without any state audit or enforcement mechanisms for the release of sealed data, the state leaves it to the goodwill of data companies to protect the interests of Washington's youth.

### Limitations of Anti-Discrimination Laws and Proposals

Several open-government advocates have proposed state-level anti-discrimination protections for individuals with a juvenile court record, as an alternative to enhancing the confidentiality of records.<sup>204</sup> If indeed current employment discrimination law is "stuck in the law-and-economics stone age" as claimed by some observers<sup>205</sup>, adding additional statutes may help clarify employer responsibilities when making judgments of ex-offenders. In theory, the system could work employers are required to notify applicants if they seek background check information through a consumer reporting agency, presenting applicants with an opportunity to rebut if the decision is based upon false information.

State-level anti-discrimination protection is unlikely to change due to well-established information problems. In order for anti-discrimination law to work, logic dictates that individuals need to *know when* they have been discriminated. As noted by Pager and Western, it is nearly impossible to identify hiring discrimination because applicants do not have sufficient information to judge the legitimacy of the decision-making process, nor do they often possess the required means to contest the results.<sup>206</sup> Further, employers often choose to circumvent the traditional safeguards set forth by FCRA by conducting

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<sup>203</sup> Wayne, "The Data-Broker Threat."

<sup>204</sup> Interview with Toby Nixon

<sup>205</sup> Moss and Huang, *How the New Economics Can Improve Discrimination Law, and How Economics Can Survive the Demise of the "Rational Actor."*

<sup>206</sup> Pager and Western, "Identifying Discrimination at Work." The statistics would appear to complete this picture: the authors suggest that "claims today are far more likely to emphasize wrongful termination or on-the-job discrimination than to target instances of discrimination at the point of hire."

independent investigations.<sup>207</sup> Individuals may therefore not know if their record is still accessible, who they should be contacting to correct the errant information, and how ultimately to regain their reputation.

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<sup>207</sup> ACLU of Washington, *Guide to Criminal Records and Employment*.

## Recommendation: Make Juvenile Records Confidential

Washington's juvenile records policy keeps the sealing process obscure, poses multiple unrealized costs, and fails to ensure rehabilitative outcomes for Washington's youth. Without an effective system to ensure the confidentiality of records after youth have paid their dues, Washington ex-offenders encounter unjustifiable obstacles when trying to go to school, get a job, and obtain housing. Several policy recommendations are provided:

- 1) The Washington State Legislature is encouraged to pass a bill that would restrict public access to juvenile records in the past, present and future. Keeping juvenile court information confidential is the only cost-effective solution to ensure that youth do not encounter undue obstacles, as well as ensure that Washington youth with indiscretions in their history would experience similar opportunities as youth in 42 other states with similar laws.
- 2) The Administrative Office of the Courts should immediately halt sales of juvenile court files, including through JIS-Link. Without proper oversight, selling access to juvenile records en masse is a recipe for disaster, as evidenced by countless stories of leaked records. In lieu of legislation restricting public access, the AOC would continue to follow relevant statutes by providing access to records through the database on its public website.
- 3) The Washington State Institute for Public Policy should conduct a full analysis regarding the fiscal and non-fiscal benefits and costs of sealing. While many studies have provided solid evidence regarding the multiple costs of having records open, these costs have rarely been quantified. Such a study would provide important evidence regarding the hidden costs of juvenile records.

# Appendices

## Appendix 1: Additional Data, National Survey of Juvenile Justice Professionals

SELECTED EXCERPTS FROM THE NATIONAL SURVEY OF JUVENILE JUSTICE PROFESSIONALS, 2005-2007<sup>208</sup>

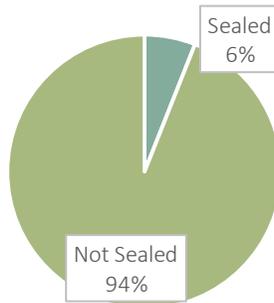
“Reduced Confidentiality of Juvenile Court Records and Proceedings Promotes...”	Response	Current Professional Position				Total
		Judge	CA/PO	Prosecutor	Defender	
Less Crime In The Community	Strongly disagree	17.9%	19.2%	15.8%	63.3%	25.1%
	Disagree	62.3%	58.3%	45.2%	32.9%	51.0%
	Agree	14.2%	19.2%	23.3%	3.8%	16.8%
	Strongly agree	5.7%	3.3%	15.8%	0.0%	7.1%
Less Recidivism By Young Offenders	Strongly disagree	21.4%	18.5%	16.8%	63.3%	25.9%
	Disagree	65.0%	60.9%	43.6%	31.6%	51.7%
	Agree	8.7%	17.9%	26.8%	5.1%	16.6%
	Strongly agree	4.9%	2.6%	12.8%	0.0%	5.8%
Appropriate Punishment Of Young Offenders	Strongly disagree	20.9%	20.1%	15.9%	67.1%	26.6%
	Disagree	52.7%	53.0%	33.8%	24.1%	42.3%
	Agree	20.9%	22.8%	35.1%	7.6%	23.7%
	Strongly agree	5.5%	4.0%	15.2%	1.3%	7.4%
Fair Treatment Of Young Offenders	Strongly disagree	24.3%	20.3%	17.3%	71.4%	28.3%
	Disagree	43.9%	46.4%	29.3%	24.7%	37.2%
	Agree	25.2%	28.8%	38.7%	3.9%	27.1%
	Strongly agree	6.5%	4.6%	14.7%	0.0%	7.4%
Efficiency Of The Justice Process	Strongly disagree	20.8%	14.6%	15.9%	61.3%	23.7%
	Disagree	49.5%	44.4%	29.0%	25.3%	37.7%
	Agree	23.8%	32.5%	36.6%	10.7%	28.4%
	Strongly agree	5.9%	8.6%	18.6%	2.7%	10.2%
Traditional Mission Of Juvenile Justice	Strongly disagree	27.4%	28.6%	25.0%	72.7%	34.4%
	Disagree	50.0%	44.2%	42.9%	18.2%	40.9%
	Agree	17.9%	23.4%	24.3%	9.1%	20.1%
	Strongly agree	4.7%	3.9%	7.9%	0.0%	4.6%

<sup>208</sup> Official citation: Willison, Janeen Buck, Christy Visher, Daniel P. Mears, and Jeffrey A. Butts. National Survey of Juvenile Justice Professionals, 2005-2007 [United States]. ICPSR26381-v1. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 2013-03-21. doi:10.3886/ICPSR26381.v1

## Appendix 2: Additional Data, Sealing by Records

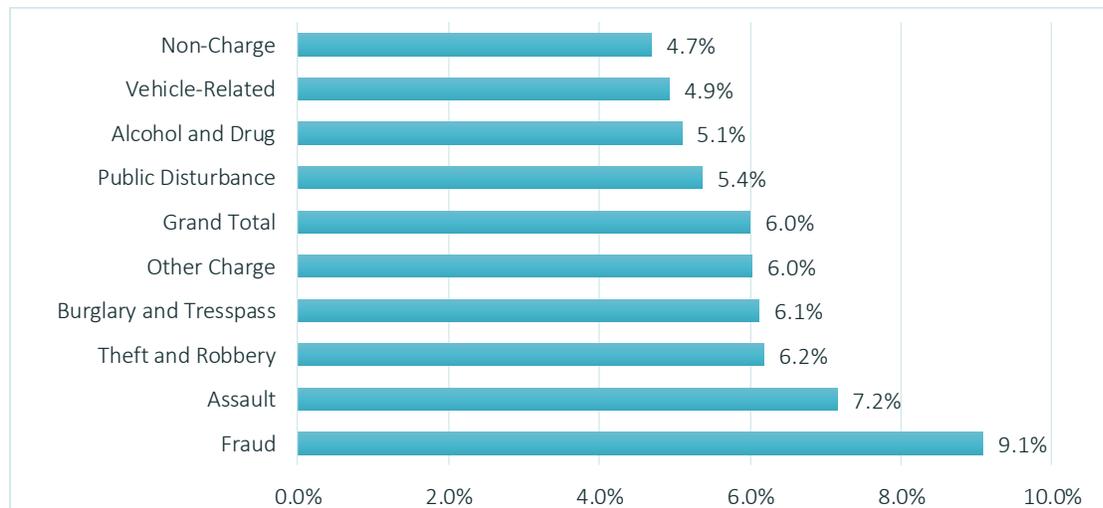
While the primary analysis focused upon individuals as the unit of analysis, overall sealing rates *by record* are also calculated. Of 124,152 records that are estimated to be eligible for sealing, 94% have not been sealed.

FIGURE 8: PERCENT OF ALL ELIGIBLE JUVENILE OFFENDER RECORDS SEALED



Only 4.7% of records that *did not* result in a charge were sealed, making non-charges the least likely type of record to be sealed.<sup>209</sup> According to the charge typology described above, records that did not result in a charge were the least likely to be sealed, followed by vehicle-related charges and drug/alcohol related charges.

FIGURE 9: SEALING RATE, BY RECORD



<sup>209</sup> The AOC uses the code 00.000.00 to denote a “non-charge” in its classification of RCW records.

## Appendix 3: Interview Guide, Individuals with Juvenile Records

My interview guide was organized three broad categories of topic for discussion:

- A. Sealing Process: *to understand the mechanics of the sealing process as experienced by young adults, and begin to explore potential problems with sealing options*
- B. Collateral Consequences: *to understand the collateral consequences that young adults face, and how sealing contributes (or does not contribute) to the mitigation of these consequences*
- C. Juvenile Records Policy: *to understand how young adults with exposure to the youth justice system consider the larger matters of public policy pertaining to the State's treatment of juvenile records*

### Sealing Process

- 1) At what point along did you become aware of the option to seal your juvenile record?
  - a. If you were aware of the option to seal your record at an earlier date (for example, immediately upon your release), would you have elected to seal your record earlier?
  - b. What other options did you have besides the King County Legal Clinic?
- 2) About how long did the sealing process take, from the time that you started until your last record was officially *sealed*?
- 3) Did any problems arise when you were sealing your record?
  - a. Can you tell me a little bit about any problems or obstacles that you encountered?
  - b. Are you aware of how long it took from the start of the process to its completion?

### Collateral Consequences

- 1) Are you aware if your record is accessible through any channel – whether the AOC or through private data companies that the state sells your records to?
- 2) Do you know anyone who has completed the sealing process that still have remnants of their record available from private companies?
- 3) Have you ever felt that you were declined for a job that you applied for because of your juvenile record?
  - a. Before your record was sealed?
  - b. After your record was sealed?
- 4) Have you ever decided to not apply for a job because the employer asked you to disclose or talk about your juvenile record?

### Juvenile Records Policy

- 1) Have you heard about pending legislation that keep most juvenile records confidential?
- 2) What do you think would help youth become more aware of their option to seal their record?
- 3) What are your thoughts on WA state law regarding the openness of juvenile records?
- 4) Do you have any policy recommendations regarding Washington State's handling of juvenile records?
- 5) What are the advantages of changing state law to keep most juvenile records confidential by default? Disadvantages?

#### Appendix 4: Excerpt from RCW 13.50.050

Records relating to commission of juvenile offenses — Maintenance of, access to, and destruction — Release of information to schools.

(1) This section governs records relating to the commission of juvenile offenses, including records relating to diversions.

(2) The official juvenile court file of any alleged or proven juvenile offender shall be open to public inspection, unless sealed pursuant to subsection (12) of this section.

(3) All records other than the official juvenile court file are confidential and may be released only as provided in this section, RCW [13.50.010](#), [13.40.215](#), and [4.24.550](#).

(4) Except as otherwise provided in this section and RCW [13.50.010](#), records retained or produced by any juvenile justice or care agency may be released to other participants in the juvenile justice or care system only when an investigation or case involving the juvenile in question is being pursued by the other participant or when that other participant is assigned the responsibility for supervising the juvenile.

(5) Except as provided in RCW [4.24.550](#), information not in an official juvenile court file concerning a juvenile or a juvenile's family may be released to the public only when that information could not reasonably be expected to identify the juvenile or the juvenile's family.

(6) Notwithstanding any other provision of this chapter, the release, to the juvenile or his or her attorney, of law enforcement and prosecuting attorneys' records pertaining to investigation, diversion, and prosecution of juvenile offenses shall be governed by the rules of discovery and other rules of law applicable in adult criminal investigations and prosecutions.

(7) Upon the decision to arrest or the arrest, law enforcement and prosecuting attorneys may cooperate with schools in releasing information to a school pertaining to the investigation, diversion, and prosecution of a juvenile attending the school. Upon the decision to arrest or the arrest, incident reports may be released unless releasing the records would jeopardize the investigation or prosecution or endanger witnesses. If release of incident reports would jeopardize the investigation or prosecution or endanger witnesses, law enforcement and prosecuting attorneys may release information to the maximum extent possible to assist schools in protecting other students, staff, and school property.

(8) The juvenile court and the prosecutor may set up and maintain a central recordkeeping system which may receive information on all alleged juvenile offenders against whom a complaint has been filed pursuant to RCW [13.40.070](#) whether or not their cases are currently pending before the court. The central recordkeeping system may be computerized. If a complaint has been referred to a diversion unit, the diversion unit shall promptly report to the juvenile court or the prosecuting attorney when the juvenile

has agreed to diversion. An offense shall not be reported as criminal history in any central recordkeeping system without notification by the diversion unit of the date on which the offender agreed to diversion.

(9) Upon request of the victim of a crime or the victim's immediate family, the identity of an alleged or proven juvenile offender alleged or found to have committed a crime against the victim and the identity of the alleged or proven juvenile offender's parent, guardian, or custodian and the circumstance of the alleged or proven crime shall be released to the victim of the crime or the victim's immediate family.

(10) Subject to the rules of discovery applicable in adult criminal prosecutions, the juvenile offense records of an adult criminal defendant or witness in an adult criminal proceeding shall be released upon request to prosecution and defense counsel after a charge has actually been filed. The juvenile offense records of any adult convicted of a crime and placed under the supervision of the adult corrections system shall be released upon request to the adult corrections system.

(11) In any case in which an information has been filed pursuant to RCW [13.40.100](#) or a complaint has been filed with the prosecutor and referred for diversion pursuant to RCW [13.40.070](#), the person the subject of the information or complaint may file a motion with the court to have the court vacate its order and findings, if any, and, subject to subsection (23) of this section, order the sealing of the official juvenile court file, the social file, and records of the court and of any other agency in the case.

(12)(a) The court shall not grant any motion to seal records for class A offenses made pursuant to subsection (11) of this section that is filed on or after July 1, 1997, unless:

(i) Since the last date of release from confinement, including full-time residential treatment, if any, or entry of disposition, the person has spent five consecutive years in the community without committing any offense or crime that subsequently results in an adjudication or conviction;

(ii) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense;

(iii) No proceeding is pending seeking the formation of a diversion agreement with that person;

(iv) The person is no longer required to register as a sex offender under RCW [9A.44.130](#) or has been relieved of the duty to register under RCW [9A.44.143](#) if the person was convicted of a sex offense;

(v) The person has not been convicted of rape in the first degree, rape in the second degree, or indecent liberties that was actually committed with forcible compulsion; and

(vi) Full restitution has been paid.

(b) The court shall not grant any motion to seal records for class B, C, gross misdemeanor and misdemeanor offenses and diversions made under subsection (11) of this section unless:

(i) Since the date of last release from confinement, including full-time residential treatment, if any, entry of disposition, or completion of the diversion agreement, the person has spent two consecutive years in the community without being convicted of any offense or crime;

(ii) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense;

(iii) No proceeding is pending seeking the formation of a diversion agreement with that person;

(iv) The person is no longer required to register as a sex offender under RCW [9A.44.130](#) or has been relieved of the duty to register under RCW [9A.44.143](#) if the person was convicted of a sex offense; and

(v) Full restitution has been paid.

(c) Notwithstanding the requirements in (a) or (b) of this subsection, the court shall grant any motion to seal records of any deferred disposition vacated under RCW [13.40.127](#)(9) prior to June 7, 2012, if restitution has been paid and the person is eighteen years of age or older at the time of the motion.

(13) The person making a motion pursuant to subsection (11) of this section shall give reasonable notice of the motion to the prosecution and to any person or agency whose files are sought to be sealed.

(14)(a) If the court grants the motion to seal made pursuant to subsection (11) of this section, it shall, subject to subsection (23) of this section, order sealed the official juvenile court file, the social file, and other records relating to the case as are named in the order. Thereafter, the proceedings in the case shall be treated as if they never occurred, and the subject of the records may reply accordingly to any inquiry about the events, records of which are sealed. Any agency shall reply to any inquiry concerning confidential or sealed records that records are confidential, and no information can be given about the existence or nonexistence of records concerning an individual.

(b) In the event the subject of the juvenile records receives a full and unconditional pardon, the proceedings in the matter upon which the pardon has been granted shall be treated as if they never occurred, and the subject of the records may reply accordingly to any inquiry about the events upon which the pardon was received. Any agency shall reply to any inquiry concerning the records pertaining to the events for which the subject received a pardon that records are confidential, and no information can be given about the existence or nonexistence of records concerning an individual.

(15) Inspection of the files and records included in the order to seal may thereafter be permitted only

by order of the court upon motion made by the person who is the subject of the information or complaint, except as otherwise provided in RCW [13.50.010](#)(8) and subsection (23) of this section.

(16) Any adjudication of a juvenile offense or a crime subsequent to sealing has the effect of nullifying the sealing order. Any charging of an adult felony subsequent to the sealing has the effect of nullifying the sealing order for the purposes of chapter [9.94A](#) RCW. The administrative office of the courts shall ensure that the superior court judicial information system provides prosecutors access to information on the existence of sealed juvenile records.

(17)(a)(i) Subject to subsection (23) of this section, all records maintained by any court or law enforcement agency, including the juvenile court, local law enforcement, the Washington state patrol, and the prosecutor's office, shall be automatically destroyed within ninety days of becoming eligible for destruction. Juvenile records are eligible for destruction when:

(A) The person who is the subject of the information or complaint is at least eighteen years of age;

(B) His or her criminal history consists entirely of one diversion agreement or counsel and release entered on or after June 12, 2008;

(C) Two years have elapsed since completion of the agreement or counsel and release;

(D) No proceeding is pending against the person seeking the conviction of a criminal offense; and

(E) There is no restitution owing in the case.

(ii) No less than quarterly, the administrative office of the courts shall provide a report to the juvenile courts of those individuals whose records may be eligible for destruction. The juvenile court shall verify eligibility and notify the Washington state patrol and the appropriate local law enforcement agency and prosecutor's office of the records to be destroyed. The requirement to destroy records under this subsection is not dependent on a court hearing or the issuance of a court order to destroy records.

(iii) The state and local governments and their officers and employees are not liable for civil damages for the failure to destroy records pursuant to this section.

(b) All records maintained by any court or law enforcement agency, including the juvenile court, local law enforcement, the Washington state patrol, and the prosecutor's office, shall be automatically destroyed within thirty days of being notified by the governor's office that the subject of those records received a full and unconditional pardon by the governor.

(c) A person eighteen years of age or older whose criminal history consists entirely of one diversion

agreement or counsel and release entered prior to June 12, 2008, may request that the court order the records in his or her case destroyed. The request shall be granted, subject to subsection (23) of this section, if the court finds that two years have elapsed since completion of the agreement or counsel and release.

(d) A person twenty-three years of age or older whose criminal history consists of only referrals for diversion may request that the court order the records in those cases destroyed. The request shall be granted, subject to subsection (23) of this section, if the court finds that all diversion agreements have been successfully completed and no proceeding is pending against the person seeking the conviction of a criminal offense.

(18) If the court grants the motion to destroy records made pursuant to subsection (17)(c) or (d) of this section, it shall, subject to subsection (23) of this section, order the official juvenile court file, the social file, and any other records named in the order to be destroyed.

(19) The person making the motion pursuant to subsection (17)(c) or (d) of this section shall give reasonable notice of the motion to the prosecuting attorney and to any agency whose records are sought to be destroyed.

(20) Any juvenile to whom the provisions of this section may apply shall be given written notice of his or her rights under this section at the time of his or her disposition hearing or during the diversion process.

(21) Nothing in this section may be construed to prevent a crime victim or a member of the victim's family from divulging the identity of the alleged or proven juvenile offender or his or her family when necessary in a civil proceeding.

(22) Any juvenile justice or care agency may, subject to the limitations in subsection (23) of this section and (a) and (b) of this subsection, develop procedures for the routine destruction of records relating to juvenile offenses and diversions.

(a) Records may be routinely destroyed only when the person the subject of the information or complaint has attained twenty-three years of age or older or pursuant to subsection (17)(a) of this section.

(b) The court may not routinely destroy the official juvenile court file or recordings or transcripts of any proceedings.

(23) Except for subsection (17)(b) of this section, no identifying information held by the Washington state patrol in accordance with chapter [43.43](#) RCW is subject to destruction or sealing under this section.

For the purposes of this subsection, identifying information includes photographs, fingerprints, palmprints, soleprints, toeprints and any other data that identifies a person by physical characteristics, name, birthdate or address, but does not include information regarding criminal activity, arrest, charging, diversion, conviction or other information about a person's treatment by the criminal justice system or about the person's behavior.

(24) Information identifying child victims under age eighteen who are victims of sexual assaults by juvenile offenders is confidential and not subject to release to the press or public without the permission of the child victim or the child's legal guardian. Identifying information includes the child victim's name, addresses, location, photographs, and in cases in which the child victim is a relative of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator. Information identifying a child victim of sexual assault may be released to law enforcement, prosecutors, judges, defense attorneys, or private or governmental agencies that provide services to the child victim of sexual assault.

## Appendix 5: Summary of Fiscal Notes for Juvenile Records Reform Bills, 2004-13

Bill	Biennium	Intent	Estimated Expenditures
3078 HB	2003-2004	Reduce waiting period for certain classes of crime	Indeterminate
2603 HB	2005-06	Seal diversion records	\$416k annually
1954 HB	2009-10	Seal deferred disposition records	Indeterminate; >\$50,000
1954 SHB	2009-10	Automatically seal deferred disposition cases	Indeterminate; >\$50,000
6561 SB	2009-10	Restrict access to juvenile records	\$2.61 million initially; \$451k per year
1793 HB	2011	Automatically seal cases	\$976k initial; \$355k annually
2541 HB	2011-12	Seal deferred disposition cases	Indeterminate
5204 SB	2011-12	Seal certain sex offense cases	Indeterminate
5558 SB	2011-12	Consumer reporting agencies	\$13,000 foregone revenue
6292 SB		Make all juvenile records confidential.	\$134,000 initially; \$112,000 annually
1651 HB	2013	Restrict public access, most juvenile records; prohibit private sales	\$518k (one-time)
1651 ESHB	2013	Restrict access to nonadjudication records	\$1.5 million (one-time)
5689 SB	2013	Restrict public access to most juvenile records	\$518k (one-time), \$20k annually
5689 SSB	2013	Restrict access to nonadjudication records (including past records)	\$1,010,400- \$1,459,200, one-time

## Appendix 6: Detailed Cost Analysis of Policies to Enhance Confidentiality of Juvenile Records

<i>Year</i>	<b>Confidentiality of All Records</b>	<b>Current Sealing</b>	<b>Automatically Restrict Non-conviction records</b>
0	\$518,400		\$1,459,200
1		\$69,629	\$34,815
2		\$68,264	\$34,132
3		\$66,926	\$33,463
4		\$65,613	\$32,807
5		\$64,327	\$32,163
6		\$63,066	\$31,533
7		\$61,829	\$30,914
8		\$60,617	\$30,308
9		\$59,428	\$29,714
10		\$58,263	\$29,131
11		\$57,120	\$28,560
12		\$56,000	\$28,000
13		\$54,902	\$27,451
14		\$53,826	\$26,913
15		\$52,770	\$26,385
16		\$51,736	\$25,868
17		\$50,721	\$25,361
18		\$49,727	\$24,863
19		\$48,752	\$24,376
20		\$47,796	\$23,898
<i>Total</i>	\$518,400	\$1,161,311	\$2,039,856

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