



Keeping juvenile records confidential: Olympia debates

Once again, Washington lawmakers will take up legislation to seal certain juvenile records. Will the third time be the charm?

By Eric Scigliano

January 29, 2014.

Editor's Note: This is the second installment in our 2-part series on sealing (or unsealing) juvenile records.

Kim Ambrose, the director of a UW legal clinic for young people dogged by juvenile criminal records, says she sees it again and again: They come in after getting barred or even ejected from housing, jobs, schools, scholarships or professional licenses because background checks have turned up juvenile convictions, sometimes for relatively minor offenses. Her clinic helps these young people apply to get their records sealed — a slow, exacting process.

“What’s really troubling,” says Ambrose, “is that often they don’t even know that they need to do this. They thought their records already were sealed.” So do many other people. “There’s something deeply embedded in our collective psyche that says juvenile criminal information shouldn’t be distributed,” says Ambrose.

For most of the past century, they weren’t. Minors were considered less culpable and more reformable and were spared what is for most offenders the most enduring penalty: the stigma of a criminal record.

Many who see the effects of those records — from ex-offenders and civil rights advocates to some judges and prosecutors — would like to return to that sort of policy. Ironically, the changes that made minors more culpable for their transgressions grew out of a move to *protect* their civil rights.

Over the years, the response to juvenile crime has swung like a pendulum between punishment meted according to the offense committed and rehabilitation administered according to the offender’s needs. Until the Progressive Movement took root in the early 20th century, punishment prevailed, and even young children were tried as adults. The progressives made rehabilitation the goal, and in 1913 Washington established a separate justice track for juveniles.

In many ways this paternalistic system resembled child protective services more than criminal justice; proceedings were confidential and conducted without legal representation, and varied greatly between jurisdictions. Courts exercised wide discretion over what were then called “juvenile delinquents.” Very often young miscreants were released with an admonishment to their parents, but chronic truants were sometimes locked away with serious offenders.

In 1967 the U.S. Supreme Court ruled that juveniles accused of crimes were entitled to the same due process as adults — except for trial by jury. However much they talked about making kids take “responsibility,” adults weren’t ready to empanel juries of youthful peers.

In 1977 Washington brought its law in line. Rising crime rates and drug use, even faster-rising fears of the same and news reports about horrible deeds committed by the shockingly young further propelled reforms here and elsewhere. “Delinquency,” a condition to be corrected, left the lexicon, replaced by crimes and offenses to be punished. Kids would be entitled to lawyers and open, public proceedings, which assured fairness and uniformity. Legislatures lowered, and lowered again, the age at which juveniles could be tried as adults for certain serious crimes. Juvenile records became public, just like adult ones.

Still, minors had one out that was not available to adults: If they made restitution, kept their noses clean for a specified number of years and jumped through a series of procedural hoops (effectively requiring they get a lawyer), youthful offenders could get their court records sealed. In 1997 the legislature narrowed this option: Henceforth, records of Class A felonies and sex crimes could not be sealed, and the waiting period for other felonies was raised to as much as 10 years.

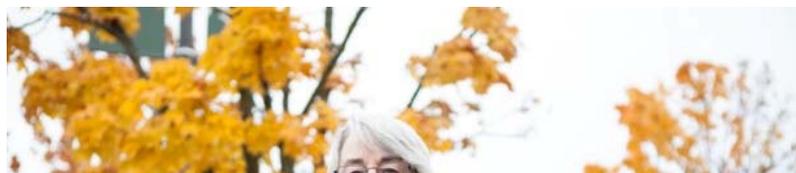
Meanwhile, a growing body of brain and behavioral research was showing what parents of teenagers had long suspected: Just because young people look and sometimes act grown up doesn’t mean they are. Brain development — specifically in the cerebral cortex, the seat of judgment, foresight and self-control, among other functions — continues into the 20s. Character is then a more plastic thing, fragile and impressionable but also reparable. Teenagers do stupid, reckless, boundary-pushing things for reasons they don’t understand either. They aren’t necessarily locked into those behaviors for life. But they may be hounded by those deeds, thanks to new technology.

The proliferation of online data brokers and background-search vendors made it irresistibly easy to probe anyone’s past, especially in the very few states, like Washington, that sell their criminal records, adult and juvenile, in bulk. In Washington’s case, those records are conveniently indexed and updated quarterly. Every suspicious snoop — employers, landlords, social services, college admissions, prospective dates — took a seat in the digital panopticon.

Open juvenile records became what Jim Theofelis, King County Juvenile Detention’s former mental health director, calls “a barrier to starting adult life.”

A decade ago the pendulum began swinging the other way. A growing chorus of judges and other officials, lawyers and academics, youthful ex-offenders and the social services assisting them decried open juvie records as a perverse scheme that costs both ex-offenders and society at large dearly. Starting in 2004, the legislature progressively extended the list of crimes youthful perpetrators could petition to get sealed, and reduced the length of time they’d have to wait. In 2011 lawmakers established a joint House-Senate task force to determine how to restrict access to juvenile records without the onerous application and hearing process.

The task force failed to agree on a solution, but Rep. Ruth Kagi (below), a longtime youth advocate, went ahead with a bill to make juvenile records in all but the most serious sex and violent crimes confidential. Last session, in its third try, HR 1651 bill won unanimous approval in the House. It might well have passed the Senate if the Human Services and Corrections Committee chair, Mike Carrell, hadn’t left several major amendments pending when, terminally ill, he went into the hospital. (Carrell died in May.)



Now Kagi’s trying again, with a hearing set for Wednesday. Her bill’s grown steadily more



palatable, with more crimes (arson, kidnapping, bombing, assault on a child, organized crime) added to the list of offenses that would remain public. She'll move to delay the bill's implementation for three years, so the court

administration won't have to switch over until it installs a long-awaited new electronic records system.

With no legislation yet forthcoming, the state courts have gone ahead anyway and limited the ways they release juvenile records. Last November, the Judicial Information System Committee (JISC), a panel of judges and other legal officials that regulates the dissemination of court records, voted to stop the bulk sale of juvenile records and to remove them from the system's online index. Employers and others seeking to obtain the juvenile records of particular individuals can still get them on the state website and at local courthouses.

Snohomish County Superior Court Judge Thomas Wynne, the JISC's vice chair, spearheaded the measure. He calls it a "less restrictive solution to the problem" of epidemic juvenile records dissemination than Kagi's bill. But that doesn't mollify the anti-sealing forces.

A heavy-breathing *Seattle Times* editorial denounced Judge Wynne's "obscure judicial committee" for usurping the legislature's role and "severely restrict[ing] access to juvenile records," even though they would still be accessible online. Perhaps taking the cue, last Thursday Senators Tim Sheldon and Pam Roach introduced a bill to reverse the JISC measure and guarantee continuing bulk sales and online indexing of juvenile records.

"We fought [Kagi's confidentiality bill] tooth and nail last year," says Bill Will, executive director of the Washington Newspaper Publishers Association. The WNPA, which represents community newspapers, and its big-market counterpart, Allied Daily Newspapers, will likely fight the sealing again, and maybe again. Together with other open-government advocates, they're one of two interest groups — an outwardly odd couple — at the core of the opposition to Kagi's effort. The other group is the state's landlords, in particular the Rental Housing Association of Washington, represented by a former state Supreme Court Justice, Phil Talmadge.

The newspapers and other open-records advocates oppose sealing on loftier grounds. They argue, vehemently, that it would compromise the public's right to know — about the administration of justice, as well as the latest sensational youth crime. Sealing juvenile records would compromise the media's ability to watchdog courts, cops and prosecutors. And it would violate Article 1, Section 10 of Washington's constitution, which ordains that "justice shall in all cases be administered openly."

Kagi and her allies insist that HR 1651 addresses these concerns. Juvenile court proceedings — the actual administration of justice — would still be open. Court data would still be available, with names redacted, letting researchers and watchdogs monitor sentencing and charging patterns for bias and other abuses. Newspapers and others could still petition the courts to get records released in cases of compelling public interest. And, says Kagi, journalists seeking to expose miscarriages of justice can always obtain files from defense attorneys, with their clients' permission.

"That's a bit of a fantasy," snorts Rowland Thompson, Allied Daily Newspapers' executive director. "It's not realistic to expect overworked public defenders to provide records. And

how do you find out they're the attorney of record? You can't keep a system honest unless you can see the records. By nature, by default, it will favor police." (I've found defense attorneys, even public defenders, glad to share records.)

Will and other press advocates cite two examples of how access to juvenile records enabled reporters to expose serious miscarriages in the courts.

Exhibit A: Pennsylvania's 2008 "Kids for Cash" scandal, a fable of the growing prison-industrial complex in which two judges railroaded thousands of juvenile defendants into outrageously harsh sentences in return for kickbacks from a private juvenile detention operator.

Exhibit B hits closer to home: The weekly *Port Townsend Leader* investigated the surprising prison sentence handed out in 1995 to Brian Sperry, a youthful first-time offender who'd defended himself with a club in a high school brawl. The harsh sentence led to a "Free Brian" campaign and, eventually, a gubernatorial pardon.

Both examples are somewhat equivocal. The fact that open-records advocates must look 17 years back or 2,000 miles away for examples suggests that such cases are rare. Neither case came to light through records; the cashed-in kids themselves complained to a legal help center in Philadelphia, which alerted investigators. Under Kagi's bill reporters would still be able to track the sentencing patterns that confirmed the Pennsylvania judges' scam.

In Port Townsend, *Leader* reporter Fred Obee learned of the shocking prison sentence from the shocked buzz going around the courthouse. He says access to records was "crucial" to completing the story: "I had to get trial transcripts, the whole court file." But Obee would have gotten them just as easily under Kagi's bill: Sperry was 19 at the time.

"I understand the concern about individual cases," says Kagi. "But that has to be balanced against the damage done to every youth who has those records. We pay as a society every time one is denied a chance to make a new start."

Kagi's argument notwithstanding, Talmadge, the landlords' lawyer, has insisted that "the system is not broken. The balance is working." The chance for individuals to apply to get their juvenile records sealed provides the necessary "safety valve." Besides, argues Talmadge, landlords and employers have a "legitimate interest" in probing applicants' backgrounds. Blocking the bulk sales of juvenile records to data brokers is an "overreaction."

Bill Hinkle, the Rental Housing Association's executive director, believes open juvenile records is all about ensuring the safety of other residents. "In days like this, when we have overwhelming gun violence in Seattle, we need to put public safety above everything else," says Hinkle. "And then, as they say, in judgment remember mercy. If a kid has made amends, changed direction, landlords understand that." In other words, trust the landlords to weigh the information wisely and compassionately.

That seems wishful. Even if a landlord wants to give a juvie offender a break, it's easier not to, especially for big commercial operations and especially in a tight housing market like Seattle's. "In my experience working with individual clients that is rare," says Melissa Hernandez, director of the American Civil Liberties Union of Washington's Second Chances project, which helps young offenders make a new start. "I've seen them fail to find housing, or go into the marginal housing market, based on minor incidents. Once they're turned down, most landlords don't have any process for appealing those decisions. I've seen dozens of corporate landlord policies that say 'No criminal history at all.'" These kinds of impacts have persuaded the ACLU, a longtime advocate of open government, to support withholding records this time.

Rowland Thompson of Allied Daily Newspapers is not so moved. He questions whether juvenile records really cause such problems. "It's highly unreliable anecdotal evidence," he

says. "Lots of people have records, and they seem to go on with their lives okay. Marshall McLuhan said it — we're living in a global village. Get on with it."

Even conceding that the stigma of juvenile records does cause unnecessary harm, other open-records advocates argue that there are less drastic ways to correct it than the nuclear option of barring access. "There are existing civil rights laws that restrict how landlords can use records, what records they can use," notes Bill Will, the community newspapers' representative. In other words, if we don't want landlords, employers and others to discriminate based on juvenile criminal histories, we can add juvenile offenses to race, gender and the other categories which already enjoy that protection.

"They think we should make employers not discriminate?! How real is that?" asks Rep. Kagi. "When an employer looks at a sheet and sees that someone has a conviction at 15 they're going to look elsewhere." It would hardly be feasible for that applicant to sue the dozens or hundreds of prospective employers who don't call back. And field trials show again and again that racial discrimination, for example, persists in employment, housing and lending, despite decades of laws against it.

Another alternative to sealing juvenile records, one propounded by the Washington Coalition for Open Government's Toby Nixon, would be to make background-search vendors scrub out juvenile records their customers can't legally use, as they're already supposed to do with eviction and bankruptcy data. That would complement the JIS Committee's new rule barring bulk sale of these records to the search companies.

Results from that approach might be spotty, considering how some of these companies already fail to scrub out individual sealed records. But this measure would go toward addressing another issue that Bill Will raises, that sealing records now would be unfair: "You'd be creating a two-tiered system for someone who was adjudicated in the system before the change and afterward."

Will's argument doesn't fly with John Clayton, assistant secretary of the state Juvenile Rehabilitation Administration. "In other words, never change it and let everyone be exposed?" Clayton chuckles grimly. "Right now, Washington residents whose records are out there are at a disadvantage against everyone who comes here from the 42 states that don't release records."

Objections like Will's only seem to steel Kagi's will. "The past damage that's been done really shouldn't stop us from doing the right thing," she says. "We've got to make one step at a time, and correcting this moving forward is the first step."

Kagi takes that first step this afternoon at 3:30, when her bill get its first 2014 hearing before the House Appropriations Subcommittee on General Government & Information Technology. Supporters will again be there in force, stoked by HR 1651's narrow miss last year. Opponents will be there too, trying to chip away at the sympathy for struggling kids embedded in Ambrose's "collective psyche."

The fate of HR 1651 may depend less on its merits than on the current legislative impasse in Olympia. Passing anything across the partisan chasm between the state House and Senate is a long shot at best, especially when it concerns matters as sensitive as crime and punishment and as elusive as forgiveness.

Read Part 1 of this series here.

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Printed on January 29, 2014