September 2004

Scarlet Letter Punishment for Juveniles: Rehabilitation Through Humiliation?

Bonnie Mangum Braudway

Follow this and additional works at: http://scholarship.law.campbell.edu/clr
Part of the Criminal Law Commons, and the Juvenile Law Commons

Recommended Citation

This Comment is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.
SCARLET LETTER PUNISHMENTS FOR JUVENILES: REHABILITATION THROUGH HUMILIATION?

"Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities?"
- Julian Mack, a pioneer in juvenile court reform of the early 20th century.¹

"[N]obody can tell from some ivory tower that you take a kid, you kick him in the rear end, and it doesn't do any good. I don't give a damn what [the experts] say."
- Governor Zell Miller (D-Ga., 1994).²

"Youth will no longer be an excuse."
- Governor Tom Ridge (R-Pa., 1996).³

I. INTRODUCTION

Over the past century, the juvenile justice system has come full circle. In the late eighteenth century, a child under the age of seven was considered incapable of criminal culpability, and was therefore immune from prosecution.⁴ A child age seven or older was treated as an adult and could be sentenced to an adult prison and even death.⁵ By the late nineteenth century, as a result of their concern over the appalling treatment of young children, early reformers began to push for the creation of a separate court for juveniles.⁶ The system had a very informal beginning, as the proceedings were intended to be

⁵. Id.
“one[s] in which a fatherly judge touched the heart and conscience of
the erring youth by talking over his problems, by paternal advice and
admonition, and in which, in extreme situations, benevolent and wise
institutions of the state provided guidance and help.”

By the 1960's and into the 1970's it became clear that this was not
always the case. The juvenile system did not provide any of the proce-
dural protections considered to be so essential in the adult court. With
little regard to proof, juveniles were often committed to state reform
school for indefinite periods of time. In an effort to reform the sys-
tem, the Supreme Court handed down cases providing juveniles with
procedural protections similar to adult court. By the mid-1970's,
however, due to the public's frustration with a perceived rise in juve-
nile crime, the reforms began to change. Efforts were directed at
changing the goals of the system to make it more punitive.

Today, due to the public's outcry for stricter punishments for
juveniles, a growing judicial trend is the use of shaming punishments
for juveniles. A shaming punishment is described as one that is
"explicitly designed to make a public spectacle of the offender's . . .
punishment and to trigger a negative, downward change in the
offender's self-concept." Examples include a fifteen year-old South
Carolina girl ordered to be shackled to her mother for a month, two
teenagers in Texas ordered to walk in front of a Wal-Mart wearing a
sign saying "I stole from this store," and a sixteen year-old Maryland
boy required to apologize on his hands and knees to his victim and his
family and remain in custody until they believed his apology was
sincere.

Using shame punishments with adults has become almost com-
monplace, and courts are split on whether these are permissible.

7. Id. at 25-26.
8. See, e.g., id. at 28 ("[T]he condition of being a boy does not justify a kangaroo
court.").
9. See, e.g., id. at 7-8.
10. See, e.g., In re Winship, 397 U.S. 358 (1970) (holding that juveniles are entitled
to a requirement of proof beyond a reasonable doubt); Gault, 387 U.S. 1.
Offenders, Good Housekeeping, Aug. 1997 at 102.
21.
15. See, e.g. Goldschmitt v. State, 490 So. 2d 123 ( Fla. Dist. Ct. App. 1986); Lindsay
Some researchers are critical of their use for adults and point out that the use of such punishments in modern times occurs only in societies such as Maoist China or by the Afghan Taliban, while others are strong supporters of their potential to curb future criminal tendencies. While the effectiveness of their use in the adult system is debatable, using shame punishments for a child who has been adjudicated delinquent is an entirely different matter. Using shaming penalties to punish juveniles is not only ineffective but can lead to further delinquency, will have a negative impact on already troubled juveniles, and will contribute to further erosion of the confidentiality of the system. This comment will address this disturbing new trend in juvenile courts.

This comment begins by discussing the historical development of the juvenile justice system and society's use of shaming penalties. In Section III, it will point out the dangers of using shaming penalties on juvenile offenders. Section IV will explore how the highest courts in two major jurisdictions may handle an appeal from a fictional juvenile sentenced to a shaming punishment. Finally, the comment will discuss possible improvements in the juvenile justice system.

II. DEVELOPMENT OF THE JUVENILE JUSTICE SYSTEM AND THE USE OF SHAMING PUNISHMENTS

In the early days of America, punishment for those who stepped outside the social bounds was notoriously harsh. Colonial America was infamous for its use of public admonishments, branding, confessions, sign wearing, and maiming. These early colonists did not base


19. See discussion infra Parts III-A-B.

their punishments on the modern theories of punishment: 21 rehabilitation, incapacitation, deterrence, and retribution. 22 Instead, they believed that a person’s social status was divinely predetermined and they must be forced to show their true sinful nature. 23 Social status was regarded as the highest good and its deprivation was viewed as a very real punishment. 24 Banishment from the community was paramount to the death penalty because there was a strong dependence upon the community for survival. 25 Shame punishments were very effective in Colonial America because of the strong social intimacy—everyone knew the offender. 26

Juveniles were not immune from these harsh penalties. In fact, prior to 1899, with the inception of the first juvenile court system in America 27, juveniles below the age of reason, typically age seven, were considered to be incapable of forming criminal culpability and were therefore immune from prosecution. 28 However, those above that age were treated as adults, sentenced to adult penalties and could even be sentenced to death. 29

The use of public shaming was prevalent until the end of the nineteenth century when it began to lose its popularity as the preference for incarceration grew. 30 There are several theories for this shift. Commentators point to two changes in American culture during the late nineteenth century for this drastic decline in the use of shaming penalties. First, the general political philosophy changed as people became more concerned with humanity and equality as society evolved. 31 Second, society itself changed. Communities were no

21. Massaro, supra note 11, at 1890.
25. See Massaro, supra note 16.
26. See id.
29. Id.
30. See Sanders, supra note 20, at 366.
31. Id. at 365-66.
longer close-knit and interdependent.\textsuperscript{32} Widespread immigration, territorial expansion, and the Industrial Revolution had a significant impact on the strong interpersonal relationships found in the colonies.\textsuperscript{33} Modern society is very different from the interdependent communities of the early colonies. The world is no longer made up of small villages where people remain their entire lives. As one commentator pointed out, "In today's secular world of gated communities, who cares if Hester slept with the minister?"\textsuperscript{34}

The concept of a separate juvenile justice system began with the urbanization and industrialization of the late nineteenth century.\textsuperscript{35} Progressive reformers, appalled by the treatment of juveniles in the criminal justice system, began to emphasize the protection, treatment, and education of youth.\textsuperscript{36} There were two important developments that led to this push for reform: (1) new developments in general criminological theories\textsuperscript{37} and (2) the emerging theory that childhood and adolescence are distinct developmental stages, totally separate from adulthood.\textsuperscript{38}

From a theoretical standpoint, ideas about the causes of crime changed from the classical theory, which blames the criminal,\textsuperscript{39} to the positivist theory, which looks to things beyond the criminal's control, such as the surrounding environment.\textsuperscript{40} The positivist theory is a form of determinism,\textsuperscript{41} which is a philosophical concept concluding

\begin{footnotes}
\item[32.] Id. at 365.
\item[33.] Id.
\item[36.] Gault, 387 U.S. at 15; See generally Mark H. Moore, et al. From Children to Citizens: The Mandate for Juvenile Justice 39-42 (1987); Lewis P. Todd & Merle E. Curti, Rise of the American Nation 593 (1986) (explaining that the progressives were also responsible for introducing probation, parole, and the goal of rehabilitation into the adult system); O'Conner, supra note 35, at 1303.
\item[38.] Id. at 357-58.
\item[40.] Blum, supra note 37, at 358-59.
\item[41.] Id. at 351, 359 n.83 ("Positivist criminology is merely determinism applied to criminology.").
\end{footnotes}
that human behavior is a result of environmental, biological, or social determinants.\textsuperscript{42} Determinists believe there are three causes of criminal behavior: (1) defects in the person's environment, (2) defects in his or her physical makeup, or (3) psychological defects.\textsuperscript{43} Accordingly, "[d]elinquency was viewed as an illness brought on by the social diseases of poverty, parental neglect, ignorance, and urban decay."\textsuperscript{44}

The other important change which helped to bring about the call for improved treatment of juveniles was the emerging belief that childhood and adolescence are developmental stages distinct from adulthood.\textsuperscript{45} In the mid-eighteenth century, during the European Enlightenment, French philosopher Jean-Jacques Rousseau stated that childhood was a distinct period from adulthood, and argued that imposing adult standards upon children would adversely affect development.\textsuperscript{46} This idea became popular in the United States later in the nineteenth century when child psychologists, including renowned G. Stanley Hall, began to argue that children were not responsible for their behavior until after their teens.\textsuperscript{47} This new belief played an important role in raising the age for criminal culpability from the traditional age of seven to the mid-teens.\textsuperscript{48}

As a result of the efforts of the reformers, the Juvenile Court Act of 1899 was passed in Illinois creating a set of rules governing the treatment and control of dependent and delinquent children.\textsuperscript{49} This idea caught on quickly and, within twenty years, every state had passed

\textsuperscript{42} DAVID MAZTA, DELINQUENCY AND DRIFT 5 (1964); Blum, supra note 37, at 359.
\textsuperscript{43} Blum, supra note 37, at 359.
\textsuperscript{45} Blum, supra note 37, at 351, 357-58.
\textsuperscript{46} JEAN-JACQUES ROUSSEAU, EMILE ON EDUCATION 91 (Allan Bloom trans., 1979) ("Nature wants children to be children before being men. If we want to pervert this order, we shall produce precocious fruits which will be immature and insipid and will not be long in rotting . . . .").
\textsuperscript{47} Blum, supra note 37, at 357-58. See ROBERT M. MENNEL, THORNS & THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825-1940 (1973) (crediting G. Stanley Hall with laying the foundation for the modern views of childhood, youth, and adolescence in the late 1800s).
\textsuperscript{48} See WILLIAM AYERS, A KIND AND JUST PARENT: THE CHILDREN OF JUVENILE COURT 25 (1995) ("Criminality was not seen as the result of a decision by a morally responsible individual; rather it was a type of youthful illness which could be treated and the child rehabilitated."); Blum, supra note 37, at 351, 358.
\textsuperscript{49} 1899 Ill. Laws 137, § 21.
similar acts creating courts modeled after Illinois. The courts, not intended to actually rehabilitate, were designed to refer juveniles to rehabilitative services and institutions. Evidence indicates that “the heart of the reform movement was aimed at changing institutional conditions, not changing the procedure used to channel juveniles into those institutions.

The early reformers believed that society’s role was not to decide a child’s guilt or innocence, but to understand how he has become what he is and what can be done to change him." The early reformers pictured the judge as a caring father figure with the qualities of a brilliant psychologist and a “dedicated social worker.” According to Judge Julian Mack, a pioneer in the juvenile system, the judge was “to find out what [the juvenile] is physically, mentally, and morally, and then, if...[the judge] learns he is treading the path that leads to criminality, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.”

Because it was believed that the judge and state would be acting in the best interest of the child, the courts were very informal and provided none of the procedural protections that were considered to be so important in the adult system. Youth were denied due process provided by the Constitution in favor of “the paternalistic solicitude and confidentiality promised by the juvenile court.” These procedural

51. Id.
52. Id.
54. See Mack, supra note 1, at 119-20. (“He must be a student of and deeply interested in the problems of philanthropy and child life, as well as a lover of children. He must be...willing and patient enough to search out the underlying causes of the trouble and to formulate the plan by which, through the cooperation, often times, of many agencies, the cure may be effected.”).
56. See Gault, 387 U.S. at 17; Commonwealth v. Fisher, 62 A. 198 (Pa. 1905) (holding that constitutional due process concerns should not apply to the Pennsylvania Juvenile Court Act because life, liberty, and property are not at issue); Symposium, Struggling For A Future: Juvenile Violence, Juvenile Justice: Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System, 36 B.C. L. REV. 1037, 1039 (Sept. 1995) (The judge “vested with wide discretion and imparting moral vision, would be able to steer the errant child into the right path.”).
57. Blum, supra note 37, at 356.
inequities were justified by the belief that the state was acting as parens patriae, or "parent of his country", which "authorizes the state to substitute and enforce judgment about what it believes to be in the best interests of the persons who presumably are unable to take care of themselves. This justification gave the judge wide discretion and often resulted in indeterminate sentences for the juveniles. Youth could be sent to training schools for indefinite periods of time with no regard for the crime or its severity. Reformers soon began to see the potential humiliation and stigma of involvement in the juvenile justice system as harmful to the youth's rehabilitation. Although confidentiality was not an initial part of the system, the belief that it was necessary in order "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past" developed quickly.

It soon became clear that this paternalistic system envisioned by the reformers fell well short of its goals. The institutions, which were supposed to rehabilitate the wayward youth, were never implemented as intended. Without the necessary financial backing, most of these institutions remained highly overcrowded and punitive, and did not live up to the best intentions of their creators. According to the Supreme Court, "the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context."

These problems led to a wave of changes beginning in the 1960's concerning the procedural inequities between the juvenile and adult courts. In 1966, United States v. Kent began a period of re-analysis of

58. BLACK'S LAW DICTIONARY 911 (8th ed. 2004). ("The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.").
59. Coupet, supra note 27, at 1308.
60. Cracking Down, supra note 44; O'Connor, supra note 35, at 1302-303.
61. Id.
63. See, e.g., Gault, 387 U.S. at 24.
64. Dalton, supra note 50, at 1186.
65. Id.
67. Id. at 60 (Black, J., concurring) ("The juvenile court planners envisaged a system that would practically immunize juveniles from 'punishment' for 'crimes' in an effort to save them from youthful indiscretions and stigmas due to criminal charges or convictions; . . . this exalted ideal has failed of achievement since the beginning.").
the juvenile justice system focusing on its constitutionality. 

According to the Court, "the child receives the worst of both worlds . . . he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." Soon after, in In re Gault, the Court provided juveniles with a number of procedural rights including representation, notice, confrontation and cross-examination of witnesses, and protection against self-incrimination. In re Gault rejected the idea of parens patriae in favor of a system "that afforded juveniles all of the protections of the adult criminal system . . . without the adult system's serious sanctions and with the promise of confidentiality." Throughout the 1960's and into the 1970's, the court continued to provide juveniles with the same procedural protections as adults, but stopped short of total equality with the denial of the constitutional right to a jury trial. Despite the increased similarities between adult and juvenile criminal courts created by these changes, their dissimilar goal persisted: juveniles were to be rehabilitated and not punished.

Soon after, a period of reform directed at changing the goals and structure of the system, including its rehabilitative ideals, followed due to increased concern over juvenile crime. In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act in order to thor-

70. Gault, 387 U.S. at 18 ("[t]he absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures.").
71. Id. at 41.
72. Id. at 33.
73. Id. at 57.
74. Id.
75. Janet E. Ainsworth, The Court's Effectiveness in Protecting the Rights of Juveniles in Delinquency Cases, THE JUVENILE COURT, Winter 1996 at 65. See Gault, 387 U.S. at 16 ("The Latin phrase proved to be a great help to those who rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance.").
76. See Breed v. Jones, 421 U.S. 519 (1975) (holding that juveniles have a right against double jeopardy); In re Winship, 397 U.S. 358 (1970) (holding that juveniles are entitled to proof beyond a reasonable doubt for adjudication).
77. McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (holding that juveniles are not entitled to the constitutional right to a jury trial because the purpose is for treatment and not punishment).
78. Cf. Gault, 387 U.S. at 21 ("The observance of due process standards. . . will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.").
oughly examine the system. 79 This assessment, the first comprehensive one since the inception of the system, found it to be ineffective. 80 Even with these negative findings, rehabilitation remained the main goal of the Act. 81 In contrast to previous reform efforts, these changes resulted not out of a concern over the treatment of juveniles, but because of a perceived increase in juvenile crime. 82 One commentator stated that the “reforms represent no more than a swing in the pendulum of public opinion undoubtedly fostered by the mass media’s exposure of the whole topic of juvenile delinquency and sensational reporting of particularly violent crimes involving juveniles.” 83 It is easy to understand why the public believes there has been a drastic rise in juvenile crime. The media frequently refers to America’s youth as “super predators” and cover stories entitled “Teenage Time Bombs” and “Heartbreaking Crimes: Kids without Conscience” are not uncommon. 84 Despite the fact that juveniles make up a small percentage of all arrests, 85 and the rate has been steadily declining since its peak in 1994, 86 studies show that the public believes the rate to be much

81. See In re Sealed Case, 893 F.2d 363, 367 (D.C. Cir. 1990) (“[T]he Act’s underlying purpose is to rehabilitate, not to punish, so as to assist youths in becoming productive members of society.”).
82. BERNARD, supra note 35, at 31-33 (describing how “juvenile justice reform policies are inherently cyclical in nature: policies are shaped directly by changing social responses to juvenile crime and rhetoric about juvenile delinquents, rather than an actual increased criminality.”)
86. Id. at 1 (stating that juvenile crime has declined 44% since 1994).
higher. Politicians have reacted to this errant perception by proposing "simplistic 'get tough' policies to pacify people's fears." In response, the states have changed their policies regarding juveniles. These changes have come in three forms: jurisdictional, jurisprudential, and procedural. Jurisdictional changes include the frequent practice of waiving juveniles to adult court when they reach a certain age or commit particular crimes. Jurisprudential changes such as changing the legislative purpose of the juvenile court system from rehabilitative to punitive and eroding confidentiality provisions for juveniles are common in many states. Procedural changes include more open access to court proceedings and more determinate sentencing.

One of the major changes that has resulted from this call for juvenile accountability has been the erosion of the traditional confidentiality of the juvenile system. Some believe that access to both juvenile records and proceedings will "show a community frustrated and afraid of highly publicized violent juvenile crime that the system is working

87. Conward, supra note 84, at 47 ("The average adult believes that youths commit 43% of all violent crime"); Michael A. Males, Adults Now More Violent Than Youth, The Sacramento Bee, Sept. 22, 1996, at F1. (Even in 1994 when juvenile crime was at its peak, a Gallup Poll concluded that "because of recent news coverage of violent crimes committed by juveniles, the public has a greatly inflated view of the amount of violent crime committed by people under the age of 18.")

88. BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 287 (1999). See John Engler, Address at the Prosecuting Attorney's Association of Michigan/Mackinac Conference 6 (July 27, 1995) (transcript on file with J.L. & POL'Y) (his 'plan to combat the rising tide of juvenile violence...[sends] a clear and unmistakable message to teen criminals: You will be caught, you will be punished swiftly and severely."


90. Waiver is the process of transferring a juvenile who would normally be under the jurisdiction of the juvenile court to adult court. See generally Cracking Down, supra note 44; Feld, supra note 89.

91. See Blum, supra note 37; Coupet, supra note 27; Danielle R. Oddo, Note, Removing Confidentiality Protections and the "Get Tough" Rhetoric: What Has Gone Wrong with the Juvenile Justice System?, 18 B.C. THIRD WORLD L.J. 105 (1998).


93. Cracking Down, supra note 44, at 331.

94. See Oddo, supra note 91, at 119 ("The destruction of confidentiality protections is integral to the overall scheme of the 'get tough' rhetoric.").
hard for everyone's benefit." Changes in the confidentiality laws have come in several forms. First, many states now provide more judicial discretion in the release of information by either providing a list of who may access the information or allowing access to those who can show good cause to view juvenile records. Second, other states are requiring public disclosure for particular offenses or when the juvenile is above a certain age. Finally, some states are now disclosing most or all juvenile information to the public. While these changes vary from state to state, they are all indicia of the changing goals of the juvenile court system.

III. THE USE OF SHAME TODAY

This decreased insistence on confidentiality in the juvenile system has resulted in a resurgence in the use of shaming penalties for juveniles. Throughout the 1990's, using shame to punish wrongdoers has become increasingly popular in the adult system. Toni M. Massaro, a professor who has studied the topic of shame in detail, believes that shame has made a comeback because people believe America's supposed shamelessness contributes to society's many problems. She points out that modern supporters of shame "blame our therapeutic culture, and the therapists and educators who helped create it, for [the] erosion" in our social limits. One such strong

100. See Garcia, supra note 22 (noting that "shame sanction" was not even defined by BLACK'S LAW DICTIONARY (6th ed. 1990)).
102. Massaro, supra note 16, at 646.
103. Id. at 652.
supporter of shame, Professor Dan Kahan, states that the public rejects the traditional alternatives to incarceration, such as fines and community service, because they fail to express the public’s desired moral condemnation.  

These modern shaming penalties are not as severe or as widespread as those of our colonial past. They are typically used for three types of offenses: (1) sexual or moral; (2) commercial and business; and (3) first-time and minor. Kahan lists four categories of shaming punishments. The first is stigmatizing publicity, which is an “attempt to magnify the humiliation inherent in conviction by communicating the offender’s status to a wider audience.” The second type is literal stigmatization. This is done by the “stamping of an offender with a mark or symbol that invites ridicule.” Another form of shaming penalty is the self-debasement ceremony or ritual intended to publicly disgrace the offender. The final category includes contrition penalties which come in two forms: either requiring the offender to publish an apology or requiring some type of apology ritual. The principal purpose of this type of punishment is to embarrass the individual.

The use of shaming punishments for juveniles creates a dangerous precedent. Despite the fact that there are no current studies regarding their effects on juveniles, and research into their efficacy and impact on adults is scant, more and more judges are beginning to use shame in an attempt to curb juvenile delinquency. After looking at the existing research on their use on adults and the issues involving juvenile delinquency itself, one thing is clear: using shaming penalties to punish juvenile delinquents is ineffective and could possibly increase

104. Kahan, supra note 18.
105. See Whitman, supra note 17, at 1065 (noting that “shame, particularly in a Christian or post-Christian society, always shadows us in our sexual activities.”).
106. See Garcia, supra note 22, at 114-15 (noting that these offenders strongly value their reputation because it’s required to make more money).
107. Whitman, supra note 17, at 1068 (stating that shame sanctions applied to first-time offenders are designed to “warn [them] that they are flirting with a deep, and deeply undesirable, status change.”).
109. Id. at 631-32.
110. Id. at 632.
111. Id.
112. Id.
113. Id. at 634.
114. Massaro, supra note 11.
115. Kahan, supra note 18, at 638 (noting that very little research has been done on the efficacy of shame); Massaro, Culture, supra note 11, at 1918.
the potential for future criminality. At best, they will have no effect because of the mentality of children and adolescents. At worst, they may actually contribute to juvenile anti-social behavior by aggravating the reasons that the juvenile acted out in the first place. The following sections will explore these theories in detail.

**Ineffectiveness**

Some judges, frustrated with the court’s apparent inability to make substantial changes, have resorted to shaming in the hope that it will deter the juvenile and those who view the punishment from participating in future criminal behavior.116 This theory of deterrence is one of the classical theoretical justifications for punishment, which holds that society punishes both to deter the individual (specific deterrence) and the general public (general deterrence) from committing future crimes.117 While there have been few studies regarding the effectiveness of shame as a deterrent, some argue that it should work because it increases the costs associating with the behavior.118

There are two problems with this argument. First, almost all other types of punishments are intended in one way or another to accomplish this and arguably have not worked. Second, this argument assumes that juveniles actually make a cost-benefit analysis before engaging in criminal conduct. This is highly unlikely considering that research shows that substantial brain development occurs throughout adolescence.119 Children and most adolescents do not think about the

116. See Lynda Longa, *Does Shame Deter Crime? That’s a Matter of Opinion*, The Atlanta Journal and Constitution, June 21, 1999 (reporting an order by former Texas judge, Ted Poe, requiring a juvenile to march in front of a Houston Wal-Mart where he was caught shoplifting wearing a sign stating, “I stole from this store. Don’t be a thief. This could happen to you.” Poe, who has gained great notoriety for his use of these penalties stated, “Shame works. Public humiliation is the greatest deterrent to behavior that I know of. We don’t like it when we’re ridiculed.”).


118. T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. Mich. J. L. Ref. 885, 917 (1996) (arguing that allowing juvenile records to be public will affect the adult decision to commit crime because the records could be used in sentencing); Kahan, *supra* note 18, at 638 (noting that there have been few studies into the deterrent effect of shaming penalties); Paul R. Kfoury, *Confidentiality and the Juvenile Offender*, 24 N.H. B.J. 135 (1983) (arguing that the stigma will impact the future choice to commit delinquent acts”); Blum, *supra* note 37, at 392 (“Social stigmas. . .will not dissuade many current delinquents from breaking the law, but they are important for forming the moral codes of young law-abiding youngsters.”).

consequences of their actions. This is why the average person's chances for involvement in the criminal justice system peaks at the age of seventeen and declines thereafter. As one commentator put it, "[c]hildren are thinking of the immediate, not whether their name is going to be in the paper next week or that some public light will be shed on them that will harm their future." It is important to note that the law still clearly recognizes the inability to make a clear and informed decision by children and adolescents. While politicians may be arguing that we need to "get tough" on "hard-core criminals" who "know that juvenile law tips the scales of justice in their favor," they are certainly not advocating a lower age for voting, alcohol consumption, tobacco use, employment, compulsory education, or driving. In fact, there has been a push in the opposite direction for changes such as graduated licenses and penalties for dropping out of high school.

Another reason why shame is unlikely to be a successful deterrent is that our culture is drastically different from those in which shame has been successful. Toni Massaro, an expert on the effects of culture on shame, states that there are five things which must be present for the penalty to have the desired effect: (1) the person to be shamed "must be [a member] of an identifiable group, such as a close-knit religious or ethnic community," (2) the person's social standing

---


122. Wallace, supra note 120, at 53.

123. This is demonstrative of the fact that the use of such public penalties looks good politically. See, e.g. John Williams, Name May Be the Game in GOP District 2 Race, THE HOUSTON CHRONICLE, March 3, 2004 (reporting that former Texas judge Ted Poe who was known for his use of public shaming penalties has a70% community name recognition in his race for the 2nd Congressional District, almost unheard of for a typical judge).

124. See GA. CODE ANN. § 40-5-22(a)(1) (2004) (requiring those under age eighteen to present proof of high school attendance, a high school diploma, a general equivalency development diploma, or a high school certificate in order to obtain a driver's license); N.C. GEN. STAT. § 20-11 (2004) (requiring a provisional license for those under eighteen years of age).

125. See Massaro, supra note 11, at 1924 (Massaro is highly critical of the potential for shame as a deterrent due to culture differences between modern day America and successful shame cultures).

126. Id. at 1883.
must be actually compromised by the sanction; the group must withdraw from the offender after the shaming is communicated to them; (4) the "person must fear withdrawal from the group;" and (5) there must be some means of reintegrating the person to the group. Massaro believes that our society is not capable of successfully reintegrating the offender, which is essential to effective shame. She points out that, while a successful reintegrative shaming culture emphasizes interdependence, community and shared values, our society values individuality, independence and autonomy. Massaro states that "modern shaming is not integrative . . . it is a call for humiliation of offenders, first by the state and then - less predictably but likely nonetheless - by the offender's community." In contrast, Professor Dan Kahan, a strong supporter of shaming penalties, points out that this problem is no different from incarcerating someone. The trouble with this argument is that it is typically the first time and minor offenders who are being given such conditions and they would not have otherwise been sent to training schools or incarcerated in adult prisons. What is intended to be lighter penalty ends up being even more harmful to the juvenile offender whose crime was minor or who has never been in trouble before.

**Increased delinquency**

Despite the increased similarities to the adult system's goal of punitive punishment, rehabilitation of the juvenile is still an important goal of the juvenile justice system in many jurisdictions. As recently as 1994, the Third Circuit reiterated this when it acknowledged "the need to avoid embarrassing and humiliating juveniles . . . and not to affect the rehabilitation of the juveniles adversely." While there have not been any empirical studies regarding the impact of shaming on a juvenile, the fact is, we just do not know how many juveniles would be effected negatively by this form of punishment. Given the

127. Id.
128. Id.
129. Id.
130. Id. at 1924.
potential dangers, this is a very high risk to take with the youth of America.

There are two ways in which public shaming could harm the juveniles involved. First, because of the various reasons that juveniles engage in delinquent behavior, shame could have a negative impact on their sense of self-worth and weaken their support system, causing them to delve even further into anti-social behavior. Second, contrary to popular belief, most juveniles who enter the system never re-offend. To stigmatize those first-time offenders, for which shaming penalties are typically used, is far too great a risk.

There is no conclusive evidence revealing one single explanation for why some juveniles engage in delinquent behavior and others do not. Official and self-reports of delinquency point to interfamilial stress, poor problem-solving ability, and poor discipline, guidance, and supervision. One researcher identified fifteen variables related to juvenile crime and grouped them into five different categories: (1) situational factors, (2) societal influences, (3) resource availability, (4) personality characteristics, and (5) their cumulative effects. Situational factors include abuse, neglect, and poor parental role models. Societal influences such as exposure to violence and a lack of heroes are also cited. Resource availability includes access to guns and controlled substances. Personality characteristics such as low self-esteem, poor communication skills, and inability to deal with negative feelings are also factors.

Another potential cause of juvenile delinquency is previous abuse or neglect. The Children's Defense Fund, an organization dedicated to the protection of children, stated that being abused or neglected

---


137. Shame, Stigma, and Crime, supra note 133 (pointing out that shaming penalties are typically used for first time offenders).

138. Coupet, supra note 27, at 1334.


141. Id. at 37-41.

142. Id. at 41-47.

143. Id. at 44-46.

144. Id. at 46-48.
increased a juvenile's chance of being arrested by 55%. An Ohio study of incarcerated youth showed that 75% of the girls and 50% of the boys had been sexually abused.

Whatever the cause, whether abuse, poverty, or personality problems, one thing that is certain is that many juvenile delinquents are likely to have a low sense of self-worth. One commentator stated that "juveniles who engage in delinquency...lack just such a sense of having a role and place in the larger society." If the child already has a low sense of self-worth and is beginning to make bad choices, what good will it do to punish him or her by public humiliation? Massaro, based on her research on the effects of shame, has described it as something that "forces a downward redefinition of one-self and causes the shamed person to feel transformed into something less than her prior, idealized image." Even Kahan, a strong supporter of the use of shame as punishment for adults has conceded that "[t]he consequences of shaming penalties are extremely unpleasant. Those who lose the respect of their peers often suffer a crippling diminishment of their self-esteem."

Some theorize that once a person has been stigmatized he is more likely to become isolated from positive influences and may begin to form stronger bonds with those illustrating more deviant social propensities. This labeling theory, which gained attention during the 1960's and 1970's, posits that a person will become what they believe others perceive him or her to be. Again, while there is no

146. Robert R. Belair, "The Need to Know" Versus Privacy, in, National Conference on Juvenile Justice Records: Appropriate Criminal and Non-Criminal Uses 37 (1997) (The study also showed that 80% came from a home with an annual income of less than $10,000).
147. See Coupet, supra note 27, at 1335 (referring to Thomas J. Bernard, The Cycle of Juvenile Justice 187 (1992)).
149. Massaro, supra note 11, at 1901.
150. Kahan, supra note 18, at 638; Shame, Stigma, and Crime, supra note 133, at 2201 ("Because shaming sanctions often alienate the offender from his preexisting communities and push him toward criminal subcultures, they tend to exacerbate his sociodviant propensities.").
151. See Neal Kumar Katyal, Deterrence's Difficulty, 95 Mich. L. Rev. 2385, 2458 (1997) ("[I]solation is a product of the subjective internalization of stigma.").
empirical data to suggest how many juveniles this could effect, this is a very high risk to take with juveniles.

Studies have shown that the availability of criminal history information to the public can result in fewer employment and educational opportunities, thereby making it less likely that they will refrain from criminal activity.154 A prime example is the case of Gina Grant, a fourteen-year-old, who killed her abusive, alcoholic mother in 1990 by beating her to death with a lead crystal candle holder.155 After pleading no contest to voluntary manslaughter, she was confined to a secure juvenile facility for six months and subsequently released on probation to the custody of her aunt in Cambridge, Massachusetts.156 While Ms. Grant was adjudicated as a juvenile and not tried as an adult, the hearing was open to the media.157 Despite the fact that the judge sealed all records in the case, there was still a virtual public record left as a result of media attention.158 Believing that a sealed juvenile record meant that her past would remain confidential, Ms. Grant answered "No" to a question about prior criminal history when applying for early admission to Harvard.159 She was accepted, and what would have been a quiet success story, turned into a national debate.160 A writer, unaware of Grant's past, featured her in a magazine article highlighting her early admission.161 After its release, newspaper clippings of the South Carolina trial were sent anonymously to Harvard, her high school, and the Boston Globe.162 Harvard rescinded its offer soon thereafter.163 This unfortunate case illustrates what can happen when the confidentiality of a juvenile is breached and the public is made aware of his or her conduct.164

154. ROBERT R. BELAIR & G. COOPER, U.S. DEP’T OF JUSTICE, PRIVACY AND JUVENILE JUSTICE RECORDS 112 (1982) (“When these doors are closed, offenders are more likely, not less likely, to return to criminal and anti-social conduct, thereby increasing, not decreasing, their danger to society.”).


156. Id.


158. Id.

159. Id.

160. Dembner & Auerbach, supra note 155, at 1.

161. Id. at 20.

162. Id. at 1.

163. Id.

164. See Nightline (ABC Television Broadcast, Apr. 11, 1995). ("Society’s memory is not as easily expunged as a criminal record." - Ted Koppell).
The vast majority of juveniles (94%) who become involved in the juvenile system will never become involved again.\textsuperscript{165} While the juvenile crime rate has at certain times increased and at certain times decreased, over time the recidivism rate has remained consistent.\textsuperscript{166} For the vast majority of juveniles who never re-offend, "the government's actual imposition of the shaming penalty is only the beginning of [their] punishment."\textsuperscript{167} Unlike fines or community service, shaming lacks an end point.\textsuperscript{168} As one commentator put it, "[m]ost juveniles do not, in fact, continue to be active and frequent offenders at either the juvenile or adult level. ... [B]efore we abandon what is almost 100 years of confidentiality protections, we need to think about the role ... that confidentiality plays in avoiding stigma for those juveniles who do, in fact, desist, and in promoting rehabilitation."\textsuperscript{169} Given the unpredictability of the impact of shame upon offenders in general, it is clear that this is far too great a risk to take with the youth of this nation.\textsuperscript{170} Taking an already alienated and confused young person and subjecting him to public humiliation will do nothing positive for his situation. While there is nothing wrong with making juveniles accountable for their offenses, publicly humiliating them is not the answer.

IV. Shame and the Courts

Despite the growing popularity of their use, few shaming penalties are ever appealed.\textsuperscript{171} Even former Texas Judge Ted Poe, made famous by his use of these punishments and sometimes referred to as the

\begin{itemize}
\item \textsuperscript{165} Uzzell, supra note 136, at 43 (stating that 94% of those ever involved in the system never return and of the remaining 6%, 2% went on to become career criminals).
\item \textsuperscript{166} U.S. DEP'T OF JUSTICE, PRIVACY and Juvenile Justice Records: A Mid-Decade Status Report 4 (May 1997).
\item \textsuperscript{167} Shame, Stigma, and Crime, supra note 133, at 2195.
\item \textsuperscript{168} Massaro, supra note 16, at 694.
\item \textsuperscript{169} Robert R. Belair, "The Need to Know" Versus Privacy, in NATIONAL CONFERENCE ON JUVENILE JUSTICE RECORDS: APPROPRIATE CRIMINAL AND NON-CRIMINAL USES 37 (1997) at 37.
\item \textsuperscript{170} See Ann Woolner, It's a Plain Shame, Politics of Public Scolding, TEX. LAWYER, Oct. 27, 1997 at 2. (noting the case of a 19 year old Georgia man who was ordered to publish his name, photo, and offense in a local newspaper after his third conviction for driving while intoxicated. He did not want his mother to know about the conviction but she saw it in the paper. After finding it, she left it on the breakfast table with a note saying how ashamed she was of him. He wrote a letter of apology and shot himself in the head).
\item \textsuperscript{171} See generally Andrew Horwitz, Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions, 57 WASH. & LEE L. REV. 75, 81 (2000).
\end{itemize}
"King of Shame,"172 has never had one of his sentences challenged on appeal.173 Most of the time these conditions are tied to a plea agreement so many offenders feel that they negotiated their disposition and are in no position to challenge it for fear they will end up with something much worse.174

There was, however, a recent North Carolina case brought by a juvenile challenging a condition requiring her “to wear a sign around her neck, 12” by 12” with the words - I AM A JUVENILE CRIMINAL - written in large letters” as a special condition of probation.175 The appellant, a fourteen-year-old female, along with three other juveniles, broke into a middle school and caused approximately $60,000 worth of damage.176 She admitted to the offenses of felony breaking and entering and felony possession of burglary tools, and received twelve months of probation requiring restitution, community service, a curfew, and drug testing among other general conditions of probation.177 She was ordered to wear the sign “whenever out in public, whenever she is away from her own residence . . . until the school year term would have ended if [she] would have been attending school.”178

The juvenile argued that the trial court’s discretion to order alternative conditions of probation other than those listed in the statute179 is limited by “specific statutory language protecting the confidentiality of the juvenile offender.”180 The juvenile’s second contention was that the condition “undermines the policy that a juvenile is not a criminal and unnecessarily subjects the juvenile to public humiliation and embarrassment.”181

174. Horwitz, supra note 171, at 81.
176. Id.
177. Id.
178. Id.
179. N.C. GEN. STAT. § 7B-2506(16) (2004) (“The court also may require the juvenile to comply with any other reasonable conditions specified in the dispositional order that are designated to facilitate supervision.”).
180. In re M.E.B., 569 S.E.2d at 685, 153 N.C. App. at 280; See N.C. GEN. STAT. § 7B-2506(16) (2004); But see N.C. GEN. STAT. § 7B-3100 (“Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited.”).
In response to the appellant’s first argument, the state contended that, while many statutes do restrict the dissemination of information regarding the juvenile, the court still has discretion regarding disclosure. 182 It pointed out that “the records and files may be examined or copied only by order of the court,” 183 and that the court is permitted to “require the juvenile to comply with any other reasonable conditions . . . that are designed to facilitate supervision.” 184 The state argued, in response to the appellant’s second argument, that the sign was not intended as a criminal punishment but was “intended to emphasize the accountability and responsibility of the juvenile, and not the juvenile’s criminal acts.” 185

The North Carolina Court of Appeals found that the state had misinterpreted the statute allowing disclosure of information by order of the court and that the “section does not grant authority to place juvenile records in a public display case on the courthouse steps.” 186 The court held that the sign was, in fact, a punishment, and not a reasonable means of facilitating supervision. 187 The Court reversed the special condition of probation and remanded the matter to district court for modification. 188

Although there are no other similar published appellate cases, it is possible to examine what might happen in other jurisdictions if this type of condition were appealed. What would happen if a similar case went before the court of last resort in either Texas or California? 189 How would the court decide the case?

It is unlikely that the cases would turn on a constitutional argument. The Supreme Court has never held that juveniles have a consti-

182. Id.
187. M.E.B., 569 S.E.2d at 686, 153 N.C. App. at 283 (The court also held that sign constituted intensive supervision and that this exceeded statutory authority for this case.)
188. Id.
189. I chose these states because they have very different judicial philosophies and because I have found incidents of shaming that have occurred in several of them in newspaper articles. See, e.g. Jeanie Russell, Shame! Shame! Shame! Evaluation of Publicly Humiliating Offenders, Good Housekeeping 102, Aug. 1997 (reporting former Texas Judge Ted Poe’s requiring a high school student to apologize to six school assemblies for smashing school windows); Debbie Salamone, Judge Orders Teen Who Maimed Tourists to Wear an Eye Patch, Orlando Sent. May 30, 1996 at A1.
tutional right to confidentiality. The Court has specifically held that the First Amendment rights of the press can trump a juvenile's interest in confidentiality. While the Court has reiterated that confidentiality is a laudable goal and that it is in the state's discretion to maintain it, it cannot unreasonably interfere with a constitutional right as important as the First Amendment without good reason.

The fact that the Court did not require confidentiality for offenders does not mean that the Supreme Court would approve of the use of shaming penalties for juveniles. When the Court has held that juveniles do not have an absolute right to confidentiality, it has done so because there was a higher interest at stake such as the First Amendment rights of the press.

Texas

Imagine that a fourteen year-old named John committed larceny in Texas. Because this offense constitutes a Class A/B Misdemeanor, he has received a Level 2 disposition. Under a Level Two disposition, the court may place John on probation for three to six months and

190. See, e.g., J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981) (holding that juvenile confidentiality is not a constitutional right).


192. Daily Mail Publ'g Co., 443 U.S. at 107 (Rehnquist, J., concurring) (“In my view, a State's interest in preserving the anonymity of its juvenile offenders - an interest that I consider to be, in the words of the Court, of the 'highest order'. . .”).

193. Id. at 109 (Rehnquist concurring) (“The juvenile court judge, unlike the press, is capable of determining whether publishing the name of the particular young person will have a deleterious effect on his chances for rehabilitation and adjustment to society's norms.”)

194. U.S. Const. amend. 1; Daily Mail Publ'g Co., 443 U.S. at 104-06 (“[T]he constitutional right must prevail over the state's interest in protecting juveniles. . . . There is no issue here of privacy. . . At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper”).

195. See, e.g., Daily Mail Publ'g Co., 443 U.S. 97; Davis v. Alaska, 415 U.S. 308, 320 (1974) (holding that “[t]he State's policy interest in protecting the confidentiality of a juvenile offender's records cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.”).

require restitution, community service, participation in a program for at-risk youths, or "if appropriate, impose additional conditions of probation." Suppose the judge orders six months probation, restitution for the damage caused, community service, and a requirement that John wear a sign stating, "I am a juvenile criminal because I stole from Super-Mart." If John immediately appeals this order, contending that it exceeds the confidentiality provisions of Texas Family Code and does not serve to protect the public or rehabilitate him, how will a court handle this?

On his first contention, John would most likely point to the Texas code provision which limits the disclosure of records and files concerning a child to a short list of people and agencies and argue that it limits the state's discretion. In response, the state might argue that a hearing involving a juvenile who is over the age of fourteen is open to the public unless the court determines that it should be excluded for good cause. When the proceedings are open to the public, basic information about the juvenile is no longer confidential. Therefore the legislature did not intend to shield the juvenile from all possible publicity and its potential impact. On this first contention, the court would most likely find for the state.

John may also argue that the sanction does not serve any rehabilitative purpose listed in the Texas Juvenile Justice Code. While this line of reasoning was effective in North Carolina, it may not work in Texas. The Texas legislature has declared the purpose of the juvenile justice code to be "the protection of the public and public safety." While the code does emphasize treatment, rehabilitation, and "remov[ing], where appropriate, the taint of criminality from children committing certain unlawful acts," the legislature has stated that treatment and rehabilitation are to emphasize accountability and responsibility. Furthermore, the Texas Supreme Court recently declared that the code promotes public safety over the best interests of the juvenile. John may claim that the punishment does not provide

197. TEX. FAM. CODE ANN. § 59.005 (Vernon 2004).
198. TEX. FAM. CODE ANN. § 58.005(a) (Vernon 2004) (providing that "[r]ecords and files concerning a child, including personally identifiable information, may only be disclosed to . . ." certain court personnel, treatment services, and those "having a legitimate interest in the proceeding or in the work of the court.").
199. TEX. FAM. CODE ANN. § 54.08(a) (Vernon 2004).
200. TEX. FAM. CODE ANN. § 51.01(C) (Vernon 2004).
201. Id.
202. TEX. FAM. CODE ANN. § 51.01(B) (Vernon 2004).
203. TEX. FAM. CODE ANN. § 51.01(C) (Vernon 2004).
for the protection of the public. In response, the state may argue that a shame sanction of this type does protect the public by warning shopkeepers so that they may keep a better eye on John. Adult courts have been split on whether this serves as a legitimate warning or not.\textsuperscript{205} However, these cases did not involve the rehabilitative goal of the juvenile system. It appears that the court would have to balance the potential public protection with the possible negative impact on the juvenile.

There is a distinct possibility that this Texas court would find for the state and uphold John's shaming condition based on the code's provisions for open proceedings and public protection. While juveniles have no constitutional right to closed proceedings and many states have taken this punitive goal in their courts, publicly shaming and humiliating a fourteen year-old first time offender will not protect the public.

\textit{California}

Assume the same facts, only now John went before a judge in Los Angeles instead of Houston. Would his appeal have a different result? The California Legislature has stated that the purpose of the juvenile justice system is "to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court."\textsuperscript{206} It emphasizes "care, treatment, and guidance that is consistent with [the juvenile's] best interest, that holds them accountable for their behavior and that is appropriate for their situation."\textsuperscript{207} The code also makes clear that "punishment' for the purposes of this chapter, does not include retribution."\textsuperscript{208} The California Juvenile Court Law appears to be less punitive and more focused on rehabilitation that the Texas Code.\textsuperscript{209} While there is an emphasis on public safety, the rehabilitative goals have not been abandoned.\textsuperscript{210} Despite the fact that California

\begin{itemize}
\item \textsuperscript{205} See People v. Meyer, 680 N.E.2d 315 (Ill. 1997) (reversing a sentencing requiring an adult convicted of aggravated battery to post a sign stating "Warning! A violent felon lives here. Enter at your own risk!"). \textit{But see}, Goldschmitt v. State, 490 So. 2d 123 (Fla. App. Ct. 1986) (upholding a sentence requiring adult convicted of driving under the influence to drive with a bumper sticker reading "Convicted D.U.I. - Restricted License").
\item \textsuperscript{206} CAL. WELF. & INST. CODE § 202(a) (Deerings 2004).
\item \textsuperscript{207} CAL. WELF. & INST. CODE § 202(b) (Deerings 2004).
\item \textsuperscript{208} CAL. WELF. & INST. CODE § 202(e) (Deerings 2004).
\item \textsuperscript{209} \textit{Compare} CAL. WELF. & INST. CODE § 202 (Deerings 2004), with TEX. FAM. CODE ANN. § 51.01(C) (Vernon 2004).
\item \textsuperscript{210} See \textit{in re} Charles C., 284 Cal. Rptr. 4, 8 (Cal. Ct. App. 1991) ("[T]he reference to punishment did not alter the over rehabilitative aspect of the juvenile justice system.").
\end{itemize}
juvenile court judges enjoy broad discretion when ordering conditions "so long as [they are] tailored to specifically meet the needs of the juvenile," a condition is not valid if it does not serve the statutory ends of probation. Under these statutes, John is more likely to win an argument that the sanction does not further any rehabilitative goal.

In contrast to Texas, California juvenile proceedings are generally closed to the public unless the hearing involves a violent felony and, even then, the judge will only allow release of the minor's name if the juvenile is fourteen years of age or older. While California does provide a short list of people and agencies to whom the juvenile court records may be released, the legislature has stated that its intent was to "provide for a limited exception . . . to ensure the rehabilitation of juvenile offenders" and reiterated its belief that juvenile records should, in general, remain confidential.

Additionally, California has already rejected the use of adult shaming penalties in at least appellate case. In the 1993 decision of People v. Hackler, the court overturned a sanction intended to advertise an offender's conviction. The defendant, convicted of petty theft after stealing beer from a store, was ordered to wear a T-shirt whenever he left his home that stated on the front, "My record plus two six-packs equals four years" and "I am on felony probation for theft" on the back. The court, stating that the probation order was "going back . . . to the era of stocks," overturned the condition finding that the trial court's intention was to humiliate the defendant rather than to rehabilitate.

It is clear that the results in John's case would drastically differ depending on whether he resides in Texas or California. Texas, known for its punitive justice system, would likely allow the condition. In contrast, California, usually considered to be a more liberal jurisdiction,

219. Hackler, 16 Cal. Rptr. 2d at 686.
220. Id. at 686.
would most likely overturn the condition. Such inconsistent results in something that can have such a major impact upon a young person’s future are unacceptable.

V. Proposals

While there may never be a perfect juvenile system or a total elimination of juvenile crime, there are possibilities for improvement. Media sensationalism and rhetoric about outbreak of juvenile crime has fueled the fire for politically-savvy politicians to push for drastic reforms. While these purely punitive responses to juvenile crime may appease the public, they are not the answer. It is important for juveniles to be held accountable for their actions and for them to learn to take responsibility, but it is also important to address the underlying causes.

There are several steps that need to be taken in order to create a system which emphasizes both the accountability of the juvenile and their potential for rehabilitation. It is important for the results to be consistent and not based upon simplistic politically-charged solutions. The first step to improvement in juvenile justice is to create a system of people who have an interest in youth and to require specialized training. The training must be comprehensive and multi-disciplinary in order to address the diverse needs of the juveniles. The next step is to address the programs set up for juveniles, not just the court itself. The juvenile courts themselves were never intended to rehabilitate. They were designed “to serve as a gateway to new rehabilitative institutions.” Unfortunately these ideal institutions were never realized. The procedure of the courts is not necessarily the problem; it is more likely the lack of availability and access to effective programs.

Legislators need to implement programs that both hold the juvenile accountable and aim to rehabilitate for the future. There are several factors that will help to make the programs successful. First, the programs need to be oriented towards juveniles only. Just because something shows potential with adults does not mean that it will be effective with juveniles. Studies show that adult counseling and vocational programs do not work for juveniles. Second, the programs should be intense, community oriented, and focused on developing specific life skills. They should concentrate not only on the juvenile

221. Dalton, supra note 50, at 1186.
222. Id.
223. Id.
individually, but on their family and surrounding environment as well. It is also important that they be closely monitored for problems and changed when necessary.

In addition, the court should have jurisdiction over these programs and other public agencies. In order to function effectively, it is necessary for the court to be able to ensure their cooperation in delivering services and treatment to the juveniles and their families. It is important to note that while confidentiality is a goal to which we should strive, the ability to share information between agencies and programs is essential. This is vital to the success of the system and should be protected.

VII. Conclusion

With the growing use of shame punishments in the juvenile justice system, it is becoming increasingly necessary for the state legislatures to address this in their juvenile justice reforms. Our society is changing, and it is important to address juvenile involvement in crime. From a century ago, the pendulum of public opinion and policy has made a full swing, perhaps too far. While juveniles are not wholly incapable of forming criminal intent or taking responsibility, neither are they super predators feeding off the perceived weaknesses of the juvenile court system. As Judge Wright of the United States Court of Appeals for the District of Columbia stated, "we cannot write these children off forever. We will inevitably hear from . . . [them] . . . again, and the kind of society we have in the years to come will in no small measure depend on our treatment of them now."225 It is important for us, as a society, to recognize that juvenile delinquents cannot simply be ignored. If they are thrown away to a system of arbitrary punishments intended to humiliate and degrade, they will be our future prisoners and not our future leaders.

Bonnie Mangum Braudway