Rethinking the Shame: The Intersection of Shaming Punishments and American Juvenile Justice

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I. Introduction: The Young Milk Thief

> *"These little turkeys have got total contempt for us, and it's time to do something."* – George F. Will, quoting a New Hampshire state legislator[1]
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> *"I hope what's going through their heads is 'Lord, have mercy . . . I am being shamed. I don't like this and I'm not doing it anymore.' Because the public can see the people out there walking and it really tickles them."* – Judge Peter Miller[2]
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> *"All criminal sentences produce shame for most citizens. But there is a difference between shame from a punishment and shame as a punishment. These judges are inventing their own forms of retributive justice like little Caesars toying with citizens."* – Jonathan Turley[3]

"What's up, Boo? How you been doin'?" she calls to a onlooker, stopping briefly to adjust the sign she carries during her parade in front of the Kangaroo Express convenience store in Panoma Park, Florida. The teenager is halfway through the sentence Judge Peter Miller imposed for misdemeanor theft: walking in front of the store she stole from carrying a big, heavy sign for two hours stating, "I stole from this store." The site supervisor reminds the girl that she cannot block her face and the girl begrudgingly repositions her sign. During her walk of shame, the girl is laughed at, honked at, pointed at, and stared at, although the residents of Putnam County are relatively unaffected by her presence.

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[1] George F. Will, *Spare the Rod and Spoil the Criminal?*, KANSAS CITY STAR, Feb. 1, 1996, at C11 (quoting an unnamed New Hampshire state legislator).

[2] *This American Life: Return to the Scene of the Crime*, CHICAGO PUBLIC RADIO (May 1, 2009), *available at* http://www.thisamericanlife.org/radio-archives/episode/379/return-to-the-scene-of-the-crime.

[3] Jonathan Turley, *Shaming Undermines Justice*, USA TODAY, Nov. 17, 2009, at 13A.

After all, it is a common sight. Judge Miller sentenced over one hundred and twenty defendants to similar shaming punishments in 2008. When asked, the teenager assures passersby that everything is okay because she was stealing milk for her little girl. At the end of the two hours, however, the teenage girl is unrepentant, stating indignantly, "I didn't learn anything . . . I'll steal again. This doesn't solve anything."[4]

The young milk thief is not alone in her punishment—the courts have sentenced both juveniles and adults to so-called "shaming punishments" for years. Shaming punishments do not have a common legal definition, either by statute or by case law; they are unique products of a criminal justice system historically engaged in a love-hate relationship with alternative sanctions.[5] Nevertheless, shaming punishments contain several generally uncontroverted elements: punishments designed to advertise an offender's wrongful conduct in a manner configured to reinforce normative social disapproval of the offender's bad actions and arouse disagreeable emotions within the offender.[6] The appropriateness, as well as the efficacy, of such punishments has been the product of much scholarly debate in recent decades.[7] Despite this dialogue, few scholars have studied the

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[4] The story and facts contained within are based upon facts presented in This American Life's broadcast, *Return to the Scene of the Crime.* Although the girl identified in the audio was eighteen years old, her story is not uncommon among juveniles. The police report listed the following items as stolen: one package of Oreo Cakesters, one Twix bar, one Milky Way, one package of M&Ms, one can of Dr. Pepper, and one pint of milk. *This American Life*, *supra* note 2.

[5] *See* Dan Markel, *Are Shaming Punishments Beautifully Retributive?: Retributivism and the Implications for the Alternative Sanctions Debate,* 54 VAND. L. REV. 2157, 2167-77 (2001) (describing the historic rise and fall of shaming punishments).

[6] Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2187 (2003) (citations omitted) [hereinafter *Shame, Stigma, and Crime*].

[7] *Compare* Dan M. Kahan, *What's Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075 (2006) (recanting his previous support for shaming and arguing that incarceration is more appropriate), *and*

appropriateness of sentencing juveniles to shaming punishments. The existing scholarship concludes that while society should hold juveniles accountable for their actions, shaming punishments are ineffective tools to meet the goal of accountability.[8] Instead, legislatures should create comprehensive rehabilitative programs to address juveniles' needs.[9]

The literature currently fails to address three matters. First, it lacks empirical data on recidivism rates after serving a shaming punishment. Thus, its true effectiveness as a deterrent is unknown. After all, the young milk thief said she would steal again.[10] Second, advocates for abandoning shaming punishments as a means of juvenile sentencing fail to adequately address the divide over the purposes of juvenile justice. While juvenile courts in some jurisdictions closely

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Markel, *supra* note 5 (arguing that shaming punishments are illiberal and not retributivist), *and* Toni M. Massaro, *The Meanings of Shame Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645 (1997) (arguing that American courts are not the appropriate institution to use shaming punishments in appropriate ways), *with* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733 (1998) (arguing that shaming punishments can be an effective alternative to imprisonment), *and* Scott E. Sanders, Note, *Scarlet Letters, Bilboes, and Cable TV: Are Shame Punishments Cruel and Outdated or are They a Viable Option for American Jurisprudence*, 37 WASHBURN L.J. 359 (1998) (arguing that shaming punishments can be both an effective deterrent and punitive sanction for certain crimes).

[8] Bonnie Mangum Braudway, Comment, *Scarlett Letter Punishments for Juveniles: Rehabilitation Through Humiliation?*, 27 CAMPBELL L. REV. 63, 65 (2004).

[9] *Id.*at 64,65

[10] *See also* United States v. Gementera, 379 F.3d 596 (9th Cir. 2004). One month after serving his shaming sentence, Gementera was caught stealing mail again. At his second sentencing, the judge sentenced Gementera to one year in prison. Expressing his frustration over Gementera's recidivism, Judge Vaughn Walker stated, "I do think, Mr. Gementera, what forbearance and patience the court may have had for you in the past has obviously not put you on the right track." Pam Smith, *'Scarlet Letter' Mail Thief Gets Less Creative Sentence Second Time Around*, THE RECORDER, (May 25, 2006), http://www.law.com/jsp/article.jsp?id=1148461533486&hbxlogin=1#.

resemble the punitive nature of the adult criminal system,[11] and thus would embrace shaming, other jurisdictions still acknowledge rehabilitation as a primary goal and offer a variety of services at disposition in lieu of punitive sanctions.[12] Finally, denouncing these alternative punishments also ignores the reality that, as one scholar noted, shaming punishments are "back with a vengeance."[13] Despite the absence of a societal consensus on the acceptability or effectiveness of these sanctions, shaming punishments have historic roots in American society and, as a practical matter, are growing more and more popular among judges.

Despite changes in juvenile court systems from the idealized systems imagined by Progressives, some of the ideas, goals, and protections are still present. This Article contends that shaming punishments conflict with juvenile justice in four ways. First, because the effectiveness of shaming as a deterrent is unknown, imposing shaming punishments instead of intervention and rehabilitative services fails to promote traditional juvenile justice goals. Second, juvenile shaming punishments create public stigma for the offender by stripping away the confidentiality of the juvenile's identity, delinquent adjudication, and disposition. Third, shaming creates the potential of dangerous public exposure by placing youths in emotionally and physically vulnerable positions. Finally, shaming punishments are generally inconsistent with the individual purposes states have announced as goals for juvenile courts.

This Article offers an alternative to the binary of either banning shaming punishments or allowing judges to mete them out without due regard to potential consequences. Part I lays the foundation of the juvenile justice system. It details how parens patriae drove the initial juvenile court system into existence and how later decisions and statutes have changed the nature of the original system. Part II discusses the tensions

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[11] *See infra* Part II.C; *see also* Braudway, *supra* note 8, at 70-74.

[12] Braudway, *supra* note 8, at 78-79.

[13] Turley, *supra* note 3.

between shaming punishments and the ideals of the juvenile justice system. Specifically, this section examines shaming's potential deterrent effects and concludes that, because shaming's ability to rehabilitate is unknown, it fails to serve as a legitimate sanction under the purposes of most juvenile court systems. This section also argues that judge-issued shaming punishments introduce juveniles into physically and emotionally vulnerable positions. Such public exposure for the offense undermines the traditionally confidential nature of the juvenile justice system. Finally, this section examines individual state purposes for juvenile justice. It concludes that most states recognize juveniles as individuals needing judicial intervention to address their needs and promote their best interests. Part III describes three possible solutions to solve the compatibility problem: abolishing shaming punishments, legislative control of shaming punishments, and controlling juvenile shaming sanctions through plea bargaining. While an admittedly imperfect solution, this Article advocates for control through plea bargains. The Article briefly concludes.

II. Concern for America's Youth: The Development of the Juvenile Justice System

As originally conceived, the American criminal justice system failed to distinguish between adult and juvenile offenders.[14] At the beginning of the twentieth century, however, Progressive activists implemented a series of system-wide political and social reforms that included concerted efforts to "re-view" the concept of juvenile justice.[15] This section describes how child welfare reformers established the juvenile system under the doctrine of parens patriae and provides an overview of significant milestones in

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[14] Kelly M. Angell, Note, *The Regressive Movement: When Juvenile Offenders are Treated as Adults Nobody Wins*, 14 S. CAL. INTERDISC. L.J. 125, 127 (2004) (citing Joseph F. Yeckel, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 WASH. U. J. URB. & CONTEMP. L. 331, 334-36 (1997)).

[15] ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 9 (1969); *see also* Angell, *supra* note 14, at 128 (describing some of the reforms enacted by the Progressive movement).

juvenile rights. It also briefly addresses recent changes within the system.

A. Parens Patriae: The Undergird of Juvenile Justice and Juvenile Courts

Throughout the late 1800s, states created juvenile courts in an ad hoc fashion, and the location of the first juvenile tribunal is subject to some debate.[16] Most scholars, however, recognize the Illinois legislature's Juvenile Court Act as the first official model for systemic change.[17] Juvenile courts generally sought to provide adolescents with a means to adjudicate their cases outside of the criminal system and to create opportunities to address the special needs of abused, neglected, delinquent, and dependent children.[18] Parens patriae, defined as the state's capacity to provide protection for those unable to care for themselves,[19] was the basis for the statutorily created juvenile courts. It provided doctrinal support for juvenile crimes to be disposed of under a "complete scheme," including any necessary treatment.[20]

At their inception, juvenile court systems were distinguishable from the traditional criminal justice system in several important respects.[21] First, the goals of juvenile justice

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[16] PLATT, *supra* note 15, at 9. ("Massachusetts and New York passed laws, in 1874 and 1892 respectively, providing for the trials of minors apart from adults charged with crimes. Ben Lindsey, a renowned judge and reformer, also claimed this distinction for Colorado where a juvenile court was, in effect, established through an education law of 1899.").

[17] *Id.* at 10. ("By 1917 juvenile court legislation had been passed in all but three states and by 1932 there were over 600 independent juvenile courts throughout the United States.").

[18] *Id.*

[19] *See* BLACK'S LAW DICTIONARY 520 (3d Pocket ed. 2006).

[20] 47 AM. JUR. 2D *Juvenile Courts and Delinquent and Dependent Children* § 1 (2009). These statutes were upheld as "salutary police measures intended for the protection and welfare of the child." *Id.* at § 18.

[21] The development of juvenile court systems also reflected significant changes in two doctrines: criminological theory and developmental theory. Braudway, *supra* note 8, at 67. Classical criminal theory blamed the criminal, but emergent theories in the late nineteenth century expanded the scope of blameworthiness into considering environmental factors. *Id.* at

and delinquency laws differed from traditional penal laws: instead of seeking to punish, juvenile laws sought to correct and protect[22] the country's "'least fortunate citizens.'"[23] This included not only serving the youth's need for "care, treatment, and guidance," but also ensuring the public's protection and safety.[24] To meet the goals of the system, courts had wide discretion to fashion solutions to juveniles' substantive problems and thus operated in unique procedural ways.

Second, children were not "accused" of having committed a crime; the court systems offered "assistance and guidance" so that a child would not have to endure to the stigma of a criminal record for his life.[25] New vocabulary highlighted the distinct and innovative type of justice these courts sought to provide. While a traditional criminal trial proceeded by way of pre-trial, trial, and sentencing, juvenile courts undertook pre-adjudicatory, adjudicatory, and dispositional steps.[26] Because the courts viewed youths as individuals in need of the state's guidance, instead of as individuals accused of a crime, courts avoided putting the youth on trial. The system did not charge juveniles with a

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67-8 (citing Arthus L. Blum, Comment, *Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice*, 27 LOY. U. CHI. L.J. 349, 385-59 (1996)). This positivist approach embraced determinism and provided that "environmental, biological, social determinants" influenced the course of human action. *Id.* at 67-8 (citing DAVID MATZA, DELINQUENCY AND DRIFT 5 (1964)). Human development theory also supported the development of the juvenile courts because childhood and adolescence were no longer lumped into adulthood, but were viewed as distinct, formative stages. *Id.* at 68 (citing Blum, *supra,* at 349, 351, 357-58).

[22] Young v. Knight, 329 S.W.2d 195, 200 (Ky. 1959) ("Proceedings in juvenile court are corrective and preventative rather than punitive.").

[23] PLATT, *supra* note 15, at 137 (citing Gustav L. Schramm, *The Juvenile Court Idea*, FED. PROBATION 13, at 21 (Sept. 1949)).

[24] *In re* Charles G., 9 Cal. Rptr. 3d 503 (Cal. Ct. App. 2004).

[25] PLATT, *supra* note 15, at 137.

[26] PAUL C. WATKINS, JR., THE JUVENILE JUSTICE CENTURY: A SOCIOLOGICAL COMMENTARY ON AMERICAN JUVENILE COURTS 47 (1998).

complaint, indictment, or information—a juvenile came before the court via petition.[27] Further, juvenile courts did not label youths as "guilty"; the court adjudged the youth delinquent, dependent, or neglected.[28]

Third, unlike the open and public nature of adult criminal proceedings, juvenile court adjudications were generally more casual and closed from the public eye.[29] Furthermore, instead of the rigid statutory definitions governing criminal law, the terms defining juvenile delinquency were amorphous and vague, ensuring that the court assisted all of those deserving of the court's attention.[30] Through their use of broad terms, juvenile courts minimized the differences between delinquent and neglected children, classifying both as individuals in need of the court's guidance and assistance.[31] Essentially, juvenile courts took a parental role instead of a strictly adjudicatory one.[32] In fact, the juvenile system considered the judge a "caring father figure" who advocated for the child in a manner similar to a social worker.[33] Because of the "surrogate parent-counselor-confessor" roles that the judge and probation officer assumed, legal representation was unnecessary.[34]

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[27] WATKINS, *supra* note 26, at 47.

[28] WATKINS, *supra* note 26, at 49.

[29] PLATT, *supra* note 15, at 137-38.

[30] Frank E. Zimring, *The Common Thread: Diversion in the Jurisprudence of Juvenile Courts, in* A CENTURY OF JUVENILE JUSTICE 142, 143 (Margaret L. Rosenheim et al., eds. 2002).

[31] Elizabeth S. Scott, *The Legal Construction of Childhood, in* A CENTURY OF JUVENILE JUSTICE, 113, 131-32 (Margaret Rosenheim et al., eds. 2002).

[32] PLATT, *supra* note 15, at 138 (quoting a statement from Chicago Bar Association that found the "trend and spirit" of the Juvenile Court Act was to allow the state to "exercise[] that tender solicitude and care . . . that a wise and loving parent" would show to his own child); *see also* Elizabeth S. Scott, *supra* note 31 (noting that juveniles needed the guidance of a "wise parent").

[33] Braudway, *supra* note 8, at 69 (citing Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909)).

[34] WATKINS, *supra* note 26, at 47.

Finally, Progressive constructed juvenile courts around the idea of "child-saving" and utilized a variety of non-legal resources to treat. Advocates aimed to ensure the child was not destined for a life of penological intervention.[35] These non-legal resources included investigation into the child's background, including "physically, mentally, [and] morally."[36] Further, the investigations reinforced the appropriateness of the non-traditional sentences juveniles received—institutionalization, foster placement, probation,[37] and training schools.[38]

The popularity of the juvenile court's rehabilitative framework quickly became evident. By 1925, only two states had not adopted specialized children's courts, and reformers were optimistic that their work would ensure a new age in how delinquent children were treated.[39] Even courts appreciated the positive outlook, as evidenced by the Pennsylvania Supreme Court in *Commonwealth v. Fisher*:

> It is to save, not to punish; it is to rescue, not to imprison; it is to subject to wise care, treatment and control rather than to incarcerate in penitentiaries and jails; it is to strengthen the better instincts and to check the tendencies which are evil; it aims, in the absence of proper parental care, or guardianship, to throw around a child, just starting in an evil course, the strong arm of the parens patriae.[40]

Appellate courts nationwide also did their part to develop the caselaw by upholding lower court decisions and expounding upon this logic. By 1930, legal, philanthropic, sociological, political, and criminological ideologies

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[35] PLATT, *supra* note 15, at 141-42.

[36] WATKINS, *supra* note 26, at 51 (citing Mack, *supra* note 33, at 119-20).

[37] BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 30 (1993).

[38] Braudway, *supra* note 8, at 70 (citations omitted).

[39] KRISBERG & AUSTIN, *supra* note 37, at 30.

[40] Commonwealth v. Fisher, 27 Pa. Super. 175 (Pa. Super. Ct. 1904).

interlocked to create an "astounding unanimity on the central tenets of juvenile law."[41]

Parens patriae theory clearly ruled the day. One scholar described the doctrine as a "liturgy . . . elevated to a sacrosanct position and anyone who had the temerity to question this benevolent doctrine was viewed as anti-child and anti-progressive."[42] Parens patriae served as the underpinning of the Progressive reformers' aims and established the nexus between those aims and the state's authority to construct juvenile courts.[43] Unfortunately, however, the visionary system fell short. Funding issues prevented the infrastructure from being fully developed and courts began issuing punitive sanctions[44] In fact, even the Supreme Court noted that despite the reformers' intentions, the result was little more than a "peculiar system for juveniles, unknown to our law in any comparable context."[45]

B. Transforming the System?: Contemporary Juvenile Rights and Protections

Both Congress and the Supreme Court contributed to the changes that moved the system away from its traditional moorings of intervention, protection, and rehabilitation. Instead of informal proceedings designed to intervene in the child's life and provide rehabilitative services, many contemporary juvenile courts now resemble adult criminal courts.[46] The court decisions and statutes discussed below provide significant due process protections to juveniles. In so

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[41] WATKINS, *supra* note 26, at 62, 73.

[42] WATKINS, *supra* note 26, at 47.

[43] Scholars have identified at least five aims of the Progressive agenda: develop a court that would (1) avoid stigmatizing the youth; (2) allow for closed proceedings and sealed records; (3) maintain a "treatment ethos" of prevention; (4) utilize a variety of social services; and (5) employ personnel who "held an almost pathological prejudice against adult criminal law and practice." WATKINS, *supra* note 26, at 49-50.

[44] Braudway, *supra* note 8, at 70.

[45] *In re* Gault, 387 U.S. 1, 17-18 (1967).

[46] Angell, *supra* note 14, at 129 (discussing how the lines between court systems have been "blurred").

doing, they have fundamentally altered the "philosophical underpinnings" of juvenile courts, resulting in significant changes in practices, purposes, and outcomes.[47]

1. Kent v. United States

In 1966, Kent argued that the District of Columbia's Juvenile Court Act (JCA) violated his rights when the court, per the Act, transferred him from juvenile court to adult court without a hearing or findings.[48] The Supreme Court agreed with Kent, noting that the state did not assume its typical roles of judge and prosecutor in juvenile court proceedings. Although the JCA was philosophically grounded in social welfare policy, the "admonition to function in a 'parental' relationship [wa]s not an invitation to procedural arbitrariness."[49] The Court noted that concern over the efficacy of juvenile courts had been growing for years,[50] but its ruling was narrow: in instances where juvenile courts waive a case to the adult criminal court system, a juvenile is entitled to a hearing, supported by statements of the court's reasoning, and effective assistance of counsel.[51]

Kent introduced a "procedural formality" into the juvenile waiver process previously unconsidered.[52] The

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[47] Donna M. Bishop et al., *Juvenile Justice Under Attack: An Analysis of the Causes and Impact of Recent Reforms*, 10 U. FLA. J.L. & PUB. POL'Y 129, 131 (1998).

[48] Kent v. United States, 383 U.S. 541, 552 (1966).

[49] *Id*. at 554-55 (citation omitted).

[50] The Court stated:

There is much evidence that some juvenile courts, including that of the District of Columbia, lack the personnel, facilities and techniques to perform adequately as representatives of the State in a parens patriae capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children

Id. at 555-56.

[51] *Id.* at 560-63.

[52] Bishop et al., *supra* note 47, at 132.

decision also prompted the National Advisory Committee for Juvenile Justice and Delinquency Prevention to promulgate the "influential" Standards for the Administration of Juvenile Justice.[53] Although *Kent*'s holding upheld constitutional pre-trial protections for juveniles, it altered the familiar course of juvenile proceedings. Informality and the absence of a need for counsel were no longer the hallmarks of juvenile proceedings as procedure began to trump the policy-oriented underpinnings of the system.

2. In re Gault

One year after *Kent*, in *In re Gault*, the Supreme Court again confronted an issue of juvenile justice: do constitutional guarantees of due process apply to juvenile justice proceedings when a delinquent juvenile would lose his liberty in a state commitment?[54] The Court answered affirmatively, recalling the systemic concerns over the juvenile justice system initially raised in *Kent*.[55] The Court analyzed the seriousness of Gault's crime and the arbitrariness of his age and granted him due process guarantees for conduct that would deprive him of his liberty upon a guilty adjudication.[56] Finding the protections of the juvenile justice system inadequate, the Court found that Gault was entitled to notice of charges, counsel, confrontation and cross-examination of witnesses, and the privilege against self-incrimination.[57]

Even more so than *Kent*, *Gault* changed the juvenile justice system. The Court ruled that the "condition of being a boy d[id] not justify a kangaroo court" and that the reach of

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[53] Bishop et al., *supra* note 47, at 132-33.

[54] *In re* Gault, 387 U.S. 1 (1967).

[55] *See id* at 17-18. ("Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.").

[56] *See id* at 29-30 ("So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliché can provide.").

[57] *Id.* at 59.

parens patriae was not unlimited.[58] The unstructured nature of juvenile proceedings gave way to process and formality. Ultimately, *Gault* concluded that due process guarantees, so long as applied shrewdly and without ruthless administration, did not deny youths the benefits of juvenile courts.[59]

3. In re Winship and McKeiver v. Pennsylvania

Building on the momentum of *Kent* and *Gault*, *In re Winship* held that the due process guarantees of the Fourteenth Amendment required that a juvenile's delinquent adjudication be determined by proof beyond a reasonable doubt.[60] Applying the framework from *Gault*, the Court affirmed that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts" and thus rejected the application of the lower preponderance of the evidence standard.[61] The Court also found that applying the more stringent burden of proof did not disrupt the nature of juvenile delinquency proceedings.[62]

In *Winship*, the Court added another layer of constitutional protections to juveniles' due process interests but did not explicitly hold that juveniles were the equivalent of adults.[63] In fact, just one year later, in 1971, in *McKeiver v.*

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[58] *Id.* at 28-30.

[59] *Id.* at 21.

[60] *In re* Winship, 397 U.S. 358 (1970).

[61] *Id.* at 365-66 (citing *In re* Gault, 387 U.S. at 36).

[62] *Id.* at 366. The Court stated that:

> Use of the reasonable-doubt standard during the adjudicatory hearing will not disturb New York's policies that a finding that a child has violated a criminal law does not constitute a criminal conviction, that such a finding does not deprive the child of his civil rights, and that juvenile proceedings are confidential. Nor will there be any effect on the informality, flexibility, or speed of the hearing at which the factfinding takes place. And the opportunity during the post-adjudicatory or dispositional hearing for a wide-ranging review of the child's social history and for his individualized treatment will remain unimpaired.

Id.

[63] Bishop et al., *supra* note 47, at 133.

Pennsylvania, a plurality of the Court affirmed the rehabilitative principles of juvenile courts and concluded that the Sixth Amendment did not guarantee the juvenile subject to delinquency adjudication a jury trial.[64] The plurality indicated that a state *could* construct a jury trial process for its juvenile courts, but that a delinquency proceeding was not encompassed within the Sixth Amendment's guarantee of an impartial jury trial in all "criminal prosecutions."[65] Like the *Kent-Gault-Winship* trilogy, *McKeiver* lamented about the failings and shortcomings of the juvenile justice system, but the majority declined to disregard its potential.[66] Finding that the juvenile court system still held promise to meet its rehabilitative goals, Justice Blackmun refused to impede the states from "experiment[ing] further and . . . seek[ing] in new and different ways the elusive answers to the problems of the young" by requiring the imposition of a jury trial.[67]

4. Congressional Action

Although states are responsible for their own juvenile courts systems, Congress also played a role in helping to shape contemporary conceptions of juvenile justice.[68] The

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[64] McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

[65] *Id.* at 545-51; *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . .").

[66] *McKeiver*, 403 U.S. at 543-44. The Court stated:

> We must recognize, as the Court has recognized before, that the fond and idealistic hopes of the juvenile court proponents and early reformers of three generations ago have not been realized . . . . The community's unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge all contribute to dissatisfaction with the experiment.

Id. (plurality).

[67] *Id.* at 547 (plurality).

[68] For more information about political and legislative efforts within the juvenile justice systems, *see* Bishop, et al., *supra* note 47, at 138-41; *see also* Brianna M. Sinon, *Failing Girls: A Cure Worse than the Disease* –

Juvenile Delinquency Prevention and Control Act of 1968 (JDPCA),[69] a precursor to the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA),[70] was designed to prevent juvenile delinquency and to "serve[] the urgent aims and the highest hopes of all of [the United States] youth and . . . people."[71] The Act's goals included rehabilitation and punishment.[72] Congress passed the JJDPA to strengthen the JDPCA by providing support to states and localities in their efforts to prevent juvenile delinquency. Objectives of the JJDPA included promoting public safety by encouraging juveniles to accept accountability for their delinquency and assisting states with research, training, data, and other tools to ensure the creation of effective programs to combat juvenile delinquency.[73] The JJDPA also continued the Supreme Court's injection of formality into the juvenile justice system by ensuring that juveniles in federal court received basic procedural rights.[74]

5. Current State of Juvenile Justice

Currently, every state and the District of Columbia have a juvenile justice system.[75] Each system is unique in purpose and procedure, although the underlying themes of rehabilitation and protection are still evident in many systems.[76] Uniformly, however, the systems are no longer the idealistic ones of the early twentieth century. Scholars have

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Charging, Trying, and Sentencing Female Juvenile Offenders as Adults, 7 HOW. SCROLL 32, 64-68 (2004).

[69] 42 U.S.C. § 3843 (2006).

[70] Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601 – 5792a (2006).

[71] Lyndon B. Johnson: Remarks Upon Signing the Juvenile Delinquency Prevention and Control Act of 1968, The American Presidency Project, July 31, 1968, http://www.presidency.ucsb.edu/ws/index.php?pid=29054.

[72] *Id.*

[73] Juvenile Justice and Delinquency Prevention Act.

[74] S. REP. NO. 93-1011 (1974).

[75] National Center for Juvenile Justice, Office of Juvenile Justice and Delinquency Prevention, http://70.89.227.250:8080/stateprofiles/.

[76] *See infra* Part II.D.

identified three ways the systems have responded to Congress's and the Supreme Court's interventions: jurisdictional, jurisprudential, and procedural.[77] One of the major jurisdictional changes is the transfer or waiver of more serious juvenile offenses to adult criminal court.[78] Public access to juvenile court proceedings and systems of determinant sentencing are examples of procedural changes.[79] Jurisprudential changes are evident in the legislative purposes enumerated in the statutes establishing the state's juvenile court system and in how the traditional confidentiality protections have diminished.[80] This Article discusses procedural and jurisprudential changes more significantly below.

The Supreme Court's juvenile justice jurisprudence and Congress's intervention have garnered a significant body of literature. While *Gault* permitted juvenile courts to operate under the doctrine of parens patriae,[81] commentators argue that the procedural formality the Court inserted into the system "shifted the focus from diagnosis and rehabilitation to culpability and punishment."[82] As a result of introducing the rhetoric of punishment into the system, the Court legitimized punishment as a dispositional goal, and the divisions between criminal and juvenile court became less formalized.[83] The

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[77] Barry C. Feld, *The Transformation of the Juvenile Court,* 75 MINN. L. REV. 691, 692 (1991).

[78] *Id.*

[79] *Id.* at 711, 717-18.

[80] Braudway, *supra* note 8, at 73.

[81] Steven Friedland, *The Rhetoric of Juvenile Rights,* 6 STAN. L. & POL'Y REV. 137, 141 (1995).

[82] Bishop et al., *supra* note 47, at 134; *see also* Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes,* 68 B.U. L. REV. 821, 831 (1988) (concluding that the Court's decisions "shifted the focus of the juvenile court from the 'real needs' of a child to proof of the commission of criminal acts"); Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 507 (1984) (arguing that the "recent switch from treatment back to blameworthiness as the hallmark of juvenile offender law" should allow for an infancy defense in juvenile proceedings).

[83] Bishop et al., *supra* note 47, at 134-35.

impact of these changes is unknown, as "even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed."[84]

III. The Conflict of Juvenile Shaming Punishments

States are divided on the purposes of their juvenile justice systems, but most states still recognize the overarching need to treat juveniles differently from adults, recognizing rehabilitation as legitimate.[85] Thus, despite changes in juvenile court systems from the idealized systems imagined by Progressives, some of the same ideas, goals, and protections are still present. Shaming punishments conflict with juvenile justice in four ways. First, shaming punishments are not proven deterrents for either adults or youths; by imposing criminal punishment instead of intervention and rehabilitative services, juvenile shaming punishments fail to promote penological goals and do not positively contribute to the intervention in the child's life. Second, shaming can place youths in emotionally and physically vulnerable positions. Third, sentencing juveniles to shaming punishments undermines the traditional foundations of confidentiality by creating public stigma for the offense. Finally, shaming punishments are generally inconsistent with the individual purposes states have announced as their stated goals for juvenile courts. The following sections detail these problems in more depth.

A. Ineffectiveness as a Deterrent

The true effectiveness of shaming punishments, either for adults or for juveniles, is unknown, and yet judges

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[84] Feld, *supra* note 77, at 693.

[85] *See infra* Part II.D; *see also* Anita Nabha, Note, *Shuffling to Justice: Why Children Should Not Be Shackled in Court*, 73 BROOK. L. REV. 1549, 1559 (2008) ("While a shift over the past two decades toward a focus on accountability has permeated the juvenile justice system, the underlying purpose of rehabilitation has never completely disappeared.").

continue to use shame to punish both groups.[86] Scholars have identified multiple reasons for shaming's popularity among judges, most notably shaming's potential effect as a deterrent.[87] The potential for shaming sanctions to "increase[] the costs associated with the behavior"[88] arguably serves to prevent individuals from committing future criminal acts. The fear of similar punishment being imposed on others may deter witnesses to the shaming punishment may from committing criminal offenses Nevertheless, scholars are split on whether shaming sanctions are likely to be an effective deterrent, based mostly on "theoretical accounts supported by selected anecdotal evidence."[89]

Drawing upon sociological and anthropological research, Toni Massaro argues that dominant American culture and traditions fail to "reflect the level of interdependence, strong norm cohesion, and robust communitarianism" that is present in cultures where shaming operates as an effective deterrent.[90] Essentially, the American cultural landscape does not embody the community norms necessary for people to witness the shaming punishments and integrate them into their rational thought processes.[91] Shaming, according to Massaro, is successful in communities that publically announce their moral and behavioral expectations and that have closer-knit, less autonomous

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[86] *See* Braudway, *supra* note 8, at 75 (citing Dan Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 638 (1996) and Toni Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1918 (1991)).

[87] There are two kinds of deterrence recognized under traditional criminal law principles: general deterrence and individual/special deterrence. Black's Law Dictionary defines general deterrence as "[a] goal of criminal law generally, or of a specific conviction and sentence, to discourage people from committing crimes" and specific deterrence as "[a] goal of a specific conviction and sentence to dissuade the offender from committing crimes in the future." BLACK'S LAW DICTIONARY 206 (3d Pocket ed. 2006).

[88] Braudway, *supra* note 8, at 76.

[89] *Shame, Stigma, and Crime*, *supra* note 6, at 2189.

[90] Massaro, *supra* note 86, at 1884.

[91] *Id.*

personal relationships; America's hands-off relationships that lack personal ties fail to meet these requirements.[92]

John Braithwaite argues that shame can serve as an effective deterrent by implementing social control in two ways.[93] First, because individuals generally crave social approval of significant others, they will be less likely to engage in criminal conduct if they face shame for their actions.[94] Second, when individuals participate in the shaming of another, they often internalize the shame; internalization results in a "pang of conscience" that ultimately serves as an internal control independent of an external societal punishment.[95] Braithwaite recognizes that the United States does not embody the traditional cultural norms that make shaming successful, but unlike Massaro, he is optimistic about its deterrent potential as compared to sanctions that do not denounce the offender.[96]

Dan Kahan, initially a proponent of shaming for its potential deterrent effects,[97] recently recanted his previous support for the sanction's ability to serve penological goals.[98] In his recant, Kahan ultimately concludes that shame "is afflicted with a social meaning handicap that, as a practical political matter, makes it an unacceptable alternative sanction for a significant and influential segment of our society."[99] Kahan further argues that because shaming sanctions are deeply partisan, unlike the pluralistic appeal of incarceration, they cannot work effectively.[100] Critics disagree with Kahan's new arguments, however, and argue he lacks empirical

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92 *Id.* at 1916.

93 JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 71-75 (1989).

94 *Id.*

95 *Id.* at 74.

96 *Id.* at 86.

97 Kahan's initial support for shaming appeared in Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996).

98 Kahan, *supra* note 7.

99 *Id.* at 2076.

100 *Id.*

support for claiming partisanship and for turning to programs of restorative justice as an acceptable alternative to incarceration.[101] Regardless of these scholars' arguments, the true effectiveness of shame as a deterrent remains undetermined.

Moreover, despite the debate over the deterrent effect of shaming sanctions imposed on adults, few scholars have considered shaming's effect on juveniles. As one commentator points out, for the cost-benefit argument propounded by Braithwaite to succeed, children would actually have to engage in a cost-benefit analysis before acting.[102] This expectation is questionable because children and young adults rarely consider the consequences of their behavior before acting.[103]

The dissenting Justices in *In re Stanford* recognized the cognitive limitations of juveniles, citing the case law, amicus briefs, and conclusions of a task force on juvenile sentencing policy.[104] Justice Stevens's dissent notes: "Adolescents 'are more vulnerable, more impulsive, and less self-disciplined than adults,' and are without the same 'capacity to control their conduct and to think in long-range terms.'"[105] Scientific evidence has also shown that because youths' brains continue to develop throughout adolescence, they cannot reason like adults.[106] Juveniles do not anticipate

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[101] Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 85 TEX. L. REV. 1385 (2007).

[102] Braudway, *supra* note 8, at 76-77.

[103] *Id.* (citing Jo-Ann Wallace, *Striking a Proper Balance Between Legitimate Users of Juvenile Uses of Juvenile Records and Individual Privacy: The District of Columbia Experience*, *in* NATIONAL CONFERENCE ON JUVENILE JUSTICE RECORDS: APPROPRIATE CRIMINAL AND NON-CRIMINAL USES 53 (1997)).

[104] *In re* Stanford, 537 U.S. 968, 69-70 (2002) (Stevens, J., dissenting).

[105] *Id.* at 473 (Stevens, J., dissenting) (citing Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978)).

[106] Marty Beyer, *Immaturity, Culpability, and Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 26, 27 (2000).

consequences and fail to minimize danger by exhibiting poor impulse control when presented with a variety of options.[107] Therefore, a shaming punishment may fail as both a general and a specific deterrent. If youths do not think long-term, seeing a peer subjected to a shaming punishment is unlikely to affect their future conduct and will not generally deter them from committing future offenses. Furthermore, if juveniles cannot exercise impulse control and reasoned decision-making, a shaming punishment may not serve as an individual deterrent.

Given the scientific evidence demonstrating juveniles' lack of cognitive capabilities to engage in rational decision-making processes, it is unclear that shaming punishments will be effective deterrents for them. Anecdotal evidence suggests that these sanctions might serve as an effective individual deterrent, as several of the individuals sentenced to these punishments noted their remorse.[108] Other offenders, however, like the young milk thief described at the beginning of this Article, were clearly not deterred.[109]

It is also unclear whether a juvenile's conduct requires the same deterrence considerations as an adult's conduct. In 1988, a plurality of the Supreme Court held that irresponsible juvenile conduct "is not as morally reprehensible as that of an adult."[110] Thus, if the conduct does not rise to a level commensurate of adult offenses, the sentence not need be the equivalent of an adult sanction. Although both the adult and juvenile systems seek rehabilitation as a goal, the logic behind

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[107] *Id.*

[108] *See Teen Forced to Carry "I am Stupid" Sign After Speeding Ticket*, WLBZ2.COM (Mar. 5, 2008, 6:51 PM), http://www.wlbz2.com/news/local/story.aspx?storyid=82125 (last visited Aug. 29, 2011) (noting that boy acknowledged effectiveness of punishment by stating "I've learned my lesson."); *see also* Martin, *infra* note 129 (reporting that offender stated at end of her walk of shame, "I just want to apologize to Fairport Harbor for the prank. It shouldn't have been done").

[109] *See also* United States v. Gementera, 379 F.3d 596 (9th Cir. 2004).

[110] Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (plurality opinion).

a shaming sanction's potential to rehabilitate and deter adults is not present when dealing with juveniles.[111]

B. State Results: General Observations and Specific Findings

Unlike a fine, probation, or even custody, judicially imposed shaming punishments often place juveniles in emotionally and physically vulnerable situations. Shaming creates public exposure for the offense, undermining the traditional confidential nature of juvenile justice. Anyone subjected to a shaming punishment that involves public exposure may feel emotionally or physically insecure, regardless of age. However, some articulations of these punishments may invite physical or verbal ridicule, or even risk of harm.

Because of their minor status, society presumes juveniles to be individuals in need of protection.[112] As part of this protection, states recognize a legitimate interest in preserving a juvenile's anonymity.[113] Thus, subjecting youths to punishments explicitly designed to "expose the offender to public view and heap ignominy upon him" in ways that fines and community service cannot generally undermines the foundations of juvenile justice.[114] This section provides

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[111] Should empirical research show that shaming does legitimately serve as an effective deterrent to juvenile crime, especially an individual deterrent that can rehabilitate the youth, the reasoning behind imposing the sanction would support imposing the punishment.

[112] *See* Cowles v. Cowles, 3 Gilman 435, 1846 WL 3872, *2 (Ill. 1846) ("It is indispensably necessary to protect the persons and preserve the property of those who are unable to protect and take care of themselves."); *see also In re* Gault, 87 U.S. 1, 15-16 (1967) (discussing need to ensure best interest of child); Mack, *supra* note 33, at 119-20 (1909) (affirming "conception that the state is higher or ultimate parent of all dependents within its borders").

[113] *See* Davis v. Alaska, 415 U.S. 308,319 (1974) ("We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender.")

[114] Garvey, *supra* note 7, at 735, 737; *see also* Julia C. Martinez, *For Shame*, ALBANY TIMES UNION, Dec. 22, 1996, at E1 (quoting U.S. District

several examples of potentially vulnerable juvenile shaming punishments offers overarching summary conclusions.[115]

1. Blind in One Eye: Vision Obstruction in Prison

In 1996, Zakee Chambers, a fifteen-year-old boy, hurled a rock into the windshield of a passing car, blinding the car's passenger, Andrea Hartmann, in her left eye.[116] The Court sentenced Chambers to one year in the county jail and ordered him to pay restitution of twenty-four thousand dollars over the period of his twenty-nine year probation.[117] The Court also sentenced him to a shaming punishment: during his one-year incarceration, Chambers wore an eye-patch for his waking hours.[118] In handing down her sentence, Judge Cynthia Mackinnon stated the purpose of the shaming sanction: "I think it's important for you to understand what this lady has gone through and will continue to go through for the rest of her life.''[119] Chambers apologized and admitted that he had failed to consider the consequences of his actions.[120]

Chambers's shaming punishment was not the sole sanction he received, but its potential to create unacceptable susceptibilities remains unchanged. Because the court only allowed Chambers to remove the eye-patch when he slept, all

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Judge Maryanne Trump as stating "Visibility is important . . . to signal to the defendant and the community that this is payback time"); Barry H. Gottlieb, *Shame of the Kitty,* L.A. TIMES, Aug. 9, 2007 ("More judges are slapping postmodern scarlet letters on people because, well, if it worked for Hester Prynne, why not for John Doe?").

115 The author does not mean to imply that these are the only cases of juvenile shaming punishments. The examples detailed in this paper are only a few collected mostly from secondary sources, given the difficulties of obtaining primary sources because of traditional procedures sealing juvenile records.

116 Debbie Salamone, *Judge Orders Teen Who Maimed Tourist to Wear Eye Patch*, ORLANDO SENTINEL, May 30, 1996, at A1.

117 *Id.*

118 *Id.*

119 *Id.* (internal quotation marks omitted).

120 *Id.*

of his movements throughout the jail were constrained by his ability to see out of only one eye.[121] Thus, the potential for Chambers to bump into something or someone and injury himself, another, or property was increased. Further, the visibility of the eye-patch to everyone who encountered him could serve to advertise his crime, opening up the potential for teasing, retaliation, and other emotional confrontations.[122] The additional shaming sanction of the eye-patch could have created an environment beyond physical discomfort that actually served to enhance the risk of physical and psychological, injury.

2. Shame Around the Neck: Picturing the Victim in a Locket

After a delinquent adjudication for involuntary manslaughter, the Court sentenced to twelve months probation with the conditions that he (1) visit and lay flowers on the victim's grave on the anniversaries of the victim's birth and death, (2) wear a necklace with the victim's picture on it, and (3) not participate in extra-curricular activities at school.[123] On appeal, the court upheld all three conditions as reasonable under the state's statutory scheme, which provided that the court could impose probationary conditions "that are related to the needs of the juvenile and . . . reasonably

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[121] Chambers was disciplined several times while in jail and was warned multiple times about not wearing the eye-patch. Debbie Salamone, *Teen in '95 Attack Sent to Mental Hospital; Experts Found the Teen, who Partially Blinded a Tourist, Incompetent to Face Drug Charges*, ORLANDO SENTINEL, Jan. 6, 1998, at D1..

[122] The author recognizes that an eye-patch could be viewed as part of a physical handicap, and that the potential for emotional vulnerability is possibly lessened in this instance. As part of the Ninth's Circuit reasoning in upholding an adult's shaming punishment in United States v. Gementera, 379 F.3d 596 (9th Cir. 2004), the court considered the nature of the defendant's exposure found that the punishment would not expose the defendant to an unsafe environment. *Id.* at 608 n.17. This analysis does not appear in the anecdotal evidence detailing Chambers's crime.

[123] *In re* J.B., 616 S.E.2d 385, 387 (N.C. Ct. App. 2005).

necessary to ensure that the juvenile will lead a law abiding life."[124]

The dissenting judge criticized the majority for failing to consider the psychological impact of wearing the necklace on a daily basis in light of testimony that J.B. was depressed, withdrawn, learning disabled, and in grief counseling over the incident.[125] The judge further denounced as irrelevant (in light of the state's emphasis on juvenile rehabilitation) the majority's discussion of what conditions it would have ordered if J.B. had been an adult.[126] Although J.B.'s conditions did not mandate how he wore the picture, thus allowing him to wear it hidden from public view in a locket or under his clothing,[127] the court forced J.B. to carry a daily reminder of his cousin's death. The potential psychological impact of this punishment cannot be underestimated, and the sanction directly contravenes the "child saving" mission of juvenile justice.

3. *On the Cusp of Juvenility: The Shaming of Older Teens*

Although neither case involved a minor, two other shaming sanctions demonstrate the potential for physical and emotional vulnerability with respect to older teens. In the first

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[124] *Id.* at 387 (citing N.C. GEN. STAT. § 7B-2510(a) (2004)) (internal quotation marks omitted).

[125] *Id.* at 391 (Jackson, J., dissenting) ("The juvenile court should have considered all of the evidence when determining the individualized needs of J.B. and balancing those need against the objectives of the state.").

[126] Judge Jackson stated:

> Disposition of a juvenile, however, involves a philosophy far different from adult sentencing . . . . [A] delinquent child is not a 'criminal.' The inference is that a juvenile's disposition is not intended to be a punishment but rather an attempt to rehabilitate him. Therefore, it is irrelevant what the court would have done were J.B. an adult and it was inappropriate for the court to take into consideration what it would have done if he were to be punished and treated as an adult.

Id. at 391 (quoting *In re* Vinson, 260 S.E.2d 591, 607 (N.C. Ct. App. 1979)) (internal quotation marks omitted).

[127] *Id.* at 388.

case, two nineteen-year-old Ohio residents stole a baby Jesus from a nativity scene and defaced it.[128] Judge Michael Cicconetti, well known for his shaming punishments, ordered the pair to walk through their town with Sidney, a donkey from a local petting zoo, and a sign stating "Sorry for the jackass offense."[129] Several hundred local residents watched as the couple led the donkey through snowy streets for approximately thirty minutes.[130] Although the pair's parade allowed them to reduce their time behind bars, Judge Cicconetti had other motives for imposing the punishment: "This is a kind of conscience flogging . . . . It is intended to bring them some public humiliation."[131] The Ohio couple's walk exposed them to traffic, verbal insults and abuse, and violent reactions from the viewing public.[132]

In another case, police busted up a toga party at the University of Massachusetts and charged the host, James Connolly, with underage drinking, noise violations, and other alcohol violations.[133] As part of his punishment, Connolly had to don his toga and stand in front of the police station for an hour.[134] Although Connolly was in a relatively safe environment in front of a police station, he wore nothing but a toga. In both cases, the court's punishment physically exposed young adults to the public and risked the potential for verbal and physical abuse.

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[128] Maggi Martin, *A Latter-day Public Penance; Pair Lead Donkey Through Fairport Harbor to Shorten Jail Time for Defacing Baby Jesus*, THE PLAIN DEALER, Feb. 3, 2003, at B1; *see also* Editorial, *Ingenious Punishments: Their Objects all Sublime*, THE ECONOMIST, Oct. 14, 2006, at 77 (discussing the case in the context of how shaming punishments are molded to fit the crime).

[129] Martin, *supra* note 128.

[130] *Id.*

[131] *Id.*

[132] In fact, when the pair reached the end of their thirty-minute march of shame, applause broke out and one townswoman cried, "Way to go judge!" *Id.*

[133] Editorial, *supra* note 128.

[134] Gottlieb, *supra* note 114.

4. Judge-Imposed Shaming Punishments May Damage Juveniles Emotionally and Physically

Most Judicially-imposed shaming punishments are often public in nature and can result in physical exposure, thus increasing the risk of physical harm or injury. Emotional or psychological vulnerability is also frequently present, as the punishment is designed to remind the offender of his bad actions and inflict feelings of shame or humiliation. Scholars recognize the stigmatic harm that can result from undesirable exposure in two other areas: strip searches and shackling.

In *Safford v. Redding*, the Court acknowledged the trauma stemming from a strip search, noting the "obvious" difference between communal undress for sports and the nakedness resulting from an intrusive body search.[135] While strong documentation supports the trauma of a strip search,[136] the potential stigma resulting from a shaming punishment's exposure is unknown. However, it is reasonable to anticipate similar arguments about the trauma of a shaming punishment. In an amicus brief filed in *Redding*, the National Association of Social Workers, joined by other interested parties, argued that the trauma resulting from a strip search "could actually *encourage* some of the precise inappropriate behavior that strip searches are suppose to detect and prevent."[137] A youth traumatized by a shaming punishment could also act out in inappropriate ways, including substance abuse or further delinquency, or suffer negative mental health effects. Although it would be rare for a shaming punishment to rise to the level of intrusiveness present in a strip search, the physical

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[135] Safford Unified School District No. One v. Redding, 129 S. Ct. 2633, 2641-42 (2009).

[136] *See generally* Brief for National Association of Social Workers et al. as Amici Curiae Supporting Respondent, Safford Unified Sch. Dist. No. One, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 870022; Brief for Juvenile Law Center et al. as Amici Curiae Supporting Respondent, Safford Unified Sch. Dist. No. One, 129 S. Ct. 2633 (2009) (No. 08-479), 2009 WL 952215.

[137] Brief for National Association of Social Workers et al. as Amici Curiae Supporting Respondent, *supra* note 136, at 8.

and emotional vulnerabilities inherent in these sanctions directly contradict the traditional goals of the juvenile justice system and are not supportable under the doctrine of parens patriea.

Scholars also recognize the dangers of emotional and physical harm stemming from shackling.[138] Shackling, however, has more than just pernicious physical and psychological effects; it also affects a juvenile's agency and dignity.[139] Juveniles forced to appear in court shackled suffer embarrassment and humiliation[140] and "feel like captive animals."[141] Much like juveniles chained in a courtroom, juveniles subjected to a public shaming punishment may feel like they are on display like animals in the zoo. Furthermore, shackling has no proven deterrent effect, and as one scholar notes, to consider shackling as a punishment potentially deterring other juveniles from committing criminal acts is "unconscionable in light of the historical mission of the juvenile court system to provide treatment for juvenile offenders."[142] Overall, the negative effects of shackling, like the negative effects of shaming, undermine the values of traditional juvenile justice by blatantly exposing juveniles to

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[138] Nabha, *supra* note 85, at 1575 ("In fact, it is generally accepted that shackling children causes both physical and psychological harm."); *see also* Leah Rabinowitz, Comment, *Due Process Restrained: The Dual Dilemmas of Discriminate and Indiscriminate Shackling in Juvenile Delinquency Proceedings*, 29 B.C. THIRD WORLD L.J. 401, 409 (2009) (citation omitted) ("[J]uveniles' dignity rights are violated because shackling often results in physical and psychological harm."); *cf.* Daniel Zeno, Note, *Shackling Children During Court Appearances: Fairness and Security in Juvenile Courtrooms*, 12 J. GENDER RACE & JUST. 257, (2008) (citation omitted) ("Shackling juveniles is antithetical to the juvenile justice system's twin goals of rehabilitation and treatment.") .

[139] Rabinowitz, *supra* note 138, at 409-10 (arguing that indiscriminate shackling eliminates the youth from the decision making process).

[140] Bernard P. Perlmutter, *Unchain the Children:* Gault, *Theraputic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1, 19-20 (2007) (citation omitted) ("[B]eing shackled in public is humiliating for young people, whose sense of identity is vulnerable.").

[141] Rabinowitz, *supra* note 138, at 410 (citation omitted).

[142] Nabha, *supra* note 85, at 1574 (citation omitted).

significant emotional and psychical discomforts and by treating the youths like criminals, not individuals in need of help.[143]

The negative effects stemming from judicially-imposed shaming punishments, strip searches, and shackling are distinguishable from parent imposed shame punishments.[144] Parents have long enjoyed broad rights to raise their children for societal integration free from governmental intervention, and this includes the right to choose and administer appropriate discipline.[145] Further, a

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[143] Zeno, *supra* note 138, at 275; *see also In Re* Amendments to the Florida Rules of Juvenile Procedure, 26 So. 3d 552, 556 (Fla. 2009) (per curiam) ("We find the indiscriminate shackling of children in Florida courtrooms as described in the NJDC's Assessment repugnant, degrading, humiliating, and contrary to the stated primary purposes of the juvenile justice system and to the principles of therapeutic justice, a concept which this Court has previously acknowledged.").

[144] Judicially imposed shaming punishments can also be distinguished from shaming punishments educators use to control their classroom during the school day. Within a classroom, students are often aware of the negative behavior of their classmates and thus a shame-oriented punishment does not often expose the crime in ways a judicially imposed shaming sanction might. Furthermore, the punishment is timely and does not require the offender to relive the crime over and over months later. Finally, there is likely a deterrent effect because students will see clearly the real and immediate consequences of such behavior. For more information on the benefits, disadvantages, and dangers of shaming punishments in schools, see Shawn E. Peterson & John R. Ross, *Shame Punishment and the Law in the Indiana Public Schools*, 14 EDUC. & L.J. 7 (2004) (concluding that shame punishments have a lot of potential in the classroom but that clear standards should be developed to avoid the negative aspects of shaming punishments).

[145] *See* Patricia E. Weidler, *Parental Physical Discipline in Maine and New Hampshire: An Analysis of Two States' Approaches to Protection Children from Parental Violence*, 3 WHITTIER J. CHILD & FAM. ADVOCACY 77, 80-88 (2003); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (striking down a compulsory education law as unconstitutionally impinging on parents' right to their children in accordance with their religious beliefs); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down a law mandating public education because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a law prohibiting the

parental shaming punishment is unlikely to expose the child to the physical or emotional danger that public shaming punishments invoke as one might expect that parents do not generally seek to expose their children's indiscretions.[146] Not all parents agree with the extent of shame sanctions,[147] and one might infer that parent-imposed shaming punishments would not implicate the public humiliation and embarrassment of judicially-imposed shaming sanctions. Another distinguishing factor is that under the traditional system of juvenile justice, courts acted in lieu of parents because the court considered all youths "victims of inadequate parental care."[148] Thus, a parent who publicly exposed his child would directly contravene parens patriae and the original goals for juvenile protection and rehabilitation.

The doctrine of parens patriae was the basis of a rare appeal of a juvenile's shaming punishment in *In re MEB.*[149] In *MEB,* the juvenile was convicted of felony breaking and entering and felony possession of burglary tools, and as a condition of her probation, she was sentenced to wear a sign around her neck stating "I AM A JUVENILE CRIMINAL"

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teaching of languages other than English in part because it interfered with the parents' rights to raise their child).

[146] One note-worthy exception is a Florida mother's punishment for her son's reckless driving. After Adam Clark was stopped by police for going one hundred and seven miles per hour in a fifty-five mile per hour zone, his mother made him hold a sign stating: "I was stupid. I drove over 100 mph and got caught. Thank God! I could have killed me and my friends." Adam held the sign in front of his Merritt Island, Florida, high school every day before and after school for one month. *Teen Forced to Carry "I am Stupid" Sign After Speeding Ticket*, WLBZ2.COM (Mar. 5, 2008, 6:51 PM), http://www.wlbz2.com/news/local/story.aspx?storyid=82125 (last visited Aug. 29, 2011) .

[147] In a letter to Judge Cynthia Mackinnon, Zakee Chambers' mother wrote, "My son has been the hanging man, being treated terribly. My son is a child who doesn't understand why or how he could be treated this way." Debbie Salamone, *Teen Who Threw Brick Jailed Again*, ORLANDO SENTINEL (July 9, 1997), http://articles.orlandosentinel.com/1997-07-09/news/9707080905_1_hartmann-patch-eye.

[148] Scott, *supra* note 31, at 131.

[149] *In re* MEB, 569 S.E.2d 683 (N.C. Ct. App. 2002).

anytime she appeared in public.[150] The youth appealed on two grounds: (1) the trial court abused its discretion because the state statute limited alternative sanctions by requiring the confidentiality of the juvenile's case and (2) the shaming punishment undermined the purposes of the state's juvenile justice system because it treated her as an adult criminal and subjected her to the type of public stigma rejected by parens patriae.[151] The North Carolina Court of Appeals ruled in favor of the juvenile on both grounds.[152] The court found that the statute guaranteed that a juvenile's records would be closed, even though the law also provided an exception for certain individuals to obtain the records, and that by forcing the young girl to wear the sign announcing her crime, the shaming punishment violated her right to confidentiality.[153]

The court also held for *MEB* on her second argument, although it did not address how the punishment failed to comply with traditional notions of juvenile justice. The state argued that *MEB*'s punishment was permissible because it promoted accountability and responsibility and did not criminalize her acts.[154] The court found that because it was

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[150] *Id.* at 684.

[151] *Id.* at 685.

[152] *Id.* at 686.

[153] *Id.* The statute at issue states:

> Unless jurisdiction of the juvenile has been transferred to superior court, all law enforcement records and files concerning a juvenile shall be kept separate from the records and files of adults and shall be withheld from public inspection. The following persons may examine and obtain copies of law enforcement records and files concerning a juvenile without an order of the court:
>
> (1) The juvenile or the juvenile's attorney;
>
> (2) The juvenile's parent, guardian, custodian, or the authorized representative of the juvenile's parent, guardian, or custodian;
>
> (3) The prosecutor;
>
> (4) Juvenile court counselors; and
>
> (5) Law enforcement officers sworn in this State.
>
> Otherwise, the records and files may be examined or copied only by order of the court.

N.C. GEN. STAT. § 7B-3001(b) (West 2009).

[154] *In re* MEB, 569 S.E.2d 683 at 685-86.

MEB's first offense, she did not qualify for the "intense supervision" the statute permitted in cases where community supervision was needed to promote offender accountability.[155] The court also rejected the state's argument that *MEB* did not actually have to wear the sign because she could stay at home; de facto house arrest was impermissible because *MEB*'s crime was statutorily ineligible for house arrest. Finding the juvenile's only alternative to be the public humiliation of wearing the sign, already held a violation of the state's Juvenile Code, the court also ruled that the punishment violated "public policy."[156] Although the court never explicitly addressed *MEB's* claims regarding the foundations and purposes of the juvenile justice system, it acknowledged that public policy supported overturning the youth's shaming sanction.

Public policy may support adult shaming punishments, as evidenced by the Ninth Circuit's reasoning in *United States v. Gementera.*[157] In upholding an adult's shaming punishment, the Ninth Circuit explicitly articulated the desirability of facilitating "the public exposure of defendant's crime and to the victims of his crime" as part of the defendant's rehabilitation.[158] Nevertheless, the logic behind exposing adults fails with respect to juveniles.[159] States initially

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[155] *Id.* at 686.

[156] *Id.*

[157] United States v. Gementera, 379 F.3d 596 (9th Cir. 2004). Gementera pled guilty to mail theft after he was caught stealing mail from mailboxes. Gementera had a long history of prior offenses, and although he received the minimum time for incarceration, the judge attached several conditions of supervised release. One such condition required Gementera to perform one hundred hours of community service by standing in front of a local post office holding a sandwich board reading: "I stole mail. This is my punishment." On appeal, the condition was upheld but the time required was reduced to eight hours. *Id.* at 598 -600.

[158] *Id.* at 602.

[159] *Cf.* Brief for National Association of Social Workers et al. as Amici Curiae Supporting Respondent, *supra* note 136, at 6 ("Treating children the same as adult suspects and offenders, including using law enforcement techniques designed for adults, is neither useful as a practical matter nor acceptable as a constitutional matter.").

established juvenile justice courts to intervene in a troubled child's life and to rehabilitate the child in effort to make him a productive member of society. Courts did not consider the proceedings criminal, and the goal was not to punish the child, but to restore the child in a holistic fashion. Judicially imposing adult-style shaming punishments on children undermines the doctrine of parens patriae by creating a psychically and emotionally vulnerable situation for the child and by exposing him to society.[160]

C. Public Stigma: Stripping Away the Confidentiality

Shaming punishments frequently expose the offender's name and/or face directly to the public, and this publicity contravenes the traditional confidentiality afforded to juvenile delinquents. As part of his concurrence in *Smith v. Daily Mail Publishing Co.*, Justice Rehnquist described as hallmarks of the system juvenile justice's emphasis on conducting proceedings "outside of the public's gaze" and on shielding youths from publicity of their offense.[161] Rehnquist noted that anonymity "protect[s] the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State."[162] In recognizing that public exposure of a juvenile's identity may have long-term detrimental effects, the Justice opined about future lost

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[160] A contemporary cause for concern is the permanency of shaming punishments imposed through the Internet. As part of their sentence for criminal mischief and battery, two Florida teens were forced to make an apology video and post it on YouTube. Keyonna Summers, *Teens Must Post Apology on YouTube*, USA TODAY, at 3A, *available at* http://www.usatoday.com/printedition/news/20080609/a_youtube09.art.htm (last visited Mar. 13, 2010). At one point, the video had over 7300 views. Chris Gaylord, *YouTube-era Crime and Punishment*, CHRISTIAN SCIENCE MONITOR, June 10, 2008, *http://www.csmonitor.com/Innovation/Horizons/2008/0610/youtube-era-crime-and-punishment.* As of March 13, 2010, the video was removed from YouTube.

[161] Smith v. Daily Publ'g Co., 443 U.S. 97, 107 (1979) (Rehnquist, J., concurring).

[162] *Id.*

employment opportunities, undue embarrassment to the family, and the potential for the punishment to do more harm than good by "provid[ing] the hardcore delinquent the kind of attention he seeks, thereby encouraging him to commit further antisocial behavior."[163]

Juvenile anonymity is not an absolute. In fact, when a newspaper lawfully obtains information regarding a juvenile's offense, it has a First Amendment right to publish the information.[164] Furthermore, defendants have a Sixth Amendment right to cross-examine juveniles, even if they have been adjudicated delinquent.[165] The constitutional considerations for those decisions are not present in administering juvenile shaming sanctions, however, and do not override the desirability of juvenile confidentiality.

The psychological impact of shaming's exposure of an offense is currently unknown, but a study of the psychological impact of the publicity concerning a youth's homicide trial provides insights to extrapolate from. Over a span of eight months, forty plus newspaper articles in the Oklahoma City area detailed the story of the young boy, L.B., and a number of these stories included his name.[166] Even after a restraining order regarding the boy's identity was issued, news publications continued to publicize the story and referred to "the 11-year-old boy (sometimes "black boy") who shot a railroad switchman."[167] The papers published L.B.'s picture, prior to the restraining order, and film footage showing him leaving the courthouse aired during that time.[168] The true extent of L.B.'s knowledge of the publicity surrounding his case is unclear; he saw an article with his name and picture,

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163 *Id.* at 108 (citing Davis v. Alaska, 415 U.S. 308, 319 (1974)).

164 Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).

165 Davis v. Alaska, 415 U.S. 308 (1974).

166 David C. Howard et al., *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203, 208 (1977). Articles covering the same story also appeared in New York, Washington, D.C., and St. Louis, as well as several cities on the west coast. *Id.*

167 *Id.*

168 *Id.* at 208-09.

although he also claimed to have heard radio and television broadcasts about his case.[169]

The study's authors found that L.B. suffered several detrimental effects from the trial's publicity, resulting in events that "hinder[ed] his rehabilitation in the community."[170] The first event was precipitated by L.B. himself when, after seeing his name and picture in the newspaper, he told other residents in the detention center he was confined to about the shooting. L.B.'s openness caused frequent confrontations between L.B. and other residents, as well as "psychological discomfort and stress . . . while he was in detention."[171] The second incident occurred after L.B. returned to school, and another student announced L.B.'s offense to the class.[172] As a result of his exposure, L.B.'s peers harassed him, and the study concluded that the publicity "produced considerable interference with the rehabilitation of the frightened and dependent child."[173] A final example of the impact of L.B.'s trial exposure occurred at home, when L.B. rejected his court-ordered home placement with his father and ran to his mother's house.[174] The authors found that the publicity had aroused in L.B. a need for protection, which he felt his father did not provide.[175] Overall, the study concluded that the publicity caused L.B. additional stress, interfered with his reintegration into the community, and let to confrontations with his peers.[176]

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169 *Id.* at 209.

170 *Id.*

171 *Id.* at 209-10. As part of the study, the authors considered L.B.'s psychological make-up. He was found to be immature and dependent, concerned with seeking acceptance from older peers and adults. He had previously engaged in delinquent behaviors and was likely to engage in attention-seeking behaviors, although he was not aggressive or hostile. *Id.* at 209.

172 *Id.* at 210. It is unclear how the student obtained the information. *Id.*

173 *Id.*

174 *Id.*

175 *Id.*

176 *Id.*

Although it is unlikely that any shaming punishment would receive the media attention given to L.B.'s case, it is clear that if L.B.'s confidentiality had been maintained, many of the difficulties he experienced would not have occurred. L.B. was not forced to walk in front of a store or stand on the courthouse steps; his identity was distributed through secondary news sources. A child publicly exposed in a shaming punishment is forced to disclose his identity (and possibly the nature of his offense) of his own accord, and his punishment could garner significant media attention.

As at least one scholar argues, "[p]ublicity is detrimental to both the juvenile's prospects for rehabilitation, and to society's chances of reforming young people before they become adult offenders."[177] The functional differences between exposure from access to court proceedings and exposure from public shaming punishments are minimal. In both instances, the youth's face (and thus possibility identity) is disclosed, the crime may be revealed, and the final adjudication of the matter (delinquent) is announced. The exposure stemming from shaming, however, is compounded by the emotional and physical vulnerabilities these sanctions produce, further working against the juvenile's rehabilitation.

D. Incompatibility with State Purposes of Juvenile Justice

The purported shift from a civil system of intervention and cure to a criminal system of guilt and punishment affected individual state systems of juvenile justice, and states began to rethink the purposes behind their juvenile justice systems. The National Center for Juvenile Justice (NCJJ) found that despite changes in philosophy and rhetoric, most states continue to adhere to the traditional goals underlying the first juvenile justice system.[178] Furthermore, as scholars have

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[177] Kathleen M. Laubenstein, Comment, *Media Access to Juvenile Justice: Should Freedom of the Press be Limited to Promote Rehabilitation of Youthful Offenders?*, 68 TEMP. L. REV. 1897, 1939 (1995).

[178] PATRICK GRIFFIN ET AL., NATIONAL CENTER FOR JUVENILE JUSTICE, NATIONAL OVERVIEWS: STATE JUVENILE JUSTICE PROFILES (2006),

argued, changes to the system have resulted not in reformation, but transformation.[179] Thus, the effects of procedural changes detailed above remain unclear in light of the stated purposes of juvenile justice.

The NCJJ establishes five different categories that most states generally fall into based on their defined juvenile court purposes: (1) "balanced and restorative justice," (2) "standard Juvenile Court Act," (3) "legislative guide," (4) emphasis on "punishment, deterrence, accountability, and/or public safety," and (5) "traditional child welfare."[180] The categories are not mutually exclusive, as state statutes often exhibit characteristics of more than one category. A brief overview of the categories demonstrates that most states still adhere to at least some of the traditional verbiage and principles of juvenile justice.

Shaming punishments are not entirely inconsistent with all five of the NCJJ's categories, especially those states that embrace punishment and protection of society, not the youth's well-being. Nevertheless, many of the state statutes contain language reminiscent to the original purposes of juvenile justice, intervention, protection, and rehabilitation, and unregulated, judicially imposed shaming punishments undermine these goals by imposing a punishment of unknown effectiveness, capable of exposing the juvenile and stripping away his confidentiality in the system.

As of 2005, at least seventeen states defined their juvenile court system as part of a plan of balanced and restorative justice, encompassing a balance of public safety, individual accountability for the offense, and offender development/rehabilitation.[181] For example, in Maryland, the

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http://70.89.227.250:8080/stateprofiles/overviews/faq9.asp; *see also In re* Groves, 376 S.E.2d 481, 482-83 (1989) ("The focus of the juvenile justice system is not on punishing the juvenile offender but on achieving an *individualized* disposition that meets the juvenile's needs and promotes his best interests.").

179 Feld, *supra* note 77, at 693.

180 GRIFFIN ET AL., *supra* note 178.

181 *Id.* The National Center for Juvenile Justice breaks the seventeen

Juvenile Causes Act governs juvenile court proceedings, and the stated purpose of the Act includes protection, care, and a "program of services and treatment" for the youth.[182] Maryland's rhetoric rings of the goals of the Progressive era and implies the necessity of a holistic, balanced approach to juvenile rehabilitation. Alabama, a state categorized by the NCJJ as "balanced and restorative justice-like," invokes language similar to the traditional underpinnings of juvenile justice but also acknowledges that the juvenile court must also

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states down into two categories: (1) explicit balanced and restorative justice and (2) balanced and restorative justice-like. States falling in the former category are Alaska, Florida, Idaho, Illinois, Kansas, Maryland, New Jersey, Pennsylvania, and Wisconsin, while states in the latter category are Alabama, California, District of Columbia, Indiana, Minnesota, Montana, Oregon, and Washington. *Id.*

[182] The enumerated purposes of Maryland's Juvenile Causes Act are:

(a) The purposes of this subtitle are:

(1) To provide for the care, protection, safety, and mental and physical development of any child coming within the provisions of this subtitle;

(2) To provide for a program of services and treatment consistent with the child's best interests and the promotion of the public interest;

(3) To conserve and strengthen the child's family ties and to separate a child from the child's parents only when necessary for the child's welfare;

(4) To hold parents of children found to be in need of assistance responsible for remedying the circumstances that required the court's intervention;

(5) Except as otherwise provided by law, to hold the local department responsible for providing services to assist the parents with remedying the circumstances that required the court's intervention;

(6) If necessary to remove a child from the child's home, to secure for the child custody, care, and discipline as nearly as possible equivalent to that which the child's parents should have given;

(7) To achieve a timely, permanent placement for the child consistent with the child's best interests; and

(8) To provide judicial procedures for carrying out the provisions of this subtitle;

MD. CODE ANN., CTS. & JUD. PROC. § 3-802 (West 2009); *see also In re* Victor B., 646 A.2d 1012, 1016 (1994) ("From an analysis of the Juvenile Causes Act and case law, it is clear that it was the intent of the General Assembly to create a separate system of courts, procedure and method of treatment for juveniles. This extensive system is civil in nature and is not a criminal proceeding.").

protect the public welfare safety.[183] Part of the stated purpose of the Alabama Juvenile Justice Act includes "secur[ing] for any child . . . the necessary treatment, care, guidance, and discipline to assist him or her in becoming a responsible, productive member of society."[184] Like Maryland, the Alabama Juvenile Justice Act addresses services to treat children and prevent further delinquent activity.[185] Although Alabama accepts the need to balance the juvenile's needs against the public welfare and the desirability of holding a juvenile accountable for their actions,[186] both Alabama and Maryland seek to protect juveniles in traditional ways. Both states seek to rehabilitate the offender and offer the juvenile protections similar to those a parent would provide his child by providing care and treatment. Shaming punishments are generally inconsistent with this category.

Seventeen states model the purposes of their court system on the language of the Standard Juvenile Court Act (SJCA).[187] The SJCA was issued in 1925, but the more influential version was created in 1959 by the National Council of Juvenile Court Judges (now the National Council of Juvenile and Family Court Judges), the National Probation and Parole Association (now the National Council on Crime and Delinquency), and the U.S. Children's Bureau (now in the U.S. Department of Health and Human Services).[188] States following this model emphasize balancing the needs of a

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183 *See* ALA. CODE § 12-15-101 (2009).

184 *Id.* § 12-15-101(b)(4).

185 *Id.* § 12-15-101(b)(5) ("To promote a continuum of services for children and their families from prevention to aftercare, considering wherever possible, prevention, diversion, and early intervention.").

186 *Id.* § 12-15-101(b)(7).

187 GRIFFIN ET AL., *supra* note 178. The National Center for Juvenile Justice breaks the seventeen states down into two categories: (1) states strictly retaining language from the Juvenile Court Act and (2) states statutes retaining trace provisions of the Act. States in the former category include Georgia, Iowa, Louisiana, Michigan, Mississippi, Missouri, Nevada, Rhode Island, and South Carolina while states in the latter category are Arkansas, California, Florida, Illinois, Maine, Massachusetts, Minnesota, and New Jersey. *Id.*

188 *Id.*

youth in juvenile court with the needs of the state and providing a home-like environment to juveniles adjudged dependent.[189]

The stated purpose of Michigan's Juvenile Code is almost identical to that of the SJCA. Although it is not as reminiscent of traditional juvenile justice ideals as Maryland or Alabama, Michigan still recognizes the state's responsibility to protect and care for juveniles in ways similar to the ideals of parens patriae.[190] Maine, another state classified by the NCJJ as retaining some of the language of the SJCA, also recognizes the desirability of maintaining the family unit, providing treatment for the juvenile, and punishing the youth when the offense is serious enough.[191]

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[189] *Id.* The SJCA's opening provision read as follows:

[E]ach child coming within the jurisdiction of the court shall receive...the care, guidance, and control that will conduce to his welfare and the best interest of the state, and that when he is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which they should have given him.

Id.

[190] The purpose of the Michigan Juvenile Code is as follows:

This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state. If a juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents.

MICH. COMP. LAWS § 712A.1(3) (2009).

[191] Maine's Juvenile Code defines its purpose as:

A. To secure for each juvenile subject to these provisions such care and guidance, preferably in the juvenile's own home, as will best serve the juvenile's welfare and the interests of society;

B. To preserve and strengthen family ties whenever possible, including improvement of home environment;

C. To remove a juvenile from the custody of the juvenile's parents only when the juvenile's welfare and safety or the protection of the public would otherwise be endangered or, when necessary, to punish a child adjudicated, pursuant to chapter 507, as having committed a juvenile crime;

D. To secure for any juvenile removed from the custody of the juvenile's parents the necessary treatment, care, guidance and discipline to assist that

Both states clearly contain elements of parens patriae, and although both also contemplate the interests of the public welfare, goals of child protection and rehabilitation can be inferred. Shaming punishments are the most inconsistent with SJCA states. SJCA states rely on the doctrine of parens patriae, but they also seek to protect and rehabilitate the child. Maintaining public safety is a secondary concern to the goal of intervening positively in the child's life.

Twelve states either follow or contain language from the Legislative Guide for Drafting Family and Juvenile Court Acts, which emphasizes developing the overall well-being of the child, replacing criminality with rehabilitation, maintaining the integrity of the family home, and assuring just and fair proceedings.[192] Vermont, one of the six states closely following the Legislative Guide, is an example of this balance. Vermont strives to rehabilitate juveniles and to remove the label of criminality from delinquency proceedings while also protecting the community, compensating victims,

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juvenile in becoming a responsible and productive member of society;

E. To provide procedures through which the provisions of the law are executed and enforced and that ensure that the parties receive fair hearings at which their rights as citizens are recognized and protected; and

F. To provide consequences, which may include those of a punitive nature, for repeated serious criminal behavior or repeated violations of probation conditions.

ME. REV. STAT. ANN. tit. 15, § 3002 (2009).

[192] States in this category model their courts after four purposes from the Legislative Guide:

(a) "to provide for the care, protection, and wholesome mental and physical development of children" involved with the juvenile court; (b) "to remove from children committing delinquent acts the consequences of criminal behavior, and to substitute therefor [sic] a program of supervision, care and rehabilitation;" (c) to remove a child from the home "only when necessary for his welfare or in the interests of public safety;" and (d) to assure all parties "their constitutional and other legal rights."

GRIFFIN ET AL., *supra* note 178. The six states very closely following the Legislative Guide are New Hampshire, New Mexico, North Dakota, Ohio, Tennessee, and Vermont, and those states with traces of the Legislative Guide are Arkansas, Maine, Montana, New Jersey, Texas, and Wyoming. *Id.*

and holding offenders accountable.[193] The NCJJ classifies Texas as retaining elements of the Legislative Guide but not following them explicitly. Texas lists public safety first among its purposes but also discusses the development and protection of the child, as well the fairness of the proceedings.[194] Vermont, as opposed to Texas, strives to

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[193] The Vermont Juvenile Code defines its purpose as:

(1) To provide for the care, protection, education, and healthy mental, physical, and social development of children coming within the provisions of the juvenile judicial proceedings chapters.

(2) To remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and to provide supervision, care, and rehabilitation which assure:

(A) balanced attention to the protection of the community;

(B) accountability to victims and the community for offenses; and

(C) the development of competencies to enable children to become responsible and productive members of the community.

(3) To preserve the family and to separate a child from his or her parents only when necessary to protect the child from serious harm or in the interests of public safety.

(4) To assure that safety and timely permanency for children are the paramount concerns in the administration and conduct of proceedings under the juvenile judicial proceedings chapters.

(5)To achieve the foregoing purposes, whenever possible, in a family environment, recognizing the importance of positive parent-child relationships to the well-being and development of children.

(6)To provide judicial proceedings through which the provisions of the juvenile judicial proceedings chapters are executed and enforced and in which the parties are assured a fair hearing, and that their constitutional and other legal rights are recognized and enforced.

VT. STAT. ANN. tit. 33, § 5101 (2009).

[194] The purpose of the Texas Juvenile Justice Code is:

(1) to provide for the protection of the public and public safety;

(2) consistent with the protection of the public and public safety:

(A) to promote the concept of punishment for criminal acts;

(B) to remove, where appropriate, the taint of criminality from children committing certain unlawful acts; and

(C) to provide treatment, training, and rehabilitation that emphasizes the accountability and responsibility of both the parent and the child for the child's conduct;

(3) to provide for the care, the protection, and the wholesome moral, mental, and physical development of children coming within its provisions;

remove the concept of criminality from its juvenile justice system. Both states, however, seek to preserve the family and promote the development of the offender. While neither openly promotes parens patriae, both contain elements of the doctrine. Although ultimately a matter of degree, shaming is also fairly inconsistent with these and other states modeling their juvenile courts after the Legislative Guide for Drafting Family and Juvenile Courts Acts. Shaming is most consistent with states incorporating criminality and public safety, but even these states often consider the child's well-being and rehabilitation as well.

The NCJJ classifies six states as "tough" because their stated purposes emphasize punishment, deterrence, community safety, and individual accountability.[195] Both Wyoming and Texas are multi-category states, having adopted some language from the Legislative Guide into their statutes but further including punishment as a key goal.[196] Wyoming strives to remove the "taint of criminality" from certain acts and to rehabilitate the juvenile to become a successful member of society.[197] Finally, at least three states emphasize the best interests of the youth in their states

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(4) to protect the welfare of the community and to control the commission of unlawful acts by children;

(5) to achieve the foregoing purposes in a family environment whenever possible, separating the child from the child's parents only when necessary for the child's welfare or in the interest of public safety and when a child is removed from the child's family, to give the child the care that should be provided by parents; and

(6) to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced.

TEX. FAM. CODE ANN. § 51.01 (2009).

195 GRIFFIN ET AL., *supra* note 178. The six states are Connecticut, Hawaii, North Carolina, Texas, Utah, and Wyoming. *Id.*

196 *See supra* note 194 and accompanying text; *see also* WYO. STAT. ANN. § 14-6-201 (2009) (listing punishment for criminal acts as a purpose of the Juvenile Justice Act).

197 WYO. STAT. ANN. § 14-6-201 (2009).

purposes for their juvenile court systems.[198] These states emphasize the welfare of the youth and the necessity of rehabilitating and guiding delinquents to become productive members of society.[199] Shaming sanctions are generally consistent with "tough" states, as well as states emphasizing the best interest of the child, although they also contain inconsistent elements. For example, Wyoming's system avoids punitive sanctions in favor of rehabilitation and prevention, marking it as reminiscent of traditional juvenile justice ideals. Also, states promoting the child's best interest focus on long-term for societal reintegration, not immediate punishment. Intervention in a child's life is another holdover from the Progressive movement.

Despite the differences in classification, most states continue to acknowledge, either directly or indirectly, some traditional elements of juvenile justice: intervention, protection, and rehabilitation. Some states are more explicit in their protections, while others balance those protections against the needs of the state. Overwhelmingly, however, states seek to promote the care and well-being of the child through positive services and programs. State juvenile courts systems are not the idealistic ones envisioned by Progressive reformers, but the fundamentals of parens patriae are still evident. Shaming punishments that criminalize and create public stigma for a juvenile offense are inconsistent with this doctrine, and with the states seeking to intervene and protect the child offender.

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[198] GRIFFIN ET AL., *supra* note 178. The three states are Kentucky, Massachusetts, and West Virginia. *Id.*

[199] *See e.g.*, Kentucky's purpose clause of the Unified Juvenile Code. The first section of the purpose clause includes: "The Commonwealth shall direct its efforts to promoting protection of children; to the strengthening and encouragement of family life for the protection and care of children; to strengthen and maintain the biological family unit; and to offer all available resources to any family in need of them . . . ." KY. REV. STAT. ANN. § 600.010(2)(a) (West 2009).

IV. Establishing Control: Proposed Solutions

The incompatibilities between juvenile justice and shaming punishments implicate an important question: what role, if any, should shaming punishments play in the juvenile system? One option is to adopt a bright-line rule banning them as part of a judge's sentencing arsenal. To avoid the harshness of this rule, however, states could dictate the scope of shaming punishments statutorily. A third option is to allow only valid plea bargains to administer shaming punishments. The following sections explore the benefits and drawbacks of these three options, ultimately advocating for regulating shaming through plea bargains.

A. Removing the Choice: Ban Juvenile Shaming

To address all of the incompatibilities between juvenile justice and shaming, jurisdictions could adopt a bright-line rule banning shaming punishments, and there are several benefits to this approach. First, the shaming experience is hardly a dignified one; scholars have described it as "mentally torturous"[200] and humiliating.[201] The role of brain development and neurology is a much-debated topic in the legal field, and courts and scholars alike recognize the differences in how adults and juveniles receive and process information.[202] When sentencing juveniles tried as adults,

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[200] Mark Spatz, Comment, *Shame's Revival: An Unconstitutional Regression*, 4 U. PA. J. CONST. L. 827, 848 (2002).

[201] *See* Sanders, *supra* note 7, at 360 ("Judges across the country creatively use public humiliation as punishment for a variety of crimes."); *see also* Massaro, *supra* note 86, at 1937 ("[T]he elusiveness of shame, the unreflective way in which the new shaming sanctions have been developed, and the serious harm to human dignity that truly effective shaming can cause, all suggest that the fairness objections to official shunning and shaming are particularly compelling.").

[202] *See e.g.*, Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 166-74 (2009) (concluding that developmental neuroscience should play a role in the future of juvenile justice); *see also* Claudia Wallis, *What Makes Teens Tic*k?, TIME, May 10, 2004, at 56; Paul Thompson, Editorial, *Brain Research Shows a Child Is Not an Adult*, FT. LAUDERDALE SUN-

some courts are willing to consider that juveniles do not possess the "intellectual and emotional capabilities" of mature adults,.[203] Courts should extend this logic to shaming punishments in juvenile adjudications; even if the court tried the offender as a juvenile, sentencing him to an adult-style punishment is inconsistent with his ability to understand his actions. Further, given shaming's potential to emotionally and physically expose a youth,[204] banning shaming punishments would ensure that the judiciary did not put juveniles in these vulnerable positions. Further study is needed to determine if juveniles are mentally equipped to handle the humiliation and susceptibilities inherent in shaming punishments.

Banning shaming punishments as a matter of law also ensures that the traditional underpinnings of juvenile justice and states' modern conceptions of those goals remain intact. As discussed previously, states vary widely in their juvenile court purposes and objectives.[205] Almost all, however, describe—either explicitly or implicitly—rehabilitative and protective purposes. Shaming is arguably inconsistent with these purposes because it seeks to punish the criminal and does not implicate the services needed to provide a holistic approach to rehabilitation. As originally conceived, juvenile courts sought to promote the best interest of the offender, not to criminalize and stigmatize his conduct.[206]

SENTINEL, May 25, 2001, at 31A (arguing that adolescents in the juvenile justice system should be treated differently based on new evidence regarding teenage brain development).

[203] *In re* Hegney, 158 P.3d 1193, 1208 (Wash. Ct. App. 2007) (citing WASH. REV. CODE. § 9.94A.540 (2005)).

[204] *See supra* Part II.B.

[205] *See supra* Part II.D.

[206] *See In re* MEB, 569 S.E.2d 683, 685 (N.C. Ct. App. 2002) ("Appellant argues that the special condition of probation violates the 'focus of the juvenile justice system' which 'is not on punishing the juvenile offender but on achieving an *individualized* disposition that meets the juvenile's needs and promotes [her] best interests.") (citing *In re* Groves, 376 S.E.2d 481, 482-83 (N.C. Ct. App. 1989)).

Scholars contend that shaming sanctions fail to sentence like offenders to like punishments,[207] but banning shaming punishments could result in more consistent sentencing. Seemingly, judges arbitrarily choose which offenders receive a shaming and which do not; this type of arbitrariness arguably violates "notions and principles of even-handed punishments."[208] However, this argument cuts both ways with respect to juveniles, as the original conceptions of juvenile justice focused on the individual's needs, not a scheme of punishment.[209] The Progressives did not contemplate an even-handed sentencing regime, and because so many states still embody traditional "child-saving" concepts in their juvenile courts' purposes, it may be unnecessary today.[210] This argument applies more strongly to states taking a formal, criminalized approach to juvenile justice, as even-handed justice is more closely aligned with traditional principles of criminal justice.[211]

There are significant drawbacks to simply banning juvenile shaming punishments. First, it is unclear whether the goals of juvenile justice are truly frustrated by administering shaming sentences. The procedural formality the *Kent-Gault-Winship* trilogy introduced into the system prompted a variety of procedural, jurisdictional, and jurisprudential changes that

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[207] Spatz, *supra* note 200, at 847-48 ("In general, shame sanctions seem to be custom designed to the offender; thus, the penalties are likely to be applied unequally.").

[208] *Id.* at 847.

[209] PLATT, *supra* note 15, at 143 ("The idea that justice can be 'personalized' was a significant feature of the child-saving movement . . . .").

[210] *See supra* Part II.D.

[211] The argument of even-handedness derives from Justice Brennan's concurrence in Furman v. Georgia, 408 U.S. 238 (1972). Scholars have derived a two-prong test from the concurrence, asking (1) whether the punishment is unacceptable in contemporary society or so degrading as to produce mental anguish and (2) whether the sanction was arbitrarily inflicted or excessive to the offense? Rosalind K. Kelley, Note, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional?*, 93 DICK. L. REV. 759, 773-74 (1989).

changed the nature of juvenile courts in many states.[212] Shaming punishments are inconsistent with traditional conceptions of juvenile justice, but if juvenile justice has been transformed into a punitive system, then shaming sanctions may have a role to play.

Second, defining shaming punishments is difficult. Although there are generally accepted components to the definition, a punishment "directed primarily at publicizing an offender's illegal conduct," and to "reinforce prevailing social norms," thus "induc[ing] an unpleasant emotional experience,"[213] giving content to those phrases must be determined in light of the individual and his offense. For some offenders, wearing a necklace everyday with the victim's picture would cause deep emotional reactions, but others would likely forget about the necklace quickly, burying it under their shirt or hiding it away in a locket. Measuring the appropriateness of a particular shaming sanction is even more difficult for juvenile offenders, as the true impact of shaming sanctions is unknown. Overall, this risk presents "far too great a risk to take with the youth of this nation."[214]

Third, these punishments vary dramatically in scope, length, and stigma, and some punishments may not cross the line into inappropriateness. Wearing a daily reminder of the crime would be an enormous psychological burden for some offenders, but having to wear a toga for an hour in public might not. Although all of these sanctions are arguably problematic for juveniles, some may be more inappropriate than others. In such instances, drawing a bright-line rule banning shaming might be overly harsh.

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212 *See generally supra* Part I.B.

213 *Shame, Stigma, and Crime*, *supra* note 6, at 2187.

214 Braudway, *supra* note 8, at 82; *see also id.* at n.170 (relating the story of a nineteen-year-old man whose drunk driving was published in the paper and after his mother expressed her shame of his actions, he committed suicide).

Society seems content to accept shaming punishments, as evidenced by the voter endorsement of "Poe-tic justice."[215] In 2004, votes elected former Texas District Judge Ted Poe, notorious for his creative shaming punishments, to the House of Representatives on his first run for office.[216] Furthermore, for individuals who relish seeing criminals humiliated and enjoy "the entertainment of improvised justice," shaming sanctions have become "wildly popular."[217] Even the passersby in the introductory story of the teenage milk thief enjoyed watching her shame.[218] The distinctions between adult and juvenile shaming punishments cannot be overlooked, and it is unclear that society currently embraces youth shaming with the same vigor it welcomes adult shaming sanctions.

Banning juvenile shaming punishments remedies any inconsistency with the traditional goals of juvenile justice, the inherent physical and emotional vulnerabilities of the punishments, and the question of their efficacy as a deterrent. However, drawing a bright-line rule is never easy, and doing so in the context of juvenile shaming may go too far. Until society knows more about these punishments' true effects, or until states more wholeheartedly reject punitive systems of juvenile justice, states should reject banning shaming.

B. Legislative Control

A second option to manage the administration of juvenile shaming punishments is to enact legislation controlling their imposition: states could statutorily define when and how to utilize shame punishments in the context of juvenile justice. This option has several benefits, including

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215 Editorial, *supra* note 128.

216 *Id.*

217 Turley, *supra* note 3.

218 One woman stated "I think it's marvelous punishment. I think it's great." Her husband added, "Paying a fine is too easy." *This American Life: Return to the Scene of the Crime*, CHICAGO PUBLIC RADIO (May 1, 2009), *available at* http://www.thisamericanlife.org/radio-archives/episode/379/return-to-the-scene-of-the-crime.

clearly demarcated lines of what are acceptable shaming punishments. In discussing how these punishments can cross the line, one scholar notes an ordinance passed in Dermott, Arkansas, a town that grew weary of its problem with juvenile delinquency.[219] The ordinance allowed the town to construct a stockade in which parents of delinquents would be on public display for a maximum of six hours a day, up to two consecutive days.[220] The statute provided parents with notice about any potential punishment, allowing them to adjust their behavior accordingly. Without the ordinance, such a punishment would have likely come as a surprise to parents brought before a judge, and the judge would not have been constrained by the prescribed penalties.

Unlike the harshness of banning shaming altogether, which completely eliminates the judge's discretion to impose the punishment, legislators could draft the statute to allow the judge to consider it either as part of or the entirety of the offender's punishment. The statute could also permit variance for age and criminal background. By allowing for a more individualized sentence, statutorily constructed shame punishments respond to criticisms of banning shaming punishment.

Scholars examining a legislative control approach to shaming have generally found it infeasible. Massaro, in her discussion of the unequal application of shaming punishments, argues that one approach is to require legislatures to enact mandatory sentencing guidelines.[221] The first problem she identifies with this approach is the difficulty

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[219] Garvey, *supra* note 7. Garvey notes that "[n]ot surprisingly, the stockade was never built." *Id.* at n.136; *see also* Suzanne Fields, *Going After the Parents*, WASH. TIMES, Aug. 15, 1989, at F1; *Resurrecting the Stockade:Town Plans to use Public Shame to Fight Lawlessness*, ST. PETERSBURG TIMES, Aug. 9, 1989, at 3A; *Town Beset by Delinquents Moves to Pillory Parents*, THE RECORD, Aug. 13, 1989, at A18.

[220] Garvey, *supra* note 219; *see also* Suzanne Fields, *supra* note 219; Resurrecting the Stockade; Town Plans to use Public Shame to Fight Lawlessness, *supra* note 219; Town Beset by Delinquents Moves to Pillory Parents, *supra* note 219.

[221] Massaro, *supra* note 86, at 1940.

in defining the United State's "cultural meaning of shame."[222] Massaro argues that if this actually exists, it is extremely "amorphous," making it nearly impossible for courts and legislatures to accurately define.[223] It is difficult to imagine a legislative drafting session for shaming punishments if the true meaning of shame is unascertainable. The second problem Massaro identifies is that "[n]o plausible sentencing schedule can anticipate the entire range of the individual factors that may determine the impact of a sanction."[224] If part of the appeal of a legislative control approach is the ability to impose an individualized sentence based on characteristics of the offender, the legislature must be able to provide an exhaustive list of factors to consider in fashioning the sentence. If the list were non-exhaustive, the simplicity and control of the statutory approach is lost as judges would be able to inject their own discretion.

To some extent, however, the judge's discretion to craft these unique and creative punishments is what makes them work—the crime fits the time.[225] A statute could list a variety of shaming sentences available for a particular crime, but the laundry list of crimes these sentences can be applied to would be nearly impossible to detail.

To effectively combat the problems identified above, legislatures must draft a juvenile shaming statute holistically, incorporating input from child psychologists, child advocates, judges, prosecutors, educators, parents, etc. This would be an expensive and lengthy process that states may be unwilling to invest in as a long-term solution. Further, just as determining the true deterrent effect of a shame sanction is difficult, understanding the psychological impact of a particular punishment ex ante is also challenging. Even ex post

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222 *Id.* at 1939.

223 *Id.*

224 *Id.* at 1941.

225 *See* Sanders, *supra* note 7 (detailing examples of how judges have gotten creative with shaming sanctions); *see also* Spatz, *supra* note 200, at 828 ("Having grown weary of "one-size-fits-all" punishments, many judges are giving "voice to a community's fury and moral disgust.").

evaluations would be difficult, as there is no identified bar from which to measure their effectiveness as compared to their psychological and physical impact.

Although a legislature could enact a statute regulating juvenile shaming sanctions, it would be a lengthy and expensive process. The difficulties in pre-determining these punishments in ways that allow for meaningful variances based on the specific offense and the youth's criminal history and personal characteristics are significant. Absent explicit guidelines to curb judicial discretion, a statute attempting to delineate only some shaming sanctions (but still providing a "catchall" provision for judges to fashion others ad hoc) fails to adequately address the emotional and physical vulnerabilities of judicially-imposed shame punishments. While certainly a practical solution, legislative control of shaming appears relatively unworkable at this time.

C. Effective Plea Bargaining

A third alternative to regulating juvenile shaming punishments is to administer them only through valid plea bargains. Despite a troubled history in juvenile justice, plea bargaining is a daily occurrence in juvenile courts nationwide.[226] The Juvenile Justice Standards, promulgated by the International Justice Association and the American Bar Association (IJA-ABA), regulate juvenile plea agreements in Chapter Three of the Adjudications section.[227] Section 3.1 governs the juvenile's capacity to plead and requires that the judge determine that the youth has the mental capacity to plead by inquiring into four factors.[228] Section 3.2 further

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[226] *See* ABA JUV. JUST. STDS. RELATING TO ADJUDICATION III: GEN. MATERIAL (1980) (discussing that although many individuals see juvenile plea bargaining as "the worst of both worlds," it is a common practice that should be regulated); *see also* Robert E. Shepherd, Jr., *Pleading Guilty in Delinquency Cases*, 16 CRIM. JUST. 46, 46 (2001) (discussing the history of plea bargain in juvenile justice).

[227] *See generally* ABA JUV. JUST. STDS. RELATING TO ADJUDICATION III: UNCONTESTED ADJUDICATION PROCEEDINGS (1980).

[228] The Standards provide that:

restricts the court's acceptance of a juvenile's plea bargain by requiring certain admonitions from the judge, including ascertaining the juvenile's understanding of the proceedings and informing the juvenile of his Constitutional trial rights.[229]

A. The juvenile court should not accept a plea admitting an allegation of the petition without determining that the respondent has the mental capacity to understand his or her legal rights in the adjudication proceeding and the significance of such a plea.

B. In determining whether the respondent has the mental capacity to enter a plea admitting an allegation of the petition, the juvenile court should inquire into, among other factors:

1. the respondent's chronological age;

2. the respondent's present grade level in school or the highest grade level achieved while in school;

3. whether the respondent can read and write; and

4. whether the respondent has ever been diagnosed or treated for mental illness or mental retardation.

Id. § 3.1.

[229] Section 3.2 states:

The judge of the juvenile court should not accept a plea admitting an allegation of the petition without first addressing the respondent personally, in language calculated to communicate effectively with the respondent, and:

A. determining that the respondent understands the nature of the allegations;

B. informing the respondent of the right to a hearing at which the government must confront respondent with witnesses and prove the allegations beyond a reasonable doubt and at which respondent's attorney will be permitted to cross-examine the witnesses called by the government and to call witnesses on the respondent's behalf;

C. informing the respondent of the right to remain silent with respect to the allegations of the petition as well as of the right to testify if desired;

D. informing the respondent of the right to appeal from the decision reached in the trial;

E. informing the respondent of the right to a trial by jury;

F. informing the respondent that one gives up those rights by a plea admitting an allegation of the petition; and

G. informing the respondent that if the court accepts the plea, the court can place respondent on conditional freedom for (___) years or commit respondent to (the appropriate correctional agency) for___years.

Id. § 3.2.

Under parens patriea, the juvenile justice system did not consider plea bargains because the court emphasized the unique needs of the individual, and "the idea that the youth could bargain with someone over what the court might do was foreign to the underlying philosophy of this unique legal institution."[230] Scholars must consider society's contemporary acceptance of plea bargaining in evaluating the changes in state juvenile justice systems that make those systems more analogous to the traditional criminal justice system. Arguably, the most significant advantage to regulating shaming through plea bargaining is that plea bargains allow the prosecutor, the probation officer, and the defense attorney to craft the punishment holistically. To further protect juveniles, Courts could require that psychologists evaluate a punishment's potential emotional and physical effects in relation to the offender. The judge would not participate, as Section 3.3 of the IJA-ABA Juvenile Justice Standards provides that generally judges should not participate in plea discussions.[231] Nevertheless, this holistic approach is reminiscent of the Progressive's approach to juvenile justice under parens patriae, as prevention and rehabilitation could be goals of the plea bargain's terms.

Juveniles would have to accept the terms of the plea bargain voluntarily, a component some scholars argue is important to ensuring that shaming punishments are properly administered.[232] Additionally, because the juvenile accepts the punishment voluntarily, the impact of pled-to shaming punishment may have a greater psychological effect than one administered by a judge. Under the IJA-ABA Standards, the youth must accept the plea of his own volition, knowing that he could turn down the plea bargain and proceed to trial.[233] In

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230 Shepherd, *supra* note 226, at 46.

231 *See* ABA JUV. JUST. STDS. RELATING TO ADJUDICATION § 3.3 (1980).

232 *See* Aaron S. Book, Note, *Shame on You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653, 685 (1999) (arguing that defendants should always be allowed to choose between a shaming punishment and an alternate sentence of incarceration).

233 It has been suggested the power of a general deterrent effect is

turn, this voluntary acceptance may lead to a greater individual deterrent effect.

So long as the judge informs the youth of the requirements of the punishment and ensures that youth comprehends that information, the offender makes an informed decision to accept the punishment.[234] Recent literature explores ways to ensure that a juvenile truly understands the consequences of entering into a plea agreement. Recognizing that adult standards for plea colloquies may fail to adequately assess a juvenile's cognitive understanding, one scholar argues that judges must: (1) recognize the effects of learning disabilities, (2) utilize open-ended questions, and (3) treat plea withdrawal as parallel to contractual avoidance.[235] Other scholarship admonishes courts to engage in "meaningful dialogue" with the offender, avoiding questions that simply prompt a yes or no answer.[236] By engaging in these further protections, judges ensure the legitimacy of the plea and, as a result, the shaming sanction.

Plea-bargaining also provides solutions to several of the problems underlying juvenile shaming. One of the issues surrounding juvenile shaming is parental disapproval of the punishments themselves.[237] Plea-bargaining answers this concern because the parent can discuss the proposed punishment with the juvenile before the juvenile accepts the plea. The judge's approval of the plea bargain is another check on shaming.[238] Judges must ensure that the juvenile is

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preferred to that of a specific deterrent effect in effort to justify imposing a shaming sanction. A specific deterrent effect could still be beneficial as the offender would not commit future acts.

[234] Section 3.4 of the JIA-ABA Juvenile Justice Standards requires that pleas be voluntary. ABA JUV. JUST. STDS. RELATING TO ADJUDICATION § 3.4 (1980).

[235] Lacey Cole Singleton, Note, *Say "Pleas": Juveniles' Competence to Enter Plea Agreements*, 9 J. L. & FAM. STUD. 439, 450-455 (2007).

[236] Robert E. Shepherd, *Plea Bargaining in Juvenile Court*, 23 CRIM. JUST. 61, 63 (2008).

[237] *See supra* note 147 and accompanying text.

[238] Section 3.3 of the IJA-ABA standards requires that a plea bargain be accepted by a Judge. ABA JUV. JUST. STDS. RELATING TO ADJUDICATION

competent to plead and determine that the juvenile has received the effective advice of counsel.[239] Finally, Section 3.8 requires the judge question the juvenile's parents about the juvenile's choice to plead and consider their comments in making a final decision about the validity of a plea.[240] The latter requirement serves as an additional check on the appropriateness of a particular shaming punishment contained within a plea bargain.

Trends in scholarship advocating for a juvenile's participation in his delinquency proceedings also support the theory that juveniles can effectively participate in the plea bargaining process. The IJA-ABA standards on Counsel for Client Parties provide in Section 3.1 that a juvenile's interest is paramount.[241] The commentary to this Section provides general support to the idea that a juvenile can meaningfully comprehend the nature of the proceedings, and thus, he should make the decisions regarding his adjudication.[242] If the

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§ 3.3 (1980).

[239] *See* ABA JUV. JUST. STDS. RELATING TO ADJUDICATION § 3.6 (1980).

[240] Section 3.8 states:

A. Except when a parent is the complainant, the judge of the juvenile court should not accept a plea admitting an allegation of the petition without inquiring of the respondent's parent or parents who are present in court whether they concur in the course of action the respondent has chosen.

B. The judge of the juvenile court should consider the responses of the respondent's parents to the court's inquiry in exercising discretion in whether to reject the tendered plea.

ABA JUV. JUST. STDS. RELATING TO ADJUDICATION § 3.8 (1980).

[241] ABA JUV. JUST. STDS. RELATING TO COUNSEL § 3.1 (1980).

[242] The commentary provides:

In most instances, even a youthful client will be mature enough to understand, with advice of counsel, at least the general nature of the proceedings, the acts with which he or she has been charged, and the consequences associated with the pending action. On this basis a juvenile client can decide whether to accede to or contest the petition. That, in essence, is what is required of the defendant in criminal proceedings and should suffice for juvenile court purposes. Although counsel may strongly feel that the client's choice of posture is unwise, and perhaps be right in that opinion, the lawyer's view may not be substituted for that of a client who is capable of considered judgment according to the standard described above.

attorney-client relationship is analogous to an adult's, and the juvenile's case proceeds according to the juvenile's wishes, then juveniles can actively participate in creating their own plea bargain agreements. Similarly, many jurisdictions allow a juvenile to waive his right to counsel, thereby empowering the youth to participate in the proceedings against him just as an adult might.[243] Finally, retaining shaming sanctions through plea bargains also recognizes that shaming seems to have popular support as an appropriate punishment.

Regulating juvenile shaming through plea bargaining is an imperfect solution. The most significant problem is whether adolescent brains are sufficiently developed to meaningfully participate in the negotiation process. Studies show that younger children may not have the capacity to fully comprehend the implications of accepting a plea bargain.[244] Not only were children more likely to accept a plea as their

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ABA JUV. JUST. STDS. RELATING TO COUNSEL § 3.1 cmt. (1980).

[243] *See* MINN. R. JUV. P. 3.04(1) (2005) ("The following provision does not apply to Juvenile Petty Offenses, which are governed by Rule 17. Any waiver of counsel must be made knowingly, intelligently, and voluntarily. Any waiver shall be in writing or on the record. The child must be fully and effectively informed of the child's right to counsel and the disadvantages of self-representation by an in-person consultation with an attorney, and counsel shall appear with the child in court and inform the court that such consultation has occurred. In determining whether a child has knowingly, voluntarily, and intelligently waived the right to counsel, the court shall look to the totality of the circumstances including, but not limited to: the child's age, maturity, intelligence, education, experience, ability to comprehend, and the presence of the child's parents, legal guardian, legal custodian or guardian ad litem. The court shall inquire to determine if the child has met privately with the attorney, and if the child understands the charges and proceedings, including the possible disposition, any collateral consequences, and any additional facts essential to a broad understanding of the case.").

[244] Randy K. Otto, *Considerations of the Assessment of Competent to Proceed in Juvenile Court*, 34 N. KY. L. REV. 323, 333 (2007) (citing Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L & HUM. BEHAV. 343-56 (2003)); *see also* Geoffrey R. McKee, *Competency to Stand Trial in Preadjudicatory Juveniles and Adults*, 26 J. AM. ACAD. PSYCHIATRY & L. 89, 96-97 (1998) (questioning a teenage defendant's capacity to understand plea bargaining).

age decreased, younger children were also more likely to focus on the terms of the plea agreement as opposed to the sentence following a guilty verdict without any consideration of the effect of an acquittal.[245] The judge bears the onus of ensuring the juvenile's plea is truly a product of the youth's voluntary choice, and that the child understands his ability to reject the plea and the punishment within.

Plea-bargaining occurs in an unequal environment; the prosecutor has all the power.[246] Not only can this lead to bullying a juvenile to accept a plea,[247] but also it can lead to racial and class disparities. Angela Jordan Davis argues that a lack of standards guiding prosecutors results in "tremendous disparities among similarly situated people, sometimes along race and/or class lines."[248] White and upper class defendants, when charged, do not go to prison as often as the poor, black, or brown, even if their criminal activity is of an equivalent nature.[249] The court must ensure that shaming punishments are not distributed unequally. Another potential problem is that a juvenile may refuse a plea simply because it contains a shaming punishment. If the state refuses to construct a plea without including a shaming punishment, the court will have to adjudicate the case. Although (perhaps) unlikely, a juvenile's refusal to plead to shaming sanction could result in an overburdening of the system.

Controlling shaming sanctions through plea bargains is an admittedly imperfect solution. Although traditional constructions of juvenile justice did not contemplate plea bargains, many state systems reflect a more punitive approach to juvenile offenders, which supports the plea bargain's role in the system. Further, as one scholar notes, "[g]iven how the

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245 Otto, *supra* note 244.

246 D. Brian Woo, *Cudgel or Carrot: How* Roper v. Simmons *Will Affect Plea Bargaining in the Juvenile System*, 7 PEPP. DISP. RESOL. L.J. 475, 492 (2007).

247 *Id.*

248 Angela J. Davis, *The American Prosecutor: Power, Discretion, and Misconduct*, 23 CRIM. JUST. 24, 29 (2008).

249 *Id.*

juvenile system ultimately seeks rehabilitation, juveniles stand best able to benefit from the plea bargaining system."[250] Recent trends advocating for a juvenile's involvement in his own criminal defense support the youth's ability to meaningfully engage in the plea bargaining process. Scientific evidence questions these assumptions, however, and places the burden on the judge to ensure that juveniles enter into plea bargains knowingly and voluntarily. Judges, advocates, and parties within the system must also be conscientious that shame-inclusive plea bargains are crafted and approved without regard to race or class.

V. Conclusion

At its inception, juvenile justice sought to intervene, protect, and rehabilitate, but systemic changes have resulted in adult-like systems of criminal justice in many jurisdictions. Shaming punishments are problematic on multiple levels, especially when applied to the youngest offenders, and are generally incompatible with the goals of juvenile justice as established under parens patriae. Shaming punishments expose youths to physically and emotionally vulnerable situations, and their efficacy as a deterrent is unknown. Further, by creating public stigma for the youth's offense, shaming denies the juvenile the traditional protections of confidentiality. Banning shaming punishments would satisfy these objections but overlooks society's general acceptance of the validity of shaming. Statutory control, while practical, is infeasible in light of the difficulties in defining all of the potentially shame-worthy offenses and punishments. Plea-bargaining, while not a perfect solution, provides a middle ground for judges to impose shaming punishments upon youths appropriately.

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[250] Woo, *supra* note 246, at 497.