SEALING UP THE PROBLEM OF CALIFORNIA'S "ONE STRIKE AND YOU'RE OUT" APPROACH FOR SERIOUS JUVENILE OFFENDERS

This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and bury them in the graveyard of the forgotten past.[1]

INTRODUCTION

J.T., a seventeen year-old boy, was charged with committing felony battery when he kicked a man in the face.[2] After admitting to the charges, he was committed to the California Youth Authority for a maximum of eight years.[3] He was honorably discharged after four years.[4] Two years later at age twenty-four, J.T. became a graduate student pursuing an advanced degree.[5] J.T. wished to have his record sealed to avoid complications with his application for the advanced academic degree.[6] Despite the judge commending him on his satisfactory rehabilitation, the law prevented the judge from sealing J.T.'s records.[7] The felony battery adjudication falls within California

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

2. *In re* Jeffrey T., 44 Cal. Rptr. 3d 861, 862 (Cal. Ct. App. 2006) (holding that the court may not seal J.T.'s juvenile record for "assault by force likely to produce great bodily injury" because it constitutes a serious offense under California Welfare and Institutions Code section 707(b) (West 2000)).

3. *Id.* at 863.

4. *Id*. An honorable discharge supposedly releases an ex-offender from all "penalties or disabilities" resulting from the offense. CAL. WELF. & INST. CODE § 1179(a) (West 2010). Even someone who is honorably discharged, however, is not necessarily entitled to have his or her records sealed. *In re* Chong K., 51 Cal. Rptr. 3d 350, 356 (Cal. Ct. App. 2006).

5. *Jeffrey T*., 44 Cal. Rptr. 3d at 863.

6. *See Id.* at 865 (stating that California Welfare and Institutions Code section 781 was enacted "to protect minors from future prejudice resulting from their juvenile records").

7. *Id.* at 863. J.T. is entitled to have his records expunged. CAL. PENAL CODE § 1203.4. *See* People v. Superior Court, 128 Cal. Rptr. 2d 794, 808 (Cal. Ct. App. 2002). However, an expunged record "in California falls short of freeing an

Welfare & Institutions Code section 707(b), which precludes J.T.'s records from being sealed under any circumstances.[8]

California enacted Proposition 21 ("Prop 21")[9] in 2000 that permanently preserves the juvenile court record of serious offenses regardless of the presence of any mitigating circumstances.[10] This provision neglects the flexible design of the juvenile court system that ordinarily grants a judge wide discretion in sanctioning youths based on their unique characteristics and the underlying circumstances of the crime.[11] Currently, the type of offense alone determines the

individual from their past mistakes." Edward Martinovich & Jay Mykytiuk, *Not Gone and Not Forgotten: The Illusion of California Expungement*, Apr. 17, 2006, http://www.criminalattorney.com/news/California-expungement/. The record is still viewable by many different individuals and agencies and can be used in many ways harmful to the individual. *Id.* An expunged record may still be used as a sentencing enhancement in a subsequent criminal prosecution. People v. Daniels, 59 Cal. Rptr. 2d 395, 397 (Cal. Ct. App. 1996).

8. CAL. WELF. & INST. CODE § 707(b) (listing thirty serious felonies, including: murder, attempted murder, voluntary manslaughter, arson, robbery, assault, selling or manufacturing drugs, five different sexual charges, five different kidnapping charges, five different weapons charges, crimes against particularly vulnerable victims, intimidation of witnesses to dissuade from giving testimony, torture, aggravated mayhem, carjacking, violent escape from specified facilities, and anything constituting a violent felony as defined in Penal Code section 667.5(c) and Penal Code section 182.22(b)); *id.* § 781(a) ("[T]he court shall not order the person's records sealed in any case in which the person has been found by the juvenile court to have committed an offense listed in subdivision (b) of Section 707 when he or she had attained 14 years of age or older.").

9. Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998 (Mar. 7, 2000), http://primary2000.sos.ca.gov/VoterGuide/Propositions/21text.htm (amending various sections of California Penal Code and California Welfare and Institutions Code).

10. *See* CAL. WELF. & INST. CODE § 781(a); DEAN J. CHAMPION, THE JUVENILE JUSTICE SYSTEM 137 (2001). Twenty-five states specify that a juvenile record may not be sealed, expunged, or destroyed if the juvenile committed a violent or other serious felony. *Id.* These states include: Alaska, California, Colorado, Delaware, Florida, Georgia, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming. Patricia Torbert & Linda Szymanski, *State Legislative Responses to Violent Juvenile Crime: 1996-1997 Update* (Washington, D.C.: U.S. Department of Justice), Nov. 1998, at 10.

11. *See* CAL. WELF. & INST. CODE § 707(c) (listing five factors for the juvenile court to consider in determining whether a minor would benefit from the juvenile court facilities, including: whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction and the circumstances and gravity of the offense alleged in the petition to have been committed by the minor); CHRISTOPHER P. MANFREDI, THE SUPREME COURT AND JUVENILE JUSTICE 28 (1998) (noting that the juvenile court's primary goal is to rehabilitate delinquents using flexible decision-making and individualized treatment).

penalty of keeping an offender's juvenile court record unsealed.[12] As a result, numerous ex-offenders must bear the burden of permanently unsealed records, despite wide variances in their needs and criminal propensities.[13] Very few juvenile offenders continue committing crimes as adults, regardless of the seriousness of their adjudicated offenses.[14] Unfortunately, due to the adverse effects of an unsealed record, those who would otherwise naturally desist from criminal activity may recidivate.[15]

Having an unsealed juvenile court record makes it difficult for a person psychologically and practically to reintegrate into society, which exacerbates the risk of recidivism.[16] The perpetual stigmatizing label and blemished record can create enormous hurdles to becoming a productive citizen.[17] Minors labeled as delinquents often have a negative self-perception, causing them to be less motivated to live a straight life.[18] Moreover, those who do put forth the effort seeking employment or higher education are often hindered by their blemished records.[19] Feelings of hopelessness and injustice may ensue from youth offenders' inability to escape the legal system;

[12] *See* CAL. WELF. & INST. CODE § 781(a).

13. California Bill Analysis, Senate Committee, 2009-2010 Regular Session, Assembly Bill 61 (June 23, 2003) at 8-9 (stating that the huge range of situations observed in juvenile cases "cries out for individualized solutions").

14. JOAN MCCORD ET AL., JUVENILE CRIME JUVENILE JUSTICE 102-03 (2001) (reporting the results of a series of studies that all found only a small proportion of adolescents commit serious crimes, and most of those who engage in illegal behavior as adolescents do not become adult criminals).

[15] Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 107-08 (1979).

[16] *Id.* (stating that disclosing juvenile court proceedings to the public may "handicap the youths' prospects for adjustment in society and acceptance by the public").

[17] *Id.*

18. Superior Court v. Chrystal B., 262 Cal. Rptr. 387, 390 (Cal. Ct. App. 1989) (noting that the sealing juvenile records gives minors a "fresh start" that helps minors become productive citizens); MANFREDI, *supra* note 11, at 28 (noting that juvenile court proceedings are generally kept confidential to protect minors from the stigma of criminal prosecution).

19. *See* CAL. PENAL CODE § 1000.4(a) (West 1985) (noting that an unsealed court record may result in the denial of an application for employment, benefit, license, or a certificate); T.N.G. v. Superior Court, 484 P. 2d 981, 988 (Cal. 1971) (noting that practically every application for employment, college admission, and business licenses inquires about applicants' criminal history, and any past delinquency usually results in an automatic rejection); MCCORD, *supra* note 14, at 201-02 (reporting the results of several studies that have found a criminal record has a significant negative impact on employment prospects, particularly for juveniles); ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 211 (2008) (noting that any type of criminal conviction often bars educational, employment, and military opportunities).

pulling youth offenders back to their old criminal ways and back to confinement.[20] This vicious cycle jeopardizes the well-being of the minor and public.

Presently, California legislators advocate the enactment of California Assembly Bill No. 61, which augments Prop 21's impediment for minors to rehabilitate.[21] A.B. 61 permanently preserves juvenile court records of more offenses in addition to those preserved by Prop 21.[22] The supporters of this bill do not adequately understand the current circumstances of juvenile crime, nor do they appreciate the potentially harmful impact of their proposed bill. Juvenile arrest rates are at an all-time low, contradicting the supporters' concern over juvenile crime.[23] Although initial juvenile offenses are relatively low, recidivism is extremely high among minors punished in California's juvenile and adult court systems.[24] Many theorists believe the high recidivism rate is related to the tough

[20] *See In re* Gault, 387 U.S. 1, 26 (1967) (noting that minors may justify their bad behavior in response to the cruelness of the juvenile justice system, which makes reform difficult).

[21] California Bill Analysis, Senate Committee, 2009-2010 Regular Session, Assembly Bill 61 (June 23, 2003). California legislators are urging to add eight sexual offenses to the list of serious offenses that preclude minors from participating in Deferred Entry of Judgment, which permits minors to immediately seal their records. *Id*. at 1, 5-6. *See* discussion *infra* Part II.E. Supporters argue that "being able to access a juvenile's history is key to properly assessing their propensity to commit further sexually violent crimes." *Id*. at 8. A fact sheet prepared in 2002 by the American Prosecutors Research Institution indicates, however, that "[a]dolescent sex offenders are considered to be more responsive to treatment than adult offenders and do not appear to continue re-offending into adulthood, especially when provided with appropriate treatment." *Id*. at 9.

22. *See id*. at 5-6.

23. Mike A. Males, *New California Crime States: The Good-Bad News*, July 13, 2009,
http://www.cjcj.org/post/juvenile/justice/new/california/crime/stats/good/bad/news
(noting that juvenile felony arrests are at their lowest point since statistics have been kept in 1955). There are many plausible explanations for the falling juvenile crime, besides the legal shift towards harsher punitive measures, such as natural fluctuation, demographic factors, cultural and religious influences, and the decreased availability of cheap guns. SCOTT & STEINBERG, *supra* note 19, at 211.

24. H. Ted. Rubin, *A Deinstitutionalized Renewal: Juvenile Justice Looks More to the Community*, JUVENILE JUSTICE UPDATE, May 2008, at 3 (reporting that 70% of juvenile delinquents were rearrested within two years of release); IRA M. SCHWARTZ, (IN) JUSTICE FOR JUVENILES 51 (1989). Low juvenile arrest rates and high recidivism rates are not inconsistent with each other. For instance, a total of 100 juvenile arrests in one year would be extremely low, and if all of those 100 juvenile arrestees commit a repeat offense after being released from custody, the recidivism rate would be at a maximum high.

sanctions imposed on juvenile delinquents in California.[25] Prop 21's rigid "sealing" provision represents an unnecessary and harsh sanction that burdens ex-juvenile offenders for their entire lives. This Note attempts to illustrate a clear and accurate picture of the current problems and identify viable solutions before any more harm is done.[26]

Part I of this Note describes the history, goals, and evolution of the juvenile court system. Part II highlights the misconceptions of juvenile offenders, which fuels the existing unnecessary and harsh sanctions. Specifically, this Note argues that California's Proposition 21's "sealing" provision hinders delinquents' ability to rehabilitate and reintegrate into society. Part II ends by offering a proposed amendment that provides an alternate procedure for California courts to seal juvenile court records. This proposal allows minors, whose cases are adjudicated in juvenile court, to seal their records immediately and keep them sealed contingent upon successful rehabilitation. The opportunity to seal one's records immediately facilitates reintegration into society and encourages youth offenders to abandon criminal activity.

25. *See id*. at 47-51 (noting that California was once a leader in rehabilitating juveniles, but now accounts for 25% of all juveniles confined in public juvenile detention centers, while it has only about 11% of the eligible youth population); *Juvenile Justice History*, CENTER ON JUVENILE & CRIMINAL JUSTICE, 2006, http://www.cjcj.org/public_education/juvenile_justice_history (noting that California still led the nation in juvenile arrests and incarceration rates in 2006, holding more than twice the number of juveniles in custody than the second leading state in the nation, Florida).

26. This Note will rebut each of the arguments in favor of Prop 21 that are outlined in the 2000 California Primary Election Ballot Pamphlet. Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998 (Mar. 7, 2000), Argument in Favor of Proposition 21, http://primary2000.sos.ca.gov/VoterGuide/Propositions/21yesarg.htm. The arguments in favor of Prop 21 misstate the law, make false predictions of a "juvenile crime wave," and improperly characterize the current punishments imposed on juveniles as "slap[s] on the wrist." *Id*.; *See* SCHWARTZ, *supra* note 24, at 47-51. The problems with California's juvenile justice system became so severe that they had a dramatic impact on the national juvenile confinement rates. *Id.* at 48-49. The only way to reduce the use of juvenile detention in the United States is to focus on the misuse in California. *Id.* at 50.

I. HISTORY AND EVOLUTION OF THE JUVENILE COURT SYSTEM

The first United States' juvenile court system was implemented in Cook County, Illinois in 1899.[27] It was designed to treat and rehabilitate, rather than punish, juvenile offenders.[28] Before 1899, the law subjected minors to the same punishments and sentences as adults.[29] Minors were sentenced to prison and integrated with hardened adult criminals.[30] In addition, two hundred capital crimes existed for which convicted minors, as young as seven years old, could be executed.[31]

The adult procedures and penalties imposed on children appalled the early reformers.[32] They believed that minors were not as morally responsible for their crimes as were adults.[33] The prevailing view held that minors committed crimes based on external and internal influences rather than solely by free will.[34] Thus, it seemed more appropriate to tend to a minor's situational circumstances and individual needs, rather than rely on punishment for deterrence.[35] The public outcry for more humane treatment of minors reached the forefront in the 1800s during the urbanization and industrialization period.[36] The Illinois state legislature responded by creating the

27. MANFREDI, *supra* note 10, at 11. Illinois was a prime candidate for social experimentation because of the extremely high population increase, which exposed children to the dangers typically found in large urbanized areas. *Id*. Chicago's population increased from 109,620 in 1860 to 2,185,283 in 1910. *Id*.

28. *In re* Carrie W., 152 Cal. Rptr. 690, 693 (Cal. Ct. App. 1979) (discussing the reasons for the inception of the juvenile court system).

29. *In re* Gault, 387 U.S. 1, 15 (1967); Michelle L. Oropeza, *The Early Intervention and the Eight Percent Problem: Effectively Merging Theories of Rehabilitation and Retribution in the California Juvenile Justice System*, 26 WHITTIER L. REV. 1217, 1219-20 (2005).

30. *Gault*, 387 U.S. at 15.

31. Oropeza, *supra* note 29, at 1219-20.

32. *Gault*, 387 U.S. at 15.

33. *Juvenile Justice History*, CENTER ON JUVENILE & CRIMINAL JUSTICE, 2006, http://www.cjcj.org/public_education/juvenile_justice_history.

34. CLEMENS BARTOLLA & STUART J. MILLER, JUVENILE JUSTICE IN AMERICA 2D 44 (1998) (asserting that the juvenile justice system was based on the positivism view of criminology, which attributed criminal acts to personality disorders and behavioral problems of which individualized treatment could reform).

35. Roper v. Simmons, 543 U.S. 551, 561-62 (2005) (noting that children do not calculate the cost-benefit analysis of their actions, which makes the use of punishment as deterrence largely ineffective).

36. MANFREDI, *supra* note 11, at 24 (stating that the dramatic growth in

juvenile court system[37] with the dual interests of public safety and providing care to youth offenders that is consistent with their best interests.[38]

A. Inception of the Juvenile Court System

By 1925, every state except Maine and Wyoming adopted juvenile courts, and by 1945, every state had juvenile courts.[39] Juvenile courts operate on the philosophy of *parens patriae*,[40] which means that the state should not punish children for their criminal behavior but should try to help them control and prevent future criminality.[41] The juvenile court system has an entirely different language to distinguish its philosophy from that of the adult criminal justice system.[42] Juvenile offenders are called delinquents rather than criminals, wards rather than prisoners, and adjudicated rather than convicted.[43] The juvenile justice system recognizes that labeling a minor as a criminal would be stigmatizing to the minor and hurt the minor's chances at reform.[44] The delinquency label, on the other hand, is meant to tell the court the minor needs help.[45]

In addition to the different language, the juvenile courts adopted different procedures to allow them to adequately attend to a minor's individual needs in procuring rehabilitation. The reformers intended

population created criminogenic environments in the cities through the rise in poverty, crime, disease, mental illness, and housing shortages).

37. MCCORD, *supra* note 14, at 157.

38. CAL. WELF. & INST. CODE § 202(b) (West 2000).

39. San Bernardino County Department of Public Social Services v. Superior Court, 283 Cal. Rptr. 332, 338 n.5 (Cal. Ct. App. 1991) (noting that California first adopted a juvenile court system in 1909 and that the system was "intended to be informal, non-adversarial, and private").

40. DEAN J. CHAMPION, THE JUVENILE JUSTICE SYSTEM 25 (2001) (noting that *parens patriae* is a term derived from twelfth century England, which means literally "the father of the country," signifying that the king had responsibility for all matters involving juveniles).

41. SAMUEL M. DAVIS, RIGHTS OF JUVENILES 2D 3 (2009) (asserting that minors should not be treated as criminals, but rather as individuals "not fully responsible for their conduct and capable of being rehabilitated").

42. CAL. WELF. & INST. CODE § 203 (West 2004) (noting that the procedure and effects of adjudging a minor in juvenile court shall be distinct from the procedure and effects of a criminal conviction).

43. MCCORD, *supra* note 14, at 154.

44. *Id*. ("[J]uvenile records were to remain confidential so as not to interfere with the child's or adolescent's ability to be rehabilitated and reintegrated into society.").

45. *In re* Gault, 387 U.S. 1, 25-26 (1967). Throughout the years, the delinquency label has become almost as stigmatizing as the adult criminal label. *Id*. at 23-24.

to streamline the juvenile court process so that minors could undergo treatment and return to society as quickly and safely as possible.[46] The reformers removed the rigidities and technicalities found in criminal law to make the process less adversarial and more informal.[47] The Supreme Court affirmed the reformers' view that the juvenile courts function more efficiently in an informal setting without *all* of the due process rights afforded to criminal defendants.[48] Judges use their wide discretion to assess the minor's individual needs in creating a treatment plan without being bound by rigid sentencing guidelines.[49]

Reality did not always match the ideal and noble endeavors of the juvenile process.[50] The wide discretion given to judges coupled with the lack of due process afforded to minors led to questionable sentences.[51] Furthermore, the detention centers were, and still are, widely underprovided and deficient.[52] The detention centers inflict a higher level of punishment and provided a lower level of rehabilitative services as intended by the juvenile court reformers.[53] In light of the severe consequences juvenile delinquents face, the Supreme Court provided minors with more constitutional safeguards to better ensure minors would not be arbitrarily confined.[54] As a

46. CHAMPION, *supra* note 40, at 274 (claiming that it is difficult for youths to accept their punishment for something they did long ago, particularly if they grow out of their delinquency before the conclusion of their sentence).

47. *Gault*, 387 U.S. at 15-16 (noting that the juvenile court procedures ought to be "clinical" rather than "punitive").

48. *Id.*; MANFREDI, *supra* note 11, at 31-32 (stating that judicial discretion, procedural informality, and indeterminate dispositions is the optimal framework for the juvenile court system as opposed to technicalities that characterize the adult criminal court system).

49 CAL. WELF. & INST. CODE § 730 ("The court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.").

50. San Bernardino County Department of Public Social Services v. Superior Court, 283 Cal. Rptr. 332, 341 (Cal. Ct. App. 1991) (stating that children are often victimized by the system); Lisa McNaughton, *Extending Roper's Reasoning to Minnesota's Juvenile Justice System*, 32 WM. MITCHELL L. REV. 1063, 1064 (2006) (noting that by the mid-1960s the juvenile courts were unable to offer sufficient individualized treatment to each child due to their heavy caseloads).

51. MANFREDI, *supra* note 11, at 32 (noting that critics of the juvenile court system believed the system's informality encouraged judicial arbitrariness).

52. Karen de Sa, *Allegations of Abuse Being Investigated*, MERCURY NEWS, Jan. 28, 2004, http://www.nospank.net/n-l35r.htm ("The experts found CYA failing in 21 of the 22 measures posed in question form by the Attorney General's Office.").

53. *In re* Gault, 387 U.S. 1, 26 (1967).

54. DAVIS, *supra* note 41, at 4-5.

consequence, the juvenile court system closely resembles the adult criminal system.[55]

B. Merging the Juvenile and Adult Court Systems

Two major sources of change merged the juvenile and adult court systems. The first source of change came from the United States Supreme Court in the 1960s out of a legitimate concern for the fairness of court proceedings and the treatment of delinquents.[56] The Court provided more structure to juvenile proceedings and more due process rights for juveniles.[57] The second source of change arose through statutes enacted in the 1980s.[58] These statutes were enacted to hold juveniles more accountable for their misconduct.[59] Exaggerated media portrayals of violent juvenile crimes created a widespread fear of a juvenile crime epidemic.[60] The statutes essentially shifted the focus of the juvenile court system from rehabilitation to retribution.

1. Abuses Found in Juvenile Detention Facilities

The first source of change from the United States Supreme Court stemmed from reports exposing the inadequate treatment that children received in juvenile detention facilities. In 1960, the Governor's Special Study Commission on Juvenile Justice investigated the operation of the juvenile courts in California.[61] The commission reported a number of serious deficiencies, including abusive and dire conditions for minors.[62] Reports across the country revealed similar results.[63] The United States Supreme Court first examined a juvenile

55. *Id*.

56 Kent v. United States, 383 U.S. 541, 556-57 (1966); *In re* Gault, 387 U.S. 1, 19 (1967); *In re* Winship, 397 U.S. 358, 359 (1970).

57. *Id*; JEFFREY FAGAN & FRANKLIN E. ZIMRING, THE CHANGING BORDERS OF JUVENILE JUSTICE 15 (2000) (noting that the Supreme Court "constitutionalized" the juvenile court).

58 *Id*. at 85.

59. *Id*. (noting that state legislatures "criminalized" the juvenile justice system).

60. McNaughton, *supra* note 50, at 1065.

61. *The Juvenile Justice & Delinquency Prevention Commissioners Resource Manual, A.C.T.I.O.N*., JUVENILE JUSTICE AND DELINQUENCY PREVENTION COMMISSION DUTIES AND POWERS, 1995, at 5, http://www.jjdpc.org/pdf/jjdpc_Duties.pdf.

62. *Id*.

63. MANFREDI, *supra* note 11, at 48-49 (noting that a task force criticized juvenile courts for their mismanagement of juvenile delinquents and failure to reduce juvenile crime).

court procedure in 1966 and reiterated some of the concerns found in these reports and investigations.[64] The Court was appalled at the juvenile process stating that a "[child] gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[65] Again, the Court observed that the flexibility in the court did not always guarantee minors the "careful, compassionate, individualized treatment" as was intended by the early reformers.[66]

The Supreme Court attributed the deficiencies in the juvenile court system to a lack of structure and guidelines.[67] Thus, the Court provided minors with the right to counsel,[68] changed the burden of proof from preponderance of the evidence to beyond a reasonable doubt,[69] and required that minors not be arbitrarily transferred to adult criminal court.[70] While some justices feared that formalizing the juvenile court system would make it more time-consuming and intimidating for minors, the majority felt formalization was a necessary step to ensure fairness.[71]

2. Moral Panic Shifts the Focus from Rehabilitation to Retribution

The second major source of change to the juvenile court system arose through statutes enacted in the mid 1980s at a time juvenile murders significantly increased.[72] The dramatic increase in juvenile arrests, coupled with the generally lenient sanctions reserved for

64 Kent v. United States, 383 U.S. 541, 556-57 (1966) (requiring adult waiver procedures to live up to constitutional fairness).

65. *Id*.

66. *In re* Gault, 387 U.S. 1, 18-19 (1967) (holding that a juvenile has a constitutional right to notice of charges, counsel, confrontation and cross-examination of witnesses, and the privilege against self-incrimination).

67. *Id*. at 19-20 (finding that many children who committed a minor offense, or who are not guilty at all, are subject to the whims of a judge who may impose unnecessarily harsh penalties).

68. *Id*. at 41-42.

69. *In re* Winship, 397 U.S. 358 (1970) (holding that the prosecution, charging a 12-year-old child for stealing that rendered him liable to confinement for as long as 6 years, had to prove its case beyond a reasonable doubt).

70. *Kent*, 383 U.S. at 553.

71. *Gault*, 387 U.S. at 77.

72. Patricia Allard & Malcolm Young, *Prosecuting Juveniles in Adult Court: The Practitioner's Perspective*, JOURNAL OF FORENSIC PSYCHOLOGY PRACTICE, 2(2), 2-3 (2002) (noting that by two years prior to the enactment of Prop 21, juvenile arrests for murder fell by 52%); MCCORD, *supra* note 12, at 2 (reporting that the huge increase in crimes were mainly property and drug crimes as opposed to murders and other violent crimes).

minors, led to new statutory provisions to make minors more accountable for their crimes.[73] The media frequently televised atrocious juvenile crimes at a greatly disproportionate rate compared to adult crimes.[74] A study found that two thirds of all crimes broadcast on the television featured juveniles, while juveniles committed only about 14% of the total crimes.[75] Nevertheless, the public was concerned and outraged.[76] Politicians exploited this public fear in their "tough on crime" campaigns to win voter support.[77] Additionally, legal scholars claimed that the rehabilitative goal of the juvenile justice system was failing.[78] One author advocated for mass incarceration of juvenile delinquents who he referred to as "super-predators."[79]

Despite a significant decline in juvenile arrests, legislators and the public continued pushing for tougher penalties against juvenile delinquents throughout the 1990s.[80] By 2000, juvenile crime rates had decreased significantly.[81] Serious violent juvenile crimes

73. *Trends: How States are Changing the Rules of Their Juvenile Justice Systems*, JUVENILE JUSTICE UPDATE, Apr./May 1997, at 7 (noting that most states modified their statutes to make prosecution of juveniles in adult court easier in order to administer longer sentences and tougher sanctions); MCCORD, *supra* note 14, at 1 (noting that most states created harsher penalties for minors in response to the rise in juvenile crime rates in the 1980s and 1990s).

74. SCOTT & STEINBERG, *supra* note 19, at 106.

75. *Id*. at 105-06; ROLF LOEBER & DAVID P. FARRINGTON, SERIOUS & VIOLENT JUVENILE OFFENDERS 18 (1998) (noting that only 8.1% of arrested juveniles consisted of violent offenders in a study of 151,209 juvenile delinquents).

76 SCOTT & STEINBERG, *supra* note 19, at 105 (noting a poll taken in 2000 showed that 60% of California citizens erroneously believed that juveniles committed most of the violent crime).

77. FAGAN & ZIMRING, *supra* note 57, at 109.

78. *Id.* at 29.

79. John DiIulio, Jr., *The Coming of the Super-predators*, WEEKLY STANDARD, Nov. 27, 1995. The author later recanted his prediction and apologized for falsely instilling fear in the public over juvenile offenders. Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19. John DiIulio stated "[i]f I knew then what I know now, I would have shouted for the prevention of crimes." *Id*.

80. *Youth Victims and Perpetrators of Serious Violent Crime*, FORUM ON FAMILY & CHILD STATISTICS (2005), http://www.childstats.gov/americaschildren/beh5.asp (noting that the nationwide rate of violent juvenile crime plummeted by 71% from 1993 to 2006).

81. Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998 (Mar. 7, 2000), Argument Against Proposition 21, http://primary2000.sos.ca.gov/VoterGuide/Propositions/21noarg.htm; SCOTT & STEINBERG, *supra* note 19, at 105 (noting a possible explanation for the reduction in juvenile crime is that minors understand that their "juvenile status" no longer shields

declined in the new millennium, dropping from 52 crimes per 1,000 juveniles in 1993 to 11 crimes per 1,000 juveniles in 2007.[82] Nevertheless, the public, still engulfed by moral panic and often unaware of reality, continues to urge legislators to "get tough" on delinquency.[83]

State legislators responded by passing new laws that lowered the age a minor could be tried as an adult, increased sentences, reduced judicial discretion, and eliminated the confidentiality for some juvenile proceedings and court records.[84] These laws substantially blur the line between juvenile and criminal justice, causing some legal scholars to question whether a separate juvenile court system should exist at all.[85] One of the most controversial of these legislative acts is California's Proposition 21, which, in many circumstances, holds minors to the same standards as adults.[86]

3. Proposition 21

In 2000, 62% of California voters passed Proposition 21, also known as the Gang Violence and Juvenile Crime Prevention Act of 1998 ("Prop 21").[87] Prop 21 was advertised as a measure to solve the violent gang problem in California.[88] However, Prop 21 encompasses a far wider range of juveniles than just gang members. It targets all serious juvenile offenders, from gang members with long criminal history, to first-time offenders with no gang affiliation whatsoever.[89]

them from severe punishment in light of the vast number of minors being tried as adults. *Id*. at 193.

82. *Youth Victims and Perpetrators of Serious Violent Crime*, *supra* note 80.

83. DAVIS, *supra* note 41, at 6-7.

84. Jennifer Taylor, *California's Proposition 21: A Case of Juvenile Injustice*, 75 S. CAL. L. REV. 983, 988 (2002).

85. DAVIS, *supra* note 41, at 5.

86 Proposition 21, *supra* note 9 (amending California and Institutions Code section 781(a)).

87. *Id*.

88. Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998 (Mar. 7, 2000), Official Title and Summary Prepared by the Attorney General, http://primary2000.sos.ca.gov/VoterGuide/Propositions/21.htm; SCOTT & STEINBERG, *supra* note 19, at 109; CHAMPION, *supra* note 40, at 76-77 (reporting that the number of gang members in the nation rose from 100,000 in 1980 to over 846,000 in 1996); JAMES C. HOWELL, JUVENILE JUSTICE & YOUTH VIOLENCE 129 (1997) (identifying three well-established programs that already targeted California's gang problem, undermining the need for further gang-control legislation).

89. Proposition 21, *supra* note 9.

Prop 21 expands the eligibility of juvenile delinquents for adult criminal court and permanently preserves their court record of serious offenses. Prosecutors have sole discretion to file charges against minors directly in adult court when a minor is charged with a serious crime listed in the California Welfare & Institutions Code section 707(b) [hereinafter all code sections refer to "California Welfare & Institution Code" unless otherwise stated].[90] Prop 21 also lowers the eligibility age for adult court from sixteen to fourteen years of age.[91] Finally, when minors are adjudicated with a serious offense listed in section 707(b), their juvenile record will be publicly accessible forever.[92]

One of the most detrimental and overlooked provisions of Prop 21 is the inability of minors to seal their records when adjudicated with a section 707(b) offense.[93] Under section 781, juveniles may petition the court to seal their records five years after the termination of jurisdiction, or upon reaching the age of majority.[94] If the minor has not committed a felony or a misdemeanor of moral turpitude and has rehabilitated to the court's satisfaction, the court shall seal the records.[95] The records shall be destroyed either five years after the record was sealed or on the minor's thirty-eighth birthday.[96] However, no records may ever be sealed or destroyed for any of the thirty different offenses listed in section 707(b), *see* note 8, if committed by a minor who is at least fourteen years old.[97] Section 707(b) offenses primarily include violent crimes and sexual offenses.[98] A judge has no discretion whatsoever to consider any mitigating factors in determining whether to seal a minor's juvenile court records for one of the enumerated offenses.[99]

Sealing a juvenile court record has great benefits. Under California law, once a juvenile record is sealed, "the proceedings in

90. CAL. WELF. & INST. CODE § 707(d)(2)(C) (West 2000).

91. *Id*. § 707(c).

92. *Id*. § 781(a).

93. *In re* Jeffrey T., 44 Cal. Rptr. 3d 861, 865 (Cal. Ct. App. 2006) ("[Proposition 21] eliminat[ed] confidentiality in some juvenile proceedings in order to hold juvenile offenders more accountable for their actions.").

94. CAL. WELF. & INST. CODE § 781(a).

95. *Id*.

96. *Id*. § 781(d)

97. *Id*.

98. *Id*. § 707(b).

99. *In re* Jeffrey T., 44 Cal. Rptr. 3d 861, 862 (Cal. Ct. App. 2006) (interpreting § 781(a)).

the case shall be deemed never to have occurred."[100] A person with a sealed juvenile record may lawfully answer "no" to any questions asking if they have been arrested or convicted of a crime.[101] The minor can also rest assured that a background check will not reveal any embarrassing or damaging information.[102] This protection allows one to become eligible for some professional licenses, relieves sex offenders of registration requirements, and prevents prosecutors from using the sealed offense to enhance a future charge.[103] Erasing a minor's past mistakes furthers the goals of the juvenile process by facilitating a fresh start at a law-abiding life.

II. PROPOSITION 21 CONTRAVENES THE PRINCIPLES AND GOALS OF THE JUVENILE JUSTICE SYSTEM

The ultimate goal of the juvenile justice system since its historical inception in 1899 has been to treat delinquents and enable them to become law-abiding citizens.[104] Accomplishing this goal promotes the best interests of minors and public safety. The system's flexible and informal design is intended to allow judges to consider all of the factors that led to the crime in formulating the best treatment plan for the minor.[105] The California Court of Appeal confirmed this analysis, stating that "in determining how best to rehabilitate a minor, the juvenile court should consider the broadest range of information."[106] However, Prop 21 forbids the juvenile court from considering *any* information whatsoever when minors commit a section 707(b) offense in terms of sealing their records.[107] California,

100. CAL. WELF. & INST. CODE § 781. There are two exceptions to the rule that a sealed record may not be disclosed without the minor's consent. *Id.* First, a sealed record may be viewed if the offender sues someone for defamation. *Id.* § 781(b). Second, the Department of Motor Vehicles may inspect people's sealed juvenile court records for purposes of determining eligibility for insurance. *Id.* § 781(c).

101. *Benefits of Sealing a California Juvenile Record*, HIGBEE & ASSOCIATES, 2009, http://www.recordgone.com/california_juvenile_record_sealing.htm.

102. *Id.*

103. *Id.*

104. *In re* Charles G., 9 Cal. Rptr. 3d 503, 507 (Cal. Ct. App. 2004).

105. FAGAN & ZIMRING, *supra* note 57, at 86 (arguing that sentencing minors exclusively on the type of offense committed leads to inefficient sanctions).

106. *In re* T.C., 93 Cal. Rptr. 3d 447, 452 (Cal. Ct. App. 2009) (emphasizing the fact that the juvenile court has wide discretion to select appropriate conditions of probation and may impose any reasonable condition that is likely to lead to rehabilitation and reformation).

107. Proposition 21, *supra* note 9 (amending California and Institutions Code section 781(a)).

along with many other states, has significantly departed from the original principles of the juvenile court system.[108] While the official trademark of the juvenile justice system continues to be rehabilitation, "reliance on the juvenile process as rehabilitative rather than punitive in nature has paid more heed to rhetoric than to reality."[109]

Focusing the juvenile justice system squarely on its trademark of rehabilitation demands individualized treatment. A treatment plan is most effective when it addresses a person's individual needs and problems.[110] The legal system has long recognized this logical fact as it generally considers a multitude of factors contained in offenders' probation reports.[111] The law, however, has eliminated individualized treatment from the determination of whether to seal juvenile court records for serious offenses.[112] This departure towards concentrating on the type of the offense, while disregarding the minor's unique characteristics, has a negative impact on a minor's rehabilitation.[113]

Individualized treatment is not without its downfalls. It can lead to discrimination, inconsistency, and inequality because judges could theoretically fail to properly assess a child's needs and amenability to rehabilitation accurately. As a result, minors may receive unfair sentences or ineffective treatment plans.[114] Judges, however, are capable of imposing just sentences, and there are safeguards against judges who fail to do so. Ample amounts of research and statistical information are available to guide a judge's discretion to implement effective treatment plans.[115] Numerous studies exploring the nature of

108. *See Trends: How States are Changing the Rules of Their Juvenile Justice Systems*, *supra* note 73, at 8.

109. DAVIS, *supra* note 41, at 494.

110. *See* BARTOLLAS & MILLER, *supra* note 34, at 27 (noting that the legal system must attack the root causes of youth crime and provide more adequately for youth offenders' needs).

111. California Bill Analysis, Senate Committee, 2009-2010 Regular Session, Assembly Bill 61 (June 23, 2003) at 6-7 (noting that probation reports must address the following: "[t]he child's age, maturity, educational background, family relationships, motivation, any treatment history, and any other relevant factors regarding the benefit the child would derive from education, treatment, and rehabilitation efforts").

112. *See* CAL. WELF. & INST. CODE § 781(a) (West 2000).

113. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 107-08 (1979) ("Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system."); San Bernardino County Department of Public Social Services v. Superior Court, 283 Cal. Rptr. 332, 338 (Cal. Ct. App. 1991) (asserting that disclosing juvenile court records impedes the minors' reintegration into society).

114. MANFREDI, *supra* note 11, at 32.

115. MCCORD, *supra* note 14, at 1 (noting that a large body of research has

juvenile crime found consistent risk-factors of delinquency as well as effective ways to reduce such risk factors.[116] In exercising discretion to sentence a juvenile, judges may consider a multitude of appropriate factors. If judges abuse their discretion in implementing a sentence based on erroneous criteria, such as punishing a minor purely to send a message to others, an appellate court can reverse the disposition.[117]

A benefit to the rigid rule prohibiting judges from sealing records for serious offenses is that it alleviates judges of the cumbersome burden of having to evaluate each individual. On the other hand, creating a presumption to seal a minor's record serves the same goal of judicial expediency. Judges would be able to quickly seal a minor's records, in the absence of strong rebuttable evidence, without significant time-consuming analyses. A presumption to seal a minor's record also better supports empirical findings that a large majority of minors "mature out" of delinquency upon reaching adulthood.[118] Studies also show that most serious juvenile offenders are amenable to rehabilitation,[119] which is the hallmark of the juvenile justice system.[120] Thus, in the interests of rehabilitating delinquents and legitimizing the juvenile justice system, all juveniles should be able to presumptively seal their records.[121]

Courts should also consider the interest of public safety before presumptively sealing a juvenile's record. If a court finds clear, specific factors that indicate an unwillingness or inability to rehabilitate, the court should override the proposed presumption and deny sealing the juvenile's record. The use of judicial discretion in

developed over the past two decades, identifying risk factors of juvenile crime and ways to effectively reduce those risk factors); HOWELL, *supra* note 88, at 191.

116. SCOTT & STEINBERG, *supra* note 19, at 59-60 (concluding that family, peer, school, and community settings factor into minors' risks of engaging in criminal activity, and programs that target these social contexts are more successful at reducing recidivism than sanctions that fail to consider individuals' unique circumstances).

117. Martha C. v. Superior Court of San Diego County, 133 Cal. Rptr. 2d 544, 547 (Cal. Ct. App. 2003). The appellate court granted a writ of mandate for a minor after finding the trial court used inappropriate factors in denying the minor Deferred Entry of Judgment. *Id*.

118. SCOTT & STEINBERG, *supra* note 19, at 183-84.

119. FAGAN & ZIMRING, *supra* note 57, at 104 (stating that the seriousness of the adjudicated offense is a much less reliable predictor of recidivism as an extensive prior record).

120. *In re* Carrie W., 152 Cal. Rptr. 690, 693 (Cal. Ct. App. 1979).

121. CHAMPION, *supra* note 40, at 137 (noting that sealing of records is intended as a rehabilitative device).

handling juvenile court records of serious offenses better comports with the juvenile court system's flexible and informal design.[122] Such flexibility is necessary in juvenile court to accommodate its dual interests of rehabilitating the minor and promoting public safety. Rigid sentencing guidelines are proper only in adult criminal court to serve its narrower goal of punishing offenders in relation to their blameworthiness.[123] The goals between the juvenile and adult court systems differ due to the fundamental neurological and situational differences between minors and adults.[124]

A. Proposition 21's "Sealing Provision" Improperly Holds Minors to an Adult Standard

Adult criminals may not seal their records based on the presumption that they have chosen a life of crime, whereas, minors may generally seal their records for crimes that are presumably the product of developmental immaturity. Unlike adults, minors are psychosocially immature.[125] The frontal lobe of the brain that controls emotions and thoughts is not fully developed until adulthood.[126] As a result, minors tend to make ill-considered decisions without contemplating the future consequences of their actions.[127] They often act on impulses, focus on instant gratification, and thrive off of risky behavior.[128] Furthermore, adolescence is an unstable time when children rely on external factors to influence their behavior and to mold their self-identity.[129] The renowned

[122] *In re* T.C., 93 Cal. Rptr. 3d 447, 452 (Cal. Ct. App. 2009).

123. FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 49 (2005).

124. Kathryn Lynn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 LAW & HUM. BEHAV. 78, 78-79 (2008) (explaining that people's brains are not fully developed until their early twenties, which may be linked to maturity of judgment factors).

125. *Id.* 79 (noting that brain maturation between adolescence and young adulthood has been spatially and temporarily mapped using MRI imaging, indicating that the brain may not mature to adult capacity until the early twenties).

126. *Id.* at 80 (noting that the pre-frontal cortex, an area involved in goal-directed behaviors and emotional processing, is altered significantly during adolescence).

127. *Id.* at 89. A study comparing adolescents and young adults found adolescents displayed significantly less responsibility and perspective than the young adults, and are more likely to make antisocial decisions than the older group. *Id*. Moreover, the study found that maturity of judgment predicted total delinquency above and beyond age, gender, race, education level, social economic status, and antisocial decision-making. *Id*. These results show strong support that psychosocial factors may be highly predictive of delinquent behavior. *Id.*

128. MCCORD, *supra* note 14, at 15-16.

129. Modecki, *supra* note 124, at 78 ("[N]umerous developmental theorists

psychologist, Terrie E. Moffitt, concluded that criminal activity is not uncommon among minors undergoing the turbulent phase of adolescence.[130] Juveniles' unstable life phase and heightened susceptibility to antisocial behavior make their misconduct less morally reprehensible than that of an adult.[131]

Minors are particularly vulnerable to excessive punishment.[132] They have not developed a thick enough skin to endure harsh sanctions without having lasting negative effects on their psyche.[133] Overly severe punishment may overshadow the minor's regret and remorse with feelings of anger and resentment. The backlash could throw a minor off the path of rehabilitation and into an indefinite criminal career. Indeed, studies show that when minors are punished as harshly as adults, they re-offend more frequently and commit more serious crimes.[134] Therefore, the law ought to provisionally punish minors just enough to impress upon them the wrongfulness of their conduct.[135] The founders of the juvenile court system recognized the adverse effects that excessive punishment may have on minors, which acted as support for the *parens patriae* philosophy.[136]

The *parens patriae* philosophy may seem overly paternalistic, but it is recognized as a legitimate principle throughout many areas of the law. The law restricts minors from enjoying many rights and privileges afforded to adults in recognition that minors are naturally immature and make harmful decisions.[137] Conversely, many areas of the law make allowances for children for the very same reasons;

maintain that adolescents, ages 13-18, may lack the judgmental maturity to make decisions based on their own inclinations and principles.").

130. SCOTT & STEINBERG, *supra* note 19, at 16.

131. Roper v. Simmons, 543 U.S. 551, 569 (2005) (holding the death penalty for minors is unconstitutional).

132. *See* SCOTT & STEINBERG, *supra* note 19, at 210; *Trends: How States are Changing the Rules of Their Juvenile Justice Systems*, *supra* note 73, at 7.

133. *See* SCOTT & STEINBERG, *supra* note 19, at 210 (claiming that the experience of imprisonment is more adverse for adolescents than for older prisoners).

134. CHAMPION, *supra* note 40, at 184 (reporting that leniency, particularly among first-time offenders, results in less recidivism). Juveniles reject the justice system as illegitimate when punished too harshly, leading to resistance and defiance. SCOTT & STEINBERG, *supra* note 19, at 200.

135. Roper v. Simmons, 543 U.S. 551, 571 (2005) (noting that minors have a reduced level of culpability that makes excessive penalties largely ineffective for purposes of deterrence).

136. BARTOLLAS & MILLER, *supra* note 34, at 165-77.

137. *Roper* 543 U.S. at 569 "[A]lmost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent."); FAGAN & ZIMRING, *supra* note 57, at xii.

children make immature and harmful decisions from which they need protection themselves.[138] For instance, a minor can unilaterally rescind a contract without incurring any penalty in order to protect minors who enter into unfavorable contracts.[139] The *parens patriae* philosophy is engrained in our society based on the principles that minors possess a greater need for protection and a lower level of expectations than adults.[140] Preserving children's and adults' records in the same manner, however, erodes these well-established principles.

Finally, the fine line at eighteen years of age, which separates those whom society holds fully accountable for their crimes from those whom are deemed less morally culpable, is not as arbitrary as it may appear.[141] Minors' movement and choices are usually limited by the authority of a parent, legal guardian, or state agent.[142] Parents and society are at least partially responsible for the neighborhoods in which minors live, activities in which they engage, and people with whom they associate.[143] Thus, it is unfair to hold minors fully accountable for crimes that may be influenced by their uncontrollable circumstances. Upon reaching eighteen years of age, the state grants people autonomy, allowing them to live and express themselves however they desire.[144] At that point, a person is more competent to make responsible decisions and assumes higher expectations to abide by social norms.[145] However, Prop 21 forces a large group of juvenile

138. *Id.* ("The reason why juveniles are not trusted with the privileges and responsibilities of an adult also explains why their irresponsible conduct is not as morally reprehensible as that of an adult.").

139. CAL. FAM. CODE § 6710 (West 1994) ("Except as otherwise provided by statute, a contract of a minor may be disaffirmed by the minor before majority or within a reasonable time afterwards or, in case of the minor's death within that period, by the minor's heirs or personal representative.").

140. *See Roper*, 543 U.S. at 569.

141. *See id*. at 569-70 (explaining three categorical differences between adults and minors that warrants differential treatment between the two groups). There is most likely no significant difference between a minor who is 17.9 years old and an adult who is 18 years old, but the line must be drawn somewhere.

142. *See id*. at 569; Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982) ("[Y]outh crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.").

143 *Id*.

144 *See In re* Holly H., 128 Cal. Rptr. 2d 907, 908 (Cal. Ct. App. 2002).

145 *Roper*, 543 U.S. at 569.

delinquents to bear adult punishments before they are bestowed with adult privileges, responsibilities, and expectations.[146]

B. Proposition 21's "Sealing" Provision Unduly Targets an Excessive Number of Juvenile Delinquents

Prop 21 unduly affects far more juvenile offenders than its proponents had intended. Prop 21 was aimed at reducing California's gang problem.[147] It was meant to maintain control over those serious, violent offenders unlikely to ever rehabilitate.[148] However, Prop 21 creates a rigid rule precluding *all* juveniles adjudicated with a section 707(b) offense from sealing their records.[149] This provision disregards the underlying circumstances of the crime and the individual characteristics of the offender, permanently subjecting an expansive variety of youth offenders to the legal system through unsealed court records.

Although offenders have high recidivism rates during adolescence,[150] most juveniles naturally desist from criminal activity upon reaching adulthood, including those who have committed serious, violent offenses.[151] Only a very small portion of serious, violent offenders are "chronic offenders" who persist in criminal activity long after adolescence.[152] In fact, only about 8% of juvenile offenders enter an adult criminal career, accounting for more than half of all repeat offenders.[153] The large number of crimes perpetuated by chronic offenders significantly inflates the adult crime rate above the

146 *See* CAL. WELF. & INST. CODE § 781(a) (West 2000) (prohibiting people from sealing their juvenile court records for serious offenses just as people convicted in adult criminal court are prohibited from sealing their records).

147. SCOTT & STEINBERG, *supra* note 19, at 103.

148. *Id.*

149. CAL. WELF. & INST. CODE § 781(a).

150. 42 U.S.C.A. § 17501(b)(8) (West 2008) (reporting that approximately 100,000 juveniles are released from secure confinement each year and have a recidivism rate ranging from 55% to 75%).

151. SCOTT & STEINBERG, *supra* note 19, at 53 (reporting that only about 5% of youth offenders will persist in criminal activity in adulthood).

152. *Id.* (noting that that vast majority of crimes are committed by a small class of offenders).

153. MICHAEL SCHUMACHER & GWEN A. KURZ, THE 8% SOLUTION: PREVENTING SERIOUS, REPEAT JUVENILE CRIME 4 (1999) (reporting the results of a study conducted in Orange County, California finding that 70% of first-time juvenile offenders desisted from criminal activity upon reaching adulthood, 22% committed no more than two additional crimes, and 8% went on to commit over 55% of repeat crimes well throughout adulthood).

juvenile crime rate in spite of the higher criminal propensities among adolescents.[154]

Chronic offenders cause substantial damage and harm from which the public deserves adequate protection. Fortunately, these dangerous offenders are generally easy to identify early on because they share unique, common characteristics, such as a criminal history predating adolescence.[155] These presumably more dangerous, chronic offenders are disposed of through the adult criminal process by various California statutes and provisions of Prop 21.[156] Section 602(b) mandates adult criminal prosecution for minors who are at least fourteen years old and charged with murder or a serious sex offense.[157] Also, prosecutors have sole discretion to try minors in adult court for any serious offense.[158] Generally, prosecutors try minors as adults when the nature of the offense is particularly heinous, and the likelihood of rehabilitation appears bleak.[159] Minors convicted in adult court generally receive longer sentences[160] and are never eligible to have their records sealed.[161]

The remaining juvenile delinquents are presumably considered to be less dangerous and are thus processed through the juvenile court system. The youth offenders processed in juvenile court may have committed a crime due to an infinite number of mitigating factors, including inherent immaturity and a poor decision-making ability. The youth offenders may be extremely remorseful and hope to reform their behavior. In any case, they are unlikely to persist in criminal

154. *Id.*

155. HOWELL, *supra* note 88, at 155 (stating that "chronic offenders [are] very different from non-chronic offenders" and most of the chronic offenders could have been predicted at the age of ten on the basis of troublesome behavior and several background features).

156. Proposition 21, *supra* note 81; CHAMPION, *supra* note 40, at 184.

157. Proposition 21, *supra* note 88; CAL. WELF. & INST. CODE § 602(b) (West 2000).

158. *Id.* § 707(d)(1); Allard & Young, *supra* note 72 (noting that over 200,000 adolescents are tried in criminal court annually).

159. CHAMPION, *supra* note 40, at 219-20 (reporting the results from an in-depth study into the characteristics of juveniles waived to adult court, finding that minors tried in adult court commonly held extensive prior records, exhibited emotional disturbances, and displayed an unwillingness to accept interventions suggested by the intake officers).

160. Allard & Young, *supra* note 72 (noting several losses a minor suffers with an adult conviction, such as having to disclose a criminal conviction to prospective employers and a loss of federal financial aid for post-secondary education).

161. CAL. WELF. & INST. CODE § 781(e).

activity as adults, making any sort of perpetual penalty unnecessary.[162] Nevertheless, Prop 21 indiscriminately precludes all juveniles from sealing their records, regardless of whether they are the 8% chronic offenders or the majority of short-term offenders. It is unreasonable and unnecessary to subject such a large, diverse group of offenders to the same type of sanction that is potentially useful for only 8% of juvenile delinquents. Furthermore, it is unreasonable to expect juvenile delinquents, who usually come from disadvantaged backgrounds, to rehabilitate while simultaneously refusing to seal their court records.

C. Forbidding Juvenile Offenders from Sealing Their Records Hurts Their Chances for Rehabilitation and Reintegration

Precluding all serious juvenile offenders from sealing their records is unnecessary and harmful to the social interest of reducing recidivism. Most juveniles are not headed for criminal careers unless punitive measures push them in that direction.[163] The United States Supreme Court announced that: "[T]he impetuousness and recklessness that may dominate in younger years can subside."[164] However, the hopelessness of offenders to erase their childhood mistakes may arouse defiance at their perceived injustice and perpetuate their recklessness.[165] A permanent juvenile court record creates a serious handicap, which arguably exacerbates recidivism.[166]

Some courts assert that keeping court records unsealed is helpful for parole officers in recommending an effective treatment program for ex-juvenile offenders who return to court.[167] However, keeping court records unsealed makes the criminal history of minors available to the public, including prospective employers, which renders more harm than good. The California Court of Appeal proclaimed that juvenile records are generally kept confidential to protect the juvenile from unnecessary adverse effects and emotional trauma.[168] These

162. SCOTT & STEINBERG, *supra* note 19, at 53 (explaining that minors tend to desist from crime upon reaching adulthood because they "develop a stable sense of identity, a stake in their future, and mature judgment").

163. *See id*. at 211.

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

165. *In re* Gault, 387 U.S. 1, 26 (1967) (noting that minors may justify their bad behavior in response to the cruelness of the juvenile justice system, which makes reform difficult).

166. T.N.G. v. Superior Court, 484 P.2d 981, 993 (Cal. 1971).

167. *Id*. at 984.

168. People v. Connor, 9 Cal. Rptr. 3d 521, 533 (Cal. Ct. App. 2004).

unnecessary adverse effects primarily include the social stigma of the delinquency label and the difficulty of obtaining a job, which both increase recidivism.[169]

1. Labeling Theory

Frank Tannenbaum set forth the first "labeling theory" in 1938, asserting that a person labeled as a delinquent will identify with that label and develop attachments to others similarly labeled.[170] The delinquency label emphasizes and evokes negative traits, conveying the message that those traits describe the delinquents.[171] Delinquents often accept their negative label, which shapes their behavior.[172] Keeping juvenile court records unsealed conveys the message to delinquents that ongoing scrutiny of the legal system is necessary because they will likely re-offend. This message, according to Tannenbaum's labeling theory, encourages minors to satisfy society's expectations of them by re-offending.

Edwin Lemert expanded upon Tannenbaum's labeling theory in 1951, focusing on the effects of society's negative reaction to individuals labeled as delinquents.[173] Lemert claimed that both labeled and unlabeled delinquents have "primary deviance," which is their initial wrongdoing caused by psychological and sociological factors.[174] However, the groups differ in that the group labeled as delinquents begin to feel ostracized by society and unable to act in a socially acceptable manner.[175] Those labeled as delinquents then act out against society as a defense mechanism to cope with their negative public reaction by committing more criminal acts, constituting "secondary deviance."[176] "Secondary deviance" is caused by delinquents' new label and social resentment, which perpetuates criminal behavior.[177] What may have been a one-time

169. *See* BARTOLLAS & MILLER, *supra* note 34, at 294.

170. FRANK TANNENBAUM, CRIME AND THE COMMUNITY 19-20 (1938).

171. *Id.*

172. *Id.*

173. Kareem L. Jordan, *Violent Youth in Adult Court: A Comprehensive Examination of Legislative Waiver and Decertification*, May 2005, at 99, http://dspace.lib.iup.edu:8080/dspace/bitstream/2069/12/1/Kareem%2520Jordan%2527s%2520Dissertation.pdf.

174. *Id.*

175. *Id.* at 100.

176. *Id.*

177. *Id.*

horrible mistake could manifest into a long-term pursuit of a deviant career, dictated by the labeling process.

The original reason for confidentiality and private hearings was to protect the juvenile delinquent from any social stigma.[178] Children who know they will never be able to rid themselves of that stigmatizing label really have just one option: to accept it. In accepting the delinquency label, the minor learns the role and norms of the label and acts accordingly.[179] Studies support the labeling theory's suggestion that youth offenders labeled as delinquents or criminals recidivate more often than youth offenders who are allowed to seal their records.[180]

2. Reduced Opportunities

Recidivism also results from a lack of access to legitimate means of achieving social goals.[181] Rehabilitation programs are less effective if an individuals' delinquent history precludes them from being accepted for a job or to college.[182] Background checks are easy and commonplace for practically all applicants seeking employment, higher education, housing, and professional licenses.[183] Employers are reluctant to hire "a kid on parole, fresh out of prison" when there are applications from people with no delinquent history.[184] Background checks often reject ex-juvenile offenders from gainful employment and cause them to feel unable to "earn money the honest way."[185]

178. San Bernardino County Department of Public Social Services v. Superior Court, 283 Cal. Rptr. 332, 339 (Cal. Ct. App. 1991).

179. JAY S. ALBANESE, DEALING WITH DELINQUENCY 57 (1993).

180. *See* Kareem L. Jordan, *supra* note 173, at 114 (finding that "labeling had a significant positive effect on deviant identity" and "deviant identity had a significant positive effect on subsequent deviance"). Several studies have also shown that minors convicted in adult court, who may never seal their records, have significantly higher recidivism rates than minors adjudicated in juvenile court, who usually may seal their records. *Id.* at 88-90.

181. MCCORD, *supra* note 14, at 200-01 (claiming that the key to successful transition from adolescence to adulthood is finding a job, which is hindered by an arrest record).

182. *See* SCOTT & STEINBERG, *supra* note 19, at 53 (noting that gainful employment discourages recidivism).

183. Anne Fisher, *I Got Caught Smoking Pot. Who's Going to Hire Me Now?*, FORTUNE, Sept. 16, 2002 (reporting that "85% of FORTUNE 500 companies now do background checks on applicants").

184. BORTNER & WILLIAMS, YOUTH IN PRISON 159 (1997).

185. *Id.*

For instance, Bernardo, who had been adjudicated for an offense as a child long ago, went to a community college determined to become successful.[186] After graduating from college, he spent three months searching for a job but was unable to get hired because of his juvenile record.[187] He felt frustrated, depressed, and hopeless and then reverted back to his old criminal ways.[188] He stole an automobile and was sentenced to prison.[189] Upon being released, he underwent another desperate and unsuccessful job search due to his criminal record.[190] Despite strong efforts to succeed, the burden of a delinquent or criminal record can set one up for failure and a return to criminal activity.

3. Financial Burden

The preservation of a child's delinquent history results in huge financial costs.[191] As mentioned above, it increases recidivism, resulting in *more* court and confinement expenses.[192] Additionally, an unsealed juvenile adjudication can be used to enhance sentences for subsequent convictions, contributing to *longer* sentences and higher incarceration costs.[193] The California Supreme Court held that using a prior adjudication, obtained in the absence of a right to a jury trial, to impose the upper term sentence does not violate due process.[194] Furthermore, a prior adjudication can count as a "strike" under

186. *Id.* at 171.

187. *Id*.

188. *Id*.

189. *Id*.

190. *Id.* at 171-72.

191. *See* Daniel Macallair, *Closing California's Division of Juvenile Facilities*, May 2009, at 2, www.cjcj.org.

192. *Id*. "Few areas of California state government warrant greater scrutiny than the $383,105,473 budget of the California Department of Corrections, Division of Juvenile Facilities." *Id*. Between 1987 and 1996, there was a 78% increase in formal processing of delinquency cases. *Id.* As of March 31, 2009, California juvenile facilities held 1,637 wards at an estimated cost of $234,029 per ward. *Id*. With an average stay of 35.3 months, a ward costs nearly $800,000 to confine. *Id*.

193. People v. Nguyen, 209 P.3d 946, 959 (Cal. 2009). The use of prior juvenile adjudication to increase a sentence under California's three strikes law is valid even though juvenile was not afforded a jury trial. *Id*. California continues to face a severe prison overcrowding crisis with about 170,000 inmates under its jurisdiction (a 125% increase from 20 years ago), creating health risks for everyone working or detained inside its correctional facilities. California Bill Analysis, Senate Committee, 2009-2010 Regular Session, Assembly Bill 61 (June 23, 2003) at 3-4.

194. *Nguyen*, 209 P.3d at 959.

California's three strikes law.[195] An adult who made a poor decision as a child can pay for it later by double the sentence time for a subsequent offense, and twenty five years to life for a third offense.[196] Unsealed juvenile records expose offenders to future sentencing enhancements, which costs hundreds of millions of dollars for the increased length of incarceration.[197]

The risk of unsealed juvenile court records being used as major sentencing enhancements significantly raises the stakes, encouraging more litigation and appeals.[198] In light of juveniles facing a permanent mark on their record that could enhance future charges, the defense will frequently reject plea offers and engage in more time-consuming and expensive litigation.[199] Before juvenile adjudications were used as strikes in California's three strikes law, the juvenile system operated quickly and efficiently.[200] Juvenile offenders often stipulated to the charges because the penalties were reasonable, and minors were able to move quickly through the process.[201] California's current strict sealing provisions and the accompanying adverse effects pose grave consequences for a minor who stipulates to an allegation. Minors adjudicated with a serious offense may not seal their records, placing them at risk of severe future enhancements.[202] The high stakes present a strong incentive to litigate the charges rather than to submit. The increase in the number of juvenile court trials and appeals stifles the process and costs the state a tremendous amount of money.[203]

195. CAL. PENAL CODE § 667(d)(3)(D) (West 2004).

196. *Id*. § 667(e).

197. California Bill Analysis, Assembly Committee, 2009-2010 Regular Session, Assembly Bill 16 (Mar. 31, 2009) at 3. During discussions on the effects of Prop 21, which added many more offenses to the violent felony list that cannot be sealed for juveniles, "The Secretary of State in its March 2000 Voter Pamphlet stated that the fiscal cost of adding several offenses to the list of serious or violent felonies was an annual cost of $300 million." *Id*. Opponents accurately predicted Prop 21 would cost California taxpayers many millions of dollars. SCOTT & STEINBERG, *supra* note 19, at 108.

198. California Bill Analysis, Assembly Committee, 2009-2010 Regular Session, Assembly Bill 168 (Mar. 31, 2009) at 2 (arguing that prohibiting records sealed significantly increases the number of court trials and appeals).

199. *Id*.

200. *See id*.

201. *Id*. at 5 (noting that juvenile court is prosecutor-friendly and minors are often encouraged to stipulate to allegations, but not when a stipulation would result in a permanent mark on a child's record).

202 *See* People v. Nguyen, 209 P.3d 946, 959 (Cal. 2009).

203. S*ee* California Bill Analysis, Assembly Committee, 2009-2010 Regular

The huge costs associated with permanently stigmatizing released youth offenders with the delinquency label, who usually grow out of delinquency upon entering adulthood, is a costly waste of funds. It is much more effective and fiscally responsible to channel resources towards preventive programs rather than ongoing punishment.[204] While some criticism over the effectiveness of rehabilitation programs is valid, many of the problems arise from a lack of funding.[205] These problems could be remedied by redirecting resources from punitive measures to rehabilitative methods.[206] Also, the efficacy of rehabilitative methods would be enhanced if children were able to reenter society without the impediment of an unsealed juvenile record.

D. Future Outlook

Society is well equipped to administer appropriate differential treatment and sanctions to serious juvenile offenders based on their individual needs. In the past few decades, sociologists and psychologists have conducted thorough studies analyzing criminogenic factors and methods to reduce recidivism.[207] Many agencies and organizations have adopted these findings in implementing effective community-based and preventive programs for troubled youth.[208] Recognizing the effectiveness of community-based programs, the federal government has enacted the Second Chance Act aimed at reducing recidivism.[209] The Second Chance Act

Session, Assembly Bill 168 (Mar. 31, 2009) at 2 (noting that the risk of having to disclose juvenile records in civil commitment proceedings "would increase the number of juvenile court trials and appeals because it significantly raises the stakes for the minor, costing counties and the state more money").

204. Proposition 21, *supra* note 81; SCOTT & STEINBERG, *supra* note 19, at 183 (asserting that extensive research indicates that less costly sanctions in the juvenile system, including community-based programs, are effective at reducing recidivism); HOWELL, *supra* note 88, at 176 (estimating that $1.40 is saved on incarceration costs for every $1.00 spent on prevention).

205. McNaughton, *supra* note 50, at 1064.

206. HOWELL, *supra* note 88, at 191.

207. *Id.*; MCCORD, *supra* note 14, at 1 (noting that a large body of research has developed over the past two decades, identifying risk factors of juvenile crime and ways to effectively reduce those risk factors).

208. *E.g.*, 42 U.S.C.A. § 17501(b)(19) (West 2008) (finding that transitional jobs programs have proven to facilitate reintegration for released offenders and reduce recidivism). Many rehabilitative programs have failed in the past because they did not utilize the "accumulated scientific knowledge about the nature and course of adolescent development." *See* SCOTT & STEINBERG, *supra* note 19, at 223.

209. 42 U.S.C.A. § 17501(a)(1).

grants up to $1,000,000 for agencies nationwide that help ex-offenders reintegrate back into the community through housing, education, and job assistance.[210]

Ensuring that ex-offenders reap the full benefits of the Second Chance Act is vital to achieve its goals of facilitating reintegration for ex-offenders and reducing recidivism. Re-entry assistance programs have been in place for a long time yet, the recidivism rate among ex-offenders is still between 55% and 75% in part because an open court record reduces the effectiveness of the services.[211] The phenomenon of the relatively low juvenile crime rate and high recidivism rate can be partly explained by the "criminal history" variable. Ex-offenders *without* an open court record have a higher success rate at securing employment through assistance programs than those *with* an open court record.[212] Sealing one's record increases a minor's chances to secure employment and many other endeavors that perform a background check. Providing reintegration services to ex-juvenile offenders along with the ability to seal their records would optimize the re-entry services' effectiveness. It would also reduce offenders' fears of being rejected or fired and encourage them to abide by the law to avoid having their records unsealed. Prop 21's sealing provision should be eliminated and replaced with an alternative provision to help give ex-offenders a full and fair "second chance."

E. Proposed Amendment

The following provision to Welfare & Institutions Code section 781 should be eliminated:

> The court shall not order the person's records sealed in any case in which the person has been found by the juvenile court to have committed an offense listed in subdivision (b) of Section 707 when he or she had attained 14 years of age or older.

The aforementioned eliminated provision of Welfare & Institutions Code section 781 should be replaced by the following amendment:

> The court may order the offender's records sealed immediately upon the offender's release from confinement. Thereafter, if the person commits a felony or misdemeanor involving moral turpitude, the court shall unseal the records, and compel the person

210. *Id.* § 3797w.

211. *Id.* § 17501(b)(8).

212. MCCORD, *supra* note 14, at 200-01.

> to notify his or her employer of the conviction if applicable, and register under the sex offender community notification laws if applicable.

This Note's proposed amendment provides the court with discretion to seal a minor's record for any offense adjudicated in juvenile court. Consistent with the existing law, minors tried in adult court shall not be able to seal their convictions.[213] Prosecutors' discretion to try minors in adult court allows the state to maintain greater control over the more dangerous, chronic offenders.[214] Prosecutors would not likely abuse their discretion by sending significantly more minors to adult court purely to circumvent minors' opportunity to seal their records. Prosecutors seek justice, not purely punishment. They are also reluctant to try minors in adult court due to the higher costs and due process standards associated with adult court.[215] Thus, prosecutors are likely to try a minor in adult court only when the crime was truly egregious and the minor does not appear amenable to rehabilitation. Conversely, juveniles tried in juvenile court, who are generally capable and willing to reform, will be able to free themselves from the system by sealing their court record.

Granting ex-juvenile offenders the ability to seal their records, irrespective of the type of crime, is consistent with other sections of California's Welfare & Institutions Code. Section 202(b) states that minors shall "receive care, treatment, and guidance consistent with their best interest" when appropriate.[216] The preference is to act in the minor's best interests in the goal of achieving rehabilitation. Under this Note's proposed amendment, the judge would have discretion to grant or deny any requests to seal records for a serious offense. The judge should grant the request to seal records unless it appears, based on the totality of circumstances, that releasing the minor from the control of the legal system would most likely jeopardize public safety.[217]

213. CAL. WELF. & INST. CODE § 781(e) (West 2010).

214. FAGAN & ZIMRING, *supra* note 57, at 126 (noting that prosecutors are sometimes overaggressive in transferring minors to adult court due to inexperience and political pressures).

215. California Bill Analysis, Assembly Committee, 2009-2010 Regular Session, Assembly Bill 168 (Mar. 31, 2009) at 6.

216. CAL. WELF. & INST. CODE § 202(b).

217. *Id.*

Section 730 provides judges with broad discretion in ruling on a minor's disposition.[218] Courts have interpreted this statute broadly as allowing the juvenile court to "impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile."[219] The statute invests a great deal of discretion into the juvenile court. Thus, Prop 21 is an anomaly in depriving the court of all discretion on the issue of whether to seal a juvenile's record for serious offenses. Also, section 827(b)(1) reaffirms the principle that "juvenile court records, in general, should be confidential."[220] This statute emphasizes the presumption to keep juvenile court records sealed. Therefore, providing the court with discretion to order a juvenile's records sealed is consistent with the existing law that favors wide judicial discretion and the confidentiality of juvenile court records.

Sections 790 through 795 govern the process of "Deferred Entry of Judgment" ("DEJ"), which closely resembles this Note's proposed amendment.[221] Under DEJ, minors fourteen years of age or older may have their juvenile court records sealed immediately upon release if they satisfy certain requirements.[222] They must admit to the instant offense, indicate a willingness to participate in DEJ, refrain from engaging in any criminal conduct, and not have been previously declared a ward of the court for a felony offense.[223] The prosecutor must inform minors that if they fail DEJ, the juvenile court will report their entire criminal history to the Department of Justice.[224] This creates a strong incentive for minors to participate in, and successfully complete, DEJ.

This Note's proposed amendment differs from DEJ merely by expanding the criteria for eligibility. A minor who commits a section 707(b) offense does not qualify for DEJ, but would qualify to have their records sealed under this Note's proposed amendment.[225] Thus, this Note does not suggest a radical change, but one that is consistent

218. *Id*. § 730 ("The court may impose and require any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.").

219. *In re* T.C., 93 Cal. Rptr. 3d 447, 452 (Cal. Ct. App. 2009).

220. CAL. WELF. & INST. CODE § 827(b)(1).

221. *Id*. § 790-795.

222. *Id*. § 790.

223. *Id*. § 791.

224. *Id*. § 793 (noting that the court, prosecuting attorney, and probation department all have the power to fail a minor out of DEJ).

225. *Id*. § 790.

with, and similar to, the statutes and goals of California's juvenile court system. The goal behind DEJ is valuable and should be expanded to expedite the juvenile court process for youth offenders and assist them with reintegration and rehabilitation. The shortcoming is that the expansion may allow dangerous, chronic offenders to seal their records. However, this is a very small class of offenders, which is largely filtered out through the adult waiver provisions and court's discretion. Also, it is better to err on the side of helping those few who are undeserving, rather than err on the side of harming the many individuals capable of, and willing to, reform.

CONCLUSION

Allowing the public to keep a watchful eye over delinquents is neither conducive to rehabilitation nor effective for public safety. Prop 21's blanket application that prevents the sealing of section 707(b) offenses hinders a significant variety of ex-juvenile offenders from starting a new productive life. A quick and easy background check of a person with a section 707(b) offense is often the linchpin that deprives the person of employment or higher education.[226] Furthermore, the perpetual delinquency label has powerful psychological effects on a person's self-perception that can lead individuals to accept the label as their true identity.[227] The product of reduced opportunities to reintegrate into society and a negative self-perception equals recidivism. The minor never attains rehabilitation, and society is burdened by more crime and penal expenses. This is an avoidable outcome if juvenile delinquents can seal their records immediately, and keep them sealed contingent upon successful rehabilitation.

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226. *See* T.N.G. v. Superior Court, 484 P.2d 981, 988 (Cal. 1971) (stating that almost every application for employment, college admission, business licenses, and other undertakings inquire whether the applicant has ever been arrested).

227. ALBANESE, *supra* note 179, at 57.

* J.D., May 2011, Thomas Jefferson School of Law. I dedicate this Note to my late Father who passed away at the beginning of this project. He was very excited when I was invited onto Law Review, and he looked forward to helping me with this Note, which he did in spirit. I loved him deeply and I hope I can continue to make him proud of me. I must thank my mother for her abundant love and support, which helped me get through the hard times and accomplish my goals. Her exceptional work ethic and strong spirit is, and will always be, what I strive to emulate in my career and life. My deepest gratitude and love to the rest of my wonderful family for their unwavering love and support. A special thanks to my editors Kevin Harrington,

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