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# AVOIDING THE SHAMEFUL BACKLASH: SOCIAL REPERCUSSIONS FOR THE INCREASED USE OF ALTERNATIVE SANCTIONS

BRIAN NETTER\*

## INTRODUCTION

For many years, the criminal justice system relied upon jail time to punish serious offenses and fines to penalize less substantial misdeeds. Middle ground was hard to come by. But with prisons overcrowded, state budgets overdrawn, and society reluctant to let crimes go unpunished, a smattering of innovative judges across the country have been turning to what are termed “alternative sanctions.” Instead of incarceration or fines, judges are getting creative. They increasingly order sanctions that are all about publicity, forcing convicts to make a “*mea culpa* message to the community.”<sup>1</sup> So, drunk drivers are forced to advertise their misdeeds with bumper stickers on their cars,<sup>2</sup> petty thieves are required to broadcast their transgressions by parading as human billboards,<sup>3</sup> and men caught soliciting

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<sup>1</sup> Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES, Jan. 16, 1997, at A1.

<sup>2</sup> See, e.g., *Goldschmitt v. State*, 490 So. 2d 123, 124, 126 (Fla. Dist. Ct. App. 1986) (per curiam) (affirming a probation requirement that obliged the defendant to affix a bumper sticker to his car stating “CONVICTED D.U.I.—RESTRICTED LICENSE”); Robert Tharp, *Driver’s Probation Stiffened After Jury Decision in Road Rage Death: Judge Adds Car Limits, Jail Time*, DALLAS MORNING NEWS, Sept. 18, 2004, at 1B (noting that a Texas man was forced to put a special bumper sticker on a low horsepower car after his role in a fatal crash caused by road rage).

<sup>3</sup> See, e.g., Ann Woolner, Op-Ed, *Shame as Punishment: Common in Early America, It’s Making a Comeback*, FULTON COUNTY DAILY REP., Oct. 6, 1997, at 1.

prostitutes are outed on public television—sometimes even before they are convicted of their crimes.<sup>4</sup>

Shaming penalties, broadly defined, are those sanctions that shine a spotlight on offenders in order to warn others of antisocial activity and of the miscreants perpetrating the deeds. Of course, every criminal sanction seeks to impose some degree of “shame” on the offender, but shaming sanctions go a step beyond the relative anonymity of isolated imprisonment or passive fine-paying by broadcasting to all who will listen and by seeking to provoke communal outrage.

Proponents of shaming argue that it appropriately expresses society’s disgust for criminal activity. Moreover, the stigmatizing effects of publicizing crime are costly for the people being shamed, and these costs have the potential to deter shamed convicts from repeating their criminal acts. Best yet, implementing shaming sanctions is far less costly than incarcerating offenders,<sup>5</sup> so alternative sanctions allow us to enforce the crimes on the books more completely. Although the amount of specific deterrence generated by shaming penalties is generally acknowledged to be an empirical question for which little data is available,<sup>6</sup> the topic has garnered significant scholarly attention discussing how best to reduce the rate of recidivism.<sup>7</sup> In the judicial system, with state criminal sanctions generally left to judicial discretion, most examples of shaming have been isolated to individual judges or probation officers with a penchant for shame.<sup>8</sup> But in a logical next step, Dan Kahan and Eric Posner have recommended amending the federal sentencing guidelines to expressly

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<sup>4</sup> This phenomenon is called “John TV.” See Art Hubacher, Comment, *Every Picture Tells a Story: Is Kansas City’s “John TV” Constitutional?*, 46 U. KAN. L. REV. 551, 552 (1998). Shaming has also provided the storyline for a network television drama in which an unresponsive landlord was forced to pace in front of his property for eight hours wearing a sandwich board stating that he was a “slumlord.” *Boston Legal: Questionable Characters* (ABC television broadcast Nov. 21, 2004). For a more thorough listing of recent shaming penalties, see Stephen P. Garvey, *Can Shaming Penalties Educate?*, 65 U. CHI. L. REV. 733, 734-37 & nn.9-20 (1998).

<sup>5</sup> See, e.g., Garvey, *supra* note 4, at 738; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 385 (1997).

<sup>6</sup> See, e.g., Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 638 (1996).

<sup>7</sup> See, e.g., ELIZA AHMED ET AL., SHAME MANAGEMENT THROUGH REINTEGRATION (2001) (advocating reintegrative, as opposed to stigmatic, shaming); JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989) (identifying the social conditions necessary for effective shaming).

<sup>8</sup> See, e.g., Ted Poe, *Public Humiliation is Effective Deterrent*, DALLAS MORNING NEWS, Apr. 11, 1997, at 31A.

allow for—and thereby encourage—the widespread stigmatic shaming of white-collar criminals.<sup>9</sup>

These scholars are not alone in their calls to bring back certain penalties more readily associated with colonial times than the twenty-first century. After American citizen Michael Fay was caned for a vandalism conviction in Singapore, movements in Tennessee, Mississippi, and Arkansas called for reintroducing caning, paddling, and even public hangings into the penal system.<sup>10</sup> Mississippi state representative Steve Holland proclaimed himself “fully convinced this will prove a deterrent to crime.”<sup>11</sup>

Because shaming is so cost-effective, it also creates the possibility that some crimes of public morality, currently unenforced, will return to favor.<sup>12</sup> Adultery is still officially illegal in twenty-four states, and while prosecutions are infrequent, Virginia prosecuted an adultery case in 2004.<sup>13</sup> After the defendant entered a guilty plea, the prosecutor proclaimed “it should now be widely known that adultery is a crime in Virginia.”<sup>14</sup>

With shaming penalties increasing in recent years and the possible normalization of shaming looming on the horizon, it is a bit surprising that virtually all of the academic activity in shaming has focused on the criminals. To be sure, specific deterrence is necessary for a punishment to

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<sup>9</sup> Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999); see also Dan M. Kahan, *Shaming White Collar Offenders*, 12 FED. SENT'G REP. 51 (1999). Kahan and Posner's proposal, however, has not been met with uniform praise. For the contrary view, see, for example, John B. Owens, *Have We No Shame?: Thoughts on Shaming, "White Collar" Criminals, and the Federal Sentencing Guidelines*, 49 AM. U. L. REV. 1047 (2000).

<sup>10</sup> John Beifuss, *Criminal-Weary States Wave the Whip, Noose; 'Old Ideas,' Critics Say*, COM. APPEAL (Memphis), Feb. 13, 1995, at A1. But see Steven S. Kan, *Corporal Punishments and Optimal Incapacitation*, 25 J. LEGAL STUD. 121, 130 (1996) (arguing that caning is cruel).

<sup>11</sup> Beifuss, *supra* note 10.

<sup>12</sup> To be sure, criminal fines are also cost-effective. But moralistic prosecutors are unlikely to send the message, for example, that justice is served when an adulterer pays money for sexual transgressions. Alternative sanctions are appealing, then, because they are simultaneously cost-effective while signaling the correct expressive content.

<sup>13</sup> For more information, see Press Release, Am. Civil Liberties Union of Va., ACLU of Virginia Asking Judge to Rule that State Law Criminalizing Adultery Is Unconstitutional (Feb. 25, 2004), available at [www.acluva.org/newsreleases2004/Feb25.html](http://www.acluva.org/newsreleases2004/Feb25.html).

<sup>14</sup> Jonathan Turley, *Of Lust and the Law*, WASH. POST, Sept. 5, 2004, at B1. Additionally, in 2001, Georgia—one of ten states then with an anti-fornication statute—prosecuted an anti-fornication case, but the conviction was ultimately overturned by the Georgia Supreme Court on state constitutional grounds. See *In re J.M.*, 575 S.E.2d 441, 442, 444 (Ga. 2003); *GA Supreme Court Invalidates Fornication Law*, PRIVACY.ORG, Jan. 13, 2000, <http://www.privacy.org/archives/001077.html>.

be effective, but it is not the only consideration. Punishment is a social function; the act of punishing reflects our social norms but also carries the capacity to reshape those norms and to alter our social dynamics.<sup>15</sup>

This Article seeks to shift the debate on shaming to question its effect on social norms. We regularly choose to abide by the laws of the state because we are driven, interchangeably, by personal self-interest, social reciprocity, and inner morality. Shame interacts with each of these core instincts; thus, we must learn where alternative sanctions reinforce our aversions to crime and where they perversely detract from legal compliance. There are no easy answers here, but our goal is to set out the contours of the three elemental aversions to crime so that empiricists can test these hypotheses and so that policy-makers and sentencing officials can better craft penal sanctions to avoid those that would prove counterproductive. The discussion that follows addresses what is essentially a policy concern for when shaming could be effective; in approaching shaming from this policy perspective, I side-step the constitutional concerns many scholars and judges have raised as to whether shaming constitutes “cruel and unusual punishment[.]” in violation of the Eighth Amendment,<sup>16</sup> because this debate is mooted where shaming is ineffectual.

Before we choose to formalize shaming sanctions, we must be wary of the effects of increased shame. Intuitively, a saturation of shaming penalties would lead to less media coverage and would render the sanctions themselves less effective as specific deterrents. But this Article goes further. The reasons people do not commit crimes are complex, but these human heuristics interact meaningfully with our views of social morality, reciprocity, and retribution, and each of these factors is uniquely influenced by public displays of shame. This Article will argue that, for certain crimes, society would be best-served by *not* flaunting the extent of legal non-compliance so as to maintain the impression that only deviants would engage in such behavior. And while such end-motivated social engineering is typically best avoided, this analysis is crucial in the context of a social

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<sup>15</sup> See WEN Y. TSAO, RATIONAL APPROACH TO CRIME AND PUNISHMENT 15 (1955) (“[T]he problem of punishment concerns two parties: 1) society which inflicts punishment; 2) the law-violator on whom punishment is inflicted.”).

<sup>16</sup> See U.S. CONST. amend. VIII. For competing views on the constitutionality of shaming, compare *United States v. Gementera*, 379 F.3d 596, 596-611 (9th Cir. 2004) (affirming shaming penalty), with *id.* at 611-12 (Hawkins, J., dissenting) (arguing that shaming penalties “simply have no place in the majesty of an Article III courtroom”). *But see* Garvey, *supra* note 4, at 776 (“[T]he Supreme Court has all but given up trying to decide when a punishment becomes disproportionate and therefore offensive to the Eighth Amendment, leaving the matter largely to legislative judgment.”).

program, like shaming, whose motivation stems from utilitarian foundations.

Because shaming punishments are not systematically applied and because general deterrence is notoriously difficult to detect, the effects of the growth of shaming will not be measurable directly until shaming actually takes off. But that may be too late to save some social norms that are particularly sensitive to the perceived rate of social compliance.

Part I of this Article provides a psychological account of the primary reasons people abstain from committing crimes, using the strength of our social norms to distinguish the powers of rational economics, social reciprocity, and inner morality. Parts II, III, and IV then address, in turn, how these psychological constituents are both bolstered and hindered by criminal sanctions and what this implies for shaming. Ultimately, we see a web of effects that, while difficult to parse, suggests that shaming penalties should be focused and specific in order to avoid sending signals that perversely detract from broad compliance with the law.

### I. WHY PEOPLE COMPLY WITH THE LAW

Many scholars have spent their careers trying to understand what makes criminals tick. The idea that there is a “criminal mind” that differs from the innocent mind has been propped up and debunked time and again.<sup>17</sup> The intrigue in criminal psychology is understandable. With the development of the positive school of criminal law in the late nineteenth century, crime began to be seen as “a natural and social phenomenon[] that . . . cannot be understood unless its causes, whether inherent in the delinquent or in his environment, are traced.”<sup>18</sup> So social scientists set out to trace the causes of crime. In the process, crime has been described as a response to those who feel left out of society,<sup>19</sup> as one of fifty-two thinking errors, or as a system of eight overlapping thinking patterns.<sup>20</sup> This is not the forum to adjudicate that dispute, nor is it necessary in our analysis of shaming. For our purposes, it is important to note only the non-controversial point that criminal activity and social values are tightly knit.<sup>21</sup>

Although most research focuses on why a minority of people *do* commit crimes, our concern is why the majority do not. It is not enough to

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<sup>17</sup> For an account of why views of the criminal mind that blame disease or society are wrong, see STANTON E. SAMENOW, *INSIDE THE CRIMINAL MIND* 9-23 (1984).

<sup>18</sup> TSAO, *supra* note 15, at 17.

<sup>19</sup> SAMENOW, *supra* note 17, at 11-12.

<sup>20</sup> See Glenn D. Walters, *The Psychological Inventory of Criminal Thinking Styles*, 22 *CRIM. JUST. & BEHAV.* 307, 309 (1995).

<sup>21</sup> See generally Kahan, *supra* note 5.

say that the absence of a thinking error leads to criminal law compliance, because learning and abiding by criminal laws often requires affirmative effort and exacts certain costs on each member of society.<sup>22</sup> And yet, the vast majority of us are motivated to learn and obey the rules of the state because we fear the consequences, because we share in the communal benefits of compliance, or because some crimes are just too heinous to imagine ourselves committing.

To understand why we do not commit crimes, we must briefly develop a sense of the social norms that bind us. We can define a “norm,” as do Ernst Fehr and Simon Gächter, as “(i) a behavioral regularity that is (ii) based on a socially shared belief how one ought to behave which triggers (iii) the enforcement of the prescribed behavior by informal social sanctions.”<sup>23</sup> These norms, in turn, can be characterized as three types: rational, reciprocal, and moral.

The simplest norms are “rational” in the tradition of law and economics. Generally speaking, we avoid doing anything that generates an expected net disutility. We regularly engage in cost-benefit analyses to determine how many miles-per-hour exceeding the posted speed limit we are willing to drive or whether waiting for a proper “walk” signal is an effective use of our time. We are choosing to obey—or ignore—the law as self-interested cost-minimizers, so if the legal penalties for a given misdeed plus the reputational costs of being branded a miscreant, discounted by the probability of apprehension, exceed the benefits of an act or omission, the “rational” person will choose to conform with legal standards.

A second category includes norms that are conditional and reciprocal in nature. Peer pressure is often blamed for youthful indiscretions but it simultaneously encourages the majority of us to abide by customs and to pay our dues to society, which may explain why people abide by jury service laws even though the threat of punishment is virtually nil. Those who serve do so out of a sense of civic obligation, sensing that many people undergo the same hardships. In order to function, all societies must develop mechanisms of cooperation, and our reciprocal norms reflect this need for large-scale group coordination. But cooperation in these circumstances is conditional on the perception that others are cooperating, as humans loathe to sit idly while others take advantage.<sup>24</sup> Moreover, without some mechanism for coordination, reciprocal arrangements can easily falter, creating substantial possibilities for social instability, as exemplified by

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<sup>22</sup> For example, your taxes do not pay themselves.

<sup>23</sup> Ernst Fehr & Simon Gächter, *Reciprocity and Economics: The Economic Implications of Homo Reciprocans*, 42 EUR. ECON. REV. 845, 854 (1998) (emphasis omitted).

<sup>24</sup> See *infra* note 82 and accompanying text.

Garrett Hardin's classic, *The Tragedy of the Commons*.<sup>25</sup> Nonetheless, there is evidence to suggest that humans instinctively cooperate even when it may not be in their self-interest to do so.<sup>26</sup>

Our strongest social values are reflected in norms of morality. Some of these are assigned the normatively-loaded moniker "natural law," but the origins of natural law are unclear. Indeed, the endogeneity of natural law norms is telling. Some social norms are so strong that they cease to be strictly social values and are instead absorbed into each individual's identity, but where these norms come from and how they strengthen to the point of self-identity is generally uncertain.<sup>27</sup> Still, if you ask a person on the street what keeps him from murdering his neighbor, he would probably respond that murder is wrong—period. That the penalties are steep or lax is generally irrelevant when we ascribe our actions to morality, but the seriousness of the punishment for a crime may affect its moral weight in the first place. According to the phenomenon of moral values, our membership in groups contributes to our self-definition and self-esteem and leads us to adopt universally-held social beliefs as our own.<sup>28</sup> These norms are passed from generation to generation through religious indoctrination, social uniformity, and raw human nature.

We can think of these three species of norms in their most-extreme forms as three species of human beings. The "rational" man of law and economics fame is commonly known as *Homo economicus*, and the "reciprocal" man has been named *Homo reciprocans*. For the criminal aversion that stems from our inner morality, we'll have to choose a name of our own, and for the sake of consistency, we will use *Homo moralis*.

Of course, this trichotomy is a simplification of complex sociological relationships that are still not fully understood. This setup is intended only to provide a plausible framework for the principal reasons we stay within

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<sup>25</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243 (1968).

<sup>26</sup> See Fehr & Gächter, *supra* note 23, at 845 ("There can be little doubt that selfish people exist and that material payoffs are powerful motivators. However, a large number of studies shows that many people are *also* driven by reciprocity.").

<sup>27</sup> Martin L. Hoffman, *Moral Internalization: Current Theory and Research*, in 10 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 85 (Leonard Berkowitz ed., 1977) ("The legacy of both Sigmund Freud and Emile Durkheim is the agreement among social scientists that most people do not go through life viewing society's moral norms as external, coercively imposed pressures to which they must submit. Though the norms are initially external to the individual and often in conflict with his desires, the norms eventually become part of his internal motive system and guide his behavior even in the absence of external authority.").

<sup>28</sup> See James E. Cameron, *Social Identity and the Pursuit of Possible Selves: Implications for the Psychological Well-Being of University Students*, 3 *GROUP DYNAMICS: THEORY, RES., & PRAC.* 179, 179 (1999).



the laws. These are the elemental forces—there is a little bit of *economicus*, *reciprocans*, and *moralis* in each one of us, and their relative influences wax and wane according to the circumstances and the particular social norms at stake. By analyzing the effects of punishment on these fundamental instincts, it becomes clear that not all crimes are equally suited to shaming sanctions.

The Parts that follow will address the social norms of economics, reciprocity, and morality, discussing both where these norms are particularly prevalent and how they interact with ordinary punishments and alternative sanctions.

## II. *HOMO ECONOMICUS*

The most well-known of our three species is the rational *Homo economicus*. At its most extreme, as set out by Mancur Olson,<sup>29</sup> scholars have argued that self-interest and nothing else guides our decision-making.<sup>30</sup> Although Olson's conclusions have been criticized,<sup>31</sup> there is still ample evidence to suggest that *Homo economicus* persists.<sup>32</sup> At least in concert with the other elemental aversions, we naturally avoid activities that cause us net harm. And if a proscription has not risen to the level of morality and no cooperative norm governs our adherence, then self-interest will be the primary force governing our decision-making. So the decisions whether to cross a street at the proper crosswalk, whether to use a friend's prescription medication, and whether to travel sixty-two in a fifty-five are guided mostly by our cost-benefit instincts. This is not to say that some people do not consider jaywalking immoral, but it is a fair generalization to assert that for most minor *malum prohibitum* offenses, it is the fear of punishment that most strongly regulates our behavior.

Where strong social norms are absent, government is typically hard-pressed to regulate.<sup>33</sup> Human decision-making is governed by a "freedom

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<sup>29</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (2d prtg. 1971).

<sup>30</sup> *Id.* at 2.

<sup>31</sup> See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 71 (2003) ("[A]s a wealth of social science evidence makes clear, Olson's *Logic* is false."); see also *infra* Part III (discussing how our interests in reciprocity often trump bare rationality). But see OLSON, *supra* note 29, at vii (prefacing his second printing by maintaining that "[t]here [had] been no change in [his] views to justify rewriting the present text").

<sup>32</sup> See Fehr & Gächter, *supra* note 23, at 847 (noting that in six studies of reciprocity, "a non-trivial minority of subjects exhibits selfish behavior").

<sup>33</sup> The government is typically hard-pressed to solve society's woes through punitive legislation. A prime example is prohibition. Without public support, the temperance movement was bound to failure. See FRANKLIN E. ZIMRING & GORDON J. HAWKINS,

of action” in which we select our best course from among a spectrum of options.<sup>34</sup> Regulation of our *Homo economicus* instincts is intended to make socially undesirable options more costly and thereby less likely to be chosen. In these circumstances, the costs of punishment matter and the perceived risks of being caught have the potential to alter behavioral patterns. Traffic law compliance, for example, is sensitive to perceived enforcement rates<sup>35</sup> and penalties,<sup>36</sup> as each person weighs these costs against the urgency of traveling more rapidly than the posted speed.

The *Homo economicus* aversion relies on snap judgments, perceived costs, and heuristic-biased risk assessments. So while our rational instincts are well-known, the conclusions we may draw are limited—mathematical calculations are frustratingly difficult to generalize. This Part is divided into two Sections. Section A addresses the three core components of the *Homo economicus* risk calculus and discusses how each can be reinforced or cut down by punishment. Section B discusses the problems of catering to our *Homo economicus* needs.

#### A. THE FRAMEWORK FOR *HOMO ECONOMICUS*

In general, where our *Homo economicus* instincts predominate, we take whatever actions will maximize our expected utility. Simply put, we choose to disobey the law when our net utility for an act or omission exceeds the disutility of being caught discounted by the probability thereof.<sup>37</sup> From a law enforcement perspective, the goal has long been to create optimal deterrence by “associating with the idea of [a crime] a deterrent sense of terror.”<sup>38</sup> But to fully evaluate the efficacy of punishments—in our case, increased use of shaming punishments—we must evaluate the effects of punishment on each of the inputs to an individual’s decision: the utility of committing a crime, the probability of

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DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL 5 (1973) (“Social problems cannot be solved by a statute.”) (quotations omitted).

<sup>34</sup> See JACK W. BREHM, A THEORY OF PSYCHOLOGICAL REACTANCE 1 (1966).

<sup>35</sup> Many municipalities have been installing red-light cameras that take pictures of every automobile improperly proceeding through an intersection. Initial studies suggest that these cameras dramatically increase red-light compliance. See Jonathan Miller, *With Cameras on the Corner, Your Ticket Is in the Mail*, N.Y. TIMES, Jan. 6, 2005, at G2.

<sup>36</sup> See, e.g., US 84/285 Reconstruction Project, Increased Law Enforcement & Double Fines Combat Speeders Through Construction Zones on 84/285 Between Santa Fe & Pojoaque (Jan. 10, 2003), [http://us84-285.com/news\\_1\\_10\\_03.htm](http://us84-285.com/news_1_10_03.htm) (announcing double fines in construction areas and increased enforcement in order to promote increased compliance with posted traffic laws).

<sup>37</sup> By using a *net* utility, this formulation accounts for the lost utility or disutility that flows from not pursuing the other course of action.

<sup>38</sup> COURTNEY STANHOPE KENNY, OUTLINES OF CRIMINAL LAW 26 (Am. ed. 1907).

being caught, and the disutility of punishment. Subsections 1, 2, and 3 will address these components in turn.

### *1. Utility of Committing Crime*

Some criminals get a thrill from their illicit activity. They like feeling power over their victims. Or, they benefit financially from escaping the constraints of regulatory law or selling wares on the black market. Crimes are committed for a reason, and these reasons differ across crimes and criminals. Our concern is how this criminal utility—isolated from the rate of criminal enforcement and the criminal penalties themselves—is affected by the risk of punishment.

Intuitively, the effect should be minimal. Whether there is a penalty or not, the same positive act would logically accord the same positive benefits. But the theory of psychological reactance suggests otherwise. Psychological reactance, first theorized by Jack Brehm, suggests that a person becomes motivationally aroused when he perceives his freedom to be threatened.<sup>39</sup> So the ignominy and risk associated with criminal activity may initially make a given criminal act *more appealing* to potential criminals. Brehm suggests that reactance persists until a person restores the freedom he lost,<sup>40</sup> meaning that sometimes, increasing penalties could perversely increase the incidence of crime.<sup>41</sup>

Experimental data support Brehm's hypothesis that compliance with threats is inversely related to threats against one's freedom, at least where relatively minor violations are concerned. In a controlled study of bathroom graffiti at the University of Texas, James Pennebaker and Deborah Sanders posted signs inside bathroom stalls. They varied the threatened punishments and the level of authority supposedly issuing the threats. Counting each graffiti, they observed a strong positive correlation between the magnitude of the threat, the authority of the threat-maker, and the amount of graffiti vandalism in the bathroom stall.<sup>42</sup> As Pennebaker and Sanders concluded: "When the threat to a freedom is sufficiently high, the person tends to respond by not complying with the threat. When the threat to freedom is low, little or no reactance is aroused and the person

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<sup>39</sup> See BREHM, *supra* note 34, at 6.

<sup>40</sup> See *id.* at 2.

<sup>41</sup> At this point, we have yet to consider the counterbalancing effects of the perceived probability of capture and the disutility of the punishment itself. But it is conceivable that, where a crime is virtually unenforceable, criminalizing the offense will only make it more prevalent.

<sup>42</sup> James W. Pennebaker & Deborah Yates Sanders, *American Graffiti: Effects of Authority and Reactance Arousal*, 2 PERSONALITY & SOC. PSYCHOL. BULL. 264, 266 (1976).

may not feel compelled to attempt to restore the threatened freedom.”<sup>43</sup> So, counterintuitively, the introduction of sanctions can make crime *more* attractive.<sup>44</sup>

Similarly, the remarkable Israeli day-care study of Uri Gneezy and Aldo Rustichini<sup>45</sup> supports the assertion that, for minor *Homo economicus*-type crimes, reactance may outweigh deterrence. Gneezy and Rustichini studied day-care centers where parents would regularly leave their children after the posted closing time. Leaving other factors unchanged, some of the day-care facilities began to impose a small monetary fine—about \$3—for late-coming parents.<sup>46</sup> But despite the deterrence hypothesis, under which moving from no cost to positive cost should increase compliance, the rate of noncompliance for day-care centers with fines was nearly double that of the control group.<sup>47</sup> Although there may have been some other psychological interactions at play here, the study demonstrates that penalties do not always have the intuitive response.

Shaming penalties may trigger reactance at a higher rate than traditional criminal sanctions. Although imprisonment certainly restricts freedom, it is not accompanied by the surefire publicity of public humiliation.<sup>48</sup> Thus, if—as Kahan and Posner advocate—shaming were ever a standard punishment for particular crimes, this could trigger the perverse psychological incentive to skirt these laws and risk highly public embarrassment. Further empirical research on the relationship between notoriety and reactance would be warranted.

## 2. Probability of Being Caught

Public perception of the enforcement rate is an important element in changing people’s minds about the costs of crime. In the late 1990s, New Orleans officials tried to crack down on indecent exposure during the festivities accompanying Mardi Gras. However, they failed and ultimately gave up because they were unable to arrest enough people to create the

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<sup>43</sup> *Id.* at 264.

<sup>44</sup> On the flip side, criminalization of certain acts can trigger first-party moral norms that make the act less desirable. This phenomenon, although arguably relevant in the *Homo economicus* calculus, will be discussed *infra* in Part IV.

<sup>45</sup> Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1 (2000).

<sup>46</sup> *Id.* at 4-5.

<sup>47</sup> *Id.* at 7. This result was confirmed by a second study in 2005. See Uri Gneezy & Aldo Rustichini, *The Second Day-Care Study* (Sept. 2005) (unpublished manuscript), available at <http://gsbwww.uchicago.edu/fac/uri.gneezy/vita/The%20Second%20Study.pdf>.

<sup>48</sup> Recall that Pennebaker and Sanders saw their reactance increase with the severity of the punishment. See *supra* notes 42-44 and accompanying text.

perception that disrobing was a risky activity.<sup>49</sup> But how effective would they have been if instead of secretly transporting offenders to the city jail, they had staged public shaming rituals the next day?

Of course, if shaming penalties (because of their low-cost nature) allowed more enforcement of criminal laws, the probability of being caught would increase,<sup>50</sup> thereby counteracting some or all of the effects of psychological reactance. Moreover, since this *Homo economicus* calculation is made by humans with our notorious inadequacies in calculating true likelihoods and accurate costs *ex ante*, the salience of shaming penalties becomes important.<sup>51</sup> The work of Amos Tversky and Daniel Kahneman suggests that human risk-assessment suffers from an availability heuristic, in which we systematically overestimate the frequency of events that come to mind easily.<sup>52</sup> Regular exposure to shaming penalties would leave us to conclude that shame was commonplace and that enforcement rates were high—or at least higher than reality. We make our judgments based on how often we *perceive* offenders to be convicted and punished, so artificially elevating this perception could be effective.

However, just as increasing the frequency of public punishment makes it seem more available—leading potential criminals to fear the consequences—frequent punishment signals that the stigma attached to each individual criminal is lower. It is one thing, after all, if sandwich-

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<sup>49</sup> See Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359, 368 (2003).

<sup>50</sup> See Kahan, *supra* note 5, at 385 (“[S]haming penalties cost much less than incarceration.”); Editorial, *Alternative Sentencing*, N.Y. TIMES, Jan. 20, 1997, at A16; George F. Will, *It’s Cheaper than Prison: Shame the Bad Guys*, SACRAMENTO BEE, Feb. 25, 1996, at F2. But there may be some crimes—like adultery, *see supra* note 14 and accompanying text—that we want to keep on the books to represent our disapproval, but don’t want to enforce for whatever reason. So whether law enforcement officials would choose to use extra resources to enforce additional crimes is a political determination.

<sup>51</sup> See Pamela Latimore & Ann Witte, *Models of Decision Making Under Uncertainty: The Criminal Choice*, in THE REASONING CRIMINAL: RATIONAL CHOICE PERSPECTIVES ON OFFENDING 129, 131 (Derek Cornish & Ronald Clarke eds., 1986) (“[S]tudies have found that probabilities used in decision making tend to be subjective rather than objective.”); *cf.* HUGH LAURENCE ROSS, *DETERRING THE DRINKING DRIVER* (rev. ed. 1984) (noting that public education programs are initially successful in reducing drunk driving because the approach is *visible*, but suggesting that the effectiveness wanes once the programs become more ordinary).

<sup>52</sup> See Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: Conjunction Fallacy in Probability Judgment*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973).

board parades happen once every year; but if there is a convict with a sandwich board on every street corner, then the potential criminal would conclude that the stigma was less burdensome.<sup>53</sup> Thus, frequency runs anti-parallel to stigma, which we consider next.

### 3. *Disutility of Being Caught*

“Deterrence is a function of the declaration of some harm, loss, deprivation, or pain that will follow noncompliance with commands.”<sup>54</sup> We can describe the total cost of conviction as the sum of the costs of punishment and reintegration. Punishment includes the tangible costs of legal defense, lost wages, and monetary sanctions imposed by the court. Reintegration includes the less tangible costs of rebuilding one’s reputation and absorbing the stigma that attaches to criminal conviction. When trying to establish a proper level of deterrence, judges can control the costs of punishment to a given convict,<sup>55</sup> but the reintegration costs are more difficult to compute and would be affected by increased use of shaming sanctions.

One of the principal attractions of shaming sanctions is that they can increase the costs of reintegration—which by and large require no state action—while decreasing the punishment costs which typically involve costs borne by the state as well. And shame’s defenders typically argue that the stigma of public humiliation is a powerful cost<sup>56</sup>—especially because we tend to overestimate the extent of our own personal shame.<sup>57</sup> But, as

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<sup>53</sup> See Kahan, *supra* note 5, at 394.

<sup>54</sup> ZIMRING & HAWKINS, *supra* note 33, at 91.

<sup>55</sup> Addressing the change in punishment costs associated with an increased use in shaming is fairly straightforward. If a crime, previously unenforced, was enforced by shaming sanctions, punishment costs would rise. If a crime otherwise punished with confinement changed to public shaming, punishment costs would decline, but reintegration costs would rise, as sentencing officials would apparently attempt to maintain a constant level of total punishment.

<sup>56</sup> See Dale Lezon, *Probation Term Sends Message; Judge Encourages Others to Use Signs To ‘Change Behavior,’* HOUS. CHRON., June 3, 2002, at A21 (“[C]riminal justice scholars and judges said public humiliation can often be one of the most effective punishments and deterrents to crime.”); Poe, *supra* note 8 (“Our founders knew that the judgment of a friend, a neighbor or family members held far greater significance than that of the jailer or judge.”).

<sup>57</sup> See Thomas Gilovich et al., *The Spotlight Effect in Social Judgment: An Egocentric Bias in Estimates of Salience of One’s Own Actions and Appearance*, 78 J. PERSONALITY & SOC. PSYCHOL. 211 (2000). Gilovich et al. demonstrated—by cleverly forcing undergraduate students to wear embarrassing Barry Manilow t-shirts—that individuals overestimate their own shame, attributing this phenomenon to “the T-shirt wearers’ feelings of being ‘in the spotlight.’” *Id.* at 213. But while the spotlight effect may bolster the baseline deterrence of shaming, there is no evidence that this effect would persist if everybody were forced to

shaming becomes more commonplace, it is no longer quite as shocking and the stigmatic effect is enervated.<sup>58</sup>

This effect can be seen by reference to the economic costs of stigma. Among job applicants with equivalent credentials, a criminal history is often a disqualifying blunder, leaving ex-convicts to suffer through underemployment long after they have served their time. But this phenomenon rests on the ability of employers to find unblemished applicants; to the extent that more job-hunters have criminal histories, the stigmatic effect of their records will be lessened.<sup>59</sup>

Socially, prizes are coveted because of their rarity and punishments are feared unless commonplace. Grade inflation made earning top marks at Princeton so pedestrian that the Ivy League school was forced to form a faculty committee to adopt new policies.<sup>60</sup> Conversely, middle-school detention is far more palatable when the detainee is joined by a crowd. And among African-American males, imprisonment has such high frequency that its deterrent effect has been substantially lost.<sup>61</sup> Toni Massaro recognized this phenomenon as applied to alternative sanctions, noting that although it would still be cost-effective to publicize the shame of millions of people each year, “[t]hese penalties would soon be ignored.”<sup>62</sup> As shaming becomes more popular, we must not forget that the reason public humiliation *can* be a deterrent is because of its circus appeal. Shaming is a curiosity for which over-expansion could be self-defeating.

## B. OPTIMIZING SHAME FOR *HOMO ECONOMICUS*

The instincts of *Homo economicus* potentially limit the effectiveness of shame. For certain crimes—which, I dare not predict—the deterrent

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advertise a fondness for *Copacabana*. In fact, the Gilovich et al. study showed that the spotlight effect was even more dramatic when the study participants were able to choose a non-shameful t-shirt of their choosing. *See id.* at 215. So this salience concern may not be unique to our discussions of alternative sanctions.

<sup>58</sup> *See* Kahan, *supra* note 5, at 357 (discussing stigma enervation); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL., PUB. POL’Y & L. 645, 650 (1997) (arguing that our failure to be shocked by anything leads increasingly to certain behaviors becoming destigmatized).

<sup>59</sup> This process is analyzed in Eric Rasmussen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996). *See also* ERIC A. POSNER, LAW AND SOCIAL NORMS 110 (2000) (noting this effect).

<sup>60</sup> *See* Karen W. Arenson, *Princeton: A Curb on Grade Inflation*, N.Y. TIMES, Apr. 27, 2004, at B6; Karen W. Arenson, *Princeton Tries to Put a Cap on Giving A’s*, N.Y. TIMES, Apr. 8, 2004, at B1.

<sup>61</sup> *See* Kahan, *supra* note 5, at 357.

<sup>62</sup> Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1931 (1991).

effect of stigmatic shaming may be insufficient to overcome psychological reactance. And even this relationship is a function of the overall frequency of shaming.<sup>63</sup>

At least for economic stigma and the job-seeking problem, Eric Rasmussen has sought to develop a mathematical formulation.<sup>64</sup> Not surprisingly, his model incorporates the criteria discussed above—the utility for criminal acts, penalties, perceived conviction rates, and the overall perceived rate of criminality—as well as the costs of crime to society.<sup>65</sup> This analysis advances the idea that there is some optimal amount of shame that we can introduce through our system of criminal justice.

Of course, theory is simpler than practice. As Eric Posner has noted, the factors that weigh on the deterrence provided by shaming are so complex and interrelated that achieving a proper level of ostracism is no small feat.<sup>66</sup> And while a structured system of shaming is likely to be less variable than existing informal social mechanisms for shame,<sup>67</sup> factors like an individual's standing in the community, the negative exposure he will attract, and the outrage his conduct will provoke would need to be further understood if this optimal level of shaming could be achieved.

A second problem with a hypothetical pursuit of our optimal shame quotient is that shame is a public good that is currently doled out in an ad hoc fashion in thousands of courthouses nationwide. The current sentencing system, then, creates a commons problem, whereby shaming is potentially useful only in moderation, but for which there is no existing mechanism to moderate anybody's usage. These concerns do not weigh on the ultimate theoretical propriety of shaming punishments but still introduce additional systemic costs of monitoring and coordinating otherwise autonomous judges.

### III. *HOMO RECIPROCAN*

Why are we honest on our taxes if the audit rate is less than one-half percent?<sup>68</sup> And why do we show up for jury duty, where we are underpaid

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<sup>63</sup> This terminology, "overall frequency," is intentionally vague. Certain shaming penalties are intended to incite different populations, be they local, regional, or national. If we were conducting a study of shame frequency, it might be appropriate to focus on media markets, since so much word-of-mouth discussion is controlled by media influences.

<sup>64</sup> Rasmussen, *supra* note 59, at 522-32.

<sup>65</sup> *Id.* at 523-24.

<sup>66</sup> POSNER, *supra* note 59, at 92-94. Posner further argues that the arbitrariness of shaming punishments led earlier implementations to be abandoned. *See id.* at 103-06.

<sup>67</sup> *Id.* at 94.

<sup>68</sup> GEN. ACCOUNTING OFF., IRS AUDIT RATES, GAO-01-484 (2001), available at <http://www.unclefed.com/GAORReports/gao01-484.pdf>. Of course, the IRS auditing



and underutilized, instead of simply shirking the responsibility? In *The Logic of Collective Action*, Mancur Olson suggested that without external incentives, rational humans would not take actions outside their limited self-interest.<sup>69</sup> But there is ample evidence to establish that *Homo reciprocans* exists and that, self-interest notwithstanding, “[w]hen they perceive that others are behaving cooperatively, individuals are moved by honor, altruism, and like dispositions to contribute to public goods even without the inducement of material incentives.”<sup>70</sup> Our reciprocal norms are quite different from moral instincts in that, whereas morality is internalized, reciprocity requires social dedication to common goals and is therefore conditional upon the actions of others. This Part is divided into two Sections. Section A provides evidence to support the proposition that *Homo reciprocans* exists and describes the key characteristics of reciprocal norms. Section B looks at how shaming practices interact with our reciprocal instincts and notes that in the case of promoting tax compliance, shaming penalties that are now being introduced are unwise.

#### A. *HOMO RECIPROCANS* EXISTS

Although insisting that humans are a friendly, cooperative species may sound a bit romantic, there is considerable evidence to suggest that we are capable of seeing beyond our narrow self-interest to promote social benefits. As Dan Kahan has argued: “Most persons think of themselves and want to be understood by others as cooperative and trustworthy and are thus willing to contribute their fair share to securing collective goods. By the same token, most individuals loathe being taken advantage of.”<sup>71</sup> This is our prototype for *Homo reciprocans*: an organism that is willing to contribute his fair share for the common good but only so far as the contribution is mutual.

The classic psychological experiment demonstrating the power of reciprocity was developed by Werner Güth, Rolf Schmittberger, and Bernd Schwarze in the early 1980s.<sup>72</sup> Their well-known experiment was an ultimatum bargaining game. In the “easy” version of their game, two players are given the chance to share a pot of money of value  $c$ . The first

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mechanism is not completely random. Those who cheat are presumably more likely to be visited by the IRS.

<sup>69</sup> OLSON, *supra* note 29, at 2; *see supra* Part II (discussing *Homo economicus*).

<sup>70</sup> Kahan, *supra* note 31, at 71. There is also ample evidence to suggest that *Homo economicus* exists. *See supra* Part II.

<sup>71</sup> Kahan, *supra* note 31, at 73.

<sup>72</sup> Werner Güth et al., *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982).

player (the offeror) gets one opportunity to divvy up the pot between himself and the offeree. The offeree, then, can either accept the offer and pocket his take or he can reject the offer, in which case both parties go home empty-handed.<sup>73</sup> If reciprocity and fairness were not considerations, the profit-maximizing “rational” offeree would accept even the smallest offer of money  $\varepsilon > 0$ , so the offeror should offer  $\varepsilon$  and keep  $c-\varepsilon$  for himself.<sup>74</sup> But this hypothesis is easily rejected by experimental data; offerors repeatedly make offers considerably more than a pittance and offerees reject small proposals even though it means betraying their monetary self-interest.<sup>75</sup> Study participants were more generous than “rational”<sup>76</sup> and were capable of punishing others at their own expense. Similar studies have confirmed this phenomenon,<sup>77</sup> suggesting that fairness and common interest have some positive value in our decisions on how to act.

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<sup>73</sup> See *id.* at 371.

<sup>74</sup> *Id.* at 372.

<sup>75</sup> See *id.* at 375 tbls.4-5.

<sup>76</sup> I use the term “rational” to suggest the rationality of the profit-maximizing *Homo economicus*. It is certainly plausible, however, to conceive of a rationality where charity and cooperation are accorded positive utility.

<sup>77</sup> Subjects in Indonesia exhibited the same behavior even when three months’ income was on the line. See Lisa A. Cameron, *Raising the Stakes in the Ultimatum Game: Experimental Evidence from Indonesia*, 37 *ECON. INQUIRY* 47, 55 (1999). And when the “take-it-or-leave-it” aspect of the ultimatum game was transformed into a “take-it” dictator game—in which the second player has no opportunity to reject his take—more than sixty percent of “dictators” ignored their rational self-interest and twenty-two percent gave their partners at least half of the pot. Robert Forsythe et al., *Fairness in Simple Bargaining Experiments*, 6 *GAMES & ECON. BEHAV.* 347, 362 (1994). But the Forsythe study suggested that fairness cannot account for *all* of the generosity from the ultimatum game. Although some of the results were statistically ambiguous, some of the comparisons between the ultimatum game and the dictator game resulted in different probability distributions. *Id.* The authors suggested that the differences between the results in ultimatum and dictator games could be explained if some people have negative utility for “spite.” *Id.* at 362-63.

$n$ -Player public goods experiments go one step further.<sup>78</sup> In these multi-stage games, participants make anonymous contributions to a common pool or choose to dedicate their funds to private interests. Resources contributed to the public good work a higher rate of return than resources contributed to private goods, but the profits are divided among the population such that each player's dominant strategy is to contribute nothing to the common pool.<sup>79</sup> While *Homo economicus* would attempt to free-ride, studies have shown that three-quarters of subjects are cooperative<sup>80</sup> and that half of these cooperators fully understand that they are economically better-off to choose otherwise.<sup>81</sup> However, as the game progresses and it becomes clear that not everybody is reciprocating, cooperation falls.<sup>82</sup> Once again, we see that humans are willing to cooperate for a common, social good but are unwilling to be taken advantage of.

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<sup>78</sup> The more familiar subset of the  $n$ -player game is the two-player Prisoners' Dilemma. In the two-player game, conditional reciprocity can be characterized as an "optimal" strategy in a long-term game. Two-party interactions are not particularly relevant for our general deterrence calculations, but the two-player Prisoners' Dilemma does suggest that sometimes, cooperation is an optimal behavior.

In the iterated Prisoners' Dilemma game, each party has the option to "cooperate" or to "defect" in each round of the game. Mutual cooperation leads to the best results for everybody, but defection is the dominant strategy for both players when they unilaterally assess their options, leading to a predicted equilibrium of mutual defection. However, when the game is extended to multiple periods, reciprocal behavior has been shown to be profit-maximizing. In two well-known competitions, Robert Axelrod invited theorists to design decision-making algorithms. He ran a Prisoners' Dilemma tournament in which each entry competed round-robin against all the others. ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 30-31 (1984). The entry that won his first tournament corresponds closely to our vision of *Homo reciprocans*. This algorithm—the simplest entry in the tournament—is called "TIT FOR TAT." Like *Homo reciprocans*, TIT FOR TAT starts out by cooperating and will continue to do so until it is betrayed. Then, it punishes the betrayal by defecting in the following round. But, TIT FOR TAT is forgiving, and so long as its opponent has returned to its cooperative ways, it returns to being nice. *See id.* at 33.

This simple strategy is so powerful that when Axelrod ran a second tournament with sixty-three entries—all of whom knew that TIT FOR TAT was the defending champion—TIT FOR TAT won again. *Id.* app. A at 195-201. So, perhaps the reason that humans are generally cooperative but refuse to be taken advantage of is because this is a long-term strategy for success that we have learned from our one-on-one interactions.

<sup>79</sup> This is an iterated multi-player Prisoners' Dilemma. For further conclusions about the Prisoners' Dilemma, see *infra* text accompanying notes 86-87.

<sup>80</sup> *See, e.g.*, James Andreoni, *Cooperation in Public-Goods Experiments: Kindness or Confusion?*, 85 AM. ECON. REV. 891, 900 (1995).

<sup>81</sup> *Id.*

<sup>82</sup> *See id.* at 896 tbl.2; SAMUEL BOWLES & HERBERT GINTIS, IS EQUALITY PASSÉ? HOMO RECIPROCANS AND THE FUTURE OF EGALITARIAN POLITICS 10-11 (Oct. 19, 1998) (unpublished manuscript), available at <http://www.umass.edu/preferen/gintis/isinequa.pdf>.

Psychological evidence from trust- and gift-exchange games affirms this proposition,<sup>83</sup> leading to the conclusion that “a large fraction of the people has a willingness to pay for rewarding kind and punishing hostile acts.”<sup>84</sup> This experimental evidence extends to political decision-making as well. Most Americans are generally supportive of programs like welfare, but in a nod to reciprocity, they support a mandated work requirement for those on the government dole.<sup>85</sup>

Additionally, there is scientific evidence that humans value reciprocating with other humans. In a neurological study, a group of professors at Emory University used functional magnetic resonance imaging (fMRI) to test brain stimulation during cooperative activities.<sup>86</sup> They found that when humans played Prisoners’ Dilemma games with other humans and both cooperated, various brain activities were triggered that were not triggered when the subjects knew they were playing against a computer.<sup>87</sup> I am loath to draw conclusions from my understanding of neurology, but perhaps this suggests that humans have an innate sensitivity for reciprocity that serves as further proof that *Homo reciprocans* is real.

#### B. HOW *HOMO RECIPROCANUS* RESPONDS TO THE SHAME OF OTHERS

*Homo reciprocans* wants to cooperate, but only so long as he feels that others are playing fairly. Nobody likes to feel taken. This instinct applies wherever our communal instincts are strong. This isn’t always the case—it would be quite strange to argue that the reason we don’t commit murder is because we have mutually determined that we don’t want to live in a community in which we kill each other.<sup>88</sup> The conclusion, of course, is true, but reciprocity isn’t the reason we do not commit murder. Violence is typically governed by *Homo moralis* instincts, whereas our interactions with society-at-large are frequently governed by *Homo reciprocans*. Where we contribute to public goods, reciprocity is king, and it is dangerous to mess with the perception that everybody is cooperating. Pessimistic expectations about the behavior of others make it difficult to sustain

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<sup>83</sup> “In a gift exchange game a player *A* can voluntarily transfer resources to player *B*. A transfer from *A* represents a ‘gift’ because player *B* has no obligation to pay for the transfer. After observing *A*’s choice *B* can also transfer resources to *A*. In case of reciprocal transfers both players are in general better off.” Fehr & Gächter, *supra* note 23, at 846.

<sup>84</sup> *Id.*

<sup>85</sup> See BOWLES & GINTIS, *supra* note 82, at 9.

<sup>86</sup> James K. Rilling et al., *A Neural Basis for Cooperation*, 35 NEURON 395 (2002).

<sup>87</sup> See *id.* at 403.

<sup>88</sup> The conclusion, of course, is true, but it is not the reason we do not commit murder.

reciprocal norms.<sup>89</sup> Nonetheless, creative legislators have taken steps to shame criminals into fulfilling their civic duties, but this trend reflects a short-sighted misjudgment that may result in overall lower compliance for affected laws.

Of course, when our reciprocal norms are violated, the violations must be punished. But the method of punishment chosen has significant implications for how the violation will affect the norm itself. Broadly speaking, the lessons of *Homo reciprocans* teach us to emphasize the positive and to reinforce social norms with evidence of broad compliance rather than to mess with the economic incentives or to throw around idle threats. Recognizing the value of social norms, our nation's anti-drug campaign has shifted from emphasizing what your brain will look like if you use drugs<sup>90</sup> to proclaiming how few teenagers actually do experiment with illegal and damaging substances.<sup>91</sup> But, there are plenty of instances where the dynamics of reciprocity are being ignored, and shaming in particular has the possibility to damage our sense of social unity.

There are two principal messages that can be sent through criminal sanctions intended to defend reciprocal norms. These messages suggest alternately that the offender is a rare social deviant or that the norm itself is less universal than previously anticipated. The former message supports and reinforces our *Homo reciprocans* instincts; the latter is dangerous. We can see both if we look at the classic example of civic responsibility: paying taxes.

It is not intuitive, but tax compliance is remarkably insensitive to the enforcement rate. Accordingly, the IRS was able to scale back its auditing efforts by seventy percent from 1996 to 2000<sup>92</sup> without fearing a fourfold rise in tax cheats. Empirical research suggests that "an individual's perception of the extent of evasion powerfully predicts compliance

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<sup>89</sup> See Fehr & Gächter, *supra* note 23, at 855.

<sup>90</sup> The egg-frying "this is your brain on drugs" campaign has been described as one of the most influential ads in television history. But many students rejected the premise of the advertisement and instead were *encouraged* to experiment with drugs as a result. As a college student reflected on the ad campaign, "I think that a scare tactic acts as more of a dare than it does actually scare kids away from using drugs." Erika Alexander, *Famous Fried Eggs: Students Debate Effectiveness, Accuracy of Well-Known Drug Commercial*, CNNFYI.COM, Dec. 6, 2000, <http://cnnstudentnews.cnn.com/fyi/interactive/news/brain/brain.on.drugs.html>.

<sup>91</sup> See, e.g., Press Release, Office of Nat'l Drug Control Policy, ONDCP to Unveil Youth Brand in September; Kids Nationwide to Identify What Stands Between Them and Drugs (Sept. 8, 2000), *available at* [http://www.mediacampaign.org/whatsyourantidrug/ad\\_release.html](http://www.mediacampaign.org/whatsyourantidrug/ad_release.html) (introducing an ad campaign emphasizing that the majority of teenagers have never used illicit drugs).

<sup>92</sup> GEN. ACCOUNTING OFF., *supra* note 68, at 2.

behavior: the higher an individual believes the rate of tax cheating to be, the more likely he or she is to cheat too.”<sup>93</sup> And yet, legislatures have begun working against this known social behavior by introducing shaming sanctions in tax law that promote the impression that tax evasion is commonplace.

Several states have begun publishing lists of their worst tax offenders.<sup>94</sup> Their argument is standard-fare specific deterrence: if tax offenders know that their identities will be publicized, they will fear additional reputational costs and will be encouraged to comply with the law and to pay their overdue fees. A Wisconsin state representative who authored a shaming bill for the State Assembly argued that his proposed “Website of Shame [would] force delinquent taxpayers out of hiding, and into the public.”<sup>95</sup> As evidence, he pointed to taxes collected from delinquent accounts once similar programs were implemented in Connecticut and Illinois.<sup>96</sup> But in our *Homo reciprocans* mindset, this misses the mark—winning the tax revenues of a subset of violators is a pyrrhic victory when the techniques result in lower overall tax compliance. The fisc would be better off if the states promoted the truthful notion that the vast majority of residents *do* pay their taxes in full and on time. This is not to say that we should not enforce the law against those who cheat, but using the mechanics of shame is liable to result in a perverse feedback among an audience of *Homo reciprocans*.

Not wanting to be outdone, the federal government has recently introduced shaming measures of its own into the tax code. These measures

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<sup>93</sup> See Kahan, *supra* note 31, at 81; see also Robert C. Cialdini, *Social Motivations to Comply*, in 2 *TAXPAYER COMPLIANCE* 200, 215 (1989) (citing an IRS commissioned report to suggest that “admitted noncompliers are more likely to estimate high levels of noncompliance within the general public” and noting that “there is a clear, positive relationship between self-reported evasion and the tax evasion of friends and relatives—this is, similar others); *cf.* Kahan, *supra* note 5, at 354 & n.18 (noting that this effect generalizes).

<sup>94</sup> See, e.g., State of Conn. Dep’t of Rev. Servs., DRS: Top 100 Delinquent Taxpayer Accounts, <http://www.ct.gov/drs/site/default.asp> (follow “Top 100 Delinquent Taxpayers List” hyperlink) (last visited Nov. 22, 2005); La. Dep’t of Rev., Cybershame, <http://www.rev.state.la.us/sections/cybershame> (last visited Nov. 22, 2005); see also Spies Online, Delinquent Taxpayers, <http://www.spiesonline.net/delinquent-taxpayers.shtml> (last visited Oct. 9, 2005) (collecting links to state websites publicizing tax delinquents).

<sup>95</sup> Press Release, Representative Frank Lasee, Assembly to Vote on Website of Shame (March 3, 2003), <http://www.legis.state.wi.us/assembly/asm02/news/pr3304.pdf>. Although Rep. Lasee’s measure passed the Wisconsin House on March 10, 2004, it never passed in the Senate. See Bill Tracking for Wisc. A.B. 473 (2003).

<sup>96</sup> See Press Release, *supra* note 95.

have been attacked as ineffective and poorly-designed<sup>97</sup> and they are unlikely to have any large impact on tax compliance, but they still represent a fundamental misunderstanding as to where publicity and shame can be effective and where they should be avoided.

The federal government's shaming measures actually don't enforce the criminal law at all. Instead, the provisions are directed at tax-motivated expatriation: when Americans renounce their citizenship in order to avoid paying their taxes.<sup>98</sup> As part of HIPAA, Congress required the IRS to publish quarterly listings of Americans who renounce their citizenship.<sup>99</sup> And a month later, as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996,<sup>100</sup> Congress adopted the Reed Amendment, which makes tax-motivated expatriates (as determined by the Attorney General) ineligible for readmission to the country.<sup>101</sup>

As usual, the rationale for this provision was understandable and focused at the tax-motivated expatriates themselves. Congressman Charles Rangel characterized expatriates as "people that America has given so much to . . . [who] care so little about that citizenship that they would flee in order to avoid taxes."<sup>102</sup> But Congress never set out to examine how *Homo reciprocans* would respond to the new information. Under our psychological framework, we consider the maintenance of our country a cooperative responsibility. But if we perceive that other people are taking advantage of American citizenship and defecting when it is in their self-interest to do so, more future defections are likely.<sup>103</sup>

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<sup>97</sup> See Michael S. Kirsch, *Alternative Sanctions for the Federal Tax Law: Symbols, Shaming, and Social Norm Management as a Substitute for Effective Tax Policy*, 89 IOWA L. REV. 863, 909 (2004).

<sup>98</sup> See *id.* at 888-90.

<sup>99</sup> I.R.C. § 6039G(e) (2000). For a sample listing of expatriates, see Quarterly Publication of Individuals, Who Have Chosen to Expatriate, as Required by Section 6039G, 67 Fed. Reg. 19,621 (Apr. 22, 2002).

<sup>100</sup> Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified at 8 U.S.C. § 1182 (2000)).

<sup>101</sup> *Id.* For a discussion of this provision's history, see Kirsch, *supra* note 97, at 891 n.133.

<sup>102</sup> 141 CONG. REC. H3996 (daily ed. Mar. 30, 1995).

<sup>103</sup> Ironically, bringing attention to tax-motivated expatriates might also introduce the possibility to unwitting citizens who could take advantage of a tax break. Still, because I.R.C. § 6039G requires the listing of *all* expatriates (not only tax-motivated) and because the re-entry bar is unlikely to generate much publicity, the shaming sanction Congress sought to impose does not specifically stigmatize people who leave the country for tax reasons. Kirsch, *supra* note 97, at 909; see Kahan, *supra* note 6, at 594 (suggesting that effective penalties must "unambiguously express condemnation"). Furthermore, there is no evidence that anybody actually reads obscure publications in the *Federal Register*, which would be required for any stigma to attach. See Massaro, *supra* note 62, at 1883.

So how, then, could shaming tax-cheats actually *reinforce* our reciprocal norms? The answer lies in targeting our shaming instead of casting a broad net against all tax delinquents. If tax evaders are portrayed as antisocial outliers and not John Does taken from a list of ordinary names, then the message is *not* that our fellow citizens will defect whenever it is convenient; the message is that these particular expatriates are not a part of the society we recognize.

One of the most notorious tax cheats in history was the “Queen of Mean,” Leona Helmsley.<sup>104</sup> Helmsley, who famously insisted that “[o]nly the little people pay taxes,”<sup>105</sup> won a highly-publicized four-year prison term for her violation of reciprocity, but the message of her public humiliation wasn’t that tax evasion was rampant; it was that Helmsley was a social deviant. Even fifteen years later, her name is synonymous with treachery, and her infamy still fascinates the public.<sup>106</sup>

A similar alleged tax cheat probably worthy of shame and publicity is telecommunications tycoon Walter Anderson, who was recently jailed on charges that he failed to report \$450 million in income and failed to pay \$200 million in taxes.<sup>107</sup> It is plausible that the publicity that will follow from his trial will again support the notion that most everybody lives to civic obligations but that Anderson has chosen a different—and horribly unacceptable—route.

The contrast between Helmsley and Anderson with George Johnson of Crystal, Minnesota, is stark. Johnson’s name appears on Minnesota’s DelinqNet taxpayer list because he owes the state \$8,944.36 in taxes from 2001 and 2002.<sup>108</sup> I do not personally know Johnson, or anybody in Crystal, Minnesota, for that matter. He could be practically anybody. And from what little we know about him, it is difficult to think of him as at all similar to Helmsley or Anderson. The Minnesota list sends the impression

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<sup>104</sup> Helmsley was jailed for mail fraud and tax evasion. See RANDELL PIERSON, *THE QUEEN OF MEAN* (1989); William Glaberson, *Helmsley Gets 4-Year Term for Tax Fraud*, N.Y. TIMES, Dec. 13, 1989, at B1.

<sup>105</sup> Don Kaplan, *Donald Dodges a ‘Leona’-ism*, N.Y. POST, Nov. 4, 2003, at 96.

<sup>106</sup> As of October 9, 2005, searching LEXIS’s five-year news database for “Leona Helmsley” yields 1805 hits. This is remarkable because Helmsley was released from prison over a decade ago and hasn’t done anything particularly newsworthy since.

<sup>107</sup> Carol D. Leonnig, *Tax Fraud Suspect Wants Bail Set; Telecom Tycoon Could Flee Before Trial, Prosecutors Argue*, WASH. POST, Mar. 11, 2005, at A6.

<sup>108</sup> In the interests of personal privacy, George Johnson is a composite of several names on the list. There are many Georges and Johnsons, somebody who owes \$8,944.36, and five people from Crystal, Minnesota. But you will have to go to the list yourself to figure out their real stories. See Minn. Rev., *DelinqNet: Individual List*, [http://www.taxes.state.mn.us/collection/delinqnet/delinqnet\\_overview.shtml](http://www.taxes.state.mn.us/collection/delinqnet/delinqnet_overview.shtml) (follow the “Individual List” hyperlink) (last visited Oct. 15, 2005).



that ordinary people—like you, me, and George—evade taxes on occasion, and this is where shaming is counterproductive.

Where cooperative norms keep us within the bounds of the law, untargted shaming sanctions must be avoided. They create a perception—right or wrong—that communal norms are not universal, which leads to increased cynicism and decreased compliance. Instead, public statements should emphasize our broad consensus while more private mechanisms are used to encourage law-breakers to return to social norm compliance.

#### IV. *HOMO MORALIS*

Third-party social constraints make crime more costly and our relationships with others create incentives to reciprocate. But frequently, our internal compasses guide our actions, and first-party morality constrains behavior. Our *Homo moralis* instincts tell us that some crimes are unthinkable. We do not care how stiff or how weak the penalty is for child molestation, we do not do it because we are not child molesters. It does not matter if there has been a surge of murders in our hometown; we are not going to kill anybody because we are not murderers.

The logic of *Homo moralis* is quite circular. Crimes that take on a moral character typically carry the heftiest penalties; and yet they carry the heftiest penalties because they are the most serious. It is difficult to unravel the mechanics of how activities gain and lose an association with morality—but morality does evolve over time. Prosecution for sex crimes against women has not always been particularly aggressive and the duel was once considered a proper way to adjudicate disputes. But today, both are unthinkable crimes that many would characterize as running contrary to their self-definitions. History notwithstanding, one generalization that seems plausible is that moral norms develop and fall over the course of generations, not years, and once crimes attain the weight of moral authority for an individual person, he is unlikely to waver in this characterization.

What is clear is that morality matters. Scholars have alternately characterized conscience and personal morality as providing another source of deterrence (through self-punishment)<sup>109</sup> or as “the attitudinal factor[] . . . [best able] to predict variance in [criminal law] compliance.”<sup>110</sup> But how does the criminal law affect our morality?

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<sup>109</sup> Harold G. Grasmick & Robert J. Bursik, Jr., *Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model*, 24 LAW & SOC'Y REV. 837, 839-40 (1990) (analogizing conscience-driven punishments to state-imposed sanctions).

<sup>110</sup> TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 60 (1990); see also Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468-71 (1997).

A glance at the law and norms movement suggests a strong relationship between the criminal law, the signals the law sends, and the strength of our *Homo moralis* aversion to crime. The law is subsidized by a moral legitimacy when citizens perceive the law as a plausible statement of what the community as a whole would implement. This moral legitimacy, in turn, encourages us to obey the law at the margins even when it does not directly accord our internalized morality. To the extent that the government overreaches and overly penalizes behavior that most people view as non-harmful, this crime-preventing force wanes. And if the government chooses to introduce widespread shaming, the possibility of crowding out arises. For if the public is called upon regularly to shame criminals at the government's behest, this may lessen the third-party shaming that we rely upon to informally enforce norms.

#### A. THE MORAL SUBSIDY OF THE LAW

We have seen already that social pressures and the fear of punishment can promote legal compliance, but commentators have also observed that the law itself has authority that promotes legal compliance independent of attached penalties. People “generally see themselves as moral beings who want to do the right thing as they perceive it,” and a well-crafted statute book shapes people's perception of what is “the right thing.”<sup>111</sup> To be precise, Robinson and Darley argue that “[c]riminal law's influence comes from being a societal mechanism by which the force of social norms is realized and by which the force of internal moral principles is strengthened.”<sup>112</sup>

Of course, this does not imply that the government can pass any law and need only wait for public morality to absorb its commands. Tom Tyler writes of the importance of legitimacy in criminal law, which “underlies [the] expectation that the public will generally obey the law” and supplies empirical data to support his assertion.<sup>113</sup> Tyler puts special weight on procedural aspects of judicial administration, which promote fairness,<sup>114</sup> but notes further that there is a strong correlation between the extent to which a person finds the law morally credible and her compliance.<sup>115</sup>

So this suggests that the government can always pass laws that everybody agrees with and can almost never successfully promote reform

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<sup>111</sup> Robinson & Darley, *supra* note 110, at 468.

<sup>112</sup> *Id.* at 471.

<sup>113</sup> TYLER, *supra* note 110, at 161.

<sup>114</sup> *Id.* at 162-65.

<sup>115</sup> *See id.* at 64-68; Robinson & Darley, *supra* note 110, at 474-75.

where social norms stand strongly opposed. This is the “sticky norms problem”<sup>116</sup>:

If the law condemns too severely—if it tries to break the grip of the contested norm (and the will of its supporters) with a “hard shove”—it will likely prove a dead letter and could even backfire. If it condemns more mildly—if it “gently nudges” citizens toward the desired behavior and attitudes—it might well initiate a process that culminates in the near eradication of the contested norm and the associated types of behavior.<sup>117</sup>

Characterizing the problem in economic terms, Kahan argues that the strength of the government’s response (i.e., where on the “gentle nudge”—“hard shove” spectrum is optimal) is a function of the portions of the population willing to enforce and to oppose a given legal change.<sup>118</sup>

As a general matter, people are willing to enforce laws against “criminals,” but they are hesitant to penalize ordinary people who happen to do something wrong. This distinction plays into the “sticky norms” problem and the legitimacy of the law. When the state publicly punishes a notorious individual criminal, like Leona Helmsley,<sup>119</sup> it has a legitimating effect: the rules of the law apply to everybody and they serve us well. But when the law is applied broadly—even though its application may still be uniform and consistent—the message is different. Suddenly, people like you and me are getting caught up in government excess, and the overall legitimacy of the law suffers. The feedback of using shoves where nudges are appropriate only strengthens the social norms the government may seek to prevent.<sup>120</sup>

On the flip side, in concert with the strong expressive content of shame, *Homo moralis* is reinforced where shame is applied to areas of strong social agreement. But, where society agrees strongest on moral conduct, long prison terms are the norm and shaming rarely enters the picture. Shaming is typically reserved for minor offenses like petty theft, commercial crimes, and nonviolent sex crimes like solicitation.<sup>121</sup> In these situations, shame will be most effective when targeted to specific crimes worthy of emphasis.

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<sup>116</sup> See generally Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607 (2000).

<sup>117</sup> *Id.* at 609.

<sup>118</sup> See *id.* at 613-18.

<sup>119</sup> See *supra* text accompanying notes 104-06.

<sup>120</sup> See Kahan, *supra* note 116, at 616.

<sup>121</sup> Note, *Shame, Stigma, and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186, 2188 (2003).

## B. THE CROWDING OUT OF MORAL VIRTUE

One of the primary draws of the shaming sanction is the power of shame in society. It is hard to underestimate the power of social disapprobation. Humans are social creatures; we rely upon our networks of friends, acquaintances, and fellow citizens to progress through life. Anything that damages this network can be traumatic and costly, so it is no surprise that techniques of excommunication have enforced social norms for centuries.

But a key question in the law-and-norms movement is how society reacts when the government formalizes a previously-informal social mechanism. In the shaming context, does the government acquire a functional monopoly on shame when it assumes regular responsibility for parading around miscreants? That is, even if shaming requires public participation, as this reflex becomes Pavlovian, will we lose our capacity to independently determine when non-penalized actions violate our social norms? Will we continue to use informal shame in the same manner and frequency when suddenly the government is responsible for conducting our orchestra of disgrace? These are sociological and empirical questions without easy answers, but they counsel caution in the expansion of shame.

Even if the government became the sole assigner of public shame, some scholars would still applaud. While some courts have been skeptical as to the rehabilitative capabilities of shaming penalties that rely upon public derision,<sup>122</sup> Stephen Garvey argues, however, that alternative sanctions serve to educate morally through a return to the theory of *lex talionis*—the law of “an eye for an eye.”<sup>123</sup> He writes that “[t]alionic punishments force an offender to somehow experience the harm he has caused,”<sup>124</sup> and that applying the ideals of moral reform theory to our penal system could effectively reduce recidivism in a forward-looking, utilitarian fashion.<sup>125</sup> He does not actually encourage us to penalize criminals with their eyes or any attacks on their physical health, but he points to examples such as Tennessee judge Joe Brown, who has taken to “allowing burglary victims to visit the burglar’s home and take something of equal value while the burglar watches” as a means to educate a criminal whose *Homo moralis* instincts are lacking.<sup>126</sup> This punishment may or may not succeed in getting

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<sup>122</sup> See Garvey, *supra* note 4, at 755.

<sup>123</sup> *Id.* at 762-83, 784.

<sup>124</sup> *Id.* at 784.

<sup>125</sup> See *id.* at 766.

<sup>126</sup> Joe B. Brown, *Judge Devises Instructional Penalties*, N.Y. TIMES, Feb. 26, 1993, at B16; see Garvey, *supra* note 4, at 784.

the criminal to understand what it is really like to be robbed, but at least the sanction has a constructive slant.

For our purposes, introducing shame for *Homo moralis* crimes could potentially “morally educate” the specific offenders without threatening the social norms underlying the proscribed conduct, but only under two conditions: (1) The underlying social norm must be close enough to the state-prescribed requirement to fall within the government’s legitimate moral subsidy; and (2) the penalty must be focused enough to highlight the individual failings of the people who are shamed. So again, we note that broad, standard shaming penalties are least likely to be effective and most likely to trigger perverse feedback reactions.

#### V. CONCLUSIONS

Thus far, shaming penalties have been applied by legislatures wishing to specifically deter criminal activity or by judges, frustrated by the current array of penalties, who want to craft a special punishment for a special offender. But as shaming penalties become more prevalent and less novel, more attention must be paid to the expressive effects of shaming on society-at-large. Using our framework for the primary reasons people avoid criminal activity, an increase in shaming could damage reciprocal norms, could wound the state’s moral legitimacy, and could marginally decrease the deterrence experienced by a cost-minimizing, rational decision-maker. These side-effects are not the inevitable fallout of shaming, but the harm caused by shaming misapplied by those who ignore its expressive value on the audience that soaks in the publicity.

The framework set out above suggests that there are three primary reasons why we do not commit crimes: economics, reciprocity, and morality. These elements are interrelated on many levels. By dramatically increasing the sanctions for marijuana possession, a state appeals to the *Homo economicus* instincts of its citizens, but *Homo moralis* may no longer see the law as a codification of society’s will. But weakening the penalties too much to coincide with social consensus could thwart the *Homo economicus* deterrence of drug use. Increasing the penalties for jury duty evasion may be perfectly consistent with our views of the law and may be economically efficient, but if the tone of the message suggests that jury compliance is low, then *Homo reciprocans* will feedback. The feedback possibilities are all heightened with shame because its public nature relies upon community involvement and uses psychological quirks to exaggerate the enforcement—and therefore the perceived prevalence—of crime.

There are no silver bullets when it comes to criminal justice, but there are better and poorer ways to enforce the law. In order to invoke alternative

sanctions properly, decision-makers must be aware of the social consequences. Although there should be little concern in invoking shame when violent or otherwise notorious crimes are committed by identifiable social outcasts, certain crimes against society are not ideal candidates for public humiliation—despite society’s interest in retribution. And even when the goal is just to increase the costs of criminal activity, we must be aware that there are counteracting forces that may undo the benefits we seek to achieve.

Shaming has been the subject of much scholarly debate in recent years, but the field is still remarkably lacking in solid empirical findings. Perhaps this is a sign that shaming will never grow to prominence and that the concerns raised in this Article will never materialize; but before we systematize alternative sanctions, we should be sure to fully recognize the perverse messages that we send about social norms when we publicly shame our criminals.

