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Shame, Culture, and American Criminal Law

Toni M. Massaro
University of Arizona

SHAME, CULTURE, AND AMERICAN CRIMINAL LAW†

*Toni M. Massaro**

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* Professor of Law, University of Arizona. B.S. 1977, Northwestern University; J.D. 1980, William & Mary. — Ed. I am grateful to Barbara Babcock, Tom Grey, Ted Schneyer, David Wexler, Walter Weyrauch, and Rob Williams for their instructive critiques of an earlier version of the manuscript.

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> The most unhappy hours in our lives are those in which we recollect times past to our own blushing — If we are immortal that must be the Hell.
>
> — Keats

I. INTRODUCTION

On October 26, 1989, a Rhode Island Superior Court judge ordered Stephen J. Germershausen to place the following four-by-six-inch ad with his picture in the *Providence Journal-Bulletin*: " 'I am Stephen Germershausen. I am 29 years old. . . . I was convicted of child molestation. . . . If you are a child molester, get professional help immediately, or you may find your picture and name in the paper, and your life under control of the state.' "[1] Purchasing this ad was a condition of his probation.[2]

In another era, Germershausen might have been put on a wheel and had all of the bones in his body cracked, one at a time.[3] During the late 1600s, he might have been nailed by both ears to a pillory, then whipped twenty times,[4] or branded with an *"M"* for molester.[5] He might have been banished or exiled from the United States.[6] Or, he might have been placed in public stocks[7] and forced to apologize

1. Hulick, *Molester's Sentence: Photo Ad in Paper,* Ariz. Republic, Nov. 9, 1989, at A1, col. 1 (state ed.).

2. *Id.*

3. *See, e.g.,* L. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 4 (1975) (describing various punitive practices of England and colonial America).

4. *See* R. SEMMES, CRIME AND PUNISHMENT IN EARLY MARYLAND 30 (1938) (describing punishment given to a witness who was found guilty of perjury).

5. *See id.* at 35 (reporting that in 1663, Maryland laws provided that county justices should be given irons for burning "malefactors" — perhaps *"H"* for "hog stealer," *"R"* for "runaway slave," *"M"* for "murderer," or *"T"* for "thief").

6. *See id.* at 38 (noting that banishment from the province was a penalty in Maryland during the late 1600s).

7. *Id.* at 39 (noting that to set a man in stocks was a usual form of punishment in Maryland during the late 1600s).

and make financial restitution to the families of his three victims.[8] Electing an alternative not unlike some of these penalties, the Rhode Island judge imposed on Germershausen a thirty-five-year suspended sentence, with thirty-five years' probation, and compelled him to publicize his conviction with this newspaper ad.[9]

Germershausen's publicity sentence is part of a modest trend in criminal law. In a smattering of recent cases, several judges have required defendants to apologize publicly to their victims[10] or to wear signs listing their offenses.[11] An Oregon judge makes some offenders buy newspaper ads to apologize for their misdeeds.[12] And the State of Nevada now allows convicted drunk drivers to elect between imprisonment or performing community service while dressed in clothing that identifies them as drunk drivers.[13]

These throwbacks to colonial-type penalties spring from frustration with the conventional options of prison and parole.[14] Prison overcrowding, as well as recurring doubts about the appropriateness and the effectiveness of incarceration, make imprisonment seem infeasible, unduly harsh, or otherwise unacceptable in some cases. Yet, many judges believe that to parole the convicted individual is too lenient.[15] In an attempt to fill this gap, reformers have proposed a host of alternative, creative sentencing strategies, which have begun to reshape

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8. In fact, the judge also ordered him to contribute $1000 to a program financed by a rape crisis center for child victims of sexual assault. *See* Hulick, *supra* note 1. The remedy of forcing a defendant to make financial restitution to the victim of a crime has a long history in the United States. Semmes describes an early Maryland case in which a convicted forger was ordered " 'set on the pillory and loose one of her ears,' " after which she was to be "imprisoned for twelve months and to pay double costs and damages" to the victim of the forgery. R. SEMMES, *supra* note 4, at 32. Money fines, of course, have a far longer history than the American experience, as the ancient concept of the "wergeld" proves. *See* P. SPIERENBURG, THE SPECTACLE OF SUFFERING 3 (1984).

9. *See* Hulick, *supra* note 1.

10. *See infra* text accompanying notes 50-55.

11. *See infra* text accompanying notes 41-49.

12. *With Jails Overcrowded, Judges Look for Innovative Sentences to Fit Crimes*, Chicago Daily L. Bull., Feb. 24, 1988, at 1, col. 5. In another recent example, a New Hampshire judge ordered a man convicted of raping a 10-year-old boy "to buy ads in two local newspapers apologizing for his crime." *Flogging?*, NEWSWEEK, Apr. 22, 1991, at 6.

13. *See* Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (referring to Nev. Rev. Stat. 484.3792 (1)(a)(2)) (1987).

14. *See infra* notes 30-31 and accompanying text.

15. Money fines likewise do not fill the judges' sanctions gap for several reasons. First, many defendants cannot pay the fines. Second, those who can afford them may pass the cost on to their "customers." *See, e.g.*, Fisse, *Sanctions Against Corporations: The Limitations of Fines and the Enterprise of Creating Alternatives*, in CORRIGIBLE CORPORATIONS AND UNRULY LAW 137, 140 (B. Fisse & P. French eds. 1985). Moreover, even when fines might be an effective deterrent, popular opinion may demand that the defendant pay for her misdeeds with more than cash. *See* French, *Publicity and the Control of Corporate Conduct: Hester Prynne's New Image*, in CORRIGIBLE CORPORATIONS AND UNRULY LAW, *supra*, at 159-60.

criminal justice in the United States.[16]

The resort to formal shaming as a criminal sanction is only one of several attempts to expand the sentencer's arsenal in an effective, inexpensive manner. Formal shaming, however, is perhaps the most sensational of these new penalties. It also exploits, in a particularly dramatic and explicit fashion, the assumed link between people's sense of shame and their tendency to observe legal norms. The purpose of this Article is to analyze whether this link is one that American criminal court judges can, or should, exploit.

I begin with a description of the new shaming sanctions and the possible justifications for this type of penalty.[17] I then identify both psychological and anthropological aspects of the phenomenon of shame, or "losing face."[18] I describe several cultures in which shaming practices are, or were, significant means of sanctioning behavior, and outline the shared features of these cultures.[19]

These psychological and anthropological materials, taken together, suggest that shaming practices are most effective and meaningful when five conditions are satisfied. First, the potential offenders must be members of an identifiable group, such as a close-knit religious or ethnic community. Second, the legal sanctions must actually compromise potential offenders' group social standing.[20] That is, the affected group must concur with the legal decisionmaker's estimation of what is, or should be, humiliating to group members. Third, the shaming must be communicated to the group and the group must withdraw from the offender — shun her — physically, emotionally, financially, or otherwise.[21] Fourth, the shamed person must fear withdrawal by the group.[22] Finally, the shamed person must be afforded some means of regaining community esteem, unless the misdeed is so grave that the offender must be permanently exiled or demoted.[23]

I apply these five characteristics to modern American communities, and speculate about whether formal shaming by contemporary American criminal courts within their communities makes practical sense.[24] I argue that the dominant social and cultural traditions in the

16. Malcolm, *New Strategies to Fight Crime Go Far Beyond Stiffer Terms and More Cells*, N.Y. Times, Oct. 10, 1990, at A16, col. 1.

17. *See infra* notes 41-92 and accompanying text.

18. *See infra* notes 94-108 and accompanying text.

19. *See infra* notes 110-96 and accompanying text.

20. *See infra* notes 190-92 and accompanying text.

21. *See infra* notes 107-08 and accompanying text.

22. *See infra* notes 192-96 and accompanying text.

23. *See infra* notes 145-46 and accompanying text.

24. *See infra* notes 197-257 and accompanying text.

United States do not reflect the level of interdependence, strong norm cohesion, and robust communitarianism that tends to characterize cultures in which shaming is prevalent and effective. Moreover, federal and state law enforcement includes no public ritual or ceremony for reintegrating or "forgiving" a shamed offender. Given these circumstances, I conclude that public shaming by a criminal court judge will be, at most, a retributive spectacle that is devoid of other positive community-expressive or community-reinforcing content. Additionally, I hypothesize that these judicial shamings will not significantly deter crime in most urban, and likely many nonurban American settings.[25]

Finally, I consider whether shaming is a reasonably humane method of punishing criminals, regardless of its practical effectiveness. In particular, I address the limiting concerns of proportionality,[26] equality,[27] and cruelty.[28] I maintain that these three concerns, which are raised by all forms of punishment, are particularly strong with shaming punishments and point against use of these penalties.[29] These conclusions are relevant to all publicly imposed criminal sanctions to the extent that all methods of public punishment attempt to exploit the target community's shared sense of revulsion and shame.

II. THE REVIVAL

A. *Introduction*

The revival of shaming springs from profound and widespread dissatisfaction with existing methods of punishment. In particular, many people, including judges, doubt the effectiveness and humanity of prison.[30] Yet, the main alternative to prison — parole — is equally unattractive, both because the community fears the often unmonitored

25. *See infra* notes 209-35 and accompanying text.

26. *See infra* notes 262-67 and accompanying text.

27. *See infra* notes 268-71 and accompanying text.

28. *See infra* note 272 and accompanying text.

29. *Id.*

30. American prisons are terribly overcrowded and expensive to run. *See, e.g.*, Finn, *Judicial Responses to Prison Crowding*, 67 JUDICATURE 318, 319 (1984) (noting that state prison populations increased 54% between 1973 and 1982); *Prison Overcrowding Project Update*, Crim. J. Newsletter, Mar. 28, 1983, at 6; Silas, *Homebodies*, A.B.A. J., May 1, 1986, at 28, 29 (reporting that Oklahoma's prison population doubled between 1979 and 1984, prompting the state legislature to expand home detention as an alternative to incarceration); *With Jails Overcrowded, Judges Look for Innovative Sentences to Fit Crimes*, Chicago Daily L. Bull., Feb. 24, 1988, at 1, col. 4 (quoting a district court judge who says he imposes novel sentences because the prisons and detention centers are overcrowded); *see generally* Farrington & Nuttall, *Prison Size, Overcrowding, Prison Violence, and Recidivism*, 8 J. CRIM. JUST. 221 (1980); Holbert & Call, *The Perspective of State Correctional Officials on Prison Overcrowding: Causes, Court Orders, and Solutions*, FED. PROBATION, Mar. 1989, at 25; *The Prison Overcrowding Crisis*, 12 N.Y.U. REV. L. & SOC. CHANGE 1 (1983-1984); Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analy-*

return of the offender to its neighborhoods, and because most people believe criminals should not go unpunished.[31]

This dissatisfaction with the primary punishment options has led to experimental, creative sanctions and probation conditions, which include the "shaming and shunning" practices. The full range of these experimental alternatives includes furlough programs,[32] community service sentences,[33] home surveillance systems,[34] so-called "shock pro-

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sis of Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment,* 29 STAN. L. REV. 893 (1977).

Prisons also can be dangerous and deplorable places, as evidenced by the prisoners' rights decisions of the 1960s-1980s. *See, e.g.,* Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979), Estelle v. Gamble, 429 U.S. 97 (1976); Procunier v. Martinez, 416 U.S. 396 (1974); Tousaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986); Badgley v. Santacroce, 800 F.2d 33 (2d Cir. 1986); Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970), *cert. denied,* 401 U.S. 983 (1971); Hamilton v. Covington, 445 F. Supp. 195 (W.D. Ark. 1978). Finn reports that "[b]y 1976, over 19,000 petitions for relief had been filed in federal courts, representing over 15 percent of the entire civil filings. . . . By the end of 1982, 31 states were under court order to remedy crowded conditions alone, and another nine were facing similar court challenges." Finn, *supra,* at 264.

31. Objections to lenient sentences and to uneven enforcement of the criminal penalties led to the adoption of mandatory sentencing guidelines in the federal system. *See* U.S. SENTENCING COMMN., FEDERAL SENTENCING GUIDELINES MANUAL (1988). The guidelines were upheld as constitutional in Mistretta v. United States, 488 U.S. 361 (1989). Nevertheless, the guidelines continue to be extremely controversial. *See, e.g.,* Bishop, *Mandatory Sentences in Drug Cases: Is the Law Defeating Its Purpose?,* N.Y. Times, June 8, 1990, at B16, col. 3. The nature and tenor of these debates reveal how divided and confused attitudes about proper punishment ends remain in the United States, even among the "experts."

32. *See, e.g.,* R. STEGGERDA & P. VENEZIA, COMMUNITY-BASED ALTERNATIVES TO TRADITIONAL CORRECTIONS 9-12 (1974) (research conducted by the Research Center of the National Council on Crime and Delinquency describing community-based alternatives to incarceration, including work-release, residential facilities, fines, and probation with support services); Unger, *Private Pomona Company Has an Alternative to Jail,* L.A. Daily J., May 19, 1986, § II, at 1, col. 3 (describing California's experimentation with privately run work furlough programs, in lieu of incarceration).

33. *See, e.g., Doctor Sentenced to Heal in India,* Natl. L.J., Aug. 25, 1980, at 3, col. 1 (psychiatrist convicted of Medicare fraud ordered to give medical services in India); *With Jails Overcrowded, Judges Look for Innovative Sentences to Fit Crimes,* Chicago Daily L. Bull., Feb. 24, 1988, at 1, col. 4 (describing Chicago judge's sentencing of a defendant who harassed blacks to 200 hours of community service with the NAACP); Wise, *Was the Judge's "Sentence" Off Base?,* Natl. L.J., Mar. 5, 1984, at 43, col. 1 (baseball player Al Bumbry sentenced to 20 minutes of signing autographs for speeding); *Sentenced to Happy Hours,* Natl. L.J., Apr. 12, 1982, at 39, col. 3 (cocktail lounge owner ordered to provide liquor to geriatric ward of local hospital after lounge was cited for overcrowding; pizza parlor owner ordered to provide pizzas to hospital patients; and music student convicted of drunk driving ordered to play concerts for patients). For a critical reaction to community service penalties, both as an insufficiently harsh penalty and as a perversion of the concept of public service as activity inspired by public spiritedness, not a court order, see Gordon, *Community Service, Mark of Disgrace,* N.Y. Times, Mar. 12, 1990, at A17, col. 3.

34. "Home detention" is the pretrial or post-conviction, full- or part-time restriction of a defendant to her own home. *See, e.g.,* Silas, *supra* note 30, at 28 (describing sentences of home confinement, used by a majority of the states as alternatives to prison); Gombossy, *Florist Placed Under 'House Arrest' in Credit Card Scam,* Natl. L.J., Aug. 11, 1986, at 6, col. 1 (discussing house arrest as response to prison overcrowding in a Connecticut case, and in other jurisdictions); *A Prisoner in His Own Home,* Natl. L.J., Feb. 15, 1982, at 35, col. 3 (describing sentence confining burglar to his mother's property for two years); Berg, *Home Detention Gaining Support,* Crim. Justice Newsletter, Nov. 21, 1983, at 3, col. 1; Berg, *Electronic Leashes Popular —*

bation,"[35] forced charitable contributions,[36] chemical therapy,[37] forced birth control,[38] and even one recent case of court-ordered castration.[39] Shaming penalties thus are one strand of a larger movement to expand the sentencer's arsenal of penalties.

Unlike these other punishment innovations, however, the shaming sanctions are explicitly designed to make a public spectacle of the offender's conviction and punishment, and to trigger a negative, downward change in the offender's self-concept.[40] Embarrassment and consequent social isolation may result from any punishment; but with most other sanctions shame and shunning are incidental and, some would argue, undesirable consequences of the penalty. With shaming penalties, in contrast, embarrassment is the principal purpose of the punishment. In the following sections I describe several modern instances of formal attempts to shame offenders.

B. *Signs*

The most obvious illustrations of shaming are the sign sanctions. Well-publicized[41] examples of sign punishments are the convicted

But Effective?, L.A. Daily J., Aug. 14, 1987, at 5, col. 1; *Federal Judge, Citing Costs of Prison, Imposes "House Arrest,"* Crim. Justice Newsletter, Oct. 1, 1985, at 2, col. 2; *see generally* Rush, *Deinstitutional Incapacitation: Home Detention in Pre-Trial and Post-Conviction Contexts,* 13 N. KY. L. REV. 375, 378 (1987). Home detention can be monitored by intensive human supervision or by electronic surveillance through electronic monitors secured to the defendant's ankle or wrist. *Id.* at 378.

35. Shock probation is the short-term incarceration of a first offender, intended to "scare her straight" by showing her the harsh reality of penitentiary life. *See generally* Note, *Shock Probation: An Alternative to Traditional Forms of Sentencing,* 12 TEXAS TECH. L. REV. 697 (1981).

36. *See, e.g.,* Liss, *A Fine Way to Give to Charity,* Natl. L.J., Nov. 26, 1984, at 47, col. 1. *See generally* Note, *Charitable Contributions as a Condition of Federal Probation for Corporate Defendants: A Controversial Sanction Under New Law,* 60 NOTRE DAME L. REV. 530 (1985).

37. *See, e.g.,* Demsky, *The Use of Depo-Provera in the Treatment of Sex Offenders,* 5 J. LEGAL MED. 295 (1984) (discussing the compelled use of chemical hormone regulation with convicted sex offenders).

38. *See A Misconceived Ruling,* L.A. Daily J., June 7, 1988, at 4, col. 1 (editorial).

39. *See* Goldfarb, *Practice of Using Castration as Sentence Being Questioned,* Crim. Justice Newsletter, Feb. 15, 1984, at 3, col. 2 (reporting choice between castration or a 30-year sentence that a South Carolina judge gave to three rapists). *But see* Mickle v. Henrichs, 262 F. Supp. 687 (D. Nev. 1918) (declaring unconstitutional a Nevada statute that authorized vasectomies for certain sex offenders); Davis v. Berry, 216 F. 413 (S.D. Iowa 1914), *revd. on other grounds,* 242 U.S. 468 (1917) (invalidating similar legislation in Iowa).

40. *See infra* notes 94-99 and accompanying text.

41. *See* Nordheimer, *In-House Dispute: Drunken Driver Bumper Sticker,* N.Y. Times, June 6, 1985, at A22, col. 3; *Scarlet Bumper: Humiliating Drunk Drivers,* TIME, June 17, 1985, at 52.

drunk driver bumper sticker[42] and distinctive license plate.[43] The convicted driver may continue to exercise driving privileges only if she affixes the identifying sign to her vehicle.

Judge Titus, the Sarasota County Florida judge who initiated the bumper sticker penalty in 1985, claims that after the program began, drunk driving incidents dropped one third in the county.[44] In explaining why she imposed the glow-in-the-dark sticker penalty, Judge Titus said that tougher fines had failed to curb drunk driving. She noted that "many people who are convicted of DUI as first offenders are well adjusted in society. They hold good jobs and value their social standing . . . . The DUI sticker capitalized on [their] fear of public notice," by bringing "shame, disgrace and a ruined reputation."[45]

The state of Nevada recently adopted a statute that allows the judge to order a defendant to perform forty-eight hours of work for the community while dressed in clothing that identifies her as a DUI offender.[46] In a decision involving a defendant convicted under this statute, the U.S. Supreme Court speculated that this penalty was "less embarrassing and less onerous than six months in jail."[47]

Identifying signs have also been part of sentences imposed on sex

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42. *See, e.g.*, Goldschmitt v. State, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986) (per curiam), *appeal denied*, 496 So. 2d 142 (Fla. 1986). *See generally* Note, *The Bumper Sticker: The Innovation That Failed*, 22 NEW ENG. L. REV. 643 (1988) (discussing the legality and impact of the bumper sticker penalty); Ohle & Wise, *Stick Goes the Bumper*, Natl. L.J., Dec. 28, 1981, at 35, col. 2 (describing bumper sticker sanctions imposed by Washington state court judge).

43. *See* OHIO REV. CODE ANN. § 4503.231 (Page's 1988). The Ohio statute, which took effect in 1986, reads as follows:

> No motor vehicle registered in the name of a person whose certificate of registration and identification license plates have been impounded . . . shall be operated or driven on any highway in this state unless it displays identification license plates which are a different color from those regularly issued and carry a special serial number that may be readily identified by law enforcement officers.

The statute was applied in State v. Barbone, No. 3653, slip. op. (Ohio Ct. App. June 26, 1987) (requiring convicted drunk driver to display the different color plates pursuant to § 4503.231).

44. Titus, *"Scarlet Letter" a Just Punishment* (Council of State Governments publication) (on file with author). Judge Titus reports that Sarasota County's DUI arrest rate dropped 33% during January-June 1986 over the same period in 1985. She says nothing indicated that the decline was due to decreased police patrols. *Id.*

45. *Id.* Judge Titus added that the sentence might also force alcoholics to acknowledge their illness, and that the glow-in-the-dark sticker might aid law enforcement officers in apprehending drivers who violated their driving restrictions. *Id.*

46. Nev. Rev. Stat. § 484.3792 (1)(a)(2) (1987).

47. Blanton v. City of North Las Vegas, 489 U.S. 544 (1989). Justice Marshall wrote the opinion. The issue before the Court was whether the defendant had a sixth amendment right to trial by jury under the Nevada statute. The right does not attach for "petty offenses," which usually means offenses for which the maximum imprisonment is six months or less. In observing that the distinctive attire was less offensive than a six-month jail sentence, though, the Court noted that the record failed to describe the clothing or where and when it had to be worn. *Blanton*, 489 U.S. at 544 n.10.

The case raises an interesting question for "innovative sentencing" reforms: when is the alternative sanction penalty grave enough to trigger the jury trial right?

offenders. In one case, a repeat offender was required, as a condition of probation, to post signs with letters at least three inches high on his residence and vehicle doors that read: DANGEROUS SEX OFFENDER — NO CHILDREN ALLOWED.[48] Other courts have required sex offenders to place ads in the local newspaper publicizing their offenses, as in the Rhode Island case described above.[49]

C. *Apologies*

A second type of shame sanction is the public apology or "confession." Judge Elaine Crane of Willoughby Municipal Court in Ohio orders some first-time offenders to write a "confessional" letter to the local newspaper.[50] In Tennessee, a judge ordered a defendant convicted of aiding in the sale of a stolen vehicle to confess his crime before a church congregation.[51] In Newport, Oregon, a town of 8500 people, a convicted criminal may be ordered to write and pay for a newspaper ad in which she announces the subject of her conviction and apologizes to the community.[52] One man who opted for the public apology in lieu of a prison sentence stated that the cost of the social embarrassment paled when compared to the cost of six months in prison.[53]

Another sanction closely related to the apology is compelled inter-

48. State v. Bateman, 95 Or. App. 456, 771 P.2d 314 (en banc), *cert denied,* 308 Or. 197, 777 P.2d 410 (1989); *see also "Scarlet Letter" Sentence OK'd by Ore. Court,* Natl. L.J., Nov. 23, 1987, at 9, col. 4.

49. Hulick, *supra* note 1. The judge, Corinne P. Grande, reportedly imposed the sentence as a condition of the offender's probation because "these cases aren't publicized" and "[t]here doesn't appear to be sufficient social response to people like [the defendant]." *Id.* at A14. She added, "It seemed to me that [the defendant] ought to be made a public example." *Id.*; *see also Better than Prison,* Peninsula Times Tribune, Jan. 4, 1990, at A9, col. 2 (picture of defendant who agreed to wear for one year a T-shirt that read "My Record and Two Six Packs Equal Four Years" on the front, and "I'm on Felony Probation" on the back instead of returning to prison); Mintz, *Judge Turns Confessing into a Religious Experience,* Natl. L.J., Feb. 6, 1984, at 47, col. 2 (describing sanction requiring car thief to post five-by-four-foot sign in his yard announcing that he was a thief).

50. *See Enforcing the "Law" of the Letter,* Natl. L.J., May 3, 1982, at 55, at col. 2. The judge stated that the purpose of the sentence is to ask the defendant what she has learned and to apologize to her victim. *Id.*

51. *See* Mintz, *supra* note 49, at 47; *cf. Woman Ordered to Apologize to Man Falsely Accused of Rape,* Gainsville Sun, July 3, 1990, at 4A, col. 3 (describing an order of a Nebraska judge that a woman who falsely accused a man of rape run radio and newspaper advertisements apologizing to him).

52. *See* Mathews, *Freedom Means Having to Say You're Sorry,* Wash. Post, Nov. 9, 1986, at A3, col. 1. In this report, the district attorney and probation officer who initiated the program explain that the idea " 'grew out of pure, sheer frustration.' " *Id.* They add that in a small town, the publication would at least warn other citizens of the dangerousness of some offenders. A local judge is reported to have said that he saw no problem with apology ads, as long as they were part of a plea bargain and not an imposed sentence. *Id.*

53. *Id.* Some more recent media accounts have criticized the shaming punishment, however. For example, a recent *Newsweek* article characterized apology advertisements as "a scarlet letter

action between the defendant and her victims. For example, a defendant convicted of drunk driving may have to meet with people whose lives have been adversely affected by drunk drivers.[54] The sentencer who orders these face-to-face encounters may be motivated more by the desire to promote consciousness-raising in the defendant or retributive satisfaction for the victims, however, than by the desire to shame the offender. Still, the opportunity for victims to confront the defendant and to describe how her deed has injured them may well trigger shame or guilt in the defendant, as well as satisfy the victims' expressive needs in some instances.[55]

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for the 1990s" and noted opponents' comparison of the practice to "public flogging." *See Flogging?, supra* note 12.

54. *See, e.g.*, Egan, *Pain Relived in War on Drunk Driving*, N.Y. Times, Mar. 16, 1989, at A16, col. 2 (describing a Redmond, Washington, program under which anyone convicted of drunk driving must spend an hour with a victim's panel composed of people whose lives have been changed adversely by drunk drivers). Forced interaction is also used as a sanction for racially insensitive or abusive conduct on some college campuses. For example, the University of Michigan adopted a controversial Policy on Discrimination and Discriminatory Harassment by Students in the University Environment, under which some students had been sentenced to write apologies to the campus newspaper and to attend counseling or small group discussions. *See* Hentoff, *Watching What You Say on Campus*, Wash. Post, Sept. 14, 1989, at A23, col. 3. The policy was struck down as unconstitutional. Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989).

A different approach to victim satisfaction in a drunk driving case was fashioned by the parties in a civil case in Virginia. The parents of a teenage girl killed by a drunk driver agreed to settle the lawsuit for $936, but demanded that the teen defendant pay the amount $1 per week. The parents insisted on the $1 weekly payments in order to remind the defendant weekly of what he had done to their daughter. *See* Campbell, *Parent Won't Let DUI Driver Forget*, Gainesville Sun, Mar. 31, 1990, at 2A, col. 5.

55. An apology is a sophisticated social gesture, as Goffman has observed. *See* E. GOFFMAN, RELATIONS IN PUBLIC 113 (1971). He has described the apology as a device "through which an individual splits himself into two parts, the part that is guilty of an offense and the part that dissociates itself from the delict and affirms a belief in the offended rule." *Id.* According to Goffman, an apology is a form of "ritual work," that may not compensate for the loss, but that expresses a pious attitude toward the rule. Thus it is *"a matter of indicating a relationship, not compensating a loss."* *Id.* at 118.

As Goffman has put it:

> In its fullest form, the apology has several elements: expression of embarrassment and chagrin; clarification that one knows what conduct has been expected and sympathizes with the application of negative sanction; verbal rejection, repudiation, and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution.

Id. at 113. Given this characteristic, apologies have a "one-time" effectiveness: if the offender repeats the crime, then his apology is revealed to be insincere, and he has proven himself to be more the self that committed the misdeed than the self that was originally embarrassed. *Id.* at 165-66. The "relationship" indicated by the apology thus is shown to be false.

The apology sanction seems to rest on the mistaken assumption that all victims will react favorably to the offender's contribution. Different victims, though, will experience a crime differently. Not all victims want or need offender remorse, explanations, or confessions. *See generally* Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 964-66 (1985) (discussing the ways in which one-dimensional assumptions about victims' experiences can distort discussions of criminal procedures designed to protect "victims' rights").

A victim's satisfaction in an apology often may be meager or none, depending on the crime and on the victim. For example, a robbery victim may be far more satisfied if she reclaims the

These modern penalties bear a strong resemblance to the pillory, and other humiliatory sanctions of the American colonial period. The obvious question is whether these sanctions make as much sense today, given our alternatives, as they arguably made in the seventeenth century. In other words, does shaming deter crime, rehabilitate offenders, or serve any other legitimate punishment objective, given contemporary cultural conditions? If it is not likely to effect these ends, then should the new sanctions be condemned as misguided spasms of judicial and legislative pique?

III. THEORETICAL JUSTIFICATIONS

> [T]heories of punishment are not theories in any normal sense. They are not, as scientific theories are, assertions or contentions as to what is or what is not the case . . . . On the contrary, those major positions concerning punishment which are called deterrent or retributive or reformative "theories" of punishment are moral *claims* as to what justifies the practice of punishment — claims as to why, morally, it *should* or *may* be used.[56]

A. *Introduction*

In any sensible and humane legal order, punishment should be reasonably related to legitimate government ends. Thus, a preliminary question is whether shaming may promote a valid government end. A second, related concern is whether shaming is a humane and fair means of achieving that end.

Classical penology identifies four ends of punishment of criminal offenders: retribution, rehabilitation, deterrence, and incapacitation.[57] Some authors have posited supplementary reasons for government-imposed punishment, such as that it satisfies and controls passion and thereby promotes efficiency in norm enforcement,[58] or that it promotes a moral education.[59] Nevertheless, the classical justifications

loot from unrepentant criminals than if she receives an apology, but not money, from a truly contrite one. E. GOFFMAN, *supra*, at 116. The effectiveness of an apology sanction, like that of shaming sanctions in general, thus hinges on a number of psychological and social variables, which may vary among crimes, victims, and perpetrators.

56. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 72 (1968).

57. *See generally* M. FRANKEL, CRIMINAL SENTENCES — LAW WITHOUT ORDER 106 (1972) (defining retribution, rehabilitation, incapacitation, and deterrence).

58. *See, e.g.*, Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861 (1975).

59. *See, e.g.*, Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984); *Introduction* to CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS AND JUSTIFICATIONS 5 (R. Gerber & P. McAnary eds. 1972). The moral education theory seems to be one form of rehabilitation, to the extent that it seeks to reform the criminal and encourage right-thinking as a path to right-acting. It is also a form of deterrence, to the extent that the moral "education" inherent in public punishment is directed both at the offender *and* the onlookers.

still dominate philosophical debates about punishment. In the following sections, I describe briefly these classical justifications, and apply them to modern shaming sanctions. I conclude that as a theoretical matter, shaming may be justifiable under any of the classical theories of punishment. I further conclude, however, that these four general theories, taken together, offer abstract, theoretical justifications for nearly any negative response to criminal behavior. Thus, the more critical inquiries are whether the shaming penalties in fact will promote any of these theoretical ends, and whether shaming is a humane way to achieve these ends.

B. *Retribution*

Retributivists argue that punishment is justified by the desire to counteract or "compensate" for the harm inflicted by the wrongdoer. It is, in short, retaliation against someone who "deserves it." "An eye for an eye" is proper redress for a crime, in order to set right the moral balance.[60] This focus is retrospective, and weighs only the value that the offender has denied society.

Modern law construes crime as an offense against the state.[61] As such, the harm to be redressed is the injury to society, and is measured through its eyes. The damage to the victim is relevant only to the extent that she is part of the larger society. Retribution thus is not satisfied by victim compensation per se. Likewise, an individual victim's assessment of the harm inflicted is not dispositive.

Retributive justice is nonconsequentialist in that it is uninterested in influencing the offender's future behavior or the behavior of other community members. It presupposes free will by the criminal actor

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The hope, I assume, is that they all will "learn something" and avoid breaching these moral lessons in the future. Punishment as "homily" might also satisfy retributivist ends if its delivery makes victims feel more "whole." Thus the moral education theory is not a *distinct* justification or theory of punishment. Rather, it is one tool for promoting norm enforcement. *Cf.* E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 108-09 (G. Simpson trans. 1933) (describing the goal of punishment as the affirmation of a common morality by expressing outrage at the breach of the legal/social order).

60. *See, e.g.*, H.L.A. HART, *supra* note 56, at 233-35. But Hart also acknowledged that different justifications for punishment become relevant at different points in a "morally acceptable account of punishment." *Id.* at 3. His definition of retributivism takes into account the voluntary nature of the wrongful act and whether the return of suffering to the offender is itself just as good. *Id.* at 231.

Kant and Hegel are among the most prominent adherents to the view that the main justification of punishment is retribution, and that this is an end in and of itself. Some theology comports with this view, though the reconciliation there is between a deity and man; it is not an earthbound exchange. *See* W. TSAO, RATIONAL APPROACH TO CRIME AND PUNISHMENT 7-8 (1955). For example, retributive principles are expressed in Judeo-Christian writings. *Leviticus* 24:17-22.

61. This construction has been the subject of mounting criticism, which has been described as the "victim's rights" movement. For a description and critique of this movement, see Henderson, *supra* note 55, at 942-53.

and demands a "proportional" negative response to her willful wrongdoing.[62] As such, the theory tends to ignore contextual or individual complexities in favor of the criminal act itself. Retributive punishment thus is both an emotional expression of disgust and an exacting of commensurate revenge that is meant to satisfy moral notions about just deserts. Retributivists believe that what goes around *should* come around (though they may disagree about why); the aim of punishment is to see that it *does* come around.

The primary attraction of retributivism is that it has ancient roots, and satisfies deep emotional, intuitive instincts. Moreover, its ends are simply stated and seem fairly easy to secure. We punish in order to avenge the harm, not to deter, rehabilitate, or contain. Revenge is easier to accomplish than these other objectives.

In recent decades retributivists have gained adherents,[63] in part because of widespread skepticism about the rehabilitative or deterrence effects of contemporary sanctions,[64] and also because some people fear the potential for abuse and the disproportionality of rehabilitation-based punishment schemes. Retribution has become an appealing alternative to these other less favored theories[65] because it justifies punishment even when no deterrence or rehabilitation results.

Pure retributivist principles can justify the new shaming practices. If, for example, a driver kills a young child in the course of operating a motor vehicle while intoxicated, forcing the driver to wear a sign in public does promote retribution ends in a simple sense. The penalty need not, under retribution theory, deter others or convince the defendant not to drive while drunk again. Its justification lies in the fact that the defendant broke the law, and so "deserves" to be punished regardless of any future effects of the punishment. If wearing a sign

62. Montesquieu, writing in the eighteenth century, emphasized proportionality as a necessary element of just punishment. Beccaria, writing in the same century, likewise stressed proportionality. *See* W. TSAO, *supra* note 60, at 29-30.

63. *See* Berns, *Retribution as a Ground for Punishment,* in CRIME AND PUNISHMENT: ISSUES IN CRIMINAL JUSTICE 1 (F. Baumann & K. Jensen eds. 1989); Gardner, *The Renaissance of Retribution — An Examination of Doing Justice,* 1976 WIS. L. REV. 781; Henderson, *supra* note 55, at 945-48; Robinson, *Moral Science, Social Science, and The Idea of Justice,* in CRIME AND PUNISHMENT: ISSUES IN CRIMINAL JUSTICE, *supra,* at 15; Rush, *supra* note 34, at 396 n.5. A different, perhaps related approach — which emphasizes the victim as the focus of criminal law — is the "restitutionary approach." This approach argues that restitution to victims, other injured parties, and society should be the purpose of punishment. *See, e.g.,* C. ABEL & F. MARSH, PUNISHMENT AND RESTITUTION 12 (1984). Still another contemporary turn on retribution theory is a recent article that develops a moral-emotive theory of punishment based on retributivist assumptions. *See* Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment,* 74 CORNELL L. REV. 655 (1989).

64. Henderson, *supra* note 55, at 945-48.

65. The only other alternative to deterrence and rehabilitation is incapacitation, which poses its own practical and moral difficulties. *See infra* section III.E.

exacts pain, then it is justified by the offender's past pain-inflicting acts. Community outrage is expressed, and the moral calculus is set right.

Of course, pure retributivism, and thus any retributivist-based attempt to justify signs, rests on fairly shallow reasoning,[66] namely, that the law has to punish crime, however it can. Major objections to pure retributivism,[67] which apply equally to retributivist justifications for shaming, are that it does not prevent the abuses of unequal, disproportional, or inhumane punishment.[68]

Even for a pure retributivist, however, the question remains whether, in a particular community, wearing a sign or apologizing would be perceived as a negative sanction, and thus would satisfy the community's interest in revenge. I address this issue in a later section.

C. *Rehabilitation*

A second, also controversial, justification for punishment is rehabilitation of offenders. This theory is easily stated and understood: the government punishes offenders in order to change their norm-violating ways.[69] Punishment therefore should promote specific deterrence ends, that is, deterrence of this particular offender. It may do so through negative stimuli, so that the offender fears being punished again and so avoids the behavior, or through training and opportuni-

66. "Retributivism" does not necessarily tell us when, or which, criminals "deserve it." Is punishment triggered by a conviction? Only an "accurate" conviction? Only an accurate conviction for violation of a "good" law? Also, as Packer has explained, some retributivists believe that the punishment is for the *criminal's* own good. It is a means by which she realizes her moral character. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 38 (1968). Others argue that it is for society's sake. *Id.* at 37-38. Pure retributivists, however, can argue it is for neither the criminal nor society's sake, and ignore consequences altogether.

67. *See, e.g.*, O.W. HOLMES, THE COMMON LAW 45 (1881) (describing retribution as "only vengeance in disguise"); J. BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 179-89 (1907) (implicitly rejecting retribution in favor of deterrence theory).

68. For example, retributivism presupposes that commensurability is a workable guidepost for punishment. But what precisely does "an eye for an eye" mean? In what way, if at all, can the sentencer ascertain the "proportionality" of a punishment for drunk driving or child molestation? "An eye for an eye" is one thing; a "sign for a molestation or human life" quite another. The sign sanction may be too much, too different, or too little, depending on one's perspective, a perspective one can justify only by entirely subjective, intuitive assessments of "equal harm."

A second problem lies in the pure retributivists' questionable assumption of free will. For example, if a drunk driver is an alcoholic, is her moral culpability the same as a DUI offender unafflicted by this disease? Unless the preliminary, and highly problematic, assumption of free will is irrebuttable, then individual factors like alcoholism pose tough complicating factors for retribution theory in general and thus also for retributivist justifications of shaming. To ignore these factors may result in disproportionate, unequal, and inhumane punishment. Yet, if one admits some individual factors into the inquiry, then it becomes difficult to justify blanket exclusion of others, such as environmental or situational pressures that may make drinking and driving more or less the product of "free will." Problems of determinism and free will are inescapable, unless one ignores them completely, which only pure retributivists are willing to do.

69. *See* F. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL 2-4 (1981).

ties for reflection that actually change the defendant's attitude as well as her behavior.[70]

Rehabilitation theory gained popularity in the United States during the late 1800s, and dominated penal philosophy during most of the 1900s.[71] Despite the initial promise of rehabilitation as a humane and sensible organizing principle of punishment, however, its appeal waned.[72] The central reason for this decline was that the practical complexity, coupled with the extreme moral complexity, of refashioning human character to cabin or obliterate criminal instincts overwhelmed reformers.[73]

Indeed, the rising doubts about whether rehabilitation is a convincing justification for punishment go deeper than skepticism about whether prisons reform offenders. Some observers question whether any feasible, humane punishment method can reform criminals. They argue that the people most in need of "character reform" are most impervious to it. Environmental, economic, biogenetic, psychological, and other external and internal factors in place before and after the rehabilitative intervention are, they claim, far more influential on offender character and behavior than any state-imposed intervention can ever be.

Moreover, some critics observe, successful rehabilitation may be difficult to assess. An offender can beguile her therapists, the parole board, or others into believing that she has "really changed" this time, and has powerful incentives to engage in such a charade. Measuring rehabilitation of a human being thus can be as difficult as predicting

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70. I include both reactions as evidence of rehabilitation, though pure rehabilitation anticipates the latter, complete character metamorphosis, whereas specific deterrence does not. Professor Blecker describes the distinction between pure rehabilitation and specific deterrence as follows:

> Specific deterrence and rehabilitation do overlap. Perhaps specific deterrence is a threat of repeating a bad time inside [prison], whereas rehabilitation is a promise of a better time outside. . . .
>
> Rehabilitation — or reformation — essentially consists in the acquisition of attitudes, values, habits and skills by which an "enlightened" criminal comes to value himself as a valid member of a society in which he can function productively and lawfully.

Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1197 (1990).

71. *See* F. ALLEN, *supra* note 69, at 5-7. Allen marks the decline of the rehabilitative ideal as occurring in 1970s. *Id.*

72. *See id.* at 24-25 (describing critiques of rehabilitation theory).

73. *See* H. PACKER, *supra* note 66, at 55-58. For example, incarceration does not seem to reform criminals, as its early advocates hoped it would. On the contrary, prison may congeal criminal characters and teach inmates new norm-breaking skills, *see, e.g.*, Blecker, *supra* note 70, at 1192-202, or may even be an attractive setting to some few prisoners. *See, e.g.*, Duncan, *"Cradled on the Sea:" Positive Images of Prison and Theories of Punishment*, 76 CALIF. L. REV. 1201, 1219-30 (1988). Current recidivism rates also suggest that a rehabilitation justification for imprisonment is implausible. Ex-prisoners simply are not forswearing crime in large numbers.

her future dangerousness, which is difficult indeed.[74]

Despite these and other criticisms of rehabilitation theory, a confirmed rehabilitationist could argue that experience proves only that our past methods do not reform offenders, not that rehabilitation cannot ever work. Absent proof to the contrary, she might add, shaming sanctions can be justified under rehabilitation theory. If, for example, a particular offender were sufficiently pained by wearing a sign that announced her status as a convicted felon, then she might be "scared straight," and refrain from committing that offense in the future. More obviously, if an offender is compelled to apologize to, or interact with victims, then she might become sensitized to the human consequences of criminal acts. The experience might cause her to realize more fully her responsibility to others and thus to avoid conduct that could imperil them. Shaming therefore can be justified under rehabilitation theory, provided that the evidence, which is not yet available, bears out that this "rehabilitation" in fact influences behavior.[75]

In sum, rehabilitation theory arguably offers an analytically sound defense of shaming practices. Because, however, rehabilitation theory anticipates offender reform, the rehabilitation-based justification for shaming ultimately depends on whether a particular shame sanction in fact will effect this consequence.[76]

D. *Deterrence*

According to deterrence theory, the primary goal of punishment is not to reform the offender or to cancel the moral debt of her crime; it is to prevent future crimes.[77] Deterrence theory holds that society in-

74. *See, e.g.*, Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 110 (1984) (discussing the inaccuracy of clinical estimations of future dangerousness).

75. Less clear is whether exile-type sanctions would promote rehabilitation ends. The message of banishment seems quite the opposite: you are *beyond* reform, and so must be expelled. For example, Aristotle wrote that "punishments and penalties should be imposed on those who disobey and are of inferior nature, while the *incurably bad* should be completely banished." THE NICOMACHEAN ETHICS OF ARISTOTLE 271 (D. Ross trans. 1966) (emphasis added). The only conceivable rehabilitation-based justification for permanent exile would be that the loss of social identity in one community might hurt enough to discourage the offender from risking banishment from another. Thus banishment might be an attempt at "transcommunity" rehabilitation. It seems very unlikely, however — at least to me — that those who banish offenders are acting out of rehabilitation instincts, or that banishment has reforming effects. Absent the opportunity to and the formal means of rejoining the community post-banishment, the more compelling justification for banishment is containment — that is, an attempt to protect the community from the offender by keeping her removed from them. For shaming sanctions, in contrast, rehabilitation-type justifications do make sense and may well be the reason that some modern reformers favor these methods.

76. *See infra* section VI.C.

77. *See generally* J. ANDENAES, PUNISHMENT AND DETERRENCE 1 (1974); PANEL ON RESEARCH ON DETERRENT AND INCAPACITATIVE EFFECTS, NATL. ACADEMY OF SCI., DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME

flicts punishment on wrongdoers in order to deter the commission of similar delicts by the same offender (specific deterrence) or by others (general deterrence). Indeed, a significant number of philosophers insist that deterrence is the *only* legitimate end of punishment,[78] provided that the punishment is not unreasonably harsh. Certainly, deterrence figures prominently in most Western theories of punishment.[79]

The primary objections to deterrence theory are practical ones, though theoretical objections surely can be, and have been, made.[80] The common practical complaints are, first, that deterrence effects are virtually impossible to gauge accurately,[81] and second, that the theory wrongly presupposes that criminal acts are motivated by rational, cost-benefit analyses by wrongdoers.[82] The theory also assumes that

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RATES 4 (1978) [hereinafter DETERRENCE AND INCAPACITATION] (deterrent effects indicated by an inverse relationship between sanction levels and crime rates). The philosophical foundation traditionally invoked in support of deterrence theory is utilitarianism. Punishment is regarded as an evil that contributes to the greatest good for the greatest number by preventing a greater evil. *See* J. BENTHAM, *supra* note 67, at 171; H. PACKER, *supra* note 66, at 39.

78. C. BECCARIA, ON CRIMES AND PUNISHMENTS 75 (1953); J. BENTHAM, *supra* note 67, at 179-89.

79. Blecker, *supra* note 70, at 1173 (pointing out the roots of deterrence theory in Plato's writings).

80. For example, some philosophers point out that if deterrence is one's sole theory of punishment, then one would not object to the punishment of an innocent person in order to deter others. Also, if general deterrence is the only end, then we need not actually punish offenders; apparent threats are sufficient. To a utilitarian, then, "real justice" is irrelevant, as long as others are deterred.

81. For a discussion of the difficulties of assessing the deterrent effects of punishment, *see* DETERRENCE AND INCAPACITATION, *supra* note 77, at 61-63.

82. *See, e.g.*, J. ANDENAES, *supra* note 77, at 42-44 (describing critiques of deterrence theory that question the assumption of rational behavior by potential offenders). In his historical account of capital punishment, G.R. Scott suggests that public punishments may not deter crime. G. SCOTT, THE HISTORY OF CAPITAL PUNISHMENT (1950). The following interview is of a convict whose death sentence had been remitted, though he had been "within an ace of being hanged for coining." *Id.* at 63.

Q: "Have you often seen an execution?"
A: "Yes, often."
Q: "Did not it frighten you?"
A: "No — why should it?
Q: "Did it not make you think that the same would happen to yourself?"
A: "Not a bit."
Q: "What did you think then?"
A: "Think? Why, I thought it was a — shame."
Q: "Now when you have been going to run a great risk of being caught and hanged, did the thought never come into your head, that it would be as well to avoid the risk?"
A: "Never."
Q: "Not when you remembered having seen men hanged for the same thing?"
A: "Oh! I never remembered anything about it; and if I had, what difference would that make. We must all take our chance. I never thought it would fall on me, and I don't think it ever will."

Id.

Such anecdotes fuel our worst nightmares about crime. We prefer to think that most people can, and do, imagine themselves "on the gallows," and that this possible scenario curbs law-

sanctions can inspire fear in some, or most, onlookers. Different people, however, experience fear differently. The punishment thus must be one that scares a significant number of would-be perpetrators.[83]

The assumed causal link between threat and deterrence cannot be verified without better knowledge than we currently possess, both about the specific causes of norm-violating behavior, and about the relation between deterrence and personality. In a well-known study of deterrence, Zimring and Hawkins illustrate the byzantine complexity of tracing the effect of legal threats[84] on human behavior. For example, intuition probably suggests that a legal sanction would decrease the attractiveness of the sanctioned conduct. In fact, however, a sanction can actually *enhance* the attractiveness of the proscribed conduct, though this reaction may not be sustained.[85] That is, a sanction can place *both* positive and negative value on an activity, and "no general statement can be made about which pull will be stronger."[86] Empirical proof of the assumptions on which deterrence theory rests therefore depends on extremely complex assessments of human motivation

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breaking instincts. That is, shame sanctions, like legal threats in general, presuppose a positive correlation between negative penalties for a behavior and avoidance of it. But the prospect of shame may not necessarily provide avoidance. Whether and to what extent it does hinge on multiple, contradictory theories about criminal personality and about subcultures of deviance.

Sigmund Freud, for one, believed that criminals committed bad acts in order to be caught and punished. He theorized that unresolved, unconscious guilt and anxiety lead offenders to commit the acts and be punished. S. FREUD, THE EGO AND THE ID (1961). That is, whatever motivates nondeviant members of society to conform to established norms may not motivate deviants. If Freud was correct, then adding to or "piling on" more stigma to conviction penalties may not deter a larger population than already is deterred by the prospect of conviction and punishment. Those who *are* susceptible to this sort of legal threat tend to obey the laws anyway. Those who do *not* obey laws are unlikely to be deterred more by the additional stigmatizing effect of public shame than by conviction and conventional punishments. The key to controlling this group might be increasing their perceived chances of getting caught — though according to Freud, even certain apprehension would not deter some offenders, because they may *want* to be caught.

Other commentators likewise present a psychological portrait of criminal subcultures that undermines strong deterrence claims for shame sanctions. Reporting on this work, one article notes that some theorists describe the offender as someone who "does not experience real guilt or shame concerning his crimes .... Indeed, the successful offender is described as triumphant .... [The] criminal is always self-confident and never thinks of his actions as being morally wrong." Frazier & Meisenhelder, *Exploratory Notes on Criminality and Emotional Ambivalence,* 8 QUALITATIVE SOC. 266, 268 (1985) (describing the work of Yochelson and Samenow).

Likely a *more* accurate profile, however, is that most criminals believe not that their acts are morally correct, but that they are in some way emotionally satisfying, justified, or "thrilling." *Id.* at 271. To most offenders, then, doing wrong is not intrinsically good, but it may seem worth it.

83. *See* W. TSAO, *supra* note 60, at 58-59; F. ZIMRING & G. HAWKINS, DETERRENCE 245-48 (1973).

84. Zimring and Hawkins coined the phrase "legal threat." *See* F. ZIMRING & G. HAWKINS, *supra* note 83, at 91-92.

85. *See* F. ZIMRING & G. HAWKINS, *supra* note 83, at 94-96; *see also* J. KATZ, SEDUCTIONS OF CRIME: THE MORAL AND SENSUAL ATTRACTION OF DOING EVIL (1988).

86. F. ZIMRING & G. HAWKINS, *supra* note 83, at 96.

and behavior. Given these complexities, the deterrence literature is equivocal and not at all susceptible to simple summaries.

Deterrence theorists do agree, however, that strong socialization is a significant predictor of law-abiding behavior. As Zimring and Hawkins observe, "social disapproval, which is an important part of most threatened consequences, will be carefully avoided by the strongly socialized individual."[87] Thus, legal threats are most likely to be effective in constraining the behavior of strongly socialized people, who already tend not to engage in criminal behavior. Many deterrence theorists also believe, despite the lack of absolute empirical proof, both that legal threats impose at least some constraint on deviant behavior, and that legal threats' best justification lies in this desirable effect.[88]

A deterrence theorist likely would conclude that, as a theoretical matter, shaming sanctions probably are justifiable. Signs and apologies — like any other negative consequence of a criminal conviction — might deter the specific offender or other would-be offenders from committing similar acts.[89] And, like all penalties, shaming sanctions should deter most effectively those people who are most strongly socialized. This means, of course, that the population most vulnerable to humiliatory punishments probably includes mainly, if not only, those people who least *need* them as an incentive to avoid wrongdoing. But a deterrence theorist might respond that this merely indicates that shaming sanctions may be redundant deterrence tools; it does not mean that deterrence ends cannot justify these sanctions.

Deterrence of future wrongdoing thus may be an adequate justification for the new shaming sanctions. Indeed, the judges and legislators who have proposed shaming sanctions probably believe quite

87. *Id.* at 120. Gerber and McAnary have made a similar point, concluding as follows:

> The prevention of crime as a goal of society is not ultimately achieved by either crass fear or huge detention centers but by a successful communication of disapproval. It is a moral process which depends for its success on a widely accepted system of law which reflect[s] a consensus of values and embod[ies] a fairness in procedure that guarantees equality of enforcement.

Introduction to CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS AND JUSTIFICATIONS, *supra* note 59, at 5.

88. *See* F. ZIMRING & G. HAWKINS, *supra* note 83, at 93; *see also* J. ANDENAES, *supra* note 77, at 16-29; Cramton, *Driver Behavior and Legal Sanctions*, 67 MICH. L. REV. 421, 452-53 (1969). This belief is weakened by data that tend to show that existing sanctions, especially incarceration, are not significant deterrents of criminal behavior. *See, e.g.*, DETERRENCE AND INCAPACITATION, *supra* note 77, at 37-42, 59-63.

89. Whether banishment is meant to serve even general deterrence ends, however, is questionable. Again, the more likely purpose is containment, not deterrence. But the threat of expulsion surely would frighten community members who value community acceptance. *See* Liggio, *The Transportation of Criminals: A Brief Political-Economic History*, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 273, 281-83 (R. Barnett & J. Hagel eds. 1977).

strongly that the threat of social ostracism will deter people from committing similar crimes. As was true of rehabilitation theory, however, deterrence theory is consequentialist; as such, a complete justification of shaming based on deterrence theory must consider whether the assumed deterrence consequences of these new sanctions actually occur. The critical inquiry for deterrence theorists thus becomes whether shaming in fact will prevent future crimes.[90]

E. *Incapacitation*

The final classical justification for shaming sanctions is incapacitation. Incapacitation theory holds that punishment should protect the community from the offender, either by confining her physically, or otherwise disabling her from committing future crimes.[91] An incapacitationist favors external controls on an offender with demonstrated criminal propensities, rather than relying on the offender's capacity for self-control. Imprisonment, banishment, home electronic surveillance, branding, mutilation, chemical treatment, and castration all are examples of incapacitative punishments.[92] Each seeks either to physically remove the offender from society, or to make criminal acts substantially more difficult to perform.

Incapacitation theory has at least two significant weaknesses. The first is that it assumes that we can predict which criminals pose an ongoing risk of harm. Incapacitationists often rely on past criminal activity, demographic factors, or other variables as strong predictors of future criminal activity. If these variables do not yield accurate predictions, however, then some offenders will be punished who do not, in an incapacitationist's sense, "deserve" it. The second weakness, according to some observers, is that the theory is too forgiving of some offenders. Incapacitationists believe that offenders who pose no future risk to the community should not be punished, though they may have committed quite serious criminal acts. For example, "heat of passion" murderers, or other criminals who act on situation-specific or person-specific impulses and are unlikely to commit future transgressions, can be released if they pose little or no danger to others. To retributivists in particular, this is an unacceptable response to a serious injury.

Despite these potential shortcomings, incapacitation theory offers support to the shaming sanctions. Public apologies, confessions, or

90. *See infra* section VI.B.

91. *See, e.g.*, H. PACKER, *supra* note 66, at 48-53.

92. *See supra* notes 32-39 and accompanying text.

signs may well be incapacitative, in that they might make future criminal acts more difficult for the offender to perform. Publicizing the offender's identity may alert community members of her criminal past and cause them to isolate her socially or professionally. People might, for example, refuse a convicted embezzler a position that gives her access to funds. A known child molester may be denied contact with children. And a convicted drunk driver may be refused alcohol or a job that involves use of a vehicle. As such, the shaming sanctions may have a disabling effect on the offenders, and thus may claim to serve incapacitation-type ends.

F. *Conclusion*

The traditional theories of punishment suggest that all of the new shaming sanctions can be justified under one or several of the basic theories. Indeed, any and all forms of punishment that our contemporary legal order might concoct likely would be consistent with at least one of these four capacious and controversial theories.

In the United States, no one theory clearly dominates all criminal punishment practices in a coherent, comprehensive way. Rather, justifications that courts and legislatures offer for punishment practices seem to reflect a pluralistic theory of punishment. As such, the political acceptability of any punishment technique, including shame sanctions, will depend on whether the evidence indicates that it actually promotes *any* of the four classical ends of punishment, rather than on whether it promotes a particular end. That is, does the new shaming in fact deter, rehabilitate, or incapacitate criminals, *or* exact proportional revenge for crime? And, if it does promote any of these ends in fact, is this shaming a reasonably humane way to further these ends? In the remaining sections, I explore both the likely práctical effectiveness and the humaneness of shaming.

IV. The Emotion of "Shame"

> Were they ashamed when they had committed abomination? Nay, they were not at all ashamed, neither could they blush.[93]

In order to evaluate both the practical effectiveness and the humaneness of a shaming sanction, one first must define the phenomenon of shame and identify the conditions under which it occurs. The key sources of this definition and the conditions of shame are psychological and anthropological materials.

Psychological studies demonstrate the complexity and gravity of

93. *Jeremiah* 6:15.

the shame emotion, and the extreme difficulty that judges are likely to experience if they attempt to craft sanctions that match offender-specific definitions of shame. Psychologists describe shame[94] as a highly individual experience that strikes at the center of human personality. The emotion evoked is a feeling, a "kind of fear of dishonor . . . [that] produces an effect similar to that produced by fear of danger."[95] This feeling is triggered by tension between an individual's ego ideal and her conscious or unconscious awareness of the ego's actual potential.[96]

Shame forces a downward redefinition of oneself, and causes the shamed person to feel transformed into something less than her prior, idealized image.[97] Wurmser describes the reaction as follows:

> In shame one feels frozen, immovable, paralyzed, even turned into stone or into another creature, such as an ass or a pig (not only in jokes, but in dreams, delusions, and myths as well); contempt by another has succeeded in changing the human partner into a mere thing, into a nothing. . . . The loss of love in shame can be described as a radical decrease of respect for the subject as a person with his own dignity; it is a disregard for his having a self in its own right and with its own prestige. . . . The thrust of this aggression is to *dehumanize.*[98]

This dehumanization and social demotion typically occur only when a shameful trait or act becomes visible, and is exposed to others.[99] Thus, one condition of the shame emotion is an audience. As one writer has said, "Shame is essentially public; if no one else

94. The dictionary defines shame as "a painful emotion caused by consciousness of guilt, shortcoming, or impropriety in one's own behavior or in the behavior or position of [another]." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2086 (1986).

95. THE NICOMACHEAN ETHICS OF ARISTOTLE, *supra* note 75, at 104-05.

96. *See, e.g.*, G. PIERS & M. SINGER, SHAME AND GUILT 28-29 (1971). The psychological theories that elaborate on shame are fairly recent. Freud and Jung dealt only briefly with the emotion of shame in their celebrated works. *See generally* Hultberg, *Shame — A Hidden Emotion,* 33 J. ANALYTICAL PSYCHOLOGY 109, 111-13 (1988) (offering a brief historical survey on the treatment of shame in in-depth psychology). Anthropologists, not psychologists, have emphasized the role of shame in their studies. *See id.* at 113-15.

97. G. PIERS & M. SINGER, *supra* note 96, at 26-27.

98. L. WURMSER, THE MASK OF SHAME 81 (1981) (emphasis added); *see also* Hultberg, *supra* note 96, at 116.

99. C. SCHNEIDER, SHAME, EXPOSURE AND PRIVACY 34-35 (1977); *see also* E. ERIKSON, CHILDHOOD AND SOCIETY 252 (2d ed. 1963) (describing the exposure and visibility inherent in shame).

Psychologists have attempted to distinguish "guilt" from "shame." *See, e.g.*, A. BUSS, SELF-CONSCIOUSNESS AND SOCIAL ANXIETY 157, 159-61 (1980) ("*Shame* is a fear of abandonment; *guilt* is a fear of castration."); H. LYND, ON SHAME AND THE SEARCH FOR IDENTITY 34-36, 50, 64 (1958); S. MILLER, THE SHAME EXPERIENCE 140-43 (1985) (distinguishing shame from guilt on basis that shame involves attention to a defect in a specific self-image, whereas guilt involves attention to one's actions, not one's self-image); L. WURMSER, *supra* note 98, at 80-82 (concluding that shame sanctions use contempt as the punishment; guilt sanctions use anger and hatred); Frazier & Meisenhelder, *supra* note 82, at 274-80 (contrasting guilt and shame on basis of whether the emotion is based on internal (guilt) or external (shame) controls).

Some anthropologists have relied on these distinctions to categorize certain cultures as "shame" or "guilt" cultures, depending on whether they rely on external or internal sanctions.

knows, there is no basis for shame. And if your action is seen, you can diminish shame only by running from the group."[100] Shaming requires witnesses who will learn of the shameful act and who will condemn it.

The audience to a shaming must include people who are important to the offender,[101] or she will not be "ashamed." The anxiety that shaming exploits is a fear of abandonment or isolation, usually from a social group or other community that is necessary or valuable to the individual.[102] The individual fears that, given the revelation of her shameful act and transformation into a lesser self, people will disregard or abandon her. Abandonment or isolation from a group is anxiety-producing only for an individual who shares the values of the community or at least fears exposure before them. To be effective, the public rebuke therefore must threaten a significant relationship.[103]

Goffman describes shame as a dynamic social exchange in which an individual "loses face" or becomes "shamefaced."[104] As he defines it, face is "the positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact."[105] Face is lost

when information is brought forth in some way about his social worth

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See G. PIERS & M. SINGER, *supra* note 96 at 59-61 (describing and reformulating these distinctions).

In legal discourse, happily, these fine-tuned psychological distinctions between guilt (internal) and shame (external) may be overlooked. As other commentators have observed, criminal law theorists need only concern themselves with whether public opinion plays some role in character formation and behavior. *See* J. BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 57 (1989); Note, *A Perspective on Non-Legal Social Controls: The Sanctions of Shame and Guilt in Representative Cultural Settings*, 35 IND. L.J. 196, 199-204, 206 (1959). They need not decide whether negative public opinion evokes "shame" versus the closely related phenomenon of "guilt." Consequently, I use the term "shame" throughout, but mean it to include the guilt emotion wherever guilt would likewise be produced by public shaming.

100. A. BUSS, *supra* note 99, at 159; *cf.* H. LYND, *supra* note 99, at 27-28 (concluding that "[t]he exposure may be to others but, whether others are or are not involved, it is always . . . exposure to one's own eyes"); G. PIERS & M. SINGER, *supra* note 96, at 66-68 (observing that the audience need not be actual for a person to experience shame; it can be fantasized).

101. A. BUSS, *supra* note 99, at 160.

102. *See, e.g.*, G. PIERS & M. SINGER, *supra* note 96, at 29 ("Behind the feeling of shame stands not the fear of hatred, but the fear of *contempt* which, on an even deeper level of the unconscious, spells fear of *abandonment*, the death by emotional starvation."); H. LYND, *supra* note 99, at 67; Hultberg, *supra* note 96, at 115-16 (Shame "is the fear of being excluded from human society. Shame implies fear of total abandonment. It is not a fear of physical death, but of psychic extinction."). As Goffman has observed, an individual may violate some social expectation or norm, yet be "untouched by this failure," when the individual is sufficiently alienated from the censuring group. He is "protected by identity beliefs of his own, he feels that he is a full-fledged normal human being, and that we are the ones who are not quite human." E. GOFFMAN, STIGMA 6 (1963).

103. C. SCHNEIDER, *supra* note 99, at 36.

104. E. GOFFMAN, *On Face-Work*, in INTERACTION RITUAL 5, 8-9 (1967).

105. *Id.* at 5.

> which cannot be integrated . . . into the line that is being sustained for him. . . . [He is] *out of face* when he participates in a contact with others without having ready a line of the kind participants in such situations are expected to take.[106]

In other words, shame requires a social encounter, an interaction between an individual and the group that exposes weaknesses or deficiencies in the individual and that reduces her post-shaming social standing or compromises her own idealized prior image.

Other psychologists likewise stress the social dynamics of shaming. John Braithwaite, who has written extensively on shame and punishment, has noted that "[w]hereas an actual punishment will only be administered by one person or a limited number of criminal justice officials, the shaming associated with punishment may involve almost all of the members of a community."[107] This means that the relevant audience must experience and must communicate a roughly common sense of outrage at, or contempt for, the sanctioned member's actions. If all or most of them ignore the spectacle, it loses its sting. This audience participation often includes withdrawal from the offender. Public shaming in many instances is followed by community shunning. Indeed, shaming exploits one's fear of shunning by others, or banishment from the community.[108]

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106. *Id.* at 8; *see also* E. ERIKSON, *supra* note 99, at 406 (describing the infantile roots of shame and the fear of "loss of face before all-surrounding, mocking audiences").

107. J. BRAITHWAITE, *supra* note 99, at 73.

108. Exile of an offender may occur in one of two ways. The community may be ordered to, or elect to, avoid the offender socially or otherwise; or, the court or other community official may take steps to secure her physical or other isolation from the community even absent community cooperation. The first type of exile is shunning; the second is banishment. Banishment typically is reserved for the most egregious cases, where the offender must be expelled altogether from the community or some part thereof. The banishment may be temporary, like a limited-term sentence, or permanent, like lawyer disbarment.

Banishment represents the ultimate downward manipulation of social identity of an offender. In effect, the local identity is erased, eradicated. The shunning is complete and permanent. The defendant must effect new contacts elsewhere, and begin a job and life in another community. Shunning is a less severe punishment, at least to the extent that the individual remains in the community and may have the opportunity to regain her neighbor's approval.

Shunning and banishment of an offender can serve several functions. First (and likely foremost) is the protection of the community from the exiled one. Second is the deterrence of similar acts by other remaining members of the community. A third possible function is to prevent retaliation by some members of the community toward the offender, and divisive factionalization of the group.

Effective shunning practices, like effective shaming, require audience participation. The audience must be willing to assume not only the role of approving spectator, but also that of active disciplinarian. The penalty's effectiveness depends upon the community's willingness to endorse the sentence by avoiding the wrongdoer. Audience complicity of this sort may be secured in several ways. Community withdrawal from a wrongdoer is particularly likely to occur in a community with powerful social and normative cohesion, like the Amish or the gypsies. But it may also occur in a community that punishes its members, formally or informally, if they fail to cooperate in shunning the offender. This may occur in authoritarian regimes that can inspire sufficient fear in its people to secure their cooperation.

Of course, the members of all communities may shun an offender because they fear harm

V. CULTURAL CONTEXT

> The modern cry in Western countries for community alternatives to the established systems of crime control is a belated need for simpler solutions to crime than repression by helicopters, electronics, computerization of records, and armed policemen. Unfortunately, the "communities" referred to are often not in existence so that despite the awareness, such lessons are difficult to learn from the advanced urban complexes.[109]

A. *Introduction*

In addition to the individual-specific psychological meaning of shame is a culture-specific[110] or anthropological meaning that influences the effectiveness of a shaming sanction. Because shaming involves audience participation or shunning of the offender or both, cultural patterns and norms of behavior partly determine whether the audience will participate in the ritual. Also, to the extent that social conformity is achieved through a shared sense of shame and guilt,[111] these emotions necessarily have community- or culture-dependent meanings. There is, in other words, a "cultural ego ideal."[112] For example, if a culture idealizes work as a means of accomplishment,

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from the offender. For example, an employer may be disinclined to hire a convicted thief out of fear of her propensity to commit similar bad acts, such as embezzlement. Formalized shunning and banishment rituals nevertheless are more characteristic of close-bound, distinctive communities, than of impersonal, less distinctive cultures.

109. W. CLIFFORD, CRIME CONTROL IN JAPAN 175 (1976).

110. Words like "culture," "community," or "society" have elusive meanings. Goffman captures this slipperiness in the following passage:

> To say that a particular practice is formed *in* a given place (or a given class of places) leaves a great deal unspecified even when systematically collected data are available. For it is often unclear whether it is claimed that the practice occurs throughout the place or only somewhere in it, and if throughout, whether this is the only place it occurs. Furthermore, [some] social arrangements and small behaviors . . . have the awkward property of pertaining not to a set of individuals that can be bounded nicely, like the citizens of a particular nation state, but to groupings whose boundaries we know very little about. . . . In any case, the reference unit "American Society" (which I use throughout), is something of a conceptual scandal, very nearly a contradiction in terms; the social unit "civilization" (whatever that might mean) is as relevant as that of nation state.

E. GOFFMAN, *supra* note 55, at xiv-xv.

The dangers of obscuring contextual complexities by invoking broad-brush terms like "culture" are massive. Everything that ethnographers say in general about a people or social group may be wrong in practical, particular applications. These errors may be compounded when cultural generalizations are plucked from their original anthropological context and applied to new, foreign settings, like criminal law theory. Nevertheless, generalizations may offer useful organizing outlines of significant tendencies in human relations. Goffman himself assumes this, insofar as he relies on the reference units of "society" and "Western society" despite his misgivings about these words.

111. *See* G. PIERS & M. SINGER, *supra* note 96, at 53-55 (describing the role of shame and guilt in socialization of the individual).

112. *Cf. id.* at 91 (calling it a cultural "super ego" in reliance on Sigmund Freud's works); H. LYND, *supra* note 99, at 28 ("The particular aspects of the self especially vulnerable to exposure differ in different cultures.").

then a beggar in that culture " 'ought to be ashamed.' "[113] Indeed, these cultural meanings may be inescapable.[114] Finally, if the purpose of official shaming is to deter members of the community from committing similar acts, then the judge must be able to ascertain and exploit this shared sense of shame.

Measurements of the cultural ego ideal, like those of the individual ego ideal, are difficult to perform[115] given the number and complex interaction of variables that give rise to shame. Moreover, the cultural meaning of shame varies widely across national cultures and within pluralistic, national cultures. Further compounding any attempt to describe a cultural meaning of shame is that anthropologists disagree about which cultural variables most influence a particular culture's definition of shame. For example, some researchers have identified childrearing practices as the primary variable that affects both cultural and individual meanings of shame.[116] Others argue, however, that a focus on childrearing alone undervalues other relevant cultural variables, which may include the society's "beliefs and values, contact and conflict with other cultures, and the historical development of particular institutions in a particular geographical environment."[117] Regardless of whether any one factor is dominant, the studies confirm that a host of cultural factors can influence which parts of the self will be especially vulnerable to public exposure.[118] One's susceptibility to the sort of moral criticism that "shaming" implies thus depends both on cultural variables[119] and on the individual experiences already

113. G. PIERS & M. SINGER, *supra* note 96, at 54-55; *see also* Kaufman & Raphael, *Shame: A Perspective on Jewish Identity*, J. PSYCHOLOGY & JUDAISM, Spring 1987, at 30, 34 (describing sources of shame in contemporary American society, such as failure to succeed, unpopularity, and failure to be independent); Myers, *Emotions and the Self: A Theory of Personhood and Political Order Among Pintupi Aborigines*, 7 ETHOS 343, 349 (1979) (describing the cultural understandings that may give rise to an emotion — such as shame — or to a sense of its appropriateness).

114. As Piers has observed, "[m]any a Utopian writer has tried to project a society which is cohesive without fear of guilt-creating punishment and without shame-producing competition. No attempt at realization has succeeded so far." G. PIERS & M. SINGER, *supra* note 96, at 55.

115. *Id.* at 83-84. Moreover, these difficulties "are greatly multiplied when the measurements have to be standardized for different cultures." *Id.* at 83.

116. *See, e.g.*, F. ELKIN & G. HANDEL, THE CHILD AND SOCIETY: THE PROCESS OF SOCIALIZATION 63 (4th ed. 1984).

117. G. PIERS & M. SINGER, *supra* note 96, at 89.

118. *See* H. LYND, *supra* note 99, at 28. For example, in some cultures death by decapitation was viewed as more honorable than death by hanging. In China, however, severance of the head from the body was considered a disgraceful death. *See* G. SCOTT, *supra* note 82, at 167.

119. Here again, though, I offer a caveat. The anthropological studies may overemphasize or misinterpret the significance of shaming among cultures that are foreign to the anthropologist observer. For example, although some studies of North American Indian tribes suggest that sharp differences exist between the tribal groups and white groups, other investigators have concluded otherwise. *See* G. PIERS & M. SINGER, *supra* note 96, at 76-78. Moreover, there is a

mentioned.

In the following sections, I describe several cultures in which official shaming is, or was, a particularly forceful and common means of enforcing norms. The shared characteristics of these cultures lend insight into the cultural conditions under which shaming may be a meaningful, effective, and humane sanction. In general, these cultures are ones that seem to possess a reasonably coherent, and widely acknowledged, cultural meaning of shame, which officials or community leaders can fairly readily exploit to secure adherence to cultural rules.

B. *Pre-World War II Japan — A Paradigmatic Shame Culture*

Anthropologists have identified as shame cultures[120] ones in which

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tendency to homogenize the practices of the various tribes, and to deemphasize or distort the differences among them. *Id.* at 76-77.

120. As indicated in note 99, *supra*, anthropologists once commonly invoked a conceptual model that distinguishes between guilt cultures and shame cultures. *See generally* Hultberg, *supra* note 96, at 113. The model has been summarized as follows:

> [T]he individual in a guilt culture develops a conscience with firm ideas of right and wrong, and, in consequence, submits to certain ethical and moral principles. A guilt culture is one in which authority is based on concepts like transgression and punishment, sin but also forgiveness, eternal salvation but also eternal damnation, a punishing God but also a merciful God. In a shame culture the highest goal is not a clear conscience but a good reputation among people. . . . In such societies, ridicule is often the hardest punishment which can be inflicted on a individual.

Id. Applying this model, some anthropologists have identified as shame cultures certain Eskimo societies, *see, e.g.*, R. LOWIE, PRIMITIVE SOCIETY 413 (1920) (discussing the song duels employed to mock offenders), early Greek culture, *see, e.g.*, E. DODDS, THE GREEKS AND THE IRRATIONAL 17-18 (1951); J. REDFIELD, NATURE AND CULTURE IN THE ILIAD 115-19 (1975), pre-World War II Japanese culture, *see* text accompanying notes 121-46 *infra*, and some North American Indian tribes' cultures, *see, e.g.*, K. LLEWELLYN & E. HOEBEL, THE CHEYENNE WAY 260-61 (1941) (describing use of satire as form of social control among the Cheyenne); G. PETTIT, PRIMITIVE EDUCATION IN NORTH AMERICA 60-62 (1946) (describing the use by some American Indian tribes of opprobrious or ridiculous nicknames to encourage the young Native Americans to observe the tribal code of proper behavior).

Some of these anthropologists rank guilt cultures and shame cultures hierarchically, with guilt cultures given more elevated status. Hultberg, *supra* note 96, at 114. As Hultberg has observed, however, this ordering may stem from the relative neglect of shame by psychologists, and from the linking of "shame" to certain (disfavored) types of society. *Id.* Post-reformation bourgeois culture, he notes, had strong connections to Protestantism and Puritanism, and thus focused more on "guilt" than "shame." *Id.* The ability to feel guilt, and the absolute distinction between right and wrong, were essential to "[keep] people rooted in bourgeois culture, by obliging them to render account to society for themselves and for their deeds." *Id.* Bias toward bourgeois culture norms thus may explain these anthropologists' notion that guilt cultures are "more advanced" than shame cultures. In any event, their dubious hierarchical claim is not critical to their descriptive claims.

One of the anthropologists' descriptive claims is that the decline of Christianity in Western European and American cultures and thus of Christian notions of good and evil, may signal a shift in these cultures from "guilt" to "shame" sanctions. If consensus about good and evil erodes, then authority that is based on the "guilt" concepts of "sin," "transgression," or "forgiveness" loses its force. Nevertheless, shame sanctions cannot provide a suitable replacement for guilt sanctions unless social consensus of a different sort emerges. This consensus need not be about good and evil, but about "face" and the conditions of favorable social standing.

As a practical *legal* matter, however, the anthropological distinctions between shame cultures and guilt cultures make little difference. In both cultures, broad social consensus is an essential

the members make frequent and conscious use of shaming as a means of behavior control. Perhaps the best known, or most often invoked, example of a shame culture is that of pre-World War II Japan.

In 1946, cultural anthropologist Ruth Benedict published a now well-known study on Japanese society.[121] Her theme was of particular interest to American readers of the day, as they had just fought a war in which understanding the Japanese psyche and cultural traditions became important.[122] Benedict concluded that shame was "the root of virtue"[123] for the Japanese people prior to World War II. Their strong concern about social judgment,[124] and the likelihood that in this close society with relatively little privacy, misconduct would not go unnoticed,[125] caused Japanese citizens to conform closely to social expectations. Moreover, if a Japanese person's social standing were attacked, she could not count on her family to rally behind her; the family's support was contingent on support from the larger community.[126] As Benedict observes, this is an extraordinary cultural response. In most societies, the family group will protect a member under attack. Thus, the significance of outside approval to the Japanese was comparatively high.

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aspect of effective legal authority. This consensus may emphasize "sin" in a guilt culture, whereas it may stress "honor" in a shame culture, but both require broad community cohesiveness. Moreover, public shaming may be effective in either culture. One may feel guilt, yet also value social approval, so that public revelation of a transgression could trigger both shame and guilt.

Of course, an offender who feels guilt or remorse may not need public "spanking" to feel punished, whereas a remorseless offender might. Thus, under an individualist scheme of punishment, shaming sanctions might be warranted less often in a guilt culture than in a shame culture. But unless a society depends *solely* on offender remorse as an instrument of social control — as few modern nation-states do — and uses *no* public method of punishment, then shame and social embarrassment are implicit aspects of its punishment scheme. Thus, any culture or social group that relies on public processes to determine guilt and punish offenders can plausibly be characterized as a "shame culture" in one sense. Meaningful sorting among cultures therefore turns not on whether its members value social approval, but on the *extent* to which they value it, and the extent to which they exploit that vulnerability to enforce social norms.

121. R. BENEDICT, THE CHRYSANTHEMUM AND THE SWORD (1946).

122. Benedict's data were not gleaned from personal visits to Japan, but from others' writings about the Japanese, from Japanese films, and from her discussions with Japan-born persons living in the United Sates. *Id.* at 5-8. Despite this methodological deficiency, her work has been influential in anthropological studies of Japanese culture.

123. *Id.* at 224.

124. *Id.* Benedict's theory has been criticized for focusing only on "public shame" and ignoring "private shame" in Japanese culture. "Public shame" would not be triggered by praise; "private shame" might be. The Japanese word "haji" extends to both types of shame, which in English might be called embarrassment (private shame) and shame (public shame). The Japanese are highly sensitive to embarrassment-haji, (or exposure sensitivity), which makes them exceptionally vulnerable to shame-haji. *See* Lebra, *Shame and Guilt: A Psychocultural View of the Japanese Self,* 11 ETHOS 192, 194 (1983) (relying on work by Sakuta).

125. *See infra* text accompanying note 139.

126. *See* R. BENEDICT, *supra* note 121, at 273-74.

This deference to external estimations of one's value was inculcated during childhood. Mothers would teach their children to know shame, upon threat of the drastic sanction of withdrawal of family affection.[127] These early childhood experiences provided "rich soil for the fear of ridicule and of ostracism which is so marked in the Japanese grown-up."[128] Elders would attempt to protect their children from the pain of future shame by schooling them in their obligations to the world, and teaching them that failure to meet those obligations would, in later life, be greeted with ridicule. The Japanese child therefore was taught social etiquette, recognition of and subordination to her duties to her neighbors, family, and community, and strong self-discipline.[129]

The Japanese pattern of childhood training, and the values on which it was premised, help place into perspective the deep importance of one's name in Japan, and the particular seriousness of an insult to a Japanese male's name. Vengeance and even suicide may have been necessary to remove the stain in some situations.[130] For example, if professional commitments were not met, this would bring shame to one's name.[131] This acute sensitivity to insult and to dishonor to one's name also explains some Japanese etiquette. A Japanese person would take great care to avoid telling another person to his face that he had made a professional error,[132] and to avoid any other shame-causing situation that would call into question another's "giri to his name"[133] that is, the obligation to live according to one's station in life.[134]

Public rebuke of an individual reared under these cultural conditions surely would strike deep and hard. Shame sanctions in Japan during this period therefore likely proved a significant deterrent to voluntary, socially disapproved behavior. On an informal level, the fear of shame produced conformity. On a formal legal level, this fear could

127. *Id.* at 286-87. Through teasing, the mother would cajole the child into socially correct behavior. For example, if a child were noisy or disobedient, the mother might say to a visitor, " 'Will you take this child away? We don't want it.' " Whereupon the visitor would take the child and begin to carry it outside the house. *Id.* at 262. The child would become frightened, and promise to be good. When the mother was convinced that the child had learned the lesson, she would relent. *Id.*

128. *Id.* at 263.

129. *Id.* at 272-73.

130. *Id.* at 145.

131. These standards were set quite high. Thus Benedict reports that school principals committed suicide because fires at their schools threatened the Emperor's picture — even though the fires were not the principals' fault. *Id.* at 151.

132. *Id.* at 152-53.

133. *Id.* at 156.

134. *Id.* at 149.

be reinforced and further manipulated through the publicity of offenses and of punishment. Moreover, the structured and tight-knit nature of Japanese society would have assured widespread agreement about the terms of social approval, an essential condition of effective shaming and shunning.

Contemporary studies of crime in Japan suggest that these informal shaming sanctions continue to work. The fear of shame, and the attendant loss of social status, help to explain the low crime rate in Japan.[135] As one commentator has said, "If crime is the price of freedom, then . . . it is a price the Japanese are not willing to pay."[136] The Japanese observe the restraints on freedom that these social expectations impose, in part because they can only escape them by leaving Japan or by living a life separate from the social structure, which is an extremely lonely life in Japan.[137] Once an individual "opts" out of the structure by refusing to conform, it is extremely difficult to reenter, because seniority is given great value. The prodigal must begin anew at the bottom.[138]

There is also little chance that a breach of the social compact will go unnoticed.[139] The Japanese today continue to live in close physical proximity, and are subject to an informal sort of "surveillance," insofar as people take an interest in each other's doings. Deviant conduct is difficult to hide.[140]

Taken together, these anthropological insights demonstrate the relationship between effective social, informal policing, and governmental enforcement of rules of behavior. Japan can rely to a significant extent on nongovernmental measures to control deviant behavior because the Japanese culture observes, and has in place informal instruments to enforce, fairly clear and coherent cultural standards.[141]

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135. *See* W. CLIFFORD, *supra* note 109, at 8-9. *But see supra* text accompanying note 81, regarding the tenuous nature of speculations about causation with crime control measures.

136. W. CLIFFORD, *supra* note 109, at 8.

137. *Id.* at 8-9.

138. *Id.* Clifford notes:

> each one in Japan has a recognized position to fill in the scheme of things, and he is expected to live up to it. The Japanese society is so constructed that if he does live up to it, then he will benefit; if he does not live up to it, then he will be despised and bring shame on all those connected with him. And if he should choose to break out of the system, to become a free-lancer, to live as a gypsy or to be unconventional in some way, then he is free to do so, but he can expect to have a very difficult time — all the more difficult if he tries to get back into the system later.

Id. at 10.

139. *See supra* text accompanying note 125.

140. W. CLIFFORD, *supra* note 109, at 13-14.

141. *Id.* at 8-11; *see also* Lebra, *supra* note 124, at 192-93. This is not meant to suggest that the modern Japanese all share a common faith or uniform set of values. In fact they embrace a

Given the Japanese emphasis on social responsibilities and on subordination to one's role within that social structure, some formal punishments that are effective in Japan fit poorly, if at all, into other cultures' punishment schemes. For example, for some crimes, Japanese prisoners are given the option of volunteering for a one-week exercise of intensive self-observation, in which the prisoner is isolated except for visits by a teacher or *sensei.*[142] The object of the seclusion and instruction is to encourage the prisoner "to see his own personality in its relation with others as a function of those relationships."[143] The prisoner is encouraged to blame himself for his complaints, and to recognize his debt to his family.[144]

This emphasis on the individual's relationship to the community is both striking and significant. The community, in turn, reinforces and rewards obedience to social duty. Thus, while manipulation of one's fear of shame may seem a harsh tool for assuring obedience, the individual receives positive affirmation in exchange for her compliance. Moreover, this punishment scheme is not wholly unforgiving; it allows for reacceptance of a contrite offender. As John Braithwaite has put it, Japan shames "reintegratively."[145] By "follow[ing] shaming ceremonies with ceremonies of repentance and reacceptance . . . [t]he moral order derives a very special kind of credibility when even he who has breached it openly comes out and affirms the evil of the breach."[146] Thus, the stakes are high when one defies the moral order, but total social banishment is a rare consequence: the offender may humble himself and thereby be reintegrated into the social fabric.

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diffusion of values. Nevertheless, the Japanese, prompted by tradition and habit, tend to continue to meet the expectations of those around them. W. CLIFFORD, *supra* note 109, at 177-78.

142. W. CLIFFORD, supra note 109, at 94.

143. *Id.*

144. *Id.* Contrast this method and underlying theory with imprisonment in the United States and the underlying religious thinking during the early nineteenth century. Prisoners would be confined to their cells and given only a Bible to read. They might receive religious instruction from ministers or lay persons. *See* S. WALKER, POPULAR JUSTICE 74 (1980). The methodology was inspired by *Matthew* 25:36: "I was in prison and ye came unto me." S. WALKER, *supra*, at 73. Today the prisoner might also, or instead, receive psychotherapy or counseling as a resocialization mechanism. Yet the ends of this psychotherapy differ from those of Japanese psychotherapy. Lebra describes the Japanese therapeutic method of Naikan, in which the client, under the guidance of a counselor, reflects in isolation on his faults in relation to the people most important to him, especially his mother. Lebra, *supra* note 124, at 205. Even in psychotherapy, the Japanese individual's obligation to her community and family is stressed to a degree unmatched in most American cultures.

Lebra emphasizes that Japan is not only a shame culture in Benedict's sense, but also a guilt culture. *Id.* at 193. Again, the nearly inextricable nature of the emotions of guilt and shame make distinctions between them hazy, if not chimerical.

145. J. BRAITHWAITE, *supra* note 99, at 74.

146. *Id.*

C. *Shaming Rituals in Other Cultures*

Though Japan offers a paradigmatic instance of a shame culture, many cultures likewise achieve significant social control and norm observation through shaming techniques. Lowie reported during the early 1900s that various Eskimo tribes relied on public embarrassment as a response to crimes against tribe members.[147] Although the various Eskimo settlements were separate societies with little political cohesion among them, within each settlement the Eskimo tribe was strongly cohesive. Thus the tribe could rely on the informal adjustment of grievances, rather than on a central governing agency.[148] One such informal Eskimo adjustment technique was the "song duel."[149] The duels were ways of sanctioning various behaviors, such as infidelity, destruction of property, and theft, among others.[150] The victim of the misdeed would compose a satirical song to mock the perpetrator and then challenge him to a public song duel.[151] Lowie describes the duel as follows:

> Drumming and chanting, [the challenger] throws his enemy's misdeeds into his teeth, exaggerating and deriding them and even rattling the family skeletons as well. The accused person receives the mockery with feigned composure and at the close of the challenger's charge returns in kind . . . . The spectators follow proceedings with the greatest interest, egging on the performers to their utmost efforts.[152]

Using these song duels, the Eskimos sought to preserve the social order without violence or other formal coercion.

A somewhat similar custom — the *vito* — historically was observed by villages in southern Spain.[153] The villagers would visit an offender's house at night and make a great noise and yell abusive songs. This annoyance could become so bothersome that the culprit would eventually decide to leave the area, thereby effecting a sort of constructive banishment.[154] Indeed, the fear of being mocked in public operates as a powerful sanction in most Mediterranean cultures, given the important role of honor and shame to Mediterranean

147. *See* R. LOWIE, *supra* note 120, at 412-15.

148. *Id.* at 413.

149. *Id.*; *see generally* A. RADCLIFFE-BROWN, STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY 205-11 (1952) (describing range of negative sanctions used by various cultures to achieve obedience to norms, from organized to diffuse, and from formal legal to informal social).

150. R. LOWIE, *supra* note 120, at 413.

151. Rasmussen, *Observations on the Intellectual Culture of the Caribou Eskimos*, in VII REPORT OF THE FIFTH THULE EXPEDITION No. 2, at 73 (1930).

152. R. LOWIE, *supra* note 120, at 413.

153. *See* J. BEATTIE, OTHER CULTURES 172 (1964).

154. *Id.*

people.[155]

The use of satire as a sanction also has appeared among Tobriand Islanders, where the injured party would shout out his accusations and derision from within his house, at night, so that all of the villagers could hear the charges. The accused one might feel compelled to leave the village, unless he was certain of his innocence or rights in the matter. The shame of being accused even caused some villagers to commit suicide.[156]

D. *Shaming in White Colonial America*

The white colonists of the United States inflicted on wrongdoers a host of punishments that bear a striking resemblance to the new shaming tools. In a turn of the century account,[157] A.M. Earle describes the colonists as "vastly touchy and resentful about being called opprobrious or bantering names; often running petulantly to the court about it and seeking redress by prosecution of the offender."[158] This ultrasensitivity, she remarks, enhanced the effectiveness of the shaming sanctions.[159] Moreover, the social intimacy of colonial communities meant that criminal offenders typically were known members of the group, not transient outsiders.[160] Thus, the fear of disgrace before the community was considerable.[161]

One colonial shaming sanction, the admonition, was administered as follows:

> Faced with a community member who had committed a serious offense, the magistrates or clergymen would lecture him privately to elicit his repentance and a resolution to reform. The offender would then be brought into open court for a formal admonition by the magistrate, a public confession of wrongdoing, and a pronouncement of sentence, wholly or partially suspended to symbolize the community's forgiveness.[162]

The admonition was a "go and sin no more" lecture, which was fol-

155. *Id.*

156. *Id.* at 176 (relying on work by Malinowski); *see also* A. EPSTEIN, THE EXPERIENCE OF SHAME IN MELANESIA 12-13 (1984).

157. A. EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS (1896).

158. *Id.* at 1.

159. *Id.* at 2.

160. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1223-24 (1982).

161. At least one historian reports, however, that the humiliatory punishments were rarely imposed on social elites. Instead, these offenders were ordered to pay a fine. *See* E. POWERS, CRIME AND PUNISHMENT IN EARLY MASSACHUSETTS 195 (1966).

162. Hirsch, *supra* note 160, at 1224; *see also* E. POWERS, *supra* note 161, at 197, 202-04 (describing public confessions).

lowed by a public apology or confession. The practice has been documented in seventeenth-century Virginia, where it involved both church and state. The offender often was forced to confess publicly to her congregation,[163] sometimes dressed in a white cloth,[164] and beg their forgiveness.[165] This forgiveness, or redemption, effectively drew the offender back into the fold and further reinforced the moral order.

The forced wearing of signs or letters that listed one's offense also occurred throughout the colonies.[166] In early Maryland, offenders were compelled to stand in the pillory wearing a sign listing their crimes.[167] Permanent labeling, through branding the offender, was another colonial method of punishing criminals.[168]

The victims of permanent labeling practices in the colonies included a vast range of offenders.[169] The temporary forms of labeling — wearing signs or initials — differed from the permanent labeling of branding or maiming in that the former punishment was intended to elicit shame but in a reintegrative fashion. Branding and maiming, in contrast, were permanent stigmas, which in effect cast the person out of the community, though they did not involve physical banishment.[170] Branding and maiming also were designed in part to prevent the offender from committing future similar acts,[171] either by warning future victims of their criminal propensities or by disabling the offender.

Other colonial forms of humiliation punishment included the "bilbo" — a bar of iron with two sliding shackles, like handcuffs, into

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163. A. EARLE, *supra* note 157, at 20, 35-36.

164. *Id.* at 111-13.

165. One account of punishment methods in Maryland during the late 1600s reports that a man "was forced to stand in open court 'with a paper on his breast declaring his offence [sic].' " R. SEMMES, *supra* note 4, at 39. In another case, a husband and wife were required to kneel before the county justices and ask for forgiveness. The justices in the case explained that they required the married couple to kneel before them because the couple had no other way to make satisfaction. *Id.* at 39.

166. A prominent literary example of the role of such shaming appears in N. HAWTHORNE, THE SCARLET LETTER (1850).

167. R. SEMMES, *supra* note 4, at 32; *see also* E. POWERS, *supra* note 161, at 198-201 (describing signs and symbols of early Massachusetts); Hirsch, *supra* note 160, at 1226 (describing wearing of signs as punishment in early Massachusetts).

168. R. SEMMES, *supra* note 4, at 35. The colonists, however, were not the originators of the labeling custom. The practice dates at least from the twelfth century. *See* A. EARLE, *supra* note 157, at 94.

169. Some Quakers were branded or maimed for practicing their faith. A. EARLE, *supra* note 157, at 138-42. Other offenders who were marked with signs or initials were drunkards, *see id.* at 88, cheats, *see id.* at 53-54, slanderers, *see* R. SEMMES, *supra* note 4, at 40, hog stealers, murderers, thieves, and runaway slaves, *see id.* at 35.

170. Hirsch, *supra* note 160, at 1228.

171. *Id.*

which the prisoner's legs were locked.[172] Earle describes the use of the bilbo sentence in seventeenth-century Massachusetts, where, for example, one "Jams Woodward" was sentenced to be " 'sett [sic] in the bilbowes for being drunk at Newetowne.' "[173] And, of course, there was the pillory, the humiliating character of which was sometimes compounded by forcing the offender not only to be sent there, but to go with dough on his head[174] or with cabbages on his head,[175] or with other symbols of his particular offense. The crowd then might seal the prisoner's mortification by throwing stale eggs at him.[176]

The ducking stool, which was used in particular for "scolding women,"[177] the stocks,[178] and the pillory all were customary features of the colonial county courthouses. Jails were uncommon before the late 1600s.[179]

The white colonists thus earned their reputation for severity in dealing with offenders.[180] Puritan culture, especially the belief in the doctrine of predestination, may help to explain the seemingly unfeeling tone, and the specific methods, of Puritan punishment.[181] The Puritans understood deviant behavior to be a mark of a person whose fixed, evil nature was becoming manifest. Their deep fear of evil and desire to reinforce the strict moral order of the community led them to emphasize formal public apologies and confessions because they believed that these public expressions of guilt and remorse would reinforce the moral order. Moreover, even if the criminal were condemned to death, the officials sought her confession before the exe-

172. A. EARLE, *supra* note 157, at 3-4.

173. *Id.* at 5.

174. *Id.* at 51 (describing the punishment of a dishonest baker).

175. *Id.* (describing the punishment of a person who had stolen cabbages).

176. *Id.* at 52.

177. *Id.* at 11, 17 (noting that the sentence was designed to "silence idle tongues").

178. *Id.* at 29. The stocks were regarded as low class, so that gentlemen were not sentenced to the stocks. The pillory was "aristocratic in comparison . . . ." *Id.* at 35.

179. R. SEMMES, *supra* note 4, at 34-35. The absence of formal prisons, however, did not mean that defendants were never physically confined. For example, Cuthbert Fenwik, "a prominent Maryland colonist," once was confined to a house that became the "prison" of St. Mary's County, but was allowed to venture to within one-half mile of the house. *Id.* at 32.

Public whippings also were a common form of punishment, and were often shockingly brutal. K. ERIKSON, WAYWARD PURITANS 188 (1966). Like the stocks, however, this punishment was not inflicted on "gentlemen." R. SEMMES, *supra* note 4, at 38-39; *see supra* note 178.

180. Still, punishment elsewhere in the world — then and now — was and is in many ways more severe. One commentator speculates that the reason the Puritans' methods nevertheless seem exceptionally harsh is that they were delivered in "cold righteousness," with a "relentless kind of certainty" that paid scant attention to offender motives, victim grief, community anger or any other emotion. K. ERIKSON, *supra* note 179, at 189. Erikson reasons that Puritan justice had a "flat, mechanical tone because it dealt with the laws of nature rather than the decisions of men." *Id.*

181. *See id.* at 194-95.

cution. The condemned person in effect would stand aside from her own life and misdeeds, pronounce them the work of the devil, and join, figuratively speaking, the crowd that affirmed the correctness of her execution.[182] This cooperation in, or "consent" to, the penalty may have relieved somewhat the Puritans' underlying discomfort, however buried, in punishing an offender whose sins were believed to be beyond her power to prevent.

Puritans' indoctrination into the will of God and the laws of nature, as the Puritans perceived them, began in childhood.[183] During the early months of life, the infant was treated indulgently. Shortly thereafter, a radical shift occurred toward a harsh, disciplined life.[184] The object was to curb or beat down the child's wilfulness as soon as possible in a direct confrontation with "original sin."[185] The effect, in psychological terms, was to deprive the child of a confident sense of autonomy.[186] As psychologists have observed, "the reverse of autonomy is the distress created by deep inner trends of shame and doubt."[187] Thus, the Puritan child became an adult who was extremely sensitive to public exposure and shame.[188]

The Puritan punishment practices, like those of the Japanese and other cultures already described, demonstrate the connection between a community's normative structure and the nature and effectiveness of legal sanctions. The colonial shaming practices can only be understood in light of the community's religious beliefs, childrearing techniques, and other culture-specific features. Like the Japanese, the Eskimo tribes, and the Tobriand Islanders, the white colonists lived in intimate, closely bound, and normatively cohesive communities, within which shaming could and did play a signal role in reinforcing standards of behavior.

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182. *Id.* at 195 ("The victim [was] asked to endorse the action of the court and to share in the judgment against him, to move back into the community as a witness to his own execution."); *see also supra* text accompanying note 55. This emphasis on cooperation by the criminal was not unique to the Puritans. During the 1700s in Amsterdam, the authorities likewise encouraged penitence of criminals, such that "[t]he execution of a disbeliever was not a perfect one." P. SPIERENBURG, *supra* note 8, at 59.

183. *See, e.g.*, Demos, *Developmental Perspectives on the History of Childhood*, 2 J. INTERDISCIPLINARY. HIST. 315, 320-21 (1971).

184. *Id.* at 321.

185. *Id.* at 320-21.

186. *Id.* at 321.

187. *Id.* at 323.

188. *Id.* at 324. The Puritans' sensitivity to public shame is reflected in the large number of defamation actions they filed, as well as in the range of humiliatory punishments they employed. *Id.* at 325.

E. *Conclusion*

The effectiveness of shaming sanctions, whether formal or informal, hinges on a variety of cultural conditions. Informal sanctions appear to work best within relatively bounded, close-knit communities, whose members "don't mind their own business" and who rely on each other.[189] These cultures have widely shared moral or behavioral expectations of their citizens, which are publicly expressed.[190] High expectations of social responsibility, coupled with close social bonding, a deemphasis of personal autonomy, and strong family attachment, produce conditions that are conducive to reintegrative shaming.[191] Effective shaming also entails a strong identification between the shamed offender and other members of the community.[192]

These cultural factors help to explain why shaming as a form of social control occurs more often within small societies that are characterized by intimate face-to-face associations, interdependence, and cooperation.[193] Close relations of this type often are missing from modern urban settings.[194] The gravity of humiliatory punishments to an individual also will hinge on her relative power and resources. If she must depend greatly on the group for social, economic, or political support, or cannot leave the group easily, then a social sanction will have a tremendous impact.[195] Thus, those people who are most likely to defy social norms and risk shaming sanctions, even within close-knit societies, are the very rich and the very poor. The rich can afford to defy the norms because they are insulated by their wealth. The

189. J. BRAITHWAITE, *supra* note 99, at 8.

190. *Id.* at 10; *see also* Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 YALE L.J. 471, 483 (1954).

191. J. BRAITHWAITE, *supra* note 99, at 30.

192. Schwartz, *supra* note 190, at 483.

193. *Id.* at 477 (quoting C. COOLEY, SOCIAL ORGANIZATION 23 (1909)); *see also* Merry, *Rethinking Gossip and Scandal*, in 1 TOWARD A GENERAL THEORY OF SOCIAL CONTROL: FUNDAMENTALS 271, (D. Black ed. 1984).

194. When, however, urban conditions create tight-knit social pockets or neighborhoods with equivalent "economic and social interdependence and barriers to mobility outside the community," then informal social sanctions in the form of gossip may be powerful curbs on social behavior. *See* Merry, *supra* note 193, at 289-90. The potential adverse consequences of shaming within these pockets are the same as in other small-scale societies, including ostracism, shunning, ridicule, and banishment. *Id.* at 284-86.

195. *Id.* at 282, 286; *see also* Grimes & Turk, *Labeling in Context*, in CRIME, LAW, AND SANCTIONS: THEORETICAL PERSPECTIVES 34, 55 (M. Krohn & R. Akers eds. 1978) (noting that "[t]he effect of labeling upon self-definition depends upon the relative power of each involved individual, as each impinges upon the others in the course of the highly personal enterprise of self-definition"); *cf.* Jensen & Erickson, *The Social Meaning of Sanctions*, in *id.* at 119, 133 (concluding that "those subjects who attribute stigmatic consequences to official labels are least likely to engage in behavior which is liable to labeling. Those most likely to deviate are those for whom official labeling may be socially meaningless.").

poor may defy the norms simply because they cannot afford to conform, and because they have less "social standing" to lose.[196]

The final factor that seems to contribute to effective shaming is the culture's capacity and instinct for reinforcement of socially *correct* behavior. In intimate societies, the organs of authority often deliver both praise and rebuke. They also have established rituals for reclaiming the shamed one, should she prove herself worthy.

VI. APPLICATION

A. *Introduction*

In the following sections, I apply the foregoing psychological and anthropological materials to modern American criminal law enforcement, and speculate about whether shaming is likely to yield positive social benefits. I focus in particular on whether shaming will deter crime, insofar as I regard this as the main objective of those who favor shame sanctions.

First, I raise doubts about a court's ability to identify the individual meaning of shame, as is necessary to effect specific deterrence or rehabilitation ends. The complex nature of shame, and the practical limitations on a judge's time and inclination to make accurate estimations about an offender's ego ideal, suggest that customized shame sanctions are an impractical objective.

Second, I note that in most criminal court contexts, especially those in large urban centers, the cultural conditions of effective, humane shaming seem absent. Unlike the intimate face-to-face cultures that rely heavily on shaming, cities in the United States typically are not characterized by high interdependence among citizens, strong norm cohesiveness, or robust communitarianism. Moreover, the primary conditions to effective shaming — audience awareness and participation, a cohesive body of would-be offenders who perceive and are sensitive to the same shame, judicial personnel and procedures that can tailor sanctions to the target audience sensitivities, and a formal means of reintegrating shamed offenders — seem only weakly present in these settings. This suggests that even sanctions that are intended to exploit a community-specific, versus offender-specific, definition of shame likewise are unlikely to effect significant deterrence.

Third, I list several institutional, administrative, and other practical problems with shaming that may make it unworkable. Fourth, I invoke the historical decline of shaming as a warning against its revi-

196. Merry, *supra* note 193, at 283-84.

val. Finally, I describe a context in which many people imagine that shaming would prove exceptionally effective — middle-class crime. I suggest that even as applied to this status sensitive population, shaming may not add measurably to the deterrence value of existing sanctions.

These conclusions are subject to an obvious and important caveat. No empirical work currently is available with which to test the practical impact of shaming sanctions. What follow, therefore, are provisional hypotheses.

B. *Shaming and Offender-Specific Factors*

The signal insight from the psychological studies of shame is that the experience is personal. People are reared differently and exposed to different peer relationships and other personality shaping influences; as such, they experience shame differently.[197] Psychologists offer general statements about one's ego ideal, but these merely describe how life experiences tend to shape the ego ideal, rather than what, precisely, those events include. For example, they believe shame hinges on the extent to which a person has a confident sense of her autonomy. They do not know, however, how to assure this confidence or how to ascertain which adults lack this training and hence are exceptionally prone to shame. For a judge in a criminal case to take into account the multiple, individual meanings of shame thus would be difficult indeed.[198]

A second, practical implication of the psychological work on shame likewise suggests that shaming may not have impressive specific deterrence or rehabilitative effects. The people who are most vulnerable to shaming are the ones who are most strongly socialized.[199] This means that the people most likely to respond to public shaming sanctions are nonoffender members of the audience, not potential offenders. An offender has demonstrated her imperviousness to the relative cost of public shaming by committing the act in question. Unless she is the first person to suffer the public humiliation, or otherwise has no warning that her actions might trigger public shame, she apparently was not deterred, for whatever reasons, by the prospect of shaming. Of course, she may have imagined, unreasonably or not, that she

197. *See supra* text accompanying notes 94-108.

198. *See infra* Part VII.

199. *See supra* text accompanying note 103; *cf.* Jensen & Erickson, *supra* note 195, at 133. Lawrence Friedman once ironically remarked that, "Criminals, it was commonly observed, did not blush." L. FRIEDMAN, A HISTORY OF AMERICAN LAW 601 (2d ed. 1985). In fact, however, psychological studies on shame suggest otherwise, though offenders may blush at *different things* than nonoffenders.

would evade detection. In any event, the threat of a possible conviction and shaming best deters the people who most fear social disapproval, who usually are not offenders.[200]

On the contrary, public degradation ceremonies may reduce inhibitions that tend to cabin criminal instincts, according to some theorists. The anticipated effect of public shaming is a downward change in status, coupled with symbolic and actual shunning of the offender by others.[201] Indeed, this shunning of convicted offenders may occur even when public officials try to contain it.[202] Once the offender's status is changed, though, she may have a reduced incentive to avoid the behaviors that triggered the demotion.[203] This is especially true when, as is the case in modern American criminal courts, there is no public ritual, ceremony, or other procedure for *reestablishing* or regaining the lost status. Modern shaming, like modern punishment in general, is not "reintegrative." The stigmatized offender thus may "drift" toward subcultures that are more accepting of her particular norm violations.[204] Association with the subculture in turn may facilitate future crime, especially for crimes that require multiple actors or hard-to-obtain materials, tools, or connections.

Labeling theorists believe that these potential negative consequences of stigmatizing offenders outweigh any benefits. Specifically, they argue that by labeling an offender "deviant" — which shaming sanctions clearly try to do — the state may produce "secondary deviance," or criminal acts that are a result of the labeling.[205] Critics of

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200. *See* Jensen & Erickson, *supra* note 195, at 133. The authors conclude that

> those subjects who attribute stigmatic consequences to official labels are least likely to engage in behavior which is liable to labeling. Those most likely to deviate are those for whom official labeling may be socially meaningless. Thus, those most likely to be labeled may be the least likely to be affected by labeling. . . . To understand the variable consequences of labeling requires an understanding of the social meaning of sanctions.

Id.

201. *See* F. ZIMRING & G. HAWKINS, *supra* note 83, at 191; J. BRAITHWAITE, *supra* note 99, at 60.

202. F. ZIMRING & G. HAWKINS, *supra* note 83, at 191.

203. *Id.* at 193. If, however, the stigmatized offender cannot locate or gain the acceptance of a subculture that tolerates her stigma, then she may adopt a life of solitary deviance, or try to regain admission into the dominant culture. J. BRAITHWAITE, *supra* note 99, at 68. For some crimes, such as drug offenses, solitary deviance may be impossible. A drug offender needs, at the least, a supplier or a buyer. *Id.* at 67.

204. *See* D. MATZA, DELINQUENCY AND DRIFT (1964).

205. *See generally* R. TROJANOWICZ & M. MORASH, JUVENILE DELINQUENCY: CONCEPTS AND CONTROL 59-61 (4th ed. 1987); Gove, *The Labelling Perspective: An Overview,* in THE LABELLING OF DEVIANCE 9 (W. Gove 2d ed. 1980); Mahoney, *The Effect of Labeling Upon Youths in the Juvenile Justice System: A Review of the Evidence,* 8 LAW & SOCY. REV. 583, 584-85 (1974); *see also* J. FREEDMAN & A. DOOB, DEVIANCY: THE PSYCHOLOGY OF BEING DIFFERENT (1968) (describing influence on experimental groups of public disclosure of their "deviance" from "average" scores on a "personality" test. Those identified as deviants first sought to

labeling theory, such as Walter Gove, quite sensibly have responded that no empirical data prove that the secondary deviance is a result of the labeling, versus whatever conditions or instincts prompted the primary offense.[206] These critics further maintain that good results can flow from labeling, such as isolating the offender and thereby preventing corruption of others (incapacitation), deterring other potential deviants (general deterrence), forcing the offender out of a criminal lifestyle, and, perhaps, channeling her toward appropriate rehabilitative services (specific deterrence and rehabilitation).[207]

The strength of these last claims I will address below. The evidence on the first claim, that labeling or stigmatizing an offender may increase the chances of subsequent delinquent behavior, is inconclusive. The most accurate statement is that we do not know, for certain, whether labeling produces secondary deviance. If the labeling theorists are correct, however, then shaming not only may not promote specific deterrence or rehabilitative ends, it may defeat them. Moreover, the more effective the shaming, the more counterproductive it may become. The judge thus would need to predict both the offender's individual susceptibility to shame and her likely post-shaming behavior. Each factor in turn might vary with the nature of the offense, the nature of the shaming sanction, and pre- and post-conviction environmental, and other offender-specific conditions. With some crimes, there is little doubt that some offenders feel sincere shame, but do not stop their behavior. Some spouse abusers, for example, may experience acute remorse after a beating episode, yet repeat the beatings.[208]

A final implication of the psychological aspects of shame, which raises both practical and fairness concerns, is the nature of the wound that shaming seeks to inflict. When it works, it redefines a person in a negative, often irreversible, way. Effective shame sanctions strike at an offender's psychological core. To allow government officials to search for and manipulate this vulnerable core is worrisome, to say the least. Moreover, nothing in the psychological materials on shame, or in the available literature on the stigmatic aspect of punishment, indi-

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conceal their deviancy. Once it was disclosed, however, they chose to associate with other "deviant" subjects).

206. Gove, *supra* note 205, at 13-15 (collecting empirical work); *see also* Mahoney, *supra* note 205, at 588-89; Wellford, *Labeling Theory and Criminology: An Assessment*, 22 SOC. PROBS. 332 (1975).

207. Gove, *supra* note 205, at 18.

208. *See, e.g.*, L. WALKER, THE BATTERED WOMAN 65-66 (1979). *But see* J. FLEMING, STOPPING WIFE ABUSE 289 (1979) (noting that not all men express regret after a beating episode).

cates that a judge or any other person can reconstruct that core after the defendant has "done her time" in the "public stocks." Certainly, nothing in contemporary criminal punishment practices suggests that judges have adopted procedures for rebuilding this core.

C. *Shaming and Modern Cultural Patterns*

Anthropological and historical materials are especially pertinent to estimations of the general deterrence effects of shunning and shame. The signal insight of these materials is that for shaming to be an effective method of controlling community behavior, the community in question must be receptive to these methods. This receptivity depends on whether the community satisfies the several cultural and institutional conditions that have been identified as characteristics of so-called shame cultures.

The cultural conditions of effective shaming seem weakly present, at best, in many contemporary American cities. Indeed, shaming sanctions run counter to the pattern of existing methods of norm enforcement in the United States. First, most law enforcement is conducted outside of public view. Private security officers, employers, or other nonpublic agents play a significant, nonpublic role in norm enforcement.[209] Even when public agents do enforce punishment, however, it rarely comes to the attention of the rest of the community in any systematic, high-profile manner.[210] Millions of people are arrested and convicted each year, but only a handful excite significant national or local interest or attention.

Formal shaming thus would constitute a significant change in law enforcement: it would attempt to bring to public attention a wide spectrum of criminal case dispositions. This shift, however, would require a dramatic restructuring of existing practice and procedure and a reversal of the strong trend toward privatization of criminal punishment. The question is whether such a reversal is likely to produce substantial public benefits.

The most thoughtful argument in favor of deprivatizing criminal law has come from John Braithwaite. Braithwaite insists that public shaming would improve the effectiveness of criminal law enforcement because it would help to create a shared, moral conception of order.

209. *See* J. BRAITHWAITE, *supra* note 99, at 60-61.

210. In fact, most criminal cases do not reach the trial stage. The overwhelming majority are plea bargained and thus escape public scrutiny. *See generally* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COLUM. L. REV. 1059 (1976); Vorenburg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

He maintains that the "uncoupling" of shame and punishment in the United States has been a mistake that partly explains our rising crime rates, as compared to the low crime rates of Japan.[211] He argues, therefore, that we should reestablish the cultural tradition of shaming wrongdoers, and explicitly link shame and punishment. That is, shaming not only can work, it is an essential aspect of a sound and effective legal order and thus must be revived in the United States.

The main problem with Braithwaite's suggestion, however, and with the contemporary revival of shaming sanctions, is that our tradition of shaming cannot be "reestablished" if the cultural conditions to this tradition have eroded. Population increases and geographical expanse confound such efforts in the United States, and may help to explain why Japan, as well as certain island or tribal cultures, have continued to couple shame and punishment more effectively than the United States has.

Other factors likewise play a role, and point against the likelihood that shaming will deter offenders in most contemporary American settings. First, the United States as a nation is not known for the highly developed sense of social interdependency that characterizes the Japanese[212] and that appears to be an integral condition of effective shaming.

Second, the official agents of norm enforcement often are viewed with suspicion or hostility. Most people in the United States, especially those in large urban centers, do not see police officers or judges as members of their "family,"[213] or otherwise part of a benign network of interconnected social actors. Impersonal, authoritarian, and detached law enforcement agents likely cannot easily substitute for the collaborative, private, interdependent networks of social control that tend to exist in small societies, or in morally cohesive larger societies. Moreover, the social unit that is mainly responsible for inculcating cultural shame values, the family, often is missing, culturally isolated, or dysfunctional.

A third significant distinction between the United States and most shame cultures is its cultural complexity. A federal or state judge's jurisdiction typically extends over several subcultures, even when the geographical region is relatively small. These subcultural variations can give rise to different definitions of shame, which may confound official efforts to deter crime through shaming.

211. J. BRAITHWAITE, *supra* note 99, at 61.

212. *Id.* at 62, 84 (emphasizing the highly developed communitarianism in Japanese society).

213. *Id.* at 62-63 (contrasting the Japanese view of authority with the North American view).

This is not to say, however, that Americans have no commonly shared instincts about crime or about shame. A majority of Americans likely agree that most of the acts we now call crimes should be.[214] For example, few American subcultures condone murder, child abuse, or theft, though some may tolerate deviant acts more readily than others,[215] and may construe differently the adequate justifications or mitigating factors for these crimes. Likewise, some fairly large subcultures likely exist whose members are in substantial agreement about certain aspects of right and wrong. Nevertheless, American subculturalism, or cultural pluralism, is pronounced enough to make broad conclusions about our moral coherence suspect, and thus to undermine the likely effectiveness of widespread government attempts to shame offenders, absent significant decentralization of criminal law authority and the delivery of formal norm enforcement power to the local subcultures.

A fourth and more considerable obstacle to effective shaming is that, even where general cultural agreement exists about what acts are wrong, significant subcultural disagreements often exist regarding what punishments are embarrassing. For example, juvenile delinquent subcultures, according to some writers, place excessive emphasis on masculinity and membership.[216] Consequently, a prison sentence is not necessarily an embarrassment to subculture members. On the contrary, it actually can elevate a member's status within the subculture.[217] Thus, for a shaming sanction to deter offenses by juvenile gang members, it must undermine the defendant's masculinity or compromise his gang membership, and trigger shunning by the gang. To deter other subcultures from committing the same offenses may require quite different forms of shaming. Subcultural meanings of status therefore influence the social meaning and general deterrence effect of sanctions, especially for crimes that tend to be committed only or mainly by that subculture. This means that a judge or other sentencing body must know what sanctions will improve an offender's status position within her subculture(s), and what sanctions will harm it.[218] The judge also must anticipate the strategies that people will use to

214. *Id.* at 39 (noting that "extreme versions of subculturalism which posit wholesale rejection of the criminal law by substantial sections of the community simply do not wash").

215. *Id.* at 66.

216. *See, e.g.*, D. MATZA, *supra* note 204, at 53, 156-59.

217. *See* F. ZIMRING & G. HAWKINS, *supra* note 83, at 216. Zimring and Hawkins quote research interviews of gang members who claim that a member who has been in jail receives greater respect from other members because of his prison experience. *Id.*

218. *Cf.* Probert, *Creative Judicial Sanctioning: Application in the Law of Torts*, 49 IOWA L. REV. 277, 286-87 (1964) (discussing the use of alternative sanctioning in civil cases).

avoid being deprived of that status position.[219]

An ability to predict these subcultural responses will hinge, in part, on the extent to which the judge is connected, whether by actual or vicarious experience, to these subcultural patterns.[220] This will depend upon the specific crime and the individual judge, among other things. In general, however, the judicial selection process tends to screen out candidates with actual experience in the criminal subculture, though they may acquire vicarious experience through their formal or informal education, experience on the bench, and other avenues to this type of awareness. Absent other information to assist them, many judges likely project their own, subcultural (predominantly white, middle-class) estimations of shame onto the offenders, rather than developing multiple subcultural meanings of shame. As such, unless we adopt different procedures for selecting and training professional judges, rely more heavily on juries of offender-group "peers," or invent alternative means of evaluating varying subcultural meanings of shame, then the shaming sanctions that sitting criminal court judges invent may not deter much (subculture) crime. None of these steps, however, has accompanied the new shaming penalties.

Finally, the anthropological studies further suggest that the effectiveness of shaming as a method of norm enforcement depends partly on whether a culture shames *reintegratively.* If the community has rituals to redeem and reclaim the chastened offender afterwards, and shaming is based in part on optimism about her responsiveness to this grooming, then the shaming is reintegrative. The earmarks of reintegrative shame cultures include social cohesiveness, a strong family system, high communitarianism, and social control mechanisms that aim to control by reintegration into the cohesive networks, rather than by formal restraint.[221]

These conditions, however, are not currently dominant in the United States.[222] Our legal institutions and national personality tend to reflect the dominant American philosophical emphasis on individuality, independence, and autonomy, rather than on interdependence, community, or shared values. Liberal values are significantly more pronounced in American legal culture than in any of the cultures that rely most effectively and notoriously on shame sanctions. For example, the Japanese concepts of shame to one's name and "honor," as defined by fulfillment of social roles, fit awkwardly at best into prevail-

219. *Id.* at 286.

220. *Id.* at 287.

221. J. BRAITHWAITE, *supra* note 99, at 84-85.

222. *Id.* at 86.

ing American visions of individual personality and self-reliance. As such, the notion that the government in criminal cases not only should exploit cultural definitions of shame, but should attempt to *forge* these definitions, would offend many Americans. Again, this strong aversion to government encroachment on individual autonomy is not our only national tradition, nor is it the dominant one within all American subcultures. Competing and supplemental traditions, such as the community-oriented traditions of North American Indian tribes, clearly exist and challenge the dominant cultural stress on "individuality." Nevertheless, the national, state and even most local cultures lack a profound sense of mutual obligation and community.[223]

Braithwaite acknowledges this relative absence of optimal cultural conditions for shaming in the United States. He nevertheless believes that even in highly individualistic cultures such as the United States, shaming still will reduce crime more effectively than punishment that is unaccompanied by moralizing and denunciation.[224] But Braithwaite's theory is based entirely on conditions that he admits are not met in the dominant, contemporary American culture. To take one striking example, he observes that "the way we respond to deviance, particularly crime, in the West, gives free play to degradation ceremonies of both a formal and informal kind to certify deviance, while providing almost no place in the culture for ceremonies to decertify deviance."[225] Despite this important admission, he adheres to his optimistic vision of the favorable possibilities of devising shame ceremonies that are "reintegrative," not disintegrative. Moreover, his optimism extends to the favorable possibilities of significant revisions of ideology; he rejects a strong embrace of individualism as too dated and outmoded.[226] He would direct the focus of norm enforcement away from the state, and toward alternative, intermediate communities of interest — such as the workplace, schools, or other association

223. *Id.* (noting that most Western societies are characterized more by individualism than communitarianism).

224. *Id.*

225. *Id.* at 163. A more optimistic account of our criminal law process is that of James Boyd White, who describes the criminal law as a system of meaning in which we "blame" the defendant and thereby preserve her dignity and our communal claims as well. White sees this system of meaning as one that, even when the defendant is punished, still recognizes her as a member of the community. J.B. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 209 (1985). This forgiving notion of blaming corresponds with Braithwaite's "reintegrative" concept of shaming. As a normative account of just punishment, I find it attractive. As a descriptive account of modern criminal law, I am unpersuaded. Robert Cover's account seems more compelling. *See* Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (concluding that "[l]egal interpretation takes place in a field of pain and death").

226. *See* J. BRAITHWAITE, *supra* note 99, at 169-70.

contexts.[227]

This is a comprehensive and utopian agenda indeed, the fulfillment of which might well enhance the favorable possibilities of effective shaming sanctions. But it demands root-down readjustment of the dominant contemporary consciousness about personal responsibility for crime control and norm observation. Short of such a profound ideological shift, coupled with significant structural and procedural changes to facilitate that shift, our modern state-imposed shame sanctions will lack the cultural foundations that Braithwaite himself deems essential.

Any theory of crime control that anticipates community participation in law enforcement cannot work without at least some *current* community receptiveness. A proposal such as Braithwaite's "reintegrative shaming" proposal, which includes a shift away from state-enforced norms, clearly demands community responsiveness and accountability. The question thus is whether the community *as it now stands* would respond favorably to his initiative.

One reason to be skeptical of Braithwaite's theory is suggested by our unsuccessful experiences with rehabilitation theory and with community-based reform efforts. Rehabilitation theory experienced a decline because, inter alia, the social conditions for this theory disappeared. For the rehabilitation approach to punishment to work, the community must have both a "strong . . . belief in the malleability of human character and behavior," and a "working agreement on what it means to be rehabilitated."[228] Nineteenth-century America arguably satisfied both conditions, and also was marked by a high regard for the family. Thus, the ideal family became the model for the rehabilitative ideal, and the sanctions imposed by juvenile courts attempted to match those of a wise parent in a family setting.[229] When this confidence in the family and consensus about rehabilitation ended, and optimism about human malleability eroded, so did confidence in the rehabilitative ideal.[230]

This demise of rehabilitation theory demonstrates the link between a community's beliefs about criminal behavior and the cultural meaning of its punishment methods. Many people today view criminals as

227. *Id.* at 172-73. Braithwaite remarks that a shift to communitarianism eventually may occur because it would serve the interests of American capital. *Id.* at 174.

228. F. ALLEN, *supra* note 69, at 11.

229. *Id.* at 15.

230. *Id.* at 18-31; *see also* Sarat, *Beyond Rehabilitation,* in CRIME AND PUNISHMENT: ISSUES IN CRIMINAL JUSTICE, *supra* note 63, at 103, 107-12 (describing complex host of changes in philosophy, political climate, and social sciences that contributed to the rise and fall of the rehabilitative ideal).

irredeemably "pathological" individuals in need of intolerably high levels of behavioral or psychological modification or of absolute containment, not as errant fellow group members who might, through post-act shaming and public opportunities to apologize, be reclaimed and reintegrated. Given this attitude toward criminals, modern shaming in the United States conveys a different and less benevolent meaning than it possesses in cultures that believe in the defendant's redemption and rehabilitation potential. Even the Puritans, with their severe methods of exploiting social embarrassment to curb crime, acted in part out of concern for the offender's soul. Modern-day shaming, in contrast, lacks this arguably benign motive and social meaning.

The importance of existing, cultural realities to effective punishment methods — especially those that would shift norm enforcement duties to the community — also is underscored by emerging evidence that the community-based reform movement too has failed. Community-based reform advocates maintain that centralization and bureaucracy of law enforcement undermine the effectiveness and humaneness of legal responses to crime, and that community-based alternatives to state-managed institutionalization are more humane, less isolating, and more economical.[231] They often add that the community alternatives "could not be worse" than conventional corrections methods, especially prison, and so should be "given a chance."[232]

The actual results of these alternatives, however, are discouraging. Instead of reducing state intervention, community-based reform seems to expand authority and increase social control.[233] The location and agency of the control may change, but not the level or its essential nature. Moreover, unmonitored discretion with its potential for unequal punishment is more commonplace under these programs than under conventional state-managed programs.[234]

One reason for the poor results of community-based reform lies in its reliance on rhetoric and a romantic view of the community alternatives to traditional state-enforced punishment, rather than on a realistic and thorough appraisal of the complex nature of a shift from a public to private system of social control. Contrary to the reformers' assumptions, the delivery of social control to community-based agencies does not necessarily mean less pervasive, more benign, or more effective control. Rather, these nontraditional, community-based in-

231. *See, e.g.*, Lewis & Darling, *The Idea of Community in Correctional Reform: How Rhetoric and Reality Join*, in ARE PRISONS ANY BETTER? 95, 96-98 (J. Murphy & J. Dison eds. 1990).

232. *Id.* at 97-98.

233. *Id.* at 99.

234. *Id.* at 102.

stitutions often reproduce or even exacerbate some of the perceived shortcomings of state-managed institutions. The ongoing community-based reform movement has faltered in part because the existing community conditions do not match the reformers' assumptions about the community's structure, behavior, values, and beliefs.

The message for shame sanction reformers is clear. If shaming innovations likewise are premised on inflated, ethnocentric, or otherwise inaccurate estimations of likely community responsiveness to public punishments, then they cannot produce the favorable outcomes that these reformers claim will occur. As I have argued, and as these past experiences with penal reform reinforce, punishment has culture-dependent meaning and effectiveness. Reform thus requires sophisticated and realistic assessment of the present culture or cultures that law seeks to control or influence.[235]

In sum, the anthropological materials suggest that for shaming to be an effective and humane punishment technique, the culture must match reformers' expectations. If reintegrative shaming is the goal, as it is under Braithwaite's model, then the existing culture must be characterized by social interconnection, mutual dependency, and social cohesion. If the culture lacks these qualities, as our dominant culture seems to, then shaming may prove as counterproductive and harsh as spanking a child does in a family governed by authoritarianism, nonnurturance, and impersonal control.

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235. Contextual analyses of disciplinary techniques in childrearing further support this claim. Different families often establish different systems of meaning and rules, in the way that different cultures tend to do. Studies of family patterns and discipline thus may be of interest to penologists. Some of these studies indicate that punitive discipline in some families promotes aggressive behavior in children. But these childrearing studies show inconsistent results, which one author has explained as follows:

> [T]he effect of punitive practices appears to be related to the severity of the practices and to the childrearing context in which it is embedded. For example, Baumrind (1971, 1986) reported that parents who provided a nurturant, responsive child-rearing environment, yet maintained high standards and occasionally used power-assertive techniques, tended to rear socially responsible boys (their girls were neither high nor low in social responsibility). However, when parental demands were enforced in a punitive, authoritarian context, boys exhibited relatively low levels of socially responsive behavior. Similarly, Roe (1980) found that children's prosocial and caring behaviors toward others appeared to be unaffected by their mothers' use of physical punishment if punishment occurred in the context of an overall positive relationship. With regard to aggressiveness, high levels of children's aggression have been positively associated with more severe parental punitiveness such as, for example, parental abuse of their children (George & Main, 1979; see Parke & Slaby, 1983). Thus, it is likely that severe punitive practices, especially when embedded in a nonsupportive environment, enhance the probability of children exhibiting aggressive patterns of behavior.

Eisenberg, *The Development of Prosocial and Aggressive Behavior,* in DEVELOPMENTAL PSYCHOLOGY: AN ADVANCED TEXTBOOK 461, 476 (M. Bornstein & M. Lamb 2d ed. 1988). Strictness, or sharp punitive practices, thus can be a proper punishment technique, if administered in an appropriate family or "cultural" context.

D. *Historical Insights*

The historical rise and fall of public shaming in the United States and Western Europe lends further support to the view that the revival of shaming is a wrong turn. Penal practices within the United States moved away from public spectacles toward incarceration during the nineteenth century.[236] One reason for the shift was that people came to believe that these punishments not only were debasing; they also did not check crime.[237] Another factor that led to abolition of these practices was a shift in attitudes toward rehabilitation as a proper and attainable goal of punishment, and toward the view that offenders would profit from being confined and required to perform useful work, exacted in proportion to their crime.[238] That is, both practical and humanistic impulses animated the rise of the penitentiary and the movement away from the humiliatory and sanguinary punishments of the early colonial period.

Public punishments likewise declined in Europe during the same period. During the seventeenth and eighteenth centuries, public spectacles had served to preserve shaky state authority,[239] insofar as state power was not yet taken for granted.[240] Spectacle helped to reinforce this power, in part because it was regarded as such harsh punishment;[241] indeed, it was viewed as graver than physical confinement.[242]

A combination of post-Enlightenment intellectual and social developments in Western Europe cast doubt on the spectacle aspect of punishment,[243] however, and contributed to its abolition. The rise of confinement as an option,[244] along with the rise of the nation-state, reduced the perceived necessity for public executions.[245] More effective, stable, and impersonal regimes led to more impersonal forms of repression.[246] As public order became relatively well secured, authorities needed less exemplary and harsh punishment as proof of their power. These social developments produced an environment in which

236. *See* O. LEWIS, THE DEVELOPMENT OF AMERICAN PRISONS AND PRISON CUSTOMS, 1776-1845, 9 (1922).

237. *Id.* at 9-10.

238. B. MCKELVEY, AMERICAN PRISONS 3 (1936).

239. P. SPIERENBURG, *supra* note 8, at 55.

240. *See id.* at 201.

241. *See id.* at 66.

242. *Id.* at 66-67.

243. *Id.* at 183.

244. *Id.*; *see also* M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 104-31 (A. Sheridan trans. 1977).

245. P. SPIERENBURG, *supra* note 8, at 205.

246. *Id.*

the post-Enlightenment appeals to abandon these painful spectacles finally could prevail. Similar intellectual and social developments likewise prompted changes in the United States. In 1835, the State of New York discontinued public hangings and the rest of the states soon followed its example.[247]

These historical accounts offer several messages for modern reformers. First, they suggest the limited deterrence value of shame sanctions in that these shaming measures, though much harsher than the modern shaming innovations, nevertheless failed to discourage offenders. Moreover, these failures occurred under conditions more favorable to public shame methods than modern cultural conditions.

A second insight of the historical materials is that people have long regarded public punishments as exceptionally painful. This does not prove that they in fact are worse than private punishments, but it lends the force of traditional estimations of cruelty to claims that they are inhumane, and that the public may recoil at their widespread use.

The third insight of the historical materials is that resort to public punishments often is a sign of flagging institutional or governmental self-confidence. Disciplinary authorities who invoke public sanctions betray insecurity about their power, and about general obedience to their moral authority. Like the weak and ineffective teacher who forces misbehaving students to stand in the corner, wear dunce caps, or endure other humiliatory measures, the government that resorts to public shame measures may reveal itself to be an ineffective, even desperate, authority. That is, the modern revival of shaming may be a symptom of impotence in our formal institutions of social control. But, if history is a guide, it suggests that a revival of formalized shaming is not a sound means of rebuilding that authority.

E. *Institutional Constraints and Other Practical Concerns*

Finally, even if the foregoing objections to shaming could be overcome, the sanction might still prove impractical for several reasons. First, if the penalty were to become a common sanction, it may produce a shaming overload, which could reduce public interest in these displays and thereby lessen the deterrence impact. This decline in public interest could prove expensive to monitor. At least three million people pass through the state and federal corrections systems each year.[248] Approximately two thirds of the offenders who are under cor-

247. G. SCOTT, *supra* note 82, at 58.

248. *See* R. CARTER, R. MCGEE & E. NELSON, CORRECTIONS IN AMERICA 1 (1975). The current figures likely are much higher than these 1975 figures reflect.

rectional supervision are on probation or parole, and thus have been returned to the community.[249] If only one half of this two thirds was sentenced to shame sanctions, this still might involve one million shamings per year for the government to publish and for the public to consume.

Daily announcements of criminal incidents, which appear in many local newspapers, thus would expand considerably. At first glance, though, this may seem a workable and relatively inexpensive alternative to prison, despite the high number of shamings. Government might exploit television, radio, newspapers, billboards, as well as other communication vehicles to announce criminal conduct. All of these methods — except perhaps televised shaming — probably would cost far less than incarceration, supervised probation, or rehabilitative therapy.

These penalties would soon be ignored, however. The main reason that most of the modern shaming sanctions described in this Article have garnered media attention is that they are curiosities, and hence newsworthy. This interest surely would wane if shaming became commonplace. That is, shaming is an inherently short-fused sanction.

The primary problem with a dramatic increase in the number of shamings thus would not be the initial cost of implementing or monitoring shaming punishments, but the practical problem of how to measure *and* respond to changes in public reactions to the shaming of one million offenders a year. For example, the court would need to assess whether and when the public would begin to ignore this flood of information. Public curiosity at first might be high, but likely would not endure. Moreover, in major metropolitan areas the shaming ads might occupy enough space to warrant addition of a pull-out section of the newspaper, which might easily be tossed aside, unread, along with other newspaper inserts. To avoid this, courts might adopt different types of shaming. For example, a judge may instead impose home-centered shamings, such as lawn signs or bumper stickers. These more localized shamings, however, would entail more localized, "customized" shaming impact assessments.

Evaluations of public responses to various types of shaming might resemble the public opinion surveys, market research, or other assessments of popular opinion that businesses or politicians commonly must make to sell or promote their products or themselves. Sophisticated work in this area likely costs more, and involves more specialized expertise, than reformers may imagine. Yet if states fail to

249. *Id.* at 11.

undertake this kind of analysis, then shaming sanctions are unlikely to maintain the deterrence impact that is their primary justification.[250]

Even if shamings were well-publicized and did continue to command significant public attention, however, they might affect the public's reaction to crimes and criminals in ways that the shame sanction advocates may not have anticipated, and may not desire. As I have indicated, most punishment now tends to take place out of public view.[251] This is especially true in densely populated urban settings, where anonymity and disinterest in others' lives often are governing rules of public interpersonal relations. Accordingly, the community can distance itself psychologically from the process and results of punishment.[252] This distancing is reinforced by the fact that the few criminals who are personalized and who do come to popular attention are the particularly grotesque, bizarre, or flamboyant offenders.[253]

Public shaming, by definition, would mean wider public exposure to punishment, and hence to a greater number of less sensational defendants. Assuming that the criminal sanctions were imposed evenly, then at least for offenses that touch a cross-section of the population — such as drunk driving, shoplifting, spouse and child abuse, or tax fraud — the public would directly confront the impact of legal sanctions on the lives of people with whom more people can empathize.

Several practical effects, some adverse, might flow from this "deprivatization" of criminal law. It would of course bring the gravity of these offenses home to more people. This, in fact, is what the sanc-

250. Other practical and fairness problems also may emerge. For example, if courts resorted to home-centered shamings, such as lawn signs, neighboring property owners likely would object. They first might attempt to drive the offender from the neighborhood. If she refused to move, however, the property owners likely would resent the judge who imposed the sentence and could complain about, if not sue over, the stigma spillover onto these innocent neighbors. Cabining the effects of these customized shame sanctions thus could be quite complicated. Assuring that all shame sanctions had *some* effect, and *continued* to do so, however, would be more complicated. At present, courts have no mechanisms for conducting such inquiries. These mechanisms, though, would need to be explored before widespread use of shaming could proceed.

251. *See supra* note 210.

252. For a discussion of the psychological works that describe the role of identification with another person and empathy for her, see Henderson, *Legality and Empathy,* 85 MICH. L. REV. 1574 (1987).

253. Occasionally, a sympathetic figure will capture public attention. A devoted elderly husband will end a spouse's misery, or a wrongly accused person will be vindicated and released. More often, however, the offenders who receive concentrated mainstream or tabloid attention are people like Richard Ramirez, who murdered 13 people in southern California and who, we are told, on one occasion "gouged out the eyes of the victim." *See Court in Los Angeles Gives 'Night Stalker' Death in 13 Killings,* N.Y. Times, Nov. 8, 1989, at A18, col. 5. The news account reported that shortly before he was sentenced to die in the gas chamber he made a statement that included remarks like "Lucifer dwells within us all," and "I am beyond evil." *Id.* Such selective accounts of criminal court business enable the public to see criminals as alien "others" and to favor quite strict crime control measures.

tioners hope will occur. The stronger our identification with the offender the greater our sense that we could end up in her same predicament. This certainly might deter others from committing similar crimes, which likely is the principal aim of the shame sentence. On the other hand, however, public discomfort and strong identification with offenders[254] might also result in public resistance to the sanction, and thus a softening of the criminal laws, or even a call for reprivatization,[255] as is evidenced by the demise of public spectacles in seventeenth- and eighteenth-century Europe. These consequences, of course, may not seem undesirable to all observers. My point here is that I doubt that reformers have taken them into account.

Public reactions to public shaming sanctions thus likely would be variable and complex. They would hinge on the nature of the sanction, the identity of the offenders, the character of the crime, and the perceived identification of the target audience with the offender. Audience acceptance of and cooperation in this "ritual" may be far more unpredictable and various than the judges and legislators who favor shaming sanctions suppose. Public sanctioning may even, in some cases, lead to an increase in violation of laws. The superficial appeal of this revival, upon closer inspection, thus begins to erode when one looks deeper at the nature of shame, the cultural context in which shaming has been "revived," and the multiple practical, institutional, and situational problems that may emerge.

F. *Middle-Class Offenders: Windows of Shaming Opportunity?*

Despite the foregoing arguments against shaming, some readers likely remain persuaded that a good public spanking will "work" for some offenders. One population of lawbreakers in particular — strongly socialized, middle-class offenders — may seem especially vulnerable to shaming because it tends to satisfy most of the cultural, psychological, and other conditions of shaming. Thus, some people would argue, shaming may make sense as a means of controlling bad behavior in this pocket of moral cohesion.

The argument that middle-class offenders will respond to shame sanctions has some force. Middle-class members likely most fear loss of social status, both because they have such status to lose and because

254. Increased identification with offenders contributed to the demise of public executions in Europe. Pieter Spierenburg states, in his study of public executions and other public punishments in the seventeenth- and eighteenth-century Amsterdam, that "[b]y the end of the eighteenth century some of the audience could feel the pain of delinquents on the scaffold. . . . [I]nterhuman identification had increased." P. SPIERENBURG, *supra* note 8, at 184.

255. The public resistance to spectacle punishment in Europe led to the decline of *public* punishment, not of punishment in general; that is, it led to privatization. *See id.*

it is precariously balanced. The members of this group have not attained, and most likely never will attain, the immunity from shunning and ostracism that exceptional wealth or high social standing affords. Acquisition of exceptional wealth, enough to elevate one to upper-class status, seldom occurs in one lifetime. Movement of this sort usually involves high risk behavior, entrepreneurial genius, or exceptional good luck — all low frequency occurrences. High social standing is even harder to obtain. Typically, it is inherited and immutable. Although marriage can enhance one's social standing, the elevation is less authentic, less stable, and not always generally acknowledged. Thus, elevation to a demonstrably higher social class is simply not possible for the vast majority of middle-class or lower middle-class people.

Demotion to a lower social class, in contrast, is always a distinct possibility. Middle-class status typically hinges on steady income and observation of middle-class rules of behavior. Loss of one's job, major illness, divorce, or notorious violation of middle-class norms, without more, can precipitate a slide into the lower class. Middle-class offenders thus may seem to be "ideal" targets for shaming sanctions. They are the people most likely to worry about public appearances, to be vulnerable to moralistic or judgmental social groups, to defer to authority, and to be relatively conventional in attitudes toward "law and order." Thus, for crimes that are likely to be committed by middle-class people, the shaming sanctions may work best, if they work anywhere. These crimes would include, among others, drinking offenses, driving offenses, embezzlement, drug offenses, spouse abuse, child abuse, and tax fraud.

Even here, though, the many practical limitations of the sort I already have named may surface and undermine the effectiveness of the shaming tactics. The middle class is subject to the same range of intraclass personality deviations, individualized meanings of shame, and unpredictable responses to shame sanctions as are other subcultures. Childrearing practices, to name one of many variables that influence the shame phenomenon, vary widely among members of the middle class. Also, even middle-class offenders likely are not as conventional or susceptible to shame as we imagine. For example, in *State v. Rosenberger,*[256] the defendant had held a respectable position with American Telephone and Telegraph (AT&T). Rosenberger stole two AT&T checks, totaling $375,000, and deposited them into his personal checking account. The defendant argued that his "shame and disgrace" in

256. 207 N.J. Super. 350, 504 A.2d 160 (1985).

being convicted was sufficient punishment. Judge Imbriani rejected this argument for the following pertinent reasons:

> [The defendant] had minimal roots anywhere and lived in Bound Brook for only two years prior to this offense. After being fired by AT & T he moved to California and quickly obtained a new and equally lucrative position. There is no evidence that he is now shunned socially, financially or otherwise. He still earns as much as he did at AT & T and it is probable that his new neighbors are totally unaware of his criminal conduct. So where is the shame? With whom has he been disgraced? How has he been punished? It is apparent that he simply moved his employment and residence 3,000 miles and continued his same life style without so much as a hitch.[257]

That is, even some members of the middle class, especially in large cities, may not care enough about what "society" thinks to make shaming a demonstrably more effective tool than mere conviction and customary punishments. Residential and occupational mobility, coupled with a generally eroded sense of community, can undermine the effectiveness of stigma punishments, even for the social groups traditionally most sensitive to stigma.

G. *Conclusion*

The meaning of any punishment is partly contextual. The penitentiary, to the Quakers, was a benign invention, meant to redeem the prisoner, not torture her.[258] Given modern cultural conditions, the meaning of shame sanctions is not benign. Rather, the message of modern shaming is predominantly harsh and disintegrative, not reintegrative. It is likely to be construed by the viewers, and experienced by the offender, as purely retributive — not rehabilitative or redemptive. And if it does deter anyone, it likely will deter most effectively those people for whom conviction and conventional punishments are threatening enough.

Braithwaite probably is correct when he says that "[y]ou cannot take the moral content out of social control and expect social control to work. If there is no morality about the law, if it is just a game of rational economic tradeoffs, cheating will be rife."[259] But his assumption that a society that replaces conventional punishment with reintegrative shaming will have less crime[260] seems unduly optimistic. It also ignores the extent to which a "punitive" practice in one context may be "reintegrative" in another and vice versa. The more promising

257. 207 N.J. Super. at 356-58, 504 A.2d at 164.

258. *See* T. DUMM, DEMOCRACY AND PUNISHMENT 65 (1987).

259. J. BRAITHWAITE, *supra* note 99, at 142.

260. *Id.* at 80.

sequence for his brand of reform is for informal, nongovernment institutions first to reconstitute a consensus about moral behavior and next to establish mechanisms for effective negative and positive reinforcement of behavior. Decentralization of authority, revitalization of family bonds and communal bonds, and a more robust sense of interdependence and responsibility to others thus should precede, or at least accompany, any legislative or judicial attempt to shame people into norm observation. Absent these preliminary and formidable steps, a formal shaming sanction is unlikely to convey the moral content Braithwaite desires. Rather, it will represent a purely retributive slap by an unforgiving and impersonal authority, and a feeble form of criminal justice.

VII. HUMANENESS FACTORS

> The combination of stigma and loss of liberty that inheres in criminal punishment represents a net loss in human dignity and autonomy. It is tempting to contemplate avoidance of that loss. . . . [O]ther things being equal, we should prefer punishments that do not entail stigma and loss of liberty to those that do.[261]

A. *Introduction*

In the preceding sections, I explored whether shaming is likely to promote valid punishment ends, in theory and in practice. In this final section, I consider whether the shaming sanctions are reasonably humane. The humaneness of a penalty depends on a host of factors, including whether it is proportional to the crime, is administered in an even-handed manner across offenders, and is not exceptionally degrading or cruel.[262]

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261. H. PACKER, *supra* note 66, at 255.

262. I do not address the constitutional arguments against such sanctions, which of course are particularized fairness arguments, because other writers already have done so. *See, e.g.*, Note, *supra* note 42, at 658-60; Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1376-78, 1381-84; Note, *"Scarlet Letter" Punishment: Yesterday's Outlawed Penalty is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613, 624-34 (1988); Note, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing — Are They Constitutional?*, 93 DICKINSON L. REV. 759 (1989).

One of the principal constitutional objections is based on the eighth amendment's proscription against cruel and unusual punishment. Constitutional arguments also might be based on the due process and equal protection clauses, on the first amendment, and on the right to privacy. Resolution of these constitutional points should depend, to a large degree, on how courts resolve the proportionality, equality, and dignity concerns raised in the following sections. As the Court in *Hutto v. Finney* explained: "The Eighth Amendment's ban on inflicting cruel and unusual punishments . . . 'proscribe[s] more than physically barbarous punishments' . . . . It prohibits penalties that are grossly disproportionate to the offense, . . . as well as those that transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.' " 437 U.S. 678, 685 (1978) (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

All existing forms of punishment violate these principles to some degree, insofar as state-imposed punishment is an inexact, unevenly experienced, and often highly coercive response to norm violations. Nevertheless, the elusiveness of shame, the unreflective way in which the new shaming sanctions have been developed, and the serious harm to human dignity that truly effective shaming can cause, all suggest that the fairness objections to official shunning and shame are particularly compelling.

B. *Proportionality*

Proportionality of a penalty can be assessed in at least two ways: the punishment can be matched to the crime, ignoring offender-specific variations, or the punishment can be matched to the crime, taking into account offender-specific mitigating factors, such as remorse.

For a punishment under either account to "match" the crime, though, it must be a measurable sanction. With shaming, the harm to the offender is almost wholly intangible and cannot be assessed. Psychological studies of shame indicate that the same stimulus may produce deep shame in some offenders and no shame in others. Thus, to the extent that punishment is justified both as a negative and a *proportional* reaction to crime, shaming may offend both qualities: it may not, for some offenders, be "negative" at all, and the same stimulus may not be experienced equally by equally culpable actors.

This latter objection, of course, is hardly unique to shaming penalties; the impact of money fines, incarceration or any other penalty is felt unevenly as well. Likewise, shame is a potential, often likely, consequence of all forms of public punishment. The question, however, is not whether peripheral and disproportional stigmatizing already is part of the criminal process, but whether it is a desirable part that should be augmented and exploited. That other penalties may produce similar untoward consequences does not make these objections pointless when applied to shaming. Also, most conventional punishments involve at least some measurable, transsituational factors, such as the hours of community service, the months spent in prison, or the dollars assessed as a fine. Judges thus can be reasonably confident both about whether a penalty has been imposed, and whether the dosage of the penalty is increasing, regardless of the offender's personality or social circumstances. Money and time, at least, are susceptible to numerical estimations; embarrassment, ego strength, and social standing defy quantitative assessment.

Another proportionality concern is that the stigma of shaming may be irreversible. This possibility presumably would have to be

taken into account in the court's or legislature's proportionality assessment. Fear of the peripheral and long-lasting effects of stigma associated with all punishments has convinced some penologists that officials should try to contain, not enhance, the publicity and labeling aspect of a criminal sanction.[263] With new shaming sanctions, however, judicial efforts to confine the shame to a discrete time period are unlikely to work. On the contrary, such efforts seem inconsistent with the effort to publicize the punishment. Once an offense becomes notorious, the public will do as it chooses with the information, regardless of official admonitions. This would be especially true in work and social relationships, where shunning might be acute for some offenders.

Officials also must consider the potential unfairness of stigma spillover. Whenever a person is sanctioned, the negative impact may extend to her family or other associates. This spillover effect is augmented when the offense is widely publicized or sensationalized. For example, one study of prisoners' wives' feelings of shame indicates that the wives were particularly embarrassed when their spouse's behavior and conviction were publicized in the local news media.[264] Expanded use of public shaming surely would deliver more convincing blows to these innocent others' reputations than conventional punishment methods already tend to. Although this could enhance the deterrence impact of a shaming sentence, at least to the extent that would-be offenders care about bringing disgrace to their intimate associates and kin, this does not necessarily entitle lawmakers or judges to exploit this apprehension.

One likely response to all of these proportionality objections is that they rely on individual-specific factors. Proportionality might instead be defined as matching the sanction to the offense, not to the offender.[265] The "eye for an eye" might be estimated not on the basis of

263. *See* N. WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 147 (1980) (noting that many countries today have laws designed to limit the stigma of a conviction, by allowing for official expurgation of the record).

264. Fishman, *Stigmatization and Prisoners' Wives' Feelings of Shame,* 9 DEVIANT BEHAV. 169, 174 (1988).

265. The recently adopted Federal Sentencing Guidelines take this approach in part, by deeming offender-specific characteristics such as education and vocational skills, family ties and responsibilities, and community ties as "not ordinarily relevant" in sentencing. U.S. SENTENCING COMMN., FEDERAL SENTENCING GUIDELINES MANUAL §§ 5H1.2, 5H1.6, at 240-41 (1988). The guidelines do regard as relevant the defendant's "acceptance of responsibility" for her criminal conduct. *Id.* at § 3E1.1, at 197. They list as evidence of this acceptance specific conduct, not mere verbal expressions of regret or responsibility. *Id.* More to the point of this Article, a federal commission that in the 1970s debated reforms of federal criminal law expressly considered and rejected the "publicity" sanctions "as inappropriate with respect either to organizations or to individuals, despite its possible deterrent effect, since it came too close to the adoption of a policy approving social ridicule as a sanction." NATL. COMMN. ON REFORM OF FED. CRIM. LAWS, FINAL REPORT, § 3007, Comment (1971).

actual shame experienced by the offender and her family, but on how much shame an average member of the community might or should feel if she were ordered to wear the same sign. Thus, proportionality inquiries would become less complex, at least insofar as the limitless range of individual shades of shame would not need to be consulted or reckoned.

The problem with this alternative is that these shaming schedules still would need to identify and grade an intensely slippery variable. The "cultural meaning of shame" within the United States is exceedingly amorphous, if indeed one national meaning exists. Neither legislators nor judges are likely to be able to define this variable accurately, let alone determine the precise spectacle that will match both the culture's definitions of shame and the gravity of the offense.[266] For example, on what possible basis might a sentencing reform commission decide that holding a sign in public was a proportional punishment for child molestation? Or, if a trial judge were to devise this sentence, how might the appellate court handle the defendant's argument that this sanction was not proportional to the crime? A coherent, articulable argument that a sign sanction is, or is not, "proportional" to this offense is difficult to imagine.

Equally difficult to express would be reasons for distinguishing more severe shaming sanctions from less harsh ones. Certainly, holding a sign in public for one week seems worse than a one-day sentence, but this is for reasons distinct from the shaming aspect of the sanction; for example, the deprivation of liberty would be greater. If everyone in town, or at least everyone significant to the offender, saw her during the first hour, then the subsequent hours would be irrelevant to the sanction's stigmatic impact, though liberty interests would become a stronger factor. Even if only one person saw the offender during the first hour, the stigma effect may be spread by that witness' relating the incident to others. In any event, the full measure of the stigma probably would be met at a certain threshold, after which "more shaming," "longer shaming," or wider publication would not matter much to the offender's reputation or sense of shame. Widespread, effective publication of the shaming probably would cause that shame threshold to be

266. Again, however, I am not arguing that we have no shared consensus of "right or wrong," but that "shame" is a particularly elusive phenomenon. For example, the "cultural meaning" of other wrong conduct — such as race discrimination — may be susceptible to judicial interpretation in ways that the cultural meaning of shame is not. *Cf.* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 355-62 (1987) (arguing that racially discriminatory acts have a cultural meaning that courts are capable of construing).

reached more *quickly* than ineffective publication, but it may not influence the final impact of disclosure.

Thus, for those observers who regard proportionality as a crucial and tight limitation on punishment, the stigma consequences of any punishment are undesirable because they are beyond our ability to control, measure, or justify rationally. Either we must take the varying contextual aspects of stigma into account, which demands a degree of sophistication that we currently lack, or we must try to minimize or contain it despite any potential sacrifice of deterrent efficacy.[267]

C. *Equality*

Erving Goffman once wrote that "the more power and prestige the others have, the more a person is likely to show considerations for their feelings."[268] To the extent that shame sanctions are "custom designed" to the offender, and not part of any sentencing guidelines, they thus are subject to the abuse of unequal application. If judges have discretion to fashion creative sentences, they may be inclined to deliver harsher sentences to some defendants than to others.[269]

The modern revivals of shaming are not part of comprehensive shame schedules, but seem instead to be episodic, almost whimsical bursts of judicial, legislative, or prosecutorial inspiration. One significant danger in such an ad hoc approach is that the "test group" for shaming will be the offenders with the least political or other means of objecting or retaliating. More powerful offenders may receive alternative sanctions like "community service," or fines.

The risk of unequal application of shame sanctions might be controlled by requiring that legislatures adopt mandatory sentencing guidelines, applied evenly to all offenders. But, as the current debates about mandatory sentencing in the federal system show, this form of equality can compromise equality in other senses.[270] For example, the

267. *See* N. WALKER, *supra* note 263, at 161. Walker suggests a third alternative, but it would not apply to shame punishments. This alternative would be for the punisher to simply ignore the unofficial stigma effect of the punishment, and demand only that the official punishment be proportional. *Id.* With shame punishments, of course, the official punishment *is* the stigma.

268. E. GOFFMAN, *supra* note 104, at 10 n.3.

269. *See* E. POWERS, *supra* note 161, at 195-96 (noting that it was the poorer thieves, drunkards, and liars who were suitable candidates for the stocks; respected citizens were more likely to be fined).

270. The deeper equality issues at stake with shaming sanctions, like those at stake with sanctions generally, are virtually insoluble. In another context, Jencks has explored the elusive meaning of "equal treatment" in terms that demonstrate several potential "inequalities" in delivering equal punishments to all offenders. He demonstrates, through a concrete example, the extent to which the meaning of equality depends on one's theory of justice. For example, a utilitarian will demand a different sort of equality than someone who embraces a moralistic the-

legislature could insist that every person who steals $200 worth of goods be compelled to stand for one hour in the town square with a sign that reads "I am a thief." This would satisfy one rather static definition of equality. The only factor relevant to the punishment decision would be whether the same offense had been committed. But if one offender stole $200 worth of groceries for her family, and the other stole a $200 stereo, then a different sense of equality would be offended. Similarly, if one offender, who had never before stolen anything in her life and enjoyed widespread public respect, were facing her first criminal charge, whereas the other had a string of prior property offenses and had a reputation as a thief, then the hour in the square for the first would not be the same as the hour in the square for the second. One could, of course, simply define equality as "same offense — same sign." But to do so would compromise other important meanings of equality.

This problem, of course, is pervasive. Individualized approaches to criminal law enforcement will always both promote *and* defeat equality objectives, no matter what sanction we impose. No plausible sentencing schedule can anticipate the entire range of the individual factors that may determine the impact of a sanction. This aspect of the equality dilemma may be especially profound with shaming sanctions, however, because "shame" is elusive and intensely offender-specific. Also, if judges did take the individualized meaning of a shame sanction into account, this could lead to the "unfair" result that prominent, white collar or upper-class offenders, who have more social status to lose, would receive milder sentences than less prominent lower-class offenders.[271] Yet if this individualized meaning is ignored, this could lead to unduly punitive sentences for some offenders, beyond any plausible specific or even general deterrence needs.

At present, the modern shame sanctions violate both senses of equality. They are neither part of a general, equally administered sentencing scheme, nor the product of reflective, individualized estimations of the offender's sense of shame. We do not know, for example, why the Rhode Island judge ordered Stephen Germershausen, but not other sex offenders, to place an ad in the newspaper for his offense.

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ory of justice. As applied to punishment generally, and to shaming in particular, Jencks' discussion shows that the "equality" of punishment depends on whether we focus principally on the offender or on society as a whole. Jencks, *Whom Must We Treat Equally for Educational Opportunity to be Equal?*, 98 ETHICS 518 (1988).

271. *See* State v. Rosenberger, 207 N.J. Super. 350, 358, 504 A.2d 160, 165 (1985) (noting that white-collar criminals stand a significantly lower chance of serving a long sentence if convicted than do bank robbers); Bramwell, *Alternative Sentencing or Part-Time Imprisonment Is Discriminatory*, 26 How. L.J. 1265, 1268 (1983) (arguing that "[a]lternative sentencing creates a two-tier system of justice and is indicative of basic unfairness and favoritism").

Nothing in the reported account of his sentence suggests that the judge selected Germershausen for this sentence because he was unusually likely to respond to this type of sentence, or because he deserved it more than other offenders. Rather, the judge simply wanted to set an example; equality concerns were not part of her stated sentencing calculus. This is a serious omission, however, and raises the strong concern that the revival of shaming may violate the principle of even-handed punishments.

D. *Cruelty*

The final fairness concern is the most difficult to define, though it makes immediate intuitive sense and may best capture the potential offense of an effective shaming sanction. When a shame sanction hits home, it is a direct assault on a basic need of all people,[272] the esteem of others. The troublesome inquiry is whether we should approve of government punishment that is principally designed to withdraw this esteem. In other words, is this type of dehumanizing punishment too "cruel" to be an acceptable sanction?

A common response to this concern is that the criminal has bargained away, or sacrificed involuntarily, her social standing in exchange for the projected fruits of her criminal activity. Social stability demands that public officials impose the burden of shame and guilt on those who defy basic, shared rules of civility and order. Some people thus argue that if some individuals' self-esteem is lost through the criminal process, then their loss is justified by our collective interest in our mutual protection, freedom, and well-being. Some may even argue that the offender's dignity is affirmed by holding her accountable for her actions, because this implies a belief that she is a rational, autonomous person.

As far as it goes, and as general as it is, the argument makes considerable sense. The argument depends, of course, on one's views about the etiology of crime, the effectiveness of degradation in curbing future behavior, and the danger of state-imposed punishments aimed directly at wounding offender's self-esteem and social standing. But even if we accept that government-imposed self-esteem losses are justifiable under some punishment circumstances, we still must determine whether a *particular* method of withdrawing that esteem produces adequate public good to justify these individual harms.

This resolution turns several factors. First, it hinges on the nature of the wound that punishment inflicts. Psychological studies of shame

272. *See* J. RAWLS, A THEORY OF JUSTICE 440 (1971).

are important to this inquiry because they disclose how serious the harm of effective shaming may be. The likely practical consequences of shaming also are important because they determine whether the competing societal interest warrants this potential assault on human dignity. Taken together, the likely practical advantages of shaming seem to be far less than its proponents imagine. Indeed, they may be negligible. This suggests that the balance of community versus individual offender concerns may tip decidedly in favor of the offender in the case of shame sanctions.

One could reach this same conclusion simply by arguing that it is always immoral to intentionally degrade a human being. This argument, though, would render any punishment scheme "immoral," a result I regard as senseless, in both practical and moral terms. When we wound others — by robbing, assaulting, driving recklessly, cheating, or otherwise — we can expect and in some sense deserve rebuke. This rebuke may well lower our social standing, and hence compromise our self-image. If we deny states the power to injure one's social standing, we deny them the power to convict and punish criminals. I would oppose such a result, as would most people. Nonetheless, whenever we place the power to rebuke in the hands of the government, liberalism reminds us to be extremely wary of that authority, and to demand that the power be exercised minimally, uniformly, and subject to constant reexamination and supervision.

State-enforced shaming authorizes public officials to search for and destroy or damage an offender's dignity. Aggressive use of such authority may be an Orwellian prospect, particularly when reintegration is not part of the punishment process. Absent far more compelling evidence than we currently possess that shaming would produce demonstrably better results than conventional punishments, then, shaming should not become part of the sentencer's arsenal.

VIII. Conclusion

Jurists and legislators have good reason to be frustrated by the failures of past attempts to find effective, humane, and economic punishment techniques. But shaming sanctions are not the solution. We cannot wish away the absence of cultural conditions that might make shaming a meaningful cultural ritual. We likewise cannot ignore the profound harm that effective shaming, where it can be achieved, may cause.

The historical demise of public shaming in dominant Western culture was prompted by rationalistic and humanistic instincts. The experiences that gave rise to those instincts should inform modern

attempts to fashion rational, humane criminal punishment. They caution against widespread revival of the pillory and stocks in the United States. Absent thoroughgoing changes in the nature of the modern state, in criminal court procedures and personnel, and in the dominant culture's conception of the relationship between the individual and her community, the modern shaming sanctions will not work. At best, they are likely to prove futile, even silly, responses to crime. At worst, they may become highly destructive, state-imposed assaults on human personality.