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Crime Delinquency 1998; 44; 277

DOI: 10.1177/0011128798044002006

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The Judicial and Judicious Use of Shame Penalties

David R. Karp

This article analyzes and critiques the recent use of judicial shame penalties. Arguing that these penalties are designed to satisfy a "retributive impulse," they communicate and enforce normative, as opposed to legal, standards. The power of the sanction is found in the threat of social exclusion. Three classes of shame penalties are identified: public exposure, debasement, and apology penalties. Critique of the penalties focuses on the risk of stigmatization and exclusion, the structural preconditions for offender reintegration, and the potentiality of using shame sanctions in an individualistic society.

The American criminal justice system suffers from a crisis of legitimacy. A 1993 national poll found that only 8 percent of Americans had great confidence in the legal system (Myers 1996). Few believe it is fair, efficient, or effective. Incarceration and probation, the right and left hands of criminal sanctioning, are widely used but endorsed with reservation. Seeking meaningful alternatives to incarceration is a growing trend in criminal justice. One avenue of experimentation gaining popularity is the use of shame penalties as a judicial sanction. The object of these penalties is to clearly communicate that the offending behavior violates not only legal standards but also the moral order. As a result, the offender's status in the community is diminished by the shaming sanction. This article reviews the use of judicial shame penalties, analyzing both the promise and problems of this approach.

THE RETRIBUTIVE IMPULSE

Among the goals of criminal sanctioning, the desire for retribution is very prominent. Two motives underlie this retributive impulse, the first being practical. To ensure the offender does not profit from the criminal act,

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The author wishes to thank Amitai Etzioni, Gordon Bazemore, and Thomas Scheff for their helpful comments on earlier drafts of this manuscript.

CRIME & DELINQUENCY, Vol. 44 No. 2, April 1998 277-294
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retribution requires a balancing of the cost/benefit equation. This often involves the imposition of some form of suffering: incarceration, monetary fines, physical labor, and so on. The second motive is symbolic. Retribution reaffirms the moral order (Clear 1994; Cragg 1992; Garland 1990; Braithwaite and Pettit 1990). As Clear (1994) indicates:

The main idea is that the offender, by the conduct, demonstrates a kind of moral ignorance. The retributive response serves to educate the offender and the punisher alike as to the forbidden nature of the conduct. It confirms the punisher's commitment to those moral norms, and it calls the lawbreaker's attention to the wrongfulness of the conduct. . . . The imposition of the penal harm makes tangible the moral evaluation of the criminal's conduct, and it symbolizes the communities' outrage at the crime. (P. 10)

Recent survey data indicate that the retributive impulse remains quite strong among Americans (Gerber and Englehardt-Greer 1996). In a 1995 national survey sample, respondents were asked to identify the most important goal of criminal sanctioning. Retribution received the most support (53 percent), which contrasted with the much lower support given to other goals of sanctioning. Rehabilitation was seen as primary by only 21 percent of the sample, incapacitation by 13 percent, and deterrence also by 13 percent. It is possible that this retributive impulse is not driven by the practical desire to impose suffering on offenders as much as it is to clarify and enforce normative standards through some symbolically expressive means.

Kahan (1996) argues that probation and most other forms of alternative sanctions fail to satisfy the public thirst for retribution because they fail to reaffirm the moral order. Incarceration is symbolically rich, especially in American society, because the denial of liberty is a punishment that penetrates a core value of the society. In a free society, the loss of liberty is a powerful signal of moral approbation. Incarceration, therefore, easily gains acceptance as a means of communicating moral disapproval. Few other sanctions are as expressively powerful. Kahan (1996) points out that both fines and community service present mixed messages to the community, undermining the moral clarity of the response.

Punishment is not just a way to make offenders suffer; it is a special social convention that signifies moral condemnation. Not all modes of imposing suffering express condemnation or express it in the same way. The message of condemnation is very clear when society deprives an offender of his liberty. But when it merely fines him for the same act, the message is likely to be different: you may do what you have done, but you must pay for the privilege. Because community service penalties involve activities that conventionally entitle people to respect and admiration, they also fail to express condemnation

in an unambiguous way. This mismatch between the suffering that a sanction imposes and the meaning that it has for society is what makes alternative sanctions politically unacceptable. (P. 593)

Shame penalties, unlike other alternative sanctions, are justified by their intent to convey the same moral condemnation as incarceration. They are meant to satisfy the retributive impulse. The symbolic power, however, does not come from the denial of liberty but, as argued below, from the reduction of social status.

NORMATIVE CONFORMITY AND THE CONCERN FOR STATUS

The idea of shaming is grounded in a sociological conception of the self that emphasizes the importance others play in the creation of identity. This view rejects the notion of selves as islands, wholly independent and autonomous. Scheff (1988, 1990) argues that shame is the most important of emotions for it looms large in every social encounter. As he describes it, shame is the emotional cognate to the social bond and shame is felt when the bond is threatened. Just as we feel fear when the physical self is threatened, we feel shame when the social self is threatened. According to Scheff (1988, p. 405): "Conformity to exterior norms is rewarded by deference and feelings of pride, and nonconformity is punished by lack of deference and feelings of shame. In this analysis, social control involves a biosocial system that functions silently, continuously, and virtually invisibly, occurring within and between members of society." Shame is an emotional cue regarding one's social status. It is a signal that one's position is in jeopardy, that there are real risks associated with loss of status or social exclusion.

Tajfel's (1981) social identity theory advances a parallel argument. Tajfel argues that the self is inherently social, constructed partially on the basis of group membership. We are social creatures and highly value our sense of belonging. The threat of rejection by others, in essence, is a threat to our self-identity. Social recognition reinforces our sense of belonging, and we feel pride. Disapproval threatens our place in the social order, threatening a loss of status and the possibility of being ostracized, imbuing us with feelings of shame. As a result, we engage in a constant process of social comparison in which we evaluate ourselves in light of other's opinions.

Although the relationship between guilt and shame is complex (Tangney 1995), for analytical purposes here it is useful to draw a bold distinction between the two concepts. Guilt is an emotional expression following a violation of internalized moral codes. The experience is wholly independent

of others' knowledge of the violation. By contrast, shame has nothing to do with internalized morality, but everything to do with others' knowledge of a violation of an accepted social norm (or an external moral code). The emotional experience comes from disappointing someone else or fearing disapproval. One may, in fact, care nothing about the violation but care terribly about others' opinions of oneself. In short, one can feel ashamed without having a conscience. Shame is felt by those who care deeply about the relationships they are in and do not wish to mar them. Shame is felt when one is concerned about social status. One might even feel ashamed by the knowledge that complete strangers hold a low opinion of one's behavior.

Guilt involves uncovering hypocrisy: the disjunction between the behavior and the internalized standard. Shaming, on the other hand, is a process of making the offender aware of how his or her behavior has violated an external moral code. Though it is possible, even probable, that one might feel both guilty and ashamed, the distinction is critical because a theory of shaming depends much more on social integration and normative processes than on individual moral development.

The judicial use of shame penalties is an attempt to threaten the social status of offenders. The penalties are meant to communicate that the offense has a moral and social nature in addition to its legal content. As such, the offense triggers disapproval. Assuming that the offender is concerned with social status, the penalty is meant to reaffirm normative standards and deter future transgressions by creating an opportunity for the offender to experience shame. The threat of social exclusion, of not being regarded as a worthy member of the community, is the primary sanction in a shame penalty.

SHAME PENALTIES IN PRACTICE

In a number of cases, judges have attempted to make use of shame penalties as alternatives to incarceration. These penalties can be understood in the context of the normative theory of shaming, which explains their potency: They work as a deterrent because individuals fear social disapproval and exclusion. In addition, shame penalties may be attractive to judges and the public because they satisfy the retributive impulse. Like incarceration, the penalties speak to a core value, although instead of liberty, shame penalties speak to social belonging. From the perspective of the public, shame penalties may succeed where other alternative sanctions, such as fines and community service, fail. Although incarceration also satisfies the retributive impulse, there are numerous unintended consequences of relying heavily on incarceration, such as huge public costs and the creation of brutal prison

cultures. Below, I review the recent judicial use of shaming. I divide the current judicial applications of shame penalties into three categories: public exposure penalties, debasement penalties, and apology penalties.

Public Exposure Penalties

Public exposure penalties refer to the largest and most basic class of shame penalties. These are defined by the attempt to communicate the offense and the offender to the public. Recent penalties include the requirement that convicted drunk drivers affix bumper stickers, signs, or special license plates to their vehicles indicating their driving offense, and that offenders of various of crimes post signs in front of their homes, place advertisements in newspapers, appear in television commercials or in cable TV programs, and wear T-shirts, signs, or bracelets indicating their offenses. For example:

- On December 10, 1991, Roy C. Letterlough pleaded guilty to driving while under the influence of alcohol in New York State. This was the defendant's sixth DWI since 1971. As part of his plea agreement, the court ordered five years' probation, a fine of \$500, a license revocation, and alcohol treatment. In addition, Judge Mogil ordered that should the defendant renew his license during the probationary period, he must affix a fluorescent sign to his car that reads, "CONVICTED DWI" (Kahan 1996; *People v. Letterlough* 1995).
- A Rhode Island Superior Court judge required an offender to purchase an advertisement in the *Providence Journal-Bulletin* reading: "I am Stephen Gersershausen. 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" (Massaro 1991, p. 1880).
- In the 1988 case of *State of Oregon v. Richard Bateman*, the defendant was convicted of child molestation. The offender was placed on five years probation and required to post a sign at his residence and on any vehicle he drove stating: "Dangerous Sex Offender—No Children Allowed" (Brilliant 1989; *State v. Bateman* 1989).
- More recently, in the 1995 case of *Illinois v. Glenn Mayer*, the defendant was convicted of aggravated battery. The judge sentenced him to probation for 30 months, fined him \$7,500, and ordered that he pay restitution of \$9,600 to the victim. As a condition of his probation, Mayer was ordered to remain on his farm and post a sign at the entrance reading: "Warning! A Violent Felon Lives Here. Enter at Your Own Risk!" (Hoffman 1997).

The central component of public exposure penalties is to bring the crime to the attention of the public so that the public may respond with shaming.¹ Note that the shaming may never be direct; it is often enough to evoke gossip alone that never reaches the ears of the offender (Braithwaite 1989). The

knowledge that gossip may occur, or the extended stares, or the constant visual reminder to the offender of his or her offense are intended to evoke shame. These penalties are, of course, reminiscent of Hester Prynne's scarlet letter.

Debasement Penalties

Debasement penalties are designed specifically to lower the status of the offender through humiliation. They generally achieve this by associating the offender with a noxious activity.

- Judge Ted Poe of Houston sentenced Steven Dodd, convicted of interfering with child custody, to 180 days in jail and 10 years of probation. During the entire probationary period, he was required to clean the Houston Police Department's stables, eventually amounting to 1,572 hours in the horse barn (El Nasser 1996).
- An offender in a domestic violence case was made to stand before his ex-wife while she spit in his face (Kahan 1996).
- A slumlord was put under house arrest in one of his rat-infested tenements (Kahan 1996).
- A probationer was required to live in a halfway house and comply with its rules. When the probationer was accused of "acting like a baby," he was told to wear diapers outside of his clothes (*Bienz v. State* 1977). Brilliant (1989, p. 1365) notes that "although the case was resolved on other grounds, the court took the opportunity to comment on the condition of wearing a diaper: 'Suffice it to say that a command . . . that an adult male wear diapers in public would certainly be demeaning in the minds of, so called, reasonable men.' "

The essence of debasement penalties is status diminution through embarrassment and humiliation. The negative feelings about the offender's behavior are communicated through imposed negative experience. This captures the practical function of retribution of disallowing the offender the opportunity to profit from the offending act. Of course, debasement penalties can be combined with public exposure to amplify the embarrassment. The ducking stool is an example of public debasement in an earlier era.

Apology Penalties

The third class of shame penalties involves ceremonial or written apologies directed to the court, the victims, or the community. Apology is a social gesture that symbolically communicates an understanding that a wrong has been committed and remorse for its commission (Tavuchis 1991). Apology penalties are a requirement that the offender demonstrate a knowledge of the moral order and culpability for the transgression. Apologies to the community

obviously combine public exposure with apology. In some cases, apology has been combined with debasement, such as a Maryland judge who has had juvenile offenders apologize to the court while on their hands and knees (Stapleton 1995).

- Ted Poe, the judge who sentenced Steven Dodd to shovel manure, in another case required a teenager who had vandalized 13 schools to return to each school and offer an apology in front of the student bodies (El Nasser 1996).
- Tennessee Judge L. Clure Morton sentenced a car thief to three years probation on the condition that he apologize for the theft to a church congregation (Mintz 1984).
- Tavuchis (1991) reports the following apology advertisement published in an Oregon newspaper with the offender's photo and description of the offense (burglary).

APOLOGY- I, Tom Kirby, wish to apologize to the people of the City of Newport for all of the problems I have caused. I know now what I did was selfish and wrong. I also realize that I have caused a lot of hardships on people that were my friends and also my own family. I want to thank the courts for a second chance to prove that I can be an honest upstanding person. My apologies again for causing any inconveniences to anyone.

THREE CRITIQUES OF SHAME PENALTIES

According to the theory behind shame penalties, shame cuts to the bone because we care deeply about how others perceive us. We conform because we do not want to jeopardize our acceptance in the social world and, as we internalize normative standards, because we do not wish to violate our consciences. There are three important critiques of the judicial use of shame penalties. First, shaming is potent and where there is potency, there is risk. Shaming can easily be counterproductive if, as the result of the stigmatization of the offender and symbolic or literal exile from the community, offenders form oppositional subcultures that reject the dominant normative standards, increasing rather than decreasing criminality. Second, the use of shame generally has an individualistic, offender-based focus that often fails to take into account the circumstances within which offending takes place. The worst case scenario amounts to "blaming the victim." Structuralists discount normative approaches such as shaming in favor of systemic solutions. Third, shaming grates against the sensibilities of a society deeply influenced by liberal political philosophy and heavily reliant upon the formal procedural mechanisms of the state. Shaming is criticized as insufficiently respectful of individual dignity and a violation of legally protected individual rights. I will take up each of these issues in turn.

Stigma and Exclusion

Retribution has been described as a “backward-looking” or nonconsequentialist theory of punishment (Massaro 1991). Its function is vindication of the moral order without particular regard to the incapacitative, deterrent, or rehabilitative effect of the punishment on the offender. Braithwaite (1989) reviews the arguments of labeling theorists and subcultural theorists, which suggest that retributive shaming can be counterproductive. Shaming may stigmatize the offender when the community expresses disapproval not only of the act but also of the person. Stigmatization leads to shunning the offender. Ostracized, the offender’s opportunities for successful conventional existence are reduced and the offender seeks the company and approval of other outcasts. Subcultures form that reject the dominant moral order and reward nonconformity and delinquency.

Braithwaite (1989; see also Braithwaite and Mugford [1994]) argues that stigmatization and exclusion are the most significant risks of shaming. Nevertheless, he argues that not all shaming will inspire subcultural formation. He contrasts a social process in which an offender is ostracized with a process that reintegrates the offender into the community. Garfinkel’s (1956) seminal article on degradation ceremonies provides the theoretical context. In any society, Garfinkel argues (pp. 422-3), the existence of social hierarchies provides the inevitable opportunities for status degradation. He goes on to specify the conditions that make degradation possible. They are, to simplify:

1. The identification of the act and offender as “out of the ordinary,” that is, as a norm violation/violator.
2. The definition of the offender by the act (“How would you describe X?” “As a person who did Y”).
3. The perception of the denouncer as legitimate and acting in the interest of the public good.
4. Distance is placed between the law-abiding and the offender, and in some way, the offender is labeled as deviant or physically outcast.

The result of this shaming process is labeling and, worse, exclusion from the community. Such a process is very likely to lead to oppositional culture formation, which goes something like this. A person shoplifts from a store. Others label this person a thief, so that the label describes more than the act, but something about the person’s character. The label is likely to stick when those who label—say, the storekeeper, the police officer, or the judge—are viewed as servants of the public good rather than as individuals seeking to malign the character of the offender. As a result, the offender comes to be seen as deviant, and others distance themselves socially (“Don’t hang around

with him”) or formally such as when the offender is expelled from school or sentenced to prison. Shaming in this light is counterproductive because oppositional cultural formation systematizes criminality. Referring to Garfinkel’s conditions for successful degradation, Braithwaite and Mugford (1994, p. 143) outline the conditions for successful reintegration. Again, to summarize (and simplify):

1. In contrast to identifying both the act and the offender as counternormative, only the act is identified as such.
2. The offender is not defined by the act, but neither is the act condoned (“hate the sin, love the sinner”).
3. The denouncer is viewed as a part of a community of relations, of which offender, victims, and others are a part. Denunciation is in the name of victims and the interest of the community.
4. Through a process of reconciliation in which the offender expresses remorse and commits to reparation, the community responds with forgiveness and decertification of the deviant label, closing the distance between the offender and the community.

In this case, the trajectory of the offender is quite different. Rather than being labeled, the offender is held accountable for the act without a degradation of character. The denouncer in this case is not only a representative of the moral order but also a member of the community just as the offender is a member. The emphasis is placed on the breakdown of appropriate social relations among community members (where the offender is made aware of the harm he or she has caused). Rather than respond with increased distance, the approach becomes one of evoking remorse in the offender and problem solving to rectify the wrong committed.

According to Braithwaite (1989):

Reintegrative shaming means that expressions of community disapproval, which may range from mild rebuke to degradation ceremonies, are followed by gestures of reacceptance into the community of law-abiding citizens. These gestures of reacceptance will vary from a simple smile expressing forgiveness and love to quite formal ceremonies to decertify the offender as deviant. Disintegrative shaming (stigmatization), in contrast, divides the community by creating a class of outcasts. (P. 55)

Just as parents disapprove misbehavior but keep the family together, the community may shame offenders for their wrongdoing but not ostracize them.

Thus, shaming can either be stigmatizing or reintegrative. It is its stigmatizing potential that raises the most objection. Many do not wish to see individuals demeaned and humiliated. This punitive end runs counter to basic

principles of respect and dignity intrinsic to an egalitarian society. Debasement shame penalties, for example, are quintessential ceremonies of degradation without the opportunity for reintegration. Being forced to wear diapers inevitably countermanded the usefulness of the halfway house experience, which is reintegrative by nature. By seeking penalties that are clearly offensive to the dignity of the person, the moral message is one of devaluation. The offender, no longer worthy of respect, is forced to wallow in the shamefulness of the offense. By emphasizing the stigmatizing potential of shaming, these penalties blur the distinction between moral condemnation of the act and of the actor. Such humiliation is not likely to generate remorse as much as anger, enabling the offender to shift his or her self-concept from victimizer to victim.

Massaro (1991), following Goffman, argues that apologies must include an expression of embarrassment, a recognition of wrongdoing, the intention to behave properly, and some effort to make restitution. Of the three types of formal penalties that have been employed recently, apologies come closest to the ideal of reintegrative shaming. They may evoke sympathy and forgiveness if they are felt to be sincere. As such, offenders are more likely to be welcomed back into the community, particularly if they are attempting to make up for the harm caused by the offense.

Where penalties combine apologies with public exposure, shaming and a bridge toward reintegration are created at once. Aside from these rare applications, we have few rituals of apology for offenders to publicly announce their guilt and sorrow (when they indeed feel it). Thus, we have few opportunities for public forgiveness and readmission into the community.

Culture Versus Structure

Shaming has an inherently individualistic, offender-based focus. The emphasis is on the moral culpability of a particular individual for a particular act. The message is always that it was wrong to steal that car, rob that person, set fire to that building because these acts have consequences for victims undeserving of such treatment. In response, offenders have only three courses of action. They may protest their innocence; admit guilt but demonstrate that the action did not in fact cause harm (the norm, not the violation, is unjust); or accept responsibility for causing harm (Braithwaite 1989). The emphasis is on the act and its consequences, not on the context within which the act occurred. Because the focus is on moral culpability, the use of shaming is biased toward individual responsibility. There is little room here for the offender to counter that he or she is a victim of circumstances.

A structuralist will argue that offenders are profoundly constrained by social forces they cannot control. Focusing on the culpability of offenders is a misguided distraction from what should be the proper response: structural change that alters the incentives for offending. For example, Sampson and Wilson (1995, p. 54) write, "The unique value of a community-level perspective is that it leads away from a simple 'kinds of people' analysis to a focus on how social characteristics of collectivities foster violence. . . . We do not need more after-the-fact (reactive) approaches that ignore the structural context of crime and the social organization of inner cities." This line of argument is common among situational theorists (Clarke 1995) and social disorganization theorists (Bursik 1988; Sampson 1995) who deemphasize motivation in favor of the ecological context of crime. This debate is loudest in discussions of the Black underclass, members of whom are disproportionately represented in tallies of criminal offenders (Sampson and Wilson 1995).

Whether shaming successfully hits its mark is an indication of the strength of the bond between the offender and the community. Individuals who are isolated and disenfranchised from the community's institutions and relations are going to be impervious to shaming, for they do not have a position in the community worth preserving. Whereas the previous discussion pointed out that shaming is potent because of its potential to stigmatize and outcast offenders, here we are concerned with those who are in some way already stigmatized either through prior imprisonment, segregation, discrimination, poverty, or some other mechanism. For them, shaming may fall on deaf ears.

The logic of a pure structuralism suggests that shaming and any other punishment of the individual offender is inappropriate because the individual is not held responsible for the crime. Punishment will be counterproductive because it so easily becomes interpreted as further punishment of the person for holding a marginal status in the society rather than as punishment of the deviant act. The offender becomes the victim. Proper recourse would be to remove the offender from the criminogenic environment to another setting or change the environment. Laudable as they may be, such efforts are beyond the scope of judges who must deal with criminal incidents, not criminogenic conditions. Nevertheless, it is possible to make judicial sanctioning at least compatible with efforts to change social conditions at the community level.

The purpose of shaming, like any other form of punishment, is to make offenders feel bad enough about their behavior that they do not wish to repeat it. The difference in kinds of punishment is how "feeling bad" is defined. Physical pain and shame differ considerably, for example. What is unique about shame is that it is indicative of a bond between the offender and other members of the community. Where there is no bond, there is no shame. The stronger the bond, the more easily a person is shamed. But there is an irony

here, for if we recognize that social isolation precedes much criminality and mutes the impact of shaming, then we must embrace a circumstantial explanation of crime. The causal influence of shaming is spurious unless we also take into account the structural conditions that affect criminality and shaming.

Effective shaming depends upon the stake a person has in the community. If a person cares nothing about the disapproval of others, shame is a useless tool. But such a person is extremely rare in society and best classified by a psychiatric disorder. More common is the person who cares little about the opinion of those who hold mainstream values. Instead, he or she cares about the opinion of other members of an oppositional subculture. Shaming remains quite effective, but only with regard to these subcultural members. The trick is to increase the stake of the offender in the larger community.

Consistent with control theory (Hirschi 1969), crime is disproportionately committed by those who have the greatest freedom and smallest stake in the larger society: young, unemployed, unmarried, urban, non-White males. The larger community must offer such individuals a compelling reason to embrace mainstream values and behaviors. Thus, when a shame penalty fails to penetrate the moral core of an offender, it may be an indication of the offender's low stake in the community, and the proper recourse is not stigmatization, but active social integration.

Shaming, therefore, provides us with a yardstick for estimating the requisite intensity of (re)integrative efforts. The appropriate focus is individualistic at first, but once it is determined that the offender is not susceptible to shaming because of isolation from the community, then efforts need to be directed toward integration. In conjunction with shame penalties, offenders may be required to participate in programs that develop competency (Bazemore and Umbreit 1995), increasing their potential to positively contribute to the community. Preventive measures are warranted in such places as underclass ghettos where large numbers of individuals are disenfranchised. Structural change is not likely to be necessary for middle-class offenders who will have a greater stake in mainstream culture.

Shame and Individualism

A third major critique of judicial use of shame penalties is that they are a form of sanctioning inappropriate to the structural and cultural context of contemporary American society. Individualism is pervasive in two spheres, each undermining the potential for shame penalties. First, a cultural ethos of individualism conflicts with the concept of shaming, viewing it as claustrophobic and a threat to expressions of individuality. Shame penalties are rejected as overly conformist, conservative, and nostalgic (Braithwaite

1989). Second, American society is highly anonymous, social ties are weak, and informal control is insufficient relative to formal systems of control (Massaro 1991; Braithwaite 1989). Shame penalties cannot overcome these forces of isolation, alienation, and anomie.

Shame penalties have been challenged with regard to constitutional protections (see Kahan 1996; Massaro 1991; Filcik 1990; Brilliant 1989; Kelley 1989), but also with regard to broader cultural standards. Shaming may be offensive to modern sensibilities because it implies conformity and consensus in a society that values individuality, diversity, and freedom. The assumption is that shaming is a Puritan sanction and that in its resurrection, our society would also embrace other aspects of Puritanism. The proper recourse is to maintain a clear separation between formal control and its regulated, bureaucratic use of power and informal control, which depends on unregulated and unaccountable sanctioning in the community. Judicial shame penalties are, of course, a use of formal power, but this use is an enabling mechanism for informal processes—status loss occurs in the community, not in the court. Thus, shame penalties may violate this clear separation of spheres.

I argue that excessive reliance on formal control causes communities to relinquish responsibility for social control and it is this that puts the liberal state at risk. As crime fears overwhelm a populace that lacks well-developed mechanisms of informal control, the public will more readily capitulate to ever more authoritarian measures of order maintenance (Rosenbaum 1993). Braithwaite (1989) writes:

And so the irony is that individualistic societies are given little choice but to rely on the state as the all-powerful agent of social control: the ideology of the minimal state produces a social reality of the maximum state. Because sanctioning by peers and intermediate groups like schools, churches, trade unions and industry associations cannot work in an individualist culture, the state responds (ineffectively) to perceived increases in crime the only way it can—by locking more people up, giving the police and business regulatory agencies more powers, trampling on the very civil liberties which are the stuff of individualist ideologies. (P. 171)

Shaming, as Braithwaite argues, may actually play a vital role in clarifying normative standards, thereby protecting various individual domains from external scrutiny and discrimination. Shaming will not work where there is dissensus over core values, either because of oppositional subcultural formation that is routed in stigmatization or because controversy exists over the legitimacy of the dominant norm such as in criminal laws regarding marijuana use, homosexual behavior, or, in a different era, which fountain Blacks may drink from. When legitimacy is in question, “offenders” may explicitly

reject the norm rather than profess their innocence or express remorse. It is a mistake to assume that reliance on formal controls and procedural justice offers more protection from a repressive conformity than reliance on a clearly articulated moral order. What matters is the clarification and enforcement of normative standards, particularly with regard to core values, and the protection of democratic processes that allow for social change.

Some critics of shaming dismiss it as inevitably weak in our highly individualistic and anonymous society (Massaro 1991). What may work in a highly interdependent and relatively communitarian society like Japan seems hopelessly idealistic here. Yet, Americans, like Japanese, are highly concerned about the opinions of others, and consciences are developed as anywhere through social interaction, normative influence, and internalization of standards. Nevertheless, anonymity is great in contemporary society. Public exposure penalties may bring about what Massaro (1991) calls a shaming overload. After some time and enough newspaper advertisements, the novelty and potency of the penalty might diminish. If people ignore car alarms, why would they pay attention to offender advertisements, especially when they appear by the dozen? Mass production of shame penalties fosters an anonymity that undercuts the effect of shaming. Penalties that personalize the exposure more locally, either in local papers, bumper stickers, or wearing signs, are less likely to suffer from this problem. The problem, in essence, is one of context. This critique suggests that offenders are more likely to feel shame in an intimate, small group situation than in an undifferentiated mass society where shame penalties may miss the mark by failing to create a conducive context for shaming.

A novel alternative application of shaming is quasi-formal, integrating the power of informal sanctioning with the oversight of the criminal justice system. Unlike judicial penalties, which prescribe the sanction but leave the shaming to the community at large, "family group conferences" bring relevant community members together in an orchestrated forum that evokes shame in the offender and facilitates reintegration (Hudson, Morris, Maxwell, and Galaway 1996). The family group conference brings the victim and offender together for a one-hour meeting. They are joined by supporters, family members, and others who hold the respect of the victim and offender. The conference is facilitated by a trained mediator who emphasizes a problem-solving approach in both the discussion and the terms for reparation. Moore and McDonald's (1995) account illustrates the experience of this variation on the shame penalty:

(Offenders) are frequently astonished and often shocked to hear of the impact that the offence—say, a burglary, theft, or assault—has had on the person most directly affected. . . . To mark this transition in the conference to the victim's

version of events, the coordinator will usually ask the offender: What were you thinking about at the time of the offence? or: How do you think the victim felt about that? Here one can talk of a typical response to the question. Almost invariably, the offender was thinking about "nothing" at the time of the offence and "doesn't know" what the victim felt. Indeed, this is the common theme uniting most offences across the spectrum, from those of little moment to those that threaten the victim's liberty, dignity or life. The offender simply doesn't see things from the victim's point of view. And when victims of offending behaviour are given an opportunity to put their version of events to the offender, the result is usually clear on the offender's face: the blank look of surprise is rapidly followed by the lowering of the face in shame. (P. 204)

The family group conference is an alternative vehicle for invoking shame in offenders. It is produced most effectively by bringing together in one room not only the victim whose account triggers the shame but also the offender's reference group upon whose esteem he or she depends. This process makes plain the victim's experience and the community estimation of the offending act, personalizing a shaming process more effectively than judicial shame penalties.

CONCLUSION

Recent use of shame penalties by judges is motivated by the search for an alternative to incarceration that effectively expresses an affirmation of the moral order. Shame sanctions, however effective at expressing moral condemnation of the offending act, are subject to three important problems. First, they have tended to be stigmatizing rather than reintegrative. Shame penalties that emphasize humiliation are likely to be counterproductive as they drive a wedge between offenders and conventional society. Second, because shaming is predicated on the offender's stake in conventional society, it is not likely to be effective for individuals already on the margins. Thus, shame penalties must be closely coupled with efforts toward social integration, for example, education programs, job training, or community development. Third, the effectiveness of shaming is also likely to be minimal in the context of an impersonal court or anonymous mass society, but it may be more potent in the informal small group setting of a family group conference.

Shaming is an important part of the normative response to an offender from the moment of conviction of guilt to the restoration of the person as a law-abiding, even contributing, citizen. But it is only one moment in a sequential process. The full sequence may be completed intensively and briefly, such as in a family group conference, or extended over time; it is the order that is most important.

Shaming should be the first signal that an offense is more than technical or harmless: It defies community standards and causes real harm to others. As a result, the community rightfully expresses moral condemnation, a disapproval of the action, and an expectation that the offender acknowledge his or her culpability. The desirable outcome, but one that cannot be controlled, is that the offender will identify with the community and its standards, judge himself or herself through its eyes, and feel remorse. In this communication of standards, it is the offender's status in the community that is in jeopardy.

The next step is that the offender must be offered the opportunity to apologize to both the victims and the community. Ideally, through some interchange between offender, victim, and community, the apology can be accepted and the offender held accountable for its sincerity by engaging in a process of reparation. At this point, the stigma must be lifted and the offender redefined as repentant. Community service may be carried out in the same spirit of voluntarism with which any other citizen might engage in it: an effort to improve the status quo. Community service ought not be viewed as punishment but as good works to be praised. This shift in orientation helps the offender and the community make the final transition toward reintegration.

Completion of restitution ought to be marked by an occasion of ceremonial reintegration. The sequence should be concluded by a commitment of the community to reintegrating the offender into conventional society. These efforts may be through social services or local economic efforts to change the social conditions of the offender's neighborhood. However it is done, it must be clear to the offender that the community values a positive effort toward conventional life.

Thus far, the judicial use of shaming has been directed at juveniles and less serious offenders. It is still unclear if the power of shaming is limited to these forms of criminality. As evidence accumulates regarding its effectiveness, the boundaries may be expanded (or contracted). Even in this limited realm, however, it is unclear how shaming should be applied to repeat offenders and to those who have previously and unsuccessfully been subjected to judicial shaming. As I have argued, the best strategy will identify the offender's stake in the community and work to increase that stake. This will not only have its own independent benefits but also increase the likelihood of successful shaming.

The current uses of shaming have been a disorganized and often spontaneous generation of creative strategies to ameliorate the pressures on an overtaxed and underachieving criminal justice system. Though no studies document the effects of the various applications, it is likely that their ultimate success will turn on these questions: Do shame penalties restore legitimacy

to the criminal justice system? Do shame penalties reaffirm the moral order, thus serving as a symbolically viable alternative to incarceration? What kinds of offenders are deterred by social disapproval and threatened status loss? And do shame penalties stigmatize and outcast, or do they offer opportunities for moral and social reintegration, ultimately increasing offenders' stake in the community?

NOTE

1. Public exposure penalties are complicated by a second (and often prioritized) goal that the public be informed so it may protect itself. In this case, the goal is one of incapacitation rather than moral condemnation. Such is the intent behind many community notification laws such as Megan's Law. Where incapacitation is the goal, the penalty is strictly a substitute for incarceration meant primarily to alleviate overcrowding. As such, the penalty is equivalent to house arrest and other recent innovations in incapacitation.

REFERENCES

- Bazemore, Gordon and Mark Umbreit. 1995. "Rethinking the Sanctioning Function in Juvenile Court: Retributive or Restorative Responses to Youth Crime." *Crime & Delinquency* 41:296-316.
- Bienz v. State, 343 So. 2d 913, Fla Dist Ct App (1977).
- Braithwaite, John. 1989. *Crime, Shame, and Reintegration*. Cambridge: Cambridge University Press.
- Braithwaite, John and Stephen Mugford. 1994. "Conditions of Successful Reintegration Ceremonies." *British Journal of Criminology* 34:139-71.
- Braithwaite, John and Philip Pettit. 1990. *Not Just Deserts*. Oxford: Clarendon.
- Brilliant, Jon A. 1989. "The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions." *Duke Law Journal*, November, pp. 1357-85.
- Bursik, Robert J. Jr. 1988. "Social Disorganization and Theories of Crime and Delinquency: Problems and Prospects." *Criminology* 26:519-51.
- Clarke, Ronald V. 1995. "Situational Crime Prevention." Pp. 91-150 in *Building a Safer Society: Strategic Approaches to Crime Prevention*, edited by M. Tonry and D. Farrington. Chicago: University of Chicago Press.
- Clear, Todd R. 1994. *Harm in American Penology*. Albany: State University of New York Press.
- Cragg, Wesley. 1992. *The Practice of Punishment*. New York: Routledge.
- El Nasser, Haya. 1996. "Paying for Crime With Shame: Judges Say 'Scarlet Letter' Angle Works." *USA Today*, June 25, p. 1.
- Filcik, Jeffrey C. 1990. "Signs of the Times: Scarlet Letter Probation Conditions." *Washington University Journal of Urban and Contemporary Law* 37:291-323.
- Garfinkel, Harold. 1956. "Conditions of Successful Degradation Ceremonies." *American Journal of Sociology* 61:420-4.
- Garland, David. 1990. *Punishment and Modern Society*. Chicago: University of Chicago Press.

- Gerber, Jurg, and Simone Engelhardt-Greer. 1996. "Just and Painful: Attitudes Toward Sentencing Criminals." Pp. 62-74 in *Americans View Crime and Justice: A National Public Opinion Survey*, edited by T. J. Flanagan and D. R. Longmire. Thousands Oaks, CA: Sage.
- Hirschi, Travis. 1969. *Causes of Delinquency*. Berkeley: University of California Press.
- Hoffman, Jan. 1997. "Crime and Punishment: Shame Gains Popularity." *The New York Times*, 16 January, p. 1.
- Hudson, Joe, Allison Morris, Gabrielle Maxwell, and Burt Galaway, eds. 1996. *Family Group Conferenes*. Monsey, NY: Criminal Justice Press.
- Kahan, Dan M. 1996. "What Do Alternative Sanctions Mean?" *University of Chicago Law Review* 63:591-653.
- Kelley, Rosalind K. 1989. "Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional?" *Dickenson Law Review* 93:759-88.
- Massaro, Toni M. 1991. "Shame, Culture, and American Criminal Law." *Michigan Law Review* 89:1880-944.
- Mintz, Robert A. 1984. "Judge Turns Confessing to a Crime Into a Religious Experience." *The National Law Journal*, 6 February, p. 47.
- Moore, David B., and J. M. McDonald. 1995. "Achieving the Good Community: A Local Police Initiative and Its Wider Ramifications." Pp. 199-229 in *Perceptions of Justice: Issues of Indigenous and Community Empowerment*, edited by K. Hazlehurst. Brookfield, CT: Ashgate.
- Myers, Laura B. 1996. "Bringing the Offender to Heel: Views of the Criminal Courts." Pp. 46-61 in *Americans View Crime and Justice: A National Public Opinion Survey*, edited by T. J. Flanagan and D. R. Longmire. Thousands Oaks, CA: Sage.
- People v. Letterlough, 86 NY2d 259, 631 NYS2d 105 (1995).
- Rosenbaum, Dennis P. 1993. "Civil Liberties and Aggressive Enforcement: Balancing the Rights of Individuals and Society in the Drug War." Pp. 55-82 in *Drugs and the Community*, edited by R. C. Davis, A. J. Lurigio, and D. P. Rosenbaum. Springfield, IL: Charles C Thomas.
- Sampson, Robert J. 1995. "The Community." Pp. 193-216 in *Crime*, edited by J. Q. Wilson and J. Petersilia. San Francisco: Institute for Contemporary Studies.
- Sampson, Robert J. and William Julius Wilson. 1995. "Toward a Theory of Race, Crime, and Urban Inequality." Pp. 37-54 in *Crime and Inequality*, edited by J. Hagan and R. D. Peterson. Stanford, CA: Stanford University Press.
- Scheff, Thomas J. 1988. "Shame and Conformity: The Deference-Emotion System." *American Sociological Review* 53:395-406.
- . 1990. *Microsociology*. Chicago: University of Chicago Press.
- Stapleton, M. A. 1995. "Prof Says It's Time to Bring Back Shame." *Chicago Daily Law Bulletin*, 8 December, p. 3.
- State v. Bateman, 95 Ore App 456, 771 P2d 314 (1989).
- Tajfel, Henri. 1981. *Human Groups and Social Categories: Studies in Social Psychology*. Cambridge: Cambridge University Press.
- Tangney, June Price. 1995. "Recent Advances in the Empirical Study of Shame and Guilt." *American Behavioral Scientist* 38:1132-45.
- Tavuchis, Nicholas. 1991. *Mea Culpa: A Sociology of Apology and Reconciliation*. Stanford, CA: Stanford University Press.