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**The New Age of
Scarlet-Letter Punishment**

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The New Age of Scarlet-Letter Punishment

“There can be no outrage, methinks, against our common nature, —whatever be the delinquencies of the individual— no outrage more flagrant than to forbid the culprit to hide his face for shame; as it was the essence of this punishment to do.”

– Nathaniel Hawthorne, *The Scarlet Letter*

What is Scarlet-Letter Punishment?

Members of society expect punishment to protect them from harm and to express moral disapprobation.¹ The most well-known and often used methods of punishment include imprisonment, fines, probation and community service. Different forms of punishment are beginning to emerge that challenge conventional notions of what punishment is all about.²

In recent years, scarlet-letter punishment has come back in vogue as an alternative to other popular sanctions.³ These penalties are designed to humiliate and degrade an offender in public while inviting some element of public participation.⁴ These sentences reveal an offender’s bad behavior to the public and force him or her to experience the uncomfortable exposure associated with the public announcement of his crime.⁵ They have reemerged primarily as a result of society’s skepticism that prison time, fines and parole do not effectively work to rehabilitate criminals.⁶ These penalties are typically reserved for sex and moral offenses,

¹ Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2077 (2006).

² Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 733 (1998).

³ See, e.g., Aaron S. Book, *Shame on You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653, 660 (1999); James Q. Whitman, *What is Wrong With Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1056 (1998).

⁴ Dan Markel, *Wrong Turns on the Road to Alternative Sanctions: Reflections on the Future of Shaming Punishments and Restorative Justice*, 1385 TEX. L. REV. 1385, 1389 (2007).

⁵ Jon A. Brilliant, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357, 1357 (1989).

⁶ See, e.g., Garvey, *supra* note 2, at 738.

commercial offenses, and minor offenses.⁷ They are usually imposed on first-time offenders.⁸ They are most likely handed down in state courts because state judges typically have broader discretion.⁹

Shaming penalties require an offender to publicize his offense to an audience that, under normal circumstances, would be unaware of it.¹⁰ As a result of this publicity, the penalties cause the offender to suffer an unpleasant, and likely painful, emotional experience.¹¹ To comprehend what constitutes scarlet-letter punishment, consider these recent examples of how judges across the county impose these types of penalties: a judge in Houston, Texas ordered that a warning sign be placed on the front door of a convicted child molester's home.¹² The sign read, "No children under the age of 18 allowed on these premises by court order."¹³ The same judge required a witness who committed perjury to wear a sign in front of the courthouse that read, "I lied in court. Tell the truth or walk with me."¹⁴ Another judge in Houston ordered a man who pleaded guilty to domestic violence to stand on the steps of City Hall, face lunchtime workers, reporters and battered women's advocates, and apologize for hitting his wife.¹⁵ Authorities in Canton, Ohio and Miami, Florida place the names, addresses and ages of convicted prostitution

⁷ *Id.* at 743.

⁸ *Id.*

⁹ Haya El Nasser, *Paying for Crime With Shame*, USA TODAY, June 25, 1996, at A1.

¹⁰ *Id.*

¹¹ *Id.*

¹² Ted Poe, *Public Humiliation is Effective Deterrent*, DALLAS MORNING NEWS, Apr. 11, 1997, at 31A.

¹³ *Id.*

¹⁴ Nicole Koch, *Houston Judge Teaches "Humiliation in Sentencing,"* WICHITA EAGLE, May 22, 1997, at 17A.

¹⁵ Paul Sperry, *Throwing the Book – and Bible – at Texas' Criminals*, INVESTOR'S BUSINESS DAILY, Dec. 3, 1996, at A1.

solicitors on a cable television channel.¹⁶ A state agency in Georgia posts on the internet the names and photos of parents who are delinquent with child support payments.¹⁷ Judges in Texas have ordered shoplifters to parade in front of the stores they robbed, carrying posters admitting their guilt.¹⁸ A Florida judge sentenced a mother who bought drugs in front of her children to take a newspaper ad telling the community what she had done.¹⁹ These are just some of the examples of the newly aggressive approaches by judges to send a message to offenders, would-be offenders, and the public.

Shaming punishments are not only inflicted upon individuals. Every state has enacted some form of sex offender registration legislation.²⁰ Registration requires that convicted sexual offenders provide local authorities with information regarding their whereabouts and prior criminal history.²¹ These “Megan’s Laws” have been enacted at the state and federal level, which require released sex offenders to register their home addresses with the states. Many states publicize this information on websites and through other means.

How did the Concept of Shaming Punishments Begin?

During the 17th and 18th centuries, the most popular methods of punishment involved shaming penalties.²² At that time, effective deterrence rested upon the shoulders of public humiliation. Public shaming constituted the most severe punishment and tended to cause more

¹⁶ Scott E. Sanders, Note, *Scarlet Letters, Bilboes and Cable TV: Are Shame Punishments Cruel and Outdated or Are They a Viable Option for American Jurisprudence?*, 37 WASHBURN L.J. 359, 370-71 (1998); *NBC Nightly News* (broadcast Aug. 25, 1994).

¹⁷ Sanders, *supra* note 11, at 370.

¹⁸ *See, e.g., id.* at 367.

¹⁹ Fort Pierce Judge Tries Humiliating Defendants, *FLORIDA TODAY*, Dec. 6, 1996, at 5B.

²⁰ Elizabeth Kelley Ciezniak, Note, *There Goes the Neighborhood: Notifying the Public When a Convicted Child Molester is Released Into the Community*, 28 IND. L. REV. 715, 717 (1995).

²¹ *See, e.g.,* *People v. Ross*, 646 N.Y.S.2d 249, 250 (1996); Sanders, *supra* note 17, at 372.

²² *See, e.g.,* Brilliant, *supra* note 5, at 1362.

pain than physical beatings.²³ Shame punishments led to shunning by the community.²⁴ As a result, the threat of shame alone deterred crime and controlled deviant behavior.²⁵

Shaming sanctions were successful because of the small size of American communities and intimate social structure in which members depended upon each other.²⁶ Most community members were life-long and the towns were essentially self-contained.²⁷ Shame punishment was based on one's essential attachment to society.²⁸ In fact, at these times, the community was synonymous with life itself.²⁹

As society developed, a more humanitarian approach to punishment evolved. By the 19th century, shaming sanctions had become "worse than useless."³⁰ One such explanation lay in the metamorphosis of American communities from small, intimate and tight-knit to urban, sprawling and anonymous.³¹ As a result, the relationships amongst community members began to transform into more impersonal interactions.³²

Another possible explanation is the changes in the composition and size of the population.³³ The 19th century saw unprecedented population growth, new mobility and

²³ Sanders, *supra* note 16, at 363.

²⁴ *Id.* at 361.

²⁵ *Id.*

²⁶ Book, *supra* note 3, at 658.

²⁷ ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 5 (Yale Univ. Press 1992); Barbara Clare Morton, *Bringing Skeletons Out of the Closet and Into the Light- "Scarlet Letter" Sentencing Can Meet the Goals of Probation in Modern America Because it Deprives Offenders of Privacy*, 35 *SUFFOLK U.L. REV.* 97, 103 (2001).

²⁸ See, e.g., Book, *supra* note 3, at 658.

²⁹ HARRY ELMER BARNES, *THE STORY OF PUNISHMENT: A RECORD OF MAN'S INHUMANITY TO MAN* 45, (Patterson Smith Publishing Corp. 1972).

³⁰ HIRSCH, *supra* note 27, at 39; Sanders, *supra* note 16, at 365.

³¹ Sanders, *supra* note 16, at 365.

³² *Id.*

³³ Matthew W. Meskell, *The History of Prisons in the United States from 1777 to 1877*, 51 *STAN. L. REV.* 839, 842 (1999).

diversification.³⁴ Citizens became more mobile and began migrating to large cities defined by autonomy and individuality.³⁵ The breakdown in the sense of community weakened the sensation of suffering that had accompanied public spectacles of shaming.³⁶

The prison system was born as a result of increasing crime rates and the failure of traditional punishments.³⁷ By the 1850's, confinement had emerged as the new form of punishment and social control of criminal behavior.³⁸

Why Use Shame?

The return to shaming penalties is to some extent a nostalgic longing for an era when a community and its principles were so uniform that people could police themselves.³⁹ The primary reason for imposing these sanctions is economic. In 2006, there were approximately 2.26 million people in state and federal prisons.⁴⁰ Prisons are costly and overused.⁴¹ Today, the costs of imprisonment consume large shares of state budgets.⁴²

Another reason used by supporters of these punishments is that imprisonment is sometimes too harsh of a punishment, and the other major alternative, probation, is too lenient.⁴³ Judges tend not to use fines and community service all that much because they are “expressively

³⁴ HIRSCH, *supra* note 27, at 35; Meskell, *supra* note 33, at 842.

³⁵ Book, *supra* note 3, at 660.

³⁶ Deni Smith Garcia, *Three Worlds Collide: A Novel Approach to the Law, Literature, and Psychology of Shame*, 6 TEX. WESLEYAN L. REV. 105, 113 (1999).

³⁷ HIRSCH, *supra* note 27, at 39.

³⁸ Sanders, *supra* note 16, at 366.

³⁹ Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, N.Y. TIMES, January 16, 1997, at A1.

⁴⁰ U.S. Department of Justice, Bureau of Justice Statistics, <http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited April 21, 2008).

⁴¹ Garvey, *supra* note 2, at 738.

⁴² *See id.*

⁴³ *Id.* at 744.

inadequate.”⁴⁴ Fines can be thought of as ambiguous punishment because they make it look like offenders can buy their way out of harsher punishment.⁴⁵ Community service receives criticism as punishment because it is supposed to be something civic-minded people do that wins them public praise and esteem.⁴⁶

Shaming penalties, according to their supporters, express moral condemnation of the offensive conduct far better than the alternatives. Proponents of scarlet-letter penalties argue that they effectively succeed in the main goals of punishment—namely, deterrence and rehabilitation.

What is the Relationship Between Shaming and Deterrence?

Supporters argue that shaming can deter future wrongdoing in three ways. First, these tactics impose some limitation on the offender’s freedom, for example, by making the offender wear a sign.⁴⁷ Second, they produce an unpleasant emotional experience, which potential offenders will want to avoid and actual offenders will want to avoid repeating.⁴⁸ Third, the offender may suffer adverse consequences from members of the community, who may gossip about him or refuse to engage in social intercourse with him.⁴⁹

In my opinion, these arguments are too speculative and problematic. Even though the criminals may have their freedom restricted, it will be in such a nominal way that it is unlikely to make a big impact. And this restriction is nothing when compared with the restrictions imposed on criminals who are sentenced to imprisonment, and who will be fully deprived of their liberty. Furthermore, it is unclear to what degree these offenders may suffer unpleasant emotions. Each

⁴⁴ Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 622 (1996).

⁴⁵ *Id.* at 622-24.

⁴⁶ *Id.* at 627-29.

⁴⁷ Garvey, *supra* note 2, at 751.

⁴⁸ *Id.*

⁴⁹ *Id.* at 751-52.

person will react differently, which will largely depend on his community, his status and his past experiences. These effects need to be measured individually and in this context, it is virtually impossible.

While I do agree that offenders may suffer adverse consequences from the community, I also find that not everyone cares about being “accepted.” A community may be so atomized that no one cares about what other people think about anyone else.⁵⁰ This is very plausible in today’s world, where technology and traveling abilities help fragment communities and allow individuals to remain more independent and anonymous. Additionally, when shame does work, it may push an offender further into criminality.⁵¹ The penalties may stigmatize or label him as a criminal, which can cause him to think he needs to behave like criminal.⁵²

What is the Relationship Between Shaming and Rehabilitation?

Another purpose of punishment is rehabilitation.⁵³ Rehabilitation is meant to forestall future offenses by changing the defendant’s preferences.⁵⁴ The rehabilitated offender accepts that what he did was wrong and, out of respect for the law and the rights of others, no longer thinks it is morally acceptable to violate either of them.⁵⁵ Thus far, the power of shaming sanctions to rehabilitate has been questionable. Courts have increasingly struck down these types of penalties after finding that they are punitive, and not rehabilitative.⁵⁶

⁵⁰ *Id.* at 753; Sanders, *supra* note 16, at 360.

⁵¹ Garvey, *supra* note 2, at 752.

⁵² *Id.*

⁵³ *See, e.g.*, Book, *supra* note 3, at 656, 678; Sanders, *supra* note 16, at 359.

⁵⁴ *See*, Garvey, *supra* note 2, at 757.

⁵⁵ *Id.*

⁵⁶ Book, *supra* note 3, at 656; Garvey, *supra* note 2, at 757.

Furthermore, the punitive effects of requiring the offender to publicize his conviction in nearly every aspect of his life clearly outweigh the rehabilitative effects. These punishments will humiliate the defendants and cause the public to disassociate themselves from them. It is important to remember that the primary purpose of probation is to reintegrate the defendant into society. The humiliation punishments will frustrate this goal.

Should Preferences Matter?

Proponents of shaming argue that these sanctions should be upheld because they are often the mode of punishment chosen by offenders.⁵⁷ This argument must be looked at in context. Society should not rely on the preference of offenders as a measure of the relative cruelty between incarceration and shaming.⁵⁸ It is no surprise that criminal offenders are willing to choose shaming over the other viable option of prison. Such choice is likely based on the duration of the punishment rather than its intensity or intrinsic cruelty.⁵⁹ Typical shaming punishments have thus far been relatively brief when juxtaposed against the duration of incarceration sentences.⁶⁰ If prisons were the benchmarks for alternative sanctions, then virtually anything would be an improvement and worth trying.⁶¹ People would perhaps be more willing to have two pinkies cut off to avoid having to spend a year in prison away from their family, but that does not necessarily mean the state should be in the business of punishing people by cutting off fingers or that such punishments are less cruel.⁶² Thus, shaming penalties seem far more

⁵⁷ Kahan, *supra* note 1, at 2080.

⁵⁸ Markel, *supra* note 4, at 1401.

⁵⁹ *Id.*

⁶⁰ *See, e.g.*, Book, *supra* note 3, at 653-54.

⁶¹ Toni M. Massaro, *The Meaning of Shame*, 3 PSYCHOL. PUB. POL'Y & L. 645, 696-97 (1997).

⁶² *Id.*

attractive to potential prison inmates. Furthermore, since shaming sanctions are relatively new and rare, offenders who have never been publicly shamed may discount the cruelty.⁶³

Why is Shaming Bad?

Despite the disagreements over the real purposes and effects of retributive punishment, there is consensus over one thing: punishment should be proportionate to the offense.⁶⁴ One of the problems with shaming sanctions is that they are difficult to balance. It is difficult to disseminate information regarding the illegal activity in a way that is proportional to the severity of the offense.⁶⁵ On one hand, these punishments can be disproportionately too weak on those offenders who are socially alienated.⁶⁶ In order for these penalties to work, a person has to care about what others think about him or her. Additionally, there are criminal sub-cultures in which shaming may become a source of pride.⁶⁷ This cannot be said of the other types of punishment.

On the other hand, these types of penalties may be too strong.⁶⁸ Since these punishments invoke a person's emotions, they can have dire consequences. They can cause the offenders to avoid the community and alienate themselves from others.⁶⁹ At the extreme, shame can result in self-destruction, and the person may attempt to rid those emotions through suicide.⁷⁰ Such case may seem inconceivable, but consider the following news story: In Georgia, a man was

⁶³ Markel, *supra* note 4, at 1402.

⁶⁴ Garvey, *supra* note 2, at 747.

⁶⁵ Alon Harel & Alon Klement, *The Economics of Shame: Why More Shaming May Deter Less*, 15-16 (August 24, 2005) (unpublished manuscript, available at <http://ssrn.com/abstract=789244>).

⁶⁶ Garvey, *supra* note 2, at 749.

⁶⁷ *Id.*; El Nasser, *supra* note 9.

⁶⁸ Garvey, *supra* note 2, at 749.

⁶⁹ *Id.* at 752.

⁷⁰ Book, *supra* note 3, at 684.

convicted of drunk driving.⁷¹ As a condition of his sentence, the judge required that a photograph of the man appear in the local newspaper.⁷² The man had not told his mother of his conviction.⁷³ She saw his picture in the newspaper and left him a note that described the horrid shame she was experiencing.⁷⁴ Distraught and embarrassed after reading the note, the man committed suicide.⁷⁵

Proponents of shaming sanctions argue that imprisonment is cruel, degrading and more likely to “vitate the reputational stake a person has in resuming a law-abiding life that shaming is.”⁷⁶ These claims warrant scrutiny. There are minimum-security prison facilities available for the types of offenders for whom shaming punishments are not an option.⁷⁷ These facilities do not even endeavor to destroy an offender’s basic human dignity.⁷⁸ In fact, a substantial part of the prison population is housed in these types of facilities.⁷⁹

What are Some Problems with Shaming as Applied in Today’s World?

From its history, it appears that scarlet letter sanctioning can successfully control and deter criminal conduct only under very limited societal conditions, which are virtually non-existent today.⁸⁰ The rise of the penitentiary and continual use of that institution attests to the failure of shaming sanctions under modern conditions.⁸¹

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 685.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Kahan, *supra* note 1, at 2080.

⁷⁷ Markel, *supra* note 4, at 1399.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1399-1400.

⁸⁰ Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880, 1922 (1991).

⁸¹ Morton, *supra* note 27, at 109.

In the shaming context today there are problems with the public bearing witness to such spectacles. The anonymous, diverse, impersonal texture of today's society is not conducive to eliciting feelings of shame.⁸² The American way of encouraging independence and individuality necessarily reduces the effectiveness of shaming.⁸³ People are wrapped up in their own worlds and are concerned with their own lives, so it is quite unlikely that they would respond apathetically to such a public spectacle of shaming.⁸⁴ As one commentator noted about today's society: "It is doubtful that in today's hectic, commuter-world people would congregate to witness someone's public shaming...Even a bumper sticker posted on an offender's car would probably get a mere glance at best."⁸⁵ The community is unlikely to react to the public spectacle in a way that will lead to the emotions and guilt needed for the offenders' deterrence and rehabilitation.

Is Shaming Undignified?

Shaming penalties are cruel, degrading and inhumane.⁸⁶ They violate an offender's dignity, which no morally decent state should do.⁸⁷ State enforced shaming authorizes public officials to search for and damage an offender's dignity.⁸⁸ Mark Kappelhoff, of the American Civil Liberties Union, sums up shame punishment by referring to it as "gratuitous humiliation of the individual that serves no societal purpose at all".⁸⁹

⁸² Garcia, *supra* note 36, at 116.

⁸³ Massaro, *supra* note 80, at 1924.

⁸⁴ Garcia, *supra* note 36, at 126.

⁸⁵ *Id.*

⁸⁶ Garvey, *supra* note 2, at 757.

⁸⁷ *Id.*

⁸⁸ Massaro, *supra* note 80, at 1943.

⁸⁹ Tony Allen-Mills, *American Criminals Sentenced to Shame*, TIMES (London), Apr. 20, 1997, at 23.

The supporters of shaming penalties argue that since the alternative to shame is imprisonment, then shame simply substitutes one set of indignities for another.⁹⁰ What's missing from this argument is the fact that shaming encourages others to bear witness to the offender's indignities.⁹¹ Individuals who are imprisoned for a certain period of time are able to remain relatively anonymous since they do not walk around announcing their convictions to society.⁹² On the other hand, those individuals who are subjected to shaming sanctions carry with them a public stigma that is not easily forgotten or ignored.

Should Punishment Focus on Shame or Guilt?

Shaming differs from other methods of punishment in that its effectiveness depends on the reaction of members of society or in the market to the public information concerning the offender's behavior.⁹³ Punishment, no matter what form, should be premised on guilt and not on shame. Shame involves the idea of an audience, whereas guilt involves no such connection.⁹⁴ Guilt focuses on the individual's particular act of wrongdoing, whereas shame focuses on the person as a whole.⁹⁵ These emotions also differ in their elicited responses.⁹⁶ Shame prompts one to hide or to strike back at the source of shame.⁹⁷ On the other hand, guilt prompts the person to

⁹⁰ Garvey, *supra* note 2, at 760.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Harel & Klement, *supra* note 65, at 1.

⁹⁴ GABRIELE TAYLOR, PRIDE, SHAME AND GUILT: EMOTIONS OF SELF-ASSESSMENT 53, (Clarendon Press, 1985); Garvey, *supra* note 2, at 766-67.

⁹⁵ Garvey, *supra* note 2, at 766.

⁹⁶ *Id.*

⁹⁷ Garvey, *supra* note 2, at 766; June Price Tangney, et al., *Shamed into Anger? The Relation of Shame and Guilt to Anger and Self-Reported Aggression*, 62 J. PERSONALITY & SOC. PSYCHOL. 669, 669 (1992).

try to make amends for the wrongdoing.⁹⁸ Rehabilitation should not depend on the response of other people; it should be an intrinsic process that an individual experiences from his own emotions. Of course, eliciting a particular emotional response from a person is not an exact science.⁹⁹ However, if the state is going to aim at any such response, then it should be guilt.¹⁰⁰

Is This the Beginning of Shifting Trends?

Dan Kahan, a national expert on shame penalties, and a well-known proponent of them, recently recanted his position.¹⁰¹ He admits that there is no statistical evidence showing that shaming works to rehabilitate or deter.¹⁰² Kahan argues that the problem with shaming penalties is that they are deeply partisan.¹⁰³ When shaming penalties are deployed, they signal that society has chosen sides with those who elevate community values over individuality and equality.¹⁰⁴ He argues that imprisonment is pluralistic, which is why it works so well as a punishment.¹⁰⁵ Persons of all cultures and worldviews can understand it and can appreciate it as a means of punishment.¹⁰⁶ Since one of the most well known advocates for shame punishments just renounced his position, it will only be a matter of time before others will follow his lead.

⁹⁸ Garvey, *supra* note 2, at 766.

⁹⁹ *Id.* at 767.

¹⁰⁰ *Id.* at 767; June Price Tangney, *Recent Advances in the Empirical Study of Shame and Guilt*, 28 AM. BEHAV. SCI. 1132, 1142 (1995).

¹⁰¹ Kahan, *supra* note 1.

¹⁰² El Nasser, *supra* note 9.

¹⁰³ Kahan, *supra* note 1, at 2076.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

What are Viable Alternatives?

To fashion an acceptable alternative to imprisonment, it is necessary to identify a form of punishment that not only condemns as forcefully as imprisonment, but that also condemns as ambiguously as imprisonment.¹⁰⁷ Kahan, and Stephen Garvey, an opponent of these penalties, introduced two such models. A third alternative, therapeutic jurisprudence, is a preventive law model.

Kahan introduced a model of restorative justice. Restorative justice is the term given to a variety of different practices, including apologies, restitution, and acknowledgments of harm and injury, as well as to other efforts to provide healing and reintegration of offenders into their communities.¹⁰⁸ Under this model, the offender, victim and representatives of the community participate in an informal mediation process.¹⁰⁹ The participants would negotiate an appropriate course of action, which would typically include some type of apology by the offender and an agreement to furnish monetary or other types of reparation to the victim.¹¹⁰ Proponents suggest that by providing structured environments in which offenders and victims meet and explain their injuries and hurts to each other, offenders could acknowledge and explain their bad acts, apologize and make restitution to victims who could forgive and feel safe again.¹¹¹ Restorative justice programs promote a healing response by creating an atmosphere of rapprochement and then by initiating a process by which the offender can help make the victim whole.¹¹² These programs emphasize the need to treat offenders with respect and to reintegrate them into the

¹⁰⁷ *Id.*

¹⁰⁸ Carrie Menkel-Meadow, *Restorative Justice: What is it and Does it Work?*, 115 ANN. REV. L. OF SOC. SCI. 161,162 (2007).

¹⁰⁹ Kahan, *supra* note 1, at 2090-91.

¹¹⁰ *Id.* at 2091.

¹¹¹ Menkel-Meadow, *supra* note 108, at 163.

¹¹² Kahan, *supra* note 1, at 2092.

community.¹¹³ Additionally, this type of program could be beneficial to victims, who would no longer be frightened or traumatized by what happened to them.¹¹⁴ For these reasons, most people approve of restorative justice because they see it as “as accentuating, not muting denunciation of offenders.”¹¹⁵

Garvey concedes that shaming punishments may successfully condemn and may even be effective deterrents, but they do little to educate.¹¹⁶ Thus, he introduces a theory of moral reform, which in essence is an educating model.¹¹⁷ The idea behind this theory is that punishments should aim to reflect back on the offender what he has done to his victim.¹¹⁸ Under this model, punishment is seen as a mode of bilateral communication.¹¹⁹ The goal of punishment is the offender’s moral education or reform.¹²⁰ This model requires the offender to be treated as a responsible, autonomous agent and not merely as an object to be manipulated through coercion and fear.¹²¹ It seeks education, not indoctrination.¹²² It prides itself on treating the offender as a responsible moral agent.¹²³

This theory forces the offender to repair the particular harm he caused, and not to simply provide some general service to the community.¹²⁴ It urges that sanctions be designed in a way

¹¹³ *Id.*; Menkel-Meadow, *supra* note 108, at 163.

¹¹⁴ Menkel-Meadow, *supra* note 108, at 163.

¹¹⁵ Kahan, *supra* note 1, at 2092.

¹¹⁶ Garvey, *supra* note 2, at 784.

¹¹⁷ *Id.* at 738.

¹¹⁸ *Id.* at 739.

¹¹⁹ *Id.* at 763; R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in 20 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 33 (Michel Tonry ed., 1996).

¹²⁰ Garvey, *supra* note 2, at 764; ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS*, 371 (Harvard Univ. Press, 1981).

¹²¹ Garvey, *supra* note 2, at 764.

¹²² *Id.* at 765.

¹²³ *Id.*

¹²⁴ *Id.* at 791; Randy Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279, 288-91 (1977).

that makes an offender experience the harm he has caused, either directly or vicariously.¹²⁵ The aim is to get the offender to reform himself.¹²⁶ Rather than simply “yelling” at the offender as in the shaming model, punishment in the educating model is intended to speak to the offender so that he will learn from what is said.¹²⁷ The other modes of punishment fail to provide such education.¹²⁸ For example, probation may limit what an offender can and cannot do, but it does not show him why his actions were wrong.¹²⁹ Likewise, community service may introduce the offender to the virtue of helping others but, again, it does nothing to show the offender why his actions were wrong.¹³⁰ Fines simply transfer wealth from the offender to the state without any explanations of his actions.¹³¹

Apology plays a major role in the moral education theory. In this model, however, the emphasis is on the apology and not the shame that might accompany it when it is given in public.¹³² Thus, the educating model would urge the offender to make the apology in private.¹³³ At the end of the process the offender comes through punishment to understand the nature of his offense, to experience guilt, and to repent his wrongdoing and seek to make amends.¹³⁴

Part of the moral education theory is the idea of *lex talionis*, which requires that the punishment mirrors the harm caused.¹³⁵ However, Garvey emphasizes that the idea of “an eye

¹²⁵ Garvey, *supra* note 2, at 780.

¹²⁶ *Id.* at 763; NOZICK, *supra* note 120, at 371.

¹²⁷ Garvey, *supra* note 2, at 763.

¹²⁸ *Id.* at 771.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 792.

¹³³ *Id.*

¹³⁴ *Id.* at 765.

¹³⁵ *Id.* at 776.

for an eye” should not be construed literally.¹³⁶ As an example, he demonstrates a possible punishment for those convicted of rape. The offenders should experience the trauma vicariously, by being forced to listen to the words and accusations of rape victims, and by engaging in role-playing in which they assume the role of the women they raped.¹³⁷ Another example is to deny a convicted perjurer access to courts for a specified period of time, with the view that the offender might learn the value of preserving the courts’ integrity.¹³⁸

Therapeutic jurisprudence is a preventive law model that seeks to alleviate the need for shaming sanctions. It is an interdisciplinary approach to legal scholarship and law reform that sees law itself as a therapeutic agent.¹³⁹ It proposes that we be sensitive to the consequences of governmental action and that we ask whether the law’s anti-therapeutic consequences can be reduced and its therapeutic consequences enhanced without subordinating due process and justice values.¹⁴⁰ This model contemplates lawyers practicing with an ethic of care and heightened interpersonal skills while seeking to prevent legal difficulties through sensitive counseling and advanced planning.¹⁴¹ It necessitates increased psychological sensitivity in the attorney-client relationship, enhanced interpersonal skills, interviewing and counseling techniques, and approaches for dealing with the emotional issues that are likely to come up in the

¹³⁶ *Id.* at 778.

¹³⁷ *Id.* at 781.

¹³⁸ Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 44 (1992).

¹³⁹ DAVID B. WEXLER AND BRUCE J. WINICK, *ESSAYS IN THERAPEUTIC JURISPRUDENCE* (Carolina Academic Press 1991).

¹⁴⁰ David Wexler, *New Directions in Therapeutic Jurisprudence: Law & Mental Health Scholarship Outside the Conventional Context of Mental Health Law*, 10 N.Y.L. SCH. J. HUM. RTS. 759, 762 (1993).

¹⁴¹ Bruce J. Winick and David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL LAW REVIEW 605, 606 (2006).

legal encounter.¹⁴² The criminal defense attorney informs the client of options and attempts to persuade the client to consider rehabilitative possibilities.¹⁴³ Therapeutic jurisprudence is committed to client-centered counseling.¹⁴⁴ The client's direct involvement in creating a success plan can increase the likelihood that he will comply with it and benefit therefrom.¹⁴⁵ All of these models show that there are feasible alternatives to scarlet letter punishment.

What are Some Proposed Solutions?

The simplest solution is to do away with these shaming practices because they serve no societal purpose. In order to do this, studies need to be conducted to show that there is little, if any, correlation between shaming punishments and rehabilitation or deterrence. In 2005, Alon Harel and Alon Klement conducted one such study.¹⁴⁶ Their research showed that there is an inverse relationship between the rate of shaming penalties and their deterrent effects.¹⁴⁷ They found that wide-ranging use of shaming penalties is likely to erode their effectiveness and that their extensive use as a substitute for traditional sanctions may undermine their deterrent effects.¹⁴⁸ Legislatures and judges should be informed of this so that they can see for themselves that these punishments do not succeed at one of their primary purposes: deterrence.

It needs to be shown that these types of sanctions violate the eighth amendment in that they are cruel and unusual punishments. In the case *Trop v. Dulles*, the court stated that the

¹⁴² *Id.* at 609.

¹⁴³ *Id.* at 614.

¹⁴⁴ Bruce J. Winick, *Redefining the Role of the Criminal Defense Lawyer in Plea Bargaining and Sentencing: A Therapeutic Jurisprudence/Preventative Law Model*, in *PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION*, 245 (Dennis P. Stolle, David B. Wexler, & Bruce J. Winick, eds., 2000).

¹⁴⁵ Winick & Wexler, *supra* note 141, at 621.

¹⁴⁶ Harel & Klement, *supra* note 65.

¹⁴⁷ *Id.* at 1.

¹⁴⁸ *Id.* at 1-2.

meaning of the eighth amendment must be drawn from the “evolving standards of human decency that mark the progress of a maturing society.” Scarlet-letter sanctioning should be struck down under this standard. As society continues to evolve, so do its methods of punishment. Society should not sanction a condition that deprives a man of his dignity by holding him out for public ridicule in every aspect of his life.

Another possible argument is that shaming sanctions infringe upon the defendants’ first amendment privacy rights. Thus far, this argument has proven to be ineffective.¹⁴⁹ Sentencing judges enjoy broad discretion authorized by statute when crafting probation sentences.¹⁵⁰ A reviewing court tends to invalidate probation sentences only if it finds the penalty to be unreasonable, unrelated to the goals of probation, or an abuse of discretion.¹⁵¹ Additionally, the United States Supreme Court has recognized that probationers do not enjoy the same degree of constitutional protections as do law-abiding citizens.¹⁵² Although this argument has not yet been successful, it is important to continue raising it.

The problem with these shaming tactics is best described by Erwin Chemerinsky, a prominent law professor: “The real measure of how civilized we are is the way we choose to punish people. It is not civilized to tell somebody you’re going to sit in the stocks and we’re

¹⁴⁹ See, e.g., *Goldschmitt v. State*, 490 So. 2d 123, 125 (Fla. 1986) (holding that it was constitutional to order a convicted drunk driver to affix a bumper sticker to his car that read “Convicted D.U.I.-Restricted License” because the message was a form of penance and a warning to other potential wrongdoers); *Ballenger v. State*, 436 S.E.2d 793, 795 (Ga. 1993) (holding that it was not an infringement of convicted drunk driver’s constitutional rights to make him wear a fluorescent pink bracelet imprinted with the words “D.U.I Convict” because it had possible rehabilitative and deterrent effects and because the sentence can also help protect society).

¹⁵⁰ Morton, *supra* note 27, at 117.

¹⁵¹ See, e.g., *People v. Dominguez*, 64 Cal. Rptr. 290, 293 (Cal. 1977); *Rodriguez v. State*, 378 So. 2d 7, 9 (Fla. 1979); Morton, *supra* note 27, at 117.

¹⁵² *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 265 (9th Cir. 1975).

going to throw stones at you.”¹⁵³ Every country deals with criminals in its own way. We, as the American public, need to set examples and show that these offenders deserve, and can benefit from, another chance. We cannot engage in these inhumane punishments, especially when there is a lack of evidence showing that are effective in deterrence or rehabilitation.

¹⁵³ El Nasser, *supra* note 9.