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NOTES

SHAME ON YOU: AN ANALYSIS OF MODERN SHAME PUNISHMENT AS AN ALTERNATIVE TO INCARCERATION

Cursed is the ground because of you; In toil you shall eat of it All the days of your life. . . . Then the Lord God said, "Behold, the man has become like one of Us, knowing good and evil; and now, lest he stretch out his hand, and take also from the tree of life, and eat, and live forever"—therefore the Lord God sent him out from the garden of Eden, to cultivate the ground from which he was taken.¹

Daniel Alvin stood before Georgia State Court Judge Leon M. Braun, Jr., to receive his sentence after being convicted of eight counts of theft.² Alvin, husband to a pregnant wife and father of disabled eight-year-old twins, convinced eight victims to hand over money for Atlanta Hawks basketball tickets and a charter bus ride to the game.³ The tickets and the bus ride never mate-

1. *Genesis* 3:17, 22-23 (Ryrie Study). This act of casting Adam and Eve out of the garden of Eden served a number of symbolic purposes. First, evicting Adam and Eve after they had eaten the fruit of the forbidden tree was an act of punishment. *See id.* at 3:17. It also was an act of mercy, allowing Adam and Eve to escape an eternal life in a state of alienation and death. *See id.* at 3:22-24. Additionally, it was an act of shaming. After eating the fruit, Adam and Eve recognized that they were not clothed and were ashamed. *See id.* at 3:7. Once they were clothed, God subjected the couple to shame of a greater magnitude by casting them out of the garden of Eden and forcing them both to recognize the extent of their sins and to begin a life, however mortal, of goodness, repentance, and eventual salvation. *See id.* at 3:24. For an excellent compilation of essays discussing religious interpretations of repentance and forgiveness, see *REPENTANCE: A COMPARATIVE PERSPECTIVE* (Amitai Etzioni & David E. Carney eds., 1997).

2. *See* Ann Woolner, *Shame as Punishment; Common in Early America, It's Making a Comeback*, *FULTON COUNTY DAILY REP.*, Oct. 6, 1997, at 1, available in *LEXIS*, News Library, Papers File.

3. *See id.*

rialized.⁴ The police did, however, and charged Alvin with theft by taking.⁵

Judge Braun decided to offer Alvin a choice: he could spend six months behind bars, or he could spend five weekends in jail and walk around the Fulton County Courthouse for a total of thirty hours wearing a sign that read "I AM A CONVICTED THIEF."⁶ Alvin chose the second option and dutifully carried his sign around the courthouse to the honks and cries of passersby.⁷ Although the sentence caused Alvin significant embarrassment in his community, he spent minimal time in jail, and his family stayed together.⁸

Judge Braun's decision to offer Alvin an alternative to incarceration represents a growing trend among sentencing judges.⁹ Frustrated with the ineffectiveness of traditional forms of punishment, judges are imposing sentences of shame upon convicted criminals more frequently.¹⁰ Ranging from the mundane to the Byzantine, such sentences are not without controversy.

Professor Dan Kahan, a supporter of shame punishment, believes that "[s]haming is a potentially cost-effective, politically popular method of punishment" that will enjoy future success because people "want[] more from criminal punishment. They want a message. They want moral condemnation of the offender."¹¹ On the other side of the debate, Mark Kappelhoff of the American Civil Liberties Union criticizes shame punishment as

4. *See id.*

5. *See id.*

6. *See id.* The sandwich board-type sign that the court required Alvin to wear over his shoulders had easily readable lettering on the front and back. *See id.*

7. *See id.*

8. *See id.* For Alvin, the choice between jail and family was clear, and well worth the humiliation. *See id.* In response to the jeers of commuters and pedestrians, Alvin stated: "It can't last forever." *Id.*

9. *See id.*

10. *See id.* Many judges do not consider shame-type punishments to be a form of punishment at all. *See id.* Rather, judges impose shaming as probation with the idea that the shaming will rehabilitate the convict, and thus fulfill the stated goal of probation. *See id.* As this Note will argue, judges improperly label shame punishments as probation, thereby subjecting appeals of shame punishment conditions to an improper standard of review. This standard dooms many creative alternatives to prison.

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

"[g]ratuitous humiliation of the individual [that] serves no societal purpose at all."¹² Mr. Kappelhoff adds that "there's been no research to suggest [that] it's been effective in reducing crime."¹³ While the issues are far from settled, there is no doubt that shame is receiving national attention.¹⁴

This Note discusses and analyzes the modern reemergence of shame punishment as an alternative to traditional sentencing practices and explores appellate court treatment of shaming cases. This Note suggests that judges who incorporate shame into their judicial arsenal as a form of probation, rather than punishment, do so erroneously. Consequently, when offenders appeal these shame-probation conditions, appellate courts subject them to a standard of judicial discretion rather than a more appropriate and more deferential standard of "cruel and unusual punishment" under the Eighth Amendment.¹⁵ Application of the judi-

12. *Id.*

13. *Id.* Mr. Kappelhoff is correct in asserting that there is little existing empirical evidence that actually proves that shaming punishment reduces crime rates. Although this lack of evidence is a stumbling block for shame advocates, there is significant circumstantial evidence that shaming, in certain circumstances, is an effective tool in the fight against crime. *See infra* note 173; *see also* text accompanying notes 135-55 (providing a further discussion of this evidence). For a well-written argument against the imposition of shame punishments, see James Q. Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055 (1998). Professor Whitman, in an eloquent and well-researched essay, argues that shame punishments, while superficially effective, violate the dignity of the offender. *See id.* at 1060. His article renouncing shame punishment is firmly grounded and discusses important issues; however, such a condemnation of the use of shame by U.S. courts warrants a balanced retort. *See infra* notes 122-34 and accompanying text (discussing the constitutionality of shame punishment).

As this Note will show, shame punishment is a potentially attractive solution to a fiscally strapped and increasingly ineffective and dangerous prison system. Furthermore, it is likely that the public would embrace shame punishment as an alternative to incarceration. Although shame punishment is not a foolproof solution, if it were instituted within certain guidelines, it would prove a viable alternative to the degrading and brutalistic system of incarceration currently in use in the United States.

14. *See* Richard Cohen, *The Shame Enforcer*, WASH. POST, Oct. 20, 1998, at A19 (discussing shaming of President Clinton). Cohen quotes Colin Powell and Bob Dole as advocating the restoration of a sense of shame for wrongdoers. *See id.*

15. U.S. CONST. amend. VIII. It is important to note here that the focus of this discussion is on shame punishment of convicted criminals. This Note will not address the growing, and admittedly problematic, phenomenon of broadcasting or publishing the names of arrested, but not convicted, suspects of crimes such as shoplifting

cial discretion standard leads appellate courts to find that imposition of shame-probation violates the fundamental goal of probation—rehabilitation of the offender.¹⁶ The appellate court then reverses the lower court's shame-probation sentence, and the offender either enters the traditional probation system or must serve a jail sentence. Alternatively, judges could impose shame as a punishment, but many state sentencing guidelines do not provide them with the latitude necessary to justify such sentences.¹⁷ This Note argues that if shaming is to succeed, legislatures must alter the statutory limits of punishment to include a shaming option.

The secondary purpose of this Note is to evaluate the efficacy of shaming as a form of punishment. Virtually no empirical data exists detailing the effectiveness of shaming in deterring crime and reducing recidivism rates; however, ample data suggests that current forms of sentencing are ineffective in punishing and/or rehabilitating criminals.¹⁸ Moreover, the majority of offenders in the prison system today are nonviolent drug offenders who would benefit from an alternative form of punishment.¹⁹ Currently, nonviolent offenders are sent to prison where, like other prisoners, they are subject to brutalization.²⁰ Upon release, they are typically disenfranchised, deemed inferior citizens by their peers and potential employers,²¹ and, in many circumstances,

and solicitation of prostitution. See, e.g., *Equal Time* (CNBC television broadcast, July 10, 1997), available in LEXIS, News Library, Transcripts File; Laura Sessions Stepp, *Neighbor Watch*, WASH. POST, Nov. 25, 1994, at B5; *Talk Back Live* (CNN television broadcast, July 13, 1995), available in LEXIS, News Library, Transcripts File; Edward Walsh, *Kansas City Tunes in as New Program Aims at Sex Trade: 'John TV'*, WASH. POST, July 8, 1997, at A3.

16. See *People v. Meyer*, 680 N.E.2d 315, 318 (Ill. 1997) (stating that the purpose of probation is to rehabilitate the offender).

17. See *id.* at 319.

18. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1996 118 tbl.2.9 [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS].

19. See *id.*

20. See generally *The Prison Discipline Study: Exposing the Myth of Humane Imprisonment in the United States*, in CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS 92 (Elihu Rosenblatt ed., 1996) (describing the condition of American prisons and the abuse and neglect faced by both violent and nonviolent prisoners) [hereinafter CRIMINAL INJUSTICE].

21. See Alexander C. Lichtenstein & Michael A. Kroll, *The Economic Role of the*

they see no alternative but to return to a life of crime.²² Such a narrow-minded formulation of punishment by the criminal justice system is outdated and serves only to make more hardened and violent criminals. This Note maintains that, in light of the current violent and overcrowded atmosphere of American prisons, shaming constitutes an efficient, fiscally sound, and creative form of sentencing that can have positive deterrent effects and reduce recidivism rates.

The first section of this Note discusses the evolution of shaming in the American criminal justice system. It also discusses why shaming, as it is imposed today, should be classified as punishment in light of the goals of probation as opposed to the goals of punishment. The second section briefly explores several principal cases recently decided by state appellate courts that involved shaming. The third section sets forth the rationale for applying an Eighth Amendment standard of review to shame punishment, and argues that shame punishments meet this standard. A focal point of this section analogizes shame punishment with the more severe, and controversial, corporal punishment. The section concludes that corporal punishment, while extremely unlikely to reemerge as an acceptable form of punishment, would indeed pass the cruel and unusual standard imposed by the Eighth Amendment.

The fourth section explores the efficacy of shaming. This discussion focuses on the psychological aspects of shaming and whether it deserves a place in the American criminal justice system. The fifth section of this Note provides an analysis of the need for shaming given the current overcrowding in prisons, the shrinking number of prisons, and increasingly tight law enforcement budgets. The sixth section concludes with a discussion of the future of shaming. This section suggests several limitations on the substance and imposition of shame punishment to ensure that judges impose these types of punishments on individuals for whom shaming has the greatest potential advantages.

U.S. Prison System, in *CRIMINAL INJUSTICE*, *supra* note 20, at 16, 26-27.

22. *See id.*

THE EVOLUTION OF SHAME

As the opening quotation of this Note indicates, the notion of shame is a fundamental aspect of human existence.²³ It is no surprise, therefore, that early forms of punishment focused on the idea of shame. Imposition of shame punishment can be traced back to the dawn of civilization.²⁴ In its earliest forms, shame punishment was based on one's essential attachment to society and civilization.²⁵ Tribes, communities, and villages were essential to life. Indeed, in early times, the community was synonymous with life itself.²⁶ One of the harshest forms of punishment was banishment from one's community.²⁷ Such punishment ensured a life of hardship or, perhaps, death.²⁸

Shaming continued to evolve throughout Europe with the invention of bizarre and horrifying methods of public torture that typically ended in the death of the accused.²⁹ These methods traveled to America where, thankfully, they became less brutal,

23. See *supra* note 1 and accompanying text.

24. See JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 57 (1989).

25. See generally HARRY ELMER BARNES, THE STORY OF PUNISHMENT: A RECORD OF MAN'S INHUMANITY TO MAN 43 (1930) (discussing primitive forms of shame punishment in tribal communities).

26. See *id.* at 45 (stating that in tribal society the unitary group was not the family but the whole clan or village).

27. See *id.* at 39, 43 (noting that primitive societies wiped out sin by wiping out the sinner).

28. See generally *id.* at 43-44 (describing both physical and mental punishments endured by criminals in primitive societies).

29. See MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 1-5 (Alan Sheridan trans., 1977). As an example of the unspeakable punishments inflicted on the accused, consider the following account:

On 2 March 1757 Damiens the regicide [king-killer] was condemned "to make the *amende honorable* before the main door of the Church of Paris", where he was to be "taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing two pounds"; then, "in the said cart, to the Place de Grève, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes, and his ashes thrown to the winds."

Id. at 3.

but no less humiliating. For relatively minor offenses, a citizen received an admonition—he appeared before a magistrate to be publicly and formally denounced.³⁰ More serious offenders were sent to the pillory or stocks.³¹ The most egregious offenders faced the brutish shaming ritual of branding or mutilation, thus “fixing on [the offenders] an indelible ‘mark of infamy’ to warn the community of their criminal propensities.”³² For example, in Williamsburg, Virginia, an individual convicted of thievery was nailed by the ear to the wooden brace of the pillory for a period of time that depended upon the seriousness of his offense.³³ After the offender served his sentence, the authorities ripped him from the pillory without first removing the nail.³⁴ The individual was thus “ear-marked” as a criminal offender for the remainder of his life.

Gradually, this “gloomy festival of punishment”³⁵ began to lose favor as America became a more progressive society.³⁶ Punishment evolved from the physical to the psychological, as citizens and legislators began to embrace the philosophy of institutionalized punishment.³⁷ As Americans moved westward, settlers realized the effectiveness of jails and prisons for housing soci-

30. See ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 3-5 (1992).

31. The pillory was a device that restrained the criminal's head and hands between two boards. See *id.* at 5. The stocks restrained the criminal's head and feet. See *id.* Typically, the pillory and stocks were placed in a very public area of the town or village so that the criminal was subject to the most severe embarrassment. See *id.* In Colonial Williamsburg, Virginia, models of these devices are located outside the restored courthouse. Long abandoned as a form of punishment, they now serve as a favorite photo opportunity for tourists.

32. *Id.* Such punishment by “marking” is familiar to many through the character of Hester Prynne, marked with a scarlet “A” for adulteress, in Nathaniel Hawthorne's 1850 novel *The Scarlet Letter*.

33. See Davis Y. Paschall, *Crime and Its Punishment in Colonial Virginia 1607-1776* 30, 38 (1937) (unpublished M.A. thesis, College of William and Mary) (on file with the College of William and Mary Library).

34. See *id.*

35. FOUCAULT, *supra* note 29, at 8.

36. See *id.*

37. For an account of the philosophy that gave rise to the modern penitentiary system, see generally HIRSCH, *supra* note 30, at 3-68 (discussing America's gradual shift to institutional incarceration rather than physical punishment).

ety's offenders.³⁸ The efficacy of shaming began to wane as society became more mobile.³⁹ America was expanding rapidly, and individuals were no longer confined to their town or village.⁴⁰ As a consequence, a criminal shamed in one community could easily pick up and move to another and enjoy a fresh start.⁴¹ By the dawn of the twentieth century, many courts had rejected shame as a useful form of punishment.⁴² Shame then experienced a period of dormancy until the late twentieth century, when it enjoyed a creative renaissance in a more enlightened form.

CASE ANALYSIS

Beginning in the mid-1970s, trial judges began to reincorporate shame into their judicial arsenal.⁴³ Sentences incorporating shame punishment have encountered varying degrees of acceptance at the appellate level.⁴⁴ The practice of assigning shame-related punishment to offenders has continued to the present, with judges developing new methods of punishing criminals without having to send them to prison. This section first pro-

38. See *id.* at 6.

39. See Woolner, *supra* note 2, at 2.

40. See *id.*

41. The decline of shaming due to geographic expansion at the turn of the century might seem to lend support to the idea that shaming would be increasingly ineffective considering the size, mobility, and population of the United States today. This is, however, not likely. The imposition of shame punishments on criminals today would have a significant impact on the American criminal justice system. See *infra* notes 135-82 and accompanying text.

42. See, e.g., *Hobbs v. State*, 32 N.E. 1019, 1021 (Ind. 1893) (recognizing that the use of pillories and stocks constituted cruel and unusual punishment in violation of the Eighth Amendment of the U.S. Constitution).

43. See *id.*; *People v. McDowell*, 130 Cal. Rptr. 839, 843 (Ct. App. 1976). In *McDowell*, the trial court required a convicted purse-snatcher to wear taps on his shoes as a form of probation. The theory was that the taps would ensure that potential victims would hear the perpetrator before he snatched another purse. The appellate court reversed, holding that the probation condition was too imprecise. See *id.* at 842-43.

44. Compare *id.* (holding probation requirement that a convicted purse-snatcher wear taps on his shoes impermissible), with *Goldschmitt v. Florida*, 490 So. 2d 123 (Fla. Dist. Ct. App. 1986) (per curiam) (holding probation requirement that a convicted drunk driver place a bumper sticker on his car that read "CONVICTED D.U.I.-RESTRICTED LICENSE" permissible because it bore some rational relationship to the offense).

vides a sample of the types of shame cases that have reached the appellate level in several states and explains the decisions in those cases. These decisions illustrate how courts are attempting to "shame" criminals into rehabilitation by imposing shame as an element of probation in sentencing. By doing so, many courts are positioning themselves for reversal, as higher courts often determine that imposing such penalties exceeds the scope of the lower court's power.⁴⁵

The Warning Signs

In the 1997 case of *People v. Meyer*,⁴⁶ an Illinois trial court convicted a sixty-two-year-old defendant of aggravated battery after he struck and kicked another man who came to his farm to return some borrowed auto parts.⁴⁷ At the sentencing hearing, the court heard evidence of aggravating and mitigating circumstances in order to determine the proper punishment.⁴⁸ After considering all of the testimony, the lower court judge sentenced

45. In the sections that follow, this Note will suggest that simply sentencing these criminals to shame punishments, instead of shame probation, will force appellate courts to apply a different analysis when reviewing the sentences. Courts likely will uphold shame punishments against cruel and unusual punishment challenges. As stated in the introduction, however, the imposition of shame punishments should not be without limits. There are many factors that a judge should take into consideration when deciding to impose a shame punishment. For a discussion of these limitations, see *infra* notes 183-205 and accompanying text.

46. 680 N.E.2d 315 (Ill. 1997).

47. *See id.* at 316.

48. *See id.* at 316-17. It appeared at trial that the defendant did not take kindly to people visiting his property. A witness testified at the sentencing hearing that he had gone to the defendant's farm to collect money owed from two bad checks and that, after defendant tendered the money, defendant kicked the witness and ordered him off the farm. *See id.* at 316. A second witness testified that when he went to the defendant's farm to investigate an insurance claim, the defendant became hostile, pushed the witness down, and kicked him several times. *See id.* In an attempt to provide mitigating circumstances, witnesses also testified that the defendant suffered from a "major depressive" disorder and that certain stresses could trigger an instant and violent change in the defendant's behavior. *See id.* Additionally, witnesses testified that the defendant's mother and wife relied on him for income, that he had a good reputation in the community, that he was attempting to control his disorder with medication, and that sending him to prison would cause his family to suffer unnecessarily. *See id.* at 316-17.

the defendant to probation instead of prison.⁴⁹ The conditions of probation included restitution to the victim, payment of a fine, and, among other things, placement "at each entrance of his property [of] a 4' X 8' sign with clearly readable lettering at least 8" in height reading: 'Warning! A Violent Felon lives here. Enter at your own Risk!'"⁵⁰

On appeal, the defendant challenged the placement of the sign as an unreasonable condition of probation, arguing that the court went beyond the scope of its authority in imposing such a condition.⁵¹ Under Illinois law, probation must "benefit society by restoring a defendant to useful citizenship, rather than allowing a defendant to become a burden as an habitual offender."⁵² The defendant in *Meyer* argued that the Illinois Unified Code of Corrections prescribed sixteen permissible probation conditions,⁵³ and that the placement of the sign, intended purely to ridicule, did not fall within any of them.⁵⁴

The State responded that the sign might very well cause the defendant some ridicule, but that effect was only incidental to its primary purpose of protecting the public and rehabilitating the offender.⁵⁵ In addition, the State argued that the sign would constantly remind the defendant of his crime and therefore increase the probability that the defendant would change his conduct and refrain from committing violent acts in the future.⁵⁶ Finally, the State asserted that the court was well within its discretion when it imposed the innovative probation condition because it reasonably conformed to the needs of both the defendant and the public.⁵⁷

49. See *id.* at 317.

50. *Id.* (quoting the trial court's supplemental order).

51. See *id.*

52. *Id.* at 318 (citing *People v. Lowe*, 606 N.E.2d 1167 (Ill. 1992); *In re G.B.*, 430 N.E.2d 1096 (Ill. 1981); *People v. Molz*, 113 N.E.2d 314 (Ill. 1953)).

53. See 730 ILL. COMP. STAT. ANN. 5/5-6-3(b) (West 1994).

54. See *Meyer*, 680 N.E.2d at 317. In addition to the 16 permissible probation conditions, the trial court in its discretion may impose "other reasonable conditions relating to the nature of the offense or the rehabilitation of the defendant as determined for each defendant." 730 ILL. COMP. STAT. ANN. 5/5-6-3(b).

55. See *Meyer*, 680 N.E.2d at 317.

56. See *id.* at 317-18.

57. See *id.* at 318.

The Illinois Supreme Court overturned the probation condition as an abuse of judicial discretion.⁵⁸ In its decision, the court relied on Illinois case law and decisions from other states that cautioned courts against using "unconventional conditions of supervision, which may have unknown consequences."⁵⁹ The court determined that the placement of the sign would be a form of public ridicule that would have many "unpredictable or unintended consequences which may be inconsistent with the rehabilitative purpose of probation."⁶⁰ It appears that the court drew heavily from the definition of probation contained in the Illinois Unified Code of Corrections. In the middle of the opinion, however, the court blurred the line between probation and punishment, stating that "[p]robation simultaneously serves as a form of punishment and as a method for rehabilitating an offender."⁶¹

In *State v. Burdin*,⁶² the Supreme Court of Tennessee required a defendant convicted of sexual battery to place a sign in his front yard notifying the community of the nature of his crime.⁶³

58. See *id.* at 318-20.

59. *Id.* at 319 (citation omitted) (citing similar language in *People v. Johnson*, 528 N.E.2d 1360 (Ill. App. Ct. 1988)).

60. *Id.* at 320.

61. *Id.* at 318 (citing *In re G.B.*, 430 N.E.2d 1096 (Ill. 1981)).

62. 924 S.W.2d 82 (Tenn. 1996). The court in *Meyer* relied upon this case to support its findings. See *Meyer*, 680 N.E.2d at 319.

63. See *Burdin*, 924 S.W.2d at 84. Note that forcing a convicted sex offender to post a sign on his front lawn differs from Megan's Law punishments that require a convicted sex offender to register with the community in which he plans to reside upon release from prison. See, e.g., N.J. STAT. ANN. § 2C:7-1 to 7-8 (West 1995 & Supp. 1998). Those punishments are beyond the scope of this Note. Although Megan's Laws involve some elements of public shame, there are other considerations, such as right to privacy concerns under the Fourth Amendment, raised in these situations. See generally Kathleen V. Heaphy, Comment, *Megan's Law: Protecting the Vulnerable or Unconstitutionally Punishing Sex Offenders?*, 7 SETON HALL CONST. L.J. 913 (1997) (discussing the right to privacy concerns implicated by Megan's Law). Additionally, requiring a sex offender to post a sign detailing his crime technically is not a condition of sentencing, but rather a condition imposed by law upon release from imprisonment. See, e.g., N.J. STAT. ANN. § 2C:7-2. A court may impose such conditions long after any probationary period has lapsed.

For discussions of Megan's Law and its implications, see generally Nadine Strossen, *Critical Perspectives on Megan's Law: Protection v. Privacy*, 13 N.Y.L. SCH. J. HUM. RTS. 1 (1996) (presenting various perspectives from proponents and opponents of Megan's Law); Kirsten R. Bredlie, Comment, *Keeping Children Out of Double Jeopardy: An Assessment of Punishment and Megan's Law in Doe v. Poritz*, 81

In addition to a suspended sentence, as a condition of confinement, the court required the defendant to erect a 4' x 8' sign reading "Warning, all children. Wayne Burdin is an admitted and convicted child molester. Parents beware."⁶⁴ The court mandated that the defendant place the sign in the front yard of his residence where he lived with his mother.⁶⁵

The Supreme Court of Tennessee overturned this condition of parole as beyond the scope of the probation requirements that trial court judges are permitted to impose.⁶⁶ The court acknowledged that the Tennessee Criminal Sentencing Reform Act of 1989⁶⁷ afforded trial judges "great latitude in formulating punishment, including the imposition of conditions on probation,"⁶⁸ but it declined to find that the trial judge was within this latitude in requiring the defendant to post such a sign.⁶⁹ Similar to the reasoning in *Meyer*, the court relied on the enumerated conditions in both the Tennessee statute on punishment⁷⁰ and the Tennessee statute on probation,⁷¹ and found that these statutes did not give the court permission to impose "breathtaking" depar-

MINN. L. REV. 501 (1996) (examining the New Jersey Supreme Court's opinion in *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995), and its implications); Sheila A. Campbell, Note, *Battling Sex Offenders: Is Megan's Law an Effective Means of Achieving Public Safety?*, 19 SETON HALL LEGIS. J. 519 (1995) (discussing registration and notification requirements of New Jersey's Megan's Law and its implication for local law enforcement); Alison Virag Greissman, Note, *The Fate of "Megan's Law" in New York*, 18 CARDOZO L. REV. 181 (1996) (examining the constitutionality of New York's Megan's Law and comparing the New York statute to Megan's Laws in other jurisdictions); Patricia L. Petrucelli, Comment, *Megan's Law: Branding the Sex Offender or Benefitting the Community?*, 5 SETON HALL CONST. L.J. 1127 (1995) (arguing that community notification laws are constitutional); Mark J. Swearingen, Comment, *Megan's Law as Applied to Juveniles: Protecting Children at the Expense of Children?*, 7 SETON HALL CONST. L.J. 525 (1997) (discussing the implications of applying Megan's Laws to juvenile sex offenders); Brian T. Telpner, Note, *Constructing Safe Communities: Megan's Law and the Purposes of Punishment*, 85 GEO. L.J. 2039 (1997) (arguing that Megan's Laws foster social cohesion by exposing undesirable members of communities).

64. *Burdin*, 924 S.W.2d at 84.

65. *See id.*

66. *See id.* at 87.

67. TENN. CODE ANN. § 40-35-101 to -504 (1997).

68. *Burdin*, 924 S.W.2d at 85.

69. *See id.* at 87.

70. TENN. CODE ANN. § 40-35-102(3).

71. *See id.* § 40-35-303(d).

tures" from traditional principles of probation.⁷² The court justified its decision by commenting on the unpredictability of such conditions:

The consequences of imposing such a condition without the normal safeguards of legislative study and debate are uncertain. Posting the sign in the defendant's yard would dramatically affect persons other than the defendant and those charged with his supervision. In addition to being novel and somewhat bizarre, compliance with the condition would have consequences in the community, perhaps beneficial, perhaps detrimental, but in any event unforeseen and unpredictable. Though innovative techniques of probation are encouraged to promote the rehabilitation of offenders and the prevention of recidivism, this legislative grant of authority may not be used to usurp the legislative role of defining the nature of punishment which may be imposed. The power to define what shall constitute a criminal offense and to assess punishment for a particular crime is vested in the legislature.⁷³

Drunk Driver Notification

In *People v. Letterlough*,⁷⁴ the New York Court of Appeals struck down a probation condition requiring a convicted drunk driver to affix a sign to his license plate notifying the public of his offense.⁷⁵ In 1991, the State of New York convicted Roy Letterlough of driving while intoxicated.⁷⁶ It was his sixth conviction for an alcohol-related driving offense.⁷⁷ His initial sentence resulted from a plea agreement and included five years of probation, payment of a \$500 fine, and alcohol treatment directed by the Department of Probation.⁷⁸ When Letterlough arrived for his formal sentencing, the court imposed an additional condi-

72. *Burdin*, 924 S.W.2d at 86.

73. *Id.* at 87.

74. 655 N.E.2d 146 (N.Y. 1995).

75. *See id.* at 146.

76. *See id.* at 147.

77. *See id.*

78. *See id.*

tion not stipulated in the prior plea agreement.⁷⁹ The court mandated that if Letterlough ever reobtained a license during his five-year probationary period, he would have to affix a sign to his license plates that read, in fluorescent letters, "convicted dwi."⁸⁰ The sentencing judge warned Letterlough that he would violate probation and face resentencing if he failed to use the signs.⁸¹

The sentencing judge carefully specified that the sign should be removable so as not to penalize unfairly innocent drivers, such as family members, who might use the same car as Letterlough.⁸² In addition, he articulated a clear rationale for the unusual probation condition, stating:

79. *See id.*

80. *Id.* The trial court was quite particular in prescribing the specifications for such a sign and its placement on the license plate. The provision stated:

"If for any reason the N.Y. State Department of Motor Vehicles (DMV) or *any* other entity, restores full or conditional limited driving privileges to the Probationer prior to the full expiration of the term of Probation imposed by this Court, Probationer agrees as follows: He/she shall order and have installed at his/her sole cost and expense, within seven (7) days of such license reinstatement, two (2) legible (day and night) metal, wood, plastic, or other durable and waterproof signs or plaques, affixed to the top or bottom of both the front *and* rear license plate of the vehicle which he/she may be driving (including owned, borrowed, leased, rented, etc.). Said signs shall state in fluorescent, large block letters 'CONVICTED DWI.' Such signs shall be the full length of the license plate, and one-half (1/2) the width. Said signs shall be inspected and approved by the Probation Department within fourteen (14) days of such reinstatement, and at *any* time thereafter: they shall remain in place for the *entire* duration of the term of Probation imposed by this Court. Failure to install them, removal without permission, driving without them, or a police stop for any reason also noting the absence of the signs, shall be grounds—if proven in court—for a determination of *VIO-LATION OF PROBATION* and immediate resentencing."

Id. (quoting the trial court's original order).

81. *See id.*

82. *See id.* The trial judge stated:

"I am not requiring that [the sign] be maintained permanently while others drive that vehicle, only when this individual drives that vehicle and *he may design*, should that contingency arise, *any sort of a metal clip system* so that it can be removed if anyone else in his family or friends decide they wish to drive his car with his consent."

Id. (quoting trial court decision).

*"I only wish to warn the public of this and only have this sign apply to this Defendant. . . . This gentleman is 54 years of age and I do not wish to be the one that opens a newspaper and sees that this gentleman has caused an accident that has taken an innocent person's life because I did not do something that either warns the public or treated his problem. I hope to be doing both."*⁸³

In overturning the probation condition, the New York Court of Appeals distinguished between the goals of punishment and the goals of probation.⁸⁴ The court of appeals accepted that Letterlough was an appropriate candidate for probation because he had a chance at rehabilitation; however, it disagreed with the means by which the lower court implemented probation.⁸⁵ The court of appeals noted that the distinction between rehabilitative and punitive sanctions admittedly was unclear.⁸⁶ The court concluded, however, that the New York legislature purposefully excluded punishment or deterrence from the goals sought to be achieved by the imposition of probation.⁸⁷ According to the Court of Appeals, the sentencing court erred by stating that the goal of imposing the controversial probation condition was to "warn the public" of the threat Letterlough posed as a recidivist drunk driver.⁸⁸ The condition of probation, the court reasoned, could not be construed as rehabilitative, but rather as simple disclosure of a person's crime, resulting in "humiliation and public disgrace."⁸⁹ As such, the condition was a form of punishment and could not qualify as a proper form of probation.⁹⁰

83. *Id.* (quoting trial court decision) (emphasis added).

84. *See id.* at 148.

85. *See id.* at 149.

86. *See id.*

87. *See id.* at 148-49.

88. *Id.* at 149 (quoting trial court decision).

89. *Id.*

90. *See id.* The court stated: "The punitive and deterrent nature of the disputed 'scarlet letter' component of the probationary conditions here overshadows any possible rehabilitative potential that it may generate and thus is out of step with the various other devices specifically authorized by [New York penal law]." *Id.* at 150 (citation omitted).

Publication of Crime

In the case of *Lindsay v. State*,⁹¹ the Florida District Court of Appeals upheld a probation requirement that a convicted drunk driver place an advertisement in a local newspaper describing his crime.⁹² The trial court convicted Charles Lindsay of drunk driving after he ran into the back of a police patrol car while drinking beer.⁹³ It was Lindsay's first conviction for drunk driving, and the sentencing judge intended it to be his last by requiring Lindsay to place his picture in the local paper along with the details of his offense.⁹⁴

Lindsay challenged the ruling on four grounds: (1) the condition violated the rehabilitative purpose of probation by imposing an unfair punishment; (2) the penalty bore no relation to the crime of drunk driving; (3) the condition subjected him to undue public ridicule and unreasonably interfered with his right to select a community in which to live; and (4) the condition "was arbitrary and capricious because it treated similarly situated offenders disproportionately."⁹⁵ The appeals court emphatically rejected Lindsay's first argument that the requirement violated the rehabilitative purpose of probation, stating:

We think that [Lindsay] assumes too much. Deciding that the primary purpose of probation is rehabilitation is not the same thing as making probation free from any punitive effect. Rehabilitation and punishment are not mutually exclusive ideas. They can co-exist in any single, particular consequence of a conviction without robbing one another of effect. In fact, it is difficult to imagine any condition of probation that does not have some punitive aspect to it.⁹⁶

The appeals court thus acknowledged the nexus between punishment and probation. Moreover, the court noted that Florida

91. 606 So. 2d 652 (Fla. Dist. Ct. App. 1992).

92. See *id.* at 652.

93. See *id.* at 653.

94. See *id.*

95. *Id.* at 655. Lindsay also argued that the condition of probation prevented him from exercising his right not to speak. See *id.*

96. *Id.* at 656.

law permits a trial judge to sentence an offender to incarceration as a condition of probation and stated that "[i]ncarceration is surely one of the clearest expressions of punishment and, if appellant were correct in his essential premise, entirely antithetical to the purely rehabilitational purpose of probation."⁹⁷ The court did not, however, go so far as to characterize the probation condition at issue as strictly punitive. While such a condition may be overwhelmingly punitive with a modicum of rehabilitative aspects, classifying the condition as exclusively punitive clearly would place it outside the framework of probation as specified by the Florida statute.⁹⁸

As for Lindsay's second argument that the probation condition bore no relationship to the crime charged, the appeals court deferred to the trial judge, who had the ultimate responsibility of determining the relationship between criminal conduct and appropriate probationary requirements.⁹⁹ The appeals court affirmed the trial court judge's "breathtaking" discretion and creative flexibility in imposing conditions of probation.¹⁰⁰

The appeals court addressed Lindsay's third argument by noting the inherent contradiction with his second rationale for reversal.¹⁰¹ Lindsay asserted that the sentence bore no relation to the crime and simultaneously argued that the sentence subjected him to ridicule and humiliation.¹⁰² The court stated "[t]here is an inherent irony that the stronger he makes the case for humiliation and ridicule, the more he tacitly concedes that [the punishment] is reasonably appropriate to its penal ends."¹⁰³ Ultimately, the court found no reason to reject the lower court's belief that the newspaper advertisement served putative rehabilitative purposes.¹⁰⁴

Finally, the appeals court dispensed with Lindsay's contention that the punishment was arbitrary and capricious by noting the

97. *Id.*

98. See FLA. STAT. ANN. § 948.01(3)(b) (West 1996) (stating that probation should serve to rehabilitate the offender and protect the community).

99. See *Lindsay*, 606 So. 2d at 657.

100. See *id.* at 655.

101. See *id.* at 657.

102. See *id.*

103. *Id.*

104. See *id.*

flexibility of sentencing guidelines.¹⁰⁵ The court emphasized that the sentencing guidelines provided judges with discretion in sentencing offenders.¹⁰⁶ This discretion both permitted individualized punishment and justified the inherent, but not unreasonable, discrepancies in sentencing DUI offenders.¹⁰⁷

DOES SHAMING PASS EIGHTH AMENDMENT MUSTER?

As described above, appellate courts frequently have struck down shaming as a form of probation on the ground that it amounts to an abuse of judicial discretion.¹⁰⁸ These courts generally reason that probation, as defined by statute, is meant to rehabilitate, whereas shaming constitutes a form of punishment.¹⁰⁹ Some states have determined that any form of probation incorporating punitive aspects not enumerated in a statutory list of acceptable probation conditions should be struck down as an abuse of judicial discretion.¹¹⁰

The purpose of this Note is not to question the formulation of the goals and acceptable limitations of probation as a part of state legislative decisionmaking. States are free to incorporate probation as a means of returning offenders to public life or allowing such individuals to avoid prison altogether.¹¹¹ Additionally, it is probably wise that states have limited the ability of judges to impose harsh conditions of probation. Absent a check on the judiciary, probation conditions might become tainted with dangerous vindictiveness and vigilantism.

Characterizing shame as probation, however, essentially precludes its imposition as a judicial technique to handle offenders

105. *See id.* at 658.

106. *See id.*

107. *See id.* (noting that the legislative intent of the Florida statute was to give judges flexibility to consider the facts of each case and the probability of recidivism).

108. *See supra* text accompanying notes 45-90.

109. *See* *People v. Meyer*, 680 N.E.2d 315, 318 (Ill. 1997); *People v. Letterlough*, 655 N.E.2d 146, 149 (N.Y. 1995); *see also* *State v. Burdin*, 924 S.W.2d 82, 85-86 (Tenn. 1996) (affirming the theory that probation should work to rehabilitate the offender).

110. *See, e.g., Meyer*, 680 N.E.2d at 320; *Burdin*, 924 S.W.2d at 87.

111. *See generally Meyer*, 680 N.E.2d at 318 (noting the repeated recognition by courts that probation, as opposed to incarceration, is designed to rehabilitate offenders).

in states that place restrictions on probation.¹¹² Consequently, banning shame-based probation removes an effective judicial response to offenders who do not deserve jail, but would be better served by something with more import than simple probation.¹¹³

The most obvious solution to this problem is for judges simply to refuse to characterize shame as probation and, alternatively, to start calling it "punishment." By defining shame as punishment, society places less importance on the probationary/rehabilitative aspects of shaming and instead focuses on the moral and social condemnation inherent in such a sanction.¹¹⁴ In practice, shame punishment is likely to have more rehabilitative effect than punitive effect.¹¹⁵ This is not detrimental. Ultimately, shame punishment is good for society because it allows offenders to return to productive lives without the stigma of prison on their records, and it provides the public with some tangible evidence that the offenders are paying their debts to society.¹¹⁶

Defining the imposition of shame as punishment rather than probation is not a mere matter of semantics. There are two hurdles that must be cleared before an attempt to institute shaming as a common form of punishment can become meaningful. First, legislatures must modify sentencing guidelines to allow for shame punishment. State sentencing guidelines impose limits on judicial discretion that are, at the appellate level, equally as fatal to shame punishment as the limits placed on probation.¹¹⁷

112. See *id.* at 320 (striking down the lower court's sentence as inconsistent with statutory provisions outlining the permissible forms of probation).

113. Cf. *id.* at 319-20 (striking down the trial judge's creative attempt to rehabilitate an offender because the punishment was outside the confines of acceptable probationary measures).

114. See generally Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 744 (1998) (arguing that shaming penalties "express moral condemnation of the offender's conduct").

115. See *Lindsay v. State*, 606 So. 2d 652, 658 (Fla. Dist. Ct. App. 1992) (noting that publicizing convictions may reduce recidivism in DUI offenders).

116. Limitations on the imposition of shame punishments and their combination with probationary aspects such as community service are essential elements of any shame punishment program that a judge may wish to implement. See *infra* text accompanying notes 183-205.

117. See, e.g., 730 ILL. COMP. STAT. ANN. § 5/5-5-3 (West 1993) (prescribing mandatory sentencing guidelines).

Amending state sentencing guidelines to permit shaming will clear the way for judges to exercise their creativity without fear of reversal on statutory grounds.

While amending state sentencing guidelines is simply a matter of legislative initiative, the second barrier to the legal acceptance of shame punishment is much more substantial. Classifying shame as punishment carries significant constitutional implications that could either limit its imposition or sound the death knell for such punishment altogether. To firmly imbed itself in the judicial arsenal, shame punishment must pass one of the primary constitutional gatekeepers of American criminal justice—the Eighth Amendment.¹¹⁸

To a reasonable person, requiring an offender to wear a sandwich board and parade around the courthouse may appear to be an unusual form of punishment.¹¹⁹ To some it also might seem slightly cruel.¹²⁰ Application of the Court's Eighth Amendment analysis shows, however, that such punishment would pass constitutional scrutiny.¹²¹ This analysis is best shown by examining shame punishment in the light of corporal punishment.

Constitutional Corporal Punishment

The Eighth Amendment prohibits the government from imposing cruel and unusual punishments.¹²² In *Trop v. Dulles*,¹²³ the Supreme Court set forth the modern interpretation of the Eighth Amendment.¹²⁴ The Court stated that the meaning of the Eighth Amendment must be drawn from "the evolving standards of de-

118. See U.S. CONST. amend. VIII (prohibiting the infliction of "cruel and unusual punishment").

119. See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 646 (1996).

120. See, e.g., Whitman, *supra* note 13, at 1058.

121. Cf. *infra* text accompanying notes 129-34 (discussing the constitutionality of corporal punishment as an analog to that of shame punishment).

122. See U.S. CONST. amend. VIII.

123. 356 U.S. 86 (1958).

124. See *id.* at 104; Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)constitutionality of the Methods of Executions*, 6 B.U. PUB. INT. L.J. 153, 160 (1996) (stating that *Trop* forms the basis of modern Eighth Amendment jurisprudence).

cency that mark the progress of a maturing society."¹²⁵ No subsequent Supreme Court decision has seriously challenged the *Trop* standard.¹²⁶ Under the "dignity of man" standard articulated in *Trop*,¹²⁷ some argue that shame punishment would be unconstitutional under the Eighth Amendment.¹²⁸ Although the Court has never ruled directly on this issue, an examination of Supreme Court jurisprudence regarding corporal punishment reveals that shame punishment likely would be upheld when subjected to an Eighth Amendment challenge. If the court were to uphold corporal punishment as constitutional under the Eighth Amendment, it arguably would find shame punishment to be constitutional as well.¹²⁹

Corporal punishment is the infliction of physical pain on a convicted criminal in lieu of, or in addition to, a prison sentence.¹³⁰ Although the modern criminal justice system does not use corporal punishment,¹³¹ the Supreme Court has never found corporal punishment to rise to the level of cruel and unusual punishment.¹³²

125. *Trop*, 356 U.S. at 101.

126. See, e.g., *Atiyeh v. Capps*, 449 U.S. 1312, 1315 (1981) (criticizing the district court's reliance on *Trop* as merely a plurality decision).

127. See *Trop*, 356 U.S. at 100.

128. See, e.g., Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357. In a well-written note attacking the use of shame as a form of probation, Brilliant criticizes shame-type probation as improper and unconstitutional in the modern civilized world according to the dignity of man standard articulated in *Trop*. See *id.* at 1381-83. His argument is not without merit, as courts could find some types of shame punishments excessive under the Supreme Court's standard. As this Note will show, however, certain types of shame punishments are more effective and more humane than sending the offender off to prison, because shame punishment provides a solution that will likely return that offender to society with more dignity than would alternative punishments. See *infra* text accompanying notes 185-200. Such a system of carefully doled out shame punishments is eminently more civilized than the alternatives of meaningless probation or brutalizing incarceration.

129. Cf. GRAEME NEWMAN, *JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS* 11, 22 (Harrow & Heston 2d ed. 1995) (1983) (noting that an element of humiliation or shaming is a part of all corporal punishments).

130. See BLACK'S LAW DICTIONARY 339 (6th ed. 1990).

131. See NEWMAN, *supra* note 129, at 9-13. Newman sets forth a compelling argument for implementing corporal punishment of criminals. His preferred method is electric shock treatments. See *id.* at 56-65. Newman received much criticism for his ideas; he even admitted to being called a "latter-day Menghele" by one penologist. *Id.* at 3.

132. See *Ingraham v. Wright*, 430 U.S. 651, 683 (1977). Further, in *State v. Cannon*,

There would not be much debate concerning corporal punishment in the United States had it not been for the 1994 caning of an American youth charged with vandalism in Singapore.¹³³ The incident prompted Justice Scalia to predict that corporal punishment likely would survive an Eighth Amendment challenge if the issue ever were brought before the U.S. Supreme Court.¹³⁴

Assuming Justice Scalia is correct, and that corporal punishment would indeed pass Eighth Amendment muster, it stands to reason that shame punishment would pass such a standard as well. Shame punishment is less severe than corporal punishment. No measurable physical pain is inflicted on the offender—which indicates that the punishment is not cruel—nor is the offender subject to anything but temporary and mild emotional distress. Such distress presumably is far less than would be experienced if the offender were forced to serve a prison sentence.

Shame punishment also is not unusual. It is, rather, a creative alternative to traditional, and arguably ineffective, modes of punishment that draws its essence from American historical tradition, and has reemerged in a less severe and more effective form.

DOES SHAMING WORK?

Regardless of whether shame punishments would survive an Eighth Amendment challenge or any other judicial analysis, courts should not impose such punishments unless there is some probability that they will rehabilitate criminal offenders. If such punishments do not work, implementing them would be a waste of judicial time and resources, and would result in placing a convicted offender in a position where he could offend again. While there is no empirical data analyzing the effectiveness of shaming

190 A.2d 514 (Del. 1963), the Delaware Supreme Court dismissed the notion that the Eighth Amendment prevented corporal punishment of criminals. *See id.* at 518. In fact, Delaware did not abolish corporal punishment formally until 1974. *See HIRSCH, supra* note 30, at 136 n.88 (stating that Delaware was the last state to abolish corporal punishment through DEL. CODE ANN. tit. 11, § 4205 (1974)).

133. *See* William Branigan, *Singapore Canes American Teenager; Clinton Calls Punishment 'A Mistake,'* WASH. POST, May 6, 1994, at A27.

134. *See Justice Scalia Says Caning Likely Constitutional,* S.F. CHRON., May 7, 1994, at A1, available in LEXIS, News Library, Papers file.

as punishment, there is evidence that shaming is an effective and creative means of keeping some offenders out of the prison system while simultaneously giving them a chance at rehabilitation.¹³⁵ This evidence takes on two forms.

First, the psychological literature indicates that shaming works. From a psychological perspective, shaming shapes behavior from childhood to adulthood.¹³⁶ Because shaming affects humans at a clinical, psychological level, it could work on the punitive level.¹³⁷ Second, a more common-sense approach posits that, because the prison system is not effectively solving the crime problem in America, society must explore alternatives that give offenders a chance at changing their ways without subjecting them to an environment that only can reinforce their criminal behavior. These two perspectives will be the focus of this section.

The Psychological Aspect: Shame is Good

In general, one can assume that people have an aversion toward the commission of crime.¹³⁸ In contemporary society, there are more law-abiding people than criminals.¹³⁹ "People comply with the law most of the time not through fear of punishment, or even fear of shaming, but because criminal behavior is simply abhorrent to them."¹⁴⁰ The development of an anti-crime attitude by the majority of the population originates with shaming early in life.¹⁴¹

Almost everyone, at one time or another, must face some type of shame punishment. Many parents punish their children's simple transgressions with spankings, lectures, and banishment to the child's room so the child can reflect on his or her conduct.¹⁴² Such simple shaming techniques are the foundation of con-

135. See BRAITHWAITE, *supra* note 24, at 179-81.

136. See *id.* at 56-58.

137. See *id.* at 73.

138. See *id.* at 71.

139. See *id.*

140. *Id.*

141. See *id.*

142. See *id.*

science, shaping human attitudes toward the unthinkableness of crime.¹⁴³ Parental shaming techniques are effective in that they serve to ingrain an automatic anxiety response in the individual that continues into adulthood.¹⁴⁴

Verbal shaming frequently accompanies physical shame punishment. Parents often tell children that they are "bad" or "naughty" for doing something wrong. "This verbal labeling is the key to a process of generalization that groups together a variety of types of misbehavior . . . that all elicit conditioned anxiety; in time the generalization proceeds further, with the more abstract concept of 'crime' being defined as 'naughty' or 'evil'."¹⁴⁵ If one accepts this argument, one also would be likely to accept the further assertion that conscience is a trait acquired through a variety of shaming techniques imposed in differing degrees by the family throughout the developmental process of the child.¹⁴⁶

As an individual progresses to adulthood, the specter of parental shame tends to diminish as the more powerful adult human conscience takes over to control actions.¹⁴⁷ As John Braithwaite describes:

In the wider society, it is no longer logistically possible, as it is in the nursery, for arrangements to be made for punishment to hang over the heads of persons whenever temptation to break the rules is put in their path. . . . Unlike any punishment handed down by the courts, the anxiety response happens without delay, indeed punishment by anxiety precedes the rewards obtained from the crime, while any punishment by law will follow long after the reward. For most of us, punishment by our own conscience is therefore a much more potent threat than punishment by the criminal justice system.¹⁴⁸

For most individuals, therefore, shame and conscience are inextricably intertwined both to deter crime and to impose a self-

143. See *id.* at 71-72.

144. See *id.* at 72.

145. *Id.* at 71.

146. See generally *id.* (tracing the emergence of human conscience).

147. See *id.* at 71-72.

148. *Id.*

penalty on those who commit crimes.¹⁴⁹ There are, however, those who commit crimes despite the existence of conscience.¹⁵⁰ The conscience of those individuals may have failed with respect to their criminal acts.¹⁵¹ In these circumstances, shame punishment has the greatest potential effect.¹⁵² "[S]haming can be a re-affirmation of the morality of the offender by expressing personal disappointment that the offender should do something so out of character"¹⁵³ Braithwaite discusses the differences between punishment and shaming:

Punishment erects barriers between the offender and punisher through transforming the relationship into one of power assertion and injury; shaming produces a greater interconnectedness between the parties, albeit a painful one, an interconnectedness which can produce the repulsion of stigmatization or the establishment of a potentially more positive relationship following integration. Punishment is often shameful and shaming usually punishes. But whereas punishment gets its symbolic content only from its denunciatory association with shaming, shaming is pure symbolic content.¹⁵⁴

Shame can function as both an effective punishment of criminals and a tool for the rehabilitation of offenders.¹⁵⁵ It can be a powerful tool indeed, but only in a society that has a need for it and wields it properly.

149. There are those individuals who simply have no conscience and for whom the shaming process is ineffective. *See id.* at 73. These individuals, known as psychopaths, for some reason have missed the conditioning step afforded to most people and neither shame, conscience, nor punishment is likely to deter them from the commission of crime. *See id.*

150. *See id.*

151. In these circumstances, which befall all of us from time to time, Braithwaite points out that "we need a refresher course in the consequences of a compromised conscience." *Id.* at 72.

152. *See id.*

153. *Id.*

154. *Id.* at 73.

155. *See id.* at 72-73.

The Need for Shaming

The previous section presented arguments demonstrating that shaming as a form of punishment works to rehabilitate criminal offenders. The question that remains is whether shaming punishment is necessary. Shaming is a rational and evidently much needed alternative to the traditional choice of prison and probation.¹⁵⁶ Many Americans have lost confidence in the criminal justice system: a 1997 Gallup Poll indicated that forty percent of Americans have "very little" or no confidence in the system.¹⁵⁷ Only twenty percent had "a great deal [or] quite a lot" of confidence.¹⁵⁸ These numbers are a disturbing comment on criminal justice, especially considering that Americans ranked crime and violence as the most important problems facing the country.¹⁵⁹ Similarly, Americans have lost faith in their state prison systems: in 1996, over seventy-four percent of Americans had only "some" or "very little" confidence in their state prisons.¹⁶⁰

America's opinion of the probation system is equally low. In response to suggestions to reduce prison overcrowding, only slightly more than twenty percent of Americans believed that parole boards should be given more authority to release offenders early.¹⁶¹ Less than sixteen percent felt that regular probation supervision was "very effective" as an alternative to prison.¹⁶²

156. See *supra* notes 135-55 and accompanying text.

157. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 18, at 118 tbl. 2.9. Those polled were asked "I am going to read you a list of institutions in American Society. Please tell me how much confidence you, yourself, have in each one—a great deal, quite a lot, some, or very little: the criminal justice system?" *Id.*

158. See *id.*

159. See *id.* at 114 tbl.2.1. In 1997, 23% of Americans ranked crime/violence as the most critical problem facing the country. See *id.* Americans ranked the economy (21%), poverty (10%), and education (10%) as less important problems facing the country. See *id.*

160. See *id.* at 124 tbl.2.16. Less than 8% of Americans had "a great deal" of confidence in the state prison system. *Id.*

161. See *id.* at 156 tbl.2.61. Other suggestions that garnered significantly more support included good behavior and work-release (63.2%), local programs designed to help first-time offenders (89.2%), and increasing taxes to build more prisons (31.4%). See *id.*

162. See *id.* at 159 tbl.2.64. This poll asked Americans to rate various alternatives to incarceration in order to reduce prison overcrowding. See *id.* These alternatives included electronic monitoring, home confinement, boot camps, and community service.

Between 1980 and 1993, the United States increased per capita expenditures for the criminal justice system by more than 308%.¹⁶³ During that same period, state governments increased their direct expenditures on correctional institutions by over 368%.¹⁶⁴ As evidenced by their dissatisfaction with the prison system,¹⁶⁵ Americans perceive that they are getting less for their tax dollar. To highlight the frustration Americans feel, in 1996, sixty-seven percent of Americans indicated that they thought government allocated too few funds to halt the rising crime rate effectively.¹⁶⁶

America, therefore, needs alternatives to a prison system perceived as ineffective in preventing crime and rehabilitating offenders. The data show that many Americans would favor alternatives to prison, such as shaming.¹⁶⁷ Over eighty-nine percent of people polled favored the imposition of local programs that would keep nonviolent and first-time offenders out of prison and permit them to remain active members of their communities.¹⁶⁸ While the poll did not specifically mention shaming, such punishments would fall within the definition specified by the pollsters because an essential feature of these punishments or programs is to permit offenders to remain part of their community.¹⁶⁹

Shame punishment is a particularly attractive option considering the number of nonviolent offenders in the criminal justice

See id. Unfortunately, this poll, conducted by the Survey Research Program at the College of Criminal Justice, Sam Houston State University, did not include the imposition of shame punishments as an option. *See id.*

163. *See id.* at 10 tbl.1.7. The increase was from \$30.37 per person to \$123.93 per person. *See id.*

164. *See id.* at 11 tbl.1.9. Direct expenditures increased from over \$3.4 billion to over \$15.9 billion. *See id.* "Correctional institutions are prisons, reformatories, jails, houses of correction, penitentiaries, correctional farms, work-houses, reception centers, diagnostic centers, industrial schools, training schools, detention centers, and a variety of other types of institutions for the confinement and correction of convicted adults or juveniles" *Id.* at 592 (emphasis omitted).

165. *See supra* text accompanying notes 157-60.

166. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 18, at 142-43 tbl.2.43.

167. *See id.* at 156 tbl.2.61.

168. *See id.*

169. *See id.*

system. In 1993, for example, the U.S. district courts convicted 53,435 defendants.¹⁷⁰ Of these, only 3,077, or 5.76%, were found guilty of committing violent offenses.¹⁷¹ The rest were convicted of nonviolent offenses.¹⁷² This is not to say that all nonviolent offenders would be suitable for shame punishment. The candidate pool is very large and there are presumably thousands who would benefit from nontraditional punishments.¹⁷³

Consider that over 20,000 of the total convictions in U.S. district courts mentioned above were for drug-related charges.¹⁷⁴ Another 13,000 or more were for offenses such as bribery, perjury, liquor, gambling, and weapons offenses.¹⁷⁵ Moreover, out of the total of those convicted, almost 19,000, or 48.2%, had no prior criminal record.¹⁷⁶ Pending some basic evaluation at the trial court level, many of these individuals might be ideal candidates for shame punishment because of the nonviolent nature of their crimes.

The American public is frustrated with the current criminal justice system, which it perceives as ineffective.¹⁷⁷ This is true despite skyrocketing budgets devoted to that system.¹⁷⁸ The vast majority of the population favors some type of alternative punishment that would keep first-time offenders out of prison and, hopefully, create productive and law-abiding citizens.¹⁷⁹ The prison population consists of primarily nonviolent offenders.¹⁸⁰ Of

170. *See id.* at 440 tbl.5.19.

171. *See id.* Violent felonies included murder, negligent manslaughter, assault, robbery, rape, other sex offenses, kidnapping, and threats against the President. *See id.*

172. *See id.* Nonviolent offenses included embezzlement, fraud, burglary, larceny, drug offenses, tax violations, gambling and liquor offenses, bribery, perjury, and motor vehicle theft. *See id.*

173. *See id.*; *see also Shame as Punishment*, INDIANAPOLIS STAR, May 2, 1998, at A14, available in 1998 WL 8327517 (noting that of all offenders ordered to undergo shame punishment by Texas judges, only two were arrested again).

174. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 18, at 440 tbl.5.19.

175. *See id.*

176. *See id.* at 441 tbl.5.20. This includes violent offenses. *See id.*

177. *See supra* notes 157-60 and accompanying text.

178. *See* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, *supra* note 18, at 10-11 tbls.1.7, 1.8, 1.9.

179. *See supra* note 168 and accompanying text.

180. *See supra* notes 171-72 and accompanying text.

these, many are first-time offenders.¹⁸¹ Subjecting these offenders to shame punishment instead of incarceration may prevent them from becoming recidivists.¹⁸²

THE BOUNDARIES OF SHAME

The role shaming will assume in the American criminal justice system is contingent upon its future success. The future of shaming depends upon imposing shaming sentences within certain substantive boundaries upon offenders who are good candidates for rehabilitation. It should be emphasized that shaming is not a panacea for the criminal justice system. Courts should administer shame sentences selectively and sensibly, and tailor them appropriately to the offender. While this Note argues that judges should be given a great deal of discretion when implementing shame punishment, there are limits that legislatures and appellate courts should put into place in order to curb the actions of over-creative and over-zealous judges who attempt to push shaming to the extreme. What follows is a discussion of recommended limitations.

The Truly Bizarre

Some judges have imposed shame punishment that is entirely too extreme. One judge in Tennessee permitted the victims of a burglary to enter the home of the convicted burglar and steal an item.¹⁸³ While such punishment is novel and somewhat humorous, it crosses the boundary of acceptable punishment. In essence, the Tennessee judge punished the offender by permitting a court-sanctioned commission of a crime. This eye-for-an-eye mentality has never been the basis of the American criminal justice system and it sends the wrong message to the public.¹⁸⁴

Additionally, judges may impose shame punishment that is ineffective because it does not shame enough. In the Tennessee case, the criminal did not face public scorn for his actions, nor

181. See *supra* note 176 and accompanying text.

182. See *Shame as Punishment*, *supra* note 173, at A14.

183. See Allen-Mills, *supra* note 11, at 23

184. See HIRSCH, *supra* note 30, at xi.

did permitting the victims to steal an item from the criminal's house have a particularly strong impact on the criminal. Effective shame punishment takes away the potential benefits the criminal might have realized from the crime.

Shame punishment should be limited to circumstances that clearly subject the offender to public shame. Judges should not impose a punishment that involves the commission of another crime. In addition, judges should not impose any shame punishment that sanctions interaction with the victim of the crime. Involving the victim of a crime in criminal punishment sends a dangerous endorsement of vigilantism from the bench.¹⁸⁵ Criminal punishment should involve only the justice system. Victims, while they deserve compassion and compensation, should not participate in the imposition of criminal punishment.

Consistency

Recently, local governments and judges have shown their ingenuity in meting out shame punishment.¹⁸⁶ Such creativity benefits society in that it allows the judge to formulate a shame sentence that truly fits the crime. In many cases, the circumstances of a crime are such that a certain type of shame punishment would not be suitable. By requiring a convicted drunk driver to affix a sign to his license plate in *People v. Letterlough*,¹⁸⁷ the court provided an excellent example of a form of shame punishment that clearly related to the crime. The sign on the license plate sufficiently warned other drivers that Letterlough had been convicted of driving while intoxicated and that they should use caution while driving near him. In con-

185. See generally Timothy Lenz, *Republican Virtue and the American Vigilante*, 12 LEGAL STUD. F. 117, 126 (1988) (recognizing that some legal theorists view vigilantism as an undesirable feature of human nature that society may prevent by legal order).

186. In New York City, for example, police issued a deli owner a \$1,000 ticket for chaining his bicycle to a tree. See Pete Bowles, *'Tree Abuser' Apologizes; Rudy Says It's Not Enough*, NEWSDAY (N.Y.), Apr. 3, 1998, available in LEXIS, News Library, Papers File. In lieu of the fine, the Parks Commissioner offered the owner amnesty if he apologized to the tree and hugged it. See *id.* The deli owner gladly accepted the shame punishment saying, "I hugged the tree 20 times today and I kissed it too." *Id.* Mayor Rudolph Giuliani said that a judge should review the matter. See *id.*

187. 655 N.E.2d 146 (N.Y. 1995).

trast, had the judge required Letterlough to wear a T-shirt with the words "CONVICTED DWI" on it and parade in front of the courthouse, Letterlough undoubtedly would have suffered shame, but the punishment would have had little relation to the crime. The sign would warn only pedestrians of his tendency to drink and drive, and those pedestrians would be unlikely to identify Letterlough while he was in his car.

In Houston, Judge Ted Poe took an even firmer stance against drunk driving. Judge Poe ordered a man convicted of intoxicated manslaughter, in addition to serving a prison term, to attend 110 days of boot camp, erect a memorial at the scene of the accident, carry a sign proclaiming his crime, speak to school students about the perils of drunk driving, and observe an autopsy of a victim of drunk driving.¹⁸⁸

The punishment prescribed by the New York court in *Letterlough* was appropriate for the crime charged. While severe, the sentence prescribed by Judge Poe was appropriate given the nature of the crime. Judges from the state should subject future offenders convicted of the same crime to a similar form of punishment. Sentences imposed for virtually equivalent crimes should not be grossly disproportionate. While shame sentences may vary in manner, style, and severity, they should not differ so much as to raise procedural or substantive due process issues.¹⁸⁹ It would be relatively simple for judges to maintain consistency in sentencing through basic computer record-keeping.

Type of Criminal

Some criminals are better suited for shaming than others.¹⁹⁰ As a general proposition, shaming should apply only to nonviolent offenders because there is a strong correlation between shame and anger or rage.¹⁹¹ To force a violent offender to under-

188. See Julia Duin, *Perpetrators Sentenced to Humiliation in Texas: Judge Orders '90s Version of Scarlet Letter*, WASH. TIMES, Sept. 5, 1998, at A1.

189. See generally Courtney Guyton Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525, 1554-57 (1996) (discussing the due process issues implicated by shaming prostitutes and their clients).

190. See BRAITHWAITE, *supra* note 24, at 73.

191. See MICHAEL LEWIS, SHAME: THE EXPOSED SELF 149-55 (1992). Lewis discuss-

go public humiliation likely would lead to more violence.¹⁹² Although shaming may be suitable for a select few violent offenders,¹⁹³ the risk to the public is too great. Prison is a better option for violent criminals.¹⁹⁴ For other, nonviolent offenders, the judge, as the primary fact finder, is in the best position to determine whether the individual is a suitable candidate for shame punishment.

Judges should not use shame punishment across the board. The judge should evaluate a variety of criteria, including witness testimony, prior dealings with the offender, and the presentence investigation report prepared by a probation officer to determine whether the offender can handle a sentence of shame or whether incarceration is a better alternative.

The consequences of failing to evaluate properly a potential candidate for shame punishment could be dreadful.¹⁹⁵ Consider the case of a man convicted of drunk driving in Georgia.¹⁹⁶ As a condition of his sentence, the judge required that a photograph of the man appear in the county's local newspaper, which served

es the consequences of shame when imposed on individuals who exhibit what is called the "shame-rage spiral." *Id.* at 153. Lewis distinguishes between simple anger and dangerous rage by stating:

Anger is a simple bodily response, whereas rage is a process, moving from shame to rage in alternative spiral fashion. Anger feels justified, whereas in rage one feels powerless. Injury is recognized in anger, but injury is denied in rage. Anger is conscious, whereas rage, based on shame substitution, is pushed from awareness. While anger may be easily resolved, rage, initiated by shame, sets up a feeling trap. . . . Anger results in a few negative consequences, and rage results in many. . . . Finally, anger appears bounded, that is, there is a way to resolve it; whereas rage itself may be unbounded.

Id.

192. *See id.*

193. There should be a general presumption that violent offenders are not suitable for shaming. Some violent offenders, however, are not a risk to the public at-large. For example, an individual convicted of an assault charge for a barroom fight is unlikely to be a danger to society unless he has been drinking in a bar. In addition to alcohol counseling, such an offender is an ideal candidate for shame punishment. In every case, however, the sentencing judge should take the individual characteristics of the offender into account before imposing a shame punishment in lieu of jail time. This is essential in the case of violent criminals.

194. *See* BRAITHWAITE, *supra* note 24, at 73.

195. *See* Woolner, *supra* note 2, at 3.

196. *See id.*

as the town's legal organ.¹⁹⁷ The man had not told his mother, with whom he lived, of the conviction.¹⁹⁸ By chance, she saw his picture in the newspaper and left her son a note on the kitchen table telling him of her shame that he was convicted of the crime.¹⁹⁹ Distraught and embarrassed after reading the note, the man committed suicide.²⁰⁰ Judges could avoid such tragedies by evaluating the type of individual to determine if he or she is a suitable candidate for shame punishment.

Voluntariness

Another means to avoid the above-mentioned tragedy is to make shame penalties voluntary. It is likely that, presented with a choice between shame and prison, many offenders would choose the former and avoid prison at all costs.²⁰¹ In some cases, however, the offender might have reasons to choose prison over shame. It is better to let the offender serve a prison sentence than to risk the type of tragedy that occurred in Georgia.²⁰² In that case, the ultimate self-imposed punishment certainly did not fit the crime. As a condition of all shame punishment, judges should offer offenders an option of either receiving the traditional punishment of incarceration or a shame punishment. Judges should make the offender fully aware of the requirements of the shame punishment before sentencing so that the offender can make an informed judgment.

Combining Shame with Service

In every case possible, judges should combine shame punishment with some utilitarian aspect.²⁰³ While requiring an individual to parade around a courthouse satisfies society from a retrib-

197. *See id.*

198. *See id.*

199. *See id.*

200. *See id.*

201. *See supra* notes 6-8 and accompanying text.

202. *See supra* text accompanying notes 196-200.

203. *See* Michael Grunwald, *Shame Makes Comeback in Court; Texas Judge Likes to Impose Public Punishment for Crime*, ARIZ. REPUBLIC, Jan. 11, 1998, at A14, available in 1998 WL 7742935.

utive standpoint because the public can see punishment at work, it is nonproductive. Whenever possible, therefore, judges should couple shaming with some sort of community service. In the case of the man required to march around with a sandwich board,²⁰⁴ he also should have to pick up garbage around the courthouse and surrounding streets. In the case of the drunk driver required to affix a sign to his license plate, the court should require the offender to inform others, possibly newly licensed drivers, about the dangers of drunk driving.²⁰⁵ Requiring some sort of community service as a part of shaming serves several purposes. It furthers the shaming process by ensuring that the community is able to protect itself from dangerous offenders and it makes potential offenders aware of the consequences of their acts. Mandatory community service also forces the offender to give something back to the community that he or she has disturbed, although in a different form.

CONCLUSION

The American criminal justice system should embrace shame as an effective means of punishing offenders. The current problems of overcrowding in America's prisons and soaring budgets that have reached their limits require that state and federal legislatures, as well as courts, implement creative alternatives to incarceration. Shaming is likely to work in appropriate cases and under the proper circumstances. The psychology of shame shows that it is a powerful tool in shaping behavior throughout an individual's lifetime. Reinforcing an offender's recognition of the wrongness of his deeds through shaming is a way to prevent future crime. Shaming punishment sets an example for others and provides the public with a tangible sense of justice in action.

Aaron S. Book

204. *See supra* notes 2-8 and accompanying text.

205. This can be accomplished through court-required lectures, or attendance at Alcoholics Anonymous meetings.