

THE MEANINGS OF SHAME Implications for Legal Reform

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This article describes and critiques the recent revival of interest in shame and shaming in various contexts, including criminal punishment. In particular, it addresses criminal sanctions that require defendants to wear signs in public, or to otherwise advertise their convictions. The article begins with the work of culture critics who claim that Americans have become shameless in ways that undermine important social and legal goals. The author takes issue with these critics and warns against legal reforms based on their provocative but potentially destructive call to shame. The author argues that the culture critics tend to conflate three terms: *shame*, *shaming*, and *shameful* and explains why separation of these terms is crucial to meaningful discussions about whether Americans have “lost” their sense of shame or should be shamed for violating social or legal norms. The author then develops the psychological and the anthropological meanings of shame, uses this backdrop to evaluate all three terms, and speculates about the likely individual and social consequences of official shaming techniques. The insight of these materials is that shame is a sophisticated, context-sensitive, and potentially highly destructive emotion. Only in certain cultural settings is official shaming likely to prove an effective or humane method of enforcing norm observation. Finally, the author applies these insights to the use of shaming penalties by courts in criminal cases and concludes that American criminal courts may be ill-equipped to exploit offender or audience shame vulnerabilities in a way that makes practical or moral sense.

[S]hame . . . the forbidden, compulsory, and now too late longing to be excused from the eyes of others.

—Eve Kosofsky Sedgwick

While terror and distress hurt, they are wounds inflicted from outside which penetrate the smooth surface of the ego; but shame is felt as an inner torment, a sickness of the soul.

—Silvan S. Tomkins

Shame is about the whole self.

—Helen Block Lewis

Vague nouns are like horoscopes; one can read into them whatever one wishes. When the vague noun refers to a primary human emotion—such as anger, joy, or

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sadness—meanings proliferate easily, because emotions remain opaque and mysterious, even to emotion theorists. And because everyone experiences them, these individualistic interpretations can claim authority.

Shame is no exception. Indeed, *shame* has become in the 1990s what *self-esteem* was in the 1980s: a blurry psychological phenomenon that is ill understood, but that nevertheless has become a catch word for sweeping social diagnoses and prescriptions. As I will show, these proposals exploit the horoscope-like appeal of the noun in ways that distract people's attention away from the subtle shift from noun to verb, from a complex and variable psychological phenomenon to stern methods of shaming people, from shame to shame on you.

The vogue is to trash American culture as shameless and to call for shame's revival through various measures, including criminal penalties designed to publicly shame offenders.¹ This back-to-shame rhetoric is popular for three, central reasons. One is that Americans have always been peculiarly fascinated by gloomy self-indictments, even as they detach themselves from their implications. That we now may be "defining deviancy down"² sounds plausible to a nation in which (we are told) two-parent families and marriage fidelity have declined sharply, and narcissism is a cultural affliction.

The "America is shameless" pitch also catches the eye and ear because it offers an entertaining, evocative, one-noun-explanation for wrenching, intractable problems. Culture critics who condemn modern American society as shameless often simplify, hyperbolize, and globalize—*shamelessly so*—which enables them to tell an interesting, digestible tale about how our replacement of Jenny Jones for Matthew Arnold has led us to ruin.³ It was "shame," they say, that once curbed unwed pregnancies, homosexuality, and adultery; and it is the demise of it that has led us to our current miserable, shameless condition. Many people are interested in assigning blame somewhere for this moral slide, and so resonate to this superficially compelling, one-word explanation for perceived social ills.

But the shame pitch appeals for a third, disturbing reason: The shameworthy ones are usually Others—typically, general categories of others unlikely to pen a response: unwed mothers, deadbeat dads, urban youths, television advertisers, psychotherapists, politicians, the audiences and guests of afternoon talk shows, Hollywood, the pop icon Madonna (always, Madonna), welfare recipients, and so on.

Shame proponents today compete with their mirror images, self-esteem proponents. Both present evidence, enlivened by gripping anecdotes, to shore up

¹See, e.g., Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, NEW YORK TIMES, A1, Col. 2 (Jan. 16, 1997); Robin Abraria, *Whatever Happened to Good Old-Fashioned Shame?* LOS ANGELES TIMES, E1 (Sept. 25, 1994); Jonathan Alter & Pat Wingert, *The Return of Shame*, NEWSWEEK (Feb. 6, 1996, 21–26); Christopher Hitchens, *The Death of Shame*, VANITY FAIR (March 1996, 68); Suzanne Fields, *The Speaker's Lagging Indicators: Why Shame and Respectability Are Making a Comeback*, THE ATLANTIC CONSTITUTION, A8 (March 20, 1995); Bonnie Gangelh, *Shame Needs Some Respect*, HOUSTON POST, D1 (Feb. 8, 1995); John Head, *Shame Is Not a '90s Thing*, ATLANTA CONSTITUTION, 7 (Aug. 29, 1994); _____, *Renaissance of Shame Rebuilds Values*, THE WASHINGTON TIMES, A1 (Mar. 26, 1995); Haya El Nasser, *Judges Say 'Scarlet Letter' Angle Works*, USA TODAY, 1A, Col. 3 (June 25, 1996). A closely related trend is the call for reversing the rise in "irresponsibility" in American society. See Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L. J. 339 (1996) (critiquing the rhetoric as it applies to reproductive choices).

²See Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17 (1993).

³JAMES TWITCHELL, FOR SHAME, 66–67 (forthcoming; St. Martin's Press).

their claims. The shame proponents compare us to the Victorians⁴ and conclude our shame downslide has made behaviors like adultery or divorce less costly to one's social status, and thus more attractive. The self-esteem proponents refer to evidence that links shame with various negative behaviors, such as alcohol abuse, criminal activity, or poor school performance, and argue for addressing these self-esteem and shame issues sympathetically.

No one thinks single-parent families are ideal, that divorce is commendable, or that adultery is noble. Nor do many people, I hope, think that humiliating people, especially young children, is a sound means of inculcating social norms. Consequently, admonitions that we need more shame and ones that we need less can appeal to wide—indeed, sometimes to the same—audiences. Many observers thus find themselves nodding with equal vigor with the culture critics who tee off on educational or social practices that seem to destigmatize once-taboo behaviors, *and* with the mental health professionals, educators and others who seek to understand, accept, and rehabilitate the damaged, lonely (and yes, clinically narcissistic) selves that often lie beneath these behaviors.

The shame rhetoric therefore is too general, too horoscope-like, to be of real assistance either in diagnosing or in treating specific social ills. Were this its only flaw, it could simply be ignored. But the new shame rhetoric is not only vague; it is also potentially destructive because it often betrays no genuine concern for the people it condemns, and advances no coherent, beneficent vision of the society that is allegedly imperiled. The message is not “Shame on us, for we are hopelessly embedded in ‘you,’ and are implicated here, in cahoots.” Nor is it “Shame on you; do better, and we will reclaim you as one of us.” Rather, it is community-constitutive in the crudest, line-drawing sense: The shamers belong to the proper community, and the shamed ones do not. Consequently, modern shaming is not reintegrative—an attempt to reestablish the bond between the norm-breaker and the relevant community through shaming followed by reacceptance—as it has been deployed relatively effectively and humanely, in some face-to-face, socially cohesive cultures. Rather, it is a call for *humiliation* of offenders, first by the state and then—less predictably but likely nonetheless—by the offenders’ community. Seeing this requires that one disentangle the emotion of shame, shame norms (as in what is shameful), and shaming, and that one recognize the complex relationships among these phenomena. In this article, I attempt to separate these terms, and to analyze how each is actually being deployed in both the popular, sweeping critiques of modern society and in the more subtle works of law reformers.

I begin with the popular works. Culture critics like Christopher Lasch claim that modern American society has lost its collective sense of shame, and that we no longer respect the shared social and legal boundaries that shame once policed. I argue that these facially seductive accounts of our shamelessness conflate shame the individual emotion with shame norms, in elusive but important ways that undermine their persuasiveness. These writers tend to ignore the extent to which the modern cultural conditions that they decry work against the likely effectiveness of shaming in securing norm enforcement. Most crucially, the culture critics fail to perceive how plastic, contextual, and potentially devastating the emotion of shame can be.

⁴*Id.* at 63–71.

I then review the works of emotion theorists who have studied shame, and discuss their various constructions of the emotion. This literature makes clear that modern Americans likely are not shameless, as the critics seem to fear. On the contrary, emotion theory suggests that shame is an inevitable consequence of perceiving one's limits, and may even be innate. However, the emotion is complex and ill understood, insofar as it appears to be subject to multiple variations that make it extremely difficult to identify or elicit shame responses in particular individuals, or to predict what behaviors the emotion will produce in a person. This does not mean that we lack any common shame sensitivities or shame norms, as some critics seem to believe. Rather, it means that shared shame focii tend to shift and scatter, as society becomes less norm cohesive, less intimate, and less face-to-face. Thus it is not "shamelessness" that should concern the modern reformers, but the relative lack of the meaningful, social connections that tend to make communities cohesive and their members emotionally vulnerable to social sanctions like gossip, shunning, and ostracism.⁵ To support this claim, I resort to both sociological and behavioral economics accounts of norm observation, which literature suggests are the optimal social conditions for effective use of shaming.

I then discuss the potential significance of these psychological and sociological materials for legal reforms. So-called shame sanctions—such as court-mandated bumper stickers that read "DUI"—are becoming more popular methods of punishing criminals.⁶ Their popularity rests in part on the intuition that people obey laws because they do not want to experience shame or lose social status, and on the sense that if judges explicitly shame offenders, this will shore up worthy social and legal norms. I argue that the first intuition is clearly sound, but that the second may not be in many, perhaps most, cases.

The most powerful argument in support of shaming sanctions has been that criminal deviance poses a cooperation problem—that is, cooperation (obedience to criminal laws) makes us collectively better off, but individually somewhat worse off—and that shaming may solve the cooperation dilemma. Shaming might rehabilitate some shame-sensitive cheaters and make them into cooperators again; it might reinforce norms and shore up cooperative behavior in shame-sensitive observers of the shaming, lest they meet the same humiliating fate; and it might isolate cheaters from the community and thereby incapacitate them.

I argue that in some, perhaps most, modern applications, shaming penalties actually may promote none of these theoretical ends except isolating cheaters. First, I note that insofar as some shame proponents argue that offenders are shameless, their shaming ends are flatly inconsistent with any rehabilitative purpose. Moreover, even when shaming does succeed in evoking shame in an offender, this does not mean that the intended rehabilitation—avoidance of the shameful conduct—will follow. Psychological accounts of shame suggest that the behavioral consequences of this emotion are unpredictable, and may include anger and a desire to retaliate against the one inflicting the shame. The shaming advocates' relative indifference to these concerns suggests that they likely are not particularly concerned with rehabilitating the offender.

Consequently, modern shaming measures must really be aimed either at

⁵See text accompanying notes 186–198 *infra*.

⁶See note 223, *infra*.

reinforcing cooperative behavior among nondeviants or at constructively banishing the criminal deviants. The problem with these justifications is that shame penalties may promote only the second end in many cases. Both the psychological and the anthropological works indicate that the general deterrence and expressive effects of shame measures are likely to be highly contextual and unpredictable, a problem that the shame proponents discount. Judges in contemporary urban or even rural courtrooms thus may not be able to deploy shaming in a manner that will be interpreted by the relevant community as the judges expect. On the contrary, shame penalties often will have multiple potential meanings, depending on the communities to which these expressions are directed, and thus will have an uncertain impact on the targeted audience's behavior. These ambiguities suggest that legal theorists should not be over quick to extend the norm theorists' *descriptive* insight—that people obey norms in part because of shame sensitivities—to legal *prescriptions* for public shaming, if the primary aim is to reinforce cooperation among the audience.

Shaming will clearly promote one end: communicating the shamer's disgust for the offender and the offense. And it plainly is cheaper than imprisonment and may in some ways be less cruel to offenders. I argue, however, that when judges and other officials express their disgust in this fashion, they risk recommitting the very act that justifies punishment of criminal offenders, that is, the treatment of others as mere objects.⁷ These penalties thus may erode important social norms of decency and respect for others' dignity, including criminal offenders' dignity, in ways that even prison does not. Official shaming, ironically, may create less cooperation, not more, in the long run. It may encourage private retaliation against offenders and a kind of "lynch-mob justice" as James Whitman recently explained;⁸ it may illumine that for some offenses the penalty is not prison and thus may decrease deterrence; it may raise the spectre of unfairness insofar as it is used only for some offenders; and it may encourage the debasement of norm offenders rather than their reproof and reintegration.

A caveat to what follows is that this work is not about which norms we ought to enforce, whether through legal penalties, informal sanctions, or other means. Indeed, it is quite skeptical about sweeping accounts about what is wrong with America and how more (or less) shame (or pride) would help to fix it. Consequently, those who experience a certain *schadenfreude* at social critiques that identify villains and heroes, draw bright lines and reach firm, unqualified conclusions will be disappointed. Nor do I solve the intractable puzzle of *what* method, besides prison, might be the best means of punishing offenders. Finally, I do not argue against all government practices or policies, including criminal penalties, that might generate or shore up norms by expressing disapproval of certain conduct or beliefs. This is not only a likely consequence of government action—consider how laws against violence, race discrimination, or child abuse may also make them seem shameful—but a worthy aim of government actions, in proper contexts, through proper methods, and subject to appropriate limits.

The emphasis of this article is on the phrase "in proper contexts, through proper methods, and subject to appropriate limits." It is directed at the modern

⁷See text accompanying notes 244–294 *infra*.

⁸See James Q. Whitman, "What Is Wrong With Shame Sanctions?" (forthcoming; Yale L.J.).

reformers who seem dazzled by the psychological and biological insight that humans are status-seeking creatures, and wish to exploit that vulnerability by publicly humiliating them. Shame is central to individual emotional development, and doubtless influences the creation and enforcement of social norms; but governmental attempts to manipulate and exploit shame through public humiliation rituals may be far more complicated, costly, and counterproductive than the reformers seem to appreciate.

I. The Modern Call to Shame

The legal reforms that resort to shaming are being proposed in an era in which interest in our shamelessness has been piqued by popular, damning accounts of modern American culture. Social critics and journalists warn that we have ceased to be embarrassed, let alone mortified, by immorality, irresponsibility, ignorance, sexual infidelity or crudity, unethical and illegal behavior, or revelation of what were once regarded as highly intimate matters. Educators, psychologists, parents, and others responsible for norm inculcation allegedly have destigmatized socially destructive behaviors and have privileged pursuit of the self without limits—including the limits once garrisoned by shame—above other, socially responsible ends. For example, public schools now stress “self-esteem,” according to some observers, instead of self-control. Educators wrongly encourage students to take indiscriminate pride in themselves, regardless of their relative intellectual or other abilities, and regardless of their effort and achievement. The social glue inherent in the phrase “you ought to be ashamed” has been replaced by a mediocritizing and uncritical acceptance of a wide range of moral, behavioral, and intellectual shortcomings. Lost are a healthy sense of shame in the face of personal failures, and the motivation to strive harder to avoid shame’s sting in the future.

Emblematic of this gloomy group of critics is the late Christopher Lasch—of *The Culture of Narcissism* fame—who in his last book excoriated those people, especially psychologists, who “dismiss shame as the vestigial remnant of an outmoded prudery.”⁹ He described how shame is closely associated with self-consciousness about “the body, which resists efforts to control it and therefore reminds us, vividly and painfully, of our inescapable limitations, the inescapability of death above everything.”¹⁰ And he warned that when these limitations are denied or relaxed, the result is a society in which “[t]he only thing forbidden . . . is the inclination to forbid.”¹¹ Modern attempts to replace shame with pride are dangerously misguided, said Lasch, because:

We do children a terrible disservice . . . by showering them with undeserved approval. The kind of reassurance they need comes only with a growing ability to meet impersonal standards of competence. Children need to risk failure and disappointment, to overcome obstacles, to face down the terrors that surround them. Self-respect cannot be conferred; it has to be earned. Current therapeutic and pedagogical practice, all “empathy” and “understanding,” hopes to manufacture

⁹CHRISTOPHER LASCH, *THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY* 202 (1995).

¹⁰*Id.* at 201.

¹¹*Id.* at 198.

self-respect without risk. Not even witch doctors could perform a medical miracle on that order.¹²

According to Lasch and his sympathizers, then, the modern mistake has been to defuse shame over shameful failures—failures that one ought to confront and feel ashamed about.

Lasch's complaint enumerates many social problems, and offers hard-edged indictments of large groups of citizens he blames for those problems,¹³ including entire professions—most notably therapists and teachers. His apocalyptic lament betrays disgust over a wide range of social, political, and educational programs—such as school programs that stress self-esteem or therapeutic interventions that seek to understand, versus condemn, deviant behavior—on the ground that such programs reinforce what instead should be greeted with shaming, if not contempt.

Examined closely, however, this stern critique is only superficially about shame the emotion, as psychologists would describe it. Instead, it encourages a get-tough, “shaming should happen” approach to parenting, therapy, education, criminal punishment, and other methods of norm inculcation and enforcement. It is also a plea for specific norms—self-reliance, self-respect, and individual responsibility.¹⁴

Jim Twitchell recently picked up the Lasch gauntlet, and likewise links our alleged loss of shame with a decline in self-reliance:

Flogging and the pillory were literal and figurative. Such shame suited a culture in which men and women were judged on the basis of character, on the basis of their moral qualities, their principles, their rectitude. While shame tempers the excesses of individualism, the focus was on the independent self: *self-help*, *self-discipline*, *self-respect*, *self-control*, *self-reliance*, *self-interest*. Responsibility was situated in the individual. Public and private were well defined and private was central. Private life. Private charity. Individual responsibility. You pull yourself up by your bootstraps. You were entitled to what you earned, the sweat of your labor.¹⁵

Like Lasch, Twitchell sweeps wide. In his rat-a-tat, alliterative passage, Twitchell touches on numerous complex and contested concerns: the relationship between “private” and “public” realms, the meaning of “moral” qualities, the role of private charity, the uncertain line between individual and environmental or other explanations for behavior and their bearing on our standards of individual responsibility, the meanings of *character* and the *self*, and the meaning of what I have “earned” or what may properly be called “my labor.” In listing them all in the context of an overarching claim that we need more shame, Twitchell makes a significant jump from shame the norm, back to shame the emotion—a move that is not flagged. We ought to be ashamed of our dependency and lack of self-control, says Twitchell; that we aren't, is *because* we feel no shame.

Other critics who favor a revival of shame in modern culture tend to make

¹²*Id.* at 206.

¹³ Lasch's account corroborates Jacob Heilbrunn's claim that “[w]hen it comes to writing about the culture war, the only thing forbidden, it seems, is nuance.” Jacob Heilbrunn, *Sense and Sensitivity*, THE NEW REPUBLIC 56,60 (Nov. 11, 1996).

¹⁴ See also Twitchell, *supra* note 3, at 64. As such, the shame lament is part of a wider cultural debate about national values, cultural pluralism, and the alleged erosion of a unifying body of knowledge, norms, and standards.

¹⁵ Twitchell, *supra* note 3, at 63–64 (emphasis in original).

similar causal assumptions. All of them condemn the erosion of social limits on a wide range of desires, ambitions, and appetites: decency, responsibility, legality, privacy, morality, etiquette, merit, and discretion, among other limits. Many blame our therapeutic culture, and the therapists and educators who helped create it, for this erosion. All of them worry that we have lost our capacity to feel shame, in all of its soul-wrenching, self-reductive, and painfully instructive glory. The result, they say, is that we have salved the angst of shame with a feel-good, "I'm O.K., You're O.K." balm. The solution, they imply, is to revive shaming as a means of reestablishing the preferred social norms.

The social critics' argument is provocative, but ultimately unconvincing. First, their indictment of therapists for failing to define or reinforce the social limits the critics admire is misaimed. The psychological works that the critics condemn are focused on analyzing shame the emotion, not on prescribing particular norms as limits on our selfhood. This is not because psychologists and psychiatrists deny the need for such limits;¹⁶ few (if any) likely want their patients to pursue shameful ends, or think parents should foster self-esteem in their children without regard for their need for discipline, self-control, self-respect, and denial of certain urges. Rather, if a dwarfing of normative, cultural factors occurs within some psychological analyses of shame, this is because therapists' professional gaze and expertise are, by definition, different from sociologists': They treat the individual (in distress), not society.¹⁷ What psychology adds to these cultural accounts is that at an individual level, the emotion of shame is vastly more complex and potentially devastating than untutored, popular descriptions of shame might suggest, and that shame can produce a wide range of destructive behaviors, including violence. Psychologists probably do not assist much—nor should they be expected to—in determining what the various social meanings of shame actually are, or ought to be. In any event, one wonders what the basis is for the implicitly empirical claim that increased norm violations and engagement in once-taboo behaviors, or decreased school performance occur because of these alleged trends in popular or clinical psychology. Also unclear is the basis for selecting shame, versus anger, disgust, contempt, guilt or other negative emotions, as the primary culprit in these accounts of changing cultural values.

Lasch's argument that modern psychology trivializes shame, with the adverse consequence that its power over us has been sapped, is especially unfair. Curiously, Lasch cites emotion theorist Silvan Tomkins as his primary example of how psychologists minimize the centrality of shame, and complains that Tomkins

¹⁶See, e.g., Robert Coles, *Pint-Sized Sexual Politics*, NEW YORK TIMES, A23, Col. 2 (Oct. 10, 1996) (child psychiatrist arguing against "value-free" counseling techniques, and insisting that children "need to know 'no.'"); Henry Lowenfeld & Yela Lowenfeld, *Our Permissive Society and the Superego*, 39 PSYCHOANALYTICAL QUARTERLY 590 (1970) (discussing ways in which cultural permissiveness regarding sexual prohibition may impair individuals' ability to enjoy life, insofar as sublimation and control of drives are essential to reconciliation with civilization).

¹⁷Of course, the more ambitious psychological works plainly do enlarge the field of inquiry to include wider social effects on, and implications of, individual psychologies. See, e.g., SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* (James Strachey ed., 1961); SIGMUND FREUD, *GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* (James Strachey ed., 1959); KAREN HORNEY, *THE NEUROTIC PERSONALITY OF OUR TIME* (1937); ERICH FROMM, *THE SANE SOCIETY* (1955). See generally, CLARA THOMPSON & P. MULLAHY, *PSYCHOANALYSIS: EVOLUTION AND DEVELOPMENT* (1957) (discussing "cultural school" of psychoanalysis).

sought to defuse shame by offering a mechanistic and simplistic theory of shame as the interruption of interest and enjoyment.¹⁸ Yet as I will show, Lasch here grossly mischaracterizes Tomkins,¹⁹ if not all psychological accounts of shame. Tomkins's painstaking, poetic search for basic elements of our emotions can hardly be read as a denial of the mystery of shame or its power. On the contrary, no one to date has made a stronger case for shame's gravity or for its indispensability: Tomkins boldly and controversially insisted that shame is *innate*—that is, basic, necessary, ubiquitous, and productive, for all of its searing pain—and described it as “a sickness of the soul.”²⁰

In these and other respects, the culture critics so mischaracterize the psychological literature on shame that one begins to wonder if their references to shame the emotion aren't actually gratuitous; perhaps these writers are addressing *only* shame the norm, and merely lamenting the ways in which (they feel) social norms in general have changed for the worse, rather than any adverse change in our emotional make-ups.

A third worrisome feature of these diatribes against “the abolition of shame” is their harshness. All of these writers betray contempt for, and disgust with, the people and professions that they describe as shameless, and they seem to welcome shaming as a proper method of norm enforcement.²¹ Contempt and disgust are closely related to shame;²² indeed, contempt and disgust are common elements of shaming techniques. But they are particularly unforgiving forms of rejection that can have dire effects. As one writer explains:

[S]hame—humiliation does not renounce the object permanently, whereas contempt—disgust does. Whenever an individual, a class or a nation wishes to maintain a hierarchical relationship, or to maintain aloofness it will have to resort to contempt of the other. . . . The hierarchical relationship is maintained either when the oppressed one assumes the attitude of contempt for himself or hangs his head in shame.²³

The modern call to shame thus may be read as an attempt to police social lines, to preserve hierarchies, and maintain borders. But to the extent that it betrays

¹⁸Lasch, *supra* note 9, at 203. See SILVAN S. TOMKINS, *AFFECT, IMAGERY CONSCIOUSNESS: VOL. II: THE NEGATIVE AFFECTS* 123 (1963).

¹⁹Perhaps this is because Lasch relied on Donald Nathanson's account of Tomkins, rather than Tomkins himself. See DONALD L. NATHANSON, *SHAME AND PRIDE: AFFECT, SEX, AND THE BIRTH OF THE SELF* (1992).

²⁰Tomkins, *supra* note 18, at 118.

²¹Consider, by way of example, the following passage from Lasch in which he accuses therapists and others of seeking not to assist their clients, but to hoist their professional status and extend their influence: “The therapeutic discovery of shame finds its political expression in remedial programs administered by caretakers professing to speak on behalf of the downtrodden but concerned, above all, to expand their professional jurisdiction.” Lasch continues, asserting that these programs attempt to “manufacture self-respect without risk,” for which he has little patience. Lasch, *supra* note 9 at 209. Jim Twitchell betrays similar pique in the foregoing pull-yourself-up-by-your-bootstraps quote arguing for shame's revival, and in his multiple passages that express contempt for contemporary television and consuming Americans who no longer embrace Victorian values or feel the Victorian's shame.

²²Tomkins, *supra* note 18, at 119. For a recent, interesting analysis of disgust see WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997).

²³Tomkins, *supra* note 18, at 140.

contempt for certain groups, it may not reflect hope that the shamed persons will reform and rejoin the group. Rather, it may seek to humiliate, expel, and ostracize them, and thereby explicitly reject the democratic faith that "all men are possible objects of identification,"²⁴ even norm violators. It is particularly ironic that Lasch, whose life-long project was to preserve democracy and to chronicle its "betrayal,"²⁵ would ignore the potential undemocratic fallout of his shame lament.

A fourth, extremely important feature of the modern call to shame is that its persuasiveness depends on a contested conception of the murky self. The railing against our alleged shamelessness implicates a fundamental but unresolved issue: What have modern conditions done to the social borders that define the self, especially our shared sense of what is shameful? If the self has achieved "sovereignty in its own realm,"²⁶ as some argue is the salient feature of modern identity, then it may be relatively free of "traditional boundaries provided by a social identity,"²⁷ including those policed by shared shame norms. Consequently, the modern self may experience a culturally thin, contingent, and highly individualistic sense of shame, which is necessarily less confined by, and thus less ashamed to transgress, traditional social boundaries. If this is so, then it is probably a *consequence*, not a cause, of the ways in which modern society differs from pre-modern, traditional societies in which one defined oneself more overtly, comprehensively, and unambiguously in terms of one's social group (typically one's neighbors, but also one's family, social class, or religious group), and thus was *comparatively* more vulnerable to the group's ostracism; to be cast out from the group in a premodern society was to be *nobody*.²⁸ Today, shaming's consequences may be necessarily less exotic; to be shamed may be to feel alienated and abandoned, but this is a fairly common, even characteristic, predicament for the modern self, according to some accounts.

That is, the culture critics confuse cause and effect, as well as emotions and norms. Shame in fact may not "temper the excesses of individualism," in the way Twitchell suggests.²⁹ On the contrary, shame and shaming by others may simply be particularly effective social controls over individuals' behavior in societies that emphasize group membership versus individualism. If so, then self-reliance actually may undermine, rather than further, Twitchell's project, insofar as independence may include independence from, and relative imperviousness to, the norm-policing efforts of others. An atomistic self will not be easily shamed by a group to which it does not feel beholden or connected.

These modern calls to shame thus might make more sense if they were part of a call to a more robust communitarianism,³⁰ because such norm-cohesive communities are more likely to produce shame-sensitive, socially manipulable members. But those who favor more shame tend to celebrate instead self-reliance and individualism, and so might not favor such strongly cohesive communities,

²⁴*Id.*

²⁵See Lasch, *supra* note 9.

²⁶ALASDAIR MACINTYRE, *AFTER VIRTUE* 34 (2d ed., 1984).

²⁷*Id.*

²⁸*Id.*

²⁹Twitchell, *supra* note 3, at 63–64.

³⁰See Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992).

even if we could reconstruct them. One wonders, then, what the shame proponents would have us *do* about our alleged shamelessness, other than to humiliate and expel the people who disgust them.

The culture critics are plainly right, as I will show, when they observe that shame is a necessary, baseline restraint on human excess that cannot be cast off without dire consequences. The problem with their proposals then, is not that they insist on shame's vital importance to a civil society, or to a fully lived, human life. Rather, it is their claim that we no longer feel shame. People—including criminals and other norm breakers—surely do still feel shame, but for widely varying reasons and within varying social contexts that influence their responses to the emotion. In modern America, the range of things that signal social status and thus may trigger shame or pride may vary dramatically among individuals and across subcultures.³¹ Likewise, the chances that these signals will be read and reinforced by others in a uniform fashion will depend on social proximity, norm cohesion, and other highly contextual variables. As the optimal conditions for effective cultural enforcement of *shared* shame norms—shame's "firmware"—have weakened, so has consensus about what those norms ought to be. Read closely, then, culture critics' real plea is not that robust shame values "aren't *there*, but that they aren't *theirs*."³²

Moreover, the link between feeling ashamed and avoiding behavior that the community deems shameful is far less certain than shame proponents may recognize. Feeling even acute shame does not necessarily translate into a life of toeing the normative line. On the contrary, feeling "dissed" by one's parents, peers, or community can produce angry alienation, rebellion, and even physical violence. Consequently, rallying for more shame—an individual-centered account of social problems—offers little insight into the admittedly wrenching norm-breakdown problems that these culture critics identify.

In the following sections, I develop each of these contentions. I begin with an in-depth analysis of the emotion of shame and its many bewildering, individual-specific complexities. I then apply these insights to various cultural contexts, as well as to legal reform efforts that urge resort to shaming as a sensible alternative to imprisonment in some criminal cases.

II. Psychological Meanings of Shame: Shame the Noun

Any serious effort to define or elicit shame, or to predict its behavioral effects, must consider that shame is ill understood, even by the emotion theorists who have studied it in depth. Indeed, the specific triggers and behavioral consequences of all emotions, including embarrassment, shame, and humiliation, are extremely variable and elusive, so that one cannot know in advance what the impact of shaming a person might be: The emotional impact may range from none, to mild discomfort, to a profound and complete loss of self that inspires a desire to die.

Shame is bordered by embarrassment, humiliation, and mortification, in porous ways that are difficult to predict or contain. If we believe that shame, but

³¹*Id.* at 259–60. See also ELIJAH ANDERSON, *STREETWISE: RACE, CLASS AND CHANGE IN AN URBAN COMMUNITY* (1990) (describing incentives for inner-city youths to violate drug laws and to engage in sexual activity).

³²This is Susan Lewis's phrase.

not the more extreme manifestations—humiliation and mortification—should attend norm violation, then reformers must take into account how labile and intense these related, negative emotions can be, before adopting reforms aimed at eliciting the particular emotion of shame.

The behavioral consequences of the emotion also vary: Some people may respond to shame not with pained withdrawal, but by lashing out at others. Consequently, if shaming penalties are intended to produce a particular emotion, or to manipulate particular post-shame behavior, then they may be ineffective in many cases.

In this section, I examine these complexities. I outline the ongoing controversy about whether and to what extent shame is innate, versus constructed, and the implications of this debate for social reforms aimed at eliciting shame in a particular individual or in members of the community in order to modify their behavior.

Hard Wired?

Most emotion theorists agree that shame is linked with the awareness of an inadequacy, strangeness, limitation, or defeat,³³ but they disagree vigorously about whether it is innate.³⁴

Notable among those who view shame as innate hardware³⁵ was the late Silvan Tomkins, who posited that shame is a basic negative affect.³⁶ According to his account, we may feel shame whenever there is an interruption or barrier to our interest or enjoyment, but that does not completely diminish that interest or pleasure.³⁷ Shame tends to produce a reduction of facial communication by dropping one's eyes, eyelids, head, and sometimes the upper body,³⁸ and, like disgust, "operates ordinarily only after interest or enjoyment has been activated."³⁹ It is also one of several innate responses that "bias [the human being] to want to remain alive and to resist death, to want to experience novelty and to resist boredom, to want to communicate, to be close to and in contact with others of his species, to experience sexual excitement and to resist the experience of head and

³³LEON WURMSER, *THE MASK OF SHAME* 42 (1981) (stating that the central flaws are "weakness, defectiveness, and dirtiness"). Contrast this English expression with the German "Ich schäme mich vor mir selbst" ("I am ashamed of myself"). *Id.* at 49. The German expression captures nicely that "the approval sought is that of the inner censor."

³⁴For a helpful review of the psychoanalytical literature on shame, see FRANCIS J. BROUCEK, *SHAME AND THE SELF* 11–24 (1991). The disagreements among emotion theorists about shame reflect deeper divisions about emotions. Consider, for example, one recent work in which the author lists seven different models of human emotion—feeling, behaviorist, physiological, cognitivist, conative, evolutionary, and contextualist—each with a distinctive account of how and why emotions occur. See RONALD DE SOUSA, *THE RATIONALITY OF EMOTION* 37 (1987).

³⁵See Nathanson, *supra* note 19, at 26, who uses the expressions "hardware, firmware, and software."

³⁶Affects are "sets of muscle and glandular responses located in the face and also widely distributed through the body, which generate sensory feedback which is either inherently 'acceptable' or 'unacceptable.'" SILVAN S. TOMKINS, *AFFECT, IMAGERY, CONSCIOUSNESS*, Vol. I: *THE POSITIVE AFFECTS* 243 (1962); Broucek, *supra* note 34, at 6–7.

³⁷Tomkins, *supra* note 18, at 123. See also Nathanson, *supra* note 19.

³⁸Tomkins, *supra* note 18, at 120. Of course, downcast eyes can signal other emotions, such as respect, in cultures that regard direct gazes as confrontational.

³⁹*Id.* at 123.

face lowered in shame."⁴⁰ To say that someone is shameless, according to this account, is incorrect; all human infants arrive neurobiologically "shame ready."⁴¹

But the line between this purported genetic unfolding and environmental shaping is quite hazy. The shame-ready infant soon learns from his or her personal shame episodes when to feel shame and why, as well as highly individualized avoidance or coping behaviors.⁴² Our affect system thus is heavily modulated by our analytical capacities,⁴³ so that even if the affect of shame is innate (and thus universal), the precise triggers for and expressions of shame, even more than other affects, are informed by our experiences (and thus intensely local).⁴⁴ These local variations may depend on one's religion,⁴⁵ culture, gender,⁴⁶ age, family dynamics, and other variables.⁴⁷

This means that shame is not necessarily linked to, or coextensive with, what is normatively *shameful*; rather, it is an "unpathologized"⁴⁸ affect that combines with cognition to assist the individual in drawing crucial lines or barriers between what one desires for pleasure (not, necessarily, taboo pleasures),⁴⁹ and what one cannot obtain or must forgo to avoid greater pain.⁵⁰

⁴⁰Tomkins, *supra* note 18, at 169–70.

⁴¹One thus does not learn to feel shame, "any more than one learns to feel pain or to gasp for air." *Id.* at 244.

⁴²*Id.* at 44. As Tomkins has put it, we are composed of "an ever-changing multi-component set of drives, affects, general and specific amplifiers and alternators. These, along with the transmitting mechanism which transforms messages into conscious form, and the perceptual and memory systems enter into the ever-changing central assemblies, . . . which govern the human organism." *Id.* at 88.

⁴³As Tomkins says, "[r]easons without effect would be impotent, affect without reason would be blind." *Id.* at 112.

⁴⁴Klaus Scherer makes this point as follows:

Emotion antecedent situations are *both* universal—with respect to many structural characteristics—and culturally specific—due to differences in values, practices, history, interaction patterns, demography, climate, economy, and social structure. One could assume that some basic eliciting themes are very similar, especially for simple emotions like disgust, anger, sadness, and fear. As soon as norms, values, and cultural practices become important, especially for complex emotions such as *shame and guilt*, the eliciting situations and their meaning become vastly more complicated and culture will obviously play a much bigger role with respect to the nature of the eliciting situations.

Klaus R. Scherer, *Evidence for Both Universality and Cultural Specificity of Emotion in Elicitation*, in *THE NATURE OF EMOTION* 172, 175 (Paul Ekman & Richard J. Davidson eds., 1994) (emphasis added).

⁴⁵See Gershen Kaufman & Lev Raphael, *Shame: A Perspective on Jewish Identity*, *J. PSYCH. & JUDAISM*, 30 (Spring 1987).

⁴⁶On the gendered aspects of shame, see Barbara L. Fredrickson & Tomi-Ann Roberts, "Objectification Theory: Towards Understanding Women's Lived Experience and Mental Health Risks," unpublished manuscript on file with author (forthcoming in *PSYCHOLOGY OF WOMEN QUARTERLY*) (describing studies that suggest that women experience more shame than men).

⁴⁷For example, few adult American males will cry in public, and few adults will throw temper tantrums or publicly hang their heads in shame. Tomkins, *supra* note 36, at 182.

⁴⁸Eve Kosofsky Sedgwick & Adam Frank, *Shame in the Cybernetic Fold: Reading Silvan Tomkins*, in *SHAME AND ITS SISTERS* 23 (1995).

⁴⁹*Id.* at 22.

⁵⁰In Tomkins's words: "Man is not only an anxious and a suffering animal, but he is above all shy animal, easily caught and impaled between longing and despair." Tomkins, *supra* note 18, at 185. This midground between our longings—*licit and illicit*—and our despair—that our reach exceeds our grasp—is fertile ground for shame. In this respect, Tomkins distinctively avoids the habit in psychological literature of linking shame simply to the prohibited or disapproved. See Sedgwick & Frank, *supra* note 48, at 5.

Relinquishing these pleasures can be debilitatingly painful, to the extent that the desires may involve the experienced self,⁵¹ and shame heightens attention to that self and to its limitations.⁵² The source of shame, like that of physical pain,⁵³ may be localized—it typically begins with the face—but its final impact radiates out and embraces the *whole self*.⁵⁴

The shame affect also entails a certain anxious ambivalence. According to some accounts, shame is thwarted interest or excitement that is only *incompletely* overcome.⁵⁵ For example, a rebuffed lover may turn away in shame with downcast eyes, but is still drawn toward the desired one. “‘I want, but . . .’” may best express this feature of the shame response.⁵⁶

Shame thus covers tremendous emotional territory, territory that is often divided conceptually into distinct categories of experience.⁵⁷ At the level of *affect*, the term *shame* may refer “equally to shyness, defeat, alienation and guilt,”⁵⁸ according to some theorists, but at the level of cognitive *experience* these emotions cover a range of experiences that are often codified separately, as I later explain.

That shame can link up so variably to external inputs makes Darwinian sense, insofar as this enables the individual to adapt to his or her social surroundings. Consequently, shame’s variability does not necessarily undermine the claim that shame is innate, though it makes it difficult to generalize about the emotion and its manifestations. In a recent work based on “evolutionary psychology,”⁵⁹ Robert Wright suggests that humans as a species are chemically addicted to social esteem, in that impressing other people may increase the serotonin (neurotransmitter) level in our brains.⁶⁰ In other words, shame and pride are one part of a larger, biologically driven social structure of status and competition that results from the species’ struggle for survival.⁶¹ Shame is simply “a way of discouraging the repeat

⁵¹Tomkins, *supra* note 18, at 133.

⁵²The complete self-involvement and self-consciousness of shame are what give it peculiar power to torment the sufferer. *Id.* at 136.

⁵³*Id.*

⁵⁴“Shame is literally an ambivalent turning of the eyes away from the object toward the face, toward the self.” *Id.* (emphasis added).

⁵⁵“In shame I wish to continue to look and to be looked at, but I also do not wish to do so.” *Id.* at 137.

⁵⁶*Id.* at 185.

⁵⁷*Id.* at 151.

⁵⁸*Id.* at 152. Emotion theorists disagree about whether these are offshoots of the same affect, versus distinct emotions. See June Price Tangney, Rowland S. Miller, Laura Flicker, & Deborah Hill Barlow, *Are Shame, Guilt and Embarrassment Distinct Emotions?* 70 J. PERSONALITY AND SOCIAL PSYCH. 1256 (1996) (rejecting Tomkin’s account and concluding that shame, guilt and embarrassment are distinct emotions).

⁵⁹ROBERT WRIGHT, *THE MORAL ANIMAL—WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* (1994).

⁶⁰*Id.* at 242–44. Cf. Philip Pettit, *Virtus Normativa: Rational Choice Perspectives*, 100 ETHICS 725, 745 (1990) (claiming that “the desire for status ranks with the desire for wealth and power as one of the basic human motives”).

⁶¹Wright speculates that “genes may work by instilling drives that, in humans, get labeled ‘ambition’ or ‘competitiveness’; or by instilling feelings such as ‘shame’ (along with an aversion to it and a tendency to feel it after a conspicuous failure); or ‘pride’ (along with an attraction to it and a tendency to feel it after doing impressive things). But whatever the exact feelings, if they raise fitness, they will become part of the species’ psychology.” Wright, *supra* note 59, at 245.

of status-reducing behaviors, however status may be defined by a particular social group."⁶²

Some emotion theorists, however, deny that shame, even at the level of affect, is innate or universal.⁶³ Emotion theorists who argue that "there are some common elements in the contexts in which emotions are found to occur, despite differences due to individual and cultural differences in social learning,"⁶⁴ are countered by theorists who express profound skepticism about the existence of *any* such common elements. Some of the universalism skeptics suggest that our emotions are not "things" or "concepts" at all, but "complex narrative struggles that give shape and meaning to somatic and affective experiences . . . [and] whose unity is to be found neither in strict logical criteria nor in the perceptible features of objects, but . . . in the types of self-involving stories they make it possible for us to tell about our feelings."⁶⁵ The latter theorists stress the internal contradictions in the emotion literature, noting that "for every William James who claims that the emotions are reducible to feelings of bodily states there is an Errol Bedford who claims that they have nothing to do with feelings or sensations or psychological facts at all, but are rather linguistic ploys for inputting responsibility and blame and for praising and criticizing conduct (as, for example, in 'I hope you are ashamed of yourself,' or 'I sure envy your technique')."⁶⁶

This ongoing innateness debate casts grave doubt on efforts to map or explain any human emotions. Whether the cartography should entail a charting of neural firings that are genetically predetermined or a charting of our emotional experiences as we have interpreted them to ourselves, or some combination of both is unclear. The universality of any emotion, including shame, therefore is unresolved, and the literature might best be summarized as follows: The "answer to the question 'Are there basic emotions?' is 'Do not trust anyone who says they really know.'"⁶⁷

Disagreement also persists over the nature of the interests that shame tends to inhibit—that is, what one is ashamed of. Some psychoanalysts, led by Sigmund Freud, have viewed shame as an inhibition of a very particular form of interest: sexual exhibitionism. In their view, shame is a reaction-formation that curbs forbidden pre-genital and, later on, genital wishes.

But other theorists describe shame far more generally as a reaction to the tension between one's ego ideal and one's actual performance⁶⁸—that is, between

⁶²*Id.* at 271.

⁶³Compare Paul Ekman, *All Emotions Are Basic, in the Nature of Emotion: Fundamental Questions* 15 (Paul Ekman & Richard J. Davidson eds., 1994) with Richard A. Shweder, "You're Not Sick, You're Just in Love": *Emotion as an Interpretive System*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 32 (Paul Ekman & Richard J. Davidson eds., 1994). See generally, RICHARD S. LAZARUS, *EMOTION AND ADAPTION* 68–81 (1991). For a discussion of this debate as it relates to criminal law, see Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 275–78 (1996).

⁶⁴Paul Ekman, *supra* note 63, at 16.

⁶⁵Richard Shweder, *supra* note 63, at 37.

⁶⁶*Id.* at 33.

⁶⁷*Id.* at 43.

⁶⁸Gerhart Piers & Milton B. Singer, *Shame, in GUILT AND SHAME* (Herbert Morris ed., 1971); ANDREW P. MORRISON, *SHAME: THE UNDERSIDE OF NARCISSISM* 31 (1989).

what one desires and what one can attain—that is not limited to defeats in the realms of sex or exhibitionistic desires as Freud suggested.⁶⁹ The frustrations that give rise to shame, they note, often erupt from an interpersonal, nonsexual conflict, where “one individual somehow breaks the interpersonal bridge with the other.”⁷⁰ Thus a common but not exclusive source of shame is the experience of being rejected or unloved by important others.⁷¹ Behind the blush of shame, this account suggests, lurks the fear of contempt and abandonment.⁷²

Whether it inhibits sexual desires only, or extends further to inhibit a wide range of pleasures, shame is an undeniably useful response in humans because it helps to curb appetites that may *need* to be curbed. Shame acts as a sentry that assists the individual in respecting others’ social and physical borders, thereby protecting the individual from the greater harms these others might inflict. Without a sense of shame, one might proceed heedless of tremendous social and other perils, only to suffer stinging rejection, abandonment, or worse. One who truly felt *no* shame thus would be a radically unsocialized, deeply disturbed individual who lacked a most basic inhibition—so basic that it is likely that very few (if any) utterly shameless individuals exist.

Also clear is that shame involves the whole self in a way that other, closely related experiences do not; for example, many emotion theorists view guilt as a more calibrated, less global, experience than shame.⁷³ Of course, experiential slippage exists between shame and other closely related emotions, such as guilt, shyness, and embarrassment;⁷⁴ but for most theorists, shame is activated by a disturbed sense of oneself that is, if only briefly, *all encompassing*⁷⁵ in ways that these other phenomena are not.⁷⁶

In sum, shame is a potentially devastating incursion into one’s idealized sense of self: It is a narcissistic defeat. As one learns to objectify oneself—that is, to see

⁶⁹Morrison, *supra* note 68, at 43.

⁷⁰Broucek, *supra* note 34, interpreting the work of Gershen Kaufman. See, e.g., GERSHEN KAUFMAN, SHAME, THE POWER OF CARING (3d ed., 1992); GERSHEN KAUFMAN, THE PSYCHOLOGY OF SHAME: THEORY AND TREATMENT OF SHAME-BASED SYNDROMES (1989).

⁷¹Broucek, *supra* note 34, at 24.

⁷²Piers & Singer, *supra* note 68, at 150.

⁷³*Guilt* typically refers to anxiety over a specific defective *act* or *omission*. In contrast, one speaks of being ashamed of *oneself*. See, e.g., HELEN MERRELL LYND, ON SHAME AND THE SEARCH FOR IDENTITY 64 (1958); HELEN BLOCK LEWIS, SHAME AND GUILT IN NEUROSIS 35–37 (1971); SUSAN MILLER, THE SHAME EXPERIENCE 142 (1985).

⁷⁴The same deed may provoke both guilt and shame, and some emotion theorists maintain that the affect auxiliary “shame” (that is, the physiological reaction we experience as shame) actually encompasses a wide range of experiences that are at the conscious and contextual level fairly distinct: embarrassment, remorse, shyness, and guilt. See, e.g., Donald L. Nathanson, *supra* note 19, at 19 (drawing on the work of Silvan Tomkins). I contrast these experiences in a later section. See text accompanying notes 119–134 *infra*.

⁷⁵As one writer describes it, “It is as if the ground under one’s feet were giving way; depth and spatial relationships may seem altered and one’s ‘place’ in space uncertain, resulting in a kind of vertigo.” Broucek, *supra* note 34, at 40.

⁷⁶Most theorists too agree on the following basic elements in the shame experience, drawn from the early, influential work of Helen Merrell Lynd:

the *sudden exposure* of unanticipated *incongruity*, the seemingly trivial incident that arouses *overwhelming and almost unbearably painful* emotion, the threat to the *core of identity*, the *loss of trust* in expectation of oneself, of other persons, of one’s society, and a reluctantly recognized *questioning of meaning* in the world.

Lynd, *supra* note 73, at 64 (1958) (emphasis added).

oneself as an object autonomous of others—one learns to compare oneself to these others.⁷⁷ With this stage of development comes the inevitable pain of unfavorable comparisons, as one confronts the hard, developmental truth that there are others who are bigger, stronger, and more competent than oneself, particularly when one is a small child.⁷⁸ Self-consciousness thus is shame hell; it expels the child from the Garden of Narcissism, where world and self were coextensive, and infantile grandiosity went unchallenged.⁷⁹

Shame therefore is an inevitable byproduct of maturation, even if it is not innate, insofar as it results from the recognition of the limits of the self. All of one's desires for uniqueness or merger simply cannot be fulfilled, even by a vigilant and loving parent. Whether it is innate remains contested, however, as does the precise role of socialization in creating shame sensitivities. What is not contested is the self-shattering pain that shame can produce in an individual. Likewise clear is that the shame experience may vary widely among individuals, to the extent that cognition and experience mold emotional responses.

Shame's Software

Ubiquitous as the shame response is among humans, it remains extremely elusive and unpredictable. The reason for this has already been stated: Even if the affect of shame is physiological, the shame experience is constructed by various, early contexts in which an individual has observed or felt shame.

In general, individuals link up the behavioral indices of shame (lowered head, averted eyes, blushing) with particular *scenes* or *scripts*, whose common theme is failing to attain a desired ideal.⁸⁰ Needless to say, however, a wide range of defects may, if observed by others (or by the self fantasizing exposure of the defect), reveal a nonideal self: one may not be ideally powerful, sexually attractive, moral, intelligent, brave, hygienic, urbane, physically healthy, confident, articulate, and so on.

The nonspecific nature of the affect and its contextual constructions therefore make it extraordinarily difficult to determine whether and how shame will be experienced by a given individual. Parents vary in the barriers that they impose on children's interest and enjoyment,⁸¹ and each child links shame to his or her own

⁷⁷Broucek, *supra* note 34, at 41. Objectification in this sense thus is a healthy, essential developmental step. For an interesting discussion of various positive forms of objectification, see Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFFAIRS 249 (1995).

⁷⁸Broucek, *supra* note 34, at 39–42.

⁷⁹This link between shame and self-esteem—indeed, with self identity—has been argued most vigorously by Andrew Morrison, who maintains that our “shame vulnerability is closely related to narcissistic vulnerability . . . Narcissistic vulnerability is the ‘underside’ of exhibitionism, grandiosity, and haughtiness—the low self-esteem, self-doubt, and fragility of self-cohesion that defines the narcissistic condition . . . [S]hame is the principal ubiquitous affect that accompanies and defines that condition.” Morrison, *supra* note 68, at 14–15. There is, according to Morrison, a dialectical relationship between shame and narcissism: “[S]hame and narcissism inform each other, as the self is experienced, first, alone, separate, and small, and again, grandiosely, striving to be perfect and reunited with its ideal. Uniqueness and specialness may be imagined in terms of total autonomy and independence, or worthiness for merger with the fantasied ideal.” *Id.* at 66 (emphasis added).

⁸⁰*Id.*

⁸¹Tomkins, *supra* note 18, at 212–213. The parents may prevent the child from interacting with the parents as much as the child wishes, may curb the child's physical freedom, may instruct the child to be less boisterous and noisy, or may otherwise limit the child's range of motion—physical, emotional, and in other respects. Each type of resistance may trigger shame, though in different ways.

life scenes, sometimes in ways the parents did not intend or expect.⁸² The result may be that *whatever* emotion triggered the behavior that prompted parental rebuke may be bound to shame, such that the child will feel shame whenever this other affect occurs.⁸³ A well-meaning parent may, through repeated reprovals of a child's affects, unintentionally teach the child not only that the targeted behaviors are shameful in context, but that the emotions associated with the behavior are too, such that even affectlessness seems shameful,⁸⁴ and the child is caught in a hopeless affect pickle.

Children learn about common shame responses by observing the shame of others,⁸⁵ a mechanism that can transmit shame norms from generation to generation.⁸⁶ Such shame legacies promote group or family solidarity,⁸⁷ solidarity that can render group members especially vulnerable to vicarious shame,⁸⁸ insofar as that solidarity may enhance their empathy for others.⁸⁹

Yet this sparse account of shame—any barrier to interest or enjoyment may trigger the affect of shame—demonstrates why one cannot with confidence predict whether or when an individual actually will experience shame: “The same barrier may produce in different individuals, or in the same individual at different times, counteraction or renunciation or that incomplete reduction of interest and enjoyment which activates shame.”⁹⁰ Moreover, a barrier to one's interest or enjoyment may arouse multiple affects, further complicating the task of predicting behavior or emotional responses.⁹¹ The plural, contextual, and variable nature of shame therefore makes any effort to *shame* a person, or to elicit shame anxieties in a group of persons, highly uncertain.⁹²

⁸²For example, a parent might reprimand a noisy six-year-old child in a restaurant by saying “You are acting like a baby! Everyone is looking at you and saying, ‘what a bad boy he is being!’” *Id.* at 227.

⁸³*Id.*

⁸⁴*Id.* at 229–30. The point is made beautifully by Tomkins, through a hypothetical shame vignette in which a small boy's parents respond to a series of the boy's affects during dinner in a manner that ultimately renders the boy affectless; yet the parents even reprove him for this resigned, affectless state, saying “ ‘Robert, you could be a little more attentive, you don't have to sit there like a hump on a log. Say something.’ ” *Id.* at 230. No affect, even *none*, pleases these parents.

⁸⁵*Id.* at 216.

⁸⁶*Id.*

⁸⁷“[S]hared shame [is] a prime instrument for strengthening the sense of mutuality and community whether it be between parent and child, friend and friend, or citizen and citizen.” *Id.*

⁸⁸*Id.* at 223. Likewise, group solidarity can be promoted by shared sorrow, shared anger, and so on. See Lazarus, *supra* note 63, at 23–24 (discussing how positive and negative emotions can strengthen social bonds).

⁸⁹Tomkins, *supra* note 18, at 226.

⁹⁰*Id.* at 187.

⁹¹*Id.*

⁹²Consider the following passage from Tomkins, in which he elaborates (with what one suspects is autobiographical energy) on the multiple ways in which a single aspect of life—work—may be a complex, highly individualized source of shame:

If my investment of interest and enjoyment is in work which has a characteristic level of difficulty, I can be shamed by any radical deviation from this optimal level. . . .

If I wish to have my work remain private, I can be ashamed if it is opened to public scrutiny. If, however, I wish my work to be widely known and it remains unknown, this can evoke shame because affect is still invested in publicity but encounters the wall of the unconsciousness of others of my work.

Given the multiple and vast contexts in which the emotions must operate as a primary motivational system,⁹³ one can appreciate the advantages of ambiguity here.⁹⁴ Emotional ambiguity is the “necessary price which must be paid by any system which is to spend its major energies in a sea of risk, learning by making errors.”⁹⁵ Yet this price can be steep: Our emotional errors can be confoundingly basic, such that we often do not understand our own, highly fluid emotions, let alone those of others.⁹⁶

Again, even emotion theorists who are deeply committed to the innateness of affects concede this enormous play in our emotional joints. A combination of two insights thus may best summarize shame the emotion: We might have innate, shame “hardware,” but it is so adaptable and influenced by environmental “software” that one cannot reliably predict when shame will occur in an individual, even in ourselves.⁹⁷ The variation insight thus softens the innateness

If I wish the initiation or continuation of my work to be demanded by others, their indifference can evoke shame. If, however, I wish the initiation or continuation of my work to be entirely my own decision, even the enthusiastic clamor of others for my work may seem coercive and evoke shame. . . .

If I wish to diversify my investments of affect in many objects . . . then I may be shamed if there is disproportionate time and energy demanded by my work which threatens liquidation of other affect investments. If, however, I wish to dedicate all my energies to work, the demands of family, friends and play may evoke shame because they interfere with the monopolistic pursuit of my work. . . .

If I am a bright housewife, I may be ashamed because too much of my work is exclusively muscular. If I am mesomorphic academic, I may be ashamed because my work is too much cerebral and too little somatonic . . .

If I am a pure scientist but I also wish my work to make a direct, immediate contribution to social welfare . . . I may feel ashamed. If, however, I am an applied scientist who wishes also to make a contribution to knowledge but whose work is . . . more useful than illuminating, then I may also experience shame.

If I am an individual whose work is very imaginative, rich and suggestive, but who wishes also that his work be precise, rigorous and beyond question, then I may be shamed by any suggestion of error. If I am an individual whose work is precise, rigorous, and correct, but I also wish it to be imaginative, rich and suggestive, I may be shamed by any suggestion of sterility or restriction of scope.

Id. at 189–90.

This passage may explain some of the emotional complexities of workplace relations, where shame issues, along with other emotional issues, may affect interactions among employees in subtlety, sometimes baffling ways.

⁹³All of the major life arenas may entail quite various, potential shame responses: We may experience shame from love, friendship, and close interpersonal relationships; shame from the body; shame from work and performance; and shame from the loss of enjoying the self. *Id.* at 192–203.

⁹⁴See Sedgwick & Frank, *supra* note 48, at 14 (noting that the likely purpose of these highly unpredictable, plastic, and complexly interacting emotions is to enable “learning, development, continuity, differentiation”).

⁹⁵Tomkins, *supra* note 36, at 114 (emphasis added).

⁹⁶*Id.* (noting that emotional errors may include being “wrong about [one’s] own wishes, their causes and outcomes”).

⁹⁷Such an approach “might resist both binary homogenization and infinitizing trivialization” in analyzing human emotion. Sedgwick & Frank, *supra* note 48, at 15.

possibility, without blurring it completely, and thereby suggests a “*more than two but also finitely many*” dimension to human emotions.⁹⁸

Most crucial of all psychological insights about shame, though, in terms of the literature’s relevance to legal and social reforms, is that *behavioral responses* to shame vary in complex ways that can exaggerate or mask its impact, or otherwise make the consequences difficult to predict.⁹⁹ For example, children who receive inadequate empathic responses from their parents, or whose idealization of a parent is ignored or rejected by that parent, can become adults in whom shame manifests itself as serious depression, anxiety, anger, or withdrawal.¹⁰⁰ And contrary to assumptions that shame always results in withdrawal from others, remorse, or avoidance of the disapproved behavior, many psychologists instead believe that “[m]any violent children lash out not because of low self-worth but because they are highly prone to shame (that is why so much violence is triggered by acts of disrespect).”¹⁰¹ Shame can provoke externalization of blame or other responses,¹⁰² including a reduced capacity for empathy.¹⁰³

⁹⁸This locution is from Sedgwick & Frank, *supra* note 48, at 14 (emphasis in original).

⁹⁹The difficulties in interpreting one’s own emotions, or in reading others’ accurately, have led some emotion theorists to conclude that the only reliable means of detecting emotional responses accurately is by hooking individuals up to machines that measure changes in their physiological states. The detection/interpretation problem is obviously compounded when the emotion itself is embarrassing or shameful, as shame is for many people. See text accompanying notes 104–107 *infra*.

¹⁰⁰Shame not only rims these adults’ emotional lives in a developmentally normal way; it comes to define them in an unhealthy way. Therapeutic attempts to undo these harmful emotional effects of childhood often flounder, because the asymmetrical and hierarchical nature of the therapist–patient relationship can exacerbate, rather than alleviate shame. As one therapist has noted, “[b]y refusing to join his patient on the same level of discourse the therapist is guaranteeing that his patient will not lack for abundant shame experiences.” Broucek, *supra* note 34, at 95. See also Lewis, *supra* note 73, at 350 (noting that “[t]herapy itself provide[s] a ready source of humiliated fury resulting from the indignities of being a patient.”). A shame-sensitive patient thus is difficult to treat by conventional methods: the patient tends to experience any unrequited interest, desire or intimate disclosure as shameful, and also will struggle mightily against any erotic transference in analysis, lest he or she “surrender to the power of archetypal insistencies, which [would bring] about an unacceptable loss of control . . . [which] is characteristically an entrapment, enslavement, or imprisonment.” Broucek, *supra* note 34, at 95. Conventional psychotherapy, and especially conventional psychoanalysis, are inherently asymmetrical relationships and thus can *enhance* the shame of some patients, unless the therapist recognizes this peril and uses it as a therapeutic opportunity to confront the shame issues of the patient.

¹⁰¹See, e.g., Richard Weissbourd, *The Feel-Good Trap*, THE NEW REPUBLIC 12 (Aug. 19 & 26, 1996). See also RICHARD WEISSBOURD, THE VULNERABLE CHILD: WHAT REALLY HURTS AMERICA’S CHILDREN AND WHAT WE CAN DO ABOUT IT 36–37, 86–88 (1996) (arguing that adolescents are a highly shame prone population and that “psychological and sociological literature suggests that teenagers are disposed to violence when they suffer shame and helplessness in relation to basic life tasks.”) Cf. Jon Elster, *Norms of Revenge*, 100 ETHICS 862 (1990) (noting that shame norms can support acts of revenge—like feuding—that are socially destructive).

¹⁰²See June Price Tangney, Rowland S. Miller, Laura Flicker, & Deborah Hill Barlow, *Are Shame, Guilt and Embarrassment Distinct Emotions?* 70 PERSONALITY AND SOCIAL PSYCH. 1256, 1267 (1996); June Price Tangney, Patricia Wagner, & Richard Gramzow, *Proneness to Shame, Proneness to Guilt, and Psychopathology*, 101 J. ABNORMAL PSYCH. 469, 470 (1992); Janice Lindsay-Hartz, Joseph deRivera, & Michael F. Mascolo, *Differentiating Guilt and Shame and Their Effects on Motivation*, in SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND PRIDE 274, 296 (June Price Tangney & Kurt W. Fischer eds., 1995); June Price Tangney, Patricia Wagner, Carey Fletcher & Richard Gramzow, *Shamed Into Anger? The Relation of Shame and Guilt to Anger and Self-Reported Aggression*, 62 J. PERSONALITY AND SOCIAL PSYCHOLOGY 669 (1992).

¹⁰³Lindsay-Hartz et al., *supra* note 102, at 296.

Further complicating any effort to identify, understand or treat individual variations on the shame experience are the phenomena of “bypassed shame”¹⁰⁴ and shame about shame. *Bypassed shame*, a term coined by Helen Block Lewis, is a defense mechanism through which “the self views itself from the standpoint of the ‘other,’ but without much affect. The person wonders what he would think of himself if he were in the position of the ‘other.’ . . . Shame affect is by-passed and replaced by watching the self from a variety of viewpoints.”¹⁰⁵ The result is that the characteristic affect of shame is masked. Likewise, if one experiences shame about shame, one may deny it, “[p]erhaps because it feels like so primitive and ‘irrational’ a state.”¹⁰⁶ Indeed, shame about shame can prompt some individuals to counterphobically engage in behavior that might otherwise be deterred by shame.¹⁰⁷

Even if we agree that certain behaviors are, or should be, shameful, we thus cannot predict when committing these behaviors will evoke shame—versus anger, grief, guilt, or other negative emotions—or be certain how to conduct parenting or other forms of norm transmission so that behaviors that are perceived as shameful *are therefore avoided*. Yet even these significant complications do not exhaust the complexities of invoking shame as a basis for social reform. I turn first to the elusive link between privacy and shame.

Privacy and Shame

The concept of privacy seems to be bound to shame, though theorists disagree about what this connection is.¹⁰⁸ Shame may reflect an apprehension about one’s perceived limitations or defects and their possible *disclosure* or *involuntary display*; this resistance to disclosure implies that boundaries between the public sphere and the private sphere protect against shame. These boundaries vary; for example, some cultures regard performance of certain bodily functions as private and others do not.¹⁰⁹ But all cultures retain some notion of a private sphere, so that

¹⁰⁴Lewis, *supra* note 73, at 38.

¹⁰⁵*Id.*

¹⁰⁶Broucek, *supra* note 34, at 111. *See also* Lazarus, *supra* note 63, at 74 (reporting on work that suggests that facial expressions for shame, unlike happiness or other basic emotions, may not be universal, and that emotions can be feigned in ways that are difficult to detect).

¹⁰⁷For example, “[a]dolescents will often counterphobically initiate sexual activity to avoid the shame of being too ashamed to be sexually active.” Lewis, *supra* note 73, at 38.

¹⁰⁸Some of them have invoked privacy as a means of distinguishing shame from guilt, maintaining that shame requires an audience, whereas guilt is an externalized sense of failure. *See, e.g.,* ARNOLD H. BUSS, *SELF-CONSCIOUSNESS AND SOCIAL ANXIETY* 159 (1980). This particular distinction does not hold up, however, as most shame theorists have observed. *See, e.g.,* Lynd, *supra* note 73, at 27–28 (noting that “[t]he exposure may be to others but, whether others are or are not involved, it is always . . . exposure to one’s own eyes.”); Piers & Singer, *supra* note 68, at 66–68 (1971) (“observing that the audience need not be actual for a person to experience shame; it can be fantasized”). Shame, like guilt, clearly can spring from self-reproach that is inspired by an internalized set of beliefs or values. It need not involve an actual audience or even a strong possibility of actual disclosure. This internal shame theater may obviously be developed through negative interactions with live others—actual audiences—which interactions are then memorized, interpreted, and recreated. But this is true of guilt as well, so that this aspect of the public/private distinction doesn’t help one distinguish shame from guilt after all. *See, e.g.,* Wurmser, *supra* note 33, at 44 and sources cited therein. The distinction is useful, however, if one seeks to distinguish shame—used here as an umbrella concept—from one subset of it, “humiliation.” Unlike shame, humiliation typically cannot occur without a humiliator. Broucek, *supra* note 34, at 75.

¹⁰⁹*See* GERSHEN KAUFMAN, *SHAME: THE POWER OF CARING* 223 (3d ed., 1992) (noting that the French have no shame about eating food or about eating in public in ways that differ from Americans).

typical members regard involuntary incursions by others into that sphere as potentially embarrassing at the least, and deeply humiliating at the worst.

Of course, an invasion of privacy will not necessarily evoke shame; it may evoke anger, anxiety, or other emotions. The crucial distinguishing features of a shame-evoking privacy invasion likely are *what* is being disclosed (e.g., a flaw, weakness, incongruity) and the *nature or means of disclosure* (i.e., it is a departure from the norm, such that the person feels abased, humiliated, or reduced by the very *fact* of the disclosure). The person's privacy is invaded in a way that sets him or her apart from others, degrades him or her, and denies him or her control.¹¹⁰

The core of the shame experience therefore is "a *special kind of visibility* and exposure . . . 'we experience shame when we feel we are placed out of the context within which we wish to be interpreted.'" ¹¹¹ Shame is a response to an assault on our inner selves—"the most intimate life we all have—our feelings,"¹¹² and thus implicates a very specific sense of control and privacy: "It functions as a guardian against any outer power that might exploit weakness in the essential realms of the self and interfere with one's own inner logic,"¹¹³ a logic that is private, central to selfhood, and inherently interior. This is why shame often inspires a desire to withdraw, hide, or shrink from public view to escape the critical gaze—external or internalized. Escaping may help to reestablish control over our feelings and interior logic; it resurrects a barrier between the private, vulnerable self and the public, penetrating audience.

An invasion of privacy thus is not a prerequisite for feeling shame, but is one potential and especially powerful trigger of the emotion. A complex dynamic links our sense of privacy, our sense of shame, and our sense of ourselves as autonomous and connected to others—as private and public beings.

Some culture critics miss the significance of this dynamic for shaming sanctions. They correctly note the privacy dimension of shame in their laments that we may obscure the distinction between public and private in our "tell-all, reveal-all, expose-all"¹¹⁴ culture. And they accurately describe shame or the need for privacy as "central to safeguarding the freedom of the body."¹¹⁵ Their fear that

¹¹⁰See AVISHAI MARGALIT, *THE DECENT SOCIETY* 207–08 (1996) (noting that "[i]nvasion of the private arena may be an effective restriction of control; or it may be intended to show the individual that he has no control, not even over this limited area; or it may be meant to show that it makes no difference whether he has any control or not. There is, thus, a tight link between the violation of privacy and one of the important senses of humiliation—namely the sense involving the absence of minimal control.")

¹¹¹Broucek, *supra* note 34, at 23 (quoting CARL D. SCHNEIDER, *SHAME, EXPOSURE AND PRIVACY* 35 (1977) (emphasis in original). Cf. ERVING GOFFMAN, *INTERACTION RITUAL* 8 (1971) (noting that a person is "out of face" when "information is brought forth in some way about his social worth which cannot be integrated, even with effort, into the line that is being sustained for him").

¹¹²Wurmser, *supra* note 33, at 66. See also CARL D. SCHNEIDER, *SHAME, EXPOSURE AND PRIVACY* 53–54 (1977) (observing that "[t]he problem of shame and the private realm is the problem of human vulnerability." (emphasis in original).

¹¹³Wurmser, *supra* note 33, at 66.

¹¹⁴Jean Beth Elshain, *The Hard Questions: Bad Publicity*, *THE NEW REPUBLIC* 25 (Aug. 12, 1996). See also JEAN BETH ELSHTAIN, *DEMOCRACY ON TRIAL* 39–46 (1995).

¹¹⁵JEAN BETH ELSHTAIN, *DEMOCRACY ON TRIAL* 55–56 (1995). Cf. Seth Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991) (discussing the power of government to sanction disfavored activities merely by disclosing the existence of them, with serious stigmatic and autonomy-invasive consequences).

an erosion of the public–private distinction will sap our sense of shame, because the private will no longer be sacred and bound by shame, is well grounded; a loss of privacy and the concomitant erosion of shame could threaten our sense of ourselves as autonomous, safe, and free.

But they ignore a paradox here: To *shame* a person, one must invade the shamed person's privacy and autonomy in a manner that *departs* from cultural norms about privacy and concealment. By defying privacy norms, shaming thus may also, paradoxically, erode them. Consequently, if the problem one hopes to solve with shame sanctions is the alleged deterioration of borders around once-intimate and once-private spheres, then resort to the privacy-destructive penalty of shaming is an inapt, likely counterproductive response.

Sex and Shame

The complex relationship between privacy and shame also sheds light on, though does not completely capture, the delicate link between sex and shame. Clearly, sexual desires can place an individual in a highly vulnerable, exposed, physical, and emotional posture; sexual desires are often quite intense, and typically directed at a particular person.

It is little wonder, then, that human sexual development is so fraught with shame potential: One literally cannot develop sexually without another's cooperation, cooperation that is beyond one's control. Consequently, for many people—perhaps all—the pleasure of sexual arousal is at least occasionally interrupted by the barrier of others' nonresponsiveness, or other obstacles to its pursuit. Sex does not produce this shame, as Freud imagined; it is the interrupted desire for it—the hesitation prompted by the anxious search for reciprocal desire—that evokes shame in this sense, and that may partly explain the perceived strong relationship between our sexual longings and shame.¹¹⁶

Of course, a powerful bind between sex and shame also may be, and often is, created in a child or adult by affirmative efforts to privatize, and to link shame to, particular sexual desires, acts, or organs.¹¹⁷ For example, if parents (or other significant authority figures) deploy shaming techniques whenever a child expresses sexual excitement, or display acute embarrassment about sex or sexual desires, then the child may become an adult who experiences sexual excitement as taboo and shameful. Yet even *without* such stigmatizing socialization, sexual desire may produce shame more often than other desires that are not so completely dependent on intimate and intense cooperation by others for their complete fulfillment. Thus, it should be no surprise if sex is often associated with shame, even across cultures that vary widely with respect to particular sexual mores.

Far less clear is that public shaming for sexual “offenses” should be a universal phenomenon. If such public shaming is a common practice, the reason may

¹¹⁶If “pride is attached to the acquisition of each moiety of normal growth and development and shame is attached to any failures along the way,” then one's sexual development often will include several shame experiences. Nathanson, *supra* note 19, at 160.

¹¹⁷This is but one example of how sexual behavior is structured by social factors, along with biological factors. See EDWARD O. LAUMANN, JOHN H. GAGNON, ROBERT T. MICHAEL, & STUART MICHAELS, *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 21–24, 78 (1994) (discussing the relevance of scripting and network theories to sexual behavior, and concluding that sexual behavior is structured by social factors).

not be any universal commitment to sex as shameful, but rather a prevalent taste for sadistic voyeurism: Because sex is an especially vulnerable, unprotectable sphere of human identity and behavior, and is often bound up in privacy, shaming a person *here* can be an especially entertaining spectacle for pain-fascinated observers.¹¹⁸

Here again, culture critics fail to appreciate the transition from shame to shaming. Many of them believe that a shame-affect bind with respect to our sexual desires and acts is crucial and worth preserving. They fear that contemporary practices have eroded this boundary, like the public-private boundary, with serious, adverse consequences. Destigmatization of illicit sexual behaviors, and the more general deprivatization of all sexual behaviors, have produced a vulgar, coarse society in which sexual modesty and sexual responsibility seem passé. When shame no longer cabins our sexual desires and behaviors, say these critics, society is the poorer for it—particularly the offspring of these shameless couplings.

But the leap from acknowledging the important role that shame may play in policing and shaping our sexual desires, to endorsing proposals for *shaming* people as means of curbing their sexual conduct or desires, is huge. People are *already* unusually shame sensitive when it comes to their sexual conduct and desires, and public shaming can deprivatize behaviors in a boomerang effect. To shame offenders as a means of restigmatizing sexual behaviors thus may be an especially harsh and counterproductive tool. In any event, it is far from clear that any norm collapse has occurred with respect to child molestation, rape, or even solicitation of prostitutes, which are the kinds of sexual offenses that have inspired shame penalties. Thus, the critics' general gloomy sense that *other* sexual behaviors, such as adultery or premarital sex, have been destigmatized and thus more common, hardly justifies official shaming of the criminal sex offenders who have actually been subjected to shaming.

The Shame Family

A final complication of shame is that several phenomena may fall under the expansive affect umbrella of *shame*, but nevertheless tend to be experienced as distinct emotions and so are codified separately by most emotion theorists. I take up here only four of these phenomena, though several others—such as remorse, regret, alienation, insult, or rejection—easily might also have been included.¹¹⁹ The point is not to produce a compendium of shame's immediate family members or cousins, but to highlight that many permutations exist¹²⁰ and that one cannot predict which permutation will be elicited in a given shame scenario.

Shame versus embarrassment. Embarrassment and shame are close cousins, if not two offshoots of the same basic affect. Embarrassment is less intense, and less enduring than shame, and the failure inherent in embarrassment tends not to be central, or personally discrediting, as is moral failure. Moral flaws are more likely

¹¹⁸See Lewis, *supra* note 73, at 24 (observing “[t]hat there is some special connection . . . between shame and the inhibition of sexual activity is a commonplace observation”). Cf. Whitman, *supra* note 8 (elaborating on the link between sex and shaming, and the carnivalesque aspect of shaming sexual offenders).

¹¹⁹The following discussion, even more than the balance of this work, has been shaped by many conversations about shame with Joel Feinberg.

¹²⁰For a plural account of the meanings of shame, or “pipil,” among the people of Papua, New Guinea, see Andrew Strathern, *Why Is Shame on the Skin?* 14:4 *ETHNOLOGY* 347 (Oct. 1975).

to trigger the more profound reactions of shame, humiliation, or mortification; embarrassment often results from a trivial or humorous event, occurs suddenly, and takes one by surprise.¹²¹

But the line between merely embarrassing and shame-provoking events is unclear and person-specific; some people might experience only embarrassment over what others might view as a more serious, moral, and thus shameful shortcoming. For example, one person arrested for drunk driving may feel only embarrassment, whereas another may feel shame. Some criminal offenders may feel no shame or embarrassment at being arrested; they may feel rage instead, or only feel shame if they admit to fear of the police or jail.¹²² A highly shame-sensitive person, in contrast, may feel deep shame at even being accused of a quite minor offense. As such, shame and embarrassment can be distinguished more easily on the basis of the intensity of the response, or other features, than on the basis of their possible causes.¹²³ It seems safe to say that predictions about this intensity in a given person or scenario are likely to be increasingly unreliable as one approaches the intersection between these emotions.

Shame versus humiliation. If embarrassment lies at one pole of the shame continuum, then humiliation lies at, or near, the other. Again, the primary distinction between humiliation and these related experiences seems to be intensity. But shame and humiliation may differ in other, crucial respects that are directly relevant to shaming sanctions in law. Humiliation more often refers to shame experiences that are both exceptionally intense *and* inflicted intentionally by another; that is, there is usually a humiliator. The more generic experience of shame, in contrast, may be imposed wholly from within. Indeed, one writer has described humiliation as typically triadic, "requiring one who humiliates, one who is humiliated, and one witness (or more) whose good opinion is important to the one humiliated."¹²⁴ All three roles can be assumed by the self, but *usually* are not: the humiliator and witness roles are more often assumed by others.

Thus, humiliation is a kind of "shame on stilts," inflicted intentionally by another, before an actual audience. Moreover, humiliation can hit home even if one lacks respect for the humiliators and has committed no offense. For example, an innocent person may well feel humiliated if forced to stand naked before an assembly of strangers, but she may not feel ashamed. Because humiliation is so

¹²¹Some emotion theorists insist that there is a line between shame and embarrassment, and that they represent distinct affective experiences, though they acknowledge that "[a]mbiguities still remain." See June Price Tangney, Rowland S. Miller, Laura Flicker, & Deborah Hill Barlow, *Are Shame, Guilt, and Embarrassment Distinct Emotions?* 70 J. PERSONALITY & SOCIAL PSYCH. 1256, 1258, 1266 (1996).

¹²²See LAWRENCE W. SHERMAN, *POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS* 161–63 (1992).

¹²³See Tangley et al., *supra* note 121, at 1265–66. Cf. GABRIELE TAYLOR, *PRIDE, SHAME, AND GUILT* 73 (1985) (arguing that "[t]he status of the evidence [with embarrassment], viz., its conception as eyes other than my own, is different from its status in shame, and its role is therefore different too."). Miller, *supra* note 73, at 38 (arguing that "the rhythm of shame is a pulling inward and groundward, a hiding and concealing, [whereas] the rhythm of . . . embarrassment might be described as the self trying to pull inward or to diffuse itself into nonexistence in response to a sudden feeling that an aspect of self has been opened up to view without one's consent or participation.")

¹²⁴Broucek, *supra* note 34, at 75. Cf. Miller, *supra* note 73, at 43 (contrasting humiliation and shame on the basis that "shame is a belief about the self . . . whereas humiliation refers to the current situation or status of the self and not to an identified, enduring quality belonging to the self").

harsh, and often behavior- or culpability-independent, many people regard *humiliating* someone as intolerable in circumstances where they might think eliciting shame in them would be acceptable. I will return to this distinction between humiliation and shame in the discussion of the potential cruelty of legal shame sanctions.

Shame versus mortification. Mortification is shame at its most devastatingly extreme, where it is linked to death both etymologically and in its gravity. The actual wish to die, or the common, spontaneous utterance "I could have died, I was so ashamed," may accompany shame that rises to this level. Of course, the death longing that accompanies mortification need not be actual, in the sense of a true suicidal impulse, but may refer to a momentary, complete loss of the self. So understood, mortification is a partial, temporary "disruption of consciousness and loss of control that leads one to appeal, by analogy, to the experience of dying."¹²⁵ Although mortification may occur without an audience or a humiliator, it overlaps with humiliation in that it can be the outcome of public humiliation.

Shame versus guilt. As stated earlier, shame is about the whole self; guilt is more narrowly confined to an act or omission.¹²⁶ Some emotion theorists describe guilt as a subspecies of the general shame *affect*, but they distinguish guilt from shame at the levels of expression and experience. Even at these levels, however, shame and guilt overlap substantially, especially when the shame is over a moral issue, rather than a different type of failure.¹²⁷ A moral default may well trigger both shame and guilt, either simultaneously, or in a shame-guilt sequence.¹²⁸

To the extent that shame and guilt are distinguishable experiences, they have been separated in different ways by different theorists. For example, some writers see guilt as a conflict between the ego and the conscience, and see shame as a conflict between the ego and the ego ideal.¹²⁹ The conscience, they say, is composed of internalized parental inhibitions and punishment; the ego ideal is formed through identification with parents and peers.¹³⁰

Others focus on the codified nature of guilt in distinguishing it from shame. Guilt, they argue, erupts from the violation of a code of behavior, legal, social, or

¹²⁵Schneider, *supra* note 112, at 79.

¹²⁶See text accompanying notes 73–75, *supra*.

¹²⁷See Miller, *supra* note 73, at 140. This overlap, however, may be more pronounced in some cultures than in others. According to one emotion theorist,

In individualist cultures both shame and guilt seem to have rather similar antecedents, strongly characterized by immorality of the eliciting behavior. The reported reactions are also quite similar for both emotions. For collectivist cultures, however, we find more clear-cut differences between shame and guilt: Guilt antecedents are perceived as more immoral than shame antecedents. Similarly, the expressive and physiological responses seem to be quite different for shame and guilt in collective cultures, shame being a shorter, "hotter" affect burst than guilt.

Klaus R. Scherer, *Evidence for Both Universality and Cultural Specificity of Emotion Elicitation*, in *THE NATURE OF EMOTION* 172, 175 (Paul Ekman & Richard J. Davidson eds., 1994).

¹²⁸Miller, *supra* note 73, at 140. Indeed, the list of "ethically relevant" emotions includes not only shame and guilt, but also "trust and its cognates—the reluctance to cheat, the feeling of being betrayed, loyalty— . . . [and] diffidence, pride in the achievements of one's friends . . . envy, jealousy . . . and resentment." RONALD DE SOUSA, *THE RATIONALITY OF EMOTION* 313 (1987).

¹²⁹Buss, *supra* note 108, at 157.

¹³⁰*Id.*

divine;¹³¹ shame can, but does not necessarily, involve violation of a norm. Guilt flows from the sense that one has caused wrongful harm to another, has defaulted in some duty to another, or has reaped gains at others' expense or despite their greater need; harm to another is not necessary for shame.¹³² Guilt's balm is punishment or repayment; shame's balm is not punishment, but restoration of the damaged self, by whatever means that might be achieved.¹³³ Often, this restoration is impossible, and only physical withdrawal will ease one's sense of shame.¹³⁴

However useful these distinctions are in some respects, though, they do not hold up well in all contexts. Assume for example that an individual commits adultery, for which she feels both shame and guilt. The sense of shame evoked by the act ("I could die with shame at what the act says about who I am, and I fear the contempt of others—indeed, of myself—because of it") is hard to disentangle from the sense of guilt evoked by the act ("I could die with guilt over what the act has done to my spouse, and I fear the legal, social, and other consequences that may flow from my deed"). Given that the consequences that flow from the act may include social consequences, including the contempt of others, the fear that animates shame over the act overlaps with the fear that animates guilt over the act. Moreover, the physiological response for both guilt and shame may not be distinguishable. If shame is the interruption of interest and excitement, then it may well include guilt as a subset, insofar as guilt refers to the disturbance of interest in whatever guilty act has drawn the individual's attention. Thus, for example, one can feel *guilty* about unrequited love as well as *ashamed*, especially if the love is for someone who is not only uninterested, but also *unavailable* because of a prior, culturally recognized commitment—legal, social, or religious—to another person, or is *taboo* because of legal, social, or religious norms. The searing burn of shame therefore is often, but not always, accompanied by pangs of guilt.

Nevertheless, a fine-tuned analysis of guilt versus shame certainly can assist in distinguishing between bad acts that implicate the whole self and those that may not, where such distinctions are important. The crucial significance of this distinction, is as follows: if public officials *could* reliably elicit a particular emotion in norm violators (which I doubt), this emotion probably ought to be *guilt*, not shame; guilt makes most offenders want to make reparations, whereas shame more often triggers efforts to restore the damaged self by other, sometimes maladaptive, means, which might even include violence toward the shamers. Again, many culture critics and social reformers fail to perceive this significance in their back-to-shame appeals.

¹³¹ See GABRIELE TAYLOR, *PRIDE, SHAME AND GUILT: EMOTIONS OF SELF-ASSESSMENT* 85 (1985); Anthony O'Hear, *Guilt and Shame as Moral Concepts*, in *PROCEEDINGS OF THE ARISTOTELIAN SOCIETY* Vol. LXXVII 72 (1976/77).

¹³² See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE*, 67, 72 (1971).

¹³³ See Tangney et al., *supra* note 121, at 1257 (noting that "whereas shame motivates concealment or escape, guilt typically motivates reparative action—confessions, apologies, and attempts to undo the harm done.") See also Lindsay-Hartz et al., *supra* note 102, at 298 (concluding that guilt and shame "differentially affect our motivations and actions").

¹³⁴ See Taylor, *supra* note 123, at 90. See also HERBERT MORRIS, *ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY* 60–62 (1976); Lazarus, *supra* note 63, at 243–44.

Summary

The foregoing discussion demonstrates that much of the imprecision in recent writings about our alleged lost sense of shame likely stems from a conflation of three terms: *shame*, *shameful*, and *shaming*. These three are not the same phenomenon. *Shame* is the internal reaction: shame the emotion. What is *shameful* is a normative judgment imposed onto behaviors, desires, or other entities. *Shaming* is an external action: shame the verb. One can experience shame without a shamer or the act of shaming. Conversely, shaming a person may not produce shame in them: anger, pride, depression, contempt, or other emotions may be triggered instead. One surely may feel shame for deeds that are not shameful, that is, things about which one *ought* to feel shame because they are moral failings, and one may feel no shame for deeds that are shameful. “You ought to be ashamed of yourself” is an attempt to impose or express a normative latticework, to restrain behavior in ways that the parent or other authority figure deems appropriate.

Consequently, when popular culture critics say we have “lost our sense of shame,” or are “shameless” they are either mistaken or misspeaking. They likely mean to say that we have lost our shared sense of what is *shameful* and may have destigmatized certain behaviors in ways the critics find alarming, a quite different claim. This distinction is crucial in evaluating the likely effectiveness and humanity of social programs, criminal sanctions, or other prescriptions that are designed to shame another—that is, to make another feel shame for shameful acts.

If, then, shame proponents’ objective is to rehabilitate those who violate social norms by shaming them, versus other means, then they must acknowledge that *we don’t know precisely how shame works in humans or how to trigger it*. Psychological accounts do show that shame is an unpleasant, self-conscious emotion that tends to be amplified or detailed through social learning, or scenes, often learned at an early age. These scenes may reflect general, external norms—parental, religious, community—so that people within a norm cohesive group will tend to agree intellectually on what is shameful (the “about” aspect of shame) and may also, from their early training, actually experience shame at the commission of a shameful act, or avoid the act to avoid the painful affect of shame. Such persons are well socialized and have internalized the rules that the external authorities deem proper, essential, and wise.

But even within tightly cohesive communities, and even within the same family, there are members whose shame responses vary significantly from what one might expect or hope. Shame is a *highly* context-, individual-, and culture-dependent emotion. For some people the fear of shame does not overcome their desire to perform the shameful act; others may not feel shame at all over committing such an act, either because they have come to reject the community’s or family’s definition of what is shameful or because they are sociopaths (as that might be defined by the prevalent rules of social behavior). That person “ought to be ashamed,” but doesn’t, for whatever reason. There may even be people who commit a shameful act out of compulsion, counterphobia, or a desire for social condemnation. Indeed, some shameful behaviors—such as violence, substance abuse, and other harmful addictions—are thought by some psychologists to spring from shame feelings, however baseless, in an individual. And although shame is a painful, negative affect, it is not necessarily one that all individuals will seek to avoid.

This is not to say that we have no common shame experiences or common shame scenes, only that the psychological literature makes clear the complexity of ascertaining what these commonalities might be, the self-encompassing consequences of hitting a person's shame center, and the difficulty in predicting what behaviors will follow from this assault on the self. That shame proponents tend not to consider *any* of these problems suggests that they may not be concerned with the consequences of shaming for the person being shamed. This is particularly evident when one considers their rhetoric that people have become "shameless"; rather obviously, one who is shameless will not feel shame's sting and thus is beyond the shamer's grasp. That is, rehabilitation and reacceptance of the individual may not be the goals.

III. Cultural Ideals: Shame the Norm

Perhaps those who condemn our shamelessness have a different objective. They may not believe that shaming will change the shamed, but hope that shame rituals will reinforce shame norms in the audience for the shaming and thus deter misconduct. If so, they still must take into account the variant, changing meanings of status and status demotion among individuals and across cultures and subcultures.¹³⁵ They must identify, if possible, extant "cultural ego ideals,"¹³⁶ insofar as such ideals may construct the ego ideal of individuals that make up this audience, and must determine how official shaming might interact with prevailing cultural norms. For example, if a culture idealizes work as a means of accomplishment, then one who does not work "ought to be ashamed"¹³⁷ and may well feel shame.¹³⁸ But if the culture does not idealize work, then a shaming ritual aimed at a work laggard may not register with the audience as predicted. On the contrary, the audience may regard the shaming as an arbitrary display of force, or as pointless and uninteresting. Correlatively, if the culture does not particularly

¹³⁵The impact of culture on shame is described by Harald G. Wallbott & Klaus R. Scherer, as follows:

shame experiences in collectivist cultures differed from shame experiences in individualistic cultures, as well as from guilt experiences in both types of cultures. Shame was experienced as being of comparatively short duration in collectivistic cultures, was felt as less immoral, and was frequently accompanied by laughing and smiling. . . . [I]n the collectivistic societies shame experiences seemed to be much more "typical" for the general shame profile than the ones reported by subjects from individualistic societies.

Cultural Determinants in Experiencing Shame and Guilt, in *SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND PRIDE* 465, 476–77 (June Price Tangney & Kurt W. Fischer eds. 1995).

¹³⁶Piers & Singer, *supra* note 68, at 91 (calling it a cultural "super ego" in reliance on Sigmund Freud's works); Lynd, *supra* note 73, at 28 ("The particular aspects of the self especially vulnerable to exposure differ in different cultures").

¹³⁷Piers & Singer, *supra* note 68, at 54–55. See also Gershen Kaufman & Lev Raphael, *Shame: A Perspective on Jewish Identity*, *J. PSYCHOLOGY & JUDAISM*, 30, 34, (Spring 1987) (describing sources of shame in contemporary American society, such as failure to succeed, unpopularity, and failure to be independent); Fred R. Myers, *Emotions and the Self: A Theory of Personhood and Political Order Among Pintupi Aborigines*, 7 *ETHOS* 343, 349 (1979) (describing the cultural understandings that may give rise to an emotion—such as shame—or to a sense of its appropriateness).

¹³⁸As Piers and Singer have observed, "[m]any a Utopian writer has tried to project a society which is cohesive without fear of guilt-creating punishment and without shame-producing competition. No attempt at realization has succeeded so far." Piers & Singer, *supra* note 68, at 55.

value the behavior that shaming seeks to reinforce—say, not driving 65 mph in a 55 mph zone—then a sanction that publicizes one's conviction for violating the rule may not do much to deter the illegal behavior. Of course, official statements might help to transform the audience's conception of shameful behavior, but if they either contradict robust social norms or have little social norm "oomph" behind them, then they obviously will have less effect than if they amplify already prevalent, robust norms.

Identifying these cultural ego ideals, like identifying individual ego ideals, is extremely dicey,¹³⁹ given the number and complex interaction of variables that may cause them. They tend to be excessively general, vague, and subject to countless caveats, because ego ideals' meanings vary widely across national cultures and within pluralistic, national cultures. Moreover, as the psychological literature demonstrates, theorists disagree strongly about the line between nature and nurture and thus about the role of culture in shaping our emotional responses.

Yet an even greater problem arises if one tries not only to identify, but to manipulate or *change* the cultural meaning of what is shameful. The culture critics seem to believe that shame norms not only need to be reinforced, but also *reinstated*, so that socially destructive behaviors are once again deemed shameful by the relevant community. Unfortunately, however, sociologists disagree strongly about which cultural variables most influence a particular culture's norms. For example, some researchers have identified child rearing practices as the primary variable that affects both cultural and individual meanings of shameful behavior.¹⁴⁰ If they are correct, then the reformers ought to focus on American families, rather than on psychologists, judges, or other more remote vehicles of norm transmission. Others argue, however, that a focus on child rearing alone grossly undervalues other relevant cultural variables, which may include the society's "beliefs and values, contact and conflict with other cultures, and the historical development of particular institutions in a particular geographical environment."¹⁴¹

Regardless of whether any one factor is dominant, the studies confirm that a host of cultural factors likely influence which parts of the self will be especially vulnerable to public exposure.¹⁴² The audience's responsiveness to the sort of moral criticism that shaming implies thus depends both on complex cultural variables,¹⁴³ and on the complex individual experiences already mentioned.

Two potential sources of insight into the most salient variables that may affect

¹³⁹*Id.* at 83–84. Moreover, these difficulties "are greatly multiplied when the measurements have to be standardized for different cultures." *Id.* at 83.

¹⁴⁰See, e.g., FREDERICK ELKIN & GERALD HANDEL, *THE CHILD AND SOCIETY: THE PROCESS OF SOCIALIZATION* 63 (4th ed., 1984).

¹⁴¹Piers & Singer, *supra* note 68, at 89.

¹⁴²See Lynd, *supra* note 73, at 28. For example, in some cultures death by decapitation was viewed as more honorable than death by hanging. In China, however, severance of the head from the body was considered a disgraceful death. See G. R. SCOTT, *THE HISTORY OF CAPITAL PUNISHMENT* 167 (1950).

¹⁴³These complexities include the problems of interpretation and translation errors. The anthropological studies may overemphasize or misinterpret the significance of shaming among cultures that are foreign to the anthropologist observer. For example, although some studies of North American Indian tribes suggest that sharp differences exist between the tribal groups and white groups, other investigators have concluded otherwise. See Piers & Singer, *supra* note 68, at 76–78. Moreover, there is a tendency to homogenize the practices of the various tribes, and to de-emphasize or distort the differences among them. *Id.* at 76–77.

a given culture's shame norms are available: anthropological studies of shame cultures, and behavioral economics studies of social norms. Both fields analyze the general characteristics that tend to produce norm cohesion among community members, though they approach the question from quite different perspectives. Again, however, the primary insight one can draw from the work is the difficulty of identifying, creating, enforcing, or modifying a given culture's shared sense of what is shameful, given the extensive range of factors at play in each. These tasks are far easier to perform, though still quite complex, in face-to-face, norm-cohesive cultures that are strongly communitarian. Whether shaming will be an effective means of shoring up norms and deterring misconduct for a given community thus may depend in part on whether and to what extent that community matches these criteria.

*Shame Norms: Anthropological Insights*¹⁴⁴

For certain cultures, the task of identifying shame norms is perhaps less intractable, because the shame latticework is particularly visible. In general, these cultures are ones that seem to possess a reasonably coherent, and widely acknowledged cultural meaning of shame, which officials or community leaders can fairly readily exploit to secure adherence to cultural rules. These "shame cultures"¹⁴⁵ tend to match the small town features of Victorian England described

¹⁴⁴Portions of this section are drawn from an earlier work. See Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880 (1991).

¹⁴⁵Anthropologists once commonly invoked a conceptual model that distinguishes between guilt cultures and shame cultures. See generally Peer Hultberg, *Shame—A Hidden Emotion*, 33 J. ANALYTICAL PSYCHOLOGY 109, 113 (1988). The model has been summarized as follows:

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

Id. Applying this model, some anthropologists have identified as shame cultures certain Eskimo societies, see, e.g., ROBERT H. LOWIE, PRIMITIVE SOCIETY 413 (1920) (discussing the song duel employed to mock offenders); early Greek culture, see, e.g., E. DODDS, THE GREEKS AND THE IRRATIONAL 17–18 (1951); J. REDFIELD, NATURE AND CULTURE IN THE ILIAD 115–19 (1975); pre-World War II Japanese culture, see text accompanying notes 146–157 *infra*; and some North American Indian tribes' cultures, see, e.g., KARL N. LEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY 260–61 (1941) (describing use of satire as form of social control among the Cheyenne); GEORGE A. PETITT, PRIMITIVE EDUCATION IN NORTH AMERICA 60–62 (1946) (describing the use by some American Indian tribes of opprobrious or ridiculous nicknames to encourage the young Native Americans to observe the tribal code of proper behavior).

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

by Wright, and longed for by Twitchell. But to simply identify these cultures, or to romanticize their capacity for cabining shameful behaviors, is not an adequate basis for proposals for more shame or official shaming by *modern* authorities. One must first ask *why* robust shame values emerged in such cultural settings, and determine whether the cultural conditions of these settings match the modern settings in which shaming has been, or might be, revived. I begin with the pre-World War II Japan, which is often invoked as the paradigmatic example of a shame culture, and also as a particularly good model of when shaming might be an effective means of norm enforcement.

Pre-World War II Japan. In her famous 1946 description of pre-World War II Japan,¹⁴⁶ cultural anthropologist Ruth Benedict concluded that shame was “the root of virtue”¹⁴⁷ for the Japanese people prior to World War II. Their strong concern about social judgment,¹⁴⁸ and the likelihood that in this close society with relatively little privacy, misconduct would not go unnoticed, caused Japanese citizens to conform closely to social expectations. Moreover, if a Japanese person’s social standing were attacked, she could not count on her family to rally behind

One of the anthropologists’ descriptive claims is that the decline of Christianity in Western European and American cultures and thus of Christian notions of good and evil, may signal a shift in these cultures from guilt to shame sanctions. Hultberg, *supra*, at 114. If consensus about good and evil erodes, then authority that is based on the guilt concepts of sin, transgression, or forgiveness loses its force. Cf. ANDREW DELBANCO, *THE DEATH OF SATAN* (1995) (discussing implications of our loss of a vocabulary to describe the sorts of experiences that used to be described as “evil”). Nevertheless, shame sanctions cannot provide a suitable replacement for guilt sanctions unless social consensus of a different sort emerges. This consensus need not be about good and evil, but about “face” and the conditions of favorable social standing.

In both shame *and* guilt cultures, however, broad social consensus is essential to effective legal authority. This consensus might emphasize “sin” in a guilt culture and “honor” in a shame culture, but each concept requires community cohesiveness to make common sense. Moreover, public shaming could be effective in either culture. One who feels guilt may also value social approval, so that public revelation of an offense would trigger both shame and guilt.

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

¹⁴⁶RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* (1946). Benedict’s data were not gleaned from personal visits to Japan, but from others’ writings about the Japanese, from Japanese films, and from her discussions with Japan-born persons living in the United States. *Id.* at 5–8. Despite this methodological deficiency, her work has been influential in anthropological studies of Japan culture.

¹⁴⁷*Id.* at 224.

¹⁴⁸*Id.* Benedict’s theory has been criticized for focusing only on “public shame” and ignoring “private shame” in Japanese culture. Public shame would not be triggered by praise; private shame might be. The Japanese word *haji* extends to both types of shame, which in English might be called embarrassment (private shame) and shame (public shame). The Japanese are highly sensitive to embarrassment-haji (or exposure sensitivity), which makes them exceptionally vulnerable to shame-haji. See Takie Sugiyama Lebra, *Shame and Guilt: A Psychocultural View of the Japanese Self*, 11 *ETHOS* 192, 194 (1983) (relying on work by Sakuta).

her; the family's support was contingent on support from the larger community.¹⁴⁹ As Benedict observed, this is an extraordinary cultural response; in most societies, the family group will protect a member under attack. Thus, the significance of outside approval to the Japanese was comparatively high.

The Japanese shame scripts were encoded during childhood. Japanese mothers would teach their children about proper conduct, subject to the drastic sanction of withdrawal of family affection.¹⁵⁰ That is, Japanese parents socialized their children with shaming rituals that were widely recognized and that were reinforced by other family and community members. (It did "take a village" and not just a family, to enforce these norms.) These early childhood experiences provided "rich soil for the fear of ridicule and of ostracism which is so marked in the Japanese grown-up."¹⁵¹ The elders attempted to protect their children from the pain of future shame by schooling them in their obligations to the world, and teaching them that failure to meet those obligations would, in later life, be greeted with ridicule. The Japanese child therefore learned to obey the norms of social etiquette, recognition of and subordination to her duties to neighbors, family, and community, and strong self-discipline.¹⁵²

Public rebuke of an individual reared under these cultural conditions struck deep and hard. Shame sanctions in Japan during this period therefore proved to be a significant deterrent to much voluntary, socially disapproved behavior. On an informal level, the fear of shame produced conformity. On a formal legal level, this fear was reinforced and further manipulated through the publicity of offenses and of punishment. The structured and tight-knit nature of Japanese society assured widespread agreement about the terms of social approval, an essential condition of effective shaming and shunning.¹⁵³ Japan thus could rely to a significant extent on

¹⁴⁹See Benedict, *supra* note 146, at 273–74.

¹⁵⁰*Id.* at 286–87. Through teasing, the mother would cajole the child into socially correct behavior. For example, if a child were noisy or disobedient, the mother might say to a visitor, "Will you take this child away? We don't want it." Whereupon the visitor would take the child and begin to carry it outside the house. *Id.* at 262. The child would become frightened, and promise to be good. When the mother was convinced that the child had learned the lesson, she would relent. *Id.*

¹⁵¹*Id.* at 263.

¹⁵²*Id.* at 272–73. See also M. W. Eisenberg, *Development of Prosocial Aggressive Behavior*, in *DEVELOPMENTAL PSYCHOLOGY: AN ADVANCED TEXTBOOK* 476 (Mark H. Bornstein & Michael E. Lamb eds., 1988) (discussing links between child rearing techniques and adult prosocial behavior).

The Japanese pattern of childhood training, and the values on which it was premised, help place into perspective the deep importance of one's name in Japan, and the particular seriousness of an insult to a Japanese male's name. Vengeance and even suicide may have been necessary to remove the stain in some situations. Benedict, *supra* note 146, at 145. For example, if professional commitments were not met, this would bring shame to one's name, which might even result in suicide. *Id.* at 151. This acute sensitivity to insult and to dishonor to one's name also explains some Japanese etiquette. A Japanese person would take great care to avoid telling another person to his face that he had made a professional error, *id.* at 152–53, and to avoid any other shame-causing situation that would call into question another's "giri to his name" *id.* at 156, that is, the obligation to live according to one's station in life. *Id.* at 149.

¹⁵³Contemporary studies of crime in Japan suggest that these informal shaming sanctions continue to work. The fear of shame, and the attendant loss of social status, help to explain the low crime rate in Japan. As one commentator has said, "If crime is the price of freedom, then . . . it is a price the Japanese are not willing to pay." See WILLIAM CLIFFORD, *CRIME CONTROL IN JAPAN* 8 (1976). The Japanese observe the restraints on freedom that these social expectations impose, in part because they can only escape them by leaving Japan or by living a life separate from the social

nongovernmental measures to control deviant behavior because the Japanese culture observed, and had in place informal means to enforce, fairly clear and coherent cultural standards.¹⁵⁴

Moreover, the individual's responsibility to the community was a reciprocal one; the community, in exchange, reinforced and rewarded obedience to social duty. Thus, although manipulation of one's fear of shame may seem a harsh tool for assuring obedience, its harshness was softened by the positive affirmation that the individual received for compliance. Significantly, this punishment scheme was not wholly unforgiving; it allowed for reacceptance of a contrite offender. As John Braithwaite has put it, Japan shamed "reintegratively,"¹⁵⁵ in a manner that preserved the line between shaming and expressing contempt. By "follow[ing] shaming ceremonies with ceremonies of repentance and reacceptance . . . [t]he moral order derives a very special kind of credibility when even he who has breached it openly comes out and affirms the evil of the breach."¹⁵⁶ Thus, although the stakes were high when one defied the Japanese moral order, irrevocable social banishment was a rare consequence: The offender could humble himself or herself, and thereby be reintegrated into the social fabric.¹⁵⁷

structure, which is an extremely lonely life in Japan. *Id.* at 8–9. Once an individual opts out of the structure by refusing to conform, it is extremely difficult to reenter, because seniority is given great value. The prodigal must begin anew at the bottom.

As Clifford notes:

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

Id. at 10. There is also little chance that a breach of the social compact will go unnoticed. The Japanese continue to live in close physical proximity, and are subject to an informal sort of "surveillance," insofar as people take an interest in each other's doings. Deviant conduct is difficult to hide. *Id.* at 13–14.

¹⁵⁴*Id.* at 8–11. See also Lebra, *supra* note 148, at 192–93. This is not meant to suggest that the modern Japanese all share a common faith or uniform set of values. In fact they embrace a diffusion of values. Nevertheless, the Japanese, prompted by tradition and habit, tend to continue to meet the expectations of those around them. Clifford, *supra* note 153, at 177–78.

¹⁵⁵JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 74 (1989). See also Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317 (1992).

¹⁵⁶Braithwaite, *supra* note 155, at 74.

¹⁵⁷Many other cultures that likewise achieve significant social control and norm observation through shaming techniques tend to match these basic cultural conditions. For example, Lowie reported during the early 1900s that various Eskimo tribes relied on public embarrassment as a response to crimes against tribe members. See ROBERT H. LOWIE, PRIMITIVE SOCIETY 412–15 (1920). Although the various Eskimo settlements were separate societies with little political cohesion among them, within each settlement the Eskimo tribe was strongly cohesive. Thus the tribe could rely on the informal adjustment of grievances, rather than on a central governing agency. *Id.* at 413.

One such informal Eskimo adjustment technique was the "song duel." *Id.* See generally A. R. RADCLIFFE-BROWN, STRUCTURE AND FUNCTION IN PRIMITIVE SOCIETY 205–11 (1965 ed.) (describing range of negative sanctions used by various cultures to achieve obedience to norms, from organized to diffused, and from formal legal to informal social). These duels were ways of sanctioning various behaviors, such as infidelity, destruction of property, and theft, among others. Lowie, *supra*, at 413. The victim of the misdeed would compose a satirical song to mock the perpetrator and then challenge him to a public song duel. Rasmussen, *Observations on the Intellectual Culture of the Caribou*

Colonial America. The colonists of the United States also imposed shame sanctions liberally and rather notoriously.¹⁵⁸ The effectiveness of these sanctions doubtless was enhanced by the colonists' alleged touchiness about being called opprobrious or bantering names; they were "often running petulantly to the court about it and seeking redress by prosecution of the offender."¹⁵⁹ But it certainly could not have succeeded—assuming it did succeed—without the social intimacy of colonial communities, which meant that criminal offenders typically were known members of the group, not transient outsiders.¹⁶⁰ The fear of disgrace before this insular community likely was considerable.¹⁶¹

One colonial sanction that exploited communal intimacy and shared norms was the admonition, which was administered as follows:

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

Eskimos, in VII REPORT OF THE FIFTH THULE EXPEDITION NO. 2, 73 (1930). Lowie describes the duel as follows:

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

Lowie, *supra*, at 423. Using these song duels, the Eskimos sought to preserve the social order without violence or other formal coercion.

A somewhat similar custom—the *vito*—historically was observed by villagers in southern Spain. JOHN BEATTIE, *OTHER CULTURES* 172 (1964). The villagers would visit an offender's house at night and make a great noise and yell abusive songs. This annoyance could become so bothersome that the culprit would eventually decide to leave the area, thereby effecting a sort of constructive banishment. *Id.* Indeed, the fear of being mocked in public still operates as a powerful sanction in many Mediterranean cultures, given the important role of honor and shame to Mediterranean people. *Id.* See also James Q. Whitman, *The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence*, 105 *YALE L.J.* 1841, 1872–1882 (1996) (describing Roman practice of allowing a debtor to declare *bonorum cessio*—a form of bankruptcy—but only if it was performed amidst public shaming, which included going naked in a public place and crying out "I declare bankruptcy!").

Still another use of satire as a sanction has been found among the Tobriand Islanders, where the injured party would shout out his accusations and derision from within his house, at night, so that all of the villagers could hear the charges. The accused one might feel compelled to leave the village, unless he was certain of his innocence or rights in the matter. The shame of being accused even caused some villagers to commit suicide. Beattie, *supra*, at 176 (relying on work by Malinowski); see also A. L. EPSTEIN, *THE EXPERIENCE OF SHAME IN MELANESIA* 12–13 (1984).

¹⁵⁸ALICE MORSE EARLE, *CURIOUS PUNISHMENTS OF BYGONE DAYS* (1969 ed.—orig. published 1896).

¹⁵⁹*Id.* at 1.

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

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

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

The admonition was a “go and sin no more” lecture, which was followed by a public apology or confession.¹⁶³

A better known colonial practice was the forced wearing of signs or letters that listed one’s offense.¹⁶⁴ In early Maryland, offenders were compelled to stand in the pillory wearing a sign listing their crimes.¹⁶⁵ Permanent labeling, through branding the offender, also was used for punishing criminals.¹⁶⁶

The temporary forms of labeling—wearing signs or initials—differed from the permanent labeling of branding or maiming, in that the former punishment was intended to elicit shame but in a reintegrative fashion.¹⁶⁷ Branding and maiming, in contrast, were permanent stigmas, which in effect cast the person out of the community, though without physical banishment.¹⁶⁸ Branding and maiming also were designed in part to prevent the offender from committing future similar acts,¹⁶⁹ either by warning future victims of their criminal propensities or by disabling the offender.

Other colonial forms of humiliation punishment included the “bilbo”—a bar of iron with two sliding shackles, like handcuffs, into which the prisoner’s legs were locked.¹⁷⁰ A. M. Earle described the use of the bilbo sentence in 17th-century Massachusetts, where, for example, one “Jams Woodward” was sentenced to be “‘sett [sic] in the bilbowes for being drunk at Newetowne.’”¹⁷¹ There was also the pillory, the humiliating character of which was sometimes compounded by forcing the offender not only to be sent there, but to go with dough,¹⁷² cabbages,¹⁷³ or other symbols of his particular offense on his head. The crowd then might seal

¹⁶³The practice has been documented in 17th-century Virginia, where it involved both church and state. The offender often was forced to confess publicly to her congregation, sometimes dressed in a white cloth, and beg their forgiveness. This forgiveness, or redemption, effectively drew the offender back into the fold and further reinforced the moral order. Earle, *supra* note 158, at 20, 35–36, 111–13.

Another account of colonial punishment methods states that in Maryland during the late 1600s a man “was forced to stand in open court ‘with a paper on his breast declaring his offence [sic].’” RAPHAEEL SEMMES, *CRIME AND PUNISHMENT IN EARLY MARYLAND* 39 (1938). In another case, a husband and wife were required to kneel before the county justices and ask for forgiveness. The justices in the case explained that they required the married couple to kneel before them because the couple had no other way to make satisfaction. *Id.* at 39.

¹⁶⁴A prominent literary example of the role of such shaming, of course, is NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (1850).

¹⁶⁵RAPHAEEL SEMMES, *CRIME AND PUNISHMENT IN EARLY MARYLAND* 32 (1938), *see also* Powers, *supra* note 161, at 198–201 (describing signs and symbols of early Massachusetts); Hirsch, *supra* note 160, at 1226 (describing wearing of signs as punishment in early Massachusetts).

¹⁶⁶Semmes, *supra* note 163, at 35. The colonists, however, were not the originators of the labeling custom. The practice dates at least from the 12th century. *See* Earle, *supra* note 158, at 94.

¹⁶⁷The victims of permanent labeling practices in the colonies included a vast range of offenders. Some Quakers were branded or maimed for practicing their faith. Earle, *supra* note 158, at 138–42. Other offenders who were marked with signs or initials were drunkards, *see id.* at 88, cheats, *see id.* at 53–54, slanderers, *see Semmes, supra* note 163, at 40, hog stealers, murderers, thieves, and runaway slaves, *see id.* at 35.

¹⁶⁸Hirsch, *supra* note 160, at 1228.

¹⁶⁹*Id.*

¹⁷⁰Earle, *supra* note 158, at 3–4.

¹⁷¹*Id.* at 5.

¹⁷²*Id.* at 51 (describing the punishment of a dishonest baker).

¹⁷³*Id.* (describing the punishment of a person who had stolen cabbages).

the prisoner's mortification by throwing stale eggs at him.¹⁷⁴ The ducking stool, which was used in particular for "scolding women,"¹⁷⁵ the stocks,¹⁷⁶ and the pillory all were customary features of the colonial county courthouses; jails were uncommon before the late 1600s.¹⁷⁷

To make sense of the harsh punishment methods, though, one must consider the then prevalent belief in the doctrine of predestination.¹⁷⁸ The colonists understood deviant behavior to be a mark of a person whose fixed, evil nature was becoming manifest. Their deep fear of evil and desire to reinforce the strict moral order of the community led them to emphasize formal public apologies and confessions because they believed that these public expressions of guilt and remorse would reinforce the moral order.¹⁷⁹

This indoctrination into the will of God and the laws of nature, began in childhood.¹⁸⁰ During the early months of life, the infant was treated indulgently. Shortly thereafter, a radical shift occurred toward a harsh, disciplined life.¹⁸¹ The object was to curb or beat down the child's wilfulness as soon as possible in a direct confrontation with "original sin."¹⁸² The effect, in psychological terms, was to deprive the child of a confident sense of autonomy.¹⁸³ As psychologists have observed, "the reverse of autonomy is the distress created by deep inner trends of

¹⁷⁴*Id.* at 52.

¹⁷⁵*Id.* at 11, 17 (noting that the sentence was designed to "silence idle tongues").

¹⁷⁶*Id.* at 29. The stocks were regarded as low class, so that gentlemen were not sentenced to the stocks. The pillory was "aristocratic in comparison . . ." *Id.* at 32.

¹⁷⁷Semmes, *supra* note 163, at 34–35. The absence of formal prisons, however, did not mean that defendants were never physically confined. For example, Cuthbert Fenwick, "a prominent Maryland colonist," once was confined to a house that became the "prison" of St. Mary's County, but was allowed to venture to within one-half mile of the house. *Id.* at 32.

Public whippings also were a common form of punishment, and were often shockingly brutal. KAI T. ERIKSON, *WAYWARD PURITANS* 188 (1966). Like the stocks, however, this punishment was not inflicted on "gentlemen." Semmes, *supra* note 163, at 38–39.

¹⁷⁸One commentator speculates that the reason the colonists' methods nevertheless seem exceptionally harsh is that they were delivered in "cold righteousness," with a "relentless kind of certainty" that paid scant attention to offender motives, victim grief, community anger, or any other emotion. Erikson, *supra* note 177, at 189. Erikson reasons that Puritan justice had a "flat, mechanical tone because it dealt with the laws of nature rather than the decisions of men." *Id.*

¹⁷⁹Even if the criminal were condemned to death, the officials still sought his confession before the execution. The condemned person in effect would stand aside from his own life and misdeeds, pronounce them the work of the devil, and join, figuratively speaking, the crowd that affirmed the correctness of his execution. This cooperation in, or "consent" to, the penalty may have relieved somewhat the colonists' underlying discomfort, however buried, in punishing an offender whose sins they believed were beyond his power to prevent. *Id.* at 195 ("The victim [was] asked to endorse the action of the court and to share in the judgment against him, to move back into the community as a witness to his own execution."). This emphasis on cooperation by the criminal was not unique. During the 1700s in Amsterdam, the authorities likewise encouraged penitence of criminals, such that "[t]he execution of a disbeliever was not a perfect one." PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING* 59 (1984).

¹⁸⁰See, e.g., John Demos, *Developmental Perspectives on the History of Childhood*, 2 J. INTERDISCIPLINARY HIST. 315, 320–21 (1971).

¹⁸¹*Id.* at 321.

¹⁸²*Id.* at 320–21.

¹⁸³*Id.* at 321.

shame and doubt.”¹⁸⁴ Thus, the child became an adult who was extremely sensitive to public exposure and shame.¹⁸⁵

Colonial punishment practices demonstrate the connection between a community’s normative structure and the nature and effectiveness of shame sanctions. Colonial shaming practices can *only* be understood in light of the web of these communities’ religious beliefs, childrearing techniques, and other culture-specific, highly contextual features.

Implications. The Japanese and the colonists lived in intimate, closely bound, and normatively cohesive communities, within which public shaming could and did play a signal and intelligible role in reinforcing social norms. Shaming sanctions, whether formal or informal, therefore seem to be most prevalent within relatively bounded, close-knit communities, whose members “don’t mind their own business” because others’ lives are regarded as everyone’s business, and who must rely on each other.¹⁸⁶ These cultures have widely shared norms that are publicly expressed. These norms include high expectations of social responsibility, coupled with close social bonding, a deemphasis of personal autonomy, an emphasis on pride and honor, and strong family attachment as a form of social control.

The effectiveness of shame sanctions also seems to hinge on the target’s relative status and other resources. If a person must depend heavily on the social group for social, economic, or political support, or cannot leave the group easily, then a shame sanction imposed by the group may have grave consequences. Thus, those people who are more likely to defy social norms and risk shaming, even within close-knit societies, are the very rich and the very poor, in terms of wealth or status.¹⁸⁷ The very rich may defy the norms because they are insulated by their wealth. The very poor may defy the norms simply because they cannot afford to conform, or because they have little social standing to lose. And people who lie between the poles may be unlikely to comply with norms when they have contacts with people who are not norm-holders, or have the mobility to escape the effects of shame sanctions by leaving the community.¹⁸⁸

The final factor that seems to contribute to effective shaming is the culture’s capacity and instinct for reinforcement of socially *correct* behavior. In intimate societies, the organs of authority often deliver both praise and rebuke. Many have established formal rituals for reclaiming the shamed one, should he or she prove worthy. Again, this means that shaming is not understood in these communities as an expression of contempt that permanently renounces or expels the shame member. The bond between the community and the shamed member is reinforced by the ritual, rather than severed.

Construction of these optimal social conditions for widely shared and enforced

¹⁸⁴*Id.* at 323.

¹⁸⁵*Id.* at 324. The colonists’ sensitivity to public shame is reflected in the large number of defamation actions they filed, as well as in the range of humiliating punishments they employed. *Id.* at 325.

¹⁸⁶See JAMES S. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* 116 (1990).

¹⁸⁷See *id.* at 286–87 (observing that there are “institutionalized excuses and indulgences available to high-status persons who fail to observe norms. A high-status person may merely be said to be eccentric, whereas the same behavior would bring severe sanctions upon a lower-status person.”)

¹⁸⁸*Id.* at 287.

shame norms would be difficult in modern urban settings, to say the least. As Robert Wright has observed, “people in Victorian England lived in the rough equivalent of a small town. . . . There are at least two reasons integrity and honesty make particular sense in a small and steady social setting. One is that (as everyone who has lived in a small town knows) there’s no escaping your past. . . . A second reason . . . is that the people you’re nice to will be around for a long time.”¹⁸⁹ Today, in contrast, “[m]any, if not most, of the people we encounter each day don’t know who we are and will never find out.”¹⁹⁰ The result is unsurprising: “If you change the rules, and allow frequent migration into and out of the group, so that there are fewer chances to reap what you’ve sown, the power of TIT FOR TAT wanes visibly and the success of meaner strategies grows.”¹⁹¹

Application of Wright’s argument to the problem of inner-city crime today yields the following, troubling insight: “From an early age, the conscience of many poor children, the very capacity for sympathy and guilt, is hemmed in by the environment, and as they grow up it settles somewhat firmly into this cramped form.”¹⁹² The standard response of making sure norm violations don’t pay won’t work in this setting, because the child is taught by his or her conditions that norm observation doesn’t pay either. Observing norms—the legal rules, not the norms modeled by the child’s peers—then becomes more costly to one’s social status than does defying them; only a chump will toe the line when those around him don’t, and obedience yields no status or other rewards.

Given these less than optimal conditions for widely shared shame norms and effective enforcement of norms through shaming, it is no surprise that in modern, nonintimate American society, shame latticework is less secure or visible, and shaming has not been a common punishment tool. In an urban, plural nation, the shared meanings of shame (like shared meanings of pride, honor or decency) are much harder for its members, as well as its officials, to ascertain or to police effectively. Yet if the culture critics and the proponents of shame penalties hope to modify or shore up norms by shaming people, then they must identify common shame values and must demonstrate how and why shaming promotes these values, given the relevant social contexts.

This is not to suggest that modern Americans have *no* shared sense of shame or that shaming can *never* be deployed effectively. Even the most biting culture critics admit that Americans still retain some common shame values, though they condemn these values as ill-chosen and thin. (Some complain, e.g., that today we shame smokers and fur-wearers, rather than adulterers and unwed mothers.)¹⁹³ Other, less disaffected writers, have identified thicker “shame scripts” in modern American culture, but they too have very general themes: “to compete for success, to be independent and self-sufficient, and to be popular and conform.”¹⁹⁴ In their

¹⁸⁹ROBERT WRIGHT, *THE MORAL ANIMAL—WHY WE ARE THE WAY WE ARE: THE NEW SCIENCE OF EVOLUTIONARY PSYCHOLOGY* 219–220 (1994).

¹⁹⁰*Id.* at 220. See also AGNES HELLER, *THE POWER OF SHAME—A RATIONAL PERSPECTIVE* 16 (1985).

¹⁹¹Wright, *supra* note 189, at 220.

¹⁹²*Id.* at 222.

¹⁹³Twitchell, *supra* note 3, at 4.

¹⁹⁴See GERSHEN KAUFMAN, *THE PSYCHOLOGY OF SHAME: THEORY AND TREATMENT OF SHAME-BASED SYNDROMES* 46 (1989); cf. JANN BENSON & DAN LYONS, *STRUTTING AND FRETTING—STANDARDS FOR SELF-ESTEEM* 46–52 (1991) (setting forth four norm types, violation of which may

view, the American emphasis on independence and rugged individuality creates “shame about shame” in ways that mask its influence.¹⁹⁵

But the widely divergent accounts of contemporary values merely underscore that no *definitive* account of the American cultural ideals relevant to shaming currently exists.¹⁹⁶ Moreover, fashioning such an account would be a formidable task in a country as culturally, religiously, regionally, and otherwise diverse as is the United States. Nonetheless, the following seems clear: Whatever our shared cultural meanings of shame may be, we surely are not “shameless”; instead, our shame focii seem to have shifted and scattered in ways that are ill-understood, difficult to assess, and—to some of us—deeply disturbing.¹⁹⁷ But this scattering of shame focii necessarily makes it vastly more difficult to construct shame rituals that will solidify the community and deter misconduct. Where the community is already united, it may not need the ritual to shore up the norm. For example, the cultural aversion to child abuse probably is strong enough that adding shaming to the penalties imposed on abusers is unnecessary to persuade the *audience* to avoid this behavior. Where the community is not so united—such as regarding the morality of same-sex relations between consenting adults—shaming offenders would be a less effective deterrent to this behavior. Other methods, that depend less on the audience’s shared meaning of what is shameful, may be more effective at deterring that behavior.¹⁹⁸

cause shame: moral norms, nonmoral norms, limit norms, and goal norms).

¹⁹⁵Kaufman, *supra* note 194, at 47.

¹⁹⁶Some writers even have argued that the decline of shared religious values in the West as organizing social principles has led not to the decline of shame, but to its ascendance. Peer Hultberg has speculated that “good and evil, which formerly seemed absolute, have become so emptied of meaning as to seem almost as if they are about to disappear, and the so-called healthy super-ego values are held increasingly in doubt. The outcome is that shame begins to dominate at the expense of guilt.” Peer Hultberg, *Shame—A Hidden Emotion*, 33 J. ANALY. PSYCH. 109, 114 (1988). Cf. ANDREW DELBANCO, *THE DEATH OF SATAN* 223–224 (1995) (arguing that the advance of secular rationality has transformed modern culture into one in which “language has been evacuated of religious metaphor,” indeed, of any metaphors that might be “ratified by . . . [an] appeal to transcendence”).

¹⁹⁷“[T]he demise of the communal external authority and of the ideal authority did not lead to the death of shame . . . [T]he shame affect is inborn in every healthy human being. *It cannot be circumvented, it can only be shifted.*” AGNES HELLER, *THE POWER OF SHAME—A RATIONAL PERSPECTIVE* 17 (1985) (emphasis added). See also Wurmser, *supra* note 33, at 262. (“It is evident . . . that the cultures of shamelessness simply shift their sense of shame.”)

¹⁹⁸That the shared meanings of shame seem splintered today is understandable when one reconsiders the psychoanalytical insight that shame involves the whole self. The “self” has been reconfigured by rapid, often noncohering changes in our social and political conditions,—*e.g.*, our relationships to our families, co-workers and neighbors, to our government, respective religious authorities, and international alliances; changes in our intellectual conditions—*e.g.*, the state of our knowledge about human biology and human personality; and changes in our environmental, economic, and other conditions, all of which inform the *whole self*. What the cultural critics sense that we have lost therefore is more pervasive and profound than, and somewhat different from, our sense of shame; rather, it is a coherent and continuous shared sense of our *selves*, in the vastly altered, discontinuous contexts to which these selves must relate and in which they must function. If shame reinforces our “inescapable limitations,” as Lasch has put it, then it is the shifting borders of modernity that limit and define the self that he must lament, *not* the emotion that is (or is not) triggered by these borders. Reestablishing these borders rather obviously is not going to occur either by decrying our shamelessness, or by shaming people who engage in the offensive behaviors. The first move is a purely rhetorical one and likely an incorrect description of the modern dilemma. The

There is, then, another profound irony here that shaming proponents seem to miss: Shamelessness and effective shaming are at least partly *incompatible*. Legal rules that attempt to stigmatize behavior that social norms do not *already* condemn may inspire resistance and may not succeed, perhaps especially when the law tries to stigmatize explicitly with shame penalties, versus imprisonment, fines, or other types of censure. Public shaming, therefore, will encounter the least resistance and most widespread approval when it is *least necessary* to shore up norms, that is, when a robust, clear, communal consensus already exists that the behavior in question is shameful, even immoral (such as molestation or soliciting a prostitute). It may also be most effective, though more controversial, when it is targeted at the *least dangerous* offenders, that is, status conscious, shame-sensitive offenders such as middle-class, first time offenders. Of course, this most effective use of shaming may also be *most destructive*, both to the offender and to the offender's family or other intimates who may suffer the spillover effects of the offender's public humiliation.

Shame Norms: Behavioral Economic Insights

Behavioral economics literature reinforces what has already been noted: Values like integrity and honesty "make particular sense in a small and steady social setting."¹⁹⁹ But when acquaintances are fleeting, integrity matters less, "and sacrifices of all kinds—even for colleagues or neighbors—are less likely to be repaid far in the future."²⁰⁰ In short, the incentive for cheating goes up, and the incentive for cooperation goes down. The rational response instead is to withdraw from cooperative behaviors.²⁰¹ Parents seeking to equip their children for success therefore may not model integrity, but rather how to be "slick and superficially sincere, to tell minor lies in profusion, to work harder on promise than delivery."²⁰² An economist thus might observe that, if Victorian England was an admirable society, this was not because it was "composed of especially admirable people . . . [A]cting conscientiously, politely, and considerately . . . just paid more in those days."²⁰³

The challenge for modern law reformers is to reconfigure society to make the desired cooperative behaviors pay more and the undesired behaviors cost more. Parents, educators, legal institutions, and other organs of social control must act on the dual assumptions that "[w]e will do almost anything for respect, including not act like animals,"²⁰⁴ and that "the worst parts of human nature are always near the surface, ready to rise when cultural restraint weakens."²⁰⁵

But how? Preliminary, very general, responses to these concerns are suggested

second is unlikely to deter much conduct if it is not already deterred by shared social norms as well as by legal rules that prohibit the conduct.

¹⁹⁹Wright, *supra* note 59, at 220. See also ROBERT H. FRANK, *PASSIONS WITHIN REASONS: THE STRATEGIC ROLE OF THE EMOTIONS* 247 (1988).

²⁰⁰Wright, *supra* note 59, at 221.

²⁰¹See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 167 (1991); EDNA ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* (1977).

²⁰²Wright, *supra* note 59, at 221.

²⁰³*Id.* at 224 (emphasis in original).

²⁰⁴*Id.* at 262. This includes *self-respect*. See TIMAR KURAN, *PRIVATE TRUTHS, PUBLIC LIES* 24–38 (1995).

²⁰⁵Wright, *supra* note 59, at 262.

by the foregoing literature: Parental messages must be reinforced by coherent, consistent social affirmations to create incentives for an individual to mind the rules, lest he or she lose face or social status. Norms must be widely understood and shared, obedience must visibly pay off, and disobedience must result in observable, real costs. Correlatively, if parental messages are undermined by conflicting social messages (or are not conveyed at all), then the incentives to curb the worst parts of one's nature decrease, and corrupt, violent, or otherwise socially destructive behaviors may rise. Put another way, "[I]arge scale changes in . . . [norms] normally require collective action, whether private or public."²⁰⁶

Yet, these seemingly obvious insights are more subtle than they first appear. As Peter Huang and Ho-Mou Wu have noted, analyses of social norms must incorporate fully the role of emotions in social order.²⁰⁷ For example, economic analyses of criminal behavior that focus on the probability of detection and the magnitude of the punishment for criminal behavior²⁰⁸ (both important factors to assess) must add to this balance the powerful role of psychological factors. For example, they must account for how "the more prevalent corruption is, the less intense is the *remorse* suffered from corrupt behavior; conversely, the less corruption there is, the more *regret* from violating a social norm not to be corrupt."²⁰⁹

Norm observation thus is not simply a function of rational risk assessment,²¹⁰ that is, that when corruption is wide-spread, the probability of detection and punishment is low. It is also a function of assessment of the relevant emotional costs, that is, the "very strong emotional desire not to be suckered,"²¹¹ the desire to avoid social disgrace, and the desire to avoid the remorse that arises from betraying the trust of others. For example, people comply with tax laws not only because of the potential fines for tax evasion, but also because of the psychic costs that may result even if one escapes detection.²¹²

Emerging, important work in economics has begun to incorporate into the traditional model of rational behavior the way emotions are one means by which people solve cooperation problems—that is, problems that "have the common feature that their solution requires people to commit themselves to behave in ways that will later conflict with their material self-interest."²¹³ These economists acknowledge and attempt to explain how emotions help us to overcome our strictly material, self-interested motives, and why we observe social norms when there is no realistic possibility of reward or punishment, such as leaving tips in restaurants far from home.

²⁰⁶Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 922 (1996).

²⁰⁷Peter H. Huang & Ho-Mou Wu, *More Order Without More Law: A Theory of Social Norms and Organizational Cultures*, 10 J. L. & ECON. 390, 391 (1994).

²⁰⁸*Id.* at 393.

²⁰⁹*Id.* at 393 (emphasis added). Notable exceptions to the tendency of economists to neglect emotions in analyzing human rational behavior are the work of Richard Posner and Gary Becker.

²¹⁰See Jon Elster, *Social Norms and Economic Theory*, 3 J. OF ECON. PERSPECTIVES 99 (1989) (arguing that not all social norms can be explained as rationalizations of communal or self-interest).

²¹¹*Id.* at 403.

²¹²See James P. F. Gordon, *Individual Morality and Reputation Costs as Deterrents to Tax Evasion*, 33 EUROPEAN ECON. REV. 797, 798 (1989); DAVID J. PYLE, *TAX EVASION AND THE BLACK ECONOMY* 104–105 (1989).

²¹³Robert Frank, *The Strategic Role of the Emotions*, 5 RATIONALITY AND SOCIETY 160, 162 (1993).

Some writers have interpreted this literature to mean, among other things, that one method for cultivating the sorts of expectations that shore up norm observation is for public officials, parents, and other influential persons to model exemplary behavior,²¹⁴ thereby cultivating “rational expectations that corruption will not be tolerated nor widespread, starting from the top.”²¹⁵ The psychological impact of such modeling is that members of the group will experience expectation-dependent emotions that sustain social norms.²¹⁶ An expectation of widespread noncorruption increases the remorse (or shame) an individual is likely to feel in violating the rules, and increases the emotional payoff one receives for compliance with the rules. Thus, they say, promoting norm observation demands (among other things) that the political leaders, judges, police officers, teachers, business leaders, parents, and other vehicles for norm transmission model exemplary behavior. Of course, one cannot ignore other factors, such as the relevant group’s capacity for detection and punishment of norm violations, just as traditional economic analysis suggests.²¹⁷

The emerging economic work thus better explains why exposure to others’ scrutiny and disapproval tends to produce conformity in views and behaviors.²¹⁸ Its emphasis on the cognitive aspects of our behavior—the cool calculation of costs and benefits—complements the newer emphasis on the hot, sticky, emotive aspects of norm observation. As one observer says, “Social norms have a *grip on the mind* that is due to the strong emotions their violations can trigger.”²¹⁹ This grip is strongest in cultures in which cheating is rare (especially by officials), when the probability of detection and punishment is high, when parents’ efforts to instill particular behavior and values are reinforced by the community, and when obedience pays off in the sense of one’s social status, sense of belonging to the community, and self-satisfaction, that is, when obedience *feels* good and cheating *feels* bad. But beyond these general observations, which in many respects merely reformulate the anthropologists’ findings in economic terms, this work offers little new, specific advice as to how to make cheating feel bad. More important, the work offers no support for the modern revival of shaming sanctions. Nothing in these economists’ accounts of *shame*, social status, and social conformity necessarily points toward *shaming* as an ideal or efficient means of making cheating feel bad.

Summary

In general, a well socialized person may feel shame over committing an act that contravenes robust social norms to which the offender and his neighbors or other relevant social group adhere. Among other things, then, these anthropologi-

²¹⁴*Id.* at 397.

²¹⁵*Id.*

²¹⁶*Id.*

²¹⁷See Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. & CRIMINOLOGY 325 (1980).

²¹⁸The commonly cited example is Asch’s experiment, in which study participants voiced a clearly incorrect opinion when confronted with a group that *uniformly* voiced that erroneous opinion. See S. E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, in *GROUPS LEADERSHIP AND MEN* 177, 181 (Harold Guetzkow ed., 1951).

²¹⁹JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 100 (1989) (emphasis in original).

cal and economic accounts of behavior suggest that criminal behavior is likely to be more prevalent when people feel no shame over violating certain criminal laws, lack empathy for the victim of the crime, and lack a sense of solidarity or belonging to the relevant group that adheres to the norms that drive the criminal law.²²⁰

The literature also suggests, however, that fostering norm observation by exploiting the shame sensitivities of citizens may be *vastly* more complex than the back-to-shame rhetoric acknowledges. It may hinge on the group's capacity for detection of norm violations, the number of people who do not conform to the norm, willingness of group members to sanction violations by other group members by imposing status losses on them, affinity for and commitment to other group members, and other—likely *many* other—things. One thing is fairly clear: The greater the social and emotional proximity between offender and victim and between offender and the community seeking to impose its norms, the more likely it is that an offender will be emotionally deterred from harming another person, or emotionally disturbed by having harmed her. The calls for more shame, thus, logically should include calls for more empathy²²¹ and stronger communal ties, *but they don't*.

That they do not is still another striking omission in the modern call to shame that suggests that the critics' agenda may not be to promote shame in any offender-reintegrative sense, but simply to express contempt for the shameless ones and to humiliate them, with little desire or hope for their reintegration or rehabilitation. That is, norm violators are not seen as reprovably wanderers from the communal flock, but as irredeemable others who pose an intolerable, growing risk to community survival.

The inquiry thus becomes whether the shameless ones really *are* beyond our collective reach, or if the pessimism of the shame proponents is undue. A second question is whether official humiliation of the shameless will in fact serve the end of *renormalization*—the restoration of lost norms or creation of new ones²²²—as shame proponents hope, despite the splintering of shame focii in modern society. A third question is whether public shaming would be acceptable even if it did serve renormalization end, given its potential harshness, its ambiguities, its uncontainable effects, and its other potential costs.

IV. Implications for Legal Reforms

Some legal decisionmakers have concluded that shaming can serve useful, norm-reinforcement ends, despite our plural and complex modern world and despite the countless uncertainties about the social and individual consequences of public shaming. These decisionmakers are animated by several practical concerns, the most important of which is that prison is an expensive, and, in many cases, too extreme penalty, and parole without conditions is too lenient. Searching for mid-ground solutions that will cost less, but that will still satisfy the community's desire to punish and condemn crime, judges have resorted to alternative sanctions, including so-called shaming penalties, such as forcing shoplifters to parade in front

²²⁰See Frank, *supra* note 213, at 65, 159, 255.

²²¹See *id.* at 225 (noting that the "psychopath fails not because of an inability to calculate self-interest, but because of an inability to empathize, a fundamental lack of emotional conditionability").

²²²Amy L. Wax, *Against Nature—On Robert Wright's The Moral Animal*, 63 U. CHI. L. REV. 351 (1996).

of the stores they have victimized, carrying signs that announce their offenses or forcing DUI offenders to affix bumper stickers to their cars that read "I am a convicted drunk driver." Although these sanctions began as isolated events, they have now captured judicial and popular attention in ways that feed into the more general cultural critiques that blame our shamelessness for a host of social ills, and that may lead to their proliferation.²²³

The penalties have gained support among some legal scholars, who rely on a growing body of legal scholarship that attempts to apply social norm literature to law.²²⁴ They argue that legal penalties generally can help to establish and reinforce social norms,²²⁵ and that shaming penalties in particular effectively and cheaply communicate opprobrium for criminal behavior and thereby increase the social, emotional, and other costs of this behavior. In this section, I describe these penalties, review the work of legal scholars who favor them, and raise questions about the efficacy and humanity of official efforts to shame offenders.

The New Shame Penalties

A recent *New York Times* front-page story described the use of a shame sanction in Pittsfield, IL. The reporter described Pittsfield as "a church-going,

²²³See Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, NEW YORK TIMES, at A1, col. 2 (Jan. 16, 1997); Robert Hanley, *Judge Upholds a Law Requiring Notice About Sex Offenders*, NEW YORK TIMES, at A9, col. 2 (July 2, 1996); Haya El Nasser, *Judges Say 'Scarlet Letter' Angle Works*, USA TODAY, 1A, col. 3, (June 25, 1996); Dion Nissenbaum, *California Bill Would Brand Drunk Drivers' Cars*, ARIZONA DAILY STAR, A1, col. 3, (Jan. 20, 1997); see generally Jon A. Brilliant, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 DUKE L.J. 1357; Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names of Prostitutes' Patrons*, 49 VAND. L. REV. 1525 (1996) (student author Courtney Guyton Persons); Note, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885 (1995) (student author Abril R. Bedarf); Case Comment, *The Bumper Sticker: The Innovation That Failed*, 22 NEW ENG. L. REV. 643 (1988) (student author Donna Di Giovanni); Note, *Scarlet Letter Punishment: Yesterday's Outlawed Penalty Is Today's Probation Condition*, 36 CLEV. ST. L. REV. 613 (1988) (student author Leonore H. Tavill); Comment, *Would You Like More Salt With That Wound? Post-Sentence Victim Allocation in Texas*, 26 ST. MARY'S L.J. 1103 (1995) (student author Keith D. Nicholson). Cf. Hodge O'Neal, *Rules Without Rationality*, 71 WASH. U. L. Q. 397, 429–33 (1993) (discussing corporate sentencing guidelines rule that allowed imposition of adverse publicity sanction in certain cases).

²²⁴In law, applications of work on the "social meaning" of norms and penalties have barely emerged. See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996); Sunstein, *supra* note 206; Ellickson, *supra* note 201; Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995); Richard L. Hasen, *Voting Without Law*, 144 U. PA. L. REV. 2135 (1996); Cass R. Sunstein, *Legal Interference With Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). What is clear, even at this early date, is that social meaning is contingent. To speak only of norms—what is thought to be shameful—as a justification for shaming offenders therefore misses a crucial point about how norms and norm enforcement actually work in particular communities. Correlatively, reform proposals that rely on shaming—like the culture reform proposals that rely on shared shame norms—simply won't succeed if they fail to consider social contexts in which they must operate.

²²⁵The threat of legal punishment may have an additive effect on illegal behavior that is accompanied by a substantial threat of social disapproval. That is, informal sanctions and formal legal sanctions can work synergistically to deter criminal behavior. See Harold G. Gransnick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. OF CRIM. L. & CRIMINOLOGY 325, 329 (1980).

farming community with a village green and coffee shop waitresses who serve the regulars scrambled eggs with a side of fresh gossip.”²²⁶ Such a close-knit community would seem to be an ideal modern venue for shaming penalties. Thus, it made sense to Judge Thomas Brownfield to exploit Pittsfield’s norm-cohesiveness potential by ordering a resident who had been convicted of aggravated battery to post a sign on his property line that read “Warning: A Violent Felon Lives Here. Travel at Your Own Risk.”²²⁷ The judge believed that a multiple-year prison sentence was too harsh an option for this defendant, who was known by many of his neighbors as a good-hearted but troubled man, with an elderly mother at home. Consequently, the judge instead gave the defendant probation, but confined him to his home for a year and required him to post this sign.²²⁸

Judges elsewhere have also ordered some offenders to carry signs or to otherwise publicize their offenses.²²⁹ A California legislator recently introduced a bill that would force repeat drunk drivers to affix red and white license plates to their cars that read: DUI.²³⁰ Bumper stickers, public apologies, and newspaper ads and sandwich signs that publicize one’s offense likewise have been deployed to punish criminal defendants.²³¹

These penalties tend to fall into four classes: “stigmatizing publicity; literal stigmatization; self-abasement; and contrition.”²³² *Stigmatizing publicity* refers to sanctions that publicize criminal status, such as the controversial practice of publishing the names of convicted sex offenders in newspapers or on billboards.²³³

²²⁶Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, NEW YORK TIMES, A1, col. 2 (Jan. 16, 1997).

²²⁷*Id.*

²²⁸*See* People v. Meyer, 661 N.E.2d 526 (Ill. App. 4th Dist. 1996). The Illinois Supreme Court recently reversed the sentence, on the ground that the judge lacked power to impose the shame sanction. People v. Meyer, 176 Ill.2d 372, 680 N.E.2d 315 (1997).

²²⁹*See, e.g.*, Lindsay v. State, 602 So. 2d 652 (Fla. App. 1992), *review denied*, 618 So. 2d 123 (Fla. App. 1986), *review denied*, 496 So. 2d 142 (Fla. 1986) (upholding probation condition requiring defendant to place bumper sticker on his car that announced he had been convicted of drunk driving); People v. Letterlough, 205 A.D. 2d 803, 613 N.Y.S. 2d 687 (1994) (upholding probation condition that compelled defendant to affix fluorescent sign reading “CONVICTED DWT” to any vehicle he drove). *See also* note 1, *supra*. These shaming penalties differ from the laws that compel people convicted of sexual offenses to register their address with the state, which may then notify local law enforcement agents and the public of their presence in the community. These laws have a shaming effect, but have been justified primarily on deterrence (incapacitation grounds). *See* State v. Afrika, 168 Misc. 2d 618, 648 N.Y.S. 2d 235 (1996) (upholding Sexual Offender Registration Act against an *ex post facto* charge and concluding that the purpose was not to punish the offenders but to protect the community). Doe v. Poritz, 142 N.J. 1, 662 A. 2d 367 (1995) (upholding sex offender registration and community disclosure statutes as against *ex post facto*, double jeopardy, bill of attainder, cruel and unusual punishment, and invasion of privacy challenges). Peoples v. Adams, 144 Ill. 2d 381, 581 N.E. 2d 637 (1991) (upholding sexual offenders registration requirement). State v. Ward, 123 Wash. 2d 488, 869 P. 2d 1062 (1994) (upholding sex offender registration requirement).

²³⁰Dion Nissenbaum, *California Bill Would Brand Drunken Drivers’ Cars*, ARIZ. DAILY STAR, at 1A, col. 3 (Jan. 20, 1997).

²³¹*See* note 229, *supra* and note 233, *infra*.

²³²Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591, 631 (1996). *See also* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991).

²³³*See* Kahan, *supra* note 232, at 631–32; *see also* Massaro *supra* note 232, at 1881 (describing judge’s order requiring a convicted child molester to place a 4 x 6 inch ad in the local paper that declared “I am Stephen Germershausen. I am 29 years old... I was convicted of child molestation.”).

Literal stigmatization refers to sanctions that effectively paste the label on the offender, such as forcing a convicted child molester to wear a sign announcing the conviction or compelling a convicted DUI offender to affix a bumper sticker to his or her car that reads “CONVICTED DUI.”²³⁴ *Self-debasement* refers to any penalty, including the foregoing, that involves “ceremonies or rituals that publicly disgrace the offender”²³⁵ *Contrition* penalties force offenders to apologize for their offenses.²³⁶

Justifications for the New Shame Penalties

Shame penalties deploy notoriety and its attendant shame to punish the offender. Their possible justifications are that public shaming may rehabilitate some offenders, may incapacitate some offenders, and may shore up norms and deter similar misconduct by others. They may also serve as relatively inexpensive moral homilies that may promote the expressive function of punishment, by conveying social norms in language that the public can understand, and thus may heed.²³⁷ Again, the basic argument has three steps: first, that people take social norms into account, including those expressed and enforced through formal laws, when deciding what actions will be in their best interests to carry out; second, that laws may reinforce social norms insofar as they express disapproval of, and thus increase the social costs of, targeted behaviors or attitudes;²³⁸ and third, that shaming penalties are an apt means of expressing this disapproval.

Shame sanctions are especially attractive penalties, according to this account, because they “unambiguously express condemnation”²³⁹ and are politically acceptable and inexpensive.²⁴⁰ Moreover, they operate in a setting of relative value consensus: criminal law. The comparative advantages of shaming penalties are twofold: They are cheaper than imprisonment, and they express appropriate moral condemnation in ways that other alternatives to imprisonment, such as fines or community service, do not.

Those who extol the expressive benefits of shaming in justifying these criminal penalties betray substantial confidence in shaming’s potential rehabilitation and deterrence benefits, even as they insist that these benefits are not necessary to justify the penalties in all cases. For example, Dan Kahan notes that “most defendants punished by shaming penalties are likely to feel shame,”²⁴¹ even if “some probably do not” (citing the massive study on deterrence by Franklin Zimring and Gordon Hawkins²⁴² that casts doubt on whether even the threat of conviction and imprisonment—both of which surely raise the shame spectre—will

²³⁴See Kahan, *supra* note 232, at 632. See also Massaro, *supra* note 232, at 1886–1888.

²³⁵Kahan, *supra* note 232, at 633. Kahan’s distinction between this category of offenses and others is blurry. All of the penalties described by Kahan presumably share this self-abasement characteristic.

²³⁶*Id.* at 634. Massaro, *supra* note 232, at 1888–89. Because I now believe that apologies differ significantly from humiliating punishments, I will not address these penalties herein.

²³⁷Kahan, *supra* note 232, at 594.

²³⁸See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

²³⁹Kahan, *supra* note 232, at 594.

²⁴⁰*Id.* at 631.

²⁴¹*Id.* at 635.

²⁴²*Id.* at 636 (citing FRANKLIN ZIMRING & GORDON HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 215–16 [1973]).

deter some norm offenders). As Kahan says, “Even if all potential cocaine dealers and muggers are shameless it seems unlikely that all potential drunk drivers, embezzlers, statutory rapists, tax evaders, and toxic-waste dumpers are. Why throw away the savings that could be achieved by shaming rather than imprisoning these offenders?”²⁴³ We can shame offenders locally, by targeting the affiliating groups that have replaced the village, such as urban neighborhoods or professional or trade organizations.

Against Shaming, Not Shame

This argument holds tremendous appeal. Why *not* economize and add shaming penalties to the judge’s cache of penalties? The answer is rather complex and, for some people, counterintuitive. First, no one objects to each part of the argument for shaming offenders; for example, the shaming critics (myself among them)²⁴⁴ do not argue that shaming would have *no* deterrence impact on *any* population of potential offenders, or that criminal convictions should be status-cost free. On the contrary, a conviction should be, in a reasonably cohesive community, inherently degrading regardless of the penalty ultimately imposed. And they may well deter some status-conscious, first-time offenders—say, first-time DUI offenders. Critics of shaming likewise do not claim that most offenders, including drunk drivers and the other types listed by Kahan, are shameless. (Given the shame literature suggestion that shame is a perception of one’s limits, it is highly unlikely that shamelessness occurs in many people, including criminal offenders.) The issues that most divide the shaming opponents from the proponents are the proponents’ often unqualified, uncontextualized claims about when and where shaming will work, what it means for shaming to work, and for *whom* it will work.²⁴⁵ Opponents also believe that proponents underestimate the complexities of manipulating shame and influencing shame norms, as well as the potential harmful social and individual consequences of expanded official shaming of offenders by judges (versus shaming by the offenders’ friends, colleagues, neighbors, or other associates).²⁴⁶

Efficacy concerns. The practical limits of shame penalties are suggested by the foregoing psychological, anthropological and behavioral economics literature. In brief, the complex and variable nature of shame suggests that customized, localized shame sanctions may be necessary in many cases; yet the limitations on a judge’s ability to make accurate estimations about an offender’s ego ideal or shame triggers, and about an offender’s relevant group or target audience, make such fine-tuning impractical. Thus official shaming may serve poorly *specific* (vs. general) deterrence, or rehabilitation ends.

Shaming proponents tend to address this argument against shaming penalties in a way that makes the argument easier to deflect. For example, Kahan, the most thoughtful and forceful of the shame proponents, says that “[c]ritics argue (somewhat inconsistently) that shaming penalties are likely to be ineffective

²⁴³*Id.* at 644.

²⁴⁴See Massaro, *supra* note 232.

²⁴⁵See *id.* at 1921–28, 1933–34.

²⁴⁶*Id.* at 1930–33.

deterrents not only because they hurt offenders too little but also because they hurt them too much."²⁴⁷ The argument that Kahan attacks—which is mine—probably should be clarified and expanded to better meet his charge of inconsistency: Shaming penalties may hurt *some* offenders too little (because the penalties miss their shame marks), may hurt *some* offenders too much (because the penalties hit their shame marks), may do nothing *by themselves* to deter norm violations (because social norms already police the behavior more effectively than any legal rule could or because the audience does not share the shame value expressed by the shaming), and also may have an unpredictable impact on an offender's subsequent behavior, even when the offender does feel shamed (because shaming does not always deter misconduct and may even result in violence). That is, stigmatic penalties are likely to have unstable, offender-variant, community-dependent, and crime-dependent meanings. At least as a matter of *specific* versus general deterrence, shaming penalties thus may not work in ways we hope—either because they will have no impact, or because their impact will be different from or harsher than we would like. Simply because prison may suffer from comparable deficiencies doesn't make shaming penalties more effective in this sense, only less expensive.

Even as a matter of general deterrence, however, shame penalties may be of less use than proponents imagine, given the ambiguities of shaming, and given that shaming's deterrence effectiveness depends entirely on the community's interpretation of the shaming. Kahan, notably, recognizes how the community's interpretation of shaming may determine its effectiveness. He believes that public authorities like judges can reinforce what certain behaviors *ought* to mean by communicating condemnation in unambiguous terms. Shaming, in his view, is a good, relatively cheap, and unambiguous way to communicate this condemnation. Using it may increase the costs of norm violation, and thereby may increase norm observation. But the general, expressive value of shaming is enough of a justification for the penalties, even if these deterrence ends are not actually served in many cases.

This approach, however, underestimates the ways in which social meaning is a complex, dynamic, bottom up and top down exchange. Again, shamelessness and shaming necessarily work *against* each other to some, likely unmeasurable, degree. Moreover, official shaming may *not* be unambiguous, *especially* if it avoids the most extreme forms of humiliation. If imprisonment's social meaning is potentially ambiguous and unstable (and it is, as both the historical example of colonial practices and the modern experience of the allegedly declining stigmatic effect of imprisonment suggest), then why *wouldn't* penalties like the forced wearing of signs, bumper stickers, or other shaming techniques be ambiguous and unstable? Shaming's meaning too will depend on the offender, the offense, the shamer, the specific form of penalty deployed, and the audience for the penalty. More crucially, unlike prison and other penalties, shaming depends *exclusively* on its "meaning" to determine whether it is punishment at *all*, as well as to what degree.

Unfortunately, at least for defenses of shaming, modern criminal court contexts, especially those in large urban centers, simply do not match the cultural conditions of effective shaming outlined in the anthropological materials. We

²⁴⁷Kahan, *supra* note 232, at 644.

(collectively) are not Victorian England, the Colonies, or pre-World War II Japan. Few of us live in villages, and many of us have little or no meaningful contact with our neighbors. The cultural conditions that so many shaming advocates claim have eroded and hope would be restored by a greater emphasis on shame, are the very conditions necessary to any effective revival of public shame practices. Thus the likely *general* deterrence effects of shaming too are doubtful in many modern settings, especially major urban centers.

Third, there are no rituals or other steps for reintegrating the shame offender, or for containing private responses to the public penalty. If the offender does not move away or withdraw socially, and if the community chooses to punish the offender with ostracism, then he or she could suffer an indefinite sentence of status degradation or other fallout, such as loss of meaningful employment. Public shamings appeal directly to the community to participate in the punishment and, presumably, to retaliate against the shamed offender by withdrawing their approval and inflicting other injuries that are difficult to predict or contain. Unlike fines, imprisonment, or community service, shaming may lack any redemptive, dues-paid end point. This makes a shame penalty impossible to contain or to calibrate, and thus to administer in anything like a proportional way. If one worries about retribution-based justifications of the penalty, not just that penalties should express condemnation, then this proportionality and interminability dilemma matters a great deal.

Fourth, the impact of stigmatization on an offender's post-shaming behavior is difficult to predict, as the psychological materials and the unresolved controversy about labeling theory—the claim that labeling an offender “deviant” produces secondary deviance or criminal acts—prove.²⁴⁸ Consider ways in which a person who is, or feels, shamed may respond: angrily (defending against the shame) or even violently.²⁴⁹ In other words, we already know that shaming does not always produce permanent (or even temporary) pained withdrawal. Shaming a person, especially an adult, instead may produce *more* norm deviance and even physical violence.

Finally, the primary appeal of the modern shame penalties may be their novelty. If they become routine measures that are deployed evenhandedly and widely, then they may cease to interest the community, may lose their capacity to shock and entertain, and may no longer deter even first-time, status-conscious offenders.

Modern shame penalties thus may be best, if not solely, justified in terms of

²⁴⁸See THE LABELLING OF DEVIANCE: EVALUATING A PERSPECTIVE (Walter R. Gove, 2d ed., 1980); Massaro, *supra* note 232, at 1919–1921.

²⁴⁹See THOMAS J. SCHEFF, BLOODY REVENGE: EMOTIONS, NATIONALISM, AND WAR 67–69 (1994) (discussing studies of shame and aggression); Charles E. Frazier & Thomas Meisenholder, *Explanatory Notes on Criminality and Emotional Ambivalence*, 8 QUALITATIVE SOCIOLOGY 266 (1985) (analyzing motivations of law breakers, and ways in which law enforcement methods may actually enhance the attractiveness of criminal activity for some offenders). See also DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE 106 (1995) (suggesting that the quality lacking in many of the worst criminals is empathy, not shame). See also ULLA V. BONDESON, ALTERNATIVES TO IMPRISONMENT: INTENTIONS AND REALITY 206 (1994) (analyzing recidivism rates of offenders sentenced to various alternative penalties and concluding that probation with supervision may result in greater recidivism than probation without supervision, which “can scarcely be explained by anything other than stigmatization theory”).

their expression of contempt for some offenders and their behavior, and the hope that this expression will teach the community a hard and somewhat obscure lesson: break (certain) laws and we (might) make a spectacle of your status degradation (but not everyone's), and deliver you up to the community for whatever ostracism or other private punishment it deems appropriate.

Even if we agreed on this as a proper objective for American law (I will address this question shortly), shaming may not achieve this end, given the constraints of modern courts and the modern cultural contexts in which they operate. In a mobile, anonymous, urban society, shaming may not be read by the public as any coherent, collective community statement about its norms. In fact, it may not be read at all by some citizens.

Again, however, this is not to suggest—it would be silly to do so—that properly crafted, context-sensitive shame penalties can't ever deter misconduct in *any* modern context. They certainly might, as long as humans remain status-conscious, socialized individuals who are vulnerable to narcissistic defeats—which, if theorists like Tomkins and Wright are correct, will be forever. The key for legal reformers is determining in which contexts shame penalties will work as predicted and without unduly harsh side effects.

Assume, for example, that one wishes to deter plagiarism by law scholars, and one sets out to do so with profession-imposed shame sanctions. Within this narrow professional community, the psychological, anthropological, and behavioral economics materials all suggest that a highly effective and inexpensive deterrent might well be to publish the names of offenders in the American Association of Law Schools (AALS) newsletter and the *Journal of Legal Education* along with the offenders' school affiliations and the plagiarized passages. Legal educators likely would respond to such measure (that is, they would be deterred from the shameful conduct) because they constitute a relatively small and highly insular community whose members likely share the value of protecting one's professional work product from plagiarists. Most community members would probably very much fear the consequences of such stigmatizing publicity, as one's professional status could be destroyed by it. The psychological consequences of such a severe status demotion probably would include embarrassment, at the least, and mortification, at the most, for most community members. In this context, then, shaming likely would interrupt the offender's personal, social, and professional pleasure at being thought of as a capable, original, and honest; the offender would be exposed to her colleagues as incompetent, derivative, and deceitful.²⁵⁰

Assume instead, however, that the AALS were to publish in its newsletter the names of the same colleagues, but now as convicted drunk drivers, embezzlers,

²⁵⁰Even this use of shaming by the AALS, though, could have unpredictable consequences. "Plagiarists" are easy to denounce, but also easy to find in most fields, including law. Even Helen Keller was accused of it. As James Kincaid has said, "pure 'originality' is an over-the-rainbow idea; none of us invent the language we employ, our education, our culture, or our history." James R. Kincaid, *Purloined Letters*, THE NEW YORKER, Jan. 20, 1997, 93, 97. Thus, were the AALS to shame legal scholar plagiarists, it might be forced to define plagiarism, which might in turn inspire resistance in colleagues who disagreed with the AALS definition. Shaming might illuminate the complexities of *defining* originality in a footnote-studded world of ideas. Again, I quote Kincaid: "Plagiarism is best understood not as a sharply defined operation, like beheading, but as a whole range of activities, more like cooking, which varies from deliberate poisoning to the school cafeteria to mother's own." *Id.*

and academic copyright infringers. Or—more to the point of actual legal shaming penalties—assume that the AALS were to compel offenders to march through the plenary session at the annual AALS conference wearing signs that read, “I am a plagiarist,” or affix such a sign on their office doors or on their shirts when teaching large classes. The likely effectiveness and acceptability of these uses of shaming are far harder to gauge, for several reasons. One is that the listed offenses might not all be ones that even law professors would regard as shameful, though their role as professors of law may make them especially sensitive about being charged with law violations of any kind. Another is that the possible motives for the offenses may make at least some AALS members less confident about condemning the offender in this highly public manner. Still another reason is that the audience for the shaming now must absorb a longer list of offenders and offenses, which might dilute the impact of the publicity sanction. Finally, and most crucially, many observers might regard the latter types of penalties (e.g., compelled parading before one’s professional peers or students) as improper, excessive, and even *cruel*, even where the conduct (i.e., plagiarism, copyright infringement, embezzlement of law school funds) was occupation related. Publicizing the offenses might be one thing; but humiliating colleagues may seem quite another. Professors might resent the AALS for exercising this authority in this manner and recoil from the shaming practice, even if they agreed wholeheartedly that the behaviors were shameful. Penalties one could bear to impose on an errant colleague thus may be significantly less humiliating than penalties that one could bear to impose on a more distant “other.” If one cannot predict—and I don’t think one can—the response of a relatively tightly bound occupational group to shaming, then it seems that the many doubts about its *more wide-spread, less tailored, and official* use need to be taken far more seriously by proponents of shaming.

Consider again the Pittsfield, IL example. One might have expected this close-knit farming community to be particularly unified and predictable in its response to the forced posting of a sign by the local defendant. Yet news accounts of community reaction to the sanction demonstrate that even in Pittsfield, shaming’s meanings are hard to predict or even summarize. One citizen stated that she thought the sentence was administered unfairly because “ ‘Half the town beats up their wives and gets off with a slap on the wrist.’ ”²⁵¹ Others thought the penalty was too harsh for the offense; others thought it was too lenient. Still others thought it might serve incapacitation ends because it at least warned others of the defendant’s violent propensities.²⁵² A likely unintended consequence of the penalty was that the defendant’s wife moved out after the sign was posted, apparently because she was so angry and embarrassed by the stigma spillover of the sign.²⁵³ That is, even this small, agrarian, face-to-face American town read this fairly clearly worded, humanely intended, shame sanction very discursively.

Shaming proponents nevertheless insist, with considerable energy, that the expense and brutality of imprisonment, and the undue leniency of parole in some cases, make shaming an attractive alternative, despite its shortcomings. Yet if prison versus parole were the sole benchmarks for alternative sanctions, then

²⁵¹Jan Hoffman, *Crime and Punishment: Shame Gains Popularity*, NEW YORK TIMES, A1, col. 2, at A11, col. 6 (Jan. 16, 1997).

²⁵²*Id.*

²⁵³*Id.*

virtually anything would be an improvement, and worth trying. We could, for example, resurrect the pillory, the ducking stool, or even the rack, as each might be described as no harsher than prison, and better than fines or community service at expressing disapproval. Shame advocates invoke a “can’t lose” benchmark when they assert that “the largest contribution to stigma comes from the fact of criminal conviction itself, whatever punishment is subsequently imposed,”²⁵⁴ and state that “because shaming penalties hurt less than imprisonment, it is implausible to think that substituting the former for the latter will aggravate the problem of over deterrence.”²⁵⁵ (That shaming hurts less is thought to be proven by evidence that, given a choice, many offenders will choose shame penalties over imprisonment.²⁵⁶)

This particular line of defense justifies far too much to be a convincing defense of shaming *per se*, and eludes the pertinent, much narrower questions: Why adopt *shaming* penalties, versus therapy, apologies, “boot camp,” or *other alternatives* to imprisonment and parole?²⁵⁷ Kahan, distinctively, begins his pro-shaming argument mindful of this latter useful and relevant comparison. He notes that fines do not express condemnation and therefore don’t satisfy expressive ends of punishment and that certain other penalties are too harsh to be politically acceptable; but he ultimately drifts back to the former, anything-beats-prison, unhelpful comparison to deflect accusations that shaming is cruel. The pertinent questions throughout should be: How should we distinguish among the many, relatively inexpensive methods of punishment *other than prison* that do express condemnation? How do we decide which method matches which offense, and which offender?²⁵⁸ And finally, when does an appropriate expression of condemnation slide into inappropriate and uncontrollable humiliation?

Shaming could also lead to other, untoward effects.²⁵⁹ For example, it could display that the penalty for certain offenses is only stigmatic, not incarceration, which might actually encourage some stigma-impervious offenders to risk a conviction. Others might wonder why some offenders are shamed and others are not, thus undermining their confidence in the even-handedness of the legal system. But again, if shaming penalties were imposed equally on all offenders who commit similar offenses, this could undercut the impact of these penalties; the more people subject to shaming, the less it compromises one’s social status—it could even

²⁵⁴Kahan, *supra* note 232, at 641.

²⁵⁵*Id.* at 641.

²⁵⁶*Id.* at 641, note 204.

²⁵⁷See NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION* 6–7, 40–41 (1990) (discussing underuse of alternative sanctions and describing a variety of such sanctions).

²⁵⁸As Lawrence Lessig has said, “meaning talk might . . . cue us to better ways to regulate social norms.” Lessig, *Social Meaning and Social Norms* 144 U. PA. L. REV. 2181, 2186. But “[o]ne cannot use meaning talk to speak in ways that purport to be general laws of humanity. Meaning prescriptions, and descriptions, are more local, more contingent. *Meanings are often highly contestable and sometimes hard to know.*” *Id.* at 2188 (emphasis added).

²⁵⁹Public executions in the 19th century too were designed to “terrorize and edify” the audience, but they instead often produced more lawlessness. The move toward privatization of punishment that occurred after the 19th century thus may have shored up legal authority as much as it may have weakened it. See Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461 (1995) (noting that the public executions “seemed to inspire more crime and social deviance than they deterred”). Cf. PIETER SPIERENBURG, *THE SPECTACLE OF SUFFERING* (1984) (arguing that the decline of public punishment occurred because of a change in sensibilities of middle- and upper-class citizens).

begin to elevate it in some cases. (If, e.g., five cars in the neighborhood bear “DUI” plates, then the plates may lose some ego ideal and social status shattering effect.) Just as jail time has lost its stigma sting within certain subcultures, so might pillory time lose its sting if many members of the subculture have endured it. Relying exclusively on the stigmatic effect of a penalty thus is an especially uncertain method of gauging its intensity or its likely impact. With most other penalties—all of which, including mandatory public service, may have stigmatic effect—there is something *besides* the stigma to point to as the measure of its intensity: time, amount of money, deprivation of liberty.

Kahan acknowledges the uncertain meanings and consequences of shaming. He states, for example, that “the net deterrent and recidivist effects of shaming can’t be resolved by *a priori* theorizing,”²⁶⁰ and that the question “requires . . . the kind of empirical assessment that dogmatic opposition to shaming penalties would only obstruct.”²⁶¹ He admits that “[C]ompared to imprisonment, shaming penalties don’t seem to admit of gradations in severity,”²⁶² “[t]he consequences of shaming penalties are extremely unpleasant,”²⁶³ and the meaning of a shame penalty to a community will “depend[] on the conventional signification of different actions within particular communities, [and that] [s]uch understandings . . . are richly variant.”²⁶⁴ Most telling of all, however, is his concession that the “short and simple answer” to the question whether shame deters criminality is “we don’t know.”²⁶⁵

But if we don’t know all of these things—and we don’t—then perhaps we shouldn’t adopt these measures, given how harsh and uncontainable an effective shaming may be for the offender and for the offender’s family, and given the risk that shaming may send a message of contempt for the offender, rather than one of mere opprobrium for the offense. If we are willing to proceed despite these risks, and without firmer evidence than we currently have about shaming’s deterrence value, then something other than rehabilitation *or* deterrence may be afoot. The goal may be solely to express moral condemnation, without regard for whether it actually does shore up norms, deter misconduct, or change the offender.²⁶⁶

Criminal law surely should express condemnation of bad acts to avoid appearing to condone and, thus, undermine the norms against them. But the goal still ought to be expressed in consequentialist terms—that is, in terms of whether a specific method of punishment does *more* than merely express disapproval, and actually *does* shore up norms *without* untoward side effects. The critics of shaming penalties, whom Kahan indicts for their “dogmatism,” thus worry about accepting an expressive justification for public shaming, by itself, because shaming may not

²⁶⁰Kahan, *supra* note 232, at 646.

²⁶¹*Id.* at 646.

²⁶²*Id.* at 640.

²⁶³*Id.* at 638.

²⁶⁴*Id.* at 637.

²⁶⁵*Id.* at 638. Here, as in several places, I agree completely with Kahan, as is clear from my earlier work. Cf. Massaro, *supra* note 232, at 1920 (“The most accurate statement is that we do not know, for certain, whether labeling [shaming] produces secondary deviance.”)

²⁶⁶As Cass Sunstein recently said, “[E]xpressive approaches to law verge on fanaticism where effects on norms are unlikely and where the consequences of the ‘statement’ are bad.” Sunstein, *supra* note 238, at 2047.

serve the expressive function *and* may have potentially devastating, uncontrollable, unpredictable, and unanalyzed side effects.

Social and political concerns. Perhaps the most serious potential side effect of expressing contempt for offenders through shame penalties is how official shaming may erode decency norms and transform the role of the government in policing criminal conduct.

The decency concern is based on the sense that shaming may be cruel and that normalizing cruelty may encourage its proliferation, especially if the expressive accounts of punishment's effects on norms hold true. Shame proponents dismiss this charge by asserting that many offenders would choose shaming over imprisonment, which implies that shaming isn't "so bad."²⁶⁷ But there are other possible interpretations of an offender's choice of shaming over prison that do not undermine the claim that shaming may be unduly harsh. In particular, as Kahan notes, one may read the choice of shaming over prison as evidence that both are horrible prospects, but that prison imposes the double cost of stigma and liberty deprivation. Shaming *does* look bad; it's just that prison looks *worse*.

Shame proponents respond that the stigma harm from shaming offenders is no greater than the stigma imposed by prison, and that stigmatic harm is an unavoidable cost of punishment, however it is imposed. Thus, they argue, cruelty objections to shaming are disingenuous, because they don't acknowledge that the primary extant alternative to shaming is prison, which is harsher on offenders. In any event, some add, the harm to shamees is not the primary measure of this penalty's appropriateness because the aim is to teach the *audience* for the shaming an important lesson, that is, the behavior for which the individual is being shamed is bad, and others will lose social status if they engage in it.

Apparently, however, the message that the crimes now subject to shaming penalties are bad was not already conveyed by the more dire possibility of imprisonment.²⁶⁸ Why not? It is hardly clear that this audience-effect justification for shaming penalties makes much sense, taken alone. Shame proponents' answer to this point is that law needs to express condemnation even if the condemnation fails to deter all crime. They reiterate that simply because the threat of imprisonment is an inadequate deterrent does not mean shaming shouldn't be deployed instead. *Both* may be of limited deterrence effect; but shaming is at least as good as prison and is less expensive. Thus there must be a way in which shaming is *worse* than prison, versus merely as bad.

Shaming is potentially worse than prison in at least one respect: Shaming may convey the message that drunk drivers, child molesters, and the other offenders subjected to these penalties are less than human others who deserve our contempt.²⁶⁹ Again, these penalties rely explicitly and exclusively on status degradation as a means of enforcing public laws; they emphasize, rather than mitigate, the caste features of punishment, even more than other current

²⁶⁷Kahan, *supra* note 232, at 646–47.

²⁶⁸Madow, *supra* note 259, at 560.

²⁶⁹The impact of such a penalty on the audience may well be, as Jim Whitman recently has suggested, to whip up a kind of lynch justice mentality in ways that cannot be regulated, as can the treatment of prisoners by officials. In so appealing to the "mob," shaming also may erode norms of respect for human dignity and respect for official authority as the primary organ of law enforcement. Whitman, *supra* note 8.

punishment methods tend to. Sending this kind of message, even about criminal offenders, is, and should be, jarring in a political order that makes equality a cultural baseline.

To understand this last argument, however, requires that one again observe the crucial differences between shame and shaming. We likely can all agree that shame is an indispensable, however painful, emotion that assists individuals in observing social and legal norms. Likewise, we can all agree that a shared sense of what is shameful—murder, child abuse, wanton destruction of property—is a necessary feature of orderly communal life, and that shame should accompany conviction for a shameful act. The debate here is whether public, official shaming is the proper means of educating criminals or the public about what is shameful.

A parent can teach a child much about what is shameful without shaming, as the earlier discussion of shame illustrates. Moreover, most parents have a relationship with their child in which any shaming that occurs is reintegrative. For modern state or federal courts to resort to criminal penalties *solely* to express contempt and to lower another's status in the eyes of the community, with no reintegration rituals in place, is quite another matter. Legal reformers who advocate shaming should consider the argument of Avishai Margalit that “[a] decent society is one whose institutions do not humiliate people.”²⁷⁰ The problem with humiliation, he suggests, is that it constitutes “the rejection of human beings as human.”²⁷¹

Humiliation and shame, in Margalit's account, overlap but are not coterminous. Shame is an acceptable aim of punishment and “involves humiliation only when one is ashamed of a feature of her self-definition connected with her belonging to a group.”²⁷² But this group affiliation must be “a legitimate ‘belonging’ feature of their self-definition” not, for example, membership in a criminal syndicate.²⁷³ Margalit describes punishment policies and procedures as “the litmus test of the decent society,”²⁷⁴ and concludes that a decent society is one that aims at punishing its criminals *without humiliating them*.²⁷⁵

Yet as Margalit himself acknowledges, this is a matter of degree: “Punishing prisoners is intended to make them feel disgraced, that is, to shame and dishonor them. . . . If disgrace is taken to the extreme, however, it may become injury to human dignity, which is humiliation.”²⁷⁶ One thus must read his philosophical account of a decent society against the backdrop of the psychological materials on shame, which show just how hazy and uncertain this crucial line between shame and humiliation can be. (Recall that some emotion theorists regard them as two versions of one affect.)

Margalit's proposed punishment model is basic training in the army, which he describes as entailing “unpleasant situations involving a lack of privacy, constant

²⁷⁰ AVISHAI MARGALIT, *THE DECENT SOCIETY* 1 (1996). Recall Jim Whitman's argument that shame sanctions are wrong because they involve a “peculiarly disturbing species of lynch justice—a species of *official lynch justice*.” Whitman, *supra* note 8.

²⁷¹ Margalit, *supra* note 270.

²⁷² *Id.* at 132.

²⁷³ *Id.* at 133.

²⁷⁴ *Id.* at 263.

²⁷⁵ *Id.* at 262.

²⁷⁶ *Id.* at 267.

supervision, and absolute lack of autonomy”²⁷⁷ but to train, not humiliate, them.²⁷⁸ The obvious practical dilemma presented by this nuanced, intent-sensitive account of decent punishment methods—and it’s a delicate one indeed—is “to transform the idea of the disgrace inherent in punishment into a concept involving only the loss of social honor *without* personal humiliation as well.”²⁷⁹ We must try to “transform prisoners into *civilian* ‘recruits,’ which would mean not rejecting the prisoners from human society.”²⁸⁰

Margalit thus concedes the proper, *inherent* role of dishonor and status degradation in punishment, but insists on a crucial brigade against its potential abuse. We should condemn the offense, but, we should not *humiliate* the offenders, lest we reject them from human society.

But why not? Aren’t banishment and humiliation an appropriate price to pay for violating criminal laws? Why not humiliate drunk drivers, deadbeat dads, child molesters, and thieves? Don’t they *deserve* it? Margalit argues that we should refrain from humiliating criminals *not* for what it may do to *them*, but for what it may do to *us*. Punishing indecent, even horrific, acts with humiliatory penalties may not even be the score, as one hopes; it may instead *redefine the game*, for humiliators and humiliated alike. A hidden potential cost of shame sanctions thus is the subtle, unpredictable way in which shaming may refract light back onto the community, and enlist its approval and participation in degrading offenders. This hidden cost may include not only an erosion of democratic assumptions of individual worth and equality, but a less decent society.

Margalit’s approach to criminal punishment therefore complements the influential work on retributivism by the late Jean Hampton, who too imposed crucial “decency” restraints on punishment. Central to the retributive response, Hampton argued, is the insulting message that the criminal action sends about the victim’s worth,²⁸¹ that is, that the victim is subordinate to the perpetrator. A successful retributive punishment, in her view, seeks to redress this injury; *but it does not recommit it*. Rather, “a successful retributive punishment is one that simultaneously inflicts suffering so as to deny lordship *but avoids degrading the wrongdoer*. . . . [T]he construction of retributive punishment is an art, which involves the satisfaction of two demands: first, that the wrongdoer be diminished; and second, that the diminishment not represent him lower in value than the victim.”²⁸² She then expresses doubts whether prisons, where conditions are bad, meet her criteria for successful retributive punishment.²⁸³ Moreover, she specifically questions whether the state can legitimately, within a liberal order, inflict retribution, particularly when the state is “inflicting retribution . . . to vindicate the worth of their victims, . . . while ignoring . . . that they [the criminals] are themselves far more victimized by poverty, poor education, and discrimination.”²⁸⁴

²⁷⁷*Id.* at 268.

²⁷⁸Of course, punishment is meant to communicate disgrace; basic training is not. *Id.* at 269.

²⁷⁹*Id.* at 269 (emphasis added).

²⁸⁰*Id.* at 270 (emphasis added).

²⁸¹Jean Hampton, *An Expressive Theory of Retribution*, in *RETRIBUTIVISM AND ITS CRITICS*, 1, 12 (Wesley Cragg ed., 1990). See also Jeffrie G. Murphy, *Forgiveness and Resentment*, in *FORGIVENESS AND MERCY*, 14 (Jeffrie G. Murphy & Jean Hampton eds., 1988).

²⁸²Hampton, *supra* note 281, at 14 (emphasis added).

²⁸³*Id.* at 15.

²⁸⁴*Id.* at 22.

Hampton and Margalit here follow in the footsteps of Joel Feinberg, who set forth his expressive theory of punishment in 1965.²⁸⁵ Feinberg concluded that the “condemnatory aspect of punishment does serve a socially useful purpose: it . . . makes possible the performance of such symbolic functions as disavowal, nonacquiescence, vindication, and absolution.”²⁸⁶ But even Feinberg—who is so convinced of the usefulness of official condemnation that he would prefer punishment that preserved this aspect *solely*, and dispensed altogether with the physical media of incarceration and corporal mistreatment, if this were feasible²⁸⁷—acknowledges that the proportionality problems are irresolvable.²⁸⁸ He specifically states that “[w]hat justice demands is that the *condemnatory aspect* of the punishment suit the crime, that the crime be of a kind that is truly worthy of reprobation.”²⁸⁹ This greatly simplifies the task of justifying stigmatic punishment: Presumably, it is justified whenever the defendant has committed a shameful offense. But his expressive theory does not deny the calibration problems, insofar as he concedes that “the more serious crimes should receive stronger disapproval than the less serious ones.”²⁹⁰ “Measure for measure” assessments, with all of their ambiguities, thus remain relevant, *even* under the most nuanced theories of punishment that reject the strict eye-for-an-eye accounting of some retributivist theories, or that openly embrace the official imposition of stigma as a socially useful, proper feature of punishment.

The potential symbolic and practical adverse consequences of shaming penalties that these philosophers warn against thus should be far more worrisome than they are to shame advocates, especially to advocates like Kahan who rely heavily on the expressive theory of punishment.²⁹¹ Margalit and Hampton suggest a substantive brake on expressive justifications for punishment: When we express condemnation of criminal acts, we ought to also express the view that even the worst offender nevertheless is a human being, not an object, and ought to be treated as such, even in the punishment phase of criminal justice. That is, we must consider whether a punishment method undermines other important norms, like equality, promotion of human dignity, and prevention of purely instrumental treatment of others, *even* convicted criminals.

Kahan’s only brakes on punishment methods seem to be that they must express moral condemnation, be politically feasible, and not shock the collective conscience. What Margalit and Hampton propose instead is far more complicated: punishment must be administered in a way that considers how it affects the offender as a fellow human being, that does not recommit the offense, and that observes the line between shame and humiliation—but with the primary goal of preserving the community’s commitment to decency, not preserving the offender’s dignity *per se*.²⁹²

²⁸⁵ See Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95–118 (1970) (reprinting the 1965 essay).

²⁸⁶ *Id.* at 115.

²⁸⁷ *Id.* at 116.

²⁸⁸ *Id.* at 116–117.

²⁸⁹ *Id.* at 118 (emphasis in original).

²⁹⁰ *Id.*

²⁹¹ Kahan relies on the work of both Feinberg and Hampton.

²⁹² See ARNE JOHAN VETLESEN, *PERCEPTION, EMPATHY, AND JUDGMENT—AN INQUIRY INTO THE PRECONDITIONS OF MORAL PERFORMANCE* 218 (1994).

I side with Margalit and Hampton here, and for this reason, along with the many others already named, conclude that the psychological works on shame are indispensable to any complete analysis of shaming sanctions. They alone analyze closely the potential emotional consequences of effective shaming and how shaming may convey contempt, and result in humiliation rather than shame. As one work has cautioned, "Contempt . . . wants to eliminate the other being as dirt is thrown away . . . the loss of love . . . can be described as a radical decrease of respect for the subject as a person with his own dignity. . . . The thrust of this aggression is to dehumanize, really to change the person into excrement."²⁹³ To dehumanize another, *even a violent criminal, should* disturb us, for the important reasons that Margalit and Hampton offer.

Likewise relevant to these decency concerns are the sociological works on shame, insofar as the meaning of shaming—is it *humiliation*, or proper social condemnation of deviancy?—is so context dependent. For example, the use of flogging by Elain Lynds, the first long-term warden of the Auburn System of punishment, may appear less harsh when one considers that he and his fellow Puritans believed in predestination. When the relevant community believes that "a convict's soul is permanently depraved and that sin is an inevitable part of his personal endowment, it makes little sense to think of 'reform' or regeneration." ²⁹⁴ On the contrary, "the best one can do for him is to contain his reprobate spirit . . . and mold him into a passive, compliant, dulled member of the social order."²⁹⁵

Thus, to be decent (or understood as such in a given social and historical context), punishment not only must fit the crime, it must fit the culture's understandings about crime and about punishment. Unfortunately, the relevant relationships among all of these variables are dynamic, unstable, and difficult to map. Shaming proponents thus face a difficult question indeed: What exactly are the meanings of shame in the varying contexts in which judges have deployed shaming? This complex and crucial question has been virtually ignored in favor of casual assumptions that shaming will deter some offenders, that it costs less than prison, and that punishment should hurt, so others won't be tempted to follow suit.

Summary

I recognize that some readers still will respond to all of my arguments against shame penalties with exasperated pique. The law has to punish crime *somehow*, they will say, and prison cannot be the whole answer, given that it is nonrehabilitative, expensive, and degrading. Shaming isn't *that* ambiguous and we aren't *so* plural that we lack *any* common sense of what is painful. (Wouldn't most of us be deterred from drunk driving if we knew we'd spend time in downtown Tucson wearing a sign around our necks that read "DUI offender"? And isn't "most of us" enough general deterrence to justify the measure, especially as it is so cheap?) Even if the penalty doesn't deter anybody, isn't it serving a positive end simply by expressing condemnation of, or contempt for, the behavior? Why should we worry

²⁹³LEON WURMSER, *THE MASK OF SHAME* 80–81 (1981). Cf. MARTHA GRACE DUNCAN, *ROMANTIC OUTLAWS, BELOVED PRISONS* 147–170 (1996) (describing ways in which criminals are compared to excrement, yet romanticized).

²⁹⁴See Erikson, *supra* note 177, at 203.

²⁹⁵*Id.*

about the fine line between shame and humiliation here, when it can't be effectively policed anywhere? Prison humiliates. Even a fine might, for an especially shame sensitive offender. The fact of conviction alone is humiliating, for many law-abiding, status-conscious citizens. And doesn't the argument against shaming implode to the extent that it worries both that shaming won't work if you can just move to Cleveland or Boise, and *also* that shame may be a permanent, nonreintegrative penalty that never lets the offender back in? Where is the evidence that the defendants who already have been shamed were devastated by it, or that their relevant communities have become less decent or more moblike? Finally, wouldn't deprivatizing punishment by resorting to public shaming be an excellent means of demonstrating the pervasiveness of certain offenses—say, domestic violence—in ways we might favor?

I have not attempted to resolve these questions, but to underscore that the answers to all of them depend on variables that are so uncertain and contextual that no general response is possible. The most crucial difference between shaming proponents and shaming critics therefore may lie here: What should we do in light of the many unresolved questions about shame, shame norms, and shaming? The proponents suggest that we should proceed and see how things go. I conclude that far more analysis and study of the complexities of shame, and of the individual, social, and political costs of shaming, should be conducted before experimentation with actual offenders. Such reflection should *always* precede the adoption of punishment reforms, but it is particularly crucial when, as now, many people feel stumped by the problem of stemming criminal behavior, and thus may be especially vulnerable to an anything-beats-the-current-regime shame on *them* appeal.²⁹⁶

Conclusion

Shame is a complex, context-variable, ubiquitous, and potentially soul-searing emotion. Like all human emotions, it is *mysterious*. To organize any social or legal reform around this mystery is likely to prove frustratingly hard, maybe impossible. We might just as easily aim at rituals that exhort us to love more, fear less, control our anger better, feel more guilt over our bad acts, and feel more empathy for our neighbors. These are all noble goals—ones I would quickly endorse as worthy social and personal aspirations. But the strong appeal of these ends should not blind us to the complexities and dangers of seeking to achieve them through formal legal measures. Shame penalties thus may not be the proper methods for restoring our common sense about right and wrong. On the contrary, there are many good reasons to think they won't produce this anticipated good, and may instead produce fairly significant, unanticipated harms.

²⁹⁶In this respect, we ought to heed the following warning of Robert Ellickson: "Lawmakers who are unappreciative of the social conditions that foster informal cooperation are likely to create a world in which there is both more law and less order." Ellickson, *supra* note 201, at 286. We also should consider the work of Norval Morris & Michael Tonry, which discusses the pattern of experimentation with alternative sanctions, and how these reforms often die due to failure of reformers to accurately foresee, assess, and overcome "daunting organizational, political, financial, and bureaucratic problems." BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM 17 (1990).