

# BEYOND FIRST BLUSH: THE UTILITY OF SHAME AS A MASTER EMOTION IN CRIMINAL SENTENCING

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## ABSTRACT

*Decades of overreliance on overincarceration have led to a growing sense of frustration and disillusionment with our criminal justice system. While legal scholars have long lamented this jail-first philosophy of punishment, some judges have recently joined in the fight by administering alternative criminal sentences to certain individuals. Among these alternative sentences are what are frequently referred to as public-shaming, or scarlet-letter, punishments. Because of the bizarre juxtaposition of novelty and archaism that shaming sentences present, these sometimes-sensationalistic punishments have become a favorite of academia, news outlets, and certain judges. However, despite significant discussion on whether and to what extent public-shaming sentences work in achieving the traditional theories of criminal punishment, relatively little attention has been paid to why and how these punishments work.*

*The key to understanding how the traditional theories of criminal punishment, particularly those known collectively as consequentialist or utilitarian, can be satisfied by shame is in understanding the emotion itself. Because shame is an intense, easily recalled, easily tailored, and universal emotion that has a tendency*

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\* Executive Editor, *Michigan State Law Review*; J.D. 2015, Michigan State University College of Law; B.A. 2011, Spring Arbor University. It is a shame that my name alone appears at the top of this Note—there are so many others who made this work possible; for their support, I am very grateful. I would first of all like to thank Professor Adam Candeub for his invaluable input throughout the note-writing process; without the narrow focus he was able to bring to this Note, I would likely not have found myself published in a journal so prestigious as the *Michigan State Law Review*. I would next like to thank my wife Stephanie for her constant support throughout law school, especially during those late nights I spent studying or writing this very Note. Lastly, I would like to thank the entire editorial staff of the Law Review for many things, but particularly for getting this written work ready for publication.

*to compound over time, it is quite useful as a master emotion in altering or preventing criminal behavior in individuals. Perhaps more importantly from a practical standpoint, shame can satisfy nearly every theory of punishment just as well as, if not better than, jail. And although there are important policy concerns that arise from exhibiting an individual's debased self to society, the well-documented horrors of the American prison system should be more troubling to anti-shame advocates.*

*Although much has been written on the subject of shame as a criminal punishment, the existing literature has largely fallen short of explaining why there is utility in shame. Accordingly, this Note addresses both the shortcomings and the misconceptions of the psychology of shame—as experienced universally and in American society—to demonstrate that shame is a master emotion that persuades behavior unlike any other emotion. This Note will consequently move the discussion of public-shaming sentences forward by providing a useful framework of understanding the very emotion that is sought to be elicited by these punishments and by demonstrating why shame has utility as a master emotion.*

#### TABLE OF CONTENTS

INTRODUCTION .....	417
I. RESURRECTING THE PILLORY: THE FALL AND RISE OF PUBLIC-SHAMING SENTENCES.....	419
A. Clever Judges and the New Shaming Sentences.....	421
B. A Right Not to Be Embarrassed? Shaming Sentences and the U.S. Constitution.....	424
C. Public Shaming: Constitutional? Probably. Good Policy? Debatable.....	427
1. <i>Debasing Dignity</i> .....	427
2. <i>“Are You Not Entertained?”: The Impact of Shaming Sentences on Society</i> .....	429
II. TRADITIONAL THEORIES OF PUNISHMENT.....	430
A. Retributivism .....	430
B. Utilitarianism .....	433
1. <i>Rehabilitation</i> .....	433
2. <i>Incapacitation</i> .....	434
3. <i>Specific Deterrence</i> .....	436
4. <i>General Deterrence</i> .....	437
III. THE PSYCHOLOGY OF SHAME.....	438
A. The Lessening of the Self .....	438

B. A “Hot” Emotion.....	440
C. Shame as Shaped and Limited by Culture.....	441
D. Shame and Morality .....	443
IV. THE UTILITY OF SHAME .....	444
A. Why Shaming Works .....	445
1. <i>Intensity</i> .....	445
2. <i>Ease of Recollection</i> .....	446
3. <i>Individualization</i> .....	447
4. <i>Universality</i> .....	448
5. <i>The Shame Spiral</i> .....	449
B. Shame’s Satisfaction of the Traditional Theories of Criminal Punishment.....	450
1. <i>Rehabilitation</i> .....	450
2. <i>Incapacitation</i> .....	451
3. <i>Specific Deterrence</i> .....	452
4. <i>General Deterrence</i> .....	453
CONCLUSION.....	454

## INTRODUCTION

*And they were both naked, the man and his wife, and were not ashamed. . . . And when the woman saw that the tree was good . . . she took of the fruit thereof, and did eat, and gave also unto her husband with her; and he did eat. And the eyes of them both were opened, and they knew that they were naked; and they sewed fig leaves together, and made themselves aprons.<sup>1</sup>*

It is quite curious that in the creation myth upon which Judaism, Christianity, and Islam are built, seemingly the first emotion felt by Adam and Eve in a fallen world was shame.<sup>2</sup> This is curious for two reasons. First, presumably any other negative emotion would have been suitable, given that Adam and Eve just caused the Fall of Man.<sup>3</sup> Second, and more remarkably, they felt shame, a social emotion,<sup>4</sup> at a time at which it appears they were the

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1. *Genesis* 2:25, 3:6-7 (King James) (emphasis omitted).

2. *See id.*

3. *See id.*

4. *See, e.g.,* Karen Caplovitz Barrett, *A Functionalist Approach to Shame and Guilt*, in SELF-CONSCIOUS EMOTIONS: THE PSYCHOLOGY OF SHAME, GUILT, EMBARRASSMENT, AND PRIDE 25, 39-41 (June Price Tangney & Kurt W. Fischer eds., 1995) [hereinafter SELF-CONSCIOUS EMOTIONS] (“If humans did not live in social groups, there would be no need for [shame.]”); Geoffrey M. White, *Representing Emotional Meaning: Category, Metaphor, Schema, Discourse*, in HANDBOOK OF EMOTIONS 30, 41 (Michael Lewis & Jeannette M. Haviland-Jones

only two humans on earth.<sup>5</sup> Putting aside questions of the account's factual accuracy, there is something to be learned from this Genesis story: Shame is central to the human experience.<sup>6</sup>

In light of this, it is unsurprising that shame has historically played a role in criminal punishment.<sup>7</sup> Further, shaming sentences have experienced a renaissance in some American courts in recent decades.<sup>8</sup> Much of this resurgence in shaming punishments is due to a growing frustration with the American penal system and its overreliance on incarceration.<sup>9</sup> It is thought by some that public-shaming sentences can “serve as a politically viable and cost-effective way of achieving deterrence, specific and general, as well as of satisfying the legitimate demands of retribution.”<sup>10</sup> However, there are others who would suggest that public shaming as punishment is either ineffective<sup>11</sup> or unconstitutional.<sup>12</sup>

This Note addresses the rise of the use of public-shaming sentences as well as the swell of criticism that has met it. Some question whether shaming sanctions can offer more than “a purely

eds., 2d ed. 2000) (commenting on “the largely social and moral significance of shame”).

5. See *Genesis* 2:22-4:1; J. David Velleman, *The Genesis of Shame*, 30 PHIL. & PUB. AFF. 27 (2001), reprinted in J. DAVID VELLEMAN, *SELF TO SELF: SELECTED ESSAYS* 45, 45-46 (2006) (“There was no preexisting culture to disapprove of nakedness or to enforce norms of dress.”).

6. MICHAEL LEWIS, *SHAME: THE EXPOSED SELF* 85 (1992) (noting shame’s “importance” and role as “the focal emotion in the Genesis creation story”).

7. See, e.g., Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1906-15 (1991) (highlighting shaming punishments in Japan, Inuit cultures, Southern Spain, the Tobriand Islands, and Colonial America); Courtney Guyton Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes’ Patrons*, 49 VAND. L. REV. 1525, 1533-34 (1996).

8. See, e.g., James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1056 (1998) (recognizing “scattered reappearance of shame sanctions in the United States”).

9. See Massaro, *supra* note 7, at 1882; Kenneth Shuster, *Halacha as a Model for American Penal Practice: A Comparison of Halachic and American Punishment Methods*, 19 NOVA L. REV. 965, 966 (1995) (stating “America’s punishment system is not working”). See generally John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL’Y REV. 377 (2013).

10. Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 738 (1998).

11. See generally Massaro, *supra* note 7, at 1917-44.

12. See, e.g., Phaedra Athena O’Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 862 (1999).

retributive slap . . . and a feeble form of criminal justice.”<sup>13</sup> That is, there is significant doubt as to whether there is any utility in shame sentencing. The otherwise extensive literature on shaming falls short of adequately explaining precisely why there is utility in shaming sanctions.<sup>14</sup> This Note accordingly seeks to fill those gaps by proposing that shame is a master emotion that has utility in effectively altering actual and potential criminal behavior and can thus satisfy the utilitarian theories of punishment.<sup>15</sup>

Part I looks at the resurgence of public-shaming sentences over the last few decades, as well as some important constitutional questions that have arisen as a result. Part II examines the traditional theories of criminal punishment. Part III then looks to the psychology of shame, how the emotion is shaped by society, and how it affects individuals. Lastly, Part IV analyzes precisely why there is utility in shaming sentences by demonstrating that shame can effectively alter individual behavior and satisfy the traditional justifications for criminal punishment.

#### I. RESURRECTING THE PILLORY: THE FALL AND RISE OF PUBLIC-SHAMING SENTENCES

Shame has played an important role in many cultures throughout the history of civilization, from ancient Judaism<sup>16</sup> to pre-

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13. Massaro, *supra* note 7, at 1936.

14. See, e.g., *id.* at 1935-36 (arguing, in part, that only retributive ends can be achieved by shaming sanctions because American society cannot actively reintegrate the offender); Garvey, *supra* note 10, at 775-94 (arguing generally that punishment should educate according to the principle of *lex talionis* and that shaming sentences do not always do this); Whitman, *supra* note 8, at 1061-62 (conceding that shame as punishment may achieve utilitarian ends, but not explaining why this is the case); Rosalind K. Kelley, Comment, *Sentenced to Wear the Scarlet Letter: Judicial Innovations in Sentencing—Are They Constitutional?*, 93 DICK. L. REV. 759, 778-83 (1989) (addressing theories of punishment, but not explaining how they apply to shame sanctions).

15. I owe much to Professor Adam Candeub for pointing me in the direction of researching and writing about the utility of shame, and even for giving me the idea that shame is a “master emotion.” The importance of his oversight and guidance of this Note cannot be overstated.

16. See Shuster, *supra* note 9, at 971-86 (discussing the various forms of Halachic punishment in ancient Judaism). Shuster also speaks to the aims of specific and general deterrence in Halachic corporal punishment performed before a crowd. *Id.* at 982.

World War II Japan,<sup>17</sup> pre-modern Europe<sup>18</sup> to contemporary China,<sup>19</sup> and nineteenth- and early twentieth-century Russia<sup>20</sup> to Taliban-ruled Afghanistan.<sup>21</sup> Shame was also the punishment of choice in pre-Colonial America.<sup>22</sup> There were a number of ways in which the pre-Colonial American could be shamed for his transgressions.<sup>23</sup> Yet shame as punishment had fallen decidedly out of favor by the end of the eighteenth century, due in large part to the rise of the penitentiary system.<sup>24</sup> What once may have been a necessary evil to deter criminal

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17. Massaro, *supra* note 7, at 1906-10 (citing cultural anthropologist Ruth Benedict's work on the country that led to the conclusion "that shame was 'the root of virtue'" in Japan because of the "acute sensitivity to insult and to dishonor to [sic] one's name" (quoting RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD* 224 (1946)); see also Kazuo Miyake & Kosuke Yamazaki, *Self-Conscious Emotions, Child Rearing, and Child Psychopathology in Japanese Culture*, in *SELF-CONSCIOUS EMOTIONS*, *supra* note 4, at 488, 488-95 (discussing the place of shame, guilt, and embarrassment in Japanese culture).

18. See generally Antonella Bettoni, Fama, *Shame Punishments and the History of Justice in the Sixteenth and Seventeenth Centuries*, in *SHAME, BLAME AND CULPABILITY: CRIME AND VIOLENCE IN THE MODERN STATE* 32 (Judith Rowbotham, Marianna Muravyeva & David Nash eds., 2013) [hereinafter *SHAME, BLAME AND CULPABILITY*] (observing that shaming sentences were effective because of the centrality of community to everyday life, but that shaming became less workable when community foundations eroded).

19. Whitman, *supra* note 8, at 1055 (taking note of the "common knowledge . . . that public humiliation of a dramatic sort was featured in the law of Maoist China" and the newer, lesser-known sanctions that allow economic criminals to be "trucked around town wearing signs describing their offenses").

20. See generally Natalia Pushkareva, *Shaming Punishments of Women in Russia in the Nineteenth and Early Twentieth Centuries*, in *SHAME, BLAME AND CULPABILITY*, *supra* note 18, at 168 (describing the punishment for a woman convicted of adultery that consisted of her being stripped, severely beaten, and driven through crowded streets by an official with a whip).

21. Whitman, *supra* note 8, at 1056 (noting the media's attention to "humiliation rituals" in Islam generally, and Afghanistan specifically).

22. See Massaro, *supra* note 7, at 1912-15.

23. Among the options for those inflicting the punishment were the admonition, a public confession in which the wrongdoer sought forgiveness; the classic donning of the sign or scarlet (or any other color, for that matter) letter; branding or maiming; the bilbo, a shackled iron bar; and the pillory. *Id.* at 1912-14 (citing, in large part, ALICE MORSE EARLE, *CURIOUS PUNISHMENTS OF BYGONE DAYS* (1896)).

24. See Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1179-81, 1220-46 (1982) (using Massachusetts as an example of the larger transition to a preference for incarceration in American criminal jurisprudence).

behavior among offenders and the masses was replaced with the new hope of a workable prison system.<sup>25</sup>

### A. Clever Judges and the New Shaming Sentences

The pitfalls of overreliance on incarceration have become readily apparent in recent decades.<sup>26</sup> Taxpayer burden,<sup>27</sup> danger to inmates,<sup>28</sup> the tendency to make criminals even more dangerous,<sup>29</sup>

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25. See *id.* at 1191-92.

26. See, e.g., Massaro, *supra* note 7, at 1884-85 (citing the argument that there is a question as to “the effectiveness and humanity of prison” and pointing out that parole is equally troublesome because of society’s desire to punish and incapacitate criminals); Conyers, *supra* note 9, at 377-79 (speaking generally to the causes and problems of overincarceration); Saby Ghoshray, *America the Prison Nation: Melding Humanistic Jurisprudence with a Value-Centric Incarceration Model*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 313, 317 (2008) (arguing that overincarceration has led to a devaluation of human capital by eroding our values); see also Bruce Western & Christopher Wildeman, *Punishment, Inequality, and the Future of Mass Incarceration*, 57 U. KAN. L. REV. 851, 851-52 (2009) (asserting that imprisonment redraws lines of citizenship, which leads to inequality); Alfred Blumstein, *Incarceration Trends*, 7 U. CHI. L. SCH. ROUNDTABLE 95, 95-96 (2000) (noting the “phenomenal incarceration binge” in the United States beginning in the 1970s).

27. See, e.g., Barry C. Scheck, *Mandatory Madness*, CHAMPION, Jan./Feb. 2005, at 4, 10 (“Federal incarceration costs taxpayers . . . \$ 4 billion annually.”).

28. See, e.g., James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 433 (2003) (describing rape in prison); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,”* 92 J. CRIM. L. & CRIMINOLOGY 127, 127 (2001) (labeling rape as “a terror that is far too common for tens of thousands of inmates in American correctional institutions”); David M. Siegal, Note, *Rape in Prison and AIDS: A Challenge for the Eighth Amendment Framework of Wilson v. Seiter*, 44 STAN. L. REV. 1541, 1542 (1992) (“The combination of AIDS and rape within our prisons thus poses a dilemma: any man sent to prison confronts, from the first moment he is incarcerated, the Kafkaesque prospect of brutal attack by another inmate and infection with one of the world’s most deadly diseases.” (footnotes omitted)).

29. Todd R. Clear, *Backfire: When Incarceration Increases Crime*, in THE UNINTENDED CONSEQUENCES OF INCARCERATION 1, 12-14 (1996), available at <http://www.vera.org/sites/default/files/resources/downloads/uci.pdf> (discussing the indirect contributions of prison to an increase in crime through negative impacts on “families and children, neighborhood order, and social inequality”); Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049, 1108 (“[T]he pervasive utilization of incarceration [] may be causing more crime than it is preventing.”); Shuster, *supra* note 9, at 966 (“[The] prevalence of recidivism suggests that many criminals are more dangerous when they leave prison than when they enter.”).



and a disproportionate effect on minorities<sup>30</sup> have led many to question the centrality of imprisonment in the American criminal justice system.<sup>31</sup> Tough-on-crime campaigns and minimum-sentencing statutes have exacerbated these problems.<sup>32</sup> In response to the limitations of prison sentences, some judges are now handing down alternative sentences that seek to shame the offender.<sup>33</sup> Generally speaking, shaming sentences create “[c]onditions which label a defendant’s person or property [and] have a stigmatizing effect.”<sup>34</sup> These sentences can range from the benign to the bizarre.

For instance, one Cleveland man convicted of making threats to the police was punished by, in addition to ninety days in jail, having to hold a sign that apologized to the officers and read, “I . . . [was] being an idiot . . . and it will never happen again.”<sup>35</sup> The judge noted that “sometimes she ‘has to get creative to get through to people.’”<sup>36</sup> A few months earlier, the same judge sentenced a woman who drove on a sidewalk around a school bus to wear a similar “idiot” sign.<sup>37</sup>

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30. See, e.g., Conyers, *supra* note 9, at 379-83 (explaining causes of over-incarceration, especially the disparate impact on African-Americans); Jennifer M. Cox, *Frequent Arrests, Harsh Sentencing, and the Disproportionate Impact They Have on African Americans and Their Community*, 3 S. REGION BLACK L. STUDENTS ASS’N L.J. 17, 18 (2009) (illustrating inequality in the prison system by pointing out that blacks and Latinos are jailed at higher rates despite lower rates of drug use); Steve Rickman, *The Impact of the Prison System on the African Community*, 34 HOW. L.J. 524, 526 (1991) (“Our incarceration rate, especially looking at the incarceration rates of our minority population in the nation . . . is the highest in the world outside of South Africa . . . .”); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1274 (2004) (“The massive scale of black citizens behind bars is matched in its enormity by the rate of black imprisonment.”).

31. See *supra* text accompanying notes 26-30.

32. See Blumstein, *supra* note 26, at 95 (“It’s easy for a politician to show a scene of him slamming the prison cell door shut and thereby fixing the crime problem.”); Scheck, *supra* note 27, at 4 (calling mandatory minimum sentencing “an unfair, senseless and wasteful disgrace”).

33. See, e.g., text accompanying notes 35-47.

34. *People v. Meyer*, 680 N.E.2d 315, 320 (Ill. 1997).

35. Doyle Murphy, *Ohio Man Ordered to Carry ‘Idiot’ Sign After Threatening Cops*, N.Y. DAILY NEWS (Sept. 3, 2013, 1:50 PM), <http://www.nydailynews.com/news/national/truth-advertising-man-carries-idiot-sign-threats-article-1.1444524>.

36. Lindsay Jolivet, *Ohio Man Ordered to Wear “Idiot” Sign After Drunken 911 Call*, DAILY BUZZ, (Sept. 4, 2013), <https://ca.news.yahoo.com/blogs/daily-buzz/ohio-man-ordered-wear-idiot-sign-drunken-911-151143098.html> (quoting Judge Pinkey Carr).

37. See *id.*; Jordan Chittley, *Ohio Woman Wears “Idiot” Sign for Driving on Sidewalk to Pass School Bus*, DAILY BUZZ (Nov. 14, 2012),



One observer, whose daughter rode that same bus, stated, “[S]he needs to be humiliated like this.”<sup>38</sup>

Another Ohio man caught soliciting the services of a prostitute was forced to wear a chicken suit as his punishment.<sup>39</sup> The judge in charge of his sentencing also sentenced a woman to a night alone in the woods for abandoning dozens of kittens in winter.<sup>40</sup> The judge has stated that jail and fines do not always work and that his shaming sentences deter crime.<sup>41</sup> There is also an element of variability when shaming sentences are an option.<sup>42</sup>

Shaming is not limited to just minor crimes, though. A Houston man who killed another while driving under the influence was forced to wear a sign explaining the accident, at the scene of the accident, for a total of thirty-two hours.<sup>43</sup> Like the Cleveland man who threatened police officers,<sup>44</sup> this was in addition to a ninety-day prison sentence.<sup>45</sup> This led one of the victim’s friends to observe that the punishment was not nearly severe enough, considering the serious nature of the crime.<sup>46</sup> Even the judge expressed concerns over merely putting the defendant on “shock probation.”<sup>47</sup>

The idea of shaming as punishment has also been spotted in the financial world. In response to the “London Whale” incident in which J.P. Morgan lost over \$6 billion of investors’ money, the Securities and Exchange Commission, Commodity Futures Trading Commission, and Justice Department all sought apologies to consumers in addition to settlements.<sup>48</sup> This, however, is not

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<http://ca.news.yahoo.com/blogs/daily-buzz/ohio-woman-wears-idiot-sign-driving-sidewalk-pass-201218583.html>.

38. *Id.* (quoting Lisa Kelley).

39. Andrea Canning, *Commit a Crime, Do the Time—in a Chicken Suit*, ABC NEWS (Aug. 11, 2007), [http://abcnews.go.com/GMA/story?id=3467505&page=1#.UAh\\_YGgTvJx](http://abcnews.go.com/GMA/story?id=3467505&page=1#.UAh_YGgTvJx).

40. *Id.*

41. *Id.*

42. *See id.*

43. Olivia Katrandjian, *Drunk Driver Made to Wear Sign Saying He Killed a Man*, ABC NEWS (Apr. 22, 2012, 2:29 PM), <http://abcnews.go.com/blogs/headlines/2012/04/drunk-driver-made-to-wear-sign-saying-he-killed-a-man/>.

44. *See* Murphy, *supra* note 35 and accompanying text.

45. Katrandjian, *supra* note 43.

46. *Id.*

47. *Id.* (internal quotation marks omitted).

48. *See* Danielle Kurtzleben, *For J.P. Morgan, Sorry Could Be the Hardest Word*, U.S. NEWS & WORLD REP. (Oct. 21, 2013, 5:18 PM), <http://www.usnews.com/news/articles/2013/10/21/for-jp-morgan-sorry-could-be-the-hardest-word>.

something to which J.P. Morgan readily acquiesced.<sup>49</sup> The rationale behind J.P. Morgan's reluctance to apologize is that an apology can lead to dire financial repercussions later in time.<sup>50</sup> It is thought that the damage done to a company's reputation through forced apologies is analogous to shaming an individual, where the individual's reputation is harmed.<sup>51</sup>

## B. A Right Not to Be Embarrassed? Shaming Sentences and the U.S. Constitution

Shaming's renewed prevalence in criminal and civil, personal and corporate, and lesser and more severe contexts is apparent from just a handful of examples.<sup>52</sup> Also apparent is the rationale for these punishments.<sup>53</sup> What may be less obvious, though, are the constitutional questions that arise as a result of these peculiar sentences. However, several courts and many legal scholars have dealt with these issues.

One of the most cited of these cases<sup>54</sup> is *Goldschmitt v. State*.<sup>55</sup> In *Goldschmitt*, the appellant sought to overturn a condition of probation that required him to place a bumper sticker on his car that stated he was convicted of driving under the influence.<sup>56</sup> The court first dismissed the appellant's First Amendment argument,<sup>57</sup> noting that the bumper sticker served as a statement of fact, not ideology,

49. *See id.*

50. *See id.* (citing John Coffee, Adolf C. Berle Professor of Law at Columbia Law School).

51. *See Companies "Named and Shamed" for Bad Behavior* (NPR radio broadcast Mar. 7, 2010), available at <http://www.npr.org/templates/transcript/transcript.php?storyid=124357844>.

52. *See discussion supra* Section I.A.

53. *See discussion supra* Section I.A.

54. *See, e.g.,* Garvey, *supra* note 10, at 735 n.10; Massaro, *supra* note 7, at 1887 n.42; Ryan J. Huschka, Comment, *Sorry for the Jackass Sentence: A Critical Analysis of the Constitutionality of Contemporary Shaming Punishments*, 54 U. KAN. L. REV. 803, 816 (2006); Kelly, *supra* note 12, at 791; Barbara Clare Morton, Note, *Bringing Skeletons out of the Closet and into the Light—"Scarlet Letter" Sentencing Can Meet the Goals of Probation in Modern America Because It Deprives Offenders of Privacy*, 35 SUFFOLK U. L. REV. 97, 116 n.160 (2001); Persons, *supra* note 7, at 1568 n.236.

55. 490 So. 2d 123 (Fla. Dist. Ct. App. 1986) (per curiam).

56. *Id.* at 124.

57. The defendant's First Amendment argument was that he was being forced to broadcast an ideological message on his vehicle, which the U.S. Supreme Court ruled against in *Wooley v. Maynard*, 430 U.S. 705 (1977). *Goldschmitt*, 490 So. 2d at 125.

and that it served “as a form of penance and a warning to other potential wrongdoers.”<sup>58</sup> The court also brushed aside the appellant’s Eighth Amendment claim<sup>59</sup> by distinguishing between the “physical rigors of the pillory” and the mere affixation of a bumper sticker.<sup>60</sup> However, the court did leave open the possibility that certain degrees of humiliation might merit constitutional protection.<sup>61</sup>

Another state case out of California also dealt with the constitutionality of a shaming sentence.<sup>62</sup> In *People v. McDowell*, the appellant, convicted of stealing a woman’s purse,<sup>63</sup> argued that being forced to wear tap shoes whenever he left his house was cruel and unusual punishment.<sup>64</sup> The court dismissed this argument, taking note of the sentencing judge’s latitude in creating appropriate sentences.<sup>65</sup> Despite the finding of constitutionality, the court did remand,<sup>66</sup> reasoning that the condition of probation was too imprecise.<sup>67</sup>

More recently, the Ninth Circuit Court of Appeals addressed shaming and the Constitution in *United States v. Gementera*.<sup>68</sup> The trial court sentenced the defendant to wear a sign for one day outside the post office; the sign said, “I stole mail. This is my punishment.”<sup>69</sup> The sentencing court stated that the “experience should have a specific rehabilitative effect on defendant that could not be accomplished by other means, certainly not by a more

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58. See *Goldschmitt*, 490 So. 2d at 125.

59. The Eighth Amendment argument stated that being forced to apply the bumper sticker was sufficiently similar to pre-colonial shaming and that most would think that such a punishment would be cruel and unusual according to modern sensibilities. *Id.*

60. *Id.*

61. See *id.* at 126 (“[W]e are unable to state as a matter of law that Goldschmitt’s bumper sticker is sufficiently humiliating to trigger constitutional objections . . .”).

62. *People v. McDowell*, 130 Cal. Rptr. 839, 842-43 (Ct. App. 1976).

63. *Id.* at 841.

64. *Id.* at 842-43.

65. *Id.* at 843 (“Merely because a condition is out of the ordinary does not make it constitutionally unreasonable. One of the advantages of probation as an alternative to confinement is that its terms can be tailored by the court to fit the individual defendant.”).

66. *Id.* at 844.

67. *Id.* at 843 (noting that requiring the defendant to wear tap shoes at all times could keep him from safely participating in a number of athletic activities and that requiring him to wear the shoes only as he exits his home would be pointless).

68. 379 F.3d 596, 608-09 (9th Cir. 2004).

69. *Id.* at 598.

extended term of imprisonment.”<sup>70</sup> That court also pointed to both specific and general deterrence as reasons for the shaming sentence.<sup>71</sup> On appeal, the defendant challenged the constitutionality of the sentence solely on Eighth Amendment grounds.<sup>72</sup> Recognizing that the Eighth Amendment must keep pace with “evolving standards of decency,”<sup>73</sup> the court found that the sentence was not cruel and unusual.<sup>74</sup>

The Supreme Court has also had occasion to explore public shaming, though in a different and more limited context.<sup>75</sup> In *Smith v. Doe*, the Court looked at an Alaska statute that required some previously convicted sex offenders to register as sex offenders.<sup>76</sup> The respondents argued that this was a violation of the Ex Post Facto Clause<sup>77</sup> and that the result of the notification provision of the statute, which required publishing of the respondents’ information on the Internet, was analogous to pre-colonial public shaming.<sup>78</sup> However, the Court found that the statutory requirement was not sufficiently similar to pre-colonial sentences and that the requirement was not punitive in nature because it only required dissemination of information.<sup>79</sup> Because of this, the regulation was not a violation of the Ex Post Facto Clause.<sup>80</sup>

The handful of state and federal appellate courts that have examined public-shaming sentences or regulations have almost

70. *Id.* at 602 (internal quotation marks omitted).

71. *Id.*

72. *Id.* at 607. The amicus to the case, however, challenged the condition based on the First, Fifth, and Fourteenth Amendments as well. *Id.* Nevertheless, the court refused to consider those issues since the court generally “do[es] not consider on appeal an issue raised only by an amicus[.]” *id.* (quoting *Swan v. Peterson*, 6 F.3d 1373, 1383 (9th Cir. 1993)), and the defendant did not adopt the amicus’s arguments, *id.* at 608.

73. *Id.* at 608 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

74. *Id.* at 610 (emphasizing that this is especially the case when compared to the realities of prison).

75. *See generally* *Smith v. Doe*, 538 U.S. 84 (2003).

76. *Id.* at 90.

77. *Id.* at 91. An ex post facto law is one that applies retroactively. *See* BLACK’S LAW DICTIONARY 701 (10th ed. 2014).

78. *Smith*, 538 U.S. at 91, 97-98.

79. *Id.* at 98-99 (“[T]he State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.”).

80. *Id.* at 105-06. Interestingly, though, the Alaska Supreme Court ended up finding that the provisions violated the state’s ex post facto clause. *Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008) (reasoning that the effects of the statute are in fact punitive).

uniformly found them constitutional.<sup>81</sup> The arguments against the constitutionality of shaming sentences may be meritorious. However, there is a growing body of case law that rejects these arguments.<sup>82</sup>

C. Public Shaming: Constitutional? Probably. Good Policy?  
Debatable.

While public-shaming sentences almost certainly constitutional,<sup>83</sup> there are some who question whether public-shaming sentences are good policy even if not “cruel and unusual.”<sup>84</sup> Shaming’s merits already have been discussed to some extent,<sup>85</sup> but there are legitimate concerns about shaming’s potential drawbacks regarding the indifference for human dignity and the effect of shame on society’s notions of justice. Because the focus here is on the utility of shame—that is to say, the net benefit of shame to society—these policy considerations are certainly worth exploring.

1. *Debasing Dignity*

A primary concern of those opposed to shaming is the basic dignity of humans, which may be jeopardized by the exposition of a criminal’s transgressions.<sup>86</sup> In the words of one scholar, “The cruelty of shame sanctions, it might be said, . . . [is that] they violate the offender’s *dignity* in some objectionable way—that they run contrary to some deep norm requiring us to treat even criminals with

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81. In fact, the *Gementera* court stated that it was “aware of no case holding that contemporary shaming sanctions violate our Constitution’s prohibition against cruel and unusual punishment.” *United States v. Gementera*, 379 F.3d 596, 609 (9th Cir. 2004); see also *Whitman*, *supra* note 8, at 1057 n.15 (citing that the rule from *Paul v. Davis*, 424 U.S. 693 (1976), which does not recognize a liberty or property interest in reputation alone, may be an absolute bar to a finding of unconstitutionality for shame sanctions, and further pointing out that “most courts that have considered the issue have validated shame sanctions”).

82. See *supra* text accompanying notes 54-80.

83. This is not to say that *all* shaming sentences will *always* be constitutional; it is likely that the seventeenth-century brand of shaming would be “cruel and unusual” by today’s constitutional standards since the “[Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

84. U.S. CONST. amend. VIII.

85. See discussion *supra* Section I.A.

86. See, e.g., *Massaro*, *supra* note 7, at 1936-43.

respect.”<sup>87</sup> In more civilized societies, even criminals should be entitled not to be humiliated.<sup>88</sup>

Further, some would argue, “[O]ther things being equal, we should prefer punishments that do not entail stigma and loss of liberty to those that do.”<sup>89</sup> Since shaming is characterized by its “stigmatizing effect” on offenders,<sup>90</sup> it is less preferable to alternate sentences that would not have such an effect. While an affront to an individual’s dignity as a human may occur collaterally to any sort of punishment, including the more traditional method of incarceration, it is argued that this affront cannot be the primary objective of an enlightened government to shame the offender.<sup>91</sup>

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87. Whitman, *supra* note 8, at 1068-69.

88. AVISHAI MARGALIT, *THE DECENT SOCIETY* 262 (Naomi Goldblum trans., 1996) (“Every human being, even a criminal, is entitled to the respect granted to humans because they are human.”); Mark Spatz, Comment, *Shame’s Revival: An Unconstitutional Regression*, 4 U. PA. J. CONST. L. 827, 834 (2002) (citing MARGALIT, *supra*, at 262) (noting that all human beings should be respected in the society that strives to be decent).

89. Massaro, *supra* note 7, at 1936 (quoting HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 255 (1968)).

90. *People v. Meyer*, 680 N.E.2d 315, 320 (Ill. 1997).

91. See Whitman, *supra* note 8, at 1068-69 (citing the argument that deprivation of liberty and property are within the ambit of a liberal government’s powers, but deprivation of dignity is not). Interestingly, the European Court of Human Rights has alluded to this same point. See *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) at 13, 16 (1978). In *Tyrer*, a fifteen-year-old boy was hit with a stick on his bare buttocks by a police officer in private as punishment for assaulting a classmate. *Id.* at 3-4. The court applied Article 3 of the European Convention on Human Rights, *id.* at 17, which prohibits torture and inhuman or degrading punishment. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, *opened for signature* Apr. 11, 1950, E.T.S. No. 005. The court stated that treating the criminal “as an object in the power of the authorities” was in direct conflict with the purpose of Article 3, “namely a person’s dignity and physical integrity.” *Tyrer*, 26 Eur. Ct. H.R. (ser. A) at 13. Seemingly, the court could argue by extension that shaming sentences are equally degrading. This would appear to be significant to the United States since the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, has an analog to the European convention. International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171. If the European court’s rationale were applied to the U.N. Covenant, as is often the case, then it would be binding on the United States. However, the United States made a reservation when signing the ICCPR that Article 7 would be interpreted in accordance with the Fifth, Eighth, and Fourteenth Amendments of the Constitution. *Id.* at United States of America Reservation 3. Thus, even if the ICCPR were understood to mean that public-shaming sentences were a violation of Article 7, this would not bind the United States for the reasons stated above. See *supra* Section I.B.

2. “Are You Not Entertained?”<sup>92</sup>: The Impact of Shaming Sentences on Society

Furthermore, the barbarism of shame taken too far is something that even the nonlegal observer can grasp. A raucous crowd that is too enmeshed in the punishment of another is understandably not desirable to many.<sup>93</sup> Perhaps scenes of the arenas in the film *Gladiator*,<sup>94</sup> the torture scene at the end of *Braveheart*,<sup>95</sup> or even the racking of a Disney protagonist in *The Hunchback of Notre Dame*<sup>96</sup> come to mind.

While even those most critical of shame sanctions would probably not predict this drastic a return to a less enlightened time, it is arguable that punitive regression will inevitably lead to societal regression.<sup>97</sup> After all, if the abandonment of shaming as punishment was symptomatic of a larger trend towards social decency,<sup>98</sup> then it seems reasonable to assert that a revival of shame necessarily forebodes a revival of uncouth society. Additionally, shaming sentences made on the whims of a bored judge trying to make headlines would likely lead to an undesirable justice system.<sup>99</sup>

While these policy concerns are perfectly legitimate, it must be asked whether the currently preferred method of punishment—incarceration—respects individual dignity or positively reinforces societal decency any better than shaming sanctions.<sup>100</sup> Regarding

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92. *GLADIATOR* (DreamWorks SKG & Universal Pictures 2000).

93. Cf. Steven G. Calabresi & Bradley G. Silverman, *Hayek and the Citation of Foreign Law*, 2015 MICH. ST. L. REV. 99-103 (discussing “the [m]adness of [c]rowds”).

94. *GLADIATOR*, *supra* note 92.

95. *BRAVEHEART* (Icon Entertainment International 1995).

96. *THE HUNCHBACK OF NOTRE DAME* (Walt Disney Pictures 1996).

97. See generally, e.g., MARGALIT, *supra* note 88; Spatz, *supra* note 88; Whitman, *supra* note 8.

98. See WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* (Ginn & Co. 1940) (1906) (observing that public punishment and societal indecency were directly related); Whitman, *supra* note 8, at 1074-75 (citing SUMNER, *supra*).

99. *Some Judges Prefer Public Shaming to Prison* (NPR radio broadcast Aug. 24, 2013), available at <http://www.npr.org/2013/08/24/215097279/some-judges-prefer-public-shaming-to-prison> (citing arguments of Jonathan Turley, Professor at George Washington University Law School).

100. This obviously reduces the debate to an oversimplistic dichotomy between prison on one hand and shame on the other. The grander discussion for the way to best and most justly punish certainly needs to be more nuanced than this, but for the purposes of this Note, shame sanctions are most easily and usefully compared with incarceration.



individual dignity of the offender, reliance on incarceration seems the less favorable and humane option when one thinks of the prisoners as being “caged like animals.”<sup>101</sup> As to the society dynamic, it is highly questionable that sending individuals away to jail cells and forgetting about them makes for a better society than active, or at least passively cognizant, participation in the individuals’ punishments.<sup>102</sup> To address these concerns more productively, though, it is necessary to examine how society justifies punishing criminals.

## II. TRADITIONAL THEORIES OF PUNISHMENT

For practically any criminal sentence to be considered effective—or just—it needs to satisfy some traditional justification of punishment.<sup>103</sup> Broadly speaking, there are two classifications of punishment justification: retributivist and utilitarian.<sup>104</sup> Retributivism is a justification in itself, whereas there are several justifications under the utilitarianism umbrella.

### A. Retributivism

The theory of retributivism essentially states that a criminal is to be “punishe[d] because, and only because, [he] deserves it.”<sup>105</sup>

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101. Garvey, *supra* note 10, at 760 (internal quotation marks omitted).

102. Cf. Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan’s Laws*, 42 HARV. J. ON LEGIS. 355, 410 (2005) (suggesting that community meetings about sex offenders seeking to reintegrate in the neighborhood can maintain the offender’s level of shame while simultaneously encouraging a constructive environment that eases the transition). *But see* Massaro, *supra* note 7, at 1935-36 (arguing that American society lacks the mechanisms to reintegrate offenders effectively).

103. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 2.01 (6th ed. 2012) (“The criminal justice system . . . inflicts pain on persons . . . by taking their life, liberty, and/or property. Any system that intentionally causes such suffering requires a justification.”).

104. See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 3-34 (2001) (exploring the competing philosophies of utilitarians—though called “consequentialists” here—retributivists, and abolitionists; abolitionists represent a new class of theorists and are thus not classical or mainstream).

105. Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (Ferdinand Schoeman ed., 1987); DRESSLER, *supra* note 103, § 2.03(B)(1); DUFF, *supra* note 104, at 20-21; Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315 (2000).

Because retributivism is focused only on the nature and severity of the crime, punishment needs to be proportional to the offense committed.<sup>106</sup> The classic metonymy “[an] eye for [an] eye”<sup>107</sup> is often employed to explain retributivism.<sup>108</sup> In the modern American context, crime is “an offense against the state. . . . [T]he harm to be redressed is the injury to society,” and it is thus society that must be satisfied with the punishment.<sup>109</sup>

Under this theory, it is not necessarily a bad thing if there are broader repercussions as to deterrence, rehabilitation, or incapacitation, but those consequences are not to be taken into account when meting out the punishment.<sup>110</sup> Part of the appeal of retributivism is its relative simplicity in application since extraneous conditions, such as the net benefit or detriment to society, need not be considered.<sup>111</sup> Moreover, retributivism satisfies the almost instinctual understanding that bad people deserve proportionally bad things to happen to them.<sup>112</sup>

This is not to say that retributivism is an unrefined philosophy used only to appease the barbaric masses.<sup>113</sup> Retributivist advocates also point out that retributivism is the only “valid philosophical premise upon which a coherent, organized system of just punishment can be built” since it is the only one “concerned exclusively with

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106. See, e.g., Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 590-92 (2005) (discussing proportionality in retributivism and different theories on how proportionality is to be achieved).

107. *Exodus* 21:24.

108. See, e.g., *Baze v. Rees*, 553 U.S. 35, 80 n.14 (2008) (Stevens, J., concurring) (citing a study that showed that 37% of proponents for capital punishment gave the “eye for an eye” reason as the basis for their support); Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 125-26 (2010) (noting the common perception that this entails revenge on an offender).

109. Massaro, *supra* note 7, at 1891 (footnote omitted).

110. See Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 859-60 (2002) (noting that retributivism does not concern itself with positive repercussions in punishing individuals).

111. Although, it is debatable that contemporary criminal sentencing adequately reflects society’s interests. If the redress is to be determined by society, application can be rather difficult given society’s complexities.

112. DUFF, *supra* note 104, at 23-26 (discussing punitive emotions).

113. See Robert A. Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379, 397-98 (1979) (“[R]etribution is that theory of punishment that most consciously seeks to fashion a just societal response to adjudicated criminal wrongdoing.”).

doing justice.”<sup>114</sup> Thus, for instance, a prohibition on cruel and unusual punishment is necessarily retributivist since it does not look to the utility of these kinds of punishments.<sup>115</sup> That is, because this prohibition necessarily requires proportionality, the Eighth Amendment will invariably satisfy retributivist ends but not necessarily utilitarian ends. Consequently, there is less of a possibility that criminal sentences will be abused in the name of retributivism than in the name of utilitarian ends.<sup>116</sup>

To take recent Supreme Court jurisprudence as an example, retributivist principles have made life without parole an impermissible sentence for minors, regardless of the crime.<sup>117</sup> Because the Eighth Amendment requires “‘graduated and proportioned [punishments]’ to both the offender and the offense,”<sup>118</sup> the wrongdoer’s youthfulness needs to be taken into account when crafting a punishment.<sup>119</sup> On the other hand, utilitarian aims could justify life without parole, or even the death penalty, for minors.<sup>120</sup> Therefore, although retribution initially appears to be the least compassionate theory of punishment, in practice it can lead to more humane sentences.<sup>121</sup>

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114. *State v. Gardner*, 947 P.2d 630, 635 (Utah 1997) (quoting Pugsley, *supra* note 113, at 381); *see also* *Kennedy v. Louisiana*, 554 U.S. 407, 441-42 (2008) (deciding that “imposing the death penalty for child rape [when the child did not die as a result] would not further retributive purposes” since the punishment sought was more severe than the underlying crime).

115. *See Gardner*, 947 P.2d at 634-35 (addressing theories of punishment as applied to Utah’s analogue of the Eighth Amendment of the United States Constitution); *see also* *United States v. Angiulo*, 852 F. Supp. 54, 62 (D. Mass. 1994) (noting that, though facially vengeful, “‘an important element of retributivism is proportionality’” (quoting Molly Fairchild James, *The Sentencing of Elderly Criminals*, 29 AM. CRIM. L. REV. 1025, 1043 (1992))). *See generally* Pugsley, *supra* note 113 (arguing that only retributivism can justify criminal punishments).

116. *See, e.g.*, Pugsley, *supra* note 113, at 399-400 (noting that utilitarian theories treat the individual wrongdoer as an object to be manipulated for the gains of society).

117. *See Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

118. *Id.* at 2463 (quoting *Roper v. Simmons*, 543 U.S. 551, 560 (2005)).

119. *See id.* at 2475.

120. *See infra* Section II.B.

121. *See Pugsley, supra* note 113, at 403-04.

## B. Utilitarianism

Unlike retributivism, utilitarianism is focused on the overall effect of punishment on society.<sup>122</sup> Thus, if more net harm is done by a severe punishment that may be well deserved by retributivist standards, then a lesser punishment is ideal; conversely, a disproportionately severe punishment could also satisfy utilitarian concerns in some cases.<sup>123</sup> Theoretically, a purely utilitarian system of justice could allow murderers to go free and gum thieves to spend twenty years in jail.<sup>124</sup> The remainder of this Section will examine each utilitarian end in turn.

### 1. Rehabilitation

Rehabilitation, once a preferred theory of punishment, has largely fallen out of favor.<sup>125</sup> The idea behind rehabilitation is to reform the offender so that he will not offend in the same way again.<sup>126</sup> Although rehabilitation is similar to specific deterrence<sup>127</sup> in its ultimate aims, rehabilitation differs in its methods by focusing on reforming the offender rather than seeking to make offending outside her economic interests.<sup>128</sup> The appeal to this justification is its moral and humane aims in making bad people into better people.<sup>129</sup> It is problematic, however, because rehabilitation does not necessarily satisfy society's demands for justice and because "the practical

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122. See, e.g., DRESSLER, *supra* note 103, § 2.03(A)(1); DUFF, *supra* note 104, at 3-7; ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 2.4 (3d ed. 2004); Christopher, *supra* note 110, at 855-56.

123. However, Jeremy Bentham—the father of utilitarian theory—argued that the infliction of punishment is always a wrong, so it can be administered only when the good it does outweighs the evil. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 158 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 2005) (1970); see also Donald A. Dripps, *Rehabilitating Bentham's Theory of Excuses*, 42 *TEX. TECH L. REV.* 383, 388 (2009) (citing BENTHAM, *supra*).

124. See generally Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 *RUTGERS L.J.* 115 (2000).

125. See, e.g., Massaro, *supra* note 7, at 1894 ("Rehabilitation theory gained popularity in the United States during the late 1800s, and dominated penal philosophy during most of the 1900s."). See generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981).

126. CAMPBELL, *supra* note 122, § 2:4.

127. See *infra* Subsection II.B.3.

128. DRESSLER, *supra* note 103, § 2.03(A)(2).

129. CAMPBELL, *supra* note 122, § 2:4.

complexity, coupled with the extreme moral complexity, of refashioning human character to cabin or obliterate criminal instincts overwhelmed reformers.”<sup>130</sup>

In fact, Congress has explicitly legislated against the aims of rehabilitation when imposing prison sentences.<sup>131</sup> The U.S. Code provides “that imprisonment is not an appropriate means of promoting correction and rehabilitation.”<sup>132</sup> The Supreme Court reaffirmed this prohibition in *Tapia v. United States*<sup>133</sup> by finding that a sentencing court cannot impose or lengthen a prison term for the promotion of rehabilitation.<sup>134</sup> It must be kept in mind that neither Congress nor the Court has found rehabilitation to be a completely misguided aim for punishment;<sup>135</sup> in fact, Congress has rejected such an assertion outright.<sup>136</sup> However, because imprisonment has become the punishment of choice in America’s criminal justice system, rehabilitation is rendered a nullity in a large proportion of criminal cases, at least at the federal level.<sup>137</sup>

## 2. Incapacitation

The justification of incapacitation stems from the community’s desire to feel safe from dangerous individuals.<sup>138</sup> Normally this is achieved by physically restraining an individual,<sup>139</sup> but it may also be accomplished by otherwise preventing the offender from committing future crimes.<sup>140</sup> Like deterrence and rehabilitation, incapacitation seeks to prevent future crimes, but it focuses instead on the outward constraints placed on the individual, not her inward economic or

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130. See Massaro, *supra* note 7, at 1894.

131. See 18 U.S.C. § 3582(a) (2012); 28 U.S.C. § 994(k) (2012).

132. 18 U.S.C. § 3582(a).

133. 131 S. Ct. 2382 (2011).

134. *Id.* at 2391.

135. See *id.* (citing S. REP. NO. 98-225, at 76-77 (1983)).

136. *Id.* (citing S. REP. NO. 98-225, at 76-77).

137. See *supra* notes 24-32 and accompanying text.

138. See, e.g., Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L.J. 536, 541-43 (2006).

139. E.g., FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 3 (1995).

140. The oft-cited, though rare, example of this is the chemical castration of sexual predators. See, e.g., John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 U. ST. THOMAS L.J. 559, 561 (2006). Another common example is the electronic tether worn by an individual on house arrest.

moral calculations.<sup>141</sup> This theory is unsatisfying to some, though, as it could justify not punishing someone if he does not pose a future risk to society.<sup>142</sup>

The converse is also true; one curious phenomenon that has resulted, in part, from the demand of incapacitation as a justification for punishment is the appearance of “three-strikes” laws,<sup>143</sup> most notably in California.<sup>144</sup> These laws are fairly self-explanatory: If an individual commits a felony, having already been convicted of two felonies, he must receive what might otherwise be an overly harsh prison sentence.<sup>145</sup> A rather extreme application of California’s three-strikes law made its way to the United States Supreme Court in *Ewing v. California*.<sup>146</sup> In *Ewing*, the defendant received twenty-five years to life in prison for stealing three golf clubs priced at a total of \$1,197.<sup>147</sup> The Court affirmed the conviction by deferring to the state’s police power and holding that the punishment was “not grossly disproportionate,” thus not violating the Constitution.<sup>148</sup> The theory of incapacitation as a justification for criminal punishment, while understandable for the social benefit of peace of mind, can thus lead to sentences incongruous with a system of punishment that seeks to achieve just results.

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141. See *supra* notes 126-30 and accompanying text; *infra* notes 149-53, 160-62 and accompanying text.

142. DUFF, *supra* note 104, at 5 (noting that incapacitation is useless to the consequentialist if it does not reduce the overall rate of crime).

143. See generally Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103 (1998).

144. CAL. PENAL CODE § 667 (West 2012).

145. See, e.g., *id.* (mandating whichever is greater between a treble long sentence and twenty-five years for any third felony committed after two violent or serious felonies); N.J. STAT. ANN. § 2C:43-7.1(a) (West 2003) (mandating life without parole for certain violent felonies); VA. CODE ANN. § 19.2-297.1 (2014) (mandating life without parole for certain violent felonies); WASH. REV. CODE. §§ 9.94A.030, 9.94A.570 (2012) (requiring life without parole for “persistent offender[s]” who commit a “most serious offense”).

146. 538 U.S. 11 (2003).

147. *Id.* at 17-18, 20.

148. *Id.* at 30-31.

### 3. *Specific Deterrence*

Specific deterrence theory seeks to prevent repeat offenses.<sup>149</sup> The idea is that the punishment is designed to the extent that it will prevent a criminal from committing other offenses in the future by showing the severity of the consequences.<sup>150</sup> This justification is rooted in the liberal tradition that assumes rational, cost-weighting actors will see that crime does not pay and consequently will not commit subsequent crimes.<sup>151</sup> Few would argue that the prevention of crime is an unworthy goal; however, this theory's opponents are quick to point out the difficulty in preventing crimes that have yet to occur.<sup>152</sup> There is also the unfortunate reality that not all individuals are rational, or alternatively, that there is no potential punishment that can outweigh a given individual's interest in committing a given crime.<sup>153</sup>

The New Jersey case of *State v. O'Neill*<sup>154</sup> nicely illustrates how specific deterrence can work in practice. In this case, an individual who had a history of abusing alcohol was convicted of "vehicular homicide while intoxicated within 1,000 feet of school property."<sup>155</sup> The trial judge also tacked on an additional year in jail to the recommended sentence, citing both general and specific deterrence.<sup>156</sup> The appellate court initially remanded the conviction for the trial judge to consider whether specific deterrence alone could justify the additional year.<sup>157</sup> Because the trial judge found that the defendant had abused alcohol and driven drunk in the past, the judge

149. See, e.g., Kent Greenawalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1286-87 (Joshua Dressler ed., 2d ed. 2002), as reprinted in JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 35 (6th ed. 2012).

150. E.g., DUFF, *supra* note 104, at 4-5.

151. Massaro, *supra* note 7, at 1896 (pointing out that the assumption that criminals are rational actors pursuing utility may be misguided).

152. E.g., Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1517-18 (1974).

153. Pugsley, *supra* note 113, at 392 (noting that critics of deterrence theory have pointed out that Bentham's "rationalistic calculus of pleasure and pain . . . [is] for many types of crimes and criminals . . . at best, irrelevant, and, at worst, a dangerous myth").

154. No. 00-12-00383-I, 2006 WL 1413440 (N.J. Super. Ct. App. Div. May 24, 2006).

155. *Id.* at \*1.

156. *Id.*

157. *Id.*



found specific deterrence as both necessary and sufficient for the elevated term of imprisonment.<sup>158</sup> Essentially, because the defendant had shown that alcohol abuse was in his individual interest, a more severe punishment was required to deter him specifically than would be necessary to deter others.<sup>159</sup>

#### 4. *General Deterrence*

In contrast, general deterrence theory seeks to prevent similar offenses from being committed by members of society other than the criminal.<sup>160</sup> Like specific deterrence, there is an assumption inherent in this justification that members of society are rational actors seeking to maximize their interests; by observing the woes of a particular offender, other community members are less likely to commit that offender's same crime.<sup>161</sup> Also like specific deterrence, general deterrence is an unpredictable justification for punishment, practically speaking.<sup>162</sup>

Perhaps where punishments based on general deterrence are most effective is in the context of white-collar crimes.<sup>163</sup> This is generally because of the unique nature of white-collar crimes, which do not require incapacitation for security purposes or specific deterrence for future acts, and because retributivist principles are a bit trickier to apply when the harm is purely economic.<sup>164</sup> In *United States v. Turner*, for instance, the defendant used rubber stamps with doctors' signatures to falsify test results for his "cardiovascular testing operations."<sup>165</sup> The trial court stated that general deterrence was the most suitable justification for his eighteen-month prison sentence, and the Sixth Circuit affirmed, despite the defendant's

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158. *Id.*

159. *See id.*

160. CAMPBELL, *supra* note 122, § 2:2.

161. *Id.*

162. Schulhofer, *supra* note 152, at 1517-18.

163. *See, e.g.,* *United States v. Prospero*, 686 F.3d 32, 47 (1st Cir. 2012); *United States v. Edwards*, 595 F.3d 1004, 1011 (9th Cir. 2010); *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006).

164. *See* *United States v. Turner*, 173 F. App'x 402, 404 (6th Cir. 2006) (citing the lower court's reasoning that "none of the community protection, specific deterrence, or retribution justifications for punishment apply in this case," and that "prison sentences are especially important for deterring white-collar crime").

165. *Id.* at 403-04.

protestations that general deterrence was an invalid end in criminal sentences according to the U.S. Sentencing Guidelines.<sup>166</sup>

### III. THE PSYCHOLOGY OF SHAME

When exploiting an individual's emotions to inflict punishment, it is presumably best practice to try to understand the psychology behind the emotion.<sup>167</sup> If the psychology of shame is not properly understood, then it would be difficult to craft suitable shaming sentences on a routine basis.<sup>168</sup> Thus, it is unlikely that absent an understanding of shame's psychology, any of the theories of punishment can be consistently satisfied through shaming sentences. This Part will accordingly examine the psychological effects of shame on an individual.

#### A. The Lessening of the Self

One of the primary characteristics of the emotion of shame is that it causes the individual to think less of herself.<sup>169</sup> Thus, she would think, "I did this bad thing; therefore, I am bad."<sup>170</sup> The individual also feels a sense of being exposed to the judgment of others.<sup>171</sup> This "highly negative and painful state . . . results in the disruption of ongoing behavior, confusion of thought, and inability to

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166. *Id.* at 407-08.

167. *E.g.*, Nathan Harris, *Shaming and Shame: Regulating Drink-Driving, in SHAME MANAGEMENT THROUGH REINTEGRATION* 73, 75 (Alfred Blumstein & David Farrington eds., 2001) ("The failure to find research on shame that presents a consistent answer to questions about its role in reintegrative shaming . . . suggests that understanding shame is also an important psychological question.").

168. *See id.*

169. Harald G. Wallbott & Klaus R. Scherer, *Cultural Determinants in Experiencing Shame and Guilt, in SELF-CONSCIOUS EMOTIONS, supra* note 4, at 465, 466-67.

170. June Price Tangney, *Shame and Guilt in Interpersonal Relationships, in SELF-CONSCIOUS EMOTIONS, supra* note 4, at 114, 115-17 (citing HELEN BLOCK LEWIS, *SHAME AND GUILT IN NEUROSIS* (1971)).

171. GÜNTER HARRY SEIDLER, *IN OTHERS' EYES: AN ANALYSIS OF SHAME* 37 (Andrew Jenkins trans., 2000) (noting that many writers on the subject have found that "the situation of being judged [i]s an intrinsic feature of the shame affect").

speak.<sup>172</sup> Such results can then in turn cause the individual to feel an even greater sense of shame.<sup>173</sup>

Moreover, this sense of diminished self-worth tends to last with an individual.<sup>174</sup> However, while the emotion of shame may seem to encompass the entire self, at least for a short time, it is actually only linked with the thing that made the individual feel shamed in the first place.<sup>175</sup> Thus, the fourteen-year-old boy whose voice cracks in front of the entire class may still feel some embarrassment as a twenty-year-old man recalling the experience; however, he will not feel less self-worth as a man, though he likely did as a boy. The same goes if, instead of the boy's voice cracking, his teacher ridiculed him in front of the entire class; he is likely to recall the incident with humiliation, but probably will not feel like a worse person because of the recollection.

While the exact process by which the feeling of shame comes to last with an individual is complex, it is a fairly straightforward concept.<sup>176</sup> The scene in which the individual experiences his shame—the “encompassing visual, auditory, and kinesthetic dimensions”—is internalized.<sup>177</sup> That imagery is then imprinted with the sense of shame that accompanied the situation.<sup>178</sup> It is as though the self attaches its own “scarlet letter” to the memory. Once this happens, “the self is now entirely capable of reproducing shame.”<sup>179</sup> Additionally, shame is magnified and made more intense over time.<sup>180</sup>

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172. Michael Lewis, *Embarrassment: The Emotion of Self-Exposure and Evaluation*, in SELF-CONSCIOUS EMOTIONS, *supra* note 4, at 198, 210.

173. Velleman, *supra* note 5, at 58 (“Having blushed can . . . be an occasion for blushing again.”).

174. Jack Katz, *The Elements of Shame*, in THE WIDENING SCOPE OF SHAME 231, 235 (Melvin R. Lansky & Andrew P. Morrison eds., 1997) (“As long as it persists, shame carries the sense that an undeniable truth about the self is revealed. The matters that one is ashamed about are acknowledged as fundamental to one’s character.”).

175. JULIEN A. DEONNA, RAFFAELE RODOGNO & FABRICE TERONI, IN DEFENSE OF SHAME: THE FACES OF AN EMOTION 104-07 (2012) (arguing that shame is “[s]evere but not all-encompassing”).

176. GERSHEN KAUFMAN, THE PSYCHOLOGY OF SHAME: THEORY AND TREATMENT OF SHAME-BASED SYNDROMES 57 (2d ed. 1996).

177. *Id.*

178. *Id.*

179. *Id.* at 55.

180. *Id.* From Doctor Kaufman’s perspective, the increased intensity of shame, coupled with the spreading of shame through the self, is analogous to a

It is also worth noting that shame differs from guilt because guilt causes the wrongdoer to focus more on the action itself and not on his worth as a human.<sup>181</sup> This translates to the individual thinking, “I did this bad thing; therefore, I committed a wrongful act for which I must atone.”<sup>182</sup> Because the foci with shame and guilt are different, the actions caused by the emotions also differ; whereas guilt tends to motivate an individual to try and make amends, shame has the unpredictable tendency to make the individual either shrink away or lash out.<sup>183</sup> However, while the shame–guilt dichotomy is significant for psychological purposes, it is probably not all that significant for legal purposes.<sup>184</sup> Either emotion can likely be elicited by what are more generally known as “shame” sentences.<sup>185</sup>

### B. A “Hot” Emotion

The next characteristic implicit in shame is one that likely any person knows intuitively: It is an intense, “hot” emotion.<sup>186</sup> Chances are, the reader can remember in greater detail the exact circumstances and feelings associated with any number of embarrassing moments than, say, the single best meal she has ever had.<sup>187</sup> The feeling is almost inextricably tied to the event.<sup>188</sup> This led Keats to observe, “The most unhappy hours in our lives are those in which we recollect times past to our own blushing. If we are immortal, that must be the Hell. If I must be immortal, I hope . . . to forget some of my school-boy days, and others since those.”<sup>189</sup> It is

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malignant cancer. *Id.* at 55-56. It is thus rather unlikely that he would agree that American society should utilize shame to punish criminals.

181. Barrett, *supra* note 4, at 26-28.

182. See Tangney, *supra* note 170, at 117.

183. *Id.* at 117-18.

184. *Contra* Garvey, *supra* note 10, at 765-66 (suggesting that if there really is a difference between the emotions, then we should aim to elicit the emotion of guilt).

185. See Jennifer Dotson, Self-in-Relation, Shame-in-Relation: Working with Shame as a Relational Construct 35 (2009) (unpublished manuscript) (citing the work of Helen Black Lewis who suggests that “shame and guilt are both different modes of effecting reparation in relationships”). Concededly, though, shame is a more acute emotion than guilt. Wallbott & Scherer, *supra* note 169, at 476.

186. Wallbott & Scherer, *supra* note 169, at 473.

187. Interview with Adam Candeub, Professor of Law, Mich. State Univ. Coll. of Law, in East Lansing, Mich. (Sept. 11, 2013).

188. *Id.*; see also *supra* Section III.A.

189. Letter from John Keats to John Hamilton Reynolds (Apr. 27, 1818), in THE LIFE AND LETTERS OF JOHN KEATS 110, 110 (Lord Houghton ed., 1867).

no surprise that most shame or embarrassment stories are highly context- and circumstance-specific.<sup>190</sup>

The heat of shame is not merely hot as an emotional phenomenon, but it manifests itself physically as well.<sup>191</sup> In addition to a literal increase in temperature, an individual's verbal communicability is impaired as a result of shame.<sup>192</sup> Avoidance of eye contact also accompanies the emotion, and efforts to suppress the urge to break eye contact, or even not to blush, can result in experiencing even greater shame.<sup>193</sup> Because so much of the internalization of shame is dependent on imagery,<sup>194</sup> the physical manifestations of the emotion of shame may contribute to the intensity of the memory of the circumstances.<sup>195</sup>

### C. Shame as Shaped and Limited by Culture

*On his face there was not a blush nor a trace of shame. He was too far from the social state, and too near the state of nature, to know what shame was.*<sup>196</sup>

While shame is perhaps a nearly universal emotion,<sup>197</sup> it is not experienced in universally the same way or to the same extent.<sup>198</sup>

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190. White, *supra* note 4, at 41 (citing Dorothy Holland & Andrew Kipnis, *American Cultural Models of Embarrassment: The Not-So Egocentric Self Laid Bare*, in EVERYDAY CONCEPTIONS OF EMOTION: AN INTRODUCTION TO THE PSYCHOLOGY, ANTHROPOLOGY AND LINGUISTICS OF EMOTION 181, 194 (James A. Russell et al. eds., 1995)).

191. Again, likely any reader can identify with the actual, physical blushing that is attendant to shame, as well as its intensity.

192. SEIDLER, *supra* note 171, at 29.

193. *Id.* at 44.

194. *See supra* notes 177-78 and accompanying text.

195. *See supra* notes 179-80 and accompanying text.

196. VICTOR HUGO, *THE HUNCHBACK OF NOTRE-DAME* 194-95 (Wordsworth Eds. Ltd., 1993) (1831) (describing the hunchback, Quasimodo, as he was being subjected to corporal punishment before a large crowd).

197. *See* White, *supra* note 4, at 41 (noting that “for Americans as for many non-Western peoples, embarrassment has a prototypically social-relational meaning” and that “shame-like emotions are ubiquitous in emotion lexicons and ideologies around the world”); *see also* KAUFMAN, *supra* note 176, at 29 (“The experience of shame is inevitable for any human being . . . .”) (quoting 2 SILVAN S. TOMKINS, *AFFECT, IMAGERY, CONSCIOUSNESS: THE NEGATIVE AFFECTS* 185 (1963))).

198. *See, e.g.*, Wallbott & Scherer, *supra* note 169, at 465-83 (discussing the differences of causes and experiences of shame in different cultures). *But see* Richard A. Shweder, *Toward a Deep Cultural Psychology of Shame*, 70 *SOC. RES.* 1109, 1109 (2003) (“When it comes to the meaning of the emotions, ‘shame’ is

This is because culture plays a large part in determining what is shameful and how intensely one should feel shame.<sup>199</sup> Culture and socialization are important to the development of shame because they give standards and norms significance.<sup>200</sup> For instance, as one might expect, the average American twenty-something is unlikely to feel shame for the same reasons or to the same extent as the average Japanese twenty-something.<sup>201</sup>

Nevertheless, even though shame is shaped by culture, shame is not necessarily created by culture. Indeed, the manifestations of shame are first seen in even the youngest babies,<sup>202</sup> and a toddler can fully experience shame.<sup>203</sup> Some argue that it is in fact “a necessary part of human life.”<sup>204</sup> Accordingly, shame is a “master emotion” because of its bearing on the individual’s conscience, tendency to communicate problems in one’s relationships, and “role in regulating [one’s] expression.”<sup>205</sup>

Furthermore, it can be argued that even if shame were a purely cultural phenomenon, “American society is a shame-based culture.”<sup>206</sup> In fact, contrary to the arguments of many,<sup>207</sup> shame may be even more potent in American society.<sup>208</sup> This is because shame is hidden, and thus taboo, in American culture.<sup>209</sup> It is the taboo that makes Americans act as though shame does not exist, not an absence

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‘shame,’ whether it is experienced on the East Coast of India or on the Upper West Side of Manhattan, by a man or by a woman . . .”).

199. Shweder, *supra* note 198, at 1109.

200. Barrett, *supra* note 4, at 40-41.

201. See Wallbott & Scherer, *supra* note 169, at 481-83.

202. PENTTI IKONEN & EERO RECHARDT, *THANATOS, SHAME, AND OTHER ESSAYS: ON THE PSYCHOLOGY OF DESTRUCTIVENESS* 111 (2010).

203. *E.g.*, Dotson, *supra* note 185, at 69.

204. *Id.* at 35 (citing Helen Black Lewis’s body of work).

205. Thomas J. Scheff & Suzanne M. Retzinger, *Shame as the Master Emotion of Everyday Life* 4-5 (July 10, 2000) (unpublished manuscript), available at [https://www.academia.edu/476112/Shame\\_as\\_the\\_master\\_emotion\\_of\\_everyday\\_life](https://www.academia.edu/476112/Shame_as_the_master_emotion_of_everyday_life).

206. KAUFMAN, *supra* note 176, at 46.

207. See, e.g., Massaro, *supra* note 7, at 1921-28 (suggesting that American society does not have the foundations for an effective public-shaming regime); Wallbott & Scherer, *supra* note 169, at 481-82.

208. See KAUFMAN, *supra* note 176, at 46.

209. *Id.*; see also Thomas Scheff, *Shame as the Master Emotion in Modern Societies* 1 (May 1, 2012) (unpublished manuscript), available at <http://www.soc.ucsb.edu/faculty/scheff/ubiq> (citing GERSHEN KAUFMAN, *THE PSYCHOLOGY OF SHAME: THEORY AND TREATMENT OF SHAME-BASED SYNDROMES* 47 (1st ed. 1989)).

or lack of shame in the culture.<sup>210</sup> Therefore, because shame is a cultural taboo, there is shame in feeling shame; the initial shame is compounded by the secondary shame that is felt for having felt shame in the first place.<sup>211</sup> Thus, the difference between America as a guilt society and Japan as a shame society is misleading, as they are both shame-based societies. The difference between America as a shame society and Japan as a shame society is that the Japanese overtly organize around shame, whereas Americans try to sweep it under the rug.<sup>212</sup>

#### D. Shame and Morality

Although “shame feels bad to the person experiencing it,” this does not keep shame from having a positive moral impact.<sup>213</sup> Rather, the pain of experiencing shame “highlight[s] the importance of meeting standards.”<sup>214</sup> One line of thought is that shame only plays, or ought to play, a role in the societal standards that are moral in nature.<sup>215</sup> Others think that shame is heteronomous, meaning that it is merely the disapproval of others that causes the emotion, not the disapproval as it relates specifically to moral standards.<sup>216</sup> Even if shame is a heteronomous emotion, some would argue that this is in fact a good thing, since moral standards are a construct of the community.<sup>217</sup>

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210. KAUFMAN, *supra* note 176, at 46; *see also* Thomas J. Scheff, *Shame in Self and Society*, 26 *SYMBOLIC INTERACTION* 239, 240-41 (2003).

211. KAUFMAN, *supra* note 176, at 46.

212. *Id.* Professor Scheff captures this quite nicely by citing four studies on shame, two of them empirical. Scheff, *supra* note 209, at 1. He concludes that “shame or its anticipation is virtually ubiquitous, yet usually invisible in modern societies.” *Id.* at 10; *see also* Heidi L. Maibom, *The Descent of Shame*, 80 *PHIL. & PHENOMENOLOGICAL RES.* 566, 566-67 (2010) (noting that despite Western cultures being considered “guilt culture[s],” “shame [still] plays an important role in how Westerners evaluate the moral standing of themselves and their actions”).

213. Jennifer C. Manion, *The Moral Relevance of Shame*, 39 *AM. PHIL. Q.* 73, 73 (2002).

214. Barrett, *supra* note 4, at 41.

215. Maibom, *supra* note 212, at 566-67.

216. *Id.* at 567.

217. *See* Cheshire Calhoun, *An Apology for Moral Shame*, 12 *J. POL. PHIL.* 127, 138-46 (2004).



Experience would tend to suggest that shame is not an inherently moral emotion.<sup>218</sup> For instance, the boy whose voice cracked in front of the class will likely feel the “hot,” prolonged lessening of the self that shame entails, even though one’s transition into adulthood is clearly an amoral experience. Further, shame may accompany experiences over which an individual has no control.<sup>219</sup> While the adolescent could have not spoken in front of the class, he had no control over his cracking voice once he did talk. Thus, shame is not a moral emotion *per se*, though it certainly can be utilized as such.

Shame is a complex emotion that is still not fully understood.<sup>220</sup> However, one thing that can be distilled from the many intricacies of the emotion is that shame is a central feature of the human experience. The nuances of the emotion complement its centrality to make shame an effective mechanism for altering behavior.<sup>221</sup> This makes shame an effective instrument in the context of criminal sentencing.

#### IV. THE UTILITY OF SHAME

Shaming sentences are both effective punishments and good policy. Assuming that public-shaming sentences are generally constitutional,<sup>222</sup> they work because shame is effective in altering the behavior of individuals. Because of this, shaming sentences adequately satisfy the traditional theories of punishment and do so far better than the more common alternative: prison.<sup>223</sup>

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218. See Manion, *supra* note 213, at 74 (“Placing shame centrally in the moral sphere may reflect some philosophical confusion about this complex affective response . . .”).

219. *Id.*

220. See *supra* Part III.

221. See *infra* Section IV.A.

222. See *supra* Section I.B.

223. It should be mentioned that this Note does not seek to demonstrate what shaming punishments should look like in practice; indeed, to do so would run counter to the assertion that shaming sentences can and should be individualized punishments. Instead, this Note seeks to show why shaming sentences can have utility in certain, but not all, situations.

## A. Why Shaming Works

Shame is effective in altering behavior because it is a “master emotion.”<sup>224</sup> It was, according to the Genesis myth, the first negative emotion felt in a fallen world.<sup>225</sup> Perhaps no other feeling could motivate behavior the way that shame does. In the context of criminal justice, no one would take seriously a sentence that sought merely to elicit the wrongdoer’s emotion of anger, say, by insulting his mother. Yet sentences that seek to elicit shame or guilt are gaining steam because of the nearly universal recognition that they at least might work.

### 1. *Intensity*

The first reason that these sentences work is because of shame’s intensity.<sup>226</sup> The focus of shame on the self is acute and painful, which immediately causes the individual to seek refuge from the stares of others.<sup>227</sup> The all-too-familiar sense of wishing to be anywhere but within the judging gaze of one’s peers is the effect sought by public-shaming sentences.<sup>228</sup> Although it is true that there are some for whom shaming is not a viable option,<sup>229</sup> “the number of such completely disaffected and therefore shameless people is probably smaller than [we] . . . think.”<sup>230</sup> Furthermore, the act of shaming forces the emotion of shame onto even those who would not normally feel it.<sup>231</sup> Thus, for the majority of the population, shaming is likely to elicit a strong emotional response.

It could be argued, though, that the intensity of shame, coupled with the tendency of the shamed individual to either lash out or withdraw from society,<sup>232</sup> would actually be counterproductive. Reasonably, one who lashes out is likely to engage in behavior that while not necessarily criminal, could potentially lead to further criminal behavior. Likewise, one who withdraws and broods over her

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224. Scheff & Retzinger, *supra* note 205, at 4.

225. *See Genesis* 2:25.

226. *See supra* discussion Section III.B.

227. Lewis, *supra* note 172, at 210; Tangney, *supra* note 170, at 117-18.

228. *E.g.*, Garvey, *supra* note 10, at 737.

229. Such as sociopaths or those most alienated from society.

230. Garvey, *supra* note 10, at 753.

231. Velleman, *supra* note 5, at 64-65.

232. *See Tangney, supra* note 170, at 117.

shaming could be ostracized from society; this is unlikely to decrease her criminal inclinations.

However, it is more likely that the intensity of shame will tide future criminal behavior, even if shame is accompanied with the initial desire to lash out or shrink away. According to Jeremy Bentham, “Pain and pleasure are the great springs of human action.”<sup>233</sup> More simply, people will do what gives them pleasure and avoid what brings them pain. Thus, because shame is such an intense and painful emotion for most, it is one that most individuals will seek to avoid. Presumably, this desire will outweigh the immediate desire to lash out at or withdraw from society.

## 2. *Ease of Recollection*

Moreover, the feeling of shame is easily recalled, and it is inexorably tied to the situation that caused it.<sup>234</sup> Thus, the prostitute solicitor forced to wear a chicken suit<sup>235</sup> is likely to relive the sharp, painful feelings he experienced each time he recalls his punishment. One could make the argument that because the recollection of shame is dependent on the circumstances in which it was initially felt,<sup>236</sup> the feeling of shame would be attached only to the punishment, not the crime. Certainly shaming sentences are of little use if the powerful emotion of shame is not in any way cognitively connected with the underlying offense in the mind of the offender.

However, it only takes one logical inference from the convicted to associate the punishment—and its attendant shame—with the crime.<sup>237</sup> In other words, the negative emotions of shame and guilt are attached to the underlying crime vicariously through the punishment of the crime. This strength of psychological association is probably lost when the offender has weeks or months to spend in

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233. JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 19 (1830).

234. Interview with Adam Candeub, *supra* note 187.

235. *See supra* note 39 and accompanying text.

236. KAUFMAN, *supra* note 176, at 57.

237. While developed cognitive abilities are not necessary to experience shame, they do aid in how and when it is experienced. Barrett, *supra* note 4, at 49. Thus, the adult with near-average intelligence experiences shame, aided by his or her developed cognitions, in a way that makes it more likely that the feeling is tied to the event. *See id.* at 26, 29-50. Assuming this is the case, a logical extrapolation is that the same developed cognitions aid in the association between the crime and the punishment.

jail and experience an array of thoughts and emotions, most of which will not be as acutely painful as shame.<sup>238</sup>

### 3. *Individualization*

Partly because of the proximate association between the emotion of shame and the punishment, and between the punishment and the underlying crime, shaming sentences can be—and perhaps must be—more neatly tailored to the individual than a mandatory-minimum statute.<sup>239</sup> For instance, requiring a gang member to merely advertise his aggravated assault could have the adverse effect of rewarding the individual and his affiliates with “street cred.” Requiring him to advertise his crime while wearing a hand-knit kitten sweater, though, would be particularly shameful for one so immersed in a culture of machismo.<sup>240</sup>

However, one of the more compelling arguments against shaming sentences is in response to precisely this possibility. The latitude judges have in crafting these sentences could lead to judicial abuse of power.<sup>241</sup> This could lead to a farcical, if not dangerous, justice system in which perpetrators of relatively minor crimes are subjected to the harassment of the masses simply because the judge felt bored on a given day. As an extension, it would be even more worrisome if shaming were to become the norm for the punishment of minor crimes. Nevertheless, while these concerns are facially legitimate, there is no indication that the judges who have imposed shame sanctions have so far abused their discretion in doing so.<sup>242</sup> Further, there has not yet been any indication that shaming sentences have had any adverse effects other than the ones they are designed to have as punishment for a crime.<sup>243</sup>

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238. See *supra* Sections III.A-B.

239. But see Massaro, *supra* note 7, at 1941-42 (noting that at the time of writing, this sort of individualization of shaming sentences was not occurring).

240. However, in enforcing a shame sanction, the judge should take the individual’s safety into account; a gang member given too “feminine” a punishment could be subject to violence from members of his own or rival gangs.

241. See, e.g., Massaro, *supra* note 7, at 1920 (“To allow government officials to search for and manipulate this vulnerable core [of an individual] is worrisome, to say the least.”).

242. Whitman, *supra* note 8, at 1057 n.15 (noting the fact that the appellate courts that have had occasion to review shame sanctions have almost uniformly upheld them).

243. This is not to say that there have been no adverse effects, but only that there is no indication of any beyond the conclusory argument that shaming sentences

Another argument against shame-as-punishment is that, even with the power that judges have in tailoring the sentences, a judge is not qualified to do so.<sup>244</sup> An individual's innumerable intricacies can affect how well a sentence will work, if at all.<sup>245</sup> This argument has little merit, though. Certainly a judge must hand down some kind of sentence to an offending individual. Even a half-hearted shaming sentence that takes into account one or two traits of an individual is more tailored to that individual than a blanket ninety-day jail sentence, for instance.<sup>246</sup> Indeed, the judge responsible for forcing the johns to wear chicken suits<sup>247</sup> and the animal abuser to sleep in the woods<sup>248</sup> cited his ability to craft a box-of-chocolates type of sentencing policy as a reason for lower crime rates in the area.<sup>249</sup>

#### 4. *Universality*

Shaming is also particularly effective as punishment because of its near universality.<sup>250</sup> Shame is an emotion experienced by almost every person on earth, regardless of culture, and this human experience can first occur in infancy.<sup>251</sup> This universality is important for two reasons. The first is because it guarantees that some kind of shaming sentence can be created to suit nearly everybody.<sup>252</sup> While

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are harmful because of the effects they have on individuals. Admittedly, it is logical folly to argue, "Since *X* has not been proven to be true, *X* must be untrue"; however, this argument carries some weight when one considers the proven deleterious effects of current system of overincarceration. That is, while shaming has not been empirically shown to have adverse social consequences, the American reliance on incarceration has. *See generally, e.g.,* Conyers, *supra* note 9 (speaking generally about the problem of over-incarceration).

244. Massaro, *supra* note 7, at 1920 ("[T]he more effective the shaming, the more counterproductive it may become. The judge thus would need to predict both the offender's individual susceptibility to shame and her likely post-shaming behavior. Each factor in turn might vary with the nature of the offense, the nature of the shaming sanction, and pre- and post-conviction environmental, and other offender-specific conditions.").

245. *Id.*

246. Though the jail sentence might, for some, be a perfectly tailored punishment.

247. *See supra* text accompanying note 39.

248. *See supra* text accompanying note 40.

249. *See* Canning, *supra* note 39.

250. *See* LEWIS, *supra* note 6, at 2 ("Shame [i]s [e]verywhere."); White, *supra* note 4, at 41.

251. *See supra* Section III.C.

252. *Cf.* KAUFMAN, *supra* note 176, at 29 (stating that "[t]he experience of shame is inevitable for any human being," which indicates that a shaming sentence

this does not necessarily mean that shaming sentences will always be practicable, viable options, it does mean that when they are, they have a relatively high likelihood of working.<sup>253</sup>

The second reason that universality is important is because of the effect it can have on others. Because nearly all individuals have experienced shame at some point, they can empathize with one currently being humiliated. Assuming the reader has attended law school, it is probably not difficult to recall a situation in which a professor cold-called an unprepared peer; likely, the reader can also probably recall “feeling bad for” the peer.<sup>254</sup> However, despite incredibly high incarceration rates,<sup>255</sup> the majority of the American public cannot empathize with one who is currently spending time in jail because most Americans have not been to jail.<sup>256</sup> The forced interaction between society and an offender through shaming sanctions, coupled with the ability of nonoffending individuals to identify with the one being shamed, make shaming sentences effective.

### 5. *The Shame Spiral*

A final reason why shame is so effective in altering behavior is the idea, to mongrelize Shakespeare, “It will have [shame], they say: [shame] will have [shame].”<sup>257</sup> Because shame is not only prevalent in America, but also taboo, the mere experience of feeling shame is in itself shameful.<sup>258</sup> Thus, the individual who has shame forced upon

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can be crafted for nearly any human being (quoting TOMKINS, *supra* note 197, at 185)).

253. See generally Michele Pifferi, *Individualization of Punishment and the Rule of Law: Reshaping Legality in the United States and Europe Between the 19th and the 20th Century*, 52 AM. J. LEGAL HIST. 325 (2012) (discussing the idea that individualization of sentences can produce better results in deterring and reforming criminal behavior).

254. Those who are especially empathetic may have even felt the physical manifestations of the emotional phenomenon of shame. See *supra* notes 191-95 and accompanying text.

255. See generally, e.g., Conyers, *supra* note 9.

256. Though dated, one study suggests that 5.1% of U.S. residents will spend time in prison at some point in their lives. THOMAS P. BONCZAR & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1 (1997), available at <http://bjs.gov/content/pub/pdf/Llgsfp.pdf>.

257. WILLIAM SHAKESPEARE, THE TRAGEDY OF MACBETH act 3, sc. 4, l. 121 (Eugene M. Waith ed., rev. ed. 1954). Macbeth, of course, states here, “It will have blood, they say: blood will have blood.” *Id.*

258. KAUFMAN, *supra* note 176, at 46.

her for her transgressions will feel the shame for the transgression<sup>259</sup> and for having felt that shame in the first place. The pain of shame therefore burns longer and hotter, both in the moment and in the recollections of the moment that occasioned the shame.

## B. Shame's Satisfaction of the Traditional Theories of Criminal Punishment

Because of shame's effectiveness as a master emotion in altering human behavior, it can adequately satisfy any traditional theory of punishment. Most of the legal literature seems to be in agreement that shaming, whatever its other drawbacks, can meet retributivist ends.<sup>260</sup> Far more disagreement surrounds whether shame can satisfy the utilitarian theories, though, and few authors have offered cogent explanations as to why or how it achieves utilitarian ends.<sup>261</sup>

### 1. Rehabilitation

Rehabilitation is perhaps the most difficult utilitarian theory of punishment to reconcile with shaming sentences. The object of rehabilitation is to prevent a convicted criminal from committing future crimes by changing his moral inclinations.<sup>262</sup> Shame, however, is not an inherently moral emotion, as it can be experienced in completely amoral situations over which the individual has no control.<sup>263</sup> In the context of public shaming as a criminal sentence, however, shame will likely be understood to have a moral component by both the offender and the observer. By forcing shame

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259. See *supra* Subsections IV.A.1-4.

260. See, e.g., Massaro, *supra* note 7, at 1936 (stating that shaming sentences offer little more than a "purely retributive slap by an unforgiving and impersonal authority, and a feeble form of criminal justice"); Whitman, *supra* note 8, at 1062 (calling shame sanctions seemingly "beautifully retributive"). But see generally Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001) (arguing against the seeming consensus that shaming satisfies the retributivist theory). One must also bear in mind that shaming sentences do not inherently meet retributivist ends. As an example, the Texas man forced to a cumulative of thirty-two hours of shaming after taking the life of another was not justly punished according to retributivists. See *supra* text accompanying notes 43-47.

261. See *supra* note 14 and accompanying text.

262. See *supra* Subsection II.B.1.

263. See *supra* note 218 and accompanying text.



upon the offender,<sup>264</sup> the sanction will “highlight[] the importance of meeting [societal] standards.”<sup>265</sup> Although it is nearly impossible to say with certainty that shaming can serve a rehabilitative purpose, there is at least the possibility for rehabilitation to be achieved through shame sanctions.

Importantly, while shame cannot guarantee rehabilitation, shame can almost assuredly promise rehabilitation with more certainty than the alternative of incarceration. Prisons are notorious for making individuals into worse people, leading to high recidivism rates;<sup>266</sup> this is the antithesis of what rehabilitation seeks to achieve. Shaming sentences, on the other hand, have at the least not been proven to be as counterproductive to rehabilitative aims, although such cases have been too few and scattered to empirically prove that shaming is *more* effective in rehabilitating. In any event, and precisely because of this uncertainty attendant to rehabilitation, this theory of punishment has fallen out of favor among many.<sup>267</sup>

## 2. Incapacitation

The theory of incapacitation is that placing outward constraints on an individual prevents future crimes, regardless of whether the person’s morals or economic interests are affected.<sup>268</sup> The most obvious—and concededly, the most effective—form of incapacitation is incarceration. Society can rest easier knowing that violent men and women are behind bars, unable to harm anyone but other prisoners or guards. Even still, shaming sentences can incapacitate.<sup>269</sup> Armed guards may accompany an individual forced to wear a sign in a public forum. There is also a more artificial incapacitation that results from societal disapproval; for instance, a thief who is forced to buy a TV advertisement may be recognized by shop owners, who will ensure he does not steal anything from their stores.

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264. Even those who might normally be more shame resistant will feel the emotion if it is forced upon them. Velleman, *supra* note 5, at 64-65.

265. Barrett, *supra* note 4, at 41.

266. See *supra* note 29 and accompanying text.

267. See *supra* Subsection II.B.1.

268. See *supra* Subsection II.B.2.

269. Massaro, *supra* note 7, at 1900 (“[S]haming sanctions may have a disabling effect on the offenders, and thus may claim to serve incapacitation-type ends.”).

Admittedly, these are pretty anemic attempts at incapacitation when compared to the near absoluteness of incarceration. Perhaps an important question to ask, though, is not about the extent of incapacitation, but the nature of the individual when he is not incapacitated. An otherwise nonviolent man is far more likely to become violent as a result of jail time than an eight-hour day of embarrassment.<sup>270</sup> Thus, the actual safety created by incapacitation by shame may outweigh the perceived safety created by incapacitation by incarceration.

### 3. *Specific Deterrence*

Perhaps the strongest case for the utility of shame as punishment is in its application to the theory of specific deterrence. Specific deterrence seeks to prevent future crimes by causing the individual to see that the net pain of punishment outweighs the net pleasure of committing a crime.<sup>271</sup> Shaming sentences work because of the intensity and longevity of the emotion of shame. Because shaming sentences are typically only administered for fairly minor crimes, the intensity of the pain of shame is likely to outweigh the pleasure of engaging in a minor crime. Take for instance the woman forced to hold a sign proclaiming her idiocy after driving on the sidewalk around a school bus.<sup>272</sup> Presumably, the hours forced to hold the sign, and the pain of shame that accompany the experience, outweigh in her mind the seconds saved by cutting around a stopped school bus.

It must be noted that the theory of specific deterrence presumes rationality on the individual as an economic actor seeking to maximize her interests;<sup>273</sup> one wonders, though, how rational the woman is to begin with when she endangered the lives of children for an incrementally faster commute.<sup>274</sup> This is a significant concern. However, this concern addresses the theory of specific deterrence as a whole, and not just as applied to shame sanctions. If the woman is not a rational actor, then no form of punishment will make her one. Alternatively, specific deterrence may still be a viable end, but the

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270. Cf. *supra* note 29 and accompanying text (noting that prisons breed violence).

271. See *supra* Subsection II.B.3.

272. See *supra* notes 37-38 and accompanying text.

273. See *supra* Subsection II.B.3.

274. See Pugsley, *supra* note 113, at 392 (noting that not all individuals are rational actors, thus making deterrence theory inapplicable in some cases).

scales would be weighted. That is to say, in order to deter, it would take a substantial outweighing by the pain of the perceived pleasure.<sup>275</sup>

The question then becomes whether jail time or shame time can achieve this better. A typical ninety days in jail would appear to be a hefty price to pay; however, a swath of emotions and memories will likely accompany a ninety-day stint in jail, perhaps even positive ones at certain points. Shaming, on the other hand, has the sole end of producing shame, the master emotion. Because of this, in addition to evidence that incarceration does *not* specifically deter,<sup>276</sup> public-shaming sentences are more likely to achieve this utilitarian end.

#### 4. *General Deterrence*

Also compelling is the case for shame in generally deterring criminal behavior. The theory of general deterrence suggests that individuals not being punished will find it in their economic interests not to commit a crime because of the punishment of another.<sup>277</sup> That is to say that “[p]unishment can act as a preventative only when the idea of it, and of its connexion with the crime, is present to the mind.”<sup>278</sup> Applied to a shame sanction, an individual who observes another man wearing a chicken suit as punishment for soliciting a prostitute<sup>279</sup> will observe the other man’s shame and conclude that visiting a prostitute is not worth the end humiliation. Likewise, a bank that sees Chase’s coerced apology<sup>280</sup> will conclude that the potential for lost business from a similar apology would outweigh the potential for gain from illegal or corrupt practices.<sup>281</sup> The emotion

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275. We must always be mindful, though, of the Eighth Amendment’s proportionality requirements. *See, e.g., Solem v. Helm*, 463 U.S. 277, 284 (1983) (stating that the Cruel and Unusual Punishment Clause of the Eighth Amendment forbids “sentences that are disproportionate to the crime committed”).

276. *See supra* note 29 and accompanying text.

277. *See supra* Subsection II.B.4.

278. Garvey, *supra* note 10, at 779 (quoting 1 JEREMY BENTHAM, *Principles of Penal Law*, in *THE WORKS OF JEREMY BENTHAM* 365, 403 (John Bowring ed., Russell & Russell, Inc. 1962) (1843)).

279. *See supra* note 39 and accompanying text.

280. *See text* accompanying notes 48-51.

281. *See, e.g., United States v. Edwards*, 595 F.3d 1004, 1011 (9th Cir. 2010) (asserting that general deterrence is particularly effective in white-collar cases); *United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006); *United States v. Proserpi*, 686 F.3d 32, 47 (1st Cir. 2012).

of shame works in generally deterring crime because of its universality.<sup>282</sup>

Because nearly everyone knows the pain of shame—magnified by its taboo in American culture—nearly everyone can vicariously feel the humiliation of the one being shamed. This empathy cannot be as readily elicited by the knowledge that some people are locked away in jail somewhere. The power of shame as a master emotion will thus guide an individual not to pursue the same criminal path as the other who is forced to endure shame.

#### CONCLUSION

Public-shaming sentences have a long history in Anglo-American law and beyond. Because of increasing frustration with American overreliance on incarceration, shaming sentences have reappeared in the United States in recent decades, albeit in more sensible forms than their pre-colonial forebears. However, despite a glut of literature on the subject, and numerous conclusions that shaming sentences are a positive trend, few have offered viable explanations of precisely why these sentences have any utility beyond achieving purely retributivist ends. These punishments, though controversial, are effective because the emotion they seek to elicit—shame—is a master emotion that plays a central role in altering behavior. Because of shame's status as a master emotion, public shaming can deter further crimes, as well as rehabilitate the offender. Shaming sentences thus satisfy any traditional theory of punishment while being far less socially costly than incarceration.

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282. See *supra* Subsection IV.A.4.

## Forthcoming Articles

The 2015:2 issue will include the following articles from the symposium titled *Public Domain(s): Law, Generating Knowledge, and Furthering Innovation in the Information Economy*, held at Michigan State University College of Law on October 2-3, 2014.

Net Neutrality: Something Old; Something New

*Justin (Gus) Hurwitz*

Protecting the Right to Innovate: Our “Innovation Wetlands”

*Andrew W. Torrance & Eric von Hippel*

The Risks and Rewards of Network Neutrality Under § 706

*John Blevins*

*Aereo* and the Problem of Machine Volition

*Bruce E. Boyden*

*Aereo*: From Working Around Copyright to Thinking Inside the (Cable) Box

*Annemarie Bridy*

Patent Pledges: Between the Public Domain and Market Exclusivity

*Jorge L. Contreras*

Beyond Intellectual Property: Economic Concerns in Patents Policy and Practice

*Thomas D. Jeitschko*

What’s New in the Network Neutrality Debate

*Robert Frieden*

Agricultural Biotechnology: Drawing on International Law to Promote Progress

*J. Anewa Osei-Tutu*

Living with Monsanto

*Daryl Lim*

Is There Anything New to Say About Network Neutrality?

*Adam Candeub*

Regulatory Competitive Shelters as Incentives for Innovation in  
Agrobiotech

*Yaniv Heled, J.S.D.*

Defining Limits to the Application of the Statutory Experimental Use  
Exception Within the Agricultural Biotechnology Industry

*Jennifer Carter-Johnson*

Leaps, Metes, and Bounds: Innovation Law and Its Logistics

*James Ming Chen*