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Abstract:

This paper examines the concept of shaming from a communitarian perspective and how shaming has been applied in criminal justice. Despite the fact that the formality of the criminal justice system impresses upon us the legal content of criminality, crime is best understood by its moral content. Crimes are not wrong because they are illegal, but because they violate shared values regarding acceptable and unacceptable behavior. Criminal activity is inherently shameful because the violation of moral codes justifies moral condemnation of the behavior (though not of the person). Because we are inherently social creatures, disapproval by others weighs heavily in our decisions to engage in various behaviors. Shame is a powerful tool for ensuring normative compliance and is a central component in theories of restorative justice and informal control. Thus it may be an important tool for communities wishing to be actively involved in criminal justice and a bridge between formal and informal control. Shaming, however, is underutilized in the criminal justice system and by communities seeking to exercise informal social control.

In particular, this paper examines (1) how shaming may be counter-productive to moral rehabilitation serving only to stigmatize and outcast and how it may be reintegrative; (2) how shaming, with its individualistic and cultural emphasis, may be reconciled with structural analyses of crime and crime control; and (3) why shaming has been overlooked due to our cultures emphasis on liberal theory and formal control. Three classes of shaming applications will be evaluated in light of this communitarian perspective on informal control. The first application involves a variety of judicial penalties imposed as conditions of probation. Some of these conflate the goal of evoking shame in offenders with the goals of retribution and incapacitation undermining their effectiveness. The second application is illustrated by the case of a New Haven neighborhood association that mobilized to reduce local prostitution by posting flyers identifying johns and sending these johns cautionary letters. The third application is quasi-formal and is illustrated by the use of “family group conferences” in which victims, offenders and their supporters hold a meeting in which shame is evoked and a strategy for reparation is discussed. These applications will be examined in order to identify the problems and promise of shaming as a strategy for informal control.

Shame and Criminal Justice

A community's response to a criminal act can take many forms even though we have narrowed the field considerably. As it is, the community defers to the state and the state punishes with prison sentences. When pressures from corrections outweigh the pressures from legislators, judges turn to probation, fines, and community service. For reasons to be discussed later on, none of these options, particularly for non-violent offenders, are ideal. It is worth considering a communitarian response to offenders. The centerpiece of such an approach would be the use of shame as a sanction.

It may be odd to raise the concept of shame in the midst of what seems a highly shameless society. A cursory look at daytime talk shows attests to a bizarre and quite common willingness to flaunt the harm people cause without remorse. Why even consider shame when so many people seem impervious to the moral disapproval of others? First of all, of course, because talk shows are not representative; they present a distorted view of our society. Indeed, the vast majority of us, only sociopaths excluded, are deeply concerned with how we are viewed by others. Social acceptance and the fear of rejection, even in our highly individualistic society, is an enormous motivation for most of us.

This paper will argue that shame is a powerful sanction and its application can alleviate much of the current pressure on our criminal justice system. But precisely because it is such a powerful sanction, it must be applied with caution. Ill-considered application is likely to do as much damage as good. In this paper, I will discuss a communitarian approach to shaming and then turn to a number of cases in which shaming has been applied and misapplied.

SHAME AND THE LOOKING GLASS SELF

Communitarians argue that individual behavior is deeply influenced by the "moral voice" of the community.¹ They disagree with libertarian and rational choice accounts of individual action which assert that individuals are largely free agents, selecting courses of action primarily on the basis individual preferences and tastes. Instead, actors are embedded within a social framework of informal control which guides and constrains individual action. The moral voice is the sociological counterpart to the superego, a clarion call to abide by the normative standards prescribed by the community. It is not merely a suggestion, but a demand for accountability. Transgressors risk informal sanctioning, whether through mild rebuke or social ostracism. Of course, the moral voice varies in intensity and it is often so muted that individuals can ignore it as they pursue their own ends with impunity.

The communitarian perspective is grounded in a sociological conception of the self that emphasizes the importance others play in the creation of identity. This view rejects the notion of selves as islands, wholly independent and autonomous. Charles Horton Cooley's seventy-five year old metaphor remains a powerful description of the social nature of the self:

¹ see Etzioni, "The Moral Voice"

As we see our face, figure, and dress in the glass, and are interested in them because they are ours, and pleased or otherwise with them according as they do or do not answer to what we should like them to be; so in imagination we perceive in another's mind some thought of our appearance, manners, aims, deeds, character, friends, and so on, and are variously affected by it. A self-idea of this sort seems to have three principal elements: the imagination of our appearance to the other person; the imagination of this judgment of that appearance and some sort of self-feeling, such as pride or mortification.²

Thomas Scheff argues that shame is the most important of emotions for it looms in every social encounter. Scheff describes "a deference-emotion system in which conformity to exterior norms is rewarded by deference and feelings of pride, and nonconformity is punished by lack of deference and feelings of shame. In this analysis, social control involves a biosocial system that functions silently, continuously, and virtually invisibly, occurring within and between members of society."³ A parallel argument is advanced by Henri Tajfel. Tajfel argues that the self is inherently social and this social identity specifically refers to "the individual's knowledge that he belongs to certain social groups together with some emotional and value significance to him of this group membership."⁴ We are social creatures and highly value our sense of belonging. The threat of rejection by others is, in essence, a threat to our self-identity. Social recognition reinforces our sense of belonging and we feel pride. Disapproval threatens our place in the social order threatening a loss of status and possibly outcasting, imbuing us with feelings of shame. The process of social comparison, in which we constantly evaluate ourselves in light of other's opinions, is at the core of moral development. As we discover what those around us approve and disapprove of we discover right and wrong.

George Herbert Mead also described the power of shame in his discussion of role-taking. We come to understand the views and expectations of others by stepping into their shoes. More importantly, we come to understand social norms by taking the role of what he called the "generalized other," referring to society's view of the behavior rather than to a specific individual's view.⁵ Naturally, shame becomes less powerful when the individual's relationship to the other becomes more distant. We are shamed by parents and peers most easily, other authority figures when we know them well, still others when they obtain our respect. We are even susceptible to the shaming of the stranger on the street who, as a member of the community, comes to represent the generalized other.

² Cooley, Charles H. Human Nature and the Social Order. New York: Scribners, 1922, p.184

³ Scheff, Thomas J. "Shame and Conformity: The Deference-Emotion System." American Sociological Review 53 (1988), p.405.

⁴ Tajfel (1972:292)

⁵ Mead and generalized other

We may assume that people obey the law primarily because they agree with the intent of the law and do not wish to transgress it because to do so would violate not only the law but one's conscience as well. Usually, we do not break the law because we believe the action to be wrong and we would feel guilty if we did it. However, consciences are fallible and a society cannot depend solely upon them for maintaining order. Nor can we completely rely on formal controls to regulate criminal activity. Among the many strategies for maintaining order, we must rely on the vehicle that creates consciences, but which draws its strength elsewhere than in guilt-avoidance. This vehicle is shame.

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

The distinction between guilt and shame is somewhat blurred by the process of moral internalization. One is not born with internalized moral codes; they are not genetically released at various stages of physical development. Morality is internalized developmentally through the repeated processes of experiencing shame for wrongful behavior and, which cannot be emphasized enough, pride for behaving correctly. Concern over social status, losing face and enjoying praise, precede concern over the violation of principles. However, once internalization occurs, that is, once a conscience is born, guilt and shame are quite distinct (even when they can, and often do, occur simultaneously).

As Mead pointed out, the ability to step into the shoes of another person enables us to view our own behavior from an external standard. As we see ourselves, we can judge the effect of our behavior on others. At such a point, the socialization process relies less on external controls, such as shaming or punishment, and more on inducing internal processes, such as appealing to conscience by invoking the respect or affection felt in the relationship. At its most developed, we should be able to take the role of the generalized other. This reflexive process is an intermediary stage between shaming and guilt.

The distinction between guilt and shame is also blurred by the concept of "guilt-tripping." Making someone feel guilty is not possible unless they have a conscience. If so, guilt-tripping involves uncovering hypocrisy: the disjunction between the behavior and the internalized standard. Successful guilt-tripping requires that the offender recognize how her behavior has is inconsistent with her own standards. Shaming, on the other hand, is a process of making the offender aware of how her behavior has violated a moral code that she has not necessarily internalized. Even though the offender can believe her behavior was not immoral, she can learn how others' view the behavior and how their disapproval lowers their opinion of her. Though theoretically distinct, guilt-tripping and shaming may be identical in practice. The feeling of remorse, for example,

may result from either guilt or shame. Hereafter, I will treat shaming as a process that may induce either shame (the emotional reaction to status loss after violating a normative standard) or guilt (the emotional reaction to violating an internalized standard).

According to the communitarian view of shame, criminal and other norm-violating behavior is primarily prevented by informal processes and shaming is the primary punisher. Shame cuts to the bone because we care deeply about how others perceive us. We conform first because we do not want to risk our acceptance in the social world and second, as we internalize normative standards, because we do not wish to violate our consciences. Although shame is a powerful sanction, it has not been employed to any significant degree by our criminal justice system. There are three important reasons for this. First, shaming is potent and where there is potency, there is risk. Misapplication of shaming can easily be counter-productive, leading to stigmatization of the offender and symbolic or literal exile from the community. As a result, stigmatized individuals tend to form oppositional subcultures that reject the dominant normative standards, undermining all forms of informal control. Second, the use of shame generally has an individualistic, offender-based focus that often fails to take into account the circumstances within which offending takes place. The worst case scenario amounts to blaming the victim and discounting structural analyses of criminality. Thus structuralists discount normative approaches such as shaming in favor of systemic solutions. Third, shaming grates against the sensibilities of a society deeply influenced by liberal political theory and heavily reliant upon the formal procedural mechanisms of the state. I will take up each of these issues in turn.

(1) Stigma and Reintegration

The use of shaming as a sanction has been criticized as unnecessarily regressive. Critics fear that shaming scars the offender with humiliation, depression, and anger, all of which will lead them further down the path of criminality and violence. For example, John Laravee, in an NPR interview said, "Shaming people ostracizes them, places them outside of our community. I think that most people brought before the court suffered some amount of shame. If you go out of your way to shame them further, to me it's pushing them aside, it's ostracizing them. And I don't believe that that's a promising a way to reduce future crime and make the community safer."⁶ The fear, as Garfinkel put it, is that shaming is a form of degradation.⁷

In a recent article by Braithwaite and Mugford, reintegrative shaming is clearly distinguished from stigmatizing shaming, a distinction that is essential for a communitarian approach to justice.⁸ To appreciate the difference they contrast the social process in which an offender is ostracized with a process that reintegrates the offender

⁶ Laravee, NPR, Executive Director of Crime and Justice Foundation

⁷ Garfinkel (1956)

⁸ Braithwaite, John, and Stephen Mugford. "Conditions of Successful Reintegration Ceremonies." The British Journal of Criminology 34.2 (1994): 139-171.

back into the community. Garfinkel's seminal paper on degradation ceremonies provides the theoretical context. In any society, Garfinkel argued, the existence of social hierarchies provides the inevitable opportunities for status degradation. For present purposes, status degradation and stigmatization may be seen as equivalent. He goes on to specify the conditions that make degradation possible. They are, to simplify:

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

The result of this shaming process is labeling and, worse, outcasting from the community. Such a process is very likely to lead to oppositional culture formation. It goes something like this. A person shoplifts from a store. Others label this person a thief, so that the label describes more than the act, but something about his character. When those who label, say the storekeeper, the cop, or the judge, are viewed as servants of the public good rather than individuals seeking to malign the character of the offender, the label is likely to stick. As a result, the offender comes to be seen as deviant, and others distance themselves socially ("Don't hang around with him") or formally such as when the offender is expelled from school or sentenced to prison. Shaming in this light is merely retributive and, ultimately, counter-productive because oppositional cultural formation systematizes criminality. Braithwaite and Mugford therefore call for reintegrative shaming which does not stigmatize. Referring to Garfinkel's conditions for successful degradation, Braithwaite and Mugford outline the conditions for successful reintegration. Again, to summarize (and simplify):

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

In this case, the trajectory of the offender is quite different. Rather than labeled, the offender is held accountable for the act without a degradation of character. The denouncer in this case is not only a representative of the moral order, but a member of the community just as the offender is a member. The emphasis shifts from the contest of rights between autonomous individuals (where the offender is punished for breaching the private sphere of the victim) to a consideration of the breakdown of appropriate social relations among community members (where the offender is made aware of the harm he

has caused). Rather than respond with increased distance, the approach becomes one of evoking remorse in the offender and problem solving to rectify the wrong committed.

According to Braithwaite, "Reintegrative shaming means that expressions of community disapproval, which may range from mild rebuke to degradation ceremonies, are followed by gestures of reacceptance into the community of law-abiding citizens. These gestures of reacceptance will vary from a simple smile expressing forgiveness and love to quite formal ceremonies to decertify the offender as deviant. Disintegrative shaming (stigmatization), in contrast, divides the community by creating a class of outcasts."⁹ Just as the parent disapproves misbehavior but keeps the family together, the community must shame the offender for his wrong-doing but not ostracize him.

Shame can easily be stigmatizing, and this is its great danger. But this speaks more to its potency than to its tragic flaw. With proper understanding it can be reintegrative. No doubt shaming is a punitive sanction, just as its opposite, social recognition is rewarding. But it is entirely appropriate for an offender to experience shame for having done wrong. To protect him from this is tantamount to complicit endorsement of the behavior. The more important consideration is whether or not this type of sanction is better or worse than alternative sanctions. Incarceration, after all, is far more stigmatizing in the physical reality of its outcasting.

Consider also other common sanctions. Kahan points out that both fines and community service present mixed messages to the community, undermining the moral clarity of the response.

Punishment is not just a way to make offenders suffer; it is a special social convention that signifies moral condemnation. Not all modes of imposing suffering express condemnation or express it in the same way. The message of condemnation is very clear when society deprives an offender of his liberty. But when it merely fines him for the same act, the message is likely to be different: you may do what you have done, but you must pay for the privilege. Because community service penalties involve activities that conventionally entitle people to respect and admiration, they also fail to express condemnation in an unambiguous way. This mismatch between the suffering that a sanction imposes and the meaning that it has for society is what makes alternative sanctions politically unacceptable.¹⁰

Relative to fines and community service, shaming is highly consistent with the moral underpinnings of the criminal law, does not give mixed messages, and has the greatest potential for admonishing the behavior while keeping the offender within the

⁹ Braithwaite, John. Crime, Shame, and Reintegration. Cambridge: Cambridge University Press, 1989, p.55.

¹⁰ Kahan, Dan M. "What Do Alternative Sanctions Mean?" The University of Chicago Law Review 63 (1996), p. 593.

community. While shaming may present a clear moral condemnation, it must be used with caution, for stigmatizing shaming is likely to be counter-productive.

Thus shaming can either be stigmatizing or reintegrative. It is its stigmatizing potential that raises the most objection. Few wish to see individuals demeaned and humiliated. In fact, it is our powerful aversion to feeling shame that makes us hesitant about its explicit application. This retributive end runs counter to basic principles of respect and dignity intrinsic to an egalitarian society. Yet most of us would wish that moral transgressions result in guilt and shame. Through trial and error, we come to learn right from wrong. When error brings disapproval and shame, but also reintegration, then it is compassionate. When it brings stigma, it is cruel.

(2) Culture vs. Structure

Shaming has an inherently individualistic, offender-based focus. The emphasis is on the moral culpability of a particular individual for a particular act. The message is always that it was wrong to steal that car, rob that person, set fire to that building because these acts have consequences for victims and these victims are inherently worthy. "Look at what you have done to them." In response, the offender has recourse in only three ways. He may protest his innocence, admit guilt but demonstrate that his action did not in fact cause harm (the norm, not the violation is unjust), or accept responsibility for causing harm. The emphasis is on the act and its consequences, not on the context within which the act occurred. Since the focus is on moral culpability, the use of shaming is biased toward individual responsibility. There is little room here for the offender to counter that he is a victim of circumstances.

A structuralist will argue that offenders are profoundly constrained by social forces they cannot control. Focusing on the culpability of offenders is a misguided distraction from what should be the proper response: structural change that alters the incentives for offending. This is common thinking among situational theorists¹¹ and social disorganization theorists¹² who de-emphasize motivation in favor of the ecological context of crime. This debate is loudest in discussions of the black underclass, members of whom are disproportionately represented in tallies of criminal offenders.¹³

In a sense, whether or not shaming successfully hits its mark is an indication of the strength of the bond between the offender and the community. The individual who is isolated and disenfranchised from the community's institutions and relations is going to be impervious to shaming, for she does not have a position in the community worth

¹¹ see Cohen and Felson

¹² Stark, Rodney. "Deviant Places: A Theory of the Ecology of Crime." *Criminology* 25.4 (1987): 893-909.

¹³ Sampson, Robert J., and William Julius Wilson. "Toward a Theory of Race, Crime, And Urban Inequality." Crime and Inequality. Ed. John Hagan and Ruth D. Peterson. Stanford, CA: Stanford University Press, 1995. 37-54.

preserving. The previous discussion pointed out that shaming is potent because of its potential to stigmatize and outcast offenders. Here we are concerned with those who are in some way already stigmatized either through prior imprisonment, segregation, discrimination or some other mechanism. For them shaming will fall on deaf ears.

Sociologists have long observed subcultural formations that reject the dominant normative standards. In their classic studies of Chicago, Shaw and McKay wrote, "...In the areas of low rates of delinquents there is more or less uniformity, consistency, and universality of conventional values and attitudes with respect to child care, conformity to law, and related matters; whereas in the high-rate areas, systems of competing and conflicting moral values have developed. Even though in the latter situation conventional traditions and institutions are dominant, delinquency has developed as a powerful competing way of life."¹⁴ Oscar Lewis argued that in order to cope with high rates of poverty and few economic opportunities, many ghetto communities have developed a "culture of poverty" in which adherence to mainstream values, such as the work ethic, was diminished because the intended rewards of such adherence were not forthcoming.¹⁵ More recently, Elijah Anderson has described the emergence of an "oppositional culture," in which ghetto youth have not only diminished their adherence to mainstream values, but actively reject them, replacing them with a system of gang values supportive of crime.¹⁶ As Braithwaite describes them, "criminal subcultures are sets of rationalizations and conduct norms which cluster together to support criminal behavior. The clustering is usually facilitated by subcultural groups which provide systematic social support for crime in any of a number of ways - supplying members with criminal opportunities, criminal values, attitudes which weaken conventional values of law-abidingness, or techniques of neutralizing conventional values."¹⁷

A telling example of oppositional cultural formation is Anderson's analysis of the relationship between "old heads" and young boys. "An old head was a man of stable means who was strongly committed to family life, to church, and most important, to passing on his philosophy, developed through his own rewarding experience with work, to young boys he found worthy. He personified the work ethic and equated it with value and high standards of morality... But as meaningful employment has become increasingly scarce, drugs more accessible, and crime a way of life for many young black men, this institution has undergone stress and significant change."¹⁸ In essence, the moral lessons of old heads have fallen on deaf ears, primarily because the young men do not believe that efforts to lead a conventional life will yield the desired outcomes. For them, particularly given the social isolation of the ghetto, opportunities for legitimate success

¹⁴ Shaw and McKay, 1942, p. 164

¹⁵ Lewis, Culture of Poverty

¹⁶ Anderson 1990

¹⁷ Braithwaite (1989; p.101

¹⁸ Anderson, 1990, p. 69

are few compared with the allure of illegal opportunities and the escapes to be found in alcohol and drugs.

Without the assistance of old heads, good schools, strong churches, and other social institutions, families struggle to keep their children away from gangs and drugs.

The morally strict and financially stable intact nuclear families, on the decline in the underclass neighborhood, with their strong emotional and social ties and their aspirations for their children, must engage in sometimes fierce competition with the peer group. With a variety of social supports, including extended kin networks and strong religious affiliations, such families can often withstand the lure of the street culture, but even they may succumb and lose control of their offspring, sometimes permanently. The much less viable family headed by an impoverished young woman who has her hands full working, socializing, and mothering stands little chance in the struggle for a child's allegiance and loyalty and often does not prevail.¹⁹

Social relationships continue despite weakened social institutions. A community does not relinquish its moral order to a vacuum. Rather, it is immediately replaced by new standards and new leaders who model and enforce these standards. Anderson argues that as old heads have disappeared, their role has been filled by individuals who reject their predecessors' moral message.

These emerging figures are in many respects the antithesis of the traditional old heads. The man derides family values and take little responsibility for the family's financial welfare. He feels hardly any obligation to his string of women and the children he has fathered. In fact he considers it a measure of success if he can get away without being held legally accountable for his out-of-wedlock children. To his hustling mentality, generosity is a weakness... For females the high life, welfare, prostitution, single parenthood, and crack addiction await. The high life holds out thrills for young girls, many of whom also seek independence from households with their mothers and sisters and brothers. Involved in sexually active peer groups, many settle for babies and participate in status games for which a 'prize' - a cute baby - is the price of admission.²⁰

Anderson's portrayal is an ethnography of a ghetto community unable to maintain informal control. It is a description of community whose conventional mores are being supplanted by those of the street. Though most residents still identify with and try to uphold conventional values, they are in direct competition with a minority of deviants who flaunt these values with impunity. Indeed, they are often rewarded by a cadre of devotees and, though impermanent, large sums of money.

The purpose of shaming, like any other form of punishment, is to make an offender feel badly enough about their behavior that they do not wish to repeat it. The differences in kinds of punishment is how "feeling bad" is defined. Physical pain and

¹⁹ Anderson, 1990, p. 92

²⁰ Anderson, 1990, p. ??

shame differ considerably, for example. What is unique about shame is that it is indicative of the bond between the offender and other members of the community. Where there is no bond, there is no shame. The stronger the bond, the more easily a person is shamed. But there is an irony here. For if we recognize that social isolation causes criminality and that social isolation mutes the impact of shaming, then we must embrace a circumstantial explanation of crime. The causal influence of shaming is spurious unless we also take into account the structural conditions that affect criminality and shaming.

Effective shaming depends upon the stake a person has in the community. If a person cares nothing about the opinion any person holds of her, shame is a useless tool. But such a person is extremely rare in society and is classified by a psychiatric disorder. More common is the person who cares little about the opinion of those who hold mainstream values. Instead she cares about the opinion of other members of an oppositional subculture. Shaming remains quite effective, but only by these subcultural members. The trick is to increase the stake of the offender in the larger community. Consistent with control theory, crime is committed most by those who have the greatest freedom and smallest stake in the community: young, unemployed, unmarried, urban, males.²¹ This is a contest in which the larger community must offer a more compelling reason to embrace mainstream values and behaviors. Thus, where shame fails, it is an indication of the offender's low stake, and the proper recourse is not stigmatization, but reintegration probably through structural change. Shaming therefore, provides us with a yardstick for estimating the necessity for structural change. The appropriate focus is individualistic at first, but once it is determined that the offender is not subject to shaming because of her isolation from the community, then efforts need to be directed towards integration. Preventive measures are warranted in such places as underclass ghettos where large numbers of individuals are disenfranchised. Structural change is not likely to be necessary for middle class offenders who will have a greater stake in mainstream culture. In this way, cultural and structural analyses are compatible.

(3) Shame, Liberal Theory, and Formal Control

The application of shame as a sanction requires that disparate worlds of justice be reconciled. In the world of the state and its formal control, social order is maintained by the state's power to impose sanctions upon criminals. This power grows either coercively by reducing individual freedom, such as in an authoritarian society, or, as Tom Tyler points out, consensually by citizens perceiving the use of power by the democratic state as legitimate.²² In either case, control is maintained impersonally and legalistically. In a second world of justice, characterized by communitarian over formal control, social order is maintained by the "moral voice" of the community.²³ Perceiving the individual as deeply embedded within a milieu of social relations, institutions, and cultural

²¹ Hirschi, 1969???

²² Tyler 1990

²³ Etzioni, "The Moral Voice

practices, individuals behave themselves because they have internalized the dominant values of the community or, if the values have not been internalized, because they do not wish to risk lowering their standing in the eyes of the community. It is the moral voice that ennobles heroes and shames wrongdoers.

Liberal theory is commensurate with the formal world of justice and infuses our current understanding of social control. In our current model, individuality is fundamentally a private matter with the state serving to protect individual autonomy. The more general cultural ethos suggests that we should not humiliate those whose practices diverge from the norm. We are not to judge the actions of others for this limits their freedom of expression. We are ambivalent about shaming criminals, despite a near consensus on the immorality of criminal behavior.²⁴ Criminal identities should be hidden, confidential, protected from public scrutiny. Ironically, we can take away criminals' physical freedom through incarceration, subject a convicted criminal to the horrors and monotony of prison life, yet cringe at the notion of exposing them to burden of public notice, the controversy over Megan's Law being a case in point.²⁵ The source of this fear is the misuse of shaming, but the result is the exclusion of shame as a tool. This paper calls for the development of appropriate uses of shaming with cautionary attention to misuse, not for its abject rejection.

Liberal theory also justifies the rationalization and formalization of our society's responses to justice. That is, liberal theory limits the conceptualization of justice to the procedural domain. We care deeply, as we should, about protecting the innocent from unjust accusation, about treating offenders fairly, about procedures and accountability. As such, we have embraced a model of formal and bureaucratic model of control. In our desire for rationality, we are pulled to formality, and in our fear of subjectivity we are pushed away from informal control. We have a visceral reaction to informal control as inevitably claustrophobic and a threat to expressions of individuality. As a result communitarian justice is often dismissed as overly conformist, conservative, and nostalgic. These misrepresentations stem from our legitimate deep-seated concern for the protected dignity of the individual coupled with a misplaced assumption that individuality can only be protected by the state. In fact, excessive reliance on formal control causes communities to relinquish responsibility for social control and this puts the liberal state at risk. As crime fears overwhelm the populace, without well-developed mechanisms of informal control, they more readily abdicate to authoritarian measures of order maintenance.²⁶ Braithwaite writes, "And so the irony is that individualistic societies are given little choice but to rely on the state as the all-powerful agent of social control: the ideology of the minimal state produces a social reality of the maximum state. Because sanctioning by peers and intermediate groups like schools, churches, trade unions and industry associations cannot work in an individualist culture, the state responds (ineffectively) to perceived increases in crime the only way it can - by locking

²⁴ see Braithwaite 1989, p.39

²⁵ Define Megan's Law

²⁶ see Rosenbaum, 1993

more people up, giving the police and business regulatory agencies more powers, trampling on the very civil liberties which are the stuff of individualist ideologies."²⁷

Shaming, as Braithwaite argues, may actually play a vital role in clarifying normative standards, thereby protecting various individual domains from external scrutiny and discrimination. For him, "the good society is intolerant of deviance from the core consensus values, and tolerant, nay encouraging, of diversity beyond the limitations set by those core values. Among the core values that the good society will not tolerate being undermined are the criminal law, and freedom and diversity outside the criminal law. The good society, in short, is both strong on duties and strong on rights, and especially strong on duties that protect rights."²⁸ Shaming will not work where there is dissensus over core values, either because of oppositional subcultural formation which is routed in stigmatization or where controversy exists over the legitimacy of the dominant norm such as in criminal laws regarding marijuana use, homosexual behavior, or in a different era, what fountain blacks may drink from. When legitimacy is in question, "offenders" may explicitly reject the norm rather than choose to protest their innocence or express remorse. It is a mistake to assume that reliance upon formal controls and procedural justice offer more protection from a repressive conformity than reliance on informal control. What matters is the clarification of normative standards, particularly with regard to core values.

The potential use of shaming as a form of control requires some permeability between the formal and informal worlds of justice. At present, our criminal justice system relies almost exclusively upon conceptions of justice deeply rooted in liberal theory. As a result shaming is generally dismissed as overly conformist and raises questions about one person's standards being imposed upon another. In fact, there is near consensus regarding the immorality of criminal behavior; what is lacking is consensus over the communal response to criminal acts. Fear of trampling upon individual rights to diverse personal expressions is overgeneralized to acts which no individuals have the right to express.

²⁷ Braithwaite (1989; 171

²⁸ Braithwaite (1989; 185

THE APPLICATION OF SHAMING

This section will examine several cases where shaming has been applied within our criminal justice system and used as a tool of community organizations fighting crime. The cases will illustrate both the advantages and disadvantages of shaming.

Formal Probationary Sanctions

In a number of cases, judges have attempted to exploit the power of shaming as an alternative to incarceration. These applications may be classified into three categories: debasement penalties, public exposure penalties, and apology penalties. I will consider each in turn.

Debasement Penalties:

Debasement penalties are designed specifically to lower the status of the offender. In a sense, these penalties remove the shaming task from the community entirely, directly attempting to affect social status by associating the offender with a noxious activity.

Judge Ted Poe of Houston sentenced Steven Dodd, convicted of interfering with child custody, to 180 days in jail and ten years of probation. During the entire probationary period he was required to clean the Houston Police Department's stables (subsequently suspended after six years and 1,572 hours in the horse barn). Dodd was quoted as saying, "That's a lot of horse manure."²⁹ Kahan notes a case in which the offender in a domestic violence case was made to stand before his ex-wife while she spit in his face.³⁰ Brilliant described the Florida case of *Bienz v. State*. "A probationer who was ordered into a halfway house was additionally required to comply with all orders given by employees of the halfway house. One such order was that the probationer, who was accused of acting like a baby, was told to wear diapers over his regular clothing. Although the case was resolved on other grounds, the court took the opportunity to comment on the condition of wearing a diaper: 'Suffice it to say that a command... that an adult male wear diapers in public would certainly be demeaning in the minds of, so called, reasonable men.'³¹ Finally, the state of Alabama recently attempted re-introducing the chain-gang for incarcerated offenders.³²

The character of these penalties hearken back to the time of ducking stools, pillories, and stocks; and the chain gangs to a historical legacy of racism. The aim of debasement penalties is obviously retributive, clearly not restorative. These are quintessential ceremonies of degradation without any opportunity for reintegration. Being forced to wear diapers would have inevitably countermanded the usefulness of the halfway house experience, which is reintegrative by nature. By seeking penalties that are clearly offensive to the dignity of the person, the moral message is one of devaluation. The offender, no longer worthy of respect, is forced to wallow in the shamefulness of the

²⁹ Judge Poe and shoveling manure, USA Today

³⁰ Kahan

³¹ Brilliant (1991; p.1365

³² Alabama chain gangs

offense. By emphasizing the retributive aspect of shaming, these penalties blur the distinction between moral condemnation of the act and of the actor. Such humiliation is not likely to generate remorse as much as anger, enabling the offender to shift his self-concept from victimizer to victim.

Public Exposure Penalties:

Public Exposure Penalties include the requirement that convicted drunk drivers affix bumper stickers or special license plates to their vehicles indicating their DWI offense, offenders of various crimes posting signs in front of their homes or placing advertisements in newspapers announcing their crimes, or wearing T-shirts, signs, or bracelets indicating their offenses.³³

On December 10, 1991, Roy C. Letterlough pleaded guilty to driving while under the influence of alcohol as a felony (DWI) in New York State. This was the defendant's sixth DWI since 1971. A part of his plea agreement, the court order five years' probation, and fine of \$500, a license revocation, and alcohol treatment. In addition, Judge Marc Mogil ordered that should the defendant renew his license during the probationary period, he must affix a fluorescent sign to his car that reads, "CONVICTED DWI."³⁴

In 1992, Charles Lindsay was driving with a blood alcohol level of .18 in Indian River County, Florida. He had the bad luck of driving his car into the back of a sheriff's patrol car. The judge sentenced him to one year of probation, required 50 hours of community service, suspended his license for the probationary period, and required that he place an advertisement in the Vero Beach Press Journal with his mug shot, name, and a caption reading, "DUI-Convicted."³⁵ In another case, an offender was made to place a 4x6 ad in Providence Journal-Bulletin reading "I am Stephen Gerershausen. I am 29 years old... I was convicted of child molestation... If you are a child molester, get professional help immediately, or you may find your picture and name in the paper, and your life under control of the state."³⁶

In the 1988 case of *State of Oregon v. Richard Bateman*, the defendant was convicted of child molestation. The offender was placed on five years probation and required to post a sign at his residence and on any vehicle he drove stating: "Dangerous Sex Offender-- No Children Allowed."³⁷ More recently, in the 1995 case of *Illinois v. Glenn Mayer*, the defendant was convicted of aggravated battery. The judge sentenced him to probation for 30 months, fined him \$7500, and ordered that he pay restitution of \$9600 to the victim. As conditions of his probation, Mayer was ordered to remain on his

³³ list of public exposure penalties

³⁴ Letterlough

³⁵ Lindsay and Vero Beach ad

³⁶ Gererhausen in Massaro

³⁷ Bateman sign

farm and that he post a sign at the entrance reading: "Warning! A Violent Felon Lives Here. Enter at Your Own Risk!"³⁸

The central component of public exposure penalties is to bring the crime to the attention to the public so that the public may respond with shaming. Note that the shaming may never be direct; it is often enough to evoke gossip alone that never reaches the ears of the offender.³⁹ The knowledge that gossip may occur, or the extended stares, or the constant visual reminder to the offender as he takes the role of the other are enough to evoke shame. It is also a goal in many of these cases that the public be informed so they may protect themselves. In this case, the goal is one of incapacitation rather than moral condemnation. This is the intent behind many of the states' community notification laws such as Megan's Law. The two goals are quite different although most court cases have not drawn the distinction. Where incapacitation is the goal, the penalty is strictly a substitute for incarceration meant primarily to alleviate overcrowding. As such the penalty is equivalent to house arrest and other recent innovations in incapacitation. When incapacitation is the goal, public safety may often overwhelm offenders' liberties, making reintegration more difficult. Virginia, for example, recently began selling a list of all parolees to the public.⁴⁰ The demand for such a list is not likely to be motivated by reintegrative shaming. It is more likely that employers, landlords and others will make use of the list to discriminate against the parolees, screening them from opportunities that would otherwise be available to them.

One of the troubling dilemmas with regard to informal control is that, as the name implies, power is transferred from governments to communities and community members are not subject to the same rigorous scrutiny as the courts. When community members know a convicted felon is in their midst they may be less than forgiving, as was the case when Snohomish, WA, residents burned down the house of a paroled sex offender when they learned of his arrival because of Washington's community notification law.⁴¹ The question becomes: should the public exposure occur independently of other efforts to ritually decertify and reintegrate offenders?

Public exposure penalties have also been questioned on constitutional grounds. Filcik, for example, writes, "'Scarlet letter' probation conditions, such as the 'Dangerous Sex Offender - No Children Allowed' signs, arguably impinge on the defendant's first amendment guarantees of free speech and association, the right to privacy and the eighth amendment protection from cruel and unusual punishment."⁴² Offenders have always been subjected to losses of various liberties, none more stark than imprisonment and capital punishment.

³⁸ Mayer sign (Tier)

³⁹ Braithwaite 1989 on gossip

⁴⁰ Fairfax Journal, 8/6/96,A6, "Parolee List a Best Seller"

⁴¹ Snohomish arson

⁴² Filcik p.311

Justice Brennan forces us to ask, “Is the punishment unacceptable to contemporary society or so degrading to human dignity as to cause the offender mental anguish?”⁴³ While the caning of Michael Fay was acceptable in Singapore, it was controversial here, just as capital punishment is (somewhat) acceptable here but not in Canada. There is no clear standard with regard to the introduction (or resurrection) of shaming penalties. Simply because they are descriptively counter-normative does not make them injunctively so. Brennan astutely contrasts acceptability with degrading human dignity. Clearly, a sign reading “Warning! Violent Offender,” which connotes the more common “Beware of Dog,” is degrading. By any standard, this is stigmatizing without being reintegrative. It increases the distance between the offender and the community, fostering isolation and a constant labeling of the offender as deviant. It would be hard to ring this offender’s doorbell without a magnified sense of dread that would color any subsequent interaction. This, of course, fulfills the goal of incapacitation, enabling the community member to exercise caution. In this case, it seems reintegrative shaming and incapacitation are mutually exclusive. Where the latter is primary, stigma will overwhelm reintegration.

Proportionality is probably the most difficult issue to resolve with regard to shaming penalties. As Massaro asks, “on what possible basis might a sentencing reform commission decide that holding a sign in public was a proportional punishment for child molestation? Or, if a trial judge were to devise this sentence, how might the appellate court handle the defendant’s argument that this sanction was not proportional to the crime?”⁴⁴

One approach to the proportionality problem is the use of time schedules. The DWI bumper stickers were to be in place only for the duration of probation. Again, removing a bumper sticker is not equal to its placement, however. The labeling is stronger than the decertification of the criminal status. The same is true for the newspaper advertisement which appears one day, but not the next. The absence doesn’t decertify. Stronger rituals of decertification are necessary to legitimate episodic labeling. Another problem with the use of time as a gauge for impact is the law of diminishing returns. It is hard to argue that the second month of driving with a bumper sticker is equal to the first month when the reference group sees the sticker for the first time.

Proportionality concerns are partially resolved by the offenses themselves. An advertisement that labels one a vandal will be responded to quite differently than one that announces a sex offender. The medium is the same, but the shaming will be more intense for the sex offender. The response, however, may often be too strong or inappropriate for offenders of more serious offenses.

Since I drive and I drink, though not together, it is easier for me to identify with someone who combines the two than the person who rapes. Unless I participate in some ritual that evokes the offender’s remorse and observe his restorative effort, it would be difficult for me to decertify his deviance and be on the receiving end of his reintegration. Thus for offenses with which I might more easily role-take with the offender, I can

⁴³ ? Kelley, ?; p.774

⁴⁴ Massaro (1991; p.1939)

reprove at a distance and comfortably accept his presence within the community without knowing the offender as a person. DWI bumper stickers or ads may be suitable for this.

Public exposure penalties may bring about two unintended consequences that are worth considering. First, they may bring about what Massaro calls a shaming overload.⁴⁵ After some time and enough newspapers advertisements, the novelty and potency of the penalty might diminish. I would turn the page just as quickly as I overlook other crime blotters and ignore car alarms. The penalties that personalize the exposure more locally, either in local papers, bumper stickers, or wearing signs, are less likely to suffer from this problem. Mass production of shaming penalties brings an anonymity that mutes the effect of shaming. Second, Massaro argues that shaming penalties may bring about unintended spillover effects. The wives and children of johns, the neighbors of an offender with a sign on his door, even those with the same names of offenders, all might be subjected to some of the shame intended only for the offender. Again the solution seems to be to localize rather than mass advertise. Spillover is less likely when offenders are not mistaken and the reference group can distinguish the guilty from the innocent.

In general, public exposure penalties seem to satisfy incapacitation goals more easily than reintegrative shaming. They stigmatize, but do nothing to reintegrate and they may suffer from unintended consequences.

Apology Penalties:

The third class of formal shaming penalties involve ceremonial or written apologies directed to victims or the community (more involved victim-offender mediation is described in the next section). Ted Poe, the judge who sentenced Steven Dodd to shovel manure, in another case required a teenager who had vandalized thirteen schools to return to each school and offer an apology in front of the student bodies.⁴⁶ Tennessee Judge L. Clure Morton sentenced a car thief to three years probation on the condition that he apologize for the theft to a church congregation.⁴⁷ Filcik noted the following apology advertisement required by an Oregon judge to be placed in a local newspaper along with the offender's photo:

CRIMINAL APOLOGY - Thomas E. Kirby was convicted of Burglary First degree for burglarizing a residence in South Beach, Oregon on October 25, 1985. He has previously been convicted of burglary in Portland. He was placed on probation... and ordered to... place this ad in the Newport News-Times apologizing for his conduct. At the time of his arrest, he was in a residence on Sam Creek Road in the Toledo/Newport area. Prior to this he resided in Waldport.

APOLOGY- I, Tom Kirby, wish to apologize to the people of the City of Newport for all of the problems I have caused. I know now what I did was selfish and

⁴⁵ Massaro, shaming overload

⁴⁶ USA Today, Poe and teen apology

⁴⁷ Tennessee apology to church

wrong. I also realize that I have caused a lot of hardships on people that were my friends and also my own family. I want to thank the courts for a second chance to prove that I can be an honest upstanding person. My apologies again for causing any inconvenience to anyone.⁴⁸

Massaro, following Goffman, argues that apologies include an expression of embarrassment, recognition of wrong-doing and the intention to behave properly, and some performance of penance or restitution.⁴⁹ The above apology at least captures two of these three conditions. Of the three types of formal penalties that have been employed recently, apologies come closest to the ideal of reintegrative shaming. They may evoke sympathy and forgiveness if they are felt to be sincere. As such, the offender is more likely to be welcomed back into the community, particularly if she is attempting to make up for the harm caused by the offense.

These penalties combine apologies with public exposure, thus shaming and a bridge toward reintegration are created at once. It is possible to stigmatize with apologies as well. One judge had juvenile offenders apologize to the court while on their hands and knees.⁵⁰ This combines debasement with apology. Aside from these rare applications, we have no rituals of apology for offenders to publicly announce their guilt and sorrow (when they indeed feel it). Thus we have no opportunities for public forgiveness and re-admission into the community. Shaming without these corresponding rituals is inevitably stigmatizing, serving only as either a deterrent or as retribution.

Community-Based Shaming

In New Haven, CT, a police crackdown on prostitution in the city's well-known red light district had the unfortunate effect of displacing the sex trade to the surrounding residential neighborhoods. One of these is Edgewood Park, a racially and economically heterogeneous neighborhood. By the early 1990s, prostitution in Edgewood began early in the morning, targeting those heading to work, and continued all day and into the night. Used condoms were littered in playgrounds, schoolkids waited for buses adjacent to hookers waiting for johns. In response, community members took an innovative approach.⁵¹

When neighbors saw a car circling a block 25 to 30 times or picking up a prostitute, they took down the license plate number and traced the registration through the Department of Motor Vehicles. Then they sent a letter to the car owner's address advising the owner that the car had been seen cruising the neighborhood. The letter detailed the community's campaign against prostitution and urged the recipient to be careful about who they lend the car to in the future. At the same time, the group posted

⁴⁸ Filcik apology quote

⁴⁹ Massaro on apology

⁵⁰ apology on hands and knees

⁵¹ Connecticut Law Journal, 1992

flyers, noting the “john of the week,” reprinting the john’s name, address, and phone number (phone numbers were subsequently dropped). Both of these were bold community approaches using shaming as the normative sanction.

The style was innovative and related approaches have appeared elsewhere. Various communities have listed the names of offenders on billboards, newspapers, radio shows, or cable TV shows. Unlike Edgewood, however, these actions are usually undertaken by local government or law enforcement. For example, Police Capt. Richard Pimental of Taunton, MA, reads the names of everyone arrested in his town on a cable TV show every week.⁵²

Although no formal study has been conducted, Edgewood’s campaign appears to have worked. Daytime prostitution apparently disappeared after the campaign was initiated, and three years after the campaign began, prostitution is “basically gone from the area,” reports the leader of the campaign.⁵³ As such, the neighborhood association began applying the tactic to other problems. In a second campaign, they posted flyers highlighting a “slumlord of the week.” In this case, the targets are landlords who do not take care of dilapidated properties. The tactic is used when landlords fail to return association phone calls, refuse invitations to association meetings, or otherwise do nothing to address the problem.

Success is certainly one criteria for the application of shaming. In this instance, “johns of the week” may not have returned, but they also did not show remorse for their actions. Instead, suits were filed by some johns (and some of their spouses) against the members of the neighborhood association for harassment (they have been subsequently dismissed). In one case, the alleged john claims his wife received the letter and subsequently left him. The plaintiffs’ attorney argues, “The harassment statute is certainly violated. They are inflicting wanton pain on people they know to be innocent in order to achieve what they consider a larger goal. I think that’s a pretty fair definition of terrorism.”⁵⁴ On the other hand, the defense attorney takes the community perspective: “The guy is patronizing a prostitute in my neighborhood. It’s affecting my property value. What’s the cause of his current problem? Visiting a prostitute in the first place, or having his wife find out about it?”

The Edgewood Neighborhood Association has clearly taken an innovative approach to their prostitution problem. The approach is an example of shaming because the letters and the posters bring the johns’ behavior to the attention of family members and the larger community. The threat is not of formal sanctioning, but of communal status loss. The marital break-up and harassment suits demonstrate the powerful impact of shaming these individuals. This community action raises important questions regarding the application of shaming.

First, what is the community’s role in defining and enforcing local standards? Since Wilson and Kelling’s widely read “Broken Windows” article, criminologists have

⁵² news media

⁵³ CLT, 1995

⁵⁴ CLT, 1992

been concerned with the ecological context within which crime occurs.⁵⁵ Generally, it is not argued that different communities have different values regarding crime, but that communities vary in their ability to enforce normative standards. Visible criminal activity, vandalism, dilapidation are cues of social disorder that reinforce a perception that the community is vulnerable to even more crime. Edgewood is an example of a community that successfully clarified the standards of what was appropriate and inappropriate neighborhood behavior. With patrols, posters, and letters they gave an account of what they will not tolerate. There were no threats issued by the association or by the police (though the plaintiffs did claim to received anonymous threatening phone calls). Rather they capitalized on the widely shared norm that soliciting a prostitute is wrong (not just illegal) and the johns would not be proud to identified.

Second, is this reintegrative shaming? One of the reasons the association was sued may have been that the shaming was stigmatizing and not reintegrative. As Braithwaite has alerted us, we have many ceremonies of degradation, but few of reintegration. The posters and letters are certainly stigmatizing, even when they don't point the finger directly (such as when the letter asserts that the car was seen making circles in an area known for prostitution). But it is harder for us to envision reintegration. In this instance, johns appear not to be locals, but anonymous outsiders entering the neighborhood only for the prostitutes and leaving immediately afterwards. As such, it is interesting that the posters have any impact at all, given the reference group is a neighborhood of strangers. Much more powerful would be the posting of flyers in the streets and shopping centers of the john's own neighborhood. (The group decided against this tactic for fear of liability. They believed that posting in their own neighborhood served primarily as a deterrent whereas posting in johns' neighborhoods was primarily retributive.)

It would be a mistake to assume reintegration occurs when the posters are torn down or blow away in the wind. We have no ritual for the john to articulate remorse and for the community at large to decertify the deviant, forgive and forget. The letters to the households are specifically targeted, unlike the posters. But they leave it to the household to resolve the crisis created by these "Dear John" letters. As a result, it seems some wives leave may their husbands, while others join in suits against the community. It would be better if somehow the two reference groups were unified in both the shaming and the reintegration.

This raises a third issue. To what extent must the community be actively involved in the shaming? A neighborhood association gained support of the community to engage in their shaming efforts, but in reality, they were not the reference group of concern for the johns. The johns' feared notoriety among family, friends, and colleagues, not the unknown residents of a blighted neighborhood. In a different, but illustrative example, a Northwest Indian Tribal Court sentenced two delinquent youths to a period of banishment on an uninhabited Puget Sound island.⁵⁶ Though it was an attempt to resurrect tribal customs, the judge did not win the full support of the important reference

⁵⁵ Wilson and Kelling, Grasmick and Bursik, Skogan 1990

⁵⁶ Puget Sound Exile

group: the youths' families. Rather than abide by the custom, family members visited the boys and brought them supplies when the boys were meant to fend for themselves in isolation. Without wide support shaming can be undermined by those who identify more closely with the offender's plight than with community's attempt at promoting justice.

Finally, this shaming campaign is conducted by community members and not by law enforcement officials, thus the procedures fall outside the system of accountability proscribed by our courts. There is no due process, no opportunity to profess innocence, no opportunity to contest the community's norms. Police need more justification than circling the neighborhood to arrest a john: should community group's be held to a lesser standard? It appears that the community groups largest concern was exposure to liability. What other protections are necessary to protect the innocent from shaming by the community? Clearly, the presence of guiding local institutions with their own systems of accountability can help. The Edgewood Neighborhood Association depended primarily upon a local law firm and an Orthodox Jewish congregation.

Family Group Conferences

The most innovative application of shaming is quasi-formal, integrating the power of informal sanctioning with the oversight of the criminal justice system. Unlike judicial penalties, which prescribes the sanction, but leaves the shaming to the community at large, family group conferencing brings relevant community members together in an orchestrated forum that evokes shame in the offender and facilitates reintegration. Only preliminary studies of family group conferencing exist, most of these from Australia and New Zealand where the technique is most popular. Major studies are underway, but until their findings are published, conclusions will have to be tentative.

The family group conference (FGC) is a diversion from formal court proceedings. Currently, FGC is used with juvenile offenders. The goal is consistent with the principles of restorative justice: to involve victims and other community members in a process that will hold offenders accountable and repair the harm they have caused.⁵⁷ The FGC brings the victim and offender together for a one-hour meeting. They are joined by supporters of each: family members and others who hold the respect of the victim and offender. The conference is mediated by someone specifically trained for FGCs, a common model uses the arresting police officers for the role. The FGC begins with an introduction by the mediator emphasizing the problem-solving approach to be taken in the meeting, introducing the conference participants, and establishing the guidelines for the discussion. Offenders are then offered the opportunity to recount the criminal incident. The victim follows with an account of how he was affected. As Moore and McDonald write,

...(Offenders) are frequently astonished and often shocked to hear of the impact that the offence - say, a burglary, theft, or assault - has had on the person most directly affected... To mark this transition in the conference to the victim's version of events, the coordinator will usually ask the offender: What were you thinking about at the time of the offence? or: How do you think the victim felt

⁵⁷ Zehr, 1990

about that? Here one can talk of a typical response to the question. Almost invariably, the offender was thinking about “nothing” at the time of the offence and “doesn’t know” what the victim felt. Indeed, this is the common theme uniting most offences across the spectrum, from those of little moment to those that threaten the victim’s liberty, dignity or life. The offender simply doesn’t see things from the victim’s point of view. And when victims of offending behaviour are given an opportunity to put their version of events to the offender, the result is usually clear on the offender’s face: the blank look of surprise is rapidly followed by the lowering of the face in shame. That shame is shared by everyone at the conference. It is most pronounced in those who are there to support the offender - although none of them are in any way culpable for the offence. Their shame seems to be felt not for the offender’s legal guilt. Rather, they seem to be ashamed about the transgression of social norms by a person with whom they are associated. Bonds between people have been threatened by the offending behavior.⁵⁸

The family group conference is therefore a vehicle for invoking shame in an offender. This is produced most effectively by bringing together in one room not only the victim whose account triggers the shame, but the offender’s reference group upon whose esteem he depends. Where the offender was hitherto unable to, in Mead’s terms, “take the role of the other,” this process makes the victim’s experience plain and the community estimation of the offending act.

Once the accounts are given, the conference turns to the discussion of reparation. In part, the purpose of this is restitution, but more importantly, this serves as the vehicle for reintegration. Moore and McDonald continue,

The ensuing discussion of reparation continues the process. Almost invariably, it is the offender, and sometimes the offender’s family, who call for the tougher penalties at this stage. They feel that the right to be reaccepted has to be earned. Offenders propose substantial amounts of community work or some other form of tariff that will demonstrate their willingness to atone for the damage they have caused. The bargaining that ensues - victims argue the case for leniency, for understanding that this mistake can and has been learned from - such bargaining runs counter to much of the received “wisdom” about what victims do and don’t want. The bargaining is one part of the process of forgiving, and it may start the long process of restoring trust.⁵⁹

The FGC is innovative not only in its use of shaming, but in its explicit attempt to reintegrate the offender. The conference ends with the signing of an agreement to the terms of reparation just discussed. This agreement may or may not be legally binding, but serves a vital symbolic function. It effectively alters the label of the offender to one who has demonstrated remorse and a willingness to make amends. The offender is at

⁵⁸ Moore and McDonald

⁵⁹ Moore and McDonald

once distancing himself from the offending behavior and committing himself to a responsible role in the community.

CONCLUSION

The role of shaming is an important part of transitioning the offender from the moment of conviction (or admission) of guilt to the restoration of the offender to the status of law-abiding, even contributing, citizen. But it is only one moment in a sequential process. This moment should be at the beginning, not at the end where it serves only as retribution. The full sequence may be completed intensively and briefly, such as in a family group conference, or extended over time; it is the order that is most important.

Shaming should be the first signal that the offense was more than technical or harmless. The message is that the offense defies community standards, that the offender has caused real harm. As a result, the community rightfully expresses moral condemnation, a disapproval of the action, and an expectation that the offender acknowledge his culpability. The desirable outcome, but one that cannot be controlled, is that the offender will identify with the community and its standards, judging himself through their eyes, and feel remorse. When the community is legitimately concerned for their safety given a probability of recidivism, incapacitation is the next course of action. At this point, too, depending upon the will of the community, retribution may be called for (though it is doubtful that retribution offers little more than a harm that will come back to haunt). Next, the offender must be offered the opportunity to apologize to both victims and the community. Ideally, through some interchange between offender, victim, and community, the apology can be accepted and the offender held accountable for its sincerity by engaging in a process of reparation. At this point, the stigma must be lifted and the offender redefined as repentant. Community service may be carried out in the same spirit of voluntarism that any other citizen might engage in it: an effort to improve the status quo. Stigmatizing the offender here such as requiring that he perform community service while wearing an outfit indicating his probationary status make little sense. Community service ought not be viewed as punishment, but as good works to be lauded. This shift in orientation helps the offender and the community make the final transition toward reintegration. Completion of restitution ought to be marked by an occasion of ceremonial reintegration.

Thus far, the organized use of shaming has been directed at juveniles and less serious offenders. It is still unclear if the power of shaming is limited to these spheres of criminality. Targeting less serious offenders, juveniles, and linking shaming to the personal reference group is an appropriate starting point for the application of shaming. As evidence accumulates regarding its effectiveness, then the boundaries may be expanded. Even in this limited realm it is unclear how it should be applied to repeat offenders and to those who have previously and unsuccessfully been subjected to organized shaming. As I have argued, the best strategy will identify the offender's stake in the community and work to increase that stake. This will not only have its own independent benefits, but also increase the likelihood of successful shaming.

Some critics of shaming dismiss it as inevitably weak in our highly individualistic and anonymous society.⁶⁰ What may work in a highly interdependent and relatively communitarian society like Japan seems hopelessly idealistic here. The argument advanced here suggests that shaming has universal import. Americans, like Japanese, are highly concerned about the opinions of others, consciences are developed as anywhere through social interaction, normative influence, and learning the ability to take the role of the other. Indeed a wider application of shaming requires a shift toward communitarianism, but it is precisely through such an application that the shift occurs. A shift need not precede it.

This paper has examined a communitarian perspective on shaming. It was argued that shaming needs to be reintegrative in order to avoid the counterproductive effects of stigma and shunning. Shaming will work best among those who have a stake in the community for the deterrent effect of shaming is the fear of communal status loss. For those without a status worth maintaining, shaming is impotent and the goal should be creating a stake in the community for the offender. There can be no reintegration if there has been no prior integration.

Community-based approaches to shaming have not been commonly documented. The Edgewood Association's activities were unusual in their direct effort to apply shaming. Their model rested upon surveillance as would any mechanism of informal control. But monitoring community behavior is supplemented by two unique interventions. The "john of the week" posters applied public exposure much like the judicial penalties. The "dear john" letters were a private action, directed specifically to offenders and their households.

The effectiveness of the community campaign may lie in the directness of the threat of communal status loss and the strength of the moral voice. Formal justice did not stand as an intermediary in this process enabling the message to be unmuted. When the community exercised its moral voice it engaged in a norm clarification process that delineated the parameters of acceptable and unacceptable behavior. Still, the campaign raises questions that need to be answered. First, what is the relationship between the offender and the community? Most of the johns came from other neighborhoods and did not have any relations with Edgewood community members beyond their brief encounters with the prostitutes. In what way are they members of the community? They are more certainly members of the reference group (the household) to which the letters were directed and it was to this group that the johns were held most accountable. But since the reference group was also not a part of Edgewood, this raised the problem of competition between the two groups (illustrated by the lawsuits) rather than cooperation. The community campaign also raises the question of how to decertify offenders, a question that has become thematic to communitarian shaming. No attempt was made by the community to decertify or reintegrate offenders. A final question raised by their efforts is how to hold communities accountable for their efforts? We can easily imagine how personal vendettas might lead to an individual finding themselves on a poster of the

⁶⁰ Massaro

week or the accidental mailing of a letter to the wrong household. This is a general problem for any organized use of informal control.

This paper also examined three formal applications of shaming penalties. Debasement penalties, such as requiring a man to wear diapers, are quintessential ceremonies of degradation. They are retributive, demeaning, and will most likely lead to ostracism and oppositional culture formation. Public exposure penalties, like DWI bumper stickers, may be less demeaning, but also fail to decertify offenders or offer opportunities for reintegration. Usually, they conflate the goals of incapacitation (community safety) and shaming, the former increasing the likelihood of ostracism. Of the formal applications, apology penalties come closest to a communitarian approach because they offer the opportunity to offenders for expressing remorse and demonstrating the intention to be law-abiding. Again, however, they do nothing to decertify, leaving it to the community at large to reject or accept the apology.

Family Group Conferencing makes the best use of informal and formal control and may become the blueprint for future applications of shaming. As a component of the criminal justice system, the conferences can be structured and accountable, yet their small size and personal nature maximize the impact of shaming. While the public exposure of the community and formal approaches appeal to offenders at the level of the “generalized other,” these conferences make use of the most relevant reference groups: the offender’s significant others and the victim. They also go beyond the other applications in their explicit attempt to decertify and reintegrate the repentant offender. Even here, however, it seems there ought to be some ritual to acknowledge the completion of the offender’s reparation contract.

The current uses of shaming have been a disorganized and often spontaneous generation of creative strategies to ameliorate the pressures on an overtaxed and underachieving criminal justice system. Though no studies document the effects of the variant applications, it is likely that their ultimate success turns on two issues: whether offenders have a stake in the community and whether the shaming is reintegrative.