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The New Debate About Shame in Criminal Justice: An Interactionist Account*

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A new debate has emerged that focuses on the potentiality of shaming as an instrument of formal social control. This article analyzes the new debate by resurrecting and elaborating on core concepts of labeling theory. Labeling theory dominated criminological thinking in the 1960s and 1970s, but fell into disrepute. With the demise of labeling, an important core issue was lost. Social standing in the community matters. Stigma, deserved or undeserved, has significant consequences for the stigmatized. The article concludes that judicial shame penalties are theoretically problematic, but reintegrative shaming alternatives, such as those found in restorative justice programs, are more promising.

Once upon a time, criminologists were very taken by the problem of stigmatized criminal offenders. In the 1950s and 1960s, and to this day as evidenced by the requisite chapter in any criminology or deviance textbook, criminologists advanced a concern that much criminal behavior can be explained by society's counterproductive reaction to initial criminal acts by its members. The burdensome social reaction to minor deviance had the effect of stigmatizing and outcasting these individuals, ultimately increasing the likelihood of future criminality. The problem was not so much the "primary" or initial criminal act by the individual, but his or her consequent "labeling," fostering a deviant identity and marginalizing the individual from conventional society.

Labeling theory, however, suffered in the wake of weak empirical support (Gove, 1975), and criminologists have largely turned their attentions elsewhere. But with the demise of labeling theory, a perennially important core issue has been lost. Social standing in the community matters. Stigma, deserved or undeserved, has significant consequences for the stigmatized. This article argues that a new debate is on the horizon, one that resurrects some core concerns initially raised by the labelists, but concerns that have been ignored because the old debate appeared to be finished.

The terms of the new debate are different. In particular, the terms *stigma*, *primary* and *secondary deviance*, and *labeling* have been replaced by new terms: *social bonds*, *social identity*, *alternative sanctions*, *expressive punishment*, and especially, *shame*. The central issue now is the potentiality of shaming as an instrument of formal social con-

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trol. On the one side are those, following in the footsteps of the labelists, who are intuitively apprehensive about shaming. They expect shaming to be harmful, emphasizing its damaging and potentially counterproductive consequences. On the other side, there are those, perhaps most influenced by the "consensus" theories of sociology in the Durkheimian tradition, who see shame as an integral part of normative conformity and the central component to communitarian mechanisms of social control. To them, social control through shame processes is a viable alternative to incarceration. The debate is not exclusively theoretical. We find its application in the contemporary use of judicial shame penalties (Kahan, 1996; Karp, 1998; Massaro, 1991, 1997; Tonry, 1999). The narrower debate about shame penalties also falls within a larger interest in the subject of shame in criminological theory (e.g., Braithwaite, 1989), social theory (e.g., Scheff, 1997), and popular culture (e.g., Alter and Wingert, 1995; Twitchell, 1997). Without attempting to address the larger cultural discourse, I concentrate here on the emerging criminal justice debate and try to locate underlying theoretical concepts within the labeling tradition.

Because labeling theory was so important to criminology two decades ago, because it has fallen into disrepute, and because some of the central insights of labeling theory are important to the current debate, I argue for revisiting some of the core concepts of the labeling perspective. I suggest that an interactionist perspective illuminates why judicial shaming is compelling, but problematic for both offenders and a civil society. I also suggest community and restorative justice alternatives to judicial shaming, identifying how they capitalize on shaming's benefits without succumbing to its liabilities. I begin, however, with illustrations of the new judicial shame penalties to emphasize the concrete reality of the new debate.

Judicial Shame Penalties

The shame debate is taking place largely in law reviews, and shaming is being put into practice by an apparently growing number of judges across the country. Even though no one knows how widespread judicial shame penalties are as yet, this particular innovation has clearly struck a chord among legal theorists and practitioners and gained wide attention as front-page news in the *New York Times* (Hoffman, 1997) and on news programs such as *20/20* (ABC, 1996). The new debate about shame is made concrete by recent attempts to employ shame penalties to criminal offenders. The judicial use of shame penalties appears to be an attempt to threaten the social status of offenders. The penalties are meant to communicate that the offense has a moral and social nature, in addition to its legal content. As such, the offense triggers disapproval. They are also meant to reaffirm normative standards and to deter future transgressions by causing the offender to experience shame. The threat of social exclusion, of not being regarded as a worthy member of the community, is the primary sanction in a shame penalty. The recent judicial use of shame penalties can be divided into two categories: public exposure penalties and debasement penalties (Karp, 1998).

Public Exposure Penalties

Public exposure penalties refer to the largest and most basic class of shame penalties. These are defined by the attempt to communicate the offense and the offender to the public. Recent penalties include requiring convicted drunken drivers to affix bumper stickers, signs, or special license plates to their vehicles indicating their driving offense. Another variation requires offenders of various crimes to post signs in front of their homes, place advertisements in newspapers, appear in television commercials or on cable TV programs, and wear T-shirts, signs, or bracelets that publicly associate the individuals with their offenses. There are several illustrations.

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 into the back of a sheriff's patrol car. The judge sentenced him to one year of probation, required fifty 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" (Kahan, 1996).

A Rhode Island Superior Court judge required an offender to purchase an advertisement in the *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" (Massaro, 1991:1880).

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" (Brilliant, 1989).

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 thirty months, fined him \$7,500, and ordered that he pay restitution of \$9,600 to the victim. As a condition of his probation, Mayer was ordered to remain on his farm and post a sign at the entrance reading: "Warning! A Violent Felon Lives Here. Enter at Your Own Risk!" (Hoffman, 1997).

A central component of public exposure penalties is to bring the crime to the attention of the public so that the public may respond with shaming. Note that the shaming is not necessarily direct; it is often enough to evoke gossip alone that never reaches the ears of the offender (Braithwaite, 1989). The knowledge that gossip may occur, the extended stares, and the constant visual reminders to the offender of his or her offense are all intended to evoke shame. These penalties are, of course, reminiscent of Hester Prynne's scarlet letter.

Debasement Penalties

Debasement penalties are designed specifically to lower the status of the offender through humiliation. They generally achieve this by associating the offender with a noxious activity. Examples include the following.

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 up the manure in the Houston Police Department's stables, eventually amounting to 1,572 hours in the horse barn (El Nasser, 1996). In another example, an offender in a domestic violence case was made to stand before his ex-wife while she spit in his face (Kahan, 1996). A third example involved a slumlord that was put under house arrest in one of his rat-infested tenements (Garvey, 1998). In a fourth example, a Maryland judge has required that juvenile offenders apologize to the court while on their hands and knees (Stapleton, 1995).

A final example is a case reported by Brilliant (1989). Here, a probationer was required to live in a halfway house and comply with its rules. When the probationer was accused of "acting like a baby," he was told to wear diapers outside of his clothes. Brilliant (1989:1365) notes that "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.'"

The essence of debasement penalties is status diminution through embarrassment and humiliation. The negative feelings about the offender's behavior are communicated through imposed negative experience. This captures the practical function of retribution by disallowing the offender the opportunity to profit from the offending act. Of course, debasement penalties can be combined with public exposure to amplify the embarrassment. The ducking stool is an example of public debasement in an earlier era.

Shaming in an Interactional Perspective

Without doubt, the use of shame penalties raises questions of morality, utility, and constitutionality. I leave technical questions of constitutionality to the law reviews (but see, for example, Book, 1999; Filcik, 1990; Kelley, 1989). I also leave aside here more pertinent questions about utility (for sociologists, criminologists, and practitioners), primarily because there are no data—we simply do not know yet if the recent shame penalties are effective (e.g., recidivism) or efficient (e.g., in lieu of other sanctions). However, see Grasmick and Green (1980), Grasmick, Bursik, and Kinsey (1991), Sherman et al. (1992), and Tibbetts (1997) for indirect empirical tests. Each demonstrates that shame, labeling, or both are of significant concern to criminal offenders. Leibrich's (1993) qualitative analysis shows similar findings. Instead, I focus on the questions that generate the greatest ire, and these are essentially moral—those having to do with justice.

Although the current debate about shame penalties raises numerous relevant questions, this analysis concentrates on an important but ignored issue: the interpretive process engendered by shame penalties that reaffirms the moral order in communities and ossifies deviant identities in offenders. This article continues with a discussion of shaming from an interactionist perspective, resurrecting and elaborating on several insights of the early labelists. In particular, four issues are examined: 1) the distinction between inclusionary and exclusionary labeling processes; 2) the purpose of debasement or status

diminution; 3) the relationship between shame penalties and attempts to affirm the normative order; and 4) the implications of shame penalties for creating deviant identities.

Both types of shame penalties, public exposure and debasement, can be characterized as a form of "stigmatizing shaming" (Braithwaite, 1989; Tonry, 1999). Stigmatizing shaming is synonymous with labeling. Braithwaite's distinction between reintegrative and stigmatizing shaming is crucial because he argues that shaming has an important role to play in crime control, but not the variety of shaming employed by contemporary judges. An alternative model for reintegrative shaming has been employed in restorative justice programs, such as family group conferencing and community reparative boards (Bazemore, 1998a and b; Clear and Karp, 1999; Van Ness and Strong, 1997). A similar alternative model is proposed by "peace-making" criminologists (Pepinsky and Quinney, 1991). Since the critique of stigmatizing shaming has its roots in traditional labeling theory, I begin this analysis with a review of labeling theory and its apparent decline in criminological thought.

The Old Debate: Labeling Theory

The origins of labeling theory are generally traced to Tannenbaum's (1938) publication of *Crime and the Community*. Here, he wrote,

The person becomes the thing he is described as being. Nor does it seem to matter whether the valuation is made by those who would punish or by those who would reform. In either case the emphasis is upon the conduct that is disapproved of. The parents or the policeman, the older brother or the court, the probation officer or the juvenile institution, insofar as they rest on the thing complained of, rest upon a false ground. Their very enthusiasm defeats their aim. The harder they work to reform the evil, the greater the evil grows under their hands. The persistent suggestion, with whatever good intentions, works mischief, because it leads to bring out the bad behavior it would suppress. The way out is through a refusal to dramatize the evil. The less said about it the better. (Tannenbaum, 1938:20)

Tannenbaum's initial statement reflects a core concern of the labelists: the social reaction to the criminal incident is as important to recidivism, if not more important, as the event itself and the prior proclivities of the offender. The social reaction stigmatizes the offender as deviant and, thereby, encourages more deviant behavior. This point of view is echoed repeatedly in the major statements of labeling theory, including Lemert (1951, 1967), Garfinkel (1956), Goffman (1963, 1967), Erikson (1962), Kitsuse (1962), Becker (1963), Scheff (1966), Shibutani (1961), Matza (1969), and Schur (1971). To be sure, these discussions of labeling pertain to various forms of deviance that are quite distinct from one another and, consequently, social reactions may operate quite differently. Thus, a narrowly cast summary such as this or, in fact, the narrowly construed terms of the old debate fail to entertain these distinctions. For example, Becker concentrates on deviant behavior around which there is substantial normative dissensus; in particular, the use of marijuana. Scheff considers the deviance of the mentally ill, for whom inten-

tionality is rarely ascribed. Both forms of deviance must be distinguished from serious criminal behavior, which is generally assumed to be intentional (except when done by the mentally ill) and affords substantial normative consensus regarding its moral illegitimacy (Rossi et al., 1974). The societal reaction process would clearly differ among these three variants.

Labeling theory asserts a crucial distinction between "primary" and "secondary" deviance (Lemert, 1967). The former, which refers to initial criminal incidents, is seen as relatively unimportant in the development of criminal careers. This follows from an assumption that deviance is fairly evenly distributed across the population, but that low-status individuals (particularly the poor and minorities) are subjected to closer official scrutiny and are more likely to be prosecuted if caught. More important than primary deviance is secondary deviance, because its root cause is the labeling process itself. As Gove (1975:7) explains the perspective,

Once a person has been labeled a deviant—and particularly if that person has passed through a degradation ceremony and been forced to become a member of a deviant group—the person has experienced a profound and frequently irreversible socialization process. He or she has not only acquired an inferior status, but has also developed a deviant worldview and the knowledge and skills that go with it. And perhaps equally important, he or she has developed a deviant self-image based upon the image of him- or herself received through the actions of others.

Tittle (1975:163) argues that the terms of the old debate focused on two basic propositions of labeling theory. First, "the probability of being officially classified as a deviant is more heavily influenced by other variables, particularly social disadvantages, than by actual rule-breaking. Second, labelists argue that official classification as a deviant has pejorative consequences which result in rule-breaking by those who are labeled." The old debate, couched in these terms, made a dramatic case that challenged conventional thinking. Criminals are *criminals* not because of their crimes, but because other social disadvantages distinguished them (unfairly) from the larger pool. And because of the criminal label, not because of prior proclivities, they are likely to commit further crimes. The empirical evidence, compiled in an edited volume by Gove (1975), in favor of either proposition was found to be quite weak for criminal offenders, juvenile delinquents, heroin addicts, sex offenders, and several noncriminal categories of social deviance (such as mental illness, alcoholism, mental retardation, and physical disability).

As the disconfirming data mounted, criminologists continued to teach labeling theory in their courses, but their research interests became devoted to other explanations of crime. This occurred despite several attempts by labelists to clarify the perspective in light of an overly narrow operationalization of the theory by its critics (Becker, 1973; Paternoster and Iovanni, 1989; Petrunik, 1980; Wellford and Triplett, 1993). The important point for the current debate is not based on either of the two strong propositional claims, and as a result, this point has been overlooked until the emergence of the new debate.

What is especially important about the labeling perspective is not that labeling is the source of all crime or that the system is biased, but that individuals care profoundly

about what others think of them. We exist in a social world in which social comparison, relative social position, envy, pride, humiliation, embarrassment, superiority, and inferiority motivate much, if not most, of our behavior, even above calculations of materialistic self-interest or any coercive conformity to the law. Because public exposure in the wake of deviant behavior subjects individuals to a variety of profound emotions, we cannot be so bold in our causal assertions, or to put it another way, so simplistic in our theorizing as the labelists once were (or caricatured to be). Nevertheless, because the public revelation of deviant behavior is so consequential for the social identity of the deviant, the original intuitions of the labelists (if not exactly their causal modeling) remain pertinent today. Clearly, wearing a T-shirt saying, "I am a thief," or posting a sign reading, "Warning: Dangerous Felon Lives Here," are as transparent a form of social labeling as can be imagined. The labeling perspective may be the single most useful paradigm for analyzing judicial shame penalties.

Inclusion and Exclusion

As yet, there are no studies that document the effects of judicial shame sanctions. We must draw from a larger literature on shame and stigma to estimate the potential effects of labeling, shaming, or stigmatizing criminal offenders. Nevertheless, many fear that the intentional application of shame is atavistic and unbecoming of modern criminal justice. Tonry (1999) describes judicial shaming as an "unthinkable" and "deeply repressive" punishment policy. Whitman (1998) calls it "barbaric," "wrong," and (with irony) "beautifully retributive."

Gilligan (1996) argues that shaming can often be counterproductive—if normative conformity is the reaction to shame by some, rage and violent outbursts will be the reactions of others. Gilligan does not critique the shame penalties in particular. Rather, he draws upon his observations of incarcerated offenders and argues that their condition is characterized by a profound humiliation and elicits desperate, brutal rituals of violence and subjugation of others in order to gain self-esteem (also see Katz, 1988, who makes a parallel point). Gilligan (1996:110) observes, "I have yet to see a serious act of violence that was not provoked by the experience of feeling shamed and humiliated, disrespected and ridiculed, and that did not represent the attempt to prevent or undo this 'loss of face.'"

There is clearly a tension in the labeling process. As Paternoster and Iovanni (1989) suggest, a variety of post-labeling events may encourage either deviance avowal or disavowal. In particular, whether the sanctioning of offenders is suffused with inclusionary or exclusionary reactions by others is a crucial determinant of secondary deviance. Orcutt (1973:260) drew this distinction when he suggested that inclusive reactions are "attempts to control rule infractions by bringing the present or future behavior of the rule-breaker into conformity with the rules of the group without excluding him from it. Exclusive reactions are those attempts at social control which operate to reject the rule-breaker from the group and revoke his privileges and status as an ordinary member." However, most readers of labeling theory did not take note of this labelist's distinction between inclusive and exclusive labeling; instead, they adopted the more generic belief that all labeling was exclusive and counterproductive.

Braithwaite (1989) elaborates on Orcutt's distinction and predicts that only "stigmatizing shame" will be counterproductive. He argues that shame can take two dramatically different forms. The first, which he calls stigmatizing or disintegrative shaming, conforms to the expectations of most labelists and contemporary critics of shaming, such as Gilligan (1996) and Massaro (1997). Shaming is tantamount to what Garfinkel (1956) described as a "ceremony of degradation." The effect of such a ceremony is, as all theories of shame predict, a degradation of social status. However, stigmatizing shame is enacted without appreciation of the potential individual consequences of status loss, particularly the severing of social bonds. In this sense, stigmatizing shame is retribution without repentance or reintegration.

Braithwaite reconciles the apparent pathogenic consequences of shame with his own optimism for the application of shame in social control by drawing a distinction between stigmatizing shame and reintegrative shame. "Reintegrative shaming is conceived as labeling that reduces crime, stigmatization as criminogenic labeling" (1989:20). For Braithwaite,

Potent shaming directed at offenders is the essential necessary condition for low crime rates. Yet shaming can be counterproductive if it is disintegrative rather than reintegrative. Shaming is counterproductive when it pushes offenders into the clutches of criminal subcultures; shaming controls crime when it is at the same time powerful and bounded by ceremonies to reintegrate the offender back into the community of responsible citizens (1989:2).

Braithwaite's theory acknowledges the need to reaffirm the moral order, but additionally claims that shaming must be followed by gestures of reconciliation and opportunities for conventional reintegration. Such gestures may "vary from a simple smile expressing forgiveness and love to quite formal ceremonies to decertify the offender as deviant" (1989:55). Thus, a necessary complement to the task of normative affirmation is the responsibility of reintegration, without which the former is only likely to lead to further marginalization of the offender. Criminal justice, then, must be sensitive to both affirmations of the moral order and offender reintegration to be effective in a civil society. Currently, however, the judicial shame penalties appear not to repair the weakened bonds of criminal offenders to the community. In this view, the judicial shame penalties, however effective at conveying moral condemnation, are insufficient because they offer the offender no means of regaining social acceptance.

Braithwaite and Mugford (1998) argue that reintegrative shaming is possible in restorative justice practices such as "family group conferencing." Here, shaming occurs not by the application of a debasement or public exposure penalty, but as a result of an informal dialogue between offender and victim, as well as other affected parties such as family, friends, or neighbors of each. In contrast to the widespread public exposure of a judicial sanction (e.g., newspaper advertisement or bumper sticker), this kind of public exposure is limited to key stakeholders and undertaken in a regulated setting—a trained mediator moderates the conference. In contrast to debasement penalties, shame is evoked in the offender when he or she learns about the harm caused by the offense and

the disappointment of significant others, rather than through ridicule or disdain expressed by often-anonymous others. Evidence from the Australian RISE (Reintegrative Shaming Experiment) project on conferencing demonstrates the possibility of shaming without debasement.

As American judges move steadily towards greater humiliation and stigma as punishments for convicted offenders, the Australian Federal Police in Canberra are showing that shame does not require humiliation. . . . ANU [Australian National University] observations of hundreds of conferences show that police officers who lead them have generally succeeded in preventing any participants from condemning offenders as bad people. While the conferences have been far more emotionally intense than court, most of the anger and shame have been aimed at the offenders' acts and not their character. Canberra police are succeeding in making offenders feel ashamed of what they have done without making them into shameful people. (Sherman and Strang, 1997:1-2)

Debasement's Purpose

If it is obvious to Braithwaite that stigmatizing shame is counterproductive, it is not obvious to the shaming judges, or to the principal legal advocate of judicial shaming, Dan Kahan (1996, 1999a). What, then, is the theory behind judicial shaming, particularly for the use of debasement penalties? Shaming, presumably, is powerful and where there is power, there is risk. Although Kahan views debasement as "morally problematic" (1999b:1935), he sees shame penalties as less degrading than imprisonment. His point is that shame penalties need to be seen as potent by the public if they are to serve as an alternative sanction. He argues that probation and most other forms of alternative sanctions have failed to compete with incarceration as a punishment because they fail to express moral condemnation. Incarceration is symbolically rich, especially in American society, because the denial of liberty is a punishment that penetrates a core value of the society. In a free society, the loss of liberty is a significant signal of moral approbation. Incarceration, therefore, easily gains acceptance as a means of communicating moral disapproval (independent of its incapacitative effects). Few other sanctions are as expressively powerful. Kahan (1996:593) 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 condemna-

tion 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.

Shaming penalties, unlike other alternative sanctions, are justified by their intent to convey the same level of moral condemnation as incarceration. The symbolic power, however, does not come from the denial of liberty, but from a reduction of social status or "status deprivation" (Kahan, 1999a:704). This argument suggests that in the search for sanctioning alternatives, shame penalties might be the only sanction that will convey the same level of approbation as incarceration, thus winning public support and achieving retributive aims.

The retributive case for shaming is that status loss is a significant risk to individual members of society; therefore, any threat of status loss can serve as a criminal deterrent. It is imposed simply as an alternative to incarceration or as an add-on to short-term jail sentences (such as in making ex-offender status public knowledge). The shaming is conceived as a credible harm to offenders, a harm they would wish not to have repeatedly imposed upon themselves and a harm that would act as a general deterrent to others. What is the "pain" that is imposed? It is clearly a form of humiliation and loss of social standing. That is, it is both emotional and interactional. The deterrent and retributive case, therefore, depends on the rational calculus of offenders and the social harm that shame penalties can inflict. While Kahan's argument is rooted in Feinberg's (1970) theory of expressive punishment, the focus on status deprivation is best understood in terms of labeling theory and the societal reaction perspective.

A Moral and Interactional Order

In Becker's (1963) *Outsiders*, much emphasis is placed on the role of "moral entrepreneurs." Crucial to the labeling process are the actions of those who feel compelled by some private or public ethic to denounce the deviant behavior and reaffirm some more conventional behavioral standard. One criterion for Garfinkel's (1956:423) status degradation ceremony is that the sanctioner be "regarded as acting in his capacity as a public figure, drawing upon communally entertained and verified experience." Judges engaged in shaming clearly perform such a role; a role that is closer to that of a moral crusader than that of a legal bureaucrat who supplies sanctions based perfunctorily on sentencing guidelines and mandates given by seemingly objective or morally neutral legal codes.

This motivation to shame, however, can be traced to a more widespread social phenomenon than an appearance of a few judicial moral entrepreneurs. Indeed, it is clearly rooted in Durkheim's theory of punishment. Shaming is necessary because the offense calls into question the moral order. The crime forces the community to reaffirm the cultural proscription of the behavior by articulating its condemnation of the act and justifying this condemnation by disclosing the damage wrought by the incident. This perspective follows from Durkheim's insight that social sanctioning reinforces the moral order. As Garland (1990:33) explains the Durkheimian view, a criminal incident,

serves as an occasion for the collective expression of shared moral passions, and this collective expression serves to strengthen these same passions through mutual reinforcement and reassurance. In effect, the social reality of the moral order is demonstrated by this collective, punitive response and is thereby further strengthened. The important point that Durkheim is making here is that the moral order of society—and hence its solidarity—rests entirely upon its sanctioning in social convention.

The interactionist elaboration of Durkheim's model underscores the mutability of the normative order. Moral entrepreneurs must work to reaffirm (or, indeed, introduce or impose) normative standards that are inherently unstable. The reaction of judges implies a broader social discourse, one that attempts to reaffirm the normative prohibitions against the illicit behavior. The shaming of offenders underscores the illegitimacy of the crime, "associating the continued existence of the behavior with negative values, pointing up its threat to the mental, physical, or moral fabric of organized society" (Eisenstadt and Henry, 1995:211).

Of the labelists, Goffman (1963, 1967) most clearly emphasized the ongoing reconstruction of social norms through social interaction. From his perspective, every social encounter was one of tension and anticipation as the participants attempted to manage the situation with a minimum of loss to their own social standing. "Much of the activity occurring during an encounter can be understood as an effort on everyone's part to get through the occasion and all the unanticipated and unintentional events that can cast participants in an undesirable light, without disrupting the relationships of the participants" (Goffman, 1967:41). Being identified as a violator of the normative order makes for a "particularly charged moment of impression management"—as offenders try to avoid being labeled as deviant. Such encounters occur when the judges sanction offenders in court as well as when members of the community come face to face with shamed offenders. "When normals and stigmatized do in fact enter one another's immediate presence, especially when they attempt to sustain a joint conversational encounter, there occurs one of the primal scenes of sociology; for, in many cases, these moments will be the ones when the causes and effects of stigma must be directly confronted by both sides" (Goffman, 1963:13).

When the offender is confronted through shaming, the denouncers are attempting to reaffirm the society's moral code. This is unidirectional in a judicial shame penalty because the offender has no means to respond to the label or to reaffirm for others his or her commitment to the code. Goffman, drawing on Mead's (1956) concept of role taking, argues that this opportunity is necessary for the successful resolution of the encounter. The offender needs to demonstrate to others, such as judges and other suspicious members of the public, that he or she is not only remorseful, but capable of understanding his or her offense from the perspective of the participants. Therefore, the offender can begin to reconstruct his or her good opinion. "The suspected person thus shows that he is thoroughly capable of taking the role of the others toward his own activity, that he can still be used as a responsible participant in the ritual process, and that the rules of conduct which he appears to have broken are still sacred, real, and unweakened.

An offensive act may arouse anxiety about the ritual code; the offender allays this anxiety by showing that both the code and he as an upholder of it are still in working order" (Goffman, 1967:22).

Garvey argues that the most important function of shame penalties is moral education. "The punishment inflicted on the offender is intended to persuade him that his offense was wrong" (1998:743). The goal is to educate the offender as to the nature of the offense and the harm it has caused, as well as to cause the offender to experience guilt and to repent. The "hard treatment" is necessary to impress upon the offender the seriousness of the offense—to make it real. The best shame penalties, according to Garvey, are those that are closely aligned with the offense itself, making plain what is wrong with the offending behavior. The offender learns about the nature of the offense by gaining something like the victim's experience—*lex talionis*. This parallels the role-taking process as the offender takes the role of the victim. Goffman, however, saw an alternative. While one route to expressive compliance is offender degradation, another is victim restoration.

There is, first, the challenge, by which participants take on the responsibility of calling attention to the misconduct; by implication they suggest that the threatened claims are to stand firm and that the threatening event itself will have to be brought back into line. The second move consists of the offering, whereby a participant, typically the offender, is given a chance to correct for the offense and re-establish the expressive order. . . . He can provide compensations to the injured—when it is not his own face that he has threatened; or he can provide punishment, penance, and expiation for himself. . . . Even though the offender may fail to prove his innocence, he can suggest through these means that he is now a renewed person, a person who has paid for his sin against the expressive order and is once more to be trusted in the judgmental scene. (Goffman, 1967:20-21)

In either route, the offender is offered the opportunity to make amends for the offense and is an active player in the process of reconciliation. The judicial shame penalties offer the punishment, but circumscribe the offender's role in atonement. Garvey is right to suggest that moral education is intended by judicial shaming, but the offender is unlikely to learn much from the lesson without active engagement, nor is the audience likely to be persuaded that the offender will "uphold the ritual code." He did not see the need for "an eye for an eye," for the offender to take the role of the victim, but for the offender to take the role of the moral citizen—conveying not equivalent suffering, but shared moral understanding.

In contrast, the central focus of reintegrative shaming processes is to provide to the offender opportunities to make amends (Bazemore, 1998b). For example, in the Vermont Reparative Probation Program, offenders meet with community board volunteers and victims to negotiate a reparative agreement (Dooley, 1996; Walther and Perry, 1997). During the board meeting, offenders have the opportunity to express their commitment to the values of the community and identify their offense as uncharacteristic of

their intrinsic nature. By dissociating the act from the actor, the event no longer qualifies as a degradation ceremony (Garfinkel, 1956). Moreover, the purpose of the meeting is to negotiate a set of reparative tasks that, by their completion, demonstrate the offender's commitment not through words, but by deeds. In this way, the offender is more likely to be positively received by the community.

For Whitman, the principal flaw of shame penalties is the atavistic reaction shaming inspires in the audience to the shaming event. Nothing in the shaming penalties evinces contrition or symbolic displays of reintegration. Instead, through public exposure and debasement, shaming appeals to the public's lowest moral sensibilities, inviting ridicule and epithets, stigma and outcasting. Shame penalties conflict too pointedly with the dignity normally accorded to citizens (even criminal offenders) in a democratic society and "promote a spirit of public indecency and brutality" (1998:1059).

In sum, the judicial shame penalties allow the relevant parties to explore, in a tentative way, the strength of the moral order. Moral entrepreneurs signify the offender as an "outsider," an exception that highlights others' conventional obedience. However, the offender's participation in affirming the moral order is crucial according to symbolic interactionists such as Goffman because order is affirmed not simply through punishment and degradation. Creating an outcast is not likely to reassure the social audience. It is necessary that the offender persuade others that his or her behavior was anomalous and inconsistent with the offender's understanding of the social codes of conduct. This may be achieved by the offender's active engagement in the decision-making process and in completion of reparative activities. Such is the difference between reintegrative shaming programs and the judicial shame penalties.

Social Identity and Shame

Affirming the moral order is a collective endeavor. But in the microsociology of symbolic interactionism, moral order is never far from constructions of individual identities. In judicial shaming, order is maintained and identity is constructed, in part, by others' expectations of the actor's behavior and reinforced by the actor's conformity to those expectations. As Wrong (1994:48) rightly argued,

Repeated interactions give rise to habits. They are perceived by the actors and become expectations in the sense of predictions or anticipations of behavior. Aware of what is expected by the other, each actor feels constrained to live up to the expectation, partly out of a feeling that the other will be irritated, offended, or disappointed if the expectation is not fulfilled. In short, interaction generates habits; perceived, they become reciprocal expectations; in addition to their purely predictive and anticipatory nature, sensitivity to them endows them with a constraining or even an obligatory character. . . . Thus do norms grow in unplanned fashion out of ongoing interaction.

Moral order is, therefore, an interactional phenomenon. Violations of expectations become violations of obligations and are thus subject to social sanctions. This concep-

tion of interactional moral order is based on the notion that the self is socially constructed, that identity is highly dependent upon the cues of others. This is apparent in Mead's (1956) social self, as it is in Cooley's (1922) looking-glass self. Goffman observed that identity is constructed interactionally as others attempt to ascertain the identity of a person, and that person's own identity is developed in response to others' expectations. "When a stranger comes into our presence, then, first appearances are likely to enable us to anticipate his category and attributes, his 'social identity.' . . . We lean on these anticipations that we have, transforming them into normative expectations, into righteously presented demands" (1963:2). In essence, we comply with what others expect us to be.

Labeling theory is concerned with the consequences of violating normative expectations, particularly the possibility of deviant identity formation. Deviant labels will elicit deviant behavior. Early labeling theory defined labeling as a simple outcome of officially classifying the offender as a lawbreaker (Becker, 1963; Lofland, 1969), by virtue of arrest, conviction, a jail sentence, or some other procedural action. However, the shame penalties come closer to the core of identity processes than traditional conceptions of labeling, which are highly variable in definition and rather indirect. For example, one reading of labeling theory (more consistent with a conflict perspective of labeling theory—see Wellford and Triplett, 1993) is that labeling is precisely an official, or state-based, process and does not occur independently of formal processing. That is, secondary deviance would not be predicted from informal labeling by members of the community except when it is a response to the offender's official classification. But an interactionist account would assume that identity processes are constructed through any kind of social interaction, formal or informal. Knowledge of the offense is all that matters, whether or not that offense is officially processed. Shame penalties point toward both formal and informal labeling. The formal labeling includes the classification of the offender by the criminal justice system, but equally potent, if not more so, are the informal labeling processes by judges in interaction with offenders, and those undertaken by members of the community who are the audience to the shaming/degradation ceremony or who become knowledgeable of the offender's newfound social status, such as through an advertisement or sign. Shame penalties are particularly potent because they capitalize on both official labeling and informal labeling by community members.

To illustrate the impact of such identity processes, it is not possible to refer to an empirical literature on judicial shaming. However, the classic "minimal-group paradigm" experiments effectively demonstrate the importance of a positive social identity. These studies show how quickly individuals will protect their social identities by showing in-group preferences and out-group discrimination. The logic is as follows. One's social position is indicated by group membership. Groups are differentiated by status. A positive self-identity is protected when one maintains a suitable social status. To protect one's social position, one must protect the status of one's group. To do so requires out-group discrimination. The central point for our purposes is the dramatic lengths one will go to maintain a favorable social identity.

The minimal-group studies form the empirical evidence for Tajfel and Turner's (1986) social identity theory. As Oakes, Haslam, and Turner (1994:82) explain,

Social identity theory assumes that people are motivated to evaluate themselves positively, and that insofar as a group membership becomes significant to the self-definition they will be motivated to evaluate that group positively. In other words, people seek a *positive social identity*. Since the value of any group membership depends upon comparison with other relevant groups, positive social identity is achieved through the establishment of *positive distinctiveness* of the ingroup from relevant outgroups (emphasis in original).

The minimal-group paradigm and social identity theory set out to explain intergroup discrimination, but in so doing, they assert the relevance of self-evaluation in terms of social markers. The minimal-group paradigm was defined as such because Tajfel and his colleagues (1971) had attempted to create a situation in which in-group members would have an opportunity to discriminate against out-group members, but would have no pre-existing justification for such discrimination.

To do this, they created two anonymous groups (the subjects' identities were not revealed to one another) on the basis of minimal criteria. This model has served in many subsequent studies of the paradigm. In one experiment, one group was formed on the basis of an expressed preference for a Kandinsky painting, the other for a Klee. In another experiment, one group comprised those who had overestimated the number of dots projected momentarily on a screen, while the other underestimated the number. The striking finding from these experiments (and they have been replicated many times) is that when asked to make subjective judgments about the character of out-group members (without knowing anything about them except that they were overestimators or Kandinsky fans), substantial proportions of the subjects would cast the out-group in a negative light (less intelligent, less attractive, less trustworthy, etc.). More important, when asked to divide payment for participation in the experiment between an out-group member and another in-group member, there was a strong tendency to discriminate against the out-group member by giving more money to the in-group member.

The minimal-group paradigm dramatically demonstrated how important group membership is for individuals, even in groups created spontaneously, arbitrarily, and artificially, and the lengths people will go to enhance the position of the in-group and themselves by association. Social identity theory makes two important points. We readily engage in social comparison, and we care deeply about our position in the social world. Social identity theory indicates that shaming may strongly affect identity because identity depends on markers of social status and judicial shaming reduces social status without providing opportunities to regain status or reputation.

More direct theorizing about the role of shame in identity processes comes from Nathanson (1992) and Scheff (1988, 1990, 1997; Scheff and Retzinger, 1991). For Nathanson (1992:20), shame and pride exist on an emotional continuum, and "it is against this yardstick that we evaluate *all of our actions*, and along which is strung our fragile and precarious sense of self" (emphasis added). Similarly, Scheff (1990:79) argues that "shame is the primary social emotion in that it is generated by the virtually constant monitoring of the self in relation to others. Such monitoring, as already suggested, is not rare but almost continuous in social interaction and, more covertly, in soli-

tary thought. If this line of thought is correct, shame would be the most frequent and possibly the most important of emotions, even though it is usually invisible."

Thus, we come to know our social position, which indicates our relative worth, by comparing ourselves to other individuals and to our group memberships (see also Shibutani, 1961). Because our dependence on others is profound, shame and pride serve as indicators of the strength of our social connection to others. Feeling shame, then, means that one's position in the social system is at risk and would be a cause for great anxiety. "These two emotions have a signal function with respect to the social bond. In this framework, pride and shame serve as intense and automatic bodily signs of the state of a system that would be otherwise difficult to observe, the state of one's bonds to others. Pride is the sign of an intact bond; shame, a severed or threatened bond" (Scheff, 1990:15).

Shame is an emotional outcome of losing status in the community. Shaming penalties may or may not actually elicit shame, but the target of these sanctions touches closely upon the self as conceptualized by interactionists. According to contemporary theories of shame, judicial shame penalties may ostensibly affirm the moral order, but in so doing, they capitalize on core interactional dynamics regarding status and identity. Perhaps hazily and unintentionally, they tread upon identities in ways the labelists most feared.

Scheff is particularly concerned with shame as an indicator of the state of the social bond. Shame penalties clearly send threatening signals to the offender about these bonds. Similarly, Hirschi (1969) worried about the social bond, not in terms of shame dynamics, but by suggesting that weakened bonds are associated with delinquency. Labelists have argued that labeling is less likely to have an impact on identity when the offender is a member of a marginalized social group because the group's status is already diminished (Harris, 1976). In a recent empirical test of labeling theory, Sherman et al. (1992) found little evidence to suggest that increasing formal labeling will reduce future offending in the absence of an offender's stake in conformity. Although they did not evaluate shame penalties, their analysis suggests that shame penalties are unlikely to be effective either as a formal or an informal social control device when offenders' social ties to the community are weak. At the same time, it is plausible to assume that shame penalties, even for those who are weakly bonded, will be interpreted as humiliating and will generate the disintegrative consequences hypothesized by Braithwaite (1989)—offenders will reject the denouncers and find companionship and acceptance in criminal subcultures.

Conclusion

Judicial shame penalties are gaining attention as a new alternative sanction (alternative to the standard small repertoire of prison and probation). They have become popular in two forms, public exposure and debasement. Both are characterized as stigmatizing shaming because they provide no opportunity for reintegration. Both types are retributive sanctions that take their potency from the reduction of the offender's social status. They are retributive insofar as reducing status is an expression of moral condemnation of the offending behavior. Debasement penalties reduce status by forcing the offender to engage in humiliating behavior, such as shoveling manure in police stables. Public

exposure penalties reduce status by advertising the offense to the public, which may respond with ridicule or contempt. Combining debasement and public exposure penalties very nearly ensures a "successful degradation ceremony."

The new debate about shame is intensely concerned with the social consequences of wearing the offender label. Hence, it is the reincarnation of the labeling debate. It is important to note that shame penalties are typically applied to minor offenders, whose social bonds may be fairly intact and may be quite susceptible to the identity processes discussed in this article.

The penalties invoke sociologically meaningful sanctioning categories—those that depend less on market (fines) or state (prison) than on civil society (manipulating social status through shame rituals). The sociological reason shame is important is that individuals depend on others to fulfill basic needs; thus, the protection of social standing is a strong motivation for conforming behavior. It follows, then, that threats to one's social standing can be conspicuously invoked for social control. According to Braithwaite (1989:9), "shaming is conceived as a tool to allure and inveigle the citizen to attend to the moral claims of the criminal law, to coax and caress compliance, to reason and remonstrate with him over the harmfulness of his conduct." In this line of thinking, shame may be exploited positively, serving as a comparatively benign mechanism of control in a civil society; one to be favored over anomie-inducing market incentives or the stultifying oppressiveness of the police state. However, as argued here, such positive effects are not likely to occur without engaging in reintegrative shaming.

Consider what shaming is meant to accomplish. First, it is meant to elicit shame. This is not guaranteed; shaming may not elicit shame. Instead, judicial shaming may elicit anger and rejection rather than contrition, although reintegrative shaming, such as in the family group conference or community reparative boards may be more effective. Second, shaming may reduce social status and function as an economic substitute for other retributive punishments, such as incarceration. Third, shaming may convey moral condemnation and reaffirm the moral order for the public. Reintegrative shaming capitalizes on the concern offenders have for social status, but does not explicitly seek to reduce it. It also seeks to convey moral disapproval, though not by condemning the person but by condemning the act. Moreover, reintegrative shaming emphasizes the harmfulness of the offender's conduct not through the severity of the punishment, but by the participation of victims and other affected parties who can articulate the harm most meaningfully. Repairing the social bond becomes possible insofar as the offender acknowledges that harm and makes amends.

Labeling theory and judicial shame penalties are worthy of another look by criminologists. In both stigmatizing and reintegrative shaming we find the raw material of symbolic interactionism—normative order, status degradation ceremonies, offender labeling—in a contemporary justice practice. By resurrecting the old debate, we find that contemporary enthusiasm for or disgust with shame penalties may be natural responses to a phenomenon that penetrates so deeply into the nature of the social self.

Shame penalties are controversial. This labeling analysis provides a critique of the shame penalties while reaffirming the normative power of shame. Reintegrative shaming

may provide all the desired benefits, without the degrading costs, that are linked to the judicial sanctions. By theoretically differentiating these shaming alternatives, practitioners may become more effective in their search for meaningful intermediate sanctions. jsj

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Legal Notes

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Other Duties for Federal Judges?

Those with a memory for the Supreme Court's earliest rulings may recall *Hayburn Case*, 2 Dall. 408 (1792), concerning a statute providing that circuit courts should make the initial decisions as to veterans' pension eligibility subject to the Secretary of War's final determination. Various justices, on circuit, held these initial pension determinations not to be judicial acts, and thus Congress had not granted judicial power under the Constitution's Article III. However, that did not prevent the justices from serving as commissioners under the statute if they wished—and they did not wish to pose obstacles to veterans obtaining their well-deserved pensions.

Hayburn's Case was important as a basic separation of powers ruling at the time when the federal judiciary was attempting to establish its institutional autonomy. The question of whether other duties could be assigned to federal judges arose again quite recently, in the context of international extradition.

When Italy sought the assistance of the United States in returning someone convicted in absentia of drug offenses, a federal magistrate issued an arrest warrant, and after the arrest, another magistrate found probable cause to extradite under the relevant treaty. The defendant sought habeas corpus, and the U.S. Court of Appeals for the Second Circuit dealt with his challenge to the constitutionality of the basic extradition statute, 18 U.S.C. §3184, which, *inter alia*, provides that once the probable cause hearing has been held and a certificate of extraditability issued, the Secretary of State may, in her discretion, return the fugitive to the country which sought extradition. This last discretionary element created the possibility of executive "revision" of a judicial officer's act that had been problematic in *Hayburn's Case*.

Rejecting the extraditee's challenge, Chief Judge Jon Newman reiterated the position of his court, also adopted by other circuits, that "the function performed by an extradition officer is not an exercise of the judicial power of the United States." *Lo Duca v. United States*, 93 F.3d 1100, 1105 (2nd Cir. 1996). He based this position on a nineteenth-century Supreme Court ruling, *In re Metzger*, 5 How. 176 (1847), on appealability of decisions by an extradition officer, from which courts had drawn the conclusion that extradition officers were acting in a "non-institutional capacity" and not exercising power under Article III, a notion reinforced by the facts that extradition officers' decisions were *not* appealable and were subject to executive "revision."